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Avenging Revenge Porn

AVENGING REVENGE PORN

By: *Samantha Kopf*¹

I. Introduction

*"It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."*²

Samuel Warren and Louis Brandeis

In a world where the line between public and private is hazy at best, it is difficult to get adequate relief when someone publicizes your private life on the Internet. In December of 2008, Holli Thometz and her longtime boyfriend, Ryan Seay, broke up amicably. One month later, a naked picture of Ms. Thometz, allegedly posted by Mr. Seay, appeared on Ms. Thometz' Facebook profile. More photos and a video of Ms. Thometz, accompanied by her name and email address, surfaced as she began to date other people. The pictures went viral and appeared on at least 100,000 sites including sextingpics.com, anonib.com, pinkmeth.tv and xhamster.com.³ These websites are hubs for the phenomenon called revenge porn, "the distribution of sexually explicit photos and/or videos of an individual (either real or photoshopped) on the Internet without permission. Revenge porn, sometimes called involuntary porn, is usually posted by a scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour."⁴ The sites provide spurned exes with a forum in which they can publish intimate images of their former lovers without consent.

Ms. Thometz was a PhD student and teaching assistant at the time; she was forced to change her name, leave her job, and go into hiding as a result of the posts. Eventually, after legally changing her name to Holly Jacobs, Ms. Thometz filed a civil suit against her former boyfriend, the websites, the websites'

owners, the websites' hosts, and other anonymous people involved in the propagation, trafficking, or redistribution of her image.⁵ Ms. Jacobs alleged that the defendants invaded her privacy, publicly disclosed private facts, and intentionally inflicted emotional distress.⁶ Ms. Jacobs' problem is not unique; one in ten ex-partners have threatened to expose risqué photos online. The threats become reality sixty percent of the time.⁷

As was the case when "instantaneous" photographs first entered the journalism world, again "modern devices afford abundant opportunities for the perpetration of [such] wrongs without any participation by the injured party,"⁸ and therefore "the protection granted by the law must be placed upon a broader foundation."⁹ For perhaps the first time in history, the word instantaneous truly means in an instant; one instantaneous decision—a tweet, a Facebook post—can irreparably damage a person's reputation for life. In the light of this, it is time for the law to adapt.¹⁰

The law recognizes and punishes for crimes that are analogous to revenge porn. In order to extinguish revenge porn, the legislature must declare that revenge porn is criminal. This Article consists of five parts, and presents its findings in Parts II, III, and IV. Part II will explain the invasion of privacy and will focus on the tort of publication of private facts. This section will describe the elements of the tort, how a plaintiff can win a case, and what forms of redress are available. Part III will consider why the civil sector is an inadequate venue for a revenge porn victim. Although a revenge porn victim suffers from publication of private facts, civil sanctions are rarely attainable and generally insufficient. Part IV of this article will advocate for the legislature to declare revenge porn a type of sex crime. It will

analogize revenge porn to existing punishable crimes and will explain why criminal punishment is fair and necessary. This section will highlight how revenge porn is similar to child pornography and why revenge porn deserves similar treatment under the law. Part V will offer a conclusion.

II. The Revenge Porn Victim's Current Legal Options

Currently, the law provides limited remedies for people injured by non-consensual pornography. Most civil avenues are useless to the person who has been personally, publicly, emotionally and economically harmed by a factual post. Libel, for example, requires that the posted information be untrue.¹¹ Revenge porn, which consists of videos or photographs of actual events, is inherently factual. Intentional infliction of emotional distress only allows recovery for severe emotional injury and resulting bodily harm, a difficult hurdle for most people, including revenge porn victims, to overcome.¹²

Revenge porn victims commonly file civil suits for invasion of privacy.¹³ Fundamental laws of privacy permit courts to "recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others."¹⁴ Virtually every state recognizes privacy rights.¹⁵ Though the remedy available is insufficient, invasion of privacy suits offers victims the best chance for redress.

The tort of invasion of privacy has remained unchanged since Justices Warren and Brandeis, who, outraged by the presence of increasingly intrusive journalists,¹⁶ first declared a right to privacy in 1890.¹⁷ In 1960, William Prosser broke the single tort into four distinct torts, including the public disclosure of embarrassing private facts about the plaintiff, intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, publicity which places the plaintiff in a false light in the public eye, and appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁸ Non-consensual pornography allegations fit best under Prosser's public disclosure tort; this tort is "an extension of defamation ... with the elimination of the defense of truth."¹⁹ The Restatement of Torts calls it an "unreasonable publicity given to [an] other's private life."²⁰

A public disclosure invasion of privacy tort is commonly referred to as the public disclosure

of private facts.²¹ This type of privacy tort holds that someone "who gives publicity to a matter concerning the private life of another"²² liable "if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person, and is not of legitimate concern to the public."²³ To gain redress for such a violation of privacy, a plaintiff must prove that the disclosed facts were, in fact, of a private nature; that the defendant publicized the facts; that such publication would offend a reasonable person; and that the material publicized was not of a legitimate public concern.²⁴

To prove that the facts were of a private nature, the plaintiff must show that the public would not have known the information but for the defendant's disclosure.²⁵ A plaintiff cannot recover if she leaves herself "open to the public eye."²⁶ For example, in *Johnson v. Evening Star Newspaper Co.*, the plaintiff, who had been mistakenly arrested and imprisoned and subsequently released, brought a publication of private facts suit against the defendant newspaper for publishing a story about her clearance on related charges. The Court of Appeals for the District of Columbia dismissed the plaintiff's complaint in part because "the principal events were already in the public domain."²⁷ To satisfy the publicity element of the tort in the revenge porn context, the plaintiff must demonstrate that the information was disclosed to the public at large and, as was the case in *Johnson*, had not previously been available publicly. Typically, plaintiffs prove publicity when the photos are made available on the Web.

The "highly offensive to a reasonable person" element is meant to prevent plaintiffs from bringing suits for ordinary, harmless publicity. "The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about [such] publicity."²⁸ The interests of free speech and the dissemination of news weigh against an absolute bar on publicizing private matters.²⁹ However, in the context of revenge porn, this standard is easily satisfied as any reasonable person would be offended if someone who they once trusted disseminated intimate images to the world. Thus, in the context of many revenge porn claims, courts are unlikely to interpret the plaintiffs' offense of such disclosure as a matter of over-sensitivity. A claim brought by a plaintiff who has never been publicly depicted in such a manner is different than a claim brought by

a plaintiff who has a reduced expectation of privacy based on previous activity that has already exposed her in such a way.

The definition of “a legitimate public concern” is broad and includes subjects such as “the question [of] whether a school system requires additional funds”³⁰ and “threats of public safety.”³¹ “[W]here the facts published are of ‘legitimate public concern,’ the right to publish information will overcome privacy rights.”³² The Supreme Court of the United States has provided guidelines for determining whether or not something is “a legitimate public concern.” For example, in *Cox Broadcasting Corp. v. Cohn*, the father of a rape victim sued a broadcasting company for invading his right to privacy by identifying his daughter by name. Stating that, “. . . events of legitimate concern to the public . . . fall within the press’ responsibility to report . . .”, the United States Supreme Court barred the father’s claim.³³ However, at the other extreme, the Supreme Court has declared the “broadcast of [a] videotape recording of sexual relations between [a] famous actress and [a] rock star”³⁴ and the “divorce of a wealthy person”³⁵ as not being legitimate public concerns. Nude photographs of a non-public person fall in between *Cox Broadcasting* and the later category. Furthermore, in light of the fact that individuals with access to the Internet are publishers and are therefore protected by the First Amendment, a plaintiff seeking judgment against a publisher of true statements of fact must prove that the publisher’s Constitutional rights of Free Speech, Free Press, and Free Expression are not in jeopardy.³⁶

A victorious plaintiff in a public disclosure case is eligible to receive equitable relief and/or monetary damages for any injuries sustained.³⁷ Removing a post, restricting use of a photo, or preventing further dissemination of information are examples of equitable relief that can be awarded to revenge porn victims. Compensatory damages for mental and emotional distress and humiliation resulting from public exposure are common remedies in such cases. Exemplary damages are also possible if the defendant made the publication with malice, intended to cause harm, or if the public disclosure of private information caused significant injuries to the plaintiff’s reputation, standing in the community, or economic situation.³⁸

III. Current Legal Options are Inappropriate and Inadequate

Revenge porn is a clear embodiment of the publication of private facts tort.³⁹ Unfortunately, due to antiquated concepts of confidentiality, the modern revenge porn plaintiffs may have a difficult time satisfying certain elements of the static tort. There are also issues with available remedies. For example, a revenge porn victim who overcomes the emotional and financial hardship of bringing suit may be compensated monetarily, but remain unsatisfied. In particular, civil remedies do not address the severe invasion of privacy resulting from a publication of private facts tort and generally fail to encompass the essence—complete exposure that strips someone of free will and the ability to consent—of the wrong.

A. *The Ease of Proving Injury and Causation Elements*

Based on injury alone, revenge porn victims are similar to traditional publication of private facts plaintiffs. Legal historians consider *Brents v. Morgan* the first case premised on the publication of private facts tort as opposed to the general invasion of privacy tort.⁴⁰ In *Brents*, the defendant informed the public that the plaintiff owed him money by posting a notice to that effect in the window of his garage. The Court of Appeals of Kentucky acknowledged that the plaintiff could recover for “great mental pain, humiliation, and mortification” caused by the defendant’s publication, but did not award damages because of an error in the jury instruction.⁴¹ In 1995, in *Doe v. Mills*, when defendant abortion protestors carried signs displaying the names of plaintiffs who were considering having abortions, the plaintiffs alleged “the publicity given by defendants was highly offensive and was deliberately calculated to embarrass and humiliate them.”⁴² The Court of Appeals of Michigan recognized that the plaintiffs had a valid publication of private facts claim and held that defendants had no right to expose the plaintiffs’ names on publicly displayed signs. This decision thereby reaffirmed a person’s legally recognized right to keep certain information, such as the decision to have an abortion, private.

Ms. Jacobs, as a representation of the typical revenge porn victim, has injuries similar to those experienced by traditional publication of private facts

plaintiffs. Ms. Jacobs claims that she was injured when Mr. Seay publicized intimate photographs and a video of her on the Internet.⁴³ Ms. Jacobs was humiliated, depressed, shamed in her professional and personal communities, and forced to leave her job.⁴⁴ Ms. Jacobs' injuries, allegedly caused by the defendant's publication, are analogous to those typically suffered by publication of private facts plaintiffs.⁴⁵

B. *The Hardship of Proving Publication of Private Facts*

Injury and causation are not enough for a revenge porn plaintiff to win a civil suit; in order to be victorious, the plaintiff must fight unnecessarily obtrusive obstacles to prove that a tortious invasion of privacy occurred.⁴⁶ The plaintiff's struggle begins with a battle to prove that the facts (or, in the case of revenge porn, the images) were in fact private.⁴⁷ Unfortunately, many courts do not consider photographs shared with others to be private.⁴⁸ In *Guest v. Leis*, the United States Court of Appeals for the Sixth Circuit equated an e-mailer to a letter-writer who loses any expectation of privacy once the e-mail reaches its recipient.⁴⁹ Transfer of control is the basis of this analogy, which therefore rationally applies whether a person transmits material through mail, e-mail, or via any other method. In the instant that someone passes along photographs to which they have consented, they lose a subjective expectation under the Fourth Amendment that those photographs will remain private or otherwise remain confidential.⁵⁰ This presumption may bar a revenge porn plaintiff from redress because it prevents the plaintiff from validly asserting a claim that the publicized facts were initially private. This standard places blame on the victim by effectively saying that, by taking and sending sensitive pictures in the first place, the plaintiff committed the true wrong. As a result, the plaintiff will may be unable to satisfy the first element necessary to establishment of the tort.

The revenge porn plaintiff is in a better position to satisfy the material elements of the tort: publication of facts, that such publication would offend a reasonable person, and that the facts publicized were not of legitimate public concern. As to the facts being publicized, in *Yath v. Fairview Clinics, N.P.*, the Minnesota Court of Appeals stated that, "Internet communication is materially similar in

nature to a newspaper publication or a radio broadcast because upon release it is available to the public at large."⁵¹ The court found that a defendant's posting of private information in a public forum – on a public MySpace.com page, in the case before it – constituted publicity and therefore satisfies the second element of the tort.⁵²

Regarding the issue of whether or not publication would offend a reasonable person, the Supreme Court of Minnesota declared in *Lake v. Wal-Mart Stores, Inc.* that, "[o]ne's naked body is a very private part of one's person and generally known to others only by choice."⁵³ In *Lake*, the court held that publicizing a photograph of the plaintiffs' naked bodies was an activity highly offensive to the reasonable person. As such, publication of a non-consenting person's naked body should satisfy the third element of the tort.

As to the whether the publication was of legitimate public concern, the Restatement (Second) of Torts notes that, "[e]very individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters"⁵⁴ In *Y.G. v. Jewish Hospital of St. Louis*, the Missouri Court of Appeals stated that, "the right of privacy has been held to apply particularly to sexual matters" Determining whether the publication of the names of in vitro fertilization participants was a tortious invasion of privacy, the *Y.G.* court reasoned that, while "[t]he *in vitro* program and its success may well have been matters of public interest, [] the identity of the plaintiffs participating in the program was . . . a private matter."⁵⁵ As a result, the names of the individuals were held to be of no legitimate public concern⁵⁶ and therefore satisfied the fourth element of the tort.

If Ms. Jacobs can overcome the obstacle of proving that the photographs she sent Mr. Seay were in fact private, she will satisfy the first element of the tort. The facts of her case make it apparent that Ms. Jacobs could fulfill the additional elements of the tort. According to Ms. Jacobs, Mr. Seay posted the images on the Internet.⁵⁷ If this were true, according to the court in *Yath*, Ms. Jacobs would satisfy the second element of the tort.⁵⁸ It is further relevant that Ms. Jacobs had not consented to dissemination of the

image to an audience wider than Mr. Seay.⁵⁹ As such, a court would likely find that publication of her naked body, an action held by the court in *Lake* to be highly offensive to a reasonable person, was offensive to Ms. Jacobs⁶⁰ and satisfies the third element of the tort action.⁶¹ Finally, the fact that revenge porn websites garner hundreds of thousands of visitors⁶² is not enough to declare the naked images of non-consenting individuals legitimate public interests. A court is most likely to determine that, while pornography may be a matter of legitimate public interest, Ms. Jacobs' identity is as private a matter as were the identities of the individuals considering *in vitro* fertilization in *Y.G. v. Jewish Hospital of St. Louis*.⁶³

C. *The Element of Shame*

It is possible that Ms. Jacobs could win some relief because she, unlike most victims of revenge porn, took the brave step of filing a lawsuit. Most revenge porn victims prefer to hide as opposed to seeking legal remedies.⁶⁴ One reason is that civil lawsuits can be extremely expensive and time-consuming.⁶⁵ Another is that lawsuits force victims to come out of hiding, which is particularly difficult for revenge porn victims because they generally regret their role in the controversy (e.g., sending the images at issue, etc.) and are embarrassed by their behaviors. Furthermore, filing the suit may take away from the ultimate goal of having the pictures eliminated from the public eye by attracting more unwanted attention and inflating the issue beyond what the plaintiff could have imagined.⁶⁶ Called the Streisand Effect, "by attempting to squelch information [you] can inadvertently make it wildly popular."⁶⁷

Ms. Jacobs is an exception. In April of 2013, after four and a half years of torment and "tired of hiding,"⁶⁸ Ms. Jacobs filed a civil lawsuit against her former boyfriend Mr. Seay. Although revenge porn is not new, this was the first time that a victim of revenge porn decided to take legal action against a former boyfriend in Florida. Ms. Jacobs acknowledges that most other victims are petrified of being even more exposed than they already are, saying "[y]ou're not exposing yourself—you're already exposed on the Internet. Instead, you're exposing what is happening to you."⁶⁹ Unfortunately, the returns are minimal even for those rare revenge porn victims who emerge from hiding and file civil suits.

Civil sanctions in the form of monetary damages and equitable relief will not serve the purposes of punishment nor discourage the undeniably grotesque behavior. This is because defendants in these cases often have "nothing to lose."⁷⁰ Posting a photo requires little time, money, or intelligence and it is not at all uncommon for the defendant posters of revenge porn to lack the means of paying any adverse judgment. Another reason that the civil sector is inadequate is because it only provides limited redress for actions taken by a single defendant. In many non-consensual pornography cases, the initial culprit is identifiable, as the person makes the first post is usually a former intimate partner. However, once the images are available to the public, anonymous website visitors are able to view them, copy them, and anonymously repost them on myriad other Internet sites. This chain reaction continues and allows the victim's exposure to increase exponentially, particularly as the anonymous viewers "Like" the images, comment on them, and promulgate the violation continuing to share them across the web. Once an image goes viral, it is difficult to stop the dissemination, even through injunctive relief.⁷¹

IV. Revenge Porn is a Crime Against Society

Beyond civil remedies and invasion of privacy suits, non-consensual pornography victims have limited opportunity to gain redress and, more importantly, to stop the torturous behavior from continuing.⁷² Recently, victims of non-consensual pornography and activists have led the charge to hold people criminally liable for posting, disseminating, and being generally involved in promulgation of revenge porn.⁷³ The victims and at least 2,800 of their supporters feel that revenge porn is not a civil wrong; instead, they argue that revenge porn is an equivalent to cyber-rape and that it should be punishable as a felony within the criminal justice system.⁷⁴

New Jersey, Florida, and California are at the forefront of the movement against revenge porn. Currently, New Jersey is the only state that has an anti-revenge pornography law. The New Jersey statute, which was directed at cyber bullying in general, states that an actor who "discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts

are exposed, unless that person has consented to such disclosure” guilty of a crime in the third degree.⁷⁵ The law was tightened following the suicide of Tyler Clementi,⁷⁶ a student who jumped to his death from the George Washington Bridge after his roommate posted video showing Mr. Clementi kissing another man on the Internet.⁷⁷ In March of 2013, Florida’s House Subcommittee unanimously voted for a bill that will make posting non-consented to pornography a felony.⁷⁸ The bill was proposed after a young Florida woman, a victim of revenge porn, reached out to the police and was told that revenge porn is not a crime.⁷⁹ In its substantive analysis, the Florida House of Representatives referenced the tendency for revenge porn victims to commit or attempt suicide.⁸⁰ In Florida, revenge porn is still legal.⁸¹ California also considered legislation related to revenge porn following the suicide of Audrie Pott, a 15 year old who was sexually assaulted by a group of boys that later publicized images of the assault around the young girl’s high school.⁸² Inspired by the tragedy,⁸³ a California State Senator proposed new legislation that was unanimously approved by California’s Public Safety Committee. In 2013, California Governor Jerry Brown signed Senate Bill 255; revenge porn is now a misdemeanor punishable by up to a \$1,000 fine and/or one-year imprisonment.⁸⁴

A. *Maintaining the Status Quo is Ineffective*

Ms. Jacobs properly utilized the appropriate legal channels available. Her civil suit names eleven defendants including “unknown persons who host, service, use, subscribe, post[,] or repost” her image or “otherwise propagate, traffic[,] or redistribute pornographic images and private facts of[/about] Ms. Jacobs.”⁸⁵ Unless Section 230 of The Communications Decency Act is changed, and until anonymous posters’ behaviors, which are entirely inconsistent with the purposes of the First Amendment, are no longer protected, every defendant, other than Mr. Seay, will be dismissed from the case.

With no criminal statutes in place, Ms. Jacobs’ best chance to legally stop her torture was through threatening civil sanctions. Ms. Jacobs realized that the law was not able to protect her or other similar victims.⁸⁶ Now a devoted activist, Ms. Jacobs visited her state Senator’s office and eventually gained permission to meet with the Florida State

Attorney’s Office.⁸⁷ A state attorney has since agreed to take on Ms. Jacobs’ case and will charge Mr. Seay with one count of stalking, two counts of harassment by use of personal identification information, and one count of unlawful publication.⁸⁸ This is the first time that a victim has filed a criminal suit in Florida against her ex for distributing revenge porn.⁸⁹ Ms. Jacobs is working with lawmakers in Florida to declare revenge porn a third-degree felony so that other victims of revenge porn might avail themselves of Florida’s court system.⁹⁰ Revenge porn is a unique crime that is not adequately addressed by existing statutes and its victims should not have to struggle to creatively fit their allegations into existing, less direct statutes. Although a minority of states have passed revenge porn laws, or laws that can be applied to revenge porn, the epidemic nature of revenge porn evidences that current deterrents are ineffective. To extinguish revenge porn, which is analogous to other acts that carry criminal sanctions, revenge porn must carry a criminal penalty.

B. *Revenge Porn is Analogous to Existing Punishable Crimes*

Revenge porn is analogous to existing punishable crimes in that it is a type of abuse, sexual exploitation, and non-contact sexual abuse. Revenge porn is a type of abuse, which is generally defined as “a departure from legal or reasonable use.”⁹¹ It is completely legal, and presumptively reasonable, for consenting adults in a relationship to take naked pictures of themselves and one another. In revenge porn cases, abuse occurs after the relationship ends, when an aggrieved party posts those intimate photos on the Internet without the other’s consent; the public outcry in response to this behavior supports the notion that it is unreasonable.⁹² Revenge porn is also a type of sexual exploitation involving “the use of a person . . . in . . . pornography . . . that has caused or could cause [that person/the subject] serious emotional injury.”⁹³ The publication of images depicting revenge porn victims without their permission frequently leads to severe embarrassment, humiliation, and emotional distress for the person shown.⁹⁴ As a result, victims of non-consensual pornography are victims of sexual exploitation. Furthermore, revenge porn is non-contact sexual abuse, examples of which include sexual harassment,⁹⁵ non-contact sexual sadism,⁹⁶

and voyeurism.⁹⁷ Non-contact sexual abuse is known to reduce a victim's self-esteem, to cause depression, anxiety, and psychosomatic illnesses, and to interfere with social, work, and educational activities.⁹⁸ Non-consensual pornography frequently catalyzes the same results; victims quit their jobs, fear for their safety, and sacrifice normal social lives in order to incessantly search the Internet for new violating images because of revenge porn.⁹⁹ Sexual abuse,¹⁰⁰ sexual exploitation,¹⁰¹ and other non-contact sexual conduct that causes harm to a non-consenting individual are crimes punishable by fines and/or imprisonment; non-consensual pornography belongs in this same category of offenses.

Society readily accepts, and perhaps demands, severe punishment for non-contact sexual crimes committed against children, including child pornography.¹⁰² The rationale behind protecting children is that they are unable to give meaningful consent, which is only possible if a person knows what he or she is consenting to and has the freedom to say "yes" or "no".¹⁰³ The consent-based rationale should also apply to adult victims of revenge pornography for the simple reason that, while the adult victim may have consented to a naked photograph, the victim at no time thought or had reason to think that she was consenting to publicity of the image. The crux of revenge porn is that the victim has no freedom to say yes or no; the transgressor is in complete control. As a result, like victims of child pornography, adults who are victims of revenge pornography cannot be understood to have provided meaningful consent because they have not been afforded the opportunity to say yes or no on the question of publication.

The law prohibits child pornography for multiple reasons. First, as the United States Supreme Court declared in *Globe Newspaper Co. v. Superior Court for Norfolk County*, the state has a compelling interest in "safeguarding the physical and psychological well-being of a minor."¹⁰⁴ In *Globe Newspaper*, the Court found that this interest was important enough to justify, in appropriate cases, a closure rule.¹⁰⁵ Second, according to the United States Supreme Court's precedential decision in *New York v. Ferber*, child pornography contributes to the sexual abuse of children.¹⁰⁶ The Court found that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."¹⁰⁷ In choosing

to criminalize revenge porn, a court could rationally apply such reasoning to cases affecting adults who never consented to subsequent publication of intimate images.

Adults who are stripped of the ability to consent are equivalent to minors who are protected because of an inability to consent;¹⁰⁸ the state therefore has the same compelling interest to safeguard the well-being of these adults. Similarly, non-consented to pornographic pictures haunt the victim for years after the original photographs are taken. The images follow the victim from job to job, relationship to relationship, and the victim must go through life knowing that the recording or photograph is likely still available and circulating on the Internet.¹⁰⁹ Revenge porn victims believe that the cyber-rape will lead to actual rape; although there is no evidence that the incidence of abuse faced by victims increases, the analogy to child pornography makes it clear that the initial abuse may catalyze and encourage more abuse.¹¹⁰ The state should not wait for the statistics to show more abuse before deciding to take protective action.

Non-consensual pornography and child pornography inflict indistinguishable injuries on similarly vulnerable victims. As is the case with child pornography and other obscene material, the First Amendment should not protect non-consented to pornography. In *Ferber*, the Supreme Court discussed reasons why certain materials, such as "unprotected 'fighting comment[s],' "libelous publication[s]," and, following *Ferber*, child pornography, fall outside of the First Amendment.¹¹¹ The Court explained when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, [that] no process of case-by-case adjudication is required."¹¹² The Supreme Court continued, "When a definable class of material . . . bears so heavily and pervasively on the welfare of [the victim] engaged in its production, we think that it is permissible to consider these materials as without the protection of the First Amendment."¹¹³ Revenge porn bears heavily and pervasively on the welfare of its victims and, continuing the analogy to child pornography, the evil of non-consented to pornography overwhelmingly outweighs any interest in free speech that may be at stake. For that reason, and because banning full categories of speech under the First Amendment (such as child pornography) is an accepted restriction

on harmful behaviors, it is therefore appropriate in this case of revenge porn.¹¹⁴

Ms. Jacobs, a non-consensual-pornography victim, is analogous to a child-pornography victim. In describing why she sent the photos in the first place, Ms. Jacobs explained that, with complete trust, she shared photos with her then long distance boyfriend “to keep the intimacy alive.”¹¹⁵ Years later, an alarmed friend called an unaware Ms. Jacobs to warn her that someone had changed Ms. Jacobs’ benign Facebook profile picture to a naked image of Ms. Jacobs.¹¹⁶ Ms. Jacobs did not have the ability to consent or not consent to this release. From the moment Ms. Jacobs discovered the initial photograph, she “Googled [her] name regularly.”¹¹⁷ She tried, without success, to remove the photos from the Internet.¹¹⁸ Months later, Ms. Jacobs felt compelled to “run” from work when she came across more naked photos of herself, upon which occasion she “felt ill,” her “stomach dropped,” and she “turned white.”¹¹⁹ Eventually, the human resources department at Ms. Jacobs’ school was made aware of the situation and Ms. Jacobs felt compelled to quit her job.¹²⁰ Ms. Jacobs believes that the revenge porn was posted to prevent her from moving on with her life after her relationship with Mr. Seay and enjoying personal and professional success, which it did.¹²¹ Mr. Seay’s alleged use of Ms. Jacobs’ naked photographs is on all fours with every other kind of sexual abuse, including the abuse that is inherent in child pornography.

Based on the relationship between the victim and the publisher of the image, as well as the nature of the harm suffered, plaintiffs in non-consensual pornography cases are more analogous to victims of other non-contact sexual abuses than the average invasion of privacy victim. This is significant since federal and state courts recognize non-contact sexual abuses as crimes.¹²² Revenge porn should be punishable by criminal law – in addition to civil law. Revenge porn, which is “utterly without redeeming social importance,”¹²³ should be a chargeable offense under criminal law consistent with the law’s purpose of creating and enforcing a code of conduct.¹²⁴ By declaring revenge porn criminal, states could attach harsh penalties to the unacceptable behavior that would go a long way towards eliminating the problem.¹²⁵ Such an action would be appropriate because revenge porn victims suffer more than victims of standard invasion of privacy do; the wrong

perpetrated against them is both an invasion of privacy and a form of criminal abuse. For example, non-consensual pornography is distinguishable from an embarrassing note on a garage window or a name on a poster because it causes more severe emotional harm and permanent distress. Once a person makes non-consensual revenge pornography public, the damage to the subject becomes irreversible and no equitable relief could possibly suffice because it is impossible to make a viewer “un-see” an image. Following this reasoning, it seems logical that the law should recognize the publication of non-consensual pornography as a crime and impose criminal penalties on revenge porn perpetrators accordingly.

C. *Criminal Punishment is Just and Will Extinguish Revenge Porn*

The law unfairly restricts a revenge porn victim’s options for redress. Legally, the victim can only pursue the person who initially posted the photos of her; website owners and anonymous posters are untouchable. Section 230 of The Communications Decency Act, called the Cox-Wyden Amendment, states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹²⁶ Section 230 has been interpreted as granting “website owners and operators far-ranging immunity for tortious material submitted by third-party users.”¹²⁷ In *Barnes v. Yahoo!, Inc.*, a revenge porn claim in which the United States Court of Appeals for the Ninth Circuit investigated the meaning of Section 230, the court stated that the Amendment “protects certain internet-based actors from certain kinds of lawsuits” and that “what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”¹²⁸ The plaintiff in *Barnes*, a young woman whose former boyfriend posted naked photographs of her on a website run by Yahoo!, sued the website for the tort of negligence and under a contract claim.¹²⁹ The court found that, in failing to remove content, Yahoo! was performing the acts of a publisher and, thus, the Cox-Wyden Amendment barred Ms. Barnes’ claim.¹³⁰

Revenge porn website owners are aware of vast protections afforded them by the Cox-Wyden Amendment and¹³¹ continue to publish revenge porn

because of their legal immunity from suit.¹³² The law not only insulates website owners, it encourages them to continue the behavior and creates an additional barrier for revenge porn victims. In order to eliminate the market for and expediently extinguish revenge porn, the law should impose “severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”¹³³ In *Ferber*, the United States Supreme Court stated that “[t]he advertising and selling of [child pornography] provide an economic motive for and are thus an integral part of the production of such materials”¹³⁴ The same is true for revenge porn, about which one publisher said “[is] literally just a business. It’s stupid not to monetize it.”¹³⁵ Section 230 of the Cox-Wyden Amendment should be reinterpreted to hold website owners who are in the business of posting user-generated content responsible for their involvement in the publication of revenge porn.

In addition to calling website owners into court, the law must lift the anonymities of posters so that they too can be held accountable. Under a well-established First Amendment right, the law grants anonymous speakers the privilege to remain anonymous.¹³⁶ This right extends to material on the Internet.¹³⁷ However, if non-consensual pornography is declared to be outside of First Amendment protection, then anonymous posters of non-consensual pornography will not be eligible for constitutional protection.¹³⁸ Website owners will be forced to reveal identifying information about anonymous posters and they will not be able to hide from the law in the penumbras of the First Amendment.

Allowing punishment for an individual’s involvement in non-consensual pornography satisfies both utilitarian and retributive purposes of punishment. Specific deterrence, a type of utilitarian justice, “is achieved if punishment deters offenders from committing their crimes again.”¹³⁹ If the law subjects non-consensual pornography defendants to criminal punishment, vengeful people may feel compelled to weigh their lusts for revenge against their fears of fines and imprisonment. At a minimum, they are likely to hesitate before hitting ‘send’ and instantaneously exposing themselves to the possibility of life with a criminal record. A second utilitarian purpose, general deterrence, “occurs when the punishment of one person discourages others from criminality.”¹⁴⁰ It is undeniable that people will

continue to take intimate photos, relationships will continue to fail, and scorned lovers will continue to seek revenge. Allowing for imposition of criminal punishments on people who post pornographic photos of non-consenting individuals on the Internet should serve to deter others from engaging in this same behavior in the future. In addition to deterrence, criminal sanctions will incapacitate offenders, remove them from society, and protect victims from the danger that they pose.¹⁴¹ In this manner, the law could release victims from the grasps of their offenders and allow them to return to some semblance of normalcy.

Criminal sanctions will also satiate retributive value. “Retribution . . . assumes that the criminal should be hurt, and that the injury caused by the criminal offense calls for a like infliction of injury on the criminal as a moral penalty.”¹⁴² The injury caused by the criminal offense of revenge porn is permanent, emotional, and psychological. Revenge porn victims are paralyzed in fear as paranoia stagnates their personal and professional lives. Criminal convictions and related penalties can inflict like injuries on perpetrators, making them an appropriate moral response. A conviction will follow the criminal in the same way that an image will follow the victim; neither person can escape the past.

Criminal liability should extend to anyone involved in revenge porn at any level. As with child pornography, large-scale distributors, individual traffickers, producers and posters should be forced to answer to the law.¹⁴³ Because criminal punishment may be the only way to remind society that actions, even one single click on a computer screen, have consequences, sentencing should reflect the invasive nature of the offense, the revengefulness of the defendant, and the need to extinguish the existence of non-consensual pornography.

V. Conclusion¹⁴⁴

Revenge porn is dangerous and it is growing. For example, in October of 2012, *Rolling Stone* named Hunter Moore, supporter and promoter of revenge porn, “The Most Hated Man on the Internet.”¹⁴⁵ In May of 2013, NBC’s *The Today Show* devoted four minutes and fifty-two seconds of prime morning news time to the phenomenon.¹⁴⁶ Weeks later, another morning talk show centered an entire

episode around the “Revenge Porn Trend.”¹⁴⁷ Despite increased awareness about the incidence of revenge porn and its ill effects, at least one victim maintains that society still does not “really realize how rampant [revenge porn] is.”¹⁴⁸

Today’s world – in which people voluntarily expose many intimate details of their lives on Twitter, Facebook, and Instagram – certainly would have appalled Justices Warren and Brandeis, who were eager to define and hold onto a private life.¹⁴⁹ However, the notion of what is “private” has changed and related laws must be revised to incorporate evolving circumstances and meanings. The purpose of a law may be “either the elimination of a public ‘mischief’ or the achievement of some positive public good.”¹⁵⁰ To eliminate the public mischief of revenge porn, to achieve the positive public good of protecting those who cannot protect themselves, states must establish a criminal law that will aid in reducing and eventually eliminating increasingly epidemic and morally corrupt conduct surrounding revenge porn.

(Endnotes)

¹ Samantha Kopf is a student at Pace University School of Law. I am grateful to Professor Leslie Yalof Garfield for her instruction, encouragement and guidance and to my family and friends, especially my parents and my husband, for their opinions and support.

² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev 193, 197 (1890).

³ Complaint, *Jacobs v. Seay*, No. 13-13626CA02 (Fla. Miami-Dade Cnty. Cir. Ct. April 18, 2013), available at <http://www.scribd.com/doc/138909420/Revenge-Porn-Complaint-Holly-Jacobs-vs-Ryan-Seay>.

⁴ Endrevengeporn.com (<http://www.endrevengeporn.org>) (last visited July 23, 2013).

⁵ Complaint, *supra* note 3.

⁶ Beth Stebner, *I’m Tired of Hiding: Revenge-porn victim speaks out over her abuse after she claims ex posted explicit photos of her online*, NYDAILYNEWS.COM (May 3, 2013), <http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147>.

⁷ McAfee, *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE.COM, (February 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>.

⁸ See Samuel D. Warren & Louis D. Brandeis, *supra* note 2, at 211 (1890).

⁹ *Id.*

¹⁰ See *E.A. Stephens & Co. v. Albers*, 256 P. 15, 23 (Colo. 1927).

¹¹ RESTATEMENT (SECOND) OF TORTS § 558 (1977)(Libel is a form of defamation. “To create liability for defamation there must be: (a) a false and defamatory statement concerning another”).

¹² *Id.* at § 46 (1965)(“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm”).

¹³ Jessica Roy, *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, BETABEAT.COM (January 21, 2013), <http://betabeat.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com>. (January 21, 2013)(Twenty-three women in Texas filed a class action lawsuit against the owners of Texxxan.com and its host GoDaddy.com for invasion of privacy and mental anguish).

¹⁴ See *Melvin v. Reid*, 297 P. 91, 97 (Cal. Ct. App. 1931) (Referred to by Prosser as the “leading case” about public disclosure of embarrassing private facts).

¹⁵ See *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386, 1388 (La. 1979).

¹⁶ See William L. Prosser, *Privacy*, 48 CAL. L. REV 383, 383 (1960).

¹⁷ See *Generally Warren & Brandeis*, *supra* note 2, at 197 (1890).

¹⁸ See Prosser, *supra* note 16, at 389. (“The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff.... [T]hese four torts may be described as follows: 1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness”).

¹⁹ *Id.* at 389, 392-98.

²⁰ RESTATEMENT (SECOND) OF TORTS § 652A (1977).

²¹ See Prosser, *supra* note 16, at 392.

²² RESTATEMENT (SECOND) OF TORTS § 652D (1977).

²³ *Id.*

²⁴ See *Lowe v. Hearst Communications, Inc.*, 414 F. Supp. 2d 669, 673 (5th Cir. 2007).

²⁵ See *Johnson v. Evening Star Newspaper Co.*, 344 F.2d 507, 508 (D.C. Cir. 1965).

²⁶ Restatement, *supra* note 22.

²⁷ See *Johnson*, 344 F.2d, at 508.

²⁸ See Prosser, *supra* note 16, at 397.

²⁹ See Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915).

³⁰ See *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*, 391 U.S. 563, 571 (1968).

³¹ See *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001).

³² See *Am. Civil Liberties Union of Miss., Inc. v. Miss.*, 911 F.2d 1066, 1071 (5th Cir. 1990).

³³ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975).

³⁴ See *id.* (citing *Michaels v. Internet Entm. Grp., Inc.*, 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998)).

³⁵ See *Bartnicki*, 532 U.S., at 539.

³⁶ See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997).

³⁷ 103 Am. Jur. Proof of Facts 3d 159 (Originally published in 2008).

³⁸ *Id.*

³⁹ See *supra* text accompanying notes 21-28.

⁴⁰ See L.S. Clemons, *The Right of Privacy in Relation to the Publication of Photographs*, 14 MARQUETTE L. REV. 193, 193 (1930).

⁴¹ See *Brents v. Morgan*, 299 S.W. 967, 968 (Ky. Ct. App. 1927).

⁴² See *Doe v. Mills*, 563 N.W.2d 824, 832-33 (Mich. Ct. App. 1995).

⁴³ Complaint, *supra* note 3.

⁴⁴ Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name—Now I’m An Activist Dedicated to Helping Other Victims*, xoJane.com (Nov. 13, 2013), <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>.

⁴⁵ See, e.g., *The Florida Star v. B.J.F.*, 491 U.S. 524, 528 (1989) (“these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling.”).

⁴⁶ See *supra* accompanying text notes 21-31.

⁴⁷ Woodrow Hartzog, *How to Fight Revenge Porn*, THE ATLANTIC (May 10, 2013), <http://www.theatlantic.com/technology/archive/2013/05/how-to-fight-revenge-porn/275759/>.

⁴⁸ *Id.*

⁴⁹ See *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001).

⁵⁰ See *id.*

⁵¹ See *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 42 (Minn. Ct. App. 2009).

⁵² See *id.*

⁵³ See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

⁵⁴ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

⁵⁵ See *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 500 (Mo. Ct. App. 1990).

⁵⁶ Cf. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975).

⁵⁷ Complaint, *supra* note 3.

⁵⁸ See *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34 (Minn. Ct. App. 2009).

⁵⁹ Beth Stebner, *‘I’m Tired of Hiding’: Revenge-Porn Victim Speaks Out Over Her Abuse After She Claims Ex Posted Explicit Photos of Her Online*, NY DAILY NEWS (May 3, 2013), <http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147> (quoting Ms. Jacobs saying, “I completely trusted him with this material.”).

⁶⁰ See complaint, *supra* note 3.

⁶¹ See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998).

⁶² Marlow Stern, *Hunter Moore, Creator of ‘Revenge Porn’ Website Is Anyone Up?, Is the Internet’s Public Enemy No. 1*, THE DAILY BEAST (March 13, 2012) (<http://www.thedailybeast.com/articles/2012/03/13/hunter-moore-creator-of-revenge-porn-website-is-anyone-up-is-the-internet-s-public-enemy-no-1.html>).

⁶³ See *Y.G.*, 795 S.W.2d at 488.

⁶⁴ See *supra* text accompanying note 50-51.

⁶⁵ Jacob Michael Kaufman and Aaron Rubin, *Keeping Privates Private: The Legal Landscape of Revenge Porn*, SOCIALLY AWARE (Jan. 29, 2014), <http://www.sociallyawareblog.com/2014/01/29/keeping-privates-private-the-legal-landscape-of-revenge-porn/>.

⁶⁶ *Id.*

⁶⁷ Bill Mordan, *The Streisand Effect*, 26 No. 5 ACC DOCKET 96, 96 (June 2008) (“The Streisand Effect owes its name to Barbra herself and a decision she made to sue an environmentalist who photographed her Malibu home. As with all celebrity events in California, Streisand’s lawsuit garnered worldwide attention. This once obscure and unknown photo, posted among thousands on an unpopular site, suddenly became one of the world’s more reproduced images”).

⁶⁸ Stebner, *supra* note 59.

⁶⁹ Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BEATBEAT.COM (May 1, 2013), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case>.

⁷⁰ Tracy Clark-Flory, *Criminalizing ‘Revenge Porn,’* SALON.COM (April 6, 2013), http://www.salon.com/2013/04/07/criminalizing_revenge_porn/.

⁷¹ It is difficult to track down all of the pictures that exist on the Internet.

⁷² See *supra* text accompanying notes 11-12.

⁷³ See, e.g., *Activists Working to Draft a Nationwide ‘Revenge Porn’ Legislation*, Circa (Jan. 23, 2014), <http://cir.ca/news/revenge-porn-laws-in-the-us>; Kelly Goff, *Woodland Hills Woman Determine to Bring Down Revenge Porn*, LOS ANGELES DAILY NEWS (Feb. 3, 2014), <http://www.dailynews.com/general-news/20140203/woodland-hills-woman-determined-to-bring-down-revenge-porn>.

⁷⁴ Endrevengeporn.com, an online hub for victims, calls revenge porn a form of cyber-rape. As of July 10, 2013, 2,870 people in the United States have signed endrevengeporn.com’s petition to make revenge porn a felony.

⁷⁵ N.J. Stat. Ann. § 2C: 14-9 (West).

⁷⁶ Sam Jasenosky, *Revenge-porn Laws Needed*, MINNESOTA DAILY (Oct. 8, 2013), <http://www.mndaily.com/opinion/columns/2013/10/07/revenge-porn-laws-needed>.

⁷⁷ *Id.*

⁷⁸ H.R. Staff Analysis 787 (Fla. 2013), available at <http://www.flsenate.gov/Session/Bill/2013/0787/Analyses/nudjaFJ51U0Mt vHkiQwDmHkNZl4=%7C14/Public/Bills/0700-0799/0787/Analysis/h0787a.CRJS.PDF>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Eric Quitugua, *Florida: Revenge Porn Still Legal*, CENTRAL FLORIDA FUTURE (Feb. 3, 2014), http://www.centralfloridafuture.com/news/florida-revenge-porn-still-legal-1.2853880#.UxYx_tzENuY.

⁸² Aaron Sankin, *Revenge Porn: California Legislators Go After Troubling New Trend*, HUFFINGTONPOST.COM (June 5, 2013), http://www.huffingtonpost.com/2013/06/05/revenge-porn-california_n_3391638.html.

⁸³ *Id.*

- ⁸⁴ Nannette Miranda, *State Senate Committee Seeks New Law on "Revenge Porn,"* ABCLOCAL.GO.COM (June 4, 2013), <http://abclocal.go.com/kfsn/story?section=news/state&id=9127761>; 'Revenge Porn' Now Illegal in California, THE SACRAMENTO BEE (Nov. 29, 2013), available at http://blogs.sacbee.com/capitolalert/latest/2013/10/revenge-porn-now-illegal-in-california.html?utm_source=dlvr.it&utm_medium=twitter#m_rss=Capitol%20Alert.
- ⁸⁵ Complaint, *supra* note 3.
- ⁸⁶ Roy, *supra* note 69.
- ⁸⁷ *Id.*
- ⁸⁸ *Id.* Mr. Seay faces a maximum penalty of four years in jail; the other defendants will not be charged.
- ⁸⁹ *Id.*
- ⁹⁰ *Id.*
- ⁹¹ Black's Law Dictionary (9th ed. 2009).
- ⁹² Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE MAGAZINE (October 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.
- ⁹³ *Id.*
- ⁹⁴ Carol Kuruvilla, *Revenge Porn? Women sue website charging X-rated pics of them were uploaded on site and rated without their knowledge*, NYDAILYNEWS.COM (January 27, 2013), <http://www.nydailynews.com/news/national/website-sued-x-rated-pics-posted-women-knowledge-article-1.1248924>.
- ⁹⁵ Mich. Comp. Laws Ann. § 37.2103 (West 2013).
- ⁹⁶ § 1027 Employment of minor to perform prohibited acts, 14 V.I.C. § 1027 (2014).
- ⁹⁷ Wash. Rev. Code Ann. § 9A.44.115 (West 2013).
- ⁹⁸ John A. Hules, *An Epidemic of Shame: Non-Contact Sexual Abuse*, *Civilizing Sexuality: Reexamining America's Values to Prevent Sexual Abuse (1994-1995)*, available at http://www.hules.us/CS_ch03.pdf.
- ⁹⁹ See Jessica Roy, *supra* note 69; Nina Bahadur, *Victims of 'Revenge Porn' Open Up On Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 9, 2014), http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html.
- ¹⁰⁰ Fla. Stat. Ann. § 794.011 (West 2013)(In Florida, sexual battery is a felony.);
- ¹⁰¹ "Any individual who violates ... this section shall be fined ... and imprisoned not less than 15 years ..." 18 U.S.C. § 2251 (Sexual exploitation of children).
- ¹⁰² United States Sentencing Commission, *The History of Child Pornography Guidelines* (October 2009), available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf.
- ¹⁰³ See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 119 (1997).
- ¹⁰⁴ See *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982).
- ¹⁰⁵ *Id.*
- ¹⁰⁶ See *New York v. Ferber*, 458 U.S. 747, 759 (1982).
- ¹⁰⁷ *Id.*
- ¹⁰⁸ See Charles A. Phipps, *supra* note 103.
- ¹⁰⁹ See David P. Shoumlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)(cited in *Ferber*)(Discussing child pornography, Shoumlin states "[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography").
- ¹¹⁰ Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web's Vilest Entrepreneur Be Stopped?*, BEATBEAT.COM (Dec. 4, 2012), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.
- ¹¹¹ See *New York v. Ferber*, 458 U.S. 747, 763 (1982).
- ¹¹² *Id.* at 763-64.
- ¹¹³ *Id.* at 764.
- ¹¹⁴ *Id.*
- ¹¹⁵ Michael E. Miller, *Miami Student Holly Jacobs Fights Revenge Porn*, MIAMI NEWTIMES.COM (May 9, 2013), <http://www.miaminewtimes.com/2013-05-09/news/revenge-porn-miami-holly-jacobs/full/>.
- ¹¹⁶ *Id.*
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- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name—Now I'm An Activist Dedicated to Helping Other Victims*, xoJane.com (Nov. 13, 2013), <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>.
- ¹²¹ See Roy, *supra* note 110.
- ¹²² See 27 Texas Administrative Code 350.100 (defining Sexual Abuse as "Conduct committed by any person against a juvenile that includes sexual abuse by contact or sexual abuse by non-contact"); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007)(stating "Some of the non-contact conduct criminalized by the foregoing federal statutes would also constitute criminal conduct under many states' laws 'relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor'"); *United States v. Martinez-Samaripa*, 680 F.3d 1221, 1226 (10th Cir. 2012)("... a non-contact sexual offense can constitute sexual abuse of a minor ...").
- ¹²³ See *Roth v. United States*, 354 U.S. 476, 484 (1957) (stating "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance").
- ¹²⁴ Paul H. Robinson, Peter D. Greene, Natasha R. Goldstein, *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 J. Crim. L. & Criminology 304, 304 (1995-1996).
- ¹²⁵ See Kuruvilla, *supra* note 94 (In California, a revenge porn poster can go to jail for the offense.).
- ¹²⁶ 47 U.S.C.A. § 230 (West 2014).
- ¹²⁷ Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRINGOPINIONS.COM (February 15, 2013), <http://www.concurringopinions.com/>

archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html.

¹²⁸ See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1106.

¹³¹ Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE MAGAZINE (October 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

¹³² See Roy, *supra* note 110.

¹³³ See *New York v. Ferber*, 458 U.S. 747, 760 (1982).

¹³⁴ *Id.* at 761.

¹³⁵ See Roy, *supra* note 69.

¹³⁶ See *Dendrite Intern., Inc. v. Doe No. 3*, 775 A.2d 756, 763 (N.J. Super. Ct. App. Div. 2001) (“We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously...”).

¹³⁷ See *In re Indiana Newspapers Inc.*, 963 N.E.2d 534, 548-49 (Ind. Ct. App. 2012) (“Anonymous speech has played an important role in the history of this country.... This First Amendment protection has been extended to material on the internet as well”).

¹³⁸ *Id.* at 549 (“Although free speech is vigorously protected, a statement will not be afforded constitutional protection if it is defamatory”).

¹³⁹ See Jamie Marie Billotte, *Is It Justified?—The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 333, 341 (1994).

¹⁴⁰ *Id.* at 341.

¹⁴¹ Michele Cotton, *Back with A Vengeance: The Resilience of Retribution As an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000).

¹⁴² *Id.* at 1317.

¹⁴³ See 18 U.S.C. §§ 2251, 2252, 2256, 2260 (2014).

¹⁴⁴ Ryan Seay claims that Holly Jacobs’ story is inaccurate. “Seay insists he never posted the pics on the internet but agreed to try to get them removed anyway. Each success, however, just made it appear as if he were the one behind the revenge porn.” On October 3, “prosecutors dropped all charges against him. The only evidence that investigators had unearthed was a tenuous link between his computer network and a fake email account created in his ex’s name. But detectives couldn’t prove Seay had created the email account or used it to disseminate any photos.” Michael E. Miller, *Revenge Porn Holly Jacobs ‘Ruined My Life,’ Ex Says*, MIAMI NEWS TIMES (Oct. 17, 2013), <http://www.miaminewtimes.com/2013-10-17/news/revenge-porn-holly-jacobs-ryan-seay/>.

¹⁴⁵ Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE MAGAZINE (October 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

¹⁴⁶ Eun Kyung Kim, ‘Revenge porn’ victim fights back: ‘I was terrified’, THE TODAY SHOW (May 3, 2013), <http://www.today.com/news/revenge-porn-victim-fights-back-i-was-terrified-6C9761188>.

¹⁴⁷ ‘Anderson Live’ Alert: Revenge Porn Trend, ANDERSON COOPER. COM (May 23, 2013), <http://www.andersoncooper.com/episodes/anderson-live-alert-revenge-porn-trend-when-relationship-ends-hoda-kotb-today-co-host-stacy-london/>.

¹⁴⁸ See Roy, *supra* note 110.

¹⁴⁹ See *Pierson v. Post*, 1805 N.Y. LEXIS 311 (N.Y. Sup. Ct. 1805).

¹⁵⁰ See Robert C. Farrell, *Legislative Purpose and Equal Protection’s Rationality Review*, 37 VILL. L. REV. 1, 4 (1992) (quoting Joseph Tussman & Jacob TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949)).