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Re: ***The Unconstitutionality of Florida Statute* § 784.049**

To Whom it May Concern:

1.0 Introduction

Revenge porn is a form of harassment – where someone posts sexually explicit photos of another person, with the intent and effect of causing them shame or embarrassment. This problem could have been dealt with by some simple updates to our harassment statutes, giving victims more power to deal with online harassment through civil means.

Unfortunately, when sexuality and gender-politics enter a debate, rational thought ceases. Florida rushed to pass a special "revenge porn" statute, largely at the urging of one law professor who has never deigned to take the bar exam. In other words, we now have an irrational, useless, and unconstitutional statute.

I do not think that *nothing* should be done about this problem. However, we should look at it rationally, with the input of people who have actually *solved this problem* for *actual clients*. A criminal statute will rarely be enforced, when it is enforced, it will be selectively enforced, and any enforcement will be unconstitutional.

I do not speak from theories derived from un-revealed agendas. I speak from experience representing real victims, and actually getting them results. I have represented many revenge porn victims, always without any payment from them. To the extent I have been able to help, threats of prison time would never have helped.

The problem is multi-fold. One problem is that law enforcement will rarely make this kind of thing a priority. For example, I represented a *child* who was the victim of revenge porn. Child pornography is illegal to create, distribute, and even possess. We informed law enforcement, who took a report, but they made it clear that this was neither a law enforcement nor prosecutorial priority. This was understandable. With all that over-stretched law enforcement has to contend with, is the investigation and prosecution of a single victim of a single act really the best use of resources? We were then, unfortunately, left to civil remedies. If law enforcement does not find it to be a priority to prosecute when the victim is a child, how will law enforcement react when the victim is a 40-year-old man or woman?

Another problem with criminal statutes is they don't actually help the victim. Even if we had been able to get law enforcement to arrest and prosecute the perpetrator, how would that have helped? The victim would still have been left with little recourse, because the images remained online, and proliferated, largely because the only person subject to any consequences would have been the man who originally posted them. Online service providers often simply reacted with arrogance, knowing that they were

protected by 47 U.S.C. § 230. When I brought it to their attention that the photos were of children, they usually complied with take-down requests. When they did not, we were able to obtain injunctive relief, because the actual images themselves were of non-constitutionally protected content, i.e. child pornography.

On the other hand, for my adult victims, we had less success, since the images were constitutionally protected. Our main line of attack was to obtain the copyright to the images from the perpetrator (when the photos were not "selfies") because copyright infringement is an exception to 47 U.S.C. § 230's immunity. This would then be used to convince the websites hosting the material to take it down.

Therein lies the solution – criminal prosecution of the original perpetrator (even if it happens and is successful) will do nothing to actually **help** a victim. Victims need the images suppressed – and the sweetness of vengeance in a criminal prosecution will fade long before the images do, unless there is a real, practical, solution.

2.0 Our Current Revenge Porn Statute is Unconstitutional and Subject to Abuse

Fla. Stat. § 784.049 provides "A person who willfully and maliciously sexually cyberharasses another person commits a misdemeanor of the first degree." The definite term of imprisonment for violation of this statute is up to one year. To "sexually cyberharass" means "to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an Internet website without the depicted person's consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person." As of July 1, 2016, "sexually explicit image" will be defined as "any image depicting nudity . . . or depicting a person engaging in sexual conduct . . . that from the facts and circumstances was intended by that person to be and remain confidential." This addition seems to be an attempt to solve the constitutionality problem, but it fails to do so.

Florida's anti-revenge porn law forbids disclosing an image based solely upon its content. A restriction on speech that is limited to particular content, e.g., sexual exposure, is a content-based restriction on freedom of expression. See, e.g., United States v. Playboy Entm't Grp., 529 U.S. 803, 811-12 (2000); Sable Commc'ns v. FCC, 492 U.S. 115, 118 (1989); see also Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("the government may not regulate speech based on its substantive content…").

Content-based restrictions on speech are presumptively unconstitutional unless the speech it forbids falls into a category of historically unprotected speech. The speech in question—disclosing sexually explicit pictures without consent and in breach of confidentiality—falls into none of the already-recognized categories. To uphold the statute as constitutional, the statute would have to pass the categorical test applied by the Supreme Court in *U.S. v. Stevens*, 559 U.S. 460 (2010), and *U.S. v. Alvarez*, 567 U.S. ____ (2012). Under that test, a substantial amount of the forbidden speech must not be protected under the First Amendment.

The Supreme Court only recognizes nine categories of speech as unprotected by the U.S. Constitution:

1. Advocacy intended, and likely, to incite imminent lawless action;
2. Obscenity;
3. Defamation;
4. Speech integral to criminal conduct;
5. So-called "fighting words";
6. Child pornography;
7. Fraud;
8. True threats; and
9. Speech presenting some grave and imminent threat the government has the power to prevent, "although," says the Supreme Court, "a restriction under the last category is most difficult to sustain."

Dissemination of nude or sexually explicit photos does not fall under any of these categories. Likewise, breach of confidentiality, violations of privacy, and the intentional infliction of emotional distress are not recognized categories of unprotected speech. In fact, very offensive speech has been held to be fully constitutionally protected. Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful")

Although *some* revenge porn could incidentally contain child pornography, or be obscene or defamatory, sexually explicit images that do not fit into these categories are protected under free speech principles. Therefore, to uphold the statute, a court would have to recognize a new category of unprotected speech that covers at least almost all of the speech forbidden by Florida's anti-revenge porn law.

In response to the far-fetched argument that sexually explicit images are "obscene," the statute does not define "sexually explicit images" as meeting any elements of obscenity. The basic guidelines to meet obscenity are: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1972).

Most sexually explicit images sent to significant others (in most cases, "nude selfies" and "mirror nudes") are not particularly offensive. Furthermore, just because a photo is republished without its subject's consent, does not mean the photo lacks any artistic value. Lastly, if revenge porn were obscene, the current obscenity statutes could be used to deal with it.

Because the legislature acted emotionally, instead of rationally, and listened to dilettantes and appeals to emotion instead of experienced attorneys who have actually worked on these cases for real clients, trying to solve real problems, the legislature has now made it potentially illegal to sell a history book about the Vietnam War, if it contains the Pulitzer Prize winning photo of "Napalm Girl." Photos of breast feeding mothers fall into the sweep of the statute. Abu Ghirab photos are swept up in the dragnet as well.

Yes, the statute has a "saving" clause that says that the law only applies if there is "no legitimate purpose." But, this leaves "legitimate purposes" to be guessed at. Perhaps in some Florida jurisdictions, citizens would have little to fear. However, in others, it would certainly lead to legitimate erotic expression creating a risk of prosecution – even if the conviction would not be upheld. This would leave a legitimate website operator to decide whether to face prosecution and possible conviction or to simply remove any potentially offending image from the website, or to simply move. But, even then, if the image is visible in Florida, or a book is mailed into Florida, some prosecutors have taken a very expansive view of the Florida long arm statute, and the Florida Supreme Court has seen no reason to limit its application.

Furthermore, even if the statute is used sparingly, and legitimately, with no even the most illegitimate true purpose can be repackaged as "legitimate."

For example, in a few revenge porn cases I handled, a man splits up with a woman who gave him intimate photos. Those photos remain in his collection, and his new girlfriend finds them. The new girlfriend is enraged, and posts them online. Will we now delve into the woman's mind to find out if she posted them with no knowledge that the subject wanted them kept private? How is she to know? What was her *intent*? If prosecuted, she could very easily say "I found the image to be beautiful, and I wanted to share that beauty with the world."

The statute is useless in form and substance, meanwhile it is very open to abuse. For example, I once represented a website operator who leaked Abu Ghraib photos. In a politically-motivated prosecution, the authorities charged him with violating the obscenity statutes. Of course they eventually dropped the charges, but the citizen was subject to prosecution, and rather than face a long, expensive, and stressful trial, he pled to probation terms. Therein lies the rub – this law will likely never help a victim, but in the hands of an over-zealous prosecutor, or someone with ulterior motives, it may prove to be a very useful foil. Imagine a radical bookstore selling the aforementioned history of the Vietnam War. Prosecute her, and perhaps she will simply agree to move her store to another town, rather than face a Polk County jury.

3.0 Solutions

The legislature could solve the problem, if it listens to reason rather than hysterics.

One important difference between the disclosure of sexually intimate images and the conduct of harassment is that a statute forbidding the former is a content-based restriction on constitutionally protected speech. Because the Florida's anti-revenge porn statute is a content-based restriction on non-obscene speech, the statute is unconstitutional.

A constitutional, statute could be crafted using existing civil remedies and new slants on civil remedies, rather trying to create a new category of criminal speech. For starters, civil remedies are less offensive constitutionally, as they at least do not subject the speaker to the prospect of jail time and the unlimited resources of the government when they come under a prosecutor's thumb. Further, civil remedies can be tailored to provide tools that victims can use for actual relief, rather than simply retribution.

There are two categories of statutes in Florida that could be tailored to truly help victims – existing harassment statutes, and the existing Right of Publicity statute. Right of publicity is derived from the law of privacy. The conflict between privacy and free speech is discussed in detail in Florida Star v. B.J.F., 491 U.S. 524, 532 (1989). This case left open the notion that privacy concerns could stand alongside free speech principles. But see Smith v. Daily Mail Publ'g Co. 443 U.S. 97 (1979) (questioning whether truthful information could ever be suppressed constitutionally).

Accordingly, I do not suggest that there would be no problems with relying upon the existing prohibitions of harassment, and privacy / publicity law. However, I do think that this is the direction you need to look in – and I believe that your chances of solving the problem, constitutionally, are greater if you use privacy and publicity law along with harassment law to help victims.

Fla. Stat. § 784.048 prohibits harassment, generally, without any mention of what the content of that harassment might be. True revenge porn is fairly categorized as "harassment," but not under the current law. However, if we were to expand the definition of harassment to encompass all online harassment, whether through erotic images or not, we would help *more* victims, and do so in a manner that had nothing to do with content based restrictions. This would actually encompass *more* conduct than the existing statute, but herein lies how it would actually solve the problem.

However, that would only solve part of the problem. We would still be left with victims lining up at police stations asking law enforcement to take time away from violent crime to devote resources to online harassment. The legislature should then add harassment to Chapter 772, so that victims will have civil remedies and the potential for injunctive relief.

This, however, still leaves the problem of internet intermediaries reacting with arrogance when 47 U.S.C. § 230 stands in the way. Therefore, what to do? We look to the Florida Right of Publicity Statute, *Fla. Stat. § 540.08,* and add language increasing its protections to create a more expansive right of publicity – which would entail slightly more than

merely revenge porn – but which could create some additional penalties when revenge porn images are used without consent.

The legislature could add language to 540.08(1):

> No person shall publish, print, display or otherwise publicly use for purposes of **harassment or to intentionally cause emotional distress, or for** trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use…

Why do this? The CDA (47 U.S.C. § 230) provides immunity to a broad swath of claims, but it exempts intellectual property claims. "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). The 9th Circuit, in Perfect 10, Inc. v. CC Bill, LLC, 488 F.3d 1102 (9th Cir.) held that this meant **federal** intellectual property claims — not state law claims. However, the First Circuit noted in dicta that Section 230 contains no such limitation. See Universal Comm'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007). The 11th Circuit has ruled on the issue favorably. See Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1324 (11th Cir. 2006). See also Doe v. FriendFinder Networks, 540 F. Supp. 2d 288 (D.N.H. 2008).

Accordingly, the legislature could create a state intellectual property right, which could be used for all forms of pervasive online harassment, which at least would arguably route around 47 U.S.C. § 230, and thus allow victims to either hold intermediaries liable, or at least subject to injunctive relief. What does that mean? We could actually *help* victims to get these images down, but we could also help victims of pervasive online harassment when the harasser is crafty enough to use non-nude images.

4.0 Conclusion

The existing revenge porn law was lobbied for by academics with an agenda that has very little to do with reality, and who had no experience actually helping victims of revenge porn. The hysterical response was to pass a "chicken soup law" – something that might give us the psychosomatic effect of "feeling better," but which has very little practical effect. In fact, it is worse than that, it is like a faith-healing cure that actually contains toxic chemicals, since the "cure" we have now is unconstitutional and actually harmful to a value that is superior even to prevention of online harassment.

Sincerely,

Marc J. Randazza