



## Combatting Non-Consensual Pornography: A Comparative Study

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### Abstract

Non-consensual pornography, colloquially known as “revenge porn,” has witnessed a troubling proliferation across various jurisdictions, carrying profound and often devastating repercussions for its victims. This paper conducts an in-depth review of the revenge porn laws with reference to identified key elements in such laws, namely, actus reus and the mens rea of the offence, rules relating to platform liability, victim protection and available remedies and penalties. As such the study is conducted in respect of laws in the United States, the United Kingdom, Singapore, India, Australia and Sri Lanka and finds that there is commonness as well as some diversity in the approaches. While the actus reus element underlying these legal frameworks exhibits some degree of uniformity, significant disparities emerge with regard to the mens rea requirement. Notably, jurisdictions such as the UK and US exhibit more limited scopes, a limitation compounded in the US by the provision of special immunities to Internet Service Providers (ISPs) and website/platform hosts. The paper also highlights the importance of adopting a comprehensive two-pronged strategy, encompassing both civil reliefs and penal laws to effectively fight NCP. As such, the paper attempts to provide an overall account of what would be the most effective legal approach in relation to the key components identified therein in the background of some common challenges posed by the inherent nature of NCP in this digital age.

**Keywords:** Non-consensual Pornography; Revenge Porn; United States; United Kingdom; Singapore; India; Sri Lanka

### 1. Introduction

There is an inseparable connection between humans and technology in the modern digital world. Be it, business, work or daily life of individuals, use of internet has become an integral part of them all. This proliferated use of internet has not only made life convenient for individuals but posed many threats, concerns and challenges. One such undesirable phenomenon triggered by the use of internet is the occurrence of various forms of online misconducts such as harassing, intimidating, stalking and extorting individuals, which would collectively be termed as ‘online harassment’. Non-consensual Pornography (NCP), commonly known as ‘revenge porn’ is such a threatening phenomenon, identified thereunder.

NCP is characterized as the unauthorized dissemination of sexually explicit or intimate images or videos of individuals through online platforms. This inevitably infringes upon the privacy of those individuals as such publication and dissemination occurs in the absence of their explicit consent. NCP often occurs following broken relationships where resentful individuals seeking revenge from their ex-partners by maliciously disseminating intimate content on digital platforms such as social media. It is such that the content may have been consensually obtained but

the act of dissemination is without the consent of the victim.<sup>1</sup> Furthermore, NCP even extends beyond interpersonal conflicts, as perpetrated by individuals completely unacquainted with the victims. In such instances, perpetrators may resort to invasive methods, including hacking into the victims' electronic devices, accessing cloud storage, intercepting communications through various software devices, or secretly recording the victim through unauthorized filming or photography.<sup>2</sup> Moreover, NCP might sometimes occur in the form of manipulation of content by interposing/photoshopping the victim's face onto images that portray individuals engaged in sexual activities. This form of image manipulation exacerbates the violation of the victim's privacy, as it involves the unauthorized and deceptive use of the victim's likeness to create sexually explicit or compromising visual content.<sup>3</sup>

As categorically recognized by a US Cyber Civil Rights Initiative report, NCP is driven by a variety of incentives, including financial gain, notoriety, content exploitation for entertainment, and to obtain social media validation through likes and online engagement. While vengeance remains a major motive, it shall also be noted that 'sharing content with friends' is yet another frequently cited reason for perpetrating NCP.

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<sup>1</sup> Jonathan, S., & Magaldi, J., 'Deconstructing the Statutory Landscape of "Revenge Porn": An Evaluation of the Elements That Make an Effective Nonconsensual Pornography Statute' (2019) 57 *American Criminal Law Review* 1499.

<sup>2</sup> Poole, E., 'Fighting Back against Non-Consensual Pornography' (2014) 49 *University of San Francisco Law Review* <https://repository.usfca.edu/cgi/viewcontent.cgi?article=1375&context=usflawreview> accessed 1 February 2021..

<sup>3</sup> Halder, D., & Jaishankar, K., 'Revenge Porn by Teens in The United States and India: A Socio-Legal Analysis' (2013) 51 *International Annals of Criminology* <https://doi.org/10.1017/S0003445200000076> accessed 1 January 2021.

While NCP may be prevalent as such its consequences and impact are far reaching. Many studies have shown that NCP can cause psychological, bodily, and socioeconomic harm to victims. Thus, many researchers believe NCP can leave victims 'emotionally and psychologically paralyzed' and 'socially and professionally ostracized.'<sup>4</sup> NCP victims often feel shame, humiliation, personal violation, and powerlessness.<sup>5</sup> NCP victims also experience hypervigilance online (checking websites for new images), trust issues, sleeplessness, depression, anxiety, low self-esteem, maladaptive coping mechanisms, and suicidal thoughts.<sup>6</sup> One study found that revenge porn had similar mental health effects on female survivors as rape.<sup>7</sup> Many NCP victims are also threatened by strangers approaching them with sexual advancements.<sup>8</sup> Many NCP victims also suffer education/career disruptions, permanent reputation harm, and

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<sup>4</sup> Beyens, J., & Lievens, E., 'A Legal Perspective on the Non-Consensual Dissemination of Sexual Images: Identifying Strengths and Weaknesses of Legislation in the US, UK and Belgium' (2016) 47 *International Journal of Law, Crime and Justice* <https://doi.org/10.1016/j.ijlcrj.2016.07.001> accessed 1 January 2021.

<sup>5</sup> Kitchen, A. N., 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 *Chicago-Kent College of Law* <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4065&context=cclawreview> accessed 1 January 2021.

<sup>6</sup> Bates, S., 'Revenge Porn and Mental Health' (2016) 12 *Feminist Criminology* <https://doi.org/10.1177/1557085116654565> accessed 1 January 2021; Kamal, M., & Newman, W. J., 'Revenge Pornography: Mental Health Implications and Related Legislation' (2016) 44 *The Journal of the American Academy of Psychiatry and the Law* <https://pubmed.ncbi.nlm.nih.gov/27644870/> accessed 2 January 2021.

<sup>7</sup> *ibid* (Samantha Bates).

<sup>8</sup> Bates, S. L., "'Stripped": An Analysis of Revenge Porn Victims' Lives after Victimization' (Summit.sfu.ca, 2015) <http://summit.sfu.ca/item/15668> accessed 1 January 2021.

damage to their relationships with spouses, family, and friends, as well as future work opportunities.<sup>9</sup> Scholars also note that ‘downstream distribution’—third parties re-posting NCP victims’ images/videos—involves ‘perpetual re-victimization’.<sup>10</sup> In many circumstances, victims may not be able to totally delete the photographs or other content from the Internet since they may have been posted on different websites.<sup>11</sup>

A 2023 survey in the United States conducted by the Centre for Innovative Public Health Research indicates that approximately 10.4 million Americans, constituting around 4% of the population, having faced threats or actual experiences of explicit image postings without their consent. A study by the Cyber and Law Foundation indicates that 27% of internet users aged 13 to 45 in India have fallen victim to revenge porn. The National Crime Records Bureau (NCRB) reports a rise in revenge porn in India, based on cases initiated for electronically publishing obscene material rising from 1,111 in 2018 to 1,814 in 2020. In the UK, around 2,050 NCP related complaints were made to the UK’s government-funded revenge porn helpline in 2020, a 22% rise from the previous year.<sup>12</sup>

<sup>9</sup> McAllister, O., ‘Action Sheet on Revenge Porn’ (2016) <https://mcolaw.com/white-papers-research/title-ix-compliance-for-study-abroad-programs> accessed 1 January 2021.

<sup>10</sup> Beyens, J., (n 18); Zousa, E., ‘For His Eyes Only’: Why Federal Legislation is Needed to Combat Revenge Porn’ (2016) 23(2) *UCLA Women’s Law Journal* <https://escholarship.org/uc/item/8wr9m9z> accessed 1 January 2021.

<sup>11</sup> Kamal, M., & Newman, W., ‘Revenge Pornography: Mental Health Implications and Related Legislation’ (*Journal of the American Academy of Psychiatry and the Law*, 2016) <http://jaapl.org/content/44/3/359> accessed 1 January 2021; Criddle, C. (n 11); Beyens, J. (n 18).

<sup>12</sup> Criddle, C., ‘Revenge Porn New Normal’ After Cases Surge in Lockdown’ (*BBC News*, 2020) <https://www.bbc.com/news/technology-54149682> accessed 11 February 2021.

The reported data is also suggestive of how women are more likely to be victims of NCP in comparison to men.<sup>13</sup> Meantime, some scholars argue that statistics on revenge porn are rare and underestimated as victims fear to file complaints out of shame and humiliation.<sup>14</sup> These figures might also be underestimated as they only consist of data from those victims who have become aware that their images have been created and/or distributed without consent. Thus, the actual figure is likely to be much higher.’<sup>15</sup>

<sup>13</sup> Office of the eSafety Commissioner, ‘Image-Based Abuse: National Survey Summary Report’ (2017) <https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf> accessed 11 February 2021.; Nitish Chandan, ‘Call It a Non-Consensual Pornemic’ (*Lkyspp.nus.edu.sg*, 2021) <https://lkyspp.nus.edu.sg/gia/article/call-it-a-non-consensual-pornemic> accessed 19 February 2021.; <https://www.statista.com/statistics/1319889/uk-victims-of-intimate-image-abuse-by-age-and-gender/>; Desmond Ng, ‘The Rise Of Non-Consensual Porn In Singapore, And The Battle To Stem Its Spread’ (*CNA*, 2020) <https://www.channelnewsasia.com/cnainsider/the-rise-of-non-consensual-porn-singapore-battle-stem-its-spread-767066> accessed 19 February 2021.; Devika Agarwal, ‘Understanding Non-Consensual Pornography: How To Recognise, Defeat Online Sexual Violence-India News , Firstpost’ (*Firstpost*, 2017) <https://www.firstpost.com/india/understanding-non-consensual-pornography-how-to-recognise-defeat-online-sexual-violence-3471742.html> accessed 19 February 2021.

<sup>14</sup> Citron, D. K., ‘Law’s Expressive Value in Combating Cyber Gender Harassment’ (2009) 108 *Michigan Law Review* [https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=https://search.yahoo.com/&httpsredir=1&article=1687&context=fac\\_pubs](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=https://search.yahoo.com/&httpsredir=1&article=1687&context=fac_pubs) accessed 1 January 2021; (*ibid* n 11)

<sup>15</sup> Henry, N., Flynn, A., & Powell, A., ‘Responding To ‘Revenge Pornography’: Prevalence, Nature and Impacts’ (*Criminology Research Grants* 2019) [https://research.monash.edu/files/264678641/08\\_1516\\_FinalReport.pdf](https://research.monash.edu/files/264678641/08_1516_FinalReport.pdf) accessed 1 January 2021.

Thereby, the existing literature identifies the nature, prevalence and impacts of NCP and exemplifies how NCP has become a growing menace causing serious damages to its victims. The serious nature of NCP has prompted legal systems worldwide to implement diverse ways to address this menace in order to efficiently reduce and ultimately eliminate it, and to offer redress to its victims. In light of the above, the objective of this paper is to conduct a comprehensive examination of the law relating to the offence of NCP to assess the effectiveness and adequacy of existing laws and to discern the key components integral to formulating an efficient and targeted legal response to combat NCP.

## 2. Key Elements of Laws relating to NCP

Demanding by its high-rising prevalence and the appalling effects it brings about on the victims and the society, countries have adopted various mechanisms to fight against NCP. While some have specific and more recent legislation to address the issue, some make use of older statutes with broader offences. Furthermore, in most cases they rely on offences found in a series of laws such as penal code and other laws relating to online safety, sexual offences and information technology. As such, the forthcoming sections of this paper will focus critically evaluating the NCP laws with respect to its recognized key elements.

### Offence of NCP: Actus Reus

At the outset, the act of NCP involves a person publishing private, intimate content of another person without the consent of the latter. This can clearly be seen covered in almost all laws that are particularly designed to fight NCP. For instance, Section 20 of Sri Lanka's Online Safety Act 2024<sup>16</sup> although not limited in its scope to fight, NCP reads that "*Any person, ... who willfully makes or communicates a statement, with intention to cause harassment to another person .... by publishing any private information of the target person...commits an offence*". In its illustrations, the Section also refers to situations of NCP caused

by ex-partners.<sup>17</sup> Here, a '*private information*' is defined to include personal information, including "any image, audio or video details, that any person may reasonably expect to remain private"<sup>18</sup>. However, a deeper examination of the conduct of NCP suggests that it is not adequate to cover only the publishing of material, but also a 'threat to publish'. Most laws also seem to reflect the same. For instance, Section 66B introduced to the *Sexual Offences Act 2003 (England and Wales)* by the *Online Safety Act of 2023* criminalizes both sharing or threatening to share intimate photos or films of others without consent. Moreover, US prosecutors utilise federal offences such as blackmail and extortion to prosecute perpetrators of NCP and as such a person who *publishes or threatens to publish* private, intimate photos or videos of another with the intention of extracting money or otherwise forcing the victim into prescribed conduct the victim would not have otherwise engaged in, is charged with extortion.<sup>19</sup> In the case of Sri Lanka '*threats to publish*' is not seen as a part of the offence itself. However, a general provision on '*attempt to commit the offence*' on all offences created under the Act, although not treated equally with the offence in terms of its punishment<sup>20</sup>, could arguably be extended to cover 'threats to publish'. However, Sri Lanka is yet to see some progressive interpretations by the courts using this new law. This extension of the actus reus is demanded in light of the harm inflicted upon the victim. Although less palpable than the actual, the distress, anger and harm caused by a threat to publish private material is unquestionable. It should further be noted that 'privacy' of the victim is undeniably compromised by such action. Thus, whether there has been an 'actual' disclosure or a 'threat' it shall be regarded as incriminating behaviour.

While that may be settled to a greater extent, some state laws in the US (such as California, Connecticut,

<sup>16</sup> Online Safety Act No. 9 of 2024

<sup>17</sup> Ibid., Section 20, Illustrations (a) & (b)

<sup>18</sup> Ibid., Section 20(2)(a)

<sup>19</sup> 18 U.S.C. § 875 on Interstate Threats or Extortion

<sup>20</sup> Section 40, Online Safe Act No. 9 of 2024

Utah and North Dakota) require proof of actual harm or emotional distress caused to the victim as an additional element in the *actus reus*.<sup>21</sup> However, such a requirement might be problematic for several reasons. Firstly, it displays a failure on the part of the legislature to recognize the magnitude of harm caused to individuals by NCP despite the extensive studies conducted worldwide. Secondly, it also fails to recognize the inherent wrongfulness of the perpetrator's conduct which amounts to a serious violation of privacy. Further, requiring that the victim testify and be subject to cross-examination on their emotional suffering has the effect of discouraging victims from reporting and participating in NCP prosecutions.<sup>22</sup> Thus, rather than requiring proof of harm for conviction, it is suggested that the harm caused to the victim could instead be considered in sentencing, as an aggravating factor.<sup>23</sup>

Another key concern in this regard is the scope of 'intimate content'. While content featuring the actual victim is quite straightforward, the question arises whether the altered images shall also be treated equally within NCP. Most laws answer this question affirmatively. Singaporean law has a comprehensive definition of '*intimate images*' inclusive of altered images where they lead to a reasonable belief that the person depicted in the image is the victim.<sup>24</sup> However, if the altered image does not lead to such a belief, (like in a situation of a face cropped into a

<sup>21</sup> California Penal Code, s 647(j)(4) (2014); North Dakota Century Code, s 12.1- 17-07(2015); Utah Code, s 76-5b-203 (2019).

<sup>22</sup> Jessica M Pollack, 'Getting Even: Empowering Victims of Revenge Porn with a Civil Cause of Action' (2017) 80 Albany Law Review <[http://www.albanylawreview.org/Articles/vol80\\_1/353%20Pollack%20PRODUCTION.pdf](http://www.albanylawreview.org/Articles/vol80_1/353%20Pollack%20PRODUCTION.pdf)> accessed 12 February 2021.

<sup>23</sup> Nicola Henry, Asher Flynn and Anastasia Powell, 'Responding To 'Revenge Pornography': Prevalence, Nature and Impacts' (Criminology Research Grants 2019) <[https://research.monash.edu/files/264678641/08\\_1516\\_FinalReport.pdf](https://research.monash.edu/files/264678641/08_1516_FinalReport.pdf)> accessed 1 January 2021.

<sup>24</sup> Penal Code of Singapore 1971, s 377BE(5)(b).

cartoon) such photos would not be classified as intimate photographs under this clause.<sup>25</sup> This position on 'altered content' is commendable in light of the effect it has on the victim, as the victim goes through the same amount of emotional distress, humiliation and harassment. Conversely, in England, Wales, and Northern Ireland, images or videos that become sexual in nature due to alteration may not be construed as 'private and sexual' under their respective laws. Certain jurisdictions lack explicit references to modified content and do not include specific exclusions for such material. Thus, it is plausible that altered content may fall under the scope of the applicable NCP laws. For clarity and efficacy in addressing the intricacies of NCP, it is crucial that altered sexual photographs and recordings are explicitly acknowledged as constituting sexual content, regardless of their initial nature. This would enhance a more comprehensive and nuanced legal approach for addressing NCP across jurisdictions.

Moreover, it is settled that, victim's initial consent given for creating any intimate material or sharing them with specific individuals does not constitute a blanket authorization for their widespread dissemination. This could even be seen explicitly recognised in laws of some jurisdictions.<sup>26</sup>

### Offence of NCP: Mens Rea

Having evaluated the *actus reus* element of NCP, this section examines an equally important element of the offence: *mens rea*. A study of the related laws in many jurisdictions reveals that *mens rea* in NCP exists in a spectrum. On one end there are laws which require intention to cause alarm or distress to the victim and on the other end laws only require knowledge, or recklessness on the part of the perpetrator to hold him guilty. In the United States, the Federal

<sup>25</sup> *ibid*, s 377BE(5) (b) Illustration (a) & (b).

<sup>26</sup> 15 U.S. Code § 6851 para (b) - Civil action relating to disclosure of intimate images.

Civil Cause of Action<sup>27</sup> in relation to disclosure of intimate images, refers to the perpetrator's knowledge or reckless disregard to the consent of the victim when publishing intimate content. Similarly, the Illinois law's *mens rea* is whether the defendant knew or should have known that the victim had not consented to the dissemination of the offending images.<sup>28</sup> The New Jersey statute's *mens rea* is that the defendant knew that he or she was not licensed or privileged to disclose the images.<sup>29</sup> However, the NCP laws of some other states in US (e.g.: Colorado, Florida, Kansas, Kentucky, Louisiana, Maine, Montana etc.), on the other hand, require proof of an additional *mens rea*, that is the defendant had an intent to harass, threaten, intimidate, humiliate, damage or harm the victim; or knowledge or reckless disregard that that such disclosure would cause harm.<sup>30</sup>

In the UK, a lower threshold is introduced with Section 66B of the Sexual Offences Act 2003, '*lack of a reasonable belief that the person depicted in the photo/film was consenting*' instead of the earlier provisions in the *Criminal Justice Act*: the requirement of an intention to cause distress. Furthermore, NCP laws in Australia also reflect the view that the 'intent to distribute' and the 'absence of consent' are sufficient to constitute the offence and do not require a *mens rea* element relating to the harm to the victim such as 'intent to cause harm or distress'.

Singaporean Penal Code, on the other hand, makes provisions that may settle in between. It provides that a person shall be guilty of an offence if he/she intentionally or knowingly distributes/threatens to

distribute an intimate image without the second person's consent to the distribution and knows or has reason to believe that the distribution/threat will or is likely to cause humiliation, alarm or distress to the person depicted in the image/recording.<sup>31</sup> Sri Lankan law also requires to prove 'intention to cause harm' by virtue of Section 20 in the Online Safety Act.<sup>32</sup>

Several issues could be noted in this context. One issue with the requirement of proving intent to harm/harass is that it may be difficult to establish that a perpetrator did have the requisite intention to cause harm/distress. Arguably, no further intention should be required, as 'there can be no innocent intent' in publishing such material. The only inference available is that the person intended harm, as there can be no other reason for distributing such content.<sup>33</sup> Despite such assertion, at times, disclosure and distribution might not imply intention to cause harm although distress etc. may be a natural and probable consequence of such conduct. For instance, sometimes the images may be distributed with an intention of just having 'fun' rather than with an intention of causing harm to the victim. However, letting perpetrators avoid liability since they lacked 'intent to cause harassment/harm/distress' would not serve the purpose of law. Moreover, requiring proof of intention to harm tends to disregard the critical point that 'the disclosure of a person's private photographs without his/her consent is in violation of their expectation that the image shall be kept private'.<sup>34</sup> Thus, replacing 'intention' with alternative *mens rea* categories

<sup>27</sup> *ibid.*

<sup>28</sup> 720 Ill. Comp. Stat., s 5/11-23.5 (2015).

<sup>29</sup> New Jersey Revised Statutes, s 2c:14-9 (2013).

<sup>30</sup> Colorado Revised Statutes, s 18-7-107, § 18-7-108 (2014); Florida. Statutes, s 784.049 (2015); Kansas Statutes, s 21- 6101(a)(8) (2016); Kentucky Revised Statutes, s 531.120 (2018); Louisiana Statutes, s 14:283.2 (2015); Maine Statutes. tit. 17-A, s 511- A (2015); Montana Revised. Statutes, s 573.110 (2018).

<sup>31</sup> section 377BE

<sup>32</sup> Online Safety Act 2024

<sup>33</sup> Crofts, T., & Kirchengast, T., 'A Ladder Approach to Criminalizing Revenge Pornography' (2019) 83(1) *The Journal of Criminal Law* <https://journals.sagepub.com/doi/full/10.1177/0022018318814361> accessed 14 February 2021.

<sup>34</sup> Delfino, R., 'Pornographic Deepfakes — Revenge Porn's Next Tragic Act – The Case for Federal Criminalization' [2019] SSRN Electronic Journal [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3341593](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341593) accessed 11 February 2021.

such as ‘knowledge’ which involves a person’s awareness ‘that it is practically certain that the conduct will cause such result’<sup>35</sup> or with ‘recklessness’ which is composed of the conscious disregard of ‘a substantial and unjustifiable risk that the material harm exists or will result from his conduct’<sup>36</sup>, would impose a reasonable threshold and would also serve as an acceptable limitation on the scope of NCP statutes.

### Platform Liability

One of the prerequisites for NCP is publishing of private material in an online platform, making it pertinent to inquire into whether the platforms shall also be liable for the harm caused by NCP. This becomes relevant especially in the context of the massive audience the platforms could carry such content to, which inevitably intensifies the impacts of NCP. Although there is emphasis on platform liability in relation to publishing of private material on social media platforms due to the intensified harm, it should not be forgotten that sharing material among selected third parties through electronic means such as private messaging applications like WhatsApp is also a part of NCP. Platform liability in such cases is almost insignificant due to the private nature of such distribution. However, upon analysing the legal provisions relating to NCP in various jurisdictions, it reveals that online platforms are generally not liable to any such harm.

For instance, Section 230 of the US Communication Decency Act<sup>37</sup> provides that no provider or user of an interactive computer service shall be held liable for the content provided by a third party. However, it also expresses that a provider or user of an interactive computer service may take any action in good faith to restrict access to or availability of material for various reasons such as obscenity or being excessively violent.<sup>38</sup> Yet, doing so is not obligatory. However,

although most states in compliance with the federal law exempt platforms from liability in this regard, a few states have made it clear that Internet Service Providers (ISPs), website providers etc. could be liable for engaging in ‘unprotected’ conduct. For example, Vermont holds websites and platforms criminally liable for soliciting or accepting payment from victims for removing, deleting or refraining from posting NCP images.<sup>39</sup> Georgia specifies that prosecutors can rebut the presumption that service providers did not know the content of posts submitted by other parties in order to hold service providers liable.<sup>40</sup> In all these instances, even though the service providers are not directly related to content creation they could still be held liable for actively facilitating such conduct or knowingly aggravating the harms caused. As such, in cases like *GoDaddy.com, LLC v. Toups*<sup>41</sup> courts have dismissed the case against the website operators of websites on the basis of immunity provided by section 230.<sup>42</sup> However, US Courts appear to take a stricter stance regarding the ISPs and interactive computer service providers which contribute to the creation of illegal content by third parties or solicit offensive content from third parties. Accordingly, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,<sup>43</sup> the Ninth Circuit held that Roommates.com is not able to claim Section 230(c) immunity since the website ‘materially contributed’ to the allegedly illegal content, as opposed to providing ‘neutral’ tools for communicating information. The Court further reasoned that the Communications Decency Act was ‘not meant to create a lawless no-man’s-land on the internet’.<sup>44</sup> These cases are exemplary of the Court’s willingness to hold the platforms liable where necessary, owing to their awareness

<sup>35</sup> Model Penal Code, s 2.02 (1985).

<sup>36</sup> *ibid.*

<sup>37</sup> Communication Decency Act 1996, s 230

<sup>38</sup> *ibid.*, s 230 (c) (2).

<sup>39</sup> 13 Vermont Statutes, s 2606 (2020).

<sup>40</sup> Georgia Code, s 16-11-90(f) (2019).

<sup>41</sup> *GoDaddy.com, L.L.C. v. Toups*, 429 S.W.3d 752, 762 (Tex. App. 2014).

<sup>42</sup> *ibid.*

<sup>43</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

<sup>44</sup> *ibid.*

of the nature of modern-day communication, technology and the depressing impacts NCP brings out. Similarly, UK law also excludes service providers from liability through Section 66D (3) of the Sexual Offences Act<sup>45</sup> which provides that a provider of an internet service shall 'not be regarded as a person who shares it'. Sri Lankan law also coincides with the same in Section 27 of the Online Safety Act<sup>46</sup>. However, it also provides that in certain situations service providers may not be exempted.<sup>47</sup>

Although a general exemption as to the liability of the platform operators and service providers may be acceptable, as exemplified by the laws above, there shall be provisions in law to make them liable in circumstances where they actively facilitate the commission of NCP. For this purpose, an 'active facilitation' may be direct conduct by the platform operator by demanding payments to remove content or indirect conduct such as refraining from deleting or removing content, not having a mechanism to report such content etc. As such, the platform operators should be treated as accomplices to NCP and be imposed with equal sentencing as the primary offender.

### **Victim Protection & available Reliefs**

NCP incontestably causes immeasurable harm on the victim. It is therefore pertinent to inquire into how the NCP laws have addressed this issue and what reliefs have been made available to the victims. At the outset, some laws make provisions for legal guardians or representatives to bring action on behalf of the victim where the victim may be incapacitated for some reason.<sup>48</sup> This is indeed welcome as it ensures broader level access to justice in cases of this nature. On a further note, civil actions relating to NCP look at recovery of damages for the harms suffered by the victim. As such, the US law provides for the recovery

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<sup>45</sup> Sexual Offences Act 2003

<sup>46</sup> Online Safety Act No. 9 of 2024

<sup>47</sup> Section 27(3) of Online Safety Act

<sup>48</sup> 15 U.S. Code § 6851 para (b) - Civil action relating to disclosure of intimate images.

of actual or liquidated damages and cost of the action. Additionally, it also provides for equitable relief such as a temporary restraining order, a preliminary injunction or permanent injunction where appropriate.<sup>49</sup> While the damages would monetarily compensate the victim for the harm suffered (just as in any civil action), the injunctive relief is more notable and an appropriate addition to prevent any further dissemination of the explicit content, thereby causing further harm. The importance of this in the context of social media is increased given that the content may be shared with a massive audience in just a few clicks and seconds. Thus, it is important to have injunctive relief for the court to order removal of content, place restraining order on the perpetrators, preventing them from purporting any further harmful conduct, etc.

Contrarily, the Singaporean law has limited civil approach to NCP and places more emphasis on the penal laws of the country to tackle NCP. Therefore, it does not offer remedies such as making provisions for the removal of the content or requiring the perpetrator to refrain from doing a particular act or compel the performance of a particular act, etc. This is unfavourable considering the harm caused by NCP, as it lacks regard to victim compensation and victim protection in the context. Thus, it is suggested that a comprehensive legal framework against NCP, should have a combination of both civil and penal laws, which would not only punish the wrongdoer but also provide relief to the victim.

### **Penalties**

It is pertinent to inquire into the penalties attached to NCP as a crime, as evidence of the extent to which different jurisdictions condemn NCP. In the US, an offender can be sentenced to up to 5 years' imprisonment, fined or caned (or any combination of these).<sup>50</sup> This is equally applicable to both an actual com-

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<sup>49</sup> *ibid.*

<sup>50</sup> Penal Code Ordinance 4 of 1871(as amended by the Criminal Law Reform Act No.15 of 2019) (sg), s 377BE(3).



mission of NCP and merely a threat which is never carried out. Similarly, provisions can be seen under the Singaporean law<sup>51</sup> as well. However, it makes provision for a higher punishment, where the victim is below 14 years of age or the crime is racially or religiously aggravated.<sup>52</sup> In India, Section 66E of the IT Act provides that offenders who have intentionally or knowingly captured, published or transmitted the image of a private area of any person without his or her consent, shall be punished with imprisonment which may extend to three years and/or with fine not exceeding two lakh rupees.<sup>53</sup> In addition to that, Section 67A of the Act imposes a much greater punishment with a maximum of seven years imprisonment and a fine which may extend to one million rupees for a similar conduct done in the electronic form. This coincides with magnitude of harm NCP creates when conducted in an online platform. In most above laws, 'threat to publish' is also treated equally as the actual commission. In contrast, 'threat to publish' is treated differently with a lesser punishment in Sri Lanka. While the commission of the actual publishing shall be punished with a maximum of five years of imprisonment and/or to a fine not exceeding five hundred thousand rupees, sentence for attempts to commit the crime (arguably where the 'threats' may fall in) is just half of the commission of the principal offence.<sup>54</sup> Furthermore, Sri Lankan law makes provisions to impose a penalty twice the regular penalty in the event of any subsequent conviction, which is rarely seen in laws. Moreover, where the situation involves a child, the penalty is aggravated to an imprisonment of maximum of twenty years and/or a fine not exceeding one million rupees.<sup>55</sup>

An evaluation of the penalties demonstrates that the state in general acknowledges the degrading nature of NCP. It is further noted that some laws go beyond,

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<sup>51</sup> Singapore Penal Code, s 377BE(3) and 377BC(3).

<sup>52</sup> *ibid*, s 377BC(4) and 377BE(4).

<sup>53</sup> Information Technology Act 2000., s 66E

<sup>54</sup> Section 40

<sup>55</sup> Section 21(2) of the Online Safety Act Sri Lanka

by imposing higher punishments in aggravated circumstances such as involvement of children, racially and religiously aggravating circumstances, electronic forms of sharing, etc. This indeed is a commendable position when considering the aggravated impact such situations contribute to. Furthermore, some laws have used 'caning' as an additional sentence, which is justified by the need to condemn the act of NCP. Such intense penalties invariably serve as an effective deterrence to the society, thereby reducing the occurrence of NCP.

#### 4. Conclusion

The aim of this study was to examine the law addressing NCP, with respect to its recognised key elements. In doing so, the paper did an overall analysis of the related laws in different jurisdictions, namely, the United States, the United Kingdom, Australia, Singapore, India and Sri Lanka. As necessitated by the rising statistics on its prevalence and the effect it has on the victims and the society, states have adopted various means of fighting against NCP. While some have latest legislation precisely dealing with NCP, some resort to broader offences contained in much older statutes. Furthermore, in most cases it is a combination of offences found in penal code, legislation on sexual offences, legislation on online safety and information technology. The study inquired into the key elements of NCP laws such as, *actus reus* and *mens rea* of the offence, platform liability, victim protection and available remedies and penalties attached.

The analysis revealed that, all jurisdictions have settled with the notion that NCP is 'a person publishing private, intimate content of another person without the consent of the latter'. Although there is consensus on that, there is a difference of opinion as to whether 'a threat to publish' in the same context shall be treated as fulfilling the *actus reus*. It was noted that the majority of the laws treat a 'threat' equally to that of the actual commission which is the welcoming position. The approach is even more diverse in respect of the *mens rea* of the offence. While some emphasise on the intention to cause harm others just settle

with knowledge or recklessness on the part of the perpetrator as to the obvious harm it inflicts on the victim. It is stated that it would be unwise to require 'intention' rather a less threshold of 'knowledge' may be more appropriate considering the harms caused. More common approach can be seen in respect of platform liability where the platform operators are exempted from liability. However, a better position could be seen in some laws where the platform operators are also made liable where there is evidence of active facilitation of NCP. Although there is emphasis on platform liability in cases of social media publishing, sharing material among selected third parties through electronic means such as private messaging applications is also a part of NCP. Most laws are also seen as more or less similar in terms of victim support, damages and injunctive relief to remove the explicit content and also in respect of criminal sanctions involving both imprisonment and fines. Some even include caning as a form of criminal sanctions which demonstrates the gravity of NCP as acknowledged by those laws. The study further recommends refining legislation with broader definitions, strengthening victim support mechanisms to encourage reporting.

While the paper provides an extensive analysis as to those components of laws and the desirability of different approaches taken by the states, it should not be disregarded that there are some common challenges to face in fighting against NCP. This mainly includes the struggle to keep pace with rapidly evolving technology which leads to gaps and unintended consequences. Moreover, the cross-border nature of NCP in online platforms also poses difficulties in bringing the perpetrators to face trial and ultimately sentencing them. Thus, efforts to fight NCP should not be limited to jurisdictional level but go beyond the borders and be achieved through political, legal, and technical cooperation. The need for ongoing legislative refinement, international collaboration, and a comprehensive, victim-centric approach, is evident, to effectively combat the challenges posed by NCP in the digital age.

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