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Fighting Back Against Revenge Porn: A Legislative Solution

Alex Jacobs

I. INTRODUCTION TO REVENGE PORN

Revenge porn “involves the distribution of nude/sexually explicit photos and/or videos of an individual without their consent.”¹ This is not a new phenomenon. In the 1980s, *Hustler*, a pornographic magazine, solicited explicit images of “nonprofessional female ‘models.’”² Though procedures were in place to prevent the nonconsensual publication of photographs,³ at least one woman had her photograph published without her consent in *Hustler* in the 1980s.⁴ “Realcore pornography” later became a pornographic genre in Usenet groups (the precursor to modern day internet bulletin boards) where users shared photographs and videos of ex-girlfriends, presumably without their subjects’ consent.⁵

Today, revenge porn is typically associated with websites where persons’ sexually explicit photos are posted without the subjects’ consent, oftentimes with links to the subjects’ social media profiles.⁶ By the beginning of the 2010s, IS ANYONE UP? became the largest of such websites with over thirty million views per month in 2011.⁷ But it is not only laypersons being victimized; in 2014, a multitude of celebrities’ nude photographs were stolen and published online.⁸

Current legal remedies are insufficient in protecting victims or punishing purveyors. Enforcement is especially weak when the victim is not a celebrity.⁹ Furthermore, statutes that could protect victims face challenges for being overbroad and

¹ CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org> (last visited at Mar. 23, 2015).

² *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1086 (5th Cir. 1984).

³ *Id.* at 1086 (noting that “Hustler’s informal policy . . . was to call the telephone number listed in the consent form [submitted with the photograph] and ask whomever claimed to be the model nonleading questions designed to elicit responses that would confirm information in the consent form. If no telephone number was listed, Hustler would send a mailgram or telegram to the address shown for the model, requesting that Hustler be called collect. If either the consent form itself or the responses during verification caused Hustler to become suspicious, or if the model had developed doubts about appearing nude in print, Hustler was supposed to place the model’s entry into a “Never to Run” category.”).

⁴ *Id.*

⁵ Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAGAZINE (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7/>.

⁶ Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), <http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics>.

⁷ *Id.* (noting that the IS ANYONE UP? website also cleared over \$13,000 per month.).

⁸ Alan Duke, *FBI, Apple Investigate Nude Photo Leak Targeting Jennifer Lawrence, Others*, CNN (Sept. 2, 2014), <http://www.cnn.com/2014/09/01/showbiz/jennifer-lawrence-photos/>.

⁹ Amanda Hess, *A Former FBI Agent on Why It’s So Hard to Prosecute Gamergate Trolls*, SLATE (Oct. 17, 2014), http://www.slate.com/blogs/xx_factor/2014/10/17/gamergate_threats_why_it_s_so_hard_to_prosecute_the_people_targeting_zoe.html.

infringing upon the First Amendment.¹⁰ In fact, purveyors of revenge porn, ironically, may have immunity under the Communications Decency Act's "Good Samaritan" provision, which protects a provider of an interactive computer service from being treated as a publisher of that information.¹¹ Beyond the statutory hurdles to recovery, the possible success of a claim may hinge upon which party took the photograph.¹²

While victims of revenge porn may feel as though they have been sexually assaulted,¹³ they bear unique challenges in recovery not faced by conventional sexual assault victims. Yet, the personal challenges a victim faces are not unique. Victims of in-person sexual assault may resort to self-harm,¹⁴ just as victims of revenge porn have resorted to self-harm.¹⁵ Sadly, others have even resorted to suicide.¹⁶

One pertinent issue regarding remedies for victims of revenge porn is society's perception of the victims. The onus is often placed upon the victim to protect him or herself. This parallels the victim-blaming phenomenon seen with in-person rape and sexual assault, further highlighting the difficulties in securing an adequate legal remedy when the assault occurs online.¹⁷ These social issues negatively impact victims', particularly women's, ability to secure adequate remedies. There is a socialization of the fear of sexuality.

We have produced a generation of terrorized and terrified women. We are the generation of women who are afraid to be intimate, to explore our

¹⁰ *First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images*, AM. CIV. LIBERTIES UNION (Sept. 23, 2014), <https://www.aclu.org/free-speech/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images> [hereinafter *First Amendment Lawsuit*].

¹¹ 47 U.S.C.A § 230(c)(1)(West 1998)(distinguishing webhosts and administrators of websites from publishers). Note that here "purveyors" means the owners of the boards/websites to which revenge porn is posted and not those individuals creating the posts.

¹² Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 422, 440 (2014). The party that took the photograph owns the copyright to the photo, so a nude photo taken by the subject may enjoy greater protection than if the same photo was taken by a spurned lover.

¹³ Lisa Gutierrez, *Jennifer Lawrence: If You Looked at My Nude Pics, You Sexually Assaulted Me*, THE KANS. CITY STAR (Oct. 7, 2014), <http://www.kansascity.com/entertainment/ent-columns-blogs/stargazing/article2555399.html>.

¹⁴ SELF-HARM, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/get-information/effects-of-sexual-assault/self-harm> (last visited Mar. 23, 2015).

¹⁵ Mark White, *Revenge Porn: Caught in a Web of Spite*, SUNDAY MORNING HERALD, Oct. 7, 2013, <http://www.smh.com.au/digital-life/digital-life-news/revenge-porn-caught-in-a-web-of-spite-20131007-2v21q.html>.

¹⁶ Beth Stebner, *Audrie Pott Suicide: Details of Online Chats Emerge a Year After Teen Killed Herself Following Alleged Assault and Cyberbullying*, N.Y. DAILY NEWS, Sept. 18, 2013, <http://www.nydailynews.com/news/national/new-details-revealed-audrie-pott-cyber-bullying-suicide-article-1.1459904>. See also Emma Woolley, *Time to Make 'Revenge-Porn' Sharing a Criminal Act in Canada*, THE GLOBE AND MAIL, July 24, 2013, <http://www.theglobeandmail.com/technology/digital-culture/time-to-make-revenge-porn-sharing-a-criminal-act-in-canada/article13386714/>. See also Michelle Dean, *The Story of Amanda Todd*, NEW YORKER (Oct. 18, 2012), <http://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd>.

¹⁷ Petula Dvorak, *Stop Blaming Victims for Sexual Assaults on Campus*, WASH. POST, Feb. 24, 2014, http://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b_story.html.

sexuality in safety, to take private pictures of our bodies, to walk to the parking lot, to dance. We are the women who won't walk alone after dark.¹⁸

This compulsion to distrust sexuality even in private makes it prohibitively difficult to find a remedy if the remedy itself requires publicizing that the victim is a sexual being.

Similar to what occurs with victims of in-person sexual assault, there are lasting effects for victims of revenge porn. For example, it is often difficult to remove one's image from the internet. A concerted effort to do so could result in the Streisand Effect: the unintended popularization of a juicy piece of online information that the would-be censor tried to scrub from the internet.¹⁹ And because revenge porn websites often link to a victim's social media accounts, being the subject of revenge porn can impact a victim's employment opportunities. There is an added impact of the social stigma in having sexually explicit photographs easily cataloged in a permanent online collection.

This Comment examines demonstrative examples of revenge porn, its victims and their struggles to find a legal remedy, and the current state of the law regarding revenge porn. This Comment also endorses a proposal for a federal legislative solution to revenge porn.

II. WHO PUBLISHES REVENGE PORN?

Purveyors of revenge porn manage websites that solicit sexually explicit photos without the subjects' consent. A variety of people—ranging from spurned lovers to bored browsers—submit these photos. Hunter Moore is the most notorious purveyor of revenge porn, and his former website, IS ANYONE UP?, best exemplified the practice.

Hunter Moore founded and managed the now defunct website, IS ANYONE UP?, and achieved infamy as a self-professed “professional life ruiner.”²⁰ A high school dropout,²¹ Moore previously worked as a party promoter before becoming a hairstylist for a fetish-porn website.²² A short time later, he founded IS ANYONE UP?, a website which first rose to prominence in the alternative music gossip scene before gaining more mainstream infamy for its pornographic content. IS ANYONE UP? was demonstrative of the broader spectrum of revenge porn websites.

IS ANYONE UP? was “a so-called revenge-porn website that allowed jilted lovers in possession of an ex's compromising photos to send said photos to Moore.”²³ What distinguished IS ANYONE UP? from other revenge porn websites at the time—aside from the numerous postings pertaining to independent alternative music artists—was its

¹⁸ Reut Amit, *That Type of Girl Deserves It*, GAWKER (Sept. 27, 2014), <http://gawker.com/that-type-of-girl-deserves-it-1639772694>.

¹⁹ *What is the Streisand Effect?*, ECONOMIST (Apr. 15, 2013), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

²⁰ Emily Zemler, *Naked & Famous: How a Risque New Website Pushes Boundaries and Buttons*, ALT. PRESS (Feb. 14, 2011), http://www.altpress.com/features/entry/naked_famous_how_a_risque_new_website_pushes_boundaries_and_buttons.

²¹ EJ Dickson, *The History of Revenge Porn that Led to Hunter Moore's Arrest*, DAILY DOT (Jan. 23, 2014), <http://www.dailydot.com/crime/hunter-moore-arrested-indicted-california/>.

²² Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

²³ *Id.* Moore would allegedly verify the subject's age before subsequently posting sexually explicit photographs online.

proclivity for including a victim's "full name, profession, social-media profile and city of residence, which ensured that the pictures would pop up on Google."²⁴ This practice easily enabled future romantic partners, school deans, and employers to locate victims' images. Though the website only existed for 16 months, it had significant negative effects on the lives of Moore's victims, including celebrities, musicians, school teachers, and political donors.²⁵

In October 2013, a grand jury indicted Moore for accessing a protected computer, without authorization, to obtain information for private financial gain.²⁶ This was the only federal indictment against Moore regarding IS ANYONE UP?. Prior to this, victims had resorted to cease and desist letters, claims of copyright infringement, and threats of physical violence.²⁷ PayPal even blocked his accounts from receiving money and donations.²⁸ Due to the significant legal challenges and inadequate laws protecting victims, however, none of the attempts, by his victims or other entities, to prevent Moore from publishing revenge porn successfully resulted in Moore suffering legal punishment for his actions.²⁹

III. WHO ARE THE VICTIMS OF REVENGE PORN?

The victims of revenge porn cut across different sections of society. They are Ivy League students.³⁰ They are award-winning actors.³¹ They are the daughters of debutantes.³² Regardless of the social circumstances of the victim, the cyber assault of revenge porn still carries harrowing consequences.

While it is difficult to quantify the cumulative effects of having one's image shared online, there are examples of individuals whose entire lifestyle and outlook changed as a result of being a victim of revenge porn. An example of this is Lena Chen, who blogged about her sex life, depression, and academic studies at Harvard College on her prominent blog, *Sex and the Ivy*.³³ Four years after her private, sexually explicit photos were initially posted to IVYGATE, a gossip site focused on the Ivy League,³⁴ Chen experienced people,

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>.

²⁷ Gold, *supra* note 6.

²⁸ Gold, *supra* note 6.

²⁹ Moore was never arrested, nor was IS ANYONE UP? seized, for his postings of revenge porn. His only indictment was a result of a charge for unauthorized access to a computer, and was only indirectly related to his history of posting and facilitating revenge porn. Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST, Dec. 3, 2015, <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/>.

³⁰ Susannah Breslin, *Those Dirty Girls*, SALON (May 30, 2008), http://www.salon.com/2008/05/30/sex_writers_on_sex/.

³¹ Jojo Marshall, *Why We All Need to Worry About Revenge Porn*, ELLE (Sept. 24, 2014), <http://www.elle.com/life-love/sex-relationships/news/a15497/what-is-revenge-porn/>.

³² Carole Cadwalladr, *Charlotte Laws' Fight with Hunter Moore, the Internet's Revenge Porn King*, GUARDIAN, March 30, 2014, <http://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king>.

³³ Breslin, *supra* note 30.

³⁴ Andrew Beaujon, *Meet IvyGate, the Scourge of Ivy League Plagiarists*, POYNTER (Oct. 8, 2012), <http://www.poynter.org/2012/meet-ivygate-the-scourge-of-ivy-league-plagiarists/190742/>.

both on the internet and in real life, attempting to sabotage her career and harass her to the point where Chen felt she need to “scall[e] back” her involvement in feminism.³⁵ It was not just her professional life that suffered; she encountered serious personal and psychological setbacks as well:

I am not the person I used to be before this ordeal. It left me mentally unstable, physically debilitated and socially isolated. I still get extremely anxious in particular social situations. Despite the outward facade of a busy and active social life, I am actually distrustful of others and fearful of intimacy. I interpret benign gestures and comments as hostile, make excuses to not go out and wonder too often what my neighbors think of me. I haven’t been able to keep up with email, and my social media presence has dwindled down to the sporadic Facebook photo of my dogs.³⁶

Chen is an example of how the victims of revenge porn can suffer lasting effects, including many that seem unquantifiable.

Another victim of standing against revenge porn is Charlotte Laws, who attended preparatory school and had a coming-out as a debutante.³⁷ A self-described member of “old-money” Atlanta,³⁸ Laws is not the stereotypical crusader against revenge porn and online sexual harassment. But in 2012 her daughter Kayla’s Facebook and email accounts were hacked.³⁹ Shortly after, a topless photo of Kayla, along with her Twitter handle, Facebook account, real name, and location were posted to IS ANYONE UP?.⁴⁰ Charlotte Laws has since campaigned to implement and bolster laws that criminalize the nonconsensual publication of sexually explicit photos.⁴¹

Moore also began targeting Charlotte herself through Twitter and IS ANYONE UP?.⁴² His followers continued his harassment in person. A “suspicious white car with [a] young, male driver” parked outside of her house on multiple days.⁴³ Charlotte received phone calls threatening her with rape and murder.⁴⁴ These types of responses show that the collateral damage of revenge porn extends beyond the primary victim.

Celebrities have been similarly targeted. Scarlett Johansson is only one example.⁴⁵ In 2011, Johansson’s mobile phone was hacked and her private nude photos were

³⁵ Lena Chen, *Former Harvard Sex Blogger: My Ex-Boyfriend Leaking Nude Pictures of Me Changed Who I Am—Forever*, TIME (Sept. 3, 2014), <http://time.com/3263406/jennifer-lawrence-celebrity-leaked-photos-revenge-porn/>.

³⁶ *Id.*

³⁷ Cadwalladr, *supra* note 32.

³⁸ Cadwalladr, *supra* note 32.

³⁹ Cadwalladr, *supra* note 32.

⁴⁰ Cadwalladr, *supra* note 32.

⁴¹ Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 21, 2014), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Jana Winter, *FBI Investigating Alleged Nude Scarlett Johansson Photo Hack*, FOX NEWS (Sept. 14, 2011), <http://www.foxnews.com/entertainment/2011/09/14/nude-scarlett-johansson-shots-show-up-on-web-spur-call-to-fbi-report-says/>.

published on the internet.⁴⁶ More recently, Jennifer Lawrence and a number of other celebrities were targeted in an online black market trade of private, sexually explicit photos.⁴⁷

While revenge porn targets men as well, women on the internet face unique challenges from anonymous attackers. “It begins with simple threats. You know, rape, dismemberment, the usual.”⁴⁸ Actions that would face swift social and legal consequences in real life are relegated to simply being considered harmless “trolling” online.⁴⁹ These threats are often unique to women since the threats are centered upon their gender.⁵⁰ Threats of rape, violence, and instances of internet stalking are often dismissed as jokes,⁵¹ despite the fact that the Department of Justice has noted that 70% of people stalked online are women and that 80% of perpetrators are men.⁵² These numbers indicate that while anyone on the internet may be a victim of “trolling,” women are particularly vulnerable to this type of harassment, especially when explicit images are involved.

Once again, Moore provides a bleak example of this type of degrading treatment of victims of revenge porn. Moore and followers of IS ANYONE UP? would encourage victims, and those who attempted to disrupt the site, to commit suicide.⁵³ While not all were influenced by Moore, numerous victims of revenge porn in fact did just that. Audrie Potts, a 15-year-old high school student, hanged herself after explicit photos taken of her at a party were distributed on the internet.⁵⁴ Rehteah Parsons was a 17-year-old who was sexually abused at a party where explicit photos were taken and then spread around her school. She also killed herself in the wake of the subsequent harassment.⁵⁵ Amanda Todd, although not directly Moore’s victim, is perhaps the most notable example of cyber-bullying; she suffered abuse from the age of 12 until her ultimate suicide at 15.⁵⁶ Her mother noted that prior to Todd’s suicide, there had been little to no discussion in the general public regarding harassment by means of the internet.⁵⁷ Though Todd was not featured on IS ANYONE UP?, Moore did discuss her suicide and rhetorically asked, “I wonder if Amanda Todd will be on walking dead [sic] tonight.”⁵⁸

⁴⁶ *Id.*

⁴⁷ Duke, *supra* note 8.

⁴⁸ Kathy Sierra, *Trouble at Koolaid Point*, SERIOUS PONY, October 7, 2014, <http://seriouspony.com/trouble-at-koolaid-point/>.

⁴⁹ *Id.*

⁵⁰ Soraya Chemaly, *There’s No Comparing Male and Female Harassment Online*, TIME (Sept. 9, 2014), <http://time.com/3305466/male-female-harassment-online/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Stebner, *supra* note 16.

⁵⁴ Stebner, *supra* note 16.

⁵⁵ Woolley, *supra* note 16.

⁵⁶ Lateef Mungin, *Bullied Canadian Teen Leaves Behind Chilling YouTube Video*, CNN (Oct. 12, 2012), <http://www.cnn.com/2012/10/12/world/americas/canada-teen-bullying/>.

⁵⁷ *Mother of Cyberbullying Victim Amanda Todd Speaks out Against Online Abuse*, FOX NEWS (July 22, 2014), <http://www.foxnews.com/world/2014/07/22/mother-cyberbullying-victim-amanda-todd-speaks-out-against-online-abuse/>.

⁵⁸ Patrick McGuire, *A Jailbait Loving Perv Destroyed Amanda Todd's Life*, VICE (Oct. 15, 2012), http://www.vice.com/en_ca/read/a-jailbait-loving-perv-destroyed-amanda-todds-life.

IV. CHALLENGES VICTIMS FACE IN SEEKING REMEDIES

Considering the number of people suffering from either a risk of, or actual, online assault and victimization through revenge porn, the situation becomes even more disturbing when examining how little recourse the average person has through law enforcement.

Initially, Charlotte Laws faced significant resistance and even resentment from the Los Angeles Police Department and the FBI when she contacted them regarding the violation against her daughter. When Laws first contacted the Los Angeles Police Department, a detective from the Computer Crimes Unit asked why someone would take a revealing and sexualized photo if that person did not intend for it to end up on the internet.⁵⁹ Laws then turned to the FBI, which instructed her to file a report with their cyber-crimes division online.⁶⁰ Laws, suspicious of this as an attempt to mollify rather than help her, mentioned to the FBI their willingness to work to defend actress Scarlett Johansson from similar leaked images.⁶¹

It is unclear why the FBI readily investigated the high-profile cases of celebrity revenge porn. One reason may be that investigating the more newsworthy virtual assault of celebrities provides a greater deterrent effect on would-be criminals posting revenge porn.⁶² Additionally, a former FBI investigator discussed the bureaucratic difficulties in investigating claims, noting that on the cyber-crimes squad, “the volume of work coming in every day was absolutely staggering.”⁶³ Cases presenting a serious threat of physical harm were prioritized, as were claims involving children, thereby decreasing the investigative power available to other claims.⁶⁴ As such, revenge porn may not be a priority given the litany of other claims this agency is tasked with investigating.

Also problematic is the victim blaming that is rampant in the comments directed toward those who aim to criminalize revenge porn. In fact, when GAWKER posted a story about Holly Jacobs, “the advocate behind End Revenge Porn and who was tormented by an ex who shared pictures of her with friends, co-workers and the Internet,” the most popular comment on the story was: “the best advice remains, DON’T MAKE PORNOGRAPHIC VIDEOS FOR YOUR BRAINDEAD MOUTH-BREATHING BODY SPRAY WEARING MEDIOCRE FRATBOY OF A BOYFRIEND. Like, EVER.”⁶⁵

Charlotte Laws’ struggles in achieving relief for her daughter are representative of the barriers victims of revenge porn typically face. But Laws had the distinct advantage of a privileged background that allowed her to tirelessly pursue a remedy.⁶⁶ Considering the obstacles she faced, even with the assets available to her, it would be reasonable to

⁵⁹ Charlotte Laws, *I've Been Called the "Erin Brockovich" of Revenge Porn, and For the First Time Ever, Here is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, XO JANE (Nov. 21, 2013), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hess, *supra* note 9.

⁶³ Hess, *supra* note 9.

⁶⁴ Hess, *supra* note 9.

⁶⁵ Woolley, *supra* note 16.

⁶⁶ Laws, *supra* note 59 (noting Charlotte’s upbringing and that her husband is an attorney).

conclude that a person of more modest means may feel defeated, and be unable to achieve success through the law.

Besides a lack of financial means, there are many other reasons why victims of revenge porn fail to receive legal relief. Thirty-four states have not codified laws explicitly criminalizing revenge porn.⁶⁷ Police and other authorities' reluctance to pursue the issue only compounds the damage. Police, often not of the generation typically victimized by revenge porn, are sometimes intimidated by new technology.⁶⁸ They are also sometimes simply ignorant about the relevant laws.⁶⁹ It would be unusual and atypical to advocate that a victim of physical harassment in real life print out statutes to bring to police when filing a complaint, however, this is precisely what one expert encourages victims to do regarding revenge porn.⁷⁰

When one of the results of being victimized by revenge porn is a loss in trust and a feeling of helplessness,⁷¹ being forced to do part of the job of the people entrusted to protect you is an especially discouraging proposition. Unfortunately, finding shelter within law enforcement seems to be a luxury afforded only to the famous.

You're probably more likely to win the lottery than to get any law enforcement agency in the United States to take action when you are harassed online, no matter how viscerally and explicitly. Local agencies lack the resources, federal agencies won't bother. Unless you're a huge important celebrity. But the rules are always different for them.⁷²

Considering these hurdles, it is easy to imagine why securing sufficient remedies for victims of revenge porn is difficult.

The failure of legal protections, leaving victims to advocate for themselves, has been seen in the United States before. There are striking similarities between how society addressed workplace harassment of women in the 1970s to treatment of revenge porn victims today. Law professor Danielle Citron analogizes to the 1970s: "[n]ot long ago, society viewed workplace sexual harassment as no big deal, just as many view cyber harassment as frat boy nonsense. Until the late 1970s, employers and judges defended

⁶⁷ Barbara Herman, *Illinois Passes Revenge Porn Law With Teeth: 'Other States Should Copy,' Says Privacy Lawyer*, INT. BUS. TIMES (Jan. 6, 2015), <http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974>.

⁶⁸ Caitin Dewy, *A British Troll was Just Jailed for His Tweets. Here's why That Will (Probably!) Never Happen in the U.S.*, WASH. POST, Oct. 1, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/10/01/a-british-troll-was-just-jailed-for-his-tweets-heres-why-that-will-probably-never-happen-in-the-u-s/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN, Nov. 19, 2013, <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>; See also Fredrick Kunkle, *Maryland Woman Urges State Lawmakers to Outlaw 'Revenge Porn'*, WASH. POST, Jan. 29, 2014, https://www.washingtonpost.com/local/md-politics/maryland-woman-urges-state-lawmakers-to-outlaw-revenge-porn/2014/01/29/3e4144ee-88e9-11e3-833c-33098f9e5267_story.html.

⁷² Kathy Sierra, *Why the Trolls Will Always Win*, WIRED (Oct. 8, 2014), <http://www.wired.com/2014/10/trolls-will-always-win/>.

male supervisors' 'amorous' activity as a normal and healthy development."⁷³ Professor Citron goes on to cite "a case involving a male supervisor who repeatedly attempted to molest two female federal employees in which the judge ruled that the law could not interfere every time an employee makes advances toward another, saying it would force employers to hire asexual people."⁷⁴ Domestic violence is also analogous, and highlights the prevalence of victim-blaming in this area. "Women who were abused by their spouses or hit on in the workplace were told they brought it on themselves, just as cyber harassment victims are today."⁷⁵

There have been some positive changes with respect to revenge porn and law enforcement. A number of states have passed legislation targeting the harms that result from revenge porn.⁷⁶ There is also some indication that law enforcement is beginning to take this matter more seriously. "L.A. prosecutor Wesley Hsu calls online harassment cases, particularly those involving nude photos, 'emotional hacking harm' and has encouraged his team of prosecutors to take them on."⁷⁷

Despite these helpful developments, there are legislative obstacles, rooted in the federal laws currently in place, that prevent adequate state-level law enforcement.⁷⁸ Section 230 of the federal Communications Decency Act (CDA)⁷⁹ provides a safe-haven for website operators.⁸⁰ Essentially, it secures protections for the owner of websites by divorcing the owner from the publication of content that may occur on his or her website. This becomes problematic when someone owns a revenge porn website, but does not independently generate the published content. Without laws that address the specific instance of the owner of a revenge porn website soliciting submissions and publications, § 230 provides a federal shield for the owners of these sites.

Another issue is the backlash facing advocates for punishment regarding revenge porn. Academics and victims pushing for more strident laws often face harassment through Twitter and Facebook.⁸¹ Professor Citron acknowledges that a change in our perception of online behavior is necessary to truly address the problem of harassment and revenge porn. She writes that "harassment online should be taken seriously, and that a robust legal and enforcement framework [should be] created to make the Internet a less chilling place for women."⁸² Professor Citron notes that "online harassment is the next frontier of civil rights."⁸³ Because society is still in its infancy regarding the creation of

⁷³ Kashmir Hill, *How to Keep Internet Trolls and Harassers From Winning*, FORBES (Aug. 21, 2014), <http://www.forbes.com/sites/kashmirhill/2014/08/21/how-to-keep-internet-trolls-and-harassers-from-winning/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Rebecca Leber, *Is Revenge Porn Legal in Your State?*, NEW REPUBLIC (Sept. 3, 2014), <http://www.newrepublic.com/article/119295/revenge-porn-laws-state-map-shows-theyre-rare-us>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 47 U.S.C.A. § 230(c)(1)(West 1998)("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.").

⁸⁰ *Id.*

⁸¹ Hill, *supra* note 73.

⁸² Hill, *supra* note 73.

⁸³ Hill, *supra* note 73.

norms pertaining to online behavior, she argues that people can still influence that behavior.⁸⁴

We can teach our kids how to behave. It's not like we can completely eliminate destructive behavior online, but we can change how we treat it. We can make cyber mobs not have so many members. Maybe we can educate the watchers of the impending shark attack so they act and warn the swimmers rather than just watch it happen.⁸⁵

And because the internet is still in its nascent stages of growth, it is entirely possible for larger communities to begin to affect the kind of positive change that Professor Citron proposes.

It is helpful to view online harassment and revenge porn as having analogues in the physical world. By exploring how society attempts to address “real world” harassment and sexual assault, it is possible to rectify the issues of the online equivalent. The examples of Lena Chen, Charlotte Laws, and the numerous suicides caused by revenge porn and its fallout, illustrate that although it initially occurs in the “cyber” world, revenge porn has lasting consequences in the physical world.

V. OVERVIEW OF CURRENT LAWS ON REVENGE PORN

At the time when Laws began her advocacy in 2012, only New Jersey criminalized the nonconsensual distribution of sexually explicit photos.⁸⁶ Now, the Cyber Civil Rights Initiative has proposed model legislation for adoption by the states.⁸⁷ In petitioning the authorities to prosecute Moore, not just for stealing her daughter's photos, but also for publishing sexually explicit photos as a unique crime, Laws was charting new territory.

To combat the damage done to her daughter, and because criminal charges were unlikely to be levied, Laws copyrighted her daughter's images and encouraged other victims she contacted to do the same.⁸⁸ After speaking with nine copyright attorneys regarding a civil suit, she found that the consensus was that this type of litigation regarding revenge porn “was largely untested in the civil courts.”⁸⁹ The theory behind using a copyright to protect victims is that if the picture is a “selfie,” the victim created the content, and is therefore entitled to protect that content.⁹⁰ Thus, simple copyright laws afford basic protection against their unauthorized reproduction.⁹¹ Kayla and Charlotte

⁸⁴ Hill, *supra* note 73.

⁸⁵ Hill, *supra* note 73.

⁸⁶ Laws, *supra* note 59.

⁸⁷ Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER CIVIL RIGHTS INITIATIVE (July 25, 2014), http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf.

⁸⁸ Laws, *supra* note 59.

⁸⁹ Laws, *supra* note 59.

⁹⁰ Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014), <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>.

⁹¹ Philip Bump, *Paging Bradley Cooper's Lawyers: He Might Own Ellen's Famous Oscar Selfie*, THE WIRE (Mar. 3, 2014), <http://www.thewire.com/politics/2014/03/paging-bradley-coopers-lawyers-you-might-own->

Laws were not the only victims of Moore, nor were they the only non-celebrity victims of revenge porn in general. Laws managed to contact numerous victims to alert them of her efforts and to inform them of ways to disrupt Moore's intended smear campaign on their characters.⁹²

Common law torts have afforded alternative protection for victims. A claim of intentional infliction of emotional distress in Texas netted one victim \$500,000.⁹³ This legal method proved especially useful in a state like Texas where revenge porn is not criminalized.⁹⁴ In California, one settlement resulted in an award of \$250,000.⁹⁵ But a legislative solution in all fifty states targeting revenge porn specifically is still warranted as a deterrent, and as recognition that the type of harm inflicted is both severe and impossible to remedy without directed legislation.⁹⁶

The intent of creating a fifty-state legislative solution is to prevent the complete loss of privacy that victims of revenge porn undergo.⁹⁷ While punitive penalties may provide some respite for victims, an offender may not have sufficient assets to pay any monetary damages awarded to the victim by a court.⁹⁸ Criminalizing the action of revenge porn guarantees that an offender cannot use having limited assets as a shield to avoid paying any damages awarded to the plaintiff during civil litigation. Creating a law in all fifty states would also allow victims to avoid the bureaucratic hassles detailed above. It will be easier for victims to show that they have been the subject of revenge porn, rather than also having to show the existence of physical threats as a result of revenge porn, which many victims are currently forced to do in order to achieve a legal remedy.

The remainder of this section examines the strengths and weaknesses of state laws that have already been enacted to target revenge porn. Next, this section outlines the shortcomings of other relevant laws, with a focus on copyright and common law torts. This section concludes with a description of how purveyors of revenge porn defend themselves.

A. *State Legislative Solutions.*

Several states have attempted to resolve the problem of revenge porn by introducing new legislation on the subject. In 2012, New Jersey enacted a law prohibiting publishing sexually explicit photos while knowingly lacking permission to do so.⁹⁹ It was

ellens-famous-oscar-selfie/358758/, ("...the person who pressed the shutter ... technically ... owns [the] copyright.").

⁹² Laws, *supra* note 59.

⁹³ Brian Rogers, *Jury Awards \$500,000 in 'Revenge Porn' Lawsuit*, HOUSTON CHRONICLE, Feb. 21, 2014, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ N.J. STAT. ANN. § 2C:14-9 (West 2015).

the first state to have such a law on its books.¹⁰⁰ Alaska enacted similar legislation that classified revenge porn as harassment in the second degree, a class B misdemeanor.¹⁰¹ California also established reproduction of private photos as a disorderly conduct misdemeanor.¹⁰² Colorado established separate class 1 misdemeanors for posting photos as harassment¹⁰³ and for monetary gain.¹⁰⁴ Delaware similarly established revenge porn as a violation of privacy that is a misdemeanor,¹⁰⁵ or a felony if aggravating factors are present.¹⁰⁶ Idaho codified video voyeurism as a felony.¹⁰⁷ Hawaii classified violation of privacy as a felony.¹⁰⁸ Georgia classified invasion of privacy as a misdemeanor.¹⁰⁹ Maryland classified revenge porn as a misdemeanor, and explicitly titled the relevant section of the code “Revenge porn prohibited.”¹¹⁰ Pennsylvania classified unlawful dissemination of an intimate image as a misdemeanor.¹¹¹ In Texas, improper photography or videotaping is classified as a felony.¹¹² Utah classified the distribution of intimate images as a misdemeanor.¹¹³ Virginia classified the unlawful dissemination or sale of images of another person as a misdemeanor.¹¹⁴ Finally, Wisconsin codified that unlawful representations depicting nudity are a felony.¹¹⁵

B. *Strengths and Weaknesses in State Laws.*

Requiring actual knowledge or malicious intent, as in Virginia’s law,¹¹⁶ that the publication of images is nonconsensual, may make it prohibitively difficult to prosecute in some instances. For example, an individual could self-publish an image to one specific website, then an automated archiving robot on that site may re-host that image on a second site.¹¹⁷ The archiving robot is unknown to the poster and not endorsed by the

¹⁰⁰ John Kopp, *Lawmakers Seek Wider Net for Pennsylvania’s ‘Revenge Porn’ Law*, PHILLYVOICE (Aug. 17, 2015), <http://www.phillyvoice.com/lawmakers-changes-revenge-porn-law/>.

¹⁰¹ ALASKA STAT. § 11.61.120(a)(6) (West 2014).

¹⁰² CAL. PENAL CODE § 647(j)(4) (West 2015).

¹⁰³ COLO. REV. STAT. §18-7-107 (West 2014).

¹⁰⁴ COLO. REV. STAT. §18-7-108 (West 2014).

¹⁰⁵ Del. Code Ann. tit. 11 § 1335 (West 2014).

¹⁰⁶ *Id.* Factors include: codifying that secret filming, publishing for monetary gain, maintaining a website for the purpose of disseminating such depictions, including identifying information, or violating within five years of a prior violation.

¹⁰⁷ IDAHO CODE ANN. § 18-6609 (2014).

¹⁰⁸ HAW. REV. STAT. § 711-1110.9 (2014).

¹⁰⁹ GA. CODE ANN. § 16-11-90 (West 2014).

¹¹⁰ MD. CODE ANN., CRIM. LAW § 3-809 (West 2014).

¹¹¹ 18 PA. CONS. STAT. § 3131 (2014).

¹¹² TEX. PENAL CODE ANN. § 21.15 (West 2015).

¹¹³ UTAH CODE ANN. § 76-5b-203 (West 2014).

¹¹⁴ VA. CODE ANN. § 18.2-386.2 (2014).

¹¹⁵ WIS. STAT. § 942.09 (2014).

¹¹⁶ VA. CODE ANN. § 18.2-386.2 (2014).

¹¹⁷ This is common knowledge among communities that exist on websites specifically for the purposes of pilfering these archives. One demonstrable example is the “AmateurArchives” sub-forum on REDDIT. On the “AmateurArchives” sub-forum, an archiving robot responds to users’ requests for pictures, that have often been deleted from the primary source, with links to images re-hosted elsewhere. See *Amateur Archives*, REDDIT, <https://www.reddit.com/user/rarchives> (last visited Sept. 24, 2016) (sexually explicit content). See also *Data Hoarder*, REDDIT, <https://www.reddit.com/r/DataHoarder/comments/245ij1/>

owner of the first website. In that instance, the operator of the archiving robot may not be subject to criminal penalty because, ostensibly, there is a cognizable defense that the images were intended to be published online, and there is a reasonable expectation that what is on the internet is never limited to just one webpage. This line of reasoning, however, begins to tread impermissibly close to the victim-blaming decried in Charlotte Laws' case¹¹⁸ and in other instances of revenge porn.¹¹⁹

The above scenario is increasingly common in various online communities. REDDIT, a popular website analogous to other internet bulletin board systems (internet forums), features one area, GoneWild, dedicated to its users' self-submitted pornographic photographs.¹²⁰ Other forums on REDDIT instruct users on how to save posts from GoneWild through an automated program.¹²¹ Users can request archived photos by reference to the original poster's REDDIT username, and follow a program link to the photographs that the original poster may have deleted.¹²² This ensures that even if the original poster deletes his or her images, or if the original poster only intended the images to be seen on GoneWild, those pornographic images can be saved and proliferated.

Legislation regarding revenge porn has run into challenges rooted in the rights guaranteed by the First Amendment.¹²³ Arizona's revenge porn law has come under scrutiny for being over broad, and abutting against the First Amendment's codification of protected speech.¹²⁴ While the law provides exceptions to its rule prohibiting revenge porn, the list is not an exhaustive.¹²⁵ The ACLU filed a federal lawsuit against Arizona's law.¹²⁶ The complaint notes that normal distribution of lawful images would be rendered illegal under Arizona's law.¹²⁷

For example, a bookseller who sells a history book containing an iconic image such as the Pulitzer Prize-winning photograph "Napalm Girl"—the unclothed Vietnamese girl running from a napalm attack—could be prosecuted under the law. A library lending a photo book about breast feeding to a new mother, a newspaper publishing pictures of abuse at the Abu Ghraib prison, or a newsweekly running a story about a local art show could all be convicted of a felony.¹²⁸

start_your_own_rgonewild_archive_automated_data/ (last visited Sept. 24, 2016) (for an example of the ease with which one may create a data archiving robot).

¹¹⁸ Laws, *supra* note 59.

¹¹⁹ Laws, *supra* note 59.

¹²⁰ Daniel Harkins, "Other People Getting Off to Me Gets Me Off": Reddit's DIY porn forums, SALON (July 13, 2013), http://www.salon.com/2013/07/14/other_people_getting_off_to_me_gets_me_off_reddits_diy_porn_forums/.

¹²¹ Data Hoarder, *supra* note 117.

¹²² Amateur Archives, *supra* note 117.

¹²³ U.S. CONST. amend. I.

¹²⁴ Jacob Sullum, *Going After 'Revenge Porn' With a Sledgehammer, Arizona Smashes the First Amendment*, REASON (Sep. 23, 2014), <http://reason.com/blog/2014/09/23/going-after-revenge-porn-with-a-sledgeha>.

¹²⁵ ARIZ. REV. STAT § 13-1425 (2014).

¹²⁶ *First Amendment Lawsuit*, *supra* note 10.

¹²⁷ *First Amendment Lawsuit*, *supra* note 10.

¹²⁸ *First Amendment Lawsuit*, *supra* note 10.

The ACLU notes that Arizona can reach its intended legislative goal of protecting against revenge porn with carefully tailored laws.¹²⁹ Initially, the ACLU's motion for a preliminary injunction against the law was contested,¹³⁰ and ultimately, the law was deemed unenforceable.¹³¹ As of the 2016 term, the ACLU and the Arizona state legislature are working to find a new solution.¹³²

A similar law in California faced the same initial challenges by the ACLU,¹³³ but its final version seemed to pass the organization's constitutional muster.¹³⁴ The revised version of the bill was more specific than the initial contested version, and it included a requirement that any poster of revenge porn must do so with the intent to "cause serious emotional distress," and the subject of the post must actually experience emotional distress, before a claim can succeed.¹³⁵

Noted constitutional scholar Eugene Volokh tackled the issue as it pertained to a Florida law legislating against revenge porn.¹³⁶ Volokh acknowledged the Supreme Court's willingness to balance social costs and benefits regarding First Amendment legislation that limits speech. He explained that while the First Amendment contains no clear instruction requiring any sort of balancing framework, it is often read as a necessary part of the text.¹³⁷ However, he notes that, historically, free speech does not extend to matters of obscenity or defamation.¹³⁸

But even under this sort of historical approach, I think nonconsensual depictions of nudity could be prohibited. Historically and traditionally, such depictions would likely have been seen as unprotected obscenity (likely alongside many consensual depictions of nudity). And while the Court has narrowed the obscenity exception — in cases that have not had occasion to deal with nonconsensual depictions — in a way that generally excludes mere nudity (as opposed to sexual conduct or "lewd exhibition of the genitals"), the fact remains that historically such depictions would not have been seen as constitutionally protected.¹³⁹

So long as a statute is "suitably clear and narrow," it stands to reason that it "would likely be upheld by the [federal] courts."¹⁴⁰

¹²⁹ *First Amendment Lawsuit*, *supra* note 10.

¹³⁰ *First Amendment Lawsuit*, *supra* note 10.

¹³¹ Joe Mullin, *Arizona Makes Deal with ACLU, Won't Enforce Bad Law on "Revenge Porn"*, ARS TECHNICA (July 12, 2015), <http://arstechnica.com/tech-policy/2015/07/arizona-makes-deal-with-aclu-wont-enforce-bad-law-on-revenge-porn/>.

¹³² *Id.*

¹³³ Eric Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Eugene Volokh, *Florida "Revenge Porn" Bill*, THE VOLOKH CONSPIRACY (April 10, 2013), <http://volokh.com/2013/04/10/florida-revenge-porn-bill/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

C. Common Law and Copyright.

While existing criminal and common law provide some remedies for victims, it is rare that these are adequate. The owner of the site UGOTPOSTED, a revenge porn site similar to IS ANYONE UP?, was criminally charged with 31 counts of conspiracy, identity theft, and extortion in California.¹⁴¹ But this type of legal success is more the exception than the rule. Furthermore, while existing tort law is already a method of punishing some violators, this too may be insufficient. Bringing a civil tort claim depends upon a victim hiring a lawyer and seeing litigation through to its conclusion. A codified criminal law, similar to the treatment of in-person sexual assault, would remove the burden from resting solely upon the victim.¹⁴² Litigating civil suits requires time and money, which victims may not necessarily have.¹⁴³

Copyright law is similarly inadequate on its own.¹⁴⁴ Images are proliferated online, and while an individual may succeed in removing his or her images in one area, the images may spring up on two or three other websites of which a victim may be unaware. Copyright law is an inadequate solution because it first assumes the victim holds the copyright to any problematic images, and then it places the onus on the victim to locate those same images and to make a request for their removal.

Another failure of civil law in this area is that young people may not be adequately deterred from proliferating revenge porn because they stand to lose little in litigation if they are unemployed or have few assets. In light of the numerous challenges Laws and other victims of revenge porn faced in trying to navigate tort law, and because taking advantage of tort law remedies requires victims to expend significant time and financial effort, a criminal law that allows a state or federal prosecutor to file charges is preferable. A uniform federal law best serves this goal.

Highlighting this legislative inadequacy are several examples of publishers of revenge porn who were not appropriately penalized. For instance, Hunter Moore was indicted for unauthorized access to a protected computer, along with conspiracy and aggravated identity theft, but not indicted under revenge porn statutes.¹⁴⁵ Rather, he was just indicted under existing, unrelated, criminal statutes.¹⁴⁶ While it is useful to have statutes in place that may encompass some of the actions of the purveyors of revenge porn, these laws' protections are often insufficient when it comes to the wide variety of potentially harmful actions included in publishing revenge porn. Common sense and the need for judicial efficiency demand that laws be enacted to combat specific criminal actions. It is inefficient and unhelpful to pigeonhole novel crimes into existing statutes. Without specific legislation tailored to addressing the unique problem of revenge porn, those who publish it will continue to escape justice.

¹⁴¹ Press Release, State of California Department of Justice, Office of the Attorney General, Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator (Dec. 13, 2013), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator>.

¹⁴² Taylor Linkous, *It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 14 (2014).

¹⁴³ *Id.* at 17.

¹⁴⁴ *Id.*

¹⁴⁵ Cadwalladr, *supra* note 32.

¹⁴⁶ Linkous, *supra* note 142, at 14–15.

Another example of such evasion is the owner of UGOTPOSTED, who was charged in part because he required that victims submit payment, as well as identification, in order to remove their images from the website.¹⁴⁷ For a fee of between \$299.99 and \$350, the owner would supposedly comply with the victim's wishes.¹⁴⁸ Here, the owner of the site was charged with 31 felony counts, including extortion.¹⁴⁹ If he had not demanded payment, several of those charges would have been unsuccessful.

Still, targeting the owner for hosting the images does little to allay the continued pain victims experience. One victim of UGOTPOSTED felt "scared for [her] life," because of the invasion of her privacy.¹⁵⁰ Once the image is removed, ostensibly the immediate harm is removed. However, even hosting the image for a short time allows for it to be copied and hosted elsewhere, thereby initiating and perpetuating a continuing harm. Current criminal laws do not address this unique aspect of the harm arising from revenge porn. It is necessary for the criminal code in state and federal law to be updated to reflect current technological realities, so as to punish the continued proliferation of revenge porn by parties other than the original poster.

It is also difficult to target webhosts specifically. While existing laws may adequately address individuals sending images to webhosts, the Communications Decency Act (CDA) exempts some webhosts from prosecution.¹⁵¹ This allows the purveyors and solicitors of revenge porn to achieve some immunity. The CDA ought to be amended with a more complete comprehension of the nuances and capabilities of the modern internet.

D. How Purveyors of Revenge Porn Defend Themselves from Legal Challenges.

Purveyors of revenge porn claim a number of defenses, both legislative and in tort law, to evade prosecution. An example containing several methods of evading the legal consequences of revenge porn is the case of Hunter Moore. For instance, Moore claimed protection under the CDA.¹⁵² By merely hosting a website, he alleged that he was free from liability for defamation.¹⁵³ Moore primarily posted third party content on IS ANYONE UP? through the use of a submission form.¹⁵⁴ Accordingly, claims of defamation failed since he was only a host, and not the creator of the content. He used the CDA's

¹⁴⁷ Press Release, State of California Department of Justice, Office of the Attorney General, Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator (Dec. 13, 2013), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator>.

¹⁴⁸ *Id.*

¹⁴⁹ Nina Golgowski & Nancy Dillon, 'Revenge Porn' Site Creator Charged with Extorting Victims to Have Nude Photos Removed, N.Y. DAILY NEWS, December 10, 2013, <http://www.nydailynews.com/news/national/revenge-porn-site-creator-arrested-extorting-thousands-article-1.1543700>.

¹⁵⁰ Tim Walker, *Man who Got Rich from 'Revenge Porn' Website UGotPosted is Finally Exposed*, INDEPENDENT (December 12, 2013), <http://www.independent.co.uk/news/world/americas/man-who-got-rich-from-revenge-porn-website-ugotposted-is-finally-exposed-9001709.html>.

¹⁵¹ Amanda Holpuch, *Hunter Moore of IsAnyoneUp.com Announces New Revenge Porn Website*, GUARDIAN, Dec. 6, 2012, <http://www.theguardian.com/culture/us-news-blog/2012/dec/06/hunter-moore-isanyoneup-revenge-porn-website>.

¹⁵² Gold, *supra* note 6. See 47 U.S.C.A. § 230(c)(1)(West 1998).

¹⁵³ Gold, *supra* note 6.

¹⁵⁴ Gold, *supra* note 6.

“Good Samaritan” provision as a grossly ironic shield. Ultimately, Moore did receive a two-year sentence, but he was only charged for unauthorized access of a protected computer for monetary gain and for identity theft, not for the actual act of publishing images or the resulting harassment.¹⁵⁵

The CDA was passed to extend to the internet the anti-obscenity laws that protected potential victims from harassing phone calls.¹⁵⁶ In order to combat the potential chilling effect of the new law, exceptions were put in place to protect internet service providers and content hosts as distinct from content creators and uploaders.¹⁵⁷ Without § 230, the part of the law that established this “Good Samaritan” exception, users who merely happened upon a pornographic image online would have violated the CDA. Given the severe negative impact his behavior has had on victims of revenge porn, Moore’s reliance on “Good Samaritan” immunity presents a special kind of irony. It also serves to demonstrate the inadequacy and antiquated nature of a law created twenty years ago, which is in desperate need of change.

Further, copyright claims against purveyors like Moore are increasingly complicated. Copyright ownership depends on who submits the photo to Moore (or other publishers), and who created the image by physically taking the picture. If the victim created the content, such as in a “selfie,” the victim is the copyright holder and, under the CDA, the content must be removed upon the victim’s request.¹⁵⁸ A more complicated legal question arises when a second party created the content and the victim then wants the content removed.

An additional complication occurs if a victim consented to a nude photo for use only by his or her partner, but the partner then uploads the photo to a website like IS ANYONE UP?. The victim’s recourse through existing copyright laws is unclear in this situation. One potential area of recourse is the issue of informed consent. A recent ruling in the Ninth Circuit declared that when a “film differs so radically from anything [the actor] could have imagined when she was cast[,] th[en] it can’t possibly be authorized by any implied license she granted.”¹⁵⁹ As applied to revenge porn, this rationale dictates that if a victim posed for a photo with the intention that it was to be used privately by the victim’s partner, the photo subsequently being distributed on the internet may be considered so far outside of an implied license or authorization that it is legally impermissible.

Similar to Moore’s evasion of any revenge porn charges, the FBI has shut down some websites that host revenge porn, but these shutdowns have not been because of the revenge porn, rather they have been due to other criminal activities on those websites.¹⁶⁰ An example of this is the PINKMETH website, which achieved notoriety as a revenge

¹⁵⁵ Ohlheiser, *supra* note 29.

¹⁵⁶ See Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 134-135, noting the relevant change in the Communications Act of 1934.

¹⁵⁷ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

¹⁵⁸ Caitlin Dewey, *How Copyright Became the Best Defense Against Revenge Porn*, WASH. POST, Sept. 8, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/09/08/how-copyright-became-the-best-defense-against-revenge-porn/>.

¹⁵⁹ *Garcia v. Google, Inc.*, 766 F.3d 929, 937 (9th Cir. 2014).

¹⁶⁰ David Gilbert, *Pink Meth Revenge Porn Darknet Website Shut Down by FBI in Operation Onymous*, INT. BUS. TIMES (Nov. 10, 2014), <http://www.ibtimes.co.uk/pink-meth-revenge-porn-darknet-website-shut-down-by-fbi-operation-onymous-1474013>.

porn site, but the site was seized by the FBI because of its connections to other websites that sold firearms and illegal drugs.¹⁶¹

A student from the University of North Texas sued PINKMETH for one million dollars in damages alleging mental anguish.¹⁶² Noted in the suit was that the damages would cover loss of earning power, lending strength to the argument that revenge porn and online harassment have lasting consequences.¹⁶³ The suit asked that the server hosting PINKMETH take the site down in an attempt to eliminate the online presence of the website's content.¹⁶⁴ The suit highlights the difficulties in policing behavior like revenge porn. "A failure by this court to enter an all-encompassing order designed specifically to cripple PinkMeth" would prove fruitless, as PINKMETH could potentially find "a new company willing to host their illegal activities."¹⁶⁵ The host would not be implicated here since he or she would have no knowledge about who uses his or her services.

Perhaps if the court had known what PINKMETH's intentions were prior to the site's creation, the court could have assigned some level of liability to PINKMETH. It is important to tackle the issue of "purpose-built" websites.¹⁶⁶ Ignoring this issue only addresses half of the revenge porn problem.¹⁶⁷ As exemplified by PINKMETH, while it is possible to take one site down, more will pop up in its place.¹⁶⁸ Some replacement sites may even be run by the same individuals. A truly effective law must identify revenge porn as a unique criminal offense, and hold accountable sites whose main purpose is revenge porn.

VI. HOW TO REPAIR THE SHORTCOMINGS IN CURRENT AND PROPOSED LEGISLATION

In order to ensure that First Amendment rights are not violated, laws ought to be narrowly tailored to the specific harm at hand. It is not enough to simply say that distributing nude photos without the subject's consent is a crime. There must be requisite intent to harm and an expectation from the victim that the images would remain private. It is also necessary to have the law offer protection not only for self-created images but also images where an individual is the subject of another's photograph. These requirements account for the shortcomings of some current copyright law as it relates to revenge porn.

These proposed requirements are supported by the Cyber Civil Rights Initiative (CCRI), a group of advocates that includes Charlotte Laws, Professor Mary Anne Franks,

¹⁶¹ *Id.*

¹⁶² Patrick Howell O'Neill, *Tor Project Sued for \$1 million in Revenge Porn Case*, DAILY DOT (July 9, 2014), <http://www.dailydot.com/crime/tor-revenge-porn-lawsuit/>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Casey Martinez, Article, *An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 U. PITT. J. TECH. L. & POL'Y 236 (2014).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

and Holly Jacobs as the Director.¹⁶⁹ The CCRI advocates for clearer legislation.¹⁷⁰ The group also recognizes the necessity of separating motive from *mens rea*.¹⁷¹

This particular confusion of motive and *mens rea* is prevalent among lawmakers.¹⁷² The idea of a “vindictive” motive should not be considered when drafting laws related to revenge porn. Awareness of the lack of consent from the victim is the operative *mens rea*. Such consideration of *mens rea* will prevent targeting of parents who take a picture of their child in the bathtub and share it with family members.

The current laws are, for the most part, silent on the issue of those who create websites for the purpose of revenge porn. While Moore did not submit any photos himself, IS ANYONE UP?, and other similar sites, exist for the main purpose of publishing revenge porn. Laws must be drafted in a way that holds the purveyors of revenge porn accountable. Accordingly, the CCRI addresses this. The group argues that § 230 of the CDA protects only intermediaries for third-party content, that is to say internet service providers (ISPs). “To the extent that online entities act as co-developers or co-creators of content, they can and should be prosecuted under state criminal law.”¹⁷³ The CCRI argues that Moore, and others like him, should not be able to use the CDA as a shield since he is not an internet provider, but rather he acts more as a co-developer of the content on his site.

The CCRI offer a strong example of legislation states ought to enact to combat revenge porn:

An actor may not knowingly disclose an image of another, identifiable person, whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure.

A. Definitions. For the purposes of this section,

- (1) “Disclose” includes transferring, publishing, distributing, or reproducing;
- (2) “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;
- (3) “Intimate parts” means the naked genitals, pubic area, or female adult nipple of the person;
- (4) “Sexual act” includes but is not limited to masturbation, genital, anal, or oral sex.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (“The law SHOULD NOT confuse mens rea (also called intent) with motive. While the requisite mens rea for each element of a criminal law should be clearly stated, criminal laws are not required to include – and indeed the majority do not include - motive requirements. ‘Intent to cause emotional distress’ or ‘intent to harass’ requirements arbitrarily distinguish between perpetrators motivated by malice and those motivated by other reasons. Motive requirements ignore the reality that many perpetrators are motivated not by malice, but by a desire to entertain, to make money, or achieve notoriety. As with theft, unlawful surveillance, and sexual assault, whether a perpetrator acts with malice is beside the point: the significant element is the lack of consent.”).

¹⁷² Matt Galka, *Florida Bill Would Make 'Revenge Porn' a Crime*, NEWS 4 JAX (Mar. 11, 2014), <http://www.news4jax.com/news/local/florida-bill-would-make-revenge-porn-a-crime>.

¹⁷³ Franks, *supra* note 87.

B. Exceptions. This section does not apply to

- (1) Images involving voluntary exposure in public or commercial settings; or
- (2) Disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.¹⁷⁴

This model legislation best serves the interests of victims, while still comporting with the constitutional framework of First Amendment jurisprudence.

A separate, non-legislative solution is greater self-policing on the internet. This approach, however, often falls short of an adequate remedy for the average, non-famous user. While Jennifer Lawrence was able to have thousands of pictures removed from Google's searching capabilities,¹⁷⁵ this occurred only after her lawyers threatened to sue Google for \$100,000,000.¹⁷⁶ Unlike Lawrence, however, many victims must do the work of getting the pictures removed themselves.¹⁷⁷ Additionally, while websites seem tacitly aware of the level of harassment that occurs in social media, they are often slow to respond, if they do so at all.¹⁷⁸ Still, while it is easy to point to the favoritism afforded celebrities as an unabashed negative, it does have a positive effect. If nothing else, it helps combat the notion that victims should not seek action against online abuse.¹⁷⁹

The possible solution of increased monitoring by internet users faces serious challenges when deception comes into play in terms of evading behavioral standards by masquerading content as something it is not. An example of how such deception occurs is the REDDIT sub-forum for "creepshots,"¹⁸⁰ which was closed following a report by Anderson Cooper on his CNN news program.¹⁸¹ Despite the official removal of the "creepshots" sub-forum from REDDIT, imitators soon sprouted up with the goal of deceiving administrators on REDDIT as to their true purpose. For example, the sub-forum

¹⁷⁴ Franks, *supra* note 87.

¹⁷⁵ Amanda Hess, *Victims of Online Crimes Are Finally Getting Justice—as Long as They're Rich and Famous*, SLATE (Oct. 10, 2014), http://www.slate.com/blogs/xx_factor/2014/10/10/online_harassment_victims_of_revenge_porn_facebook_hate_speech_and_twitter.html.

¹⁷⁶ *Google Responds to Jennifer Lawrence Attorney's \$100 Million Lawsuit Threat*, HOLLYWOOD REPORTER (Oct. 2, 2014), http://www.hollywoodreporter.com/thr-esq/google-responds-jennifer-lawrence-attorneys-737656?utm_source=twitter.

¹⁷⁷ Woolley, *supra* note 16.

¹⁷⁸ See Imani Gandi, *#TwitterFail: Twitter's Refusal to Handle Online Stalkers, Abusers, and Haters*, RH REALITY CHECK (Aug. 12, 2014), <http://rhrealitycheck.org/article/2014/08/12/twitterfail-twitters-refusal-handle-online-stalkers-abusers-haters/>.

¹⁷⁹ Hess, *supra* note 9.

¹⁸⁰ Colloquially, "creepshots" are the nonconsensual, non-pornographic candid photos of women.

¹⁸¹ Kevin Morris, *Reddit Shuts Down Teen Pics Section*, THE DAILY DOT (Oct. 11, 2011), <http://www.dailydot.com/society/reddit-r-jailbait-shutdown-controversy/>. Cooper's report told the story of a woman whose explicit picture was posted on the site, and who struggled for six years to have the photo removed. Not only was she asked to submit other photos to the website, for identification purposes, she did not own the copyright to the original explicit image, which furthered the delay of the picture's removal. Unfortunately, her story is not an uncommon one. See Fernando Alfonso III, *Creepshots Never Went Away—We Just Stopped Talking About Them*, THE DAILY DOT (Feb. 07, 2014), <http://www.dailydot.com/lifestyle/reddit-creepshots-candidfashionpolice-photos/>.

“CandidFashionPolice” features photographs of women wearing “tight or revealing clothing.”¹⁸² The images appear to be nonconsensual as a number are taken in grocery stores and classrooms.¹⁸³ This practice illustrates that although “creepshots” are nominally banned from REDDIT, analogous images are permissible so long as they exist under the guise of critiquing “fashion choices.”¹⁸⁴ This deception has, thus far, proved successful.

With that in mind, it may not suffice to simply encourage greater self-policing online. REDDIT is a large website with nearly 174 million unique page views per month.¹⁸⁵ There are over 8,000 sub-forums.¹⁸⁶ With the ease and speed with which individuals can create new sub-forums, it would be prohibitively difficult to police each one individually. It is easy for sub-forums to be deceptive and circumvent the moderated removal of certain content.

Furthermore, self-policing would likely fail due to the overwhelming “libertarian” bend of website moderators.¹⁸⁷ If a website moderator or owner values a specific reading of free speech and the First Amendment in opposition to the wishes of victims of revenge porn, that moderator would be free to allow nonconsensual images to remain on the site, absent legislation directly targeting this issue.

In many aspects, this issue is directly tied to internet user demographics. REDDIT’s cofounder, Alex Ohanian, recognized the problem of revenge porn as an obstacle to discourse and as a barrier of entry to women, specifically with regard to REDDIT.¹⁸⁸ Noting that free speech is of value to the internet, he advocates that it must be utilized with requisite levels of responsibility and maturity.¹⁸⁹ Users of REDDIT now occupy a position of power, and have a moral obligation to wield it appropriately. Paradoxically, despite these statements, Ohanian still allows sexist communities, whose sole purposes are tormenting women through revenge porn and nonconsensual explicit images, to proliferate on his website. While Ohanian has made strides to improve the level of discourse and treatment of women on REDDIT, his actions are inadequate. This is indicative of the need for a legislative solution.

¹⁸² Erin Gloria Ryan, *Banned Creepshots Forum Reappears as Clearly Fake 'Fashion Police'*, JEZEBEL (Apr. 08, 2014), <http://jezebel.com/banned-creepshots-forum-reappears-as-clearly-fake-fash-1560791608>.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (“To the subreddit’s 20,000 plus users, CandidFashionPolice’s transparently not-real fashion critique seems a part of the joke, the web equivalent of that gag where a character in a sitcom or cartoon shows up in a place where they are unwelcome wearing oversized black rimmed plastic glasses and a bowler hat. In one photo of the backside of a woman wearing a form fitting all-white dress, users critique the use of a blue dog leash by an out-of-focus person in the background. In another shot, featuring a large-breasted woman on the beach talking to her friend, an engineer critiques the strain her breasts must put on her bathing suit straps. A-hyuk, a-hyuk. Fashion! Aren’t we having fun with fashion?”).

¹⁸⁵ *Number of Unique Visitors to Reddit From July 2012 to April 2016 (in Millions)*, STATISTA, <https://www.statista.com/statistics/443332/reddit-monthly-visitors/> (last visited Sept. 24, 2016).

¹⁸⁶ *Id.*

¹⁸⁷ See Kashmir Hill, *Reddit Co-Founder Alexis Ohanian’s Rosy Outlook on the Future of Politics*, FORBES (Feb. 2, 2012), <http://www.forbes.com/sites/kashmirhill/2012/02/02/reddit-co-founder-alexis-ohanians-rosy-outlook-on-the-future-of-politics/>.

¹⁸⁸ Alexis Kleinman, *Alexis Ohanian, Reddit Co-Founder, to His 'Fellow Geeks': Stop Being Sexist*, HUFFINGTON POST (Mar. 26, 2013), http://www.huffingtonpost.com/2013/03/26/alexis-ohanian-reddit-sexism_n_2955200.html.

¹⁸⁹ *Id.*

Laws addressing intent and laws holding owners of communities devoted to revenge porn accountable would preempt the colossal effort required to self-police the internet efficiently. Furthermore, while content can be removed from some sites, its proliferation cannot be deterred as effectively by individual attempts at moderation as it would be by criminal penalties. Additionally, site-wide administrators would be free from liability, provided that they comply with takedown notices, which should quell fears of chilling free speech or treading upon First Amendment guarantees. Finally, a legislative solution eliminates any intrinsic biases in enforcement that may arise from the typical demographics of certain website users.

The various requirements and benefits of a legislative solution to revenge porn illustrate that addressing such a complex issue necessarily requires an examination of online harassment as a whole and society's collective inability to hold abusers liable. In an age where cyber-bullying is news in the *NEW YORK TIMES*,¹⁹⁰ and society feels a degree of comfort in analogizing the harms caused through the online medium to harms in the physical medium, it is necessary for society to view revenge porn as a form of sexual assault. So long as revenge porn can be dismissed as separate and distinct from a person's life in the physical realm, it will continue to be dismissed.

One way to ensure that a legislative solution would be effective is to target the "hosting," as well as the publication, of nonconsensual explicit images for the purpose of revenge porn. The model legislation proposed by the CCRI would accomplish this necessary task.

VI. CONCLUSION

Revenge porn, though not unique to the internet, has found a home where it is shielded through a variety of legal obstacles. The internet is an area where individuals can act in ways that would be a crime in the physical world, but are not prohibited in the cyber world. While society has slowly come to recognize the error in blaming victims in harassment and assault, it is miles behind in recognizing that the same occurs online, and that proper deference and respect must be afforded to victims of the online equivalent. Revenge porn is a manifestation of these online ills, and highlights the law's inability to effectively protect online citizens. Self-policing, while noble and sometimes effective, ultimately falls short. Legal punishments must act as deterrents, rather than depending on website moderators and owners to act as moral gatekeepers.

Revenge porn presents novel challenges to state legislators unfamiliar with regulating an issue this complex on the internet. Pertinent challenges include how to criminalize the distribution of revenge porn, how to hold webhosts accountable, and how to exempt hosts who are uninvolved with the distribution and are merely administrators on a website where such content may be distributed.

A legislative solution to revenge porn is necessary, given the prohibitively expensive nature of civil litigation, in addition to the inadequate remedies offered by the common law. A legislative solution must target not only those who share nonconsensual images, but also those who create websites for the purpose of hosting those images. A

¹⁹⁰ Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, *N.Y. TIMES*, Sept. 13, 2013, <http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html>.

useful and comprehensive legislative solution must be crafted in such a way that it is both mindful of First Amendment rights and freedoms, but also protective of those who make use of the valuable tool that is the internet.