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THE RIGHT TO BE VIRTUALLY CLOTHED

Peter W. Cooper

Abstract: Nonconsensual pornography, also known as, “revenge pornography” or “cyber exploitation,” is the publication of a person’s nude image or video online by a third party. It is a privacy violation that can ruin a person’s social and professional life. Although advocates and lawmakers have done substantial work addressing this problem, current legal remedies fall short. This Comment argues that two privacy protections developed abroad, the “right to be forgotten” and the “right to delete,” should be applied domestically to nonconsensual pornography. One aspect of the “right to be forgotten,” i.e., the ability to remove nonconsensually posted images from search engine results, could be developed domestically to counter the reputational impact of revenge porn. Additionally, the “right to delete,” which is currently limited to the copyright context in the United States, could be expanded so that courts could mandate removal of images both from websites and from individuals’ possession once consent has been withdrawn. These rights—which together compose a right to control nonconsensually published nude images online—herein dubbed the “right to be virtually clothed”—will help address reputational and social damage as well as reduce the overall impact of revenge porn first by obscuring the underlying content and ultimately by removing it from the web.

INTRODUCTION

Amanda Todd was a fifteen-year-old girl from British Columbia.¹ An anonymous stranger convinced her to reveal her breasts on her webcam.² A year later, the stranger created a Facebook page with the picture.³ Amanda was harassed, bullied, and tormented, both at school and online.⁴ Amanda expressed her devastation in a YouTube video, stating, “I can never get that photo back. It’s out there forever”⁵ A few months after she made the video, Amanda took her own life.⁶ The permanence of such photos is a foundational aspect of nonconsensual pornography’s invidious nature—once content is created, there is no practical way, legal or otherwise, for victims to conceal or remove

1. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 11 (2014); *see also* Calvin Cunningham, *Full Video: Amanda Todd: Struggling, Bullying, Suicide, Self Harm, Fighting*, YOUTUBE (Oct. 13, 2012), <https://youtu.be/IyHX7wMJBY0> [<https://perma.cc/MNW8-BVFU>].

2. Cunningham, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

images.⁷ This can change.

Nonconsensual pornography—also known as “revenge porn”—is a form of online harassment that causes irreparable reputational and career damage.⁸ Revenge porn is the nonconsensual distribution of sexually explicit photographs or videos online. Often the perpetrator will post an image along with a fake advertisement for sex and the subject’s individually identifiable information such as their home and work addresses, social media profiles, and social security numbers.⁹ Additionally, some perpetrators will intentionally prioritize the order that a search engine displays nonconsensual pornography results when someone searches for the subject’s name.¹⁰ As a result, revenge porn can cause severe emotional harm, ruin careers, and place survivors¹¹ in physical danger.¹²

This Comment will propose three legislative measures that would mitigate harms associated with revenge porn. Part I describes how the internet promotes and extends access to content, which facilitates revenge porn and intensifies its damage.¹³ Part II analyzes historical and contemporary approaches to privacy law in the United States and gives a brief overview of current legal approaches to revenge porn. Part III advocates for recognition of a “right to be virtually clothed,” stemming from the “right to be forgotten” and the “right to delete” as recognized internationally. Specific to the revenge porn context, the “right to be virtually clothed” includes the right to remove nonconsensual images from search engine results, and the right to delete nonconsensual images once consent has been withdrawn—from both a website hosting the images and from the individual who possesses the images. Finally, Part

7. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350 (2014) (stating that once content has been posted thousands of people can view and repost the content). *But cf. infra* notes 115–16 and accompanying text (discussing the impact of Google’s voluntary deindexing procedure).

8. Citron & Franks, *supra* note 7, at 352.

9. *Id.* at 350–51 (“In a study of 1,244 individuals, over 50% of victims reported that their naked photos appeared next to their full name and social network profile; over 20% of victims reported that their e-mail addresses and telephone numbers appeared next to their naked photos.”).

10. CITRON, *supra* note 1, at 67.

11. I use the word “survivor” as opposed to “victim” throughout this Comment. *See* EUGENE MCLAUGHLIN & JOHN MUNCIE, *THE SAGE DICTIONARY OF CRIMINOLOGY* 315 (2001) (“Feminists, recognizing the power of linguistics, object to the term victim because of its emphasis on passivity and powerlessness and prefer instead to focus on ways in which women actively resist the oppression of their personal and structural locations.”).

12. *See* Citron & Franks, *supra* note 7, at 350–54 (discussing revenge porn’s damage).

13. *See infra* Part I; Citron & Franks, *supra* note 7, at 350 (“The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways.”).

IV describes the potential legal challenges these proposals might face and ways to overcome these barriers.

I. REVENGE PORN DESTROYS CAREERS, REPUTATIONS, RELATIONSHIPS, AND CAUSES PSYCHOLOGICAL HARM

Often, the first response to revenge porn is a form of victim blaming¹⁴: “don’t take nude photos or videos.”¹⁵ The logic goes, if you do not take pictures or videos of yourself or allow others to take them, then you will not have a problem. This ostensibly simple solution ignores the gendered nature of the problem,¹⁶ the reality that these images are being taken—and will continue to be¹⁷—and the severity of the effect of the non-consensual publication of nude images online. What happens online affects our lives offline. People who post revenge porn online destroy survivors’ offline reputations, job opportunities, and relationships, and cause psychological harm.¹⁸ These harms are intensified due to cultural norms and because the internet is easy to use and globally accessible.¹⁹

One prominent aspect that fuels revenge porn’s harms is its cultural and gendered context. It is often men who instigate the initial act of recording and women who suffer the consequences.²⁰ Danielle Citron, who has extensively studied revenge porn, illustrates that revenge porn is powerful because society gives it power: “[h]arassers know that women will be seen as sluts . . . [and] post women’s nude images

14. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), <http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> [<https://perma.cc/6VUZ-V6B7>] (“[G]iven that it is women who are primarily targeted by revenge porn, the advice is really aimed at women, and aimed specifically at restricting their sexual behavior.”).

15. Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 28, 2013), <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/#74f9d4cd4177> (“[F]or individuals who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don’t take nude photos or videos.”).

16. See Franks, *supra* note 14.

17. Emma Barker, *Cosmo Survey: 9 out of 10 Millennial Women Take Naked Photos*, COSMOPOLITAN (Sept. 3, 2014), <http://www.cosmopolitan.com/sex-love/advice/a30675/ninety-percent-millennial-women-take-nude-photos-cosmo-survey/> [<https://perma.cc/P4VE-VN8J>].

18. CITRON, *supra* note 1, at 17.

19. See CITRON, *supra* note 1. See generally Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 68 (Saul Levmore & Martha C. Nussbaum et al. eds., 2010).

20. See CITRON, *supra* note 1, at 17.

because they know it will make them unemployable, undateable, and at risk for sexual assault.”²¹ Although revenge is certainly a reason that people post revenge porn, it is not the only reason.²² Perpetrators may be motivated by money, sexual gratification, or entertainment, or have no particular reason.²³ Whatever the motivation, it is no coincidence that ninety percent of revenge porn survivors are female.²⁴ This is not to say that revenge porn does not affect men.²⁵ Rather, revenge porn disproportionately affects women, both in terms of the number of women affected and the amount of social stigma attached.

A second aspect is that the internet’s accessibility and ease of use allows “relatively powerless people [to] gain enormous power over the lives of particular women”²⁶ The internet provides nearly everyone the opportunity to publish material anonymously and instantly. Prior to the internet, perpetrators were arguably more accountable because publicizing pictures required printing and mailing pictures; images and videos went as widely as they were distributed; and there was a trail by which to trace perpetrators.²⁷ Now, people can anonymously share images and videos—that have major life consequences for the subject—globally, without fear that anyone will know they were the publisher.²⁸

Moreover, revenge porn perpetrators have developed sophisticated ways of exploiting search engine algorithms so that employers, friends, and new acquaintances searching a survivor’s name will see the nonconsensual pornography first.²⁹ This is particularly damaging because up to seventy percent of employers have rejected candidates based on data found online and seventy-five percent of employers have formal policies that require hiring personnel to research applicants

21. *Id.*

22. Holly, *Infographic: The Anatomy of an Effective Revenge Porn Law*, END REVENGE PORN (Jan. 23, 2015), <http://www.cybercivilrights.org/anatomy-effective-revenge-porn-law/> [<https://perma.cc/TX9B-FAYU>].

23. *Id.*

24. Natalie Webb, *End Revenge Porn Infographic*, CYBER C.R. INITIATIVE (Jan. 3, 2014), http://www.cybercivilrights.org/end_revenge_porn_infographic [<https://perma.cc/4JRT-GFQU>].

25. *Id.*

26. Nussbaum, *supra* note 19, at 69.

27. *Id.* at 79.

28. *Id.*

29. “Google bombing” causes Google’s page rank algorithm to cause certain pages or images to appear when searching a particular phrase, such as a survivor’s name. See Marziah Karch, *What Is a Google Bomb*, ABOUT TECH, <http://google.about.com/od/g/googlebombdef.htm> [<https://perma.cc/JD39-QVRH>] (last updated Mar. 1, 2016).

online.³⁰ Images form first impressions that cannot be undone: “Even if prospective employers are clear that [potential employees] are victims and that the rumors are false, knowing the pornographic depictions may taint their view of these women, just as knowledge of a rape victim’s identity often colors people’s associations with her.”³¹

In addition to ruining survivors’ livelihoods, revenge porn can destroy social aspects of survivors’ lives by engendering fear, destroying their ability to date, and causing feelings of embarrassment in public.³² Revenge porn is also used as blackmail to keep women in abusive relationships or as leverage in custody negotiations.³³ Revenge porn websites capitalize on this harm, by extorting survivors by making them pay fees to remove content as well.³⁴ Given the multitude of harms that result from revenge porn, there is a clear need for regulation and effective redress for survivors.

II. THE CURRENT LEGAL LANDSCAPE DOES NOT EFFECTIVELY ADDRESS REVENGE PORN

A. *The Right to Privacy Does Not Include the Right to Control Information About Oneself*

The evolution of privacy law created a system that protects certain privacy violations but fails to address revenge porn effectively. Revenge porn is, in essence, a privacy violation: images intended for a specific person at a specific time are publicized for the world to see. Privacy law evolved in a piecemeal manner, and the legal concept of privacy began with tort liability.³⁵ Beyond tort liability, privacy evolved into an adjunct constitutional right.³⁶ And, over the years, Congress recognized some pockets of privacy for certain types of information,³⁷ but there is no

30. CROSS-TAB MKTG. SERVS., ONLINE REPUTATION IN A CONNECTED WORLD (2010), http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf [<https://perma.cc/MG2L-VTLH>].

31. Nussbaum, *supra* note 19, at 80.

32. *See id.*

33. Michelle Goldberg, *Revenge Porn Is Malicious and Reprehensible. But Should It Be a Crime?*, NATION (Oct. 1, 2014), <http://www.thenation.com/article/181829/war-against-revenge-porn> [<https://perma.cc/ZSF3-B8UM>].

34. CITRON, *supra* note 1, at 175 (“MyEx.com removes people’s nude photos within forty-eight hours after people pay them \$400.”).

35. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 10 (4th ed. 2012).

36. *See generally* Roe v. Wade, 410 U.S. 113, 152 (1973).

37. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936; 45 C.F.R. pt. 164 (2016) (privacy of individually identifiable health information

general right to privacy that revenge porn survivors can invoke.

The most profound development in privacy law in the United States was Samuel Warren and Louis Brandeis' seminal article, "The Right to Privacy."³⁸ Warren and Brandeis argued that there should be a common law "right to be let alone," drawing comparisons between the right to privacy and property rights.³⁹ Fifteen years later, Georgia became the first state to uphold a common law tort action for privacy invasions.⁴⁰ In the years that followed, other states began to legally recognize the harms caused by privacy invasions through various torts.⁴¹ In 1960, William Prosser surveyed the state of existing tort law and concluded that there were essentially four types of privacy harms: (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 that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁴² Although privacy law is by no means uniform across states, the Restatement (Second) of Torts tracks Prosser's model, and most states recognize some, if not all, of these torts.⁴³

The United States Supreme Court also recognizes a limited constitutional right to privacy.⁴⁴ The United States Constitution, unlike the constitutions in some other countries, does not explicitly mention the right of privacy.⁴⁵ The Court held, "the protection of a person's *general*

covered by the Health Insurance Portability and Accountability Act); 15 U.S.C. § 6501 (2012) (privacy of children's personal information collected by websites covered by the Children's Online Privacy Protection Act); *id.* §§ 6801–6809 (2012) (privacy of financial records covered by the Gramm-Leach-Bliley Act).

38. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also Daniel J. Solove, *A Brief History of Information Privacy Law*, in PROSKAUER ON PRIVACY 10 (2006) (describing the evolution of privacy law).

39. Warren & Brandeis, *supra* note 38.

40. Pavesich v. New Eng. Life Ins., 50 S.E. 68 (Ga. 1905).

41. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 385 (1960).

42. *Id.* at 389.

43. SOLOVE & SCHWARTZ, *supra* note 35, at 32; RESTATEMENT (SECOND) OF TORTS § 652A–E (Am. Law. Inst. 1977).

44. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (finding the "right of privacy" within the penumbras of the Bill of Rights).

45. Compare U.S. CONST., with S. AFR. CONST., 1996, ch. 2, § 14, <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> [<https://perma.cc/X9E3-F6AY>] ("Everyone has the right to privacy"), and MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. 6 ("Every person shall have the right to the protection of his or her private and family life, home, relations and good reputation . . . Every person shall have the right to the protection of his or her personal data, and to access and disseminate data of public interest."). See also *Roe*, 410 U.S. at 152 ("The Constitution

right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”⁴⁶ However, the Court recognized that there are privacy rights embedded in the Constitution as adjunct rights that exist in the penumbras of other rights.⁴⁷ That is, certain zones of privacy exist that are rooted in the Constitution.⁴⁸ For example, the Court recognized the “privacy in one’s associations” as a corollary to the First Amendment,⁴⁹ the privacy of the marital bedroom,⁵⁰ and the privacy of an individual’s sexual behavior,⁵¹ as protected by the Due Process Clause of the Fourteenth Amendment. Outside of previously recognized zones—or “penumbras”—the right of privacy is limited to “personal rights that can be deemed ‘fundamental.’”⁵²

Beyond the Supreme Court’s recognition of common law and constitutional privacy, Congress has passed a number of federal privacy laws. But these laws only provide limited protection in specific contexts. For example, the Health Information Portability and Accountability Act of 1996⁵³ (HIPAA) prohibits the disclosure of protected health information,⁵⁴ the Gramm-Leach-Bliley Act requires financial institutions to safeguard sensitive financial data,⁵⁵ and the Children’s Online Privacy Protection Act provides certain levels of privacy for children online.⁵⁶ Although some federal laws that prohibit the sexual exploitation of minors can be used to force websites to remove nude images of children,⁵⁷ there are no similar protections for adults whose nude images have been posted online without their consent.

does not explicitly mention any right of privacy.”).

46. *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (emphasis in original).

47. *See Roe*, 410 U.S. at 152.

48. *Id.* (“In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.” (citations omitted)).

49. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

50. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

51. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

52. *Roe*, 410 U.S. at 152.

53. Pub. L. No. 104-191, 110 Stat. 1936.

54. 45 C.F.R. pt. 164 (2016) (protecting privacy of individually identifiable health information).

55. 15 U.S.C. §§ 6801–6809 (2012) (protecting privacy of financial records).

56. *Id.* § 6501 (protecting privacy of children’s personal information collected by websites).

57. *Id.* §§ 6501–6506; 18 U.S.C. § 2252 (2012).

Current law is limited because it does not allow revenge porn survivors any control over the images that others have posted online. Although tort law may allow survivors to sue for public disclosure of private facts or the intentional infliction of emotional distress,⁵⁸ these laws do not address the ongoing reputational harm caused by the images remaining online. Likewise, federal privacy laws do not address nonconsensually distributed images for adults, and federal law prevents states from addressing the problem.⁵⁹

B. Legal Avenues for Addressing Revenge Porn's Harms Are Burgeoning, Yet Remain Inadequate

Despite the legal system's recognition of privacy harms, the remedies for revenge porn are inadequate.⁶⁰ The legal system keeps most survivors at its gates due to the costs of litigation,⁶¹ the inability to remain anonymous in a lawsuit,⁶² and the difficulty of obtaining computer forensic evidence linking perpetrators to crimes.⁶³ This is especially true given that many perpetrators are judgment proof, and the costs and complexity of taking on a revenge porn case are formidable.⁶⁴ However, those with representation have attempted to address the damages of revenge porn through criminal law and civil remedies, including copyright law and civil rights law, and by attempting to hold website operators accountable through various torts.⁶⁵ The problem with the current criminal and civil responses to revenge porn is that they are slow, costly, and—in many circumstances—ultimately ineffective at removing the underlying content. While litigation is pending, images remain online, often linked to a survivor's name, and they continue to affect survivors' livelihoods, social lives, and mental well-being.

58. CITRON, *supra* note 1, at 121.

59. *See infra* Part IV.A.

60. *See, e.g.,* Danielle Keats Citron, *Civil Rights in Our Information Age*, in *THE OFFENSIVE INTERNET*, *supra* note 19, at 31, 32 (arguing that in many cyber crimes “[t]raditional criminal and tort law can reach some of [survivors’] injuries, such as the tarnished reputations, emotional distress caused by threats, and privacy invasions. But they fall short of a complete response because they fail to address the gender and race-based nature of the damage”).

61. Citron & Franks, *supra* note 7, at 358.

62. FED. R. CIV. P. 17(a)(1).

63. CITRON, *supra* note 1, at 84.

64. Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET*, *supra* note 19, at 155, 160.

65. *See* CITRON, *supra* note 1, at 121.

1. *Criminal Law*

Criminal law is a promising solution because it can help deter potential perpetrators, yet it remains unavailable to some survivors because not all states have passed criminal revenge porn laws. As of May 2016, thirty-two states had passed revenge porn specific criminal laws.⁶⁶ Nine additional states had bills pending in legislation.⁶⁷ For those fortunate enough to live in a state where revenge porn is a criminal act, these laws will likely have deterrent effects. But even if all states criminalize revenge porn, criminalization will not fully address the reputational damage revenge porn causes. In other words, incarcerating a person for revenge porn does not change the fact that a search engine will continue to perpetuate the reputational damage caused by the crime, nor does it remove the posted content.⁶⁸

In addition to revenge porn specific state criminal laws, federal criminal law prohibits some types of revenge porn conduct as well. For example, the federal stalking statute prohibits a perpetrator from engaging in a “course of conduct” that puts a person in reasonable fear of death or serious bodily injury or causes substantial emotional distress.⁶⁹ But in many cases revenge porn perpetrators make no explicit threats, and the behavior at issue does not meet the “course of conduct”⁷⁰ required for felony stalking charges.⁷¹

Although criminal laws will help by deterring perpetrators of revenge porn,⁷² these laws do not address the removal of the content from search engine results, websites, or from perpetrators. Because the content

66. *State Revenge Porn Criminal Laws*, C.A. GOLDBERG (last updated May 6, 2016), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws> [<https://perma.cc/532M-74JB>].

67. *See id.* (listing pending bills).

68. Many advocates support, and have comprehensively addressed, laws criminalizing revenge porn. *See, e.g.*, Citron & Franks, *supra* note 7. Although criminalization will be an important part of the fight against revenge porn and has been successful in other countries, this Comment will focus on other methods of relief for survivors and will not further discuss criminalization as a solution. For a further discussion of international criminalization efforts, see Alice Nutting, *Revenge Porn Is Vile Symptom of Modern Misogyny — But We Now Have a Chance to Stamp It Out*, INDEPENDENT (Nov. 16, 2014), <http://www.independent.co.uk/voices/comment/revenge-porn-is-vile-symptom-of-the-misogynistic-modern-age—its-about-time-we-had-a-protection-law-9864101.html> [<http://perma.cc/VM28-AJ5A>] (discussing Britain’s recent revenge porn laws).

69. 18 U.S.C. § 2261A (2012).

70. “The term ‘course of conduct’ means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.” 18 U.S.C. § 2266(2).

71. *Id.*

72. CITRON, *supra* note 1, at 123 (“Criminal convictions are powerful deterrents because of their lasting collateral consequences.”).

remains online and accessible through search engines worldwide, these laws do not remedy revenge porn's reputational harms. In fact, several state criminal laws explicitly carve out immunity for website operators.⁷³ Thus, websites have no legal liability for failure to remove revenge porn images posted by users.⁷⁴ Perpetrators likewise are not legally compelled to destroy the images at issue. Only Hawaii and North Carolina give courts the power to order destruction of the images pursuant to their revenge porn laws.⁷⁵ However, to destroy a recording, a Hawaiian court must find either that the recording was nonconsensual or that the defendant acted with intent to harm.⁷⁶ Similarly, for a North Carolina court to order the destruction of an image, the plaintiff must prove the perpetrator's intent to do either of the following:

- a. Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.
- b. Cause others to coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person.⁷⁷

These laws grant judges the discretion to order a perpetrator to delete the nonconsensually recorded content,⁷⁸ but each is limited to a showing

73. *See, e.g.*, WASH. REV. CODE § 9A.86.010(4) (2016) (“This section does not impose liability upon the following entities solely as a result of content provided by another person: (a) An interactive computer service, as defined in 47 U.S.C. Sec. 230(f)(2).”); N.C. GEN. STAT. ANN. § 14-190.5A(d) (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE ANN. § 12.1-17-07.2(4) (West, Westlaw through 2015 Reg. Sess.).

74. This is necessary because state law to the contrary would be preempted by § 230 immunity. 47 U.S.C. § 230(c)(1) (2012).

75. HAW. REV. STAT. ANN. § 711-1110.9(2) (West, Westlaw through 2016 Reg. Sess.) (“In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section.”); N.C. GEN. STAT. ANN. § 14-190.5A(e) (“In addition to any penalty or other damages, the court may award the destruction of any image made in violation of this section.”).

76. HAW. REV. STAT. ANN. § 711-1110.9(1).

77. N.C. GEN. STAT. ANN. § 14-190.5A.

78. In other states that do not grant judges the discretion to order a perpetrator to delete the nonconsensual content, advocates may still be able to ask the court to order a perpetrator to delete non-consensually recorded content as a form of equitable relief, or use injunctions to prevent dissemination. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8316.1 (West, Westlaw through 2016 Reg. Sess.) (allowing for “[a]dditional relief the court deems necessary and proper”); TEX. CIV. PRAC. & REM. CODE ANN. § 98B.004 (West, Westlaw through 2015 Reg. Sess.) (allowing a court to “issue a temporary restraining order or a temporary or permanent injunction to restrain and prevent the disclosure or promotion of intimate visual material with respect to the person depicted in the material”). However, I am unaware of any case to date where this has been successful. There may also be a potential equity-based argument where a court could compel the photographer to issue a takedown notice under copyright law. Again, I am unaware of any case where this has been attempted.

of intent.⁷⁹ This means that the law does not cover the non-revenge situations where a perpetrator has other motivations such as money, sexual gratification, entertainment, or no particular reason.⁸⁰

In sum, twenty-eight out of fifty states have laws that criminalize revenge porn, and in very specific circumstances a few federal laws may apply to revenge porn. Although these laws, and the continued proliferation of these laws, will help deter revenge porn perpetrators, they do not halt or negate the ongoing reputational damage of revenge porn, once an image has been nonconsensually distributed.

2. *Civil Remedies*

Apart from criminal laws, advocates have sought relief against revenge porn perpetrators through civil statutes. For survivors living in California,⁸¹ Florida,⁸² North Carolina,⁸³ North Dakota,⁸⁴ Pennsylvania,⁸⁵ Texas,⁸⁶ Vermont,⁸⁷ Washington,⁸⁸ and Wisconsin,⁸⁹ there is the possibility of monetary relief beyond the potential criminal deterrence. However, in only three of these nine states does the law explicitly allow survivors to file suits while maintaining their confidentiality.⁹⁰ Moreover, the injunctive relief provided pursuant to these statutes (like most injunctive relief) often comes too late—after images have been posted, reposted, and shown up in search results for the survivor’s name. While these laws are vital—and legislators should continue to pass them—they are incomplete because they do not address removing revenge porn from search results, websites, or the person who possesses the material.

Attempts to hold websites or website operators liable for failure to remove revenge porn have ultimately been unsuccessful because of the

79. See HAW. REV. STAT. ANN. § 711-1110.9(2); N.C. GEN. STAT. ANN. § 14-190.5A(e).

80. See *supra* Part I.

81. CAL. CIV. CODE § 1708.85 (West, Westlaw through 2016 Reg. Sess.).

82. FLA. STAT. ANN. § 784.049 (West, Westlaw through 2016 2d Reg. Sess.).

83. N.C. GEN. STAT. ANN. § 14-190.5A(g).

84. N.D. CENT. CODE ANN. § 32-03-58 (West, Westlaw through 2015 Reg. Sess.).

85. 42 PA. CONS. STAT. ANN. § 8316.1 (West, Westlaw through 2016 Reg. Sess.).

86. TEX. CIV. PRAC. & REM. CODE ANN. § 98B.003 (West, Westlaw through 2015 Reg. Sess.).

87. VT. STAT. ANN. tit. 13, § 2606(e) (West, Westlaw through 2016 Reg. Sess.).

88. WASH. REV. CODE § 4.24.795 (2014).

89. WIS. STAT. ANN. § 995.50(2)(d) (West, Westlaw through 2016 Reg. Sess.) (cross-referencing § 942.09, i.e., a criminal revenge porn statute).

90. CAL. CIV. CODE § 1708.85 (West, Westlaw through 2016 Reg. Sess.); VT. STAT. ANN. tit. 13, § 2606; WASH. REV. CODE § 4.24.795.

Communications Decency Act (CDA).⁹¹ The CDA carves out immunity for website operators for user-posted content.⁹² Section 230 of the CDA, the “Good Samaritan” provision, states: “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.”⁹³ This provision, combined with a preemption clause, effectively insulates people who host revenge porn websites from civil liability.⁹⁴ Whoever posts the material on a website is treated as the “publisher,” while the website is like an empty news rack where users can place any content and display it to the world at large.⁹⁵ Although this immunity is broad, it is not absolute. If a website operator “invites the posting of illegal materials or makes actionable postings itself,” this immunity ceases to exist.⁹⁶ Practically speaking, because revenge porn is (somewhat by definition) user-posted content, and website operators are likely the only parties able to pay for a judgment, the CDA limits survivors’ ability to obtain monetary relief and states’ abilities to enact prophylactic legislation in this area.⁹⁷

To address the removal of revenge porn content, some survivors have used copyright law—to which § 230 immunity does not apply.⁹⁸ But it is an incomplete solution that does nothing when the photographer is not the survivor.⁹⁹ Copyright law protects a photographer or videographer’s images from publication, even when they are unpublished and

91. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

92. 47 U.S.C. § 230 (2012).

93. *Id.* § 230(c)(1).

94. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

95. *Id.*

96. See *Jones v. Dirty World Entm’t Recordings, LLC*, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)).

97. For a more in-depth analysis of CDA and its application to revenge porn, see Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J.L. & GENDER 583, 588 (2015) (explaining the “history, goals, and immunity created by the CDA, examining the distinctions between an ‘Internet service provider’ (‘ISP’) and an ‘information content provider’ and the varying protection granted to each . . . [as well as] a summary of a few of the most salient suggestions for revisions and/or amendments to the CDA proposed by legal scholars.”). See also *infra* Section IV(a) (discussing Oregon’s successful regulation of “mugshot” photos, where § 230 was not a barrier).

98. CITRON, *supra* note 1, at 172.

99. See Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422 (2014).

unregistered.¹⁰⁰ Websites and search engines¹⁰¹ that publish or link to copyrighted work can be held liable unless they comply with the “takedown” procedures in the Digital Millennium Copyright Act.¹⁰² This means that the photographer, under penalty of perjury, declares that he or she has the rights to, and does not authorize, the content displayed on a search engine or a website.¹⁰³ If the search engine or website fails to “expeditiously . . . remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity,” it can be held liable for copyright infringement.¹⁰⁴

Submitting a takedown request does not guarantee that a website will remove content or that a search engine will expeditiously remove links.¹⁰⁵ Revenge porn websites often ignore a user’s request to remove material,¹⁰⁶ and some seek to exploit survivors by asking them for money to remove the content.¹⁰⁷ Attempting to sue a website that publishes copyrighted material requires the survivor or his or her attorney to track down the people behind the websites, which is often extremely difficult and expensive.¹⁰⁸ Proving monetary damages from material that survivors did not intend to be public also limits the effectiveness of some copyright suits.¹⁰⁹ Ultimately, while copyright law

100. 17 U.S.C. § 201 (2012) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”); *see also id.* § 106 (describing exclusive right to reproduce works); *Copyright in General*, U.S. COPYRIGHT OFFICE <http://copyright.gov/help/faq/faq-general.html#automatic> [<https://perma.cc/DBQ7-7HND>] (last visited Apr. 14, 2016) (“Copyright exists from the moment the work is created.”).

101. Websites and search engines fall under the definition of “service provider.” *See* 17 U.S.C. § 512 (k)(1) (“[T]he term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”).

102. *See id.* § 512(c) (describing website operator liability for user-posted content and the requirements for an effective takedown notice).

103. *Id.* § 512(c)(3).

104. *Id.* § 512(d)(3).

105. CITRON, *supra* note 1, at 168; Goldberg, *supra* note 33 (“[T]he process of getting Google to remove links to copyrighted material can be drawn out and unpredictable.”).

106. CITRON, *supra* note 1, at 172 (“Many revenge porn sites ignore requests to remove infringing material because they are not worried about being sued. They know that most victims cannot afford to hire a lawyer to file copyright claims.”).

107. *Id.* at 168.

108. In traditional copyright cases, the damages from a breach of copyright come from the expected gains of marketing and selling copyrighted material, which for revenge porn survivors, is nothing. *See In re Dawson v. Wash. Mut. Bank, F.A.*, 390 F.3d 1139, 1146 n.3 (9th Cir. 2004) (“interpreting ‘actual damages’ in the context of the Copyright Act to cover only economic damages” (citing *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002))).

109. *Id.*

has been useful for survivors that took the pictures or videos themselves, it was not designed to protect privacy,¹¹⁰ and survivors are out of luck if someone else took their nude photo.¹¹¹

III. MOVING FORWARD: A WAY TO MITIGATE REVENGE PORN'S HARMS

An additional approach is needed to address the shortcomings of legal approaches used so far. Many scholars have argued for increased criminalization and availability of civil legal remedies for survivors as solutions to revenge porn.¹¹² While these approaches are encouraging, and gaining traction,¹¹³ they remain a partial solution. To fully address the reputational, privacy, and blackmail harms from revenge porn, there needs to be a way to nullify the cause of the harm itself. In Europe, the Court of Justice of the European Union and a court in Germany developed two privacy protections that should be applied in the United States: the “right to be forgotten” and the “right to delete.”¹¹⁴ By combining one aspect of the right to be forgotten (deindexing) and two aspects of the right to delete—from both 1) the private individual that keeps material once consent has been withdrawn, and 2) the website that hosts the content—the legal system could give survivors the right to be virtually clothed.

A. *Deindexing Is a Viable Tool for Partially Addressing Revenge Porn's Harms That Should Be Codified and Expanded*

Congress should consider passing a federal deindexing law to alleviate some of the reputational damage associated with revenge porn. Deindexing occurs when a search engine removes a site from its index and search results.¹¹⁵ That is, when people search for a term, for

110. See *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (affirming that “the protection of privacy is not a function of the copyright law”).

111. CITRON, *supra* note 1, at 122. For a more complete description of how survivors *can* use copyright, see Levendowski, *supra* note 99.

112. See, e.g., 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), <http://jolt.richmond.edu/v20i4/article14.pdf> [<https://perma.cc/HEC6-68B5>].

113. See *States with Revenge Porn Criminal Laws*, *supra* note 66.

114. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, EU:C:2014:317*; Philip Oltermann, ‘Revenge Porn’ Victims Receive Boost from German Court Ruling, THE GUARDIAN (May 22, 2014, 14:14 E.D.T.), <http://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling> [<https://perma.cc/T8W7-KQZ3>].

115. See, e.g., *Google's Legal Blow: What 'The Right to Be Forgotten' Means*, WALL ST. J. (May

instance, a survivor's name, the search will not display certain results—such as a revenge porn posting. In the revenge porn context, deindexing could, at the survivor's request, remove links to revenge porn from search engine results. Deindexing is a partial solution because it does not remove the underlying content; it just makes the content harder to find. This reduces the social harm caused by revenge porn because postings will remain obscure to most employers, friends, and family.¹¹⁶ However, because the content has not been deleted, a revenge porn perpetrator could still send the direct link to a survivor's friends and family. After deindexing, a user can still access an image or video on the web through a direct link. Two of the major search engines in the United States, Google and Bing, voluntarily adopted deindexing in the revenge porn context.¹¹⁷ However, not all search engines have adopted this practice and there is no legal remedy if a search engine refuses to consider a request.

The right to deindex information from search engine results stems from the Court of Justice of the European Union (CJEU) recognizing the “right to be forgotten” in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos*.¹¹⁸ In *Google Spain*, Costeja González filed a complaint because when people searched his name in Google, they would see two twelve-year-old newspaper articles describing how he was forced to sell his property to pay off social security debts.¹¹⁹ The CJEU considered the broad privacy protections outlined in the European Union's Data Protection Directive (DPD),¹²⁰ and balanced González's

13, 2014, 10:36 AM EST), <http://blogs.wsj.com/digits/2014/05/13/what-you-need-to-know-about-the-eu-high-court-google-ruling/>; *Site Removed from the Google Index*, GOOGLE SUPPORT, <https://support.google.com/webmasters/answer/40052?hl=en> [<http://perma.cc/YC7Q-LENL>] (last visited Apr. 14, 2016).

116. See generally *The IRL Impact of Google's New "Revenge Porn" Policy*, CYBER C.R. INITIATIVE (June 23, 2015), <http://www.cybercivilrights.org/the-irl-impact-of-googles-new-revenge-porn-policy/> [<https://perma.cc/57LE-E4Z5>].

117. Stephanie Mlot, *Microsoft Bing Accepting Revenge Porn Removal Requests*, PC MAG. (July 23, 2015, 8:00 AM EST), <http://www.pcmag.com/article2/0,2817,2488308,00.asp> [<http://perma.cc/PL4U-V38M>] (“A website—similar to the ‘right to be forgotten’ form used in the European Union—is live on support.google.com.”).

118. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos*, EU:C:2014:317.

119. *Id.*

120. Directive 94/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 268) 31. The DPD commands all European Union Member States to “protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.” See *id.* at 38. The DPD regulatory framework covers all data processed by third parties except “by a natural person in the course of

right to privacy (with respect to the processing of his personal data) against the legitimate interests of internet users potentially interested in having access to this information.¹²¹ The CJEU held that González’s privacy rights outweighed the legitimate interests of users having instantaneous access to his attachment proceedings.¹²² The CJEU further held that, upon request, search engines were legally obligated to remove links between people’s names and postings that were “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine.”¹²³ Removing the links in this way did not affect the underlying content on the website or in the newspaper.¹²⁴ The CJEU limited its holding to situations where the search results interfere with an individual’s right to privacy and the public does not have a justified interest in knowing the information.¹²⁵

The United States should adopt a statutory right to deindex information, limited solely to the revenge porn context. Adopting this right in the United States would limit revenge porn’s harms. As described in Part I, if search engines did not publicize revenge porn it would have a more limited impact on survivors’ careers and social lives.¹²⁶ The right to deindex would require a federal civil statute that (1) compels search engines capable of displaying revenge porn results to adopt a procedure for deindexing revenge porn, (2) sets timelines for compliance, and (3) removes the discretion of the search engine regarding whether to block the material—for instance, once a requestor’s identity has been proven.

In the last year, a limited “right to be forgotten” has been voluntarily adopted in the United States by both Google and Microsoft.¹²⁷ Revenge porn survivors now have the ability to ask these search engines to remove nude or sexually explicit images uploaded or shared without

purely personal or household activities,” or by the State for specified activities. *See* Summaries of EU Legislation: Protection of Personal Data, EUR LEX, http://europa.eu/legislation_summaries/information_society/data_protection/114012_en.htm [<https://perma.cc/W7EU-3D5E>] (last visited Apr. 20, 2016).

121. *Google Spain SL*, Case C-131/12, ¶¶ 80–81.

122. *Id.*

123. *Id.* ¶ 94.

124. *See id.* ¶ 98 (requiring only that the links be removed from the list of results, not from the online archive).

125. *Id.* ¶¶ 98–99.

126. *Supra* Part I; *see also* Leiter, *supra* note 64, at 161–62.

127. Mlot, *supra* note 117117.

their consent.¹²⁸ However, these practices—unlike the legal obligation to remove links to copyrighted material and child pornography—are optional.¹²⁹ The absence of a legal right to deindex means that other search engines, like Yahoo, that do not have a method allowing survivors to report links containing their non-consensually shared images,¹³⁰ are not violating the law.

B. The Ability to Delete Content Will Help Prevent Perpetrators from Posting Revenge Porn and Help Survivors Remove Images That Perpetrators Have Already Posted

Courts should be able to enforce the right of individuals who have shared their intimate images to revoke their consent and have the images deleted. Because deindexing does not address the actual content at issue, survivors should be able to invoke this “right to delete” before perpetrators share the nonconsensual images. A preemptory right is necessary because most of the time survivors are unaware that perpetrators have posted images online until after the fact—long after used have reposted, viewed, and downloaded the images.¹³¹ Unlike deindexing, this will require survivors to use the court system—which raises access to justice and anonymity concerns. While this is an imperfect solution, half-a-loaf is better than no bread.

Germany first recognized the right to delete in the revenge porn context. Recognizing the time-sensitive nature of privacy in the digital age, a court in Germany ruled that an ex-partner had the preemptive right to have nude photos taken of herself deleted after the relationship

128. *See Remove Information from Google*, GOOGLE SUPPORT, <https://support.google.com/websearch/troubleshooter/3111061?hl=en> [https://perma.cc/ZT7Z-4A7F] (last visited Apr. 14, 2016) (an online form for removal); Alan Sembera, *How to Remove Personal Information on Bing*, CHRON, <http://smallbusiness.chron.com/remove-personal-information-bing-71991.html> [https://perma.cc/DBM3-7H9B] (last visited Apr. 14, 2016) (describing the steps to contact Bing regarding removal).

129. *Removal Policies*, GOOGLE SUPPORT, <https://support.google.com/websearch/answer/2744324> [http://perma.cc/3M9S-2TF3] (last visited Apr. 14, 2016).

130. *Dear Yahoo: Please Let Revenge Porn Victims Make Link Deletion Requests*, VICTIMS2SURVIVORS UK (Aug. 18, 2015), <http://victims2survivors.co.uk/2015/08/18/dear-yahoo-please-let-revenge-porn-victims-make-link-deletion-requests/> [https://perma.cc/HC6Q-Q5ZT].

131. Lulu Chang, *Finally, Removing Revenge Porn from Pornhub Is Being Made Simpler*, YAHOO NEWS, (Oct. 15, 2015, 12:15 PM), <http://news.yahoo.com/finally-removing-revenge-porn-pornhub-161535473.html> [https://perma.cc/TY23-P959] (“[M]ost victims don’t realize that footage has been distributed until long after it first appears online. And with the rapid circulation that our digital age allows, attorney Elisa D’Amico notes that victims are still ‘left chasing fruit flies with a butterfly net.’”).

was over.¹³² The court found that “consent to use and own privately recorded nude pictures could be withdrawn by the ex-partner on the grounds of personal rights, which are valued higher than the ownership rights of the photographer.”¹³³ Recognizing the potential harms and the fact that once a perpetrator posts an image or video online it can easily be copied, reposted, and widely distributed, the court acted proactively.¹³⁴ This ruling was limited solely to nude images: “any pictures where the woman was fully clothed did not have to be deleted, as these have ‘little, if any capacity’ to compromise her, the judge said in a statement.”¹³⁵

In addition to removing images from the perpetrator, individuals should have the right to remove revenge porn from websites hosting the content. Imposing liability on websites that host revenge porn for failure to remove nonconsensual intimate images upon request would allow survivors to “delete” revenge porn from the web. This right to delete is necessary, because even if the index to a website has been removed from Google’s (or any search engine’s) search and ranking algorithm, this does not mean the content has been removed from the internet. The content is still accessible worldwide to anyone who has the direct link.

Deindexing and the right to delete will likely encounter preemption challenges, constitutional challenges, and resistance from free speech advocacy groups. However, it may be possible to enforce these rights in a way that overcomes these barriers. It is important to advocate for these rights because together they would create a system that effectively addresses survivors’ damages. However, these solutions will require balancing fundamental rights such as freedom of expression.

IV. POTENTIAL BARRIERS TO IMPLEMENTING THESE RIGHTS IN THE UNITED STATES CAN BE OVERCOME

To mitigate revenge porn, survivors must be able to deindex search

132. Oltermann, *supra* note 114.

133. *Id.*; see also *Court Orders Ex-Lovers to Delete Sexy Pics*, LOCAL (May 22, 2014, 8:10 AM), <http://www.thelocal.de/20140522/court-forces-ex-lovers-to-delete-sexy-photos> [<https://perma.cc/96EV-XQZ2>] (“The Higher Regional Court of Koblenz decided in a verdict published on Tuesday that when a relationship finished, intimate material should be deleted - if one of the ex-partners asked for it to be.”).

134. See Oltermann, *supra* note 114.

135. Heather Saul, *German Court Rules Ex-lovers Must Delete Explicit Photos of Partners After a Break-up*, INDEPENDENT (May 22, 2014), <http://www.independent.co.uk/news/world/europe/german-court-rules-ex-lovers-must-delete-explicit-photos-of-partners-after-a-break-up-9419009.html> [<http://perma.cc/VM28-AJ5A>].

results and delete compromising images and videos. There are ways to implement this “right to be virtually clothed” so that it does not transgress other rights. In addition to the constitutional concerns and federal barriers to state implementation of these proposed laws, the major challenges to implementing these solutions will likely come from groups that support free speech rights.¹³⁶ However, “the First Amendment conversation often ignores the expressive interests of people who want to share intimate images with their romantic partners. Greater privacy protections allow people to openly express their personalities and values.”¹³⁷ Groups concerned about the chilling effect on the “free speech” of those who post revenge porn should also be concerned about chilling the expressive interests that deregulation has fostered. It is ironic that free speech rights groups fight against revenge porn laws, because failure to act ultimately interferes with survivors’ rights, too.

A. *Current Federal Law Prohibits States from Granting These Rights*

Congress needs to create a *federal* legal right to deindex or delete that is enforceable against website operators because of the immunity it provided website operators in the Communications Decency Act. Section 230 of the CDA grants website operators immunity from content posted by users, i.e., “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.”¹³⁸ This is combined with a preemption clause: “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”¹³⁹ In short, federal law would need to be amended to hold website operators or search engines liable.¹⁴⁰ This is important

136. See, e.g., *Freedom of Expression: The First Amendment Ignored*, ACLU, <https://www.aclu.org/freedom-expression-0> [https://perma.cc/D6LY-M4M7] (last visited Apr. 14, 2016) (“The American Civil Liberties Union has been involved in virtually all of the landmark First Amendment cases to reach the U.S. Supreme Court, and remains absolutely committed to the preservation of each and every individual’s freedom of expression.”).

137. Cynthia Barmore, Comment, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 468 (2015).

138. 47 U.S.C. § 230(c)(1) (2012).

139. *Id.* § 230(e)(3).

140. See *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006), *aff’d*, 242 F. App’x 833 (3d Cir. 2007) (broadly interpreting the CDA to immunize Google from the tortious acts of a third party through its website search tool and its caching system). A number of law review comments and articles discuss the need for federal legislation and the limitations of CDA immunity. See, e.g., Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of*

because without liability, website operators have no reason to stop hosting these profitable websites.¹⁴¹

While the CDA's § 230 immunity typically preempts state action, in situations where § 230 does not apply states have been successful in addressing similar harms. For example, Oregon successfully outlawed the exploitative use of mugshot photos online in cases where the subjects were later exonerated.¹⁴² Websites exploiting mugshot photos created a similar situation to what many revenge porn survivors face. For example, mugshot websites published defamatory images then demanded a fee to have the images removed.¹⁴³ Because mugshot websites actively collected the mugshots and hosted them, the websites were considered the "publishers" of the material under the CDA.¹⁴⁴ This meant that Oregon could regulate them. In contrast, on revenge porn websites, the "publisher" is a user on the site who uploads an image. Because a user uploads the image, as opposed to the website itself, the website is protected by § 230 immunity.¹⁴⁵ As with Oregon's mugshot law, when § 230 immunity is not an issue, states can pass laws that balance "the public's right to be informed against an individual's right to not be extorted," something states are currently preempted from doing for revenge porn.¹⁴⁶

B. Attempts at Federal Legislation and Revocation of § 230 Immunity Will Meet Resistance

Because privacy interests can conflict with First Amendment

Civil Immunity by Operators of Revenge Porn Websites, 102 CALIF. L. REV. 1303 (2014); Emily Poole, Comment, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 187 (2015).

141. See Franklin, *supra* note 140, at 1307–08 ("The original revenge porn website, 'Is Anyone Up?,' is estimated to have grossed up to \$20,000 a month.").

142. OR. REV. STAT. ANN. § 646A.806 (West, Westlaw through 2016 Reg. Sess.).

143. See Poole, *supra* note 140, at 188 (2015) (describing how a revenge porn operator made thousands of dollars from removal fees). In fact, these issues were so similar in nature that Vermont decided to address them at the same time. See, e.g., 2015 Vt. Legis. Serv. 1 (West) ("An act relating to disclosure of sexually explicit images without consent, charging fees for removing booking photographs from the Internet . . .").

144. See 47 U.S.C. § 230.

145. *Id.* (stating that websites will not be treated as the publisher of material posted by others, and preempting liability under state law).

146. See Christian Gaston, *John Kitzhaber to Sign Oregon Law Regulating Mug Shot Web Sites*, OREGONIAN (July 29, 2013, 6:00 AM), http://www.oregonlive.com/politics/index.ssf/2013/07/john_kitzhaber_to_sign_oregon.html [<https://perma.cc/D8DZ-DR7L>] (quoting defense attorney advocate regarding the mug shot law).

concerns, addressing revenge porn has been an uphill battle.¹⁴⁷ Free speech groups like the American Civil Liberties Union (ACLU) have helped challenge state attempts to criminalize revenge porn and have argued against federal criminalization.¹⁴⁸ In addition, groups like the Electronic Frontier Foundation tout § 230 of the CDA as “one of the most valuable tools for protecting freedom of expression and innovation on the internet.”¹⁴⁹ While these positions have merit—and striking a balance with the law will be difficult—the current legal landscape in the United States allows the First Amendment free rein online at the expense of unrestricted revenge pornography.

Free speech advocacy groups have been responsible for narrowing the scope and severity of criminal revenge porn laws. In Florida, an ACLU spokesperson explained the group’s rationale, saying, “you can’t create new exceptions to the First Amendment for every awful idea that people come up with. If it’s too broad, it can make criminals of lots of people, even people behaving innocently.”¹⁵⁰ He also noted that the ACLU would be more comfortable if the law had a more limited scope, that is, if it required proof of intent to cause harm.¹⁵¹ In California, the ACLU and the Electronic Frontier Foundation argued against California’s law criminalizing revenge porn.¹⁵² The ACLU also helped overturn Arizona’s criminal law.¹⁵³ Arizona made it a felony to “intentionally disclose, display, distribute, publish, advertise, or offer a photograph,

147. Many advocacy groups opposed initial legislation attempts. For example, free speech advocacy groups like Article 19 cautioned against criminalization. See Gabrielle Guillemain, *Revenge Porn: All Your Questions Answered*, ARTICLE 19 (July 31, 2014), <http://www.article19.org/join-the-debate.php/168/view/> [https://perma.cc/55LS-GMK3].

148. See, e.g., *Antigone Books L.L.C. v. Brnovich*, No. 2:14-CV-02100-SRB (D. Ariz. July 10, 2015); Peter Rugg, *An ACLU Lawyer’s Free-Speech Argument Against Federal Revenge Porn Laws*, INVERSE (Aug. 17, 2015), <https://www.inverse.com/article/5379-an-aclu-lawyer-s-free-speech-argument-against-federal-revenge-porn-laws> [https://perma.cc/292U-ECJQ].

149. *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> [https://perma.cc/4HLS-Y3CY] (last visited Apr. 14, 2016).

150. Rick Stone, *In Florida, ‘Revenge Porn’ Is a Moving Target*, WLRN (Dec. 4, 2013, 7:56 AM), <http://wlrn.org/post/florida-revenge-porn-moving-target> [https://perma.cc/29ZL-22SM].

151. *Id.*

152. See Anne Flaherty, *Revenge Porn Victims Pursue New Laws, But ACLU Urges Caution*, BOSTON GLOBE (Nov. 16, 2013), <https://www.bostonglobe.com/news/nation/2013/11/16/revenge-porn-victims-press-for-new-laws/cXQNeLzOcy7oSDTUh3W5fK/story.html> [https://perma.cc/P5RH-KMKU] (explaining that members of the ACLU and EFF believe these laws risk becoming an overly broad criminalization of speech).

153. Final Decree at 2, *Antigone Books*, No. 2:14-CV-02100-SRB, <http://mediacoalition.org/files/litigation/antigone-books-brnovich-final-decree.pdf> [https://perma.cc/E7TW-52XT] (“Defendants are permanently enjoined from enforcing, threatening to enforce, or otherwise using Arizona Revised Statute § 13-1425 in its current form.”).

videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.”¹⁵⁴ Because the scope of the illegal activity was too broad—for example, it did not “include exceptions for photos that [were] newsworthy or artistic” and did not require that the subject was harmed because of the conduct—the law was widely critiqued, and eventually overturned.¹⁵⁵

Free speech advocacy groups are protective of § 230 immunity because “CDA 230 makes the U.S. a safe haven for websites that want to provide a platform for controversial or political speech and a legal environment favorable to free expression.”¹⁵⁶ Although website operator immunity has allowed free speech to flourish, there are two sides to this coin. With near-absolute protection under the CDA, website operators have little to no accountability. Revenge porn is only one example of the noxious online behavior that near total immunity has allowed.¹⁵⁷

Some free speech advocates argue that because there is no way to objectively determine what speech has value, we should allow all negative and harmful speech so as not to quell the freedom of expression.¹⁵⁸ Although this position may have some merit, it is not consistent with the current legal approach in the United States. Historically, the United States Supreme Court has reaffirmed that certain speech acts are outside of First Amendment protections because they are inherently harmful and dangerous.¹⁵⁹ Here too, the Court needs to recognize revenge porn’s inherent harm and recognize that the First Amendment does not protect revenge porn.

154. Ariz. H.B. 2515, 51st Leg., 2d. Reg. Sess. (2014), *invalidated by* *Antigone Books L.L.C. v. Brnovich*, No. 2:14-CV-02100-SRB (D. Ariz. July 10, 2015).

155. Steven Nelson, *Arizona Law Makes Bathtub Baby Photos a Felony* (Sept. 24, 2014, 2:52 PM EDT), <http://www.usnews.com/news/articles/2014/09/24/arizona-revenge-porn-law-bathtub-baby-photos-felony> [<https://perma.cc/B8F5-MRYH>]; *see* Final Decree, *supra* note 153. Arizona has an updated amended version of this statute that has not been invalidated. *See* ARIZ. REV. STAT. § 13-1425 (West, Westlaw through 2016 2d. Reg. Sess.).

156. *Section 230 of the Communications Decency Act*, *supra* note 149.

157. *See* Nussbaum, *supra* note 19, at 73–74 (detailing some of the harassment, hate speech, and socially destructive behavior that occurs online).

158. *See, e.g., Issues, Freedom of Speech*, LIBERTARIAN, <https://www.lp.org/issues/freedom-of-speech> [<https://perma.cc/C8CR-JR22>].

159. For example, “true threats” are not protected as a First Amendment right. *See generally* *Watts v. U.S.*, 394 U.S. 705 (1969).

C. *Enacting These Rights Will Require Balancing First Amendment Concerns*

The First Amendment does not render these steps to create a right to be virtually clothed unconstitutional. The First Amendment requires that courts balance free speech against the right to privacy.¹⁶⁰ While this Comment does not seek to address fully the nuances of the First Amendment challenges at issue, it will briefly describe how First Amendment theory applies to deindexing, deleting content from websites, and requiring individuals to destroy revenge porn. Finally, to balance these new rights successfully with free speech rights, it is important to consider potential First Amendment restraints when drafting these laws. This means that laws should carefully incentivize companies and website operators by providing limited liability, and confine the right to be virtually clothed to the revenge porn context.

Revenge porn is not likely protected speech.¹⁶¹ Laws that infringe on the First Amendment are subject to strict scrutiny, unless the speech at issue is categorically unprotected.¹⁶² This means that when the government regulates speech, it must have a compelling interest and narrowly tailor the regulation to that interest.¹⁶³ Obscene speech is categorically unprotected and laws that regulate obscene content are only subject to rational basis review.¹⁶⁴ To determine whether material is obscene, courts look to *Miller v. California*.¹⁶⁵ *Miller* sets out a two-part test for whether material meets the legal definition of obscene.¹⁶⁶ The *Miller* test asks whether the work, taken as a whole, appeals to the prurient interest in sex, portrays sexual conduct in a patently offensive way, and whether there is literary artistic, political, or scientific value in the material.¹⁶⁷

160. See, e.g., Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) (“Once it is acknowledged that the free speech interest must give way in such a situation to a competing social interest, acceptance of at least *some* form of balancing process is established.”).

161. See Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn*, 90 CHI.-KENT L. REV. 247, 277 (2015).

162. See *Ripplinger v. Collins*, 868 F.2d 1043, 1050 (9th Cir. 1989).

163. *New York v. Ferber*, 458 U.S. 747, 756–57 (1942).

164. *Id.* at 754.

165. *Miller v. California*, 413 U.S. 15 (1973); see also *Ferber*, 458 U.S. at 756 (discussing the *Miller* standard).

166. *Id.* at 24.

167. *Miller*, 413 U.S. at 15; see also CONG. RESEARCH SERV., LIBRARY OF CONGRESS, DOC. NO. 112-9 THE CONSTITUTION OF THE UNITED STATES—ANALYSIS AND INTERPRETATION 1302 (Kenneth R. Thomas et al. eds., 2013).

Courts applying this test will likely conclude that most revenge porn is obscene. Per the test, the trier of fact applies the standard of the local community where the court sits.¹⁶⁸ Patently offensive representations include ultimate sexual acts, masturbation, excretory functions, and lewd exhibition of the genitals.¹⁶⁹ These are exactly the kind of images that are used in revenge porn and those most likely to cause reputational damage. The value prong of the test asks whether a reasonable person would find literary, artistic, political, or scientific value in the material.¹⁷⁰ It is difficult to conceive of a local community that would find value in revenge pornography.

1. *Deindexing Does Not Transgress the First Amendment*

There is no doubt that laws that allow people to deindex or delete information about themselves could be subject to abuse. For example, a few months after the CJEU decided *Google Spain*, a musician sought to remove a tepid review from the Washington Post citing the right to be forgotten.¹⁷¹ This is concerning because an overly broad “right to be forgotten” could be used to suppress free speech. People may want to know whether or not to go see a particular pianist; although the information is negative to the performer, it serves a useful purpose and has value. But potential for abuse should not be an impediment to progress. Courts in the United States have historically understood that “certain degrees of harm can override the value of free speech,”¹⁷² and revenge porn constitutes a case where this axiom holds true.

One way to enforce a deindexing law in the United States would be to emulate the way the “right to be forgotten” works in Europe. One suggestion is to set up a “panel of neutral arbitrators who would evaluate claims by *private* individuals that Google is returning search results that might constitute tortious or dignitary harms.”¹⁷³ Once a revenge porn survivor demonstrates his or her identity and attests to the nonconsensual nature of the publication, he or she could petition to no longer associate

168. *See id.* at 1302 (citing *Texas v. Johnson*, 491 U.S. 397 (1989)).

169. *Id.* at 1303.

170. *Id.* at 1302.

171. Caitlin Dewey, *Pianist Asks the Washington Post to Remove a Concert Review Under the E.U.'s 'Right to Be Forgotten' Ruling*, WASH. POST (Oct. 31, 2014), <http://www.washingtonpost.com/news/the-intersect/wp/2014/10/31/pianist-asks-the-washington-post-to-remove-a-concert-review-under-the-e-u-s-right-to-be-forgotten-ruling/> [https://perma.cc/AL8R-6UAM].

172. Leiter, *supra* note 64, at 163.

173. *Id.* at 170 (emphasis in original).

his or her name with the search results. This is similar to the way Google has begun to comply with the CJEU's enforcement of the "right to be forgotten." Specifically, "search engines make the initial decision about whether to remove links after people submit their requests. If individuals disagree with the decisions, the data regulators in European countries step in to judge the merits of each case."¹⁷⁴ In the United States, the "right to be forgotten" could similarly be limited both in scope and in context so that it is only available to revenge porn survivors.

The Supreme Court has never addressed the issue of deindexing, but precedent suggests that a law requiring deindexing is constitutional. In *United States v. American Library Association*,¹⁷⁵ the Court upheld a federal law that conditioned federal assistance to libraries on the installation of software "to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them."¹⁷⁶ A four justice plurality held that strict scrutiny did not apply to the Children's Internet Protection Act (CIPA), a law aimed specifically at "the problems associated with the availability of Internet pornography in public libraries."¹⁷⁷ The Court overturned the lower court's holding that the filtering software was a content-based restriction subject to strict scrutiny.¹⁷⁸ Further, the Court found that even if the software had a tendency to overblock—that is block access to constitutionally protected speech—it would still be permissible because CIPA authorized a librarian to disable filters.¹⁷⁹

Similarly, if Congress were to pass a law mandating deindexing, the Court would likely uphold the law against a constitutional challenge. Under an intermediate scrutiny analysis, if a law is tailored to filtering revenge porn and the only content that search engines filter comes from user requests, the filter is unlikely to be overly broad. Like software used to block images, filtering nonconsensual images from showing up with the search results of a person's name is a valid constitutional exercise of power. It is more limited than CIPA, which targeted internet pornography in general, and it regulates the conduct of private

174. Mark Scott, *Discussing Online 'Right to Be Forgotten,' Google Takes European Privacy Tour to Spain*, N.Y. TIMES (Sept. 9, 2014, 5:54 PM), http://bits.blogs.nytimes.com/2014/09/09/discussing-online-right-to-be-forgotten-google-takes-european-privacy-tour-to-spain/?_r=0 [<https://perma.cc/HD8N-GLLF>].

175. 539 U.S. 194 (2003).

176. *Id.* at 199.

177. *Id.* at 198.

178. *Id.* at 202–03.

179. *Id.* at 208.

companies through private actors.

Even if a deindexing law were subject to strict scrutiny, a court could similarly uphold the law. The government has a compelling interest in restricting revenge pornography.¹⁸⁰ The law should be narrowly tailored to restricting revenge porn images, as opposed to pornography in general. By restricting the top twenty search engines capable of displaying revenge porn results from displaying results connected to particular users, the law would not create a constitutionally impermissible barrier, even if a court considered revenge porn protected speech. Like the librarian in *American Library Association*, there would still be ways to get around the filter. The only potential free speech interest remaining would be the right of a person seeking access to this information, using their preferred search engine, to see the nonconsensual nude images associated with another person's name. Even under a liberal interpretation of the First Amendment, this interest is unlikely to carry much weight, especially because, post-deindexing, this information could still be accessed in other ways.

2. *Extending Copyright Protection to Survivors Who Did Not Create the Images or Removing § 230 Immunity Is Constitutional*

While this Comment is primarily concerned with deindexing, this procedure does not remove the content from websites. Compelling website operators to remove images from websites can be constitutional. As mentioned previously, copyright law already holds website operators liable for refusing to comply with takedown requests of copyrighted material.¹⁸¹ Similarly, federal legislation can impose liability on website operators because federal laws are not subject to § 230 immunity.¹⁸² Congress should extend this right to revenge porn. In the existing literature, two proposals seem the most probable: (1) Congress could extend the concept of “joint authorship” to survivors who allowed themselves to be filmed or photographed,¹⁸³ or (2) Congress could narrow the scope of § 230's immunity so that it would not protect revenge porn site operators and create a “takedown remedy” for revenge porn posts at the federal level.¹⁸⁴ Both Derek Bambauer and Danielle

180. See *supra* Section IV.C.

181. See *supra* Section IV.A.

182. This is because § 230 immunity comes from a federal law. See *supra* Section IV.A.

183. See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014).

184. CITRON, *supra* note 1, at 172 (discussing the possibility of adding a takedown remedy to the federal cyber stalking statute which would be outside of § 230's reach).

Citron explore these proposals in-depth in their respective works,¹⁸⁵ but it is worth mentioning why the proposals are constitutional.

There is no First Amendment right to post another person's copyrighted material, and website operators are liable for user-posted content if they fail to comply with a valid take down notification.¹⁸⁶ Although "some restriction on expression is the inherent and intended effect of every grant of copyright," it is likely that a limited extension of copyright protection to revenge porn survivors would be constitutional.¹⁸⁷ Because the issue involves two private parties—as opposed to the government's regulation of a private party's speech—the First Amendment does not prohibit this type of civil remedy. "Congress may apparently extend and expand copyright law as it wishes, without giving rise to First Amendment scrutiny, so long as it leaves the idea/expression dichotomy and fair use defense 'undisturbed.'"¹⁸⁸ Additionally, § 230's immunity is a federal statutory right, not a constitutional right. Congress may pass a law amending § 230 at any time. Either remedy would place considerable financial pressure on websites to delete liability-inducing content.

3. *Compelling Private Parties to Delete Revenge Porn Could Be Constitutional*

A limited civil right to compel private parties to delete nonconsensual pornography will likely face greater challenges, yet is still permissible if it involves a dispute between private parties as opposed to a broad governmental restriction. A law that allows the government to compel a private citizen to delete all forms of obscenity is unconstitutional.¹⁸⁹ But the right to be virtually clothed could require only that the private party delete photos requested by the subject herself, in court, after consent has been revoked. Applied against private individuals, the rights should involve a court process—where the plaintiff may use a confidential identity in relation to the action—and a judge can balance the personal rights of the parties before making a determination that the material must

185. See Bambauer, *supra* note 183; CITRON, *supra* note 1, at 167–89.

186. See 17 U.S.C. § 512(c) (2012) (describing website operator liability for user-posted content and the requirements for an effective takedown notice); CITRON, *supra* note 1, at 172 ("Section 230 does not immunize site operators from copyright claims.").

187. See *Golan v. Holder*, 565 U.S. ___, 132 S. Ct. 873, 889 (2012); Neil W. Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1102 (2013).

188. See Netanel, *supra* note 187, at 1102.

189. See *Stanley v. Georgia*, 394 U.S. 557 (1969), *abrogated by Osborne v. Ohio*, 495 U.S. 103 (1990).

be deleted.¹⁹⁰

Although the First Amendment limits the government's ability to outlaw the private possession of obscene materials,¹⁹¹ this limit is not absolute.¹⁹² When the state has a compelling interest in safeguarding its citizen's physical and psychological well-being, it may outlaw the distribution and private possession of obscene materials.¹⁹³ For example, in *Osborne v. Ohio*,¹⁹⁴ the Supreme Court upheld an Ohio law proscribing the possession and viewing of child pornography. The Court found that the State had an important interest in protecting the survivors of child pornography.¹⁹⁵ In doing so, the Court overturned its previous statement in *Stanley* that although "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."¹⁹⁶

The Court upheld the individual's limited privacy interest in *Stanley* because the government could not show that the "right to protect the individual's mind from the effects of obscenity" was a compelling government interest.¹⁹⁷ Nor, in that case, could the State of Georgia demonstrate a compelling governmental interest in its assertion that obscene materials may incite a person to engage in antisocial conduct.¹⁹⁸ Additionally, the Court in *Osborne* later distinguished *Stanley* because the punishment of possession was not necessary to punish distribution, and there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination—exposure to children and unwilling adults.¹⁹⁹

Unlike in *Stanley*, the States have a compelling interest in protecting its citizens from the damage revenge porn creates. Here, the Court could find that the grievous privacy violations, extortion, blackmail, and

190. A judicial determination in an adversary proceeding ensures that the final restraint on freedom of expression is constitutional. See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

191. *Stanley*, 394 U.S. at 559 ("[T]he mere private possession of obscene matter cannot constitutionally be made a crime.").

192. In *Osborne v. Ohio*, the Supreme Court limited the holding in *Stanley*. See *Osborne*, 495 U.S. at 108 ("*Stanley* should not be read too broadly.").

193. See *id.* (unanimously upholding New York's law forbidding the private possession of child pornography); *New York v. Ferber*, 458 U.S. 747, 756 (1942).

194. 495 U.S. 103 (1990).

195. *Id.* at 108.

196. *Stanley*, 394 U.S. at 568.

197. *Id.* at 565.

198. *Id.* at 566–67.

199. See CONG. RESEARCH SERV., *supra* note 167, at 1305.

stigma associated with revenge porn, are enough to uphold a law against constitutional challenges. This constitutes a more compelling interest than the “right to protect the individual’s mind” Georgia tried to promote in *Stanley*. Similar to the compelling interest in *Osborne*, compelled deletion of revenge porn—pre-publication—may be the only way to eliminate the difficulty of trying to control content once it has been posted.²⁰⁰

Congress²⁰¹ will likely be able to draft prophylactic legislation that gives survivors a way to compel deletion of the underlying content. This could be done without transgressing the First Amendment—especially in cases of blackmail or where the perpetrator threatens to disclose material.

CONCLUSION

Revenge porn creates particularly harmful reputational damage for survivors that current legal remedies do not adequately address. While revenge porn specific civil remedies will help survivors seek monetary relief, and criminal laws will help deter potential perpetrators, neither of these solutions address the underlying content. Some advocates have successfully used copyright law to address this deficiency, but copyright law is useful only if the survivor takes the photograph or video herself.

A prominent aspect that fuels revenge porn’s reputational damage is the link between a survivor’s name and the image in a search engine result. Recognizing this need, Congress should consider enacting legislation that requires search engines to deindex nonconsensual pornography. In addition, to address the content published on websites, scholars have proposed expanding copyright and narrowing the scope of the CDA’s broad immunities. This will allow survivors fortunate enough to procure legal representation a legal avenue to compel websites to remove nonconsensually posted content. Narrowing the scope of the CDA’s immunity would also allow states to craft legislation to regulate website operators and force them to remove content—as was done with “mugshot photos” in Oregon. Finally, survivors should have the right to compel private parties to delete images, once survivors revoke their consent, and before it can be posted online.

Ultimately, implementing the right to be virtually clothed will require Congress to act. While this will be a considerable challenge—and there remain a number of challenges yet to be addressed—there is hope that

200. See Chang, *supra* note 131.

201. Or the states, if § 230 immunity has been removed for revenge porn websites.

the tide is turning. From October 2014 to May 2016, seventeen additional states passed criminal laws banning revenge porn, nine more have legislation pending, and two of the world's most popular search engines voluntarily adopted deindexing—helping to diminish revenge porn's impact.