

Punishing ‘Revenge Porn’: Legal Interpretations of and Responses to Non-
Consensual Intimate Image Distribution in Canada

by

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Abstract

The act of distributing nude or sexually explicit images without consent—often colloquially referred to as “revenge porn”—has become an issue of popular concern and the product of frequent news headlines both in Canada and internationally. Activist and academic work has largely focused on gaining recognition of the harms of non-consensual intimate image distribution (NCIID) and campaigning for its specific criminalization; yet, little research has been done to analyze how this act is actually being responded to in the everyday practice of the law and to determine the broader social impacts of these legal responses to and understandings of NCIID. Thus, in this dissertation, I undertake a critical discourse analysis of NCIID case law in Canada. Through this research, I map and analyze the ongoing legal construction of and response to NCIID and trouble many of the prevailing assumptions regarding the nature of NCIID and the efficacy of legal responses to this act.

My discursive analysis of legal responses to NCIID utilizes anti-carceral, pro-sex, intersectional, and critical legal feminisms (along with queer theory and theorizations of technology and photography) to determine what NCIID is “coming to mean” (Crocker 2008, 90) in law. I find that NCIID is a complex issue involving: a diversity of victims and offenders, a range of harms, a plethora of potential framings, and a variable relationship to digital technologies. Ultimately, I argue that an analysis of the efficacy of responding to NCIID in law must consider this diversity of cases and the socio-legal impacts of various constructions of and responses to NCIID.

My research finds that Canadian judges have largely understood NCIID as an extremely harmful act requiring denunciation and deterrence (often via incarceration). Although this may be understood by many “revenge porn” activists and researchers as an unproblematic development that demonstrates the effectiveness of legal responses to NCIID, I argue that it is necessary to critically analyze the unexpected consequences and shortcomings of responding to NCIID through law.

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Dedication

This dissertation (and many others I imagine) is dedicated to the memory of Connor O'Callaghan, an incredible scholar and friend.

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Introduction

The non-consensual distribution of intimate images can literally take lives. I cannot emphasize enough [...] the urgency with regard to moving the legislation forward, putting in place those necessary protections found in the Criminal Code and giving the police the power to intervene and pre-empt and prevent the type of activity that led to the death of Rehtaeh Parsons, Amanda Todd and others.

- Peter MacKay, Minister of Justice
Canadian House of Commons 2014

The act of distributing nude or sexually explicit images without consent—often colloquially referred to as “revenge porn”—has become an issue of popular concern and the product of frequent news headlines both in Canada and internationally (Hanna 2017, MacIvor 2017, Choudhary 2018, Fitzpatrick 2018, Yi 2018, Wahlquist 2019). Growing attention to the act of non-consensual intimate image distribution (NCIID) over the past decade has been stimulated by the creation of websites devoted to hosting “revenge porn” content (e.g. Hunter Moore’s infamous site isanyoneup.com) (Hearn and Hall 2018), high profile celebrity “nude photo scandals” (Duke 2014, Farries and Sturm 2018), and countless reports from around the world of women and girls being harassed and slut-shamed after having their intimate images spread online (Fairbairn 2015, Dodge 2016, McGovern et al. 2016, Powell and Henry 2017). This act has also attracted widespread social concern and legislative attention because it simultaneously speaks to fears of the “dark side” of digital technology (House of Commons 41st Parliament, 2nd Session 2014, Hasinoff 2015), anxieties regarding (especially youth) sexual expression (Hasinoff 2015, Karaian and Van Meyl 2015, McGovern et al. 2016, Wodda and Panfil 2018), and increasingly mainstream feminist concerns regarding sexual violence and violence against women (Hill 2015, Powell and Henry 2017). For instance, several scholars have discussed how anxieties regarding new technologies and youth sexuality/sexual

expression have dovetailed and contributed to the pervasive panic associated with both non-consensual and consensual nude image sharing amongst youth (Ringrose et al. 2012, Bivens and Fairbairn 2015, Karaian 2014, Hasinoff 2015, Milford 2015, Angelides 2013, McGovern et al. 2016). Additional attention to this issue has resulted from the inclusion of NCIID within mounting activist, governmental, and scholarly responses to violence against women and sexual violence (Benoit et al. 2014, Citron and Franks 2014, Valenti 2014, May 2016, European Institute for Gender Equality 2017, Fairbairn 2015, McGlynn et al. 2017, Aikenhead 2018).

Rising concerns about the harm and ubiquity of NCIID have resulted in calls from activists and scholars to criminalize this act (Kitchen 2015, Citron and Franks, 2014, Hill, 2015), and specific criminal and civil law sanctions have now been implemented in jurisdictions such as Canada, parts of the United States, the United Kingdom, the Philippines, Israel, parts of Australia, and Japan (Powell and Henry, 2017, Crofts and Kirchengast 2019, Farries and Sturm 2018). While pre-existing civil and criminal law offences such as, in Canada, criminal harassment and invasion of privacy are often applicable to cases of non-consensual intimate image distribution and have been used to respond to this act (West Coast LEAF 2014, Lenhart, Ybarra and Price-Feeney, 2016), high profile cases and new levels of attention to this issue internationally have resulted in widespread calls for *specific* legal remedies (Dodge 2016, Powell and Henry 2017, Crofts and Kirchengast 2019). For instance, as demonstrated in the epigraph above, the deaths by suicide of two Canadian NCIID victims, Rehtaeh Parsons and Amanda Todd¹, were

¹ These two teenagers both died by suicide after having nude/sexually explicit images distributed without their consent and experiencing persistent bullying and harassment from their peers in the aftermath. In the Rehtaeh Parsons' case the image was of an alleged sexual assault occurring, while the Amanda Todd case involves a non-consensually created screenshot of Todd's breasts.

often cited as the impetus for Canadian *Criminal Code* provisions to address NCIID (House of Commons 41st Parliament, 2nd Session 2014). In 2015, the push to create a specific *Criminal Code* provision for NCIID in Canada was successful as the *Protecting Canadians from Online Crime Act (The Act)*² came into force across the country. Canada's *Criminal Code* provision addressing NCIID at section 162.1(1) now reads:

Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty: (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or (b) of an offence punishable on summary conviction (Canadian Criminal Code 1985)³.

While the implementation of this law and others like it around the world are generally understood as a victory for victims of NCIID and as a necessary recognition of the harm of non-physical/"cyber" forms of sexual violence (Kitchen 2015, Citron and Franks, 2014, Hill, 2015, Powell and Henry, 2017), substantial questions remain regarding the efficacy of various legal responses to NCIID and the implications of responding to this

² While the criminalization of NCIID was notably uncontroversial within political debates on *The Act*, it should be noted that critics were concerned with how the emotionally charged aspects of this portion of *The Act* were utilized to draw attention away from the controversial provisions in *The Act* that allowed government and police greater surveillance power over citizens (Southey 2013). As West Coast LEAF asserts in their report on "cyber misogyny", "it is extremely unfortunate that the government has made important legal reforms that would protect the rights of women and girls contingent on also enacting privacy infringing provisions that are likely unconstitutional" (West Coast LEAF 2014, 13).

³ The definition of "intimate image" for the purpose of the law is described as: "a visual recording of a person made by any means including a photographic, film or video recording, (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity; (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed" (Canadian Criminal Code 1985).

act amidst highly charged social beliefs about its harms and meanings (Bailey, *Time to Unpack* 2014, Shariff and DeMartini 2015).

While many academics and activists have vigorously argued for the increased legal regulation of this act, little research has been done to analyze how this act is actually being responded to in the everyday practice of the law and to determine the broader social impacts of these legal responses. Thus, in this dissertation, I undertake a critical discourse analysis of NCIID case law in Canada. Through this research, I map and analyze the ongoing legal construction of and response to NCIID as an issue and trouble many of the prevailing assumptions regarding the nature of NCIID and the efficacy of legal responses to this act. In addition to contributing to a greater understanding of acts of NCIID and legal responses to this act, the potential broader implications of this research include additions to scholarly analysis of: the impacts of new technologies on sexual violence (Powell and Henry, 2017, Fairbairn, Bivens and Dawson, 2013); the efficacy of legal responses to sexual violence, domestic violence, and bullying/harassment (Shariff and DeMartini 2015, Bailey, *A Perfect Storm* 2015, Crenshaw 1991, Sokoloff and DuPont 2005); and the complex power dynamics and diversity of subjects involved in cases of sexual violence, domestic violence, harassment/bullying, and related acts (Crenshaw 1991, Sokoloff and DuPont 2005, MacDonald, Osborne and Smith 2005, McHugh, Livingston and Ford 2005).

Demonstrating the need for further research on NCIID, the basic nature and dynamics of NCIID as an issue are still being determined—with researchers, legislatures, and activists continuing to grapple with how to categorize this issue (e.g. as sexual assault or cyberbullying) and providing opposing claims about, for instance, who is most at risk

of NCIID victimization and who is perpetrating this act and why. That is, legal responses to NCIID are being implemented at a time when we still know very little about who will be most impacted by criminalizing this act and what existing systemic issues may intersect with this act and how. The ongoing struggle over what terminology to use to refer to acts of sharing nude/sexually explicit images without consent speaks to broader divergences and gaps in understandings of NCIID. The potential terms used to refer to NCIID remain plentiful and contested, with this act being referred to as, for instance, revenge porn (Citron and Franks, 2014, Hall and Hearn, 2017, Kitchen 2015, Salter and Crofts, 2015, Bates 2017), non-consensual pornography (Hill, 2015, Slane and Langlois, 2018), and image-based sexual abuse (McGlynn, Rackley and Houghton, 2017, Powell and Henry, 2017). “Revenge porn” is a widely understood term but many scholars argue that it is inappropriate as it wrongly implies that all offenders are motivated by the desire for revenge (Powell and Henry 2017, Hall and Hearn 2018, Crofts and Kirchengast 2019). Non-consensual pornography puts more emphasis on the lack of consent involved in these acts, but is sometimes critiqued for not placing enough emphasis on the abusive/harmful nature of this act—as the term pornography is said to imply “a sense of choice and legitimacy” or to “eroticiz[e] the harms” of NCIID (McGlynn, Rackley and Houghton, 2017, 38). Disagreements over which name best communicates the nature of the harm victims experience and the motivations of offenders speak to the ongoing struggle to understand this act. As I argue throughout this dissertation, the ways we name and frame this act have substantive implications for law and society. For instance, framing acts of NCIID as a form of “sexual assault” rather than “cyberbullying” can result in very different ideas about the appropriateness of criminal punishments in

response to this act and the amount of stigma that should be attached to offenders (See Chapter 3).

Even knowledge about NCIID that has been widely accepted has recently become contested. For instance, while NCIID is often understood as an issue primarily affecting women and girls (Aikenhead 2018, Citron and Franks, 2014, May 2016, European Institute for Gender Equality 2017, Fairbairn, 2015, McGlynn, Rackley and Houghton, 2017, West Coast LEAF 2014), quantitative research studies have found that males and females are equally as likely to be victims (Henry, Powell and Flynn 2017, Lenhart, Ybarra and Price-Feeney, 2016) and one study found that boys are somewhat more likely than girls to be victims (Steeves 2014). Likewise, although “revenge porn” is typically understood to include cases where nude/sexual images are shared for the purpose of “revenge” against a female romantic partner/ex-partner (Henry, Powell and Flynn 2017), research on offender motivations and case contexts have begun to find that intimate images are shared for a variety of reasons that include, for instance, sexual gratification and to prove sexual prowess to a peer group (Henry, Powell and Flynn 2017, 3, Hall and Hearn, 2017, Ringrose and Harvey, 2015). These changing understandings of who is most affected by this act and who is most likely to commit this act (and why) necessitate an intersectional and postmodern analysis of the power dynamics and systemic issues at play in particular NCIID cases (See Chapter 5).

Emerging research that undermines widely held assumptions about NCIID results in questions about what kinds of acts and what kinds of actors we have criminalized and regulated in legal responses to NCIID. While an emerging body of research critically analyzes the *extra-legal* regulation of both consensual and non-consensual intimate image

sharing (Ringrose et al. 2012, Angelides 2013, Karaian 2014, Hasinoff 2015), much of the existing literature on formal legal responses to NCIID argues for the need to criminalize NCIID without critically assessing the potential shortcomings or particular implications of this response (Kitchen 2015, Citron and Franks 2014, Bloom 2016, Hill 2015). Responding to this gap in critical legal analysis, in this dissertation I analyze 49 Canadian legal cases involving acts of NCIID (including assessing legal responses to NCIID that predate its specific criminalization in Canada). Recognizing the diversity of NCIID cases and of legal responses to these cases, this analysis includes adult and youth cases, criminal and civil cases, and cases at all levels of the courts in Canada. Building on critical analysis of the extra-legal regulation of consensual and non-consensual intimate image sharing (Karaian 2014, Hasinoff 2015, Bivens and Fairbairn 2015, Milford 2015), I seek to expose the various assumptions and beliefs that underlie legal understandings of and responses to NCIID in practice and analyze the social implications of various legal responses to this act.

My inquiry into legal responses to NCIID in Canada builds on existing scholarship on consensual and non-consensual intimate image sharing, such as: quantitative scholarship that has helped to outline the nature of NCIID in Australia, Canada, and the United States (Henry, Powell and Flynn 2017, Lenhart, Ybarra and Price-Feeney 2016, Steeves 2014); critical analysis of the ways legal and extra-legal responses to consensual and non-consensual image sharing are deployed against youth (Angelides 2013, Karaian, 2014, Hasinoff 2015, Slane, 2013, Bivens and Fairbairn 2015, Karaian and Van Meyl, 2015, Karaian, 2012); qualitative research exploring how youths understand and navigate the dynamics of consensual and non-consensual image sharing

(Ringrose and Harvey, 2015, Bailey, *A Perfect Storm* 2015, Lockhart 2018); research on the harms experienced by victims of NCIID (Bluett-Boyd et al. 2013, Bates 2017, Powell and Henry 2017); and explorations of the efficacy of legal responses to this act (Aikenhead 2018, Citron and Franks 2014, Kitchen 2015, Langlois and Slane 2017, Salter and Crofts 2015, Shariff and DeMartini 2015, Crofts and Kirchengast 2019).

Following a description of my methodology and theoretical framework in Chapter 1, in Chapter 2 my socio-legal analysis begins by mapping the history of legal responses to NCIID in Canada and deconstructing socio-legal assertions of NCIID as a “cyber” specific act. Using insights from science and technology studies and communications studies (Baym 2010, boyd 2011, Wagman 2016, Hand 2012)—and building on critiques of the popular assumption that NCIID is an issue unique to the digital era (Hasinoff 2015, Salter and Crofts, 2015, Bivens and Fairbairn 2015)—I analyze the impacts of various judicial understandings of digital technology in NCIID cases. I argue that judicial understandings of digital technology have significant impacts on perceptions of the level of harm caused by NCIID and that nuanced understandings of digital technology are necessary for appropriately responding to this act.

While Chapter 2 focuses specifically on deconstructing the understanding of NCIID as a “cyber” act, in Chapter 3 I scrutinize the many additional scholarly and popular understandings of NCIID and assess the implications of particular attempts to categorize this act. Specifically, I undertake a discursive analysis (Foucault 1972, Foucault 1970) of the various framings of NCIID as an issue of: cyberbullying; child pornography; gender-based violence; sexual violence/sexual assault; domestic violence; and as a privacy violation. Rather than siding with a particular framing of NCIID, I argue

for a contextual non-essentialist⁴ reading of individual cases and provide critical analysis of the stakes and hazards of taking up particular framings in law. In Chapter 4, I further support the argument for a non-essentialist and contextual understanding of NCIID by demonstrating that, contrary to the belief that all victims of NCIID are “ruined” (Chun and Friedland 2015) by this act, the harm of NCIID is experienced in a variety of ways (i.e. as relatively harmless). Using the insights of sex positive feminism (Friedman and Valenti 2008, Wodda and Panfil 2018), I provide a challenge to typical understandings of the harm of NCIID and argue that—to avoid the reaffirmation of the sex-negative beliefs that often support the harm of NCIID—socio-legal responses should better recognize the continuum of harms experienced in NCIID cases.

Chapter 5 further complicates understandings of NCIID by troubling assumptions about who commits this act (and why) and who is most likely to be victimized by this act. Complicating the typically imagined “revenge porn” scenario of a heterosexual woman/girl being victimized by a male partner or ex-partner, I utilize the theories of postmodern and intersectional feminisms to consider scenarios beyond the vengeful man/victimized woman paradigm and demonstrate the myriad ways power dynamics and social norms circulate within particular cases of NCIID. In light of the complexity of NCIID described throughout the previous chapters, in Chapter 6 I consider criminal law’s ability to effectively respond to the broad range of issues and individuals involved in acts of NCIID. I take up anti-carceral (Bumiller 2008, Bernstein 2012, Taylor 2018), critical legal (Smart 1989, Randall 2010), and intersectional (Crenshaw 1991, Kim 2018) feminisms to critique the legal feminist focus on responding to NCIID through the

⁴ I do not refer to NCIID as having any innate meaning or one correct framing. Rather, I understand the meanings of this act, and the identities and concepts associated with it, as socially constructed and culturally/contextually contingent.

criminal law (Kitchen 2015, Hill 2015, Citron and Franks 2014). I consider both the shortcomings of criminal justice responses and the potential of alternative responses to this issue (e.g. restorative justice, transformative justice, education, and technological innovation). I conclude this dissertation with final reflections on my research findings, a call for further critical research on acts of NCIID that do not fit the mold of the (imagined) paradigmatic case, and a consideration of future challenges for legal responses to NCIID—such as arguments that NCIID laws should be extended to cover fake nude images (i.e. deepfakes) and broader concerns regarding protections for privacy and reputation in the digital age.

In light of the dearth of critical research on legal responses to NCIID, especially in terms of legal responses to NCIID in practice, in this dissertation I argue that we must consider the impacts of taking up particular social conceptions of NCIID in law and, likewise, consider the social implications of various legal constructions of NCIID. Legal responses to this act may have unexpected social impacts, such as the reaffirmation of the sex-negative belief that women who are sexually exposed necessarily experience reputational ruin (Chapter 4) and the labeling of marginalized youth as sex offenders (Chapter 6). And popular and academic framings of this issue may have unexpected carceral implications, such as the criminalization and increased surveillance of teenage girls (McGovern et al. 2016). In this dissertation I analyze the implications of turning to law to respond to acts of NCIID and explore the implications of mobilizing certain socio-legal conceptions of—for instance—technology, harm, and sexual violence in responses to “revenge porn”.

Chapter 1: Methodology and Theoretical Framing

Defining NCIID

For the purposes of this research, NCIID is understood to include the non-consensual distribution—whether digital or physical⁵—of a photo or video that depicts nudity, partial nudity, or explicit sexual acts. The term distribution is used here to include both disseminating copies of images to others (e.g. giving a physical photograph or transferring a digital file) and showing images (e.g. momentarily displaying an image on a smartphone screen or passing around a physical photo). Taking from Powell’s (2010) work and reflecting the framing of NCIID in s.162.1 of the *Criminal Code of Canada*, this definition includes photographs that were consensually created as well as those that were non-consensually created. As mentioned above, the terms used to refer to the act of distributing nude/sexual images without consent remain plentiful and contested—with terms such as revenge porn, non-consensual pornography, and image-based sexual abuse being offered as a label for this act. There are arguments for and against each of these terms based on understandings of the harms, motivations, and nature of this act (e.g. “revenge porn” implies a motive of “revenge” and labels the relevant image as constituting “porn”) (Powell and Henry, 2017, McGlynn, Rackley and Houghton, 2017). To avoid the beliefs (regarding motives, harms, etc.) attributed to many (shorter and more catchy) terms, I have chosen to use the phrase non-consensual intimate image distribution. This choice is consistent with the language used in Canadian criminal law, and describes the *action* I am referring to rather than defining the act as a form of *abuse* or as an act motivated by *revenge*. My definition of NCIID is inclusive of various contexts

⁵ Informed by the work of Salter and Crofts (2015) showing that NCIID is not an issue created by the advent of digital technology, my definition of NCIID includes both digital and physical images.

and dynamics that may occur in these cases to allow my research to remain open to unexpected findings and to a wide range of experiences and framings of NCIID.

Methodological Approach

The aim of this research is to map and interrogate legal understandings of, and responses to, NCIID in Canada. I am interested in exploring how this act has been understood as related to the rise of digital technology, how this act is legally contextualized and associated with other crimes/wrongdoings, how the impacts of NCIID are understood in law, how those who commit and are victimized by this act are constructed, and how the impacts of legal responses to this act are understood. The answers to these questions will provide a more robust understanding of the judicial assumptions and socio-legal truth-claims that underlie and justify various responses to NCIID. To garner these research findings, I conduct a discourse analysis of Canadian legal cases of NCIID.

Discourse analysis is based on the understanding that meaning is socially constructed and that the analysis of “linguistic exchanges and expressions” can help us to better understand how certain concepts have been and are being constructed—and thereby to assess what possible implications these constructions have (Niemi-Kiesiläinen, Honkatukia and Ruuskanen 2007, 79). The methodological approach of discourse analysis allows me to decipher the “hidden assumptions” within the “seemingly neutral language of the law” (Broughton 1999, Niemi-Kiesiläinen, Honkatukia and Ruuskanen 2007, 70, Conley and O'Barr 1990). The way that discourse analysis is used in this project more specifically falls under the category of *critical* discourse analysis, as I recognize that legal discourse is situated and interpreted within a specific cultural, social,

political, and economic time and space and influenced by the power relations and dominant social conventions of that time and space (Foucault 1970, Wodak 2001, Gee 2011). Further, my employment of discourse analysis is critical in that it considers the ways power relations and social inequalities are reflected and/or reaffirmed through discourse and provides counter-narratives that both reveal and challenge these power relations and inequalities (van Dijk 1995).

To demonstrate the efficacy of utilizing critical discourse analysis to analyze case law, it is important to first understand law as, what Foucault terms, a discursive practice (Foucault, *An Introduction* 1978); that is, as a practice that "systematically form[s] the objects of which [it] speak[s]" (Foucault, *The Archaeology of Knowledge* 1972, 49). Law is a discursive practice in that it is a "meaning-making" activity (Crocker 2008, 90) that "produces meaning via its institutions and practices" (Broughton 1999, 137). In the context of NCIID, the discursive construction in law of the act of sharing intimate images without consent creates knowledge about this act that can be wielded in particular ways in law and society. Like other forms of discourse, the meanings that are "imposed" on things through the practice of legal discourse (Foucault, *The Archaeology of Knowledge* 1972, 67) both influence and are influenced by socio-economic contexts and traditions and, thus, can inform diffuse forms of social and legal regulation (Broughton 1999, Turkel 1990).

Critical legal scholars champion the application of discourse analysis to the study of law, arguing that law is "an interpretive process" (Conley and O'Barr 1990) that produces "culturally and historically contingent" meanings (Broughton 1999, 137). Scholars such as Cossman (1997), Khan (2014), Crocker (2008), and Menzie (2018) have

provided fruitful examples of how to approach law discursively. Following Crocker's application of discourse analysis to the study of legal responses to criminal harassment in Canada, I approach the analysis of NCIID case law "as a way of investigating the meaning of the legal response rather than as a way of evaluating the outcomes or products themselves" (Crocker 2008, 90). Thus, I analyze judicial discourse to draw out what NCIID is "coming to mean" (Crocker 2008, 90) in law and how this might impact and be impacted by socio-legal conceptions of—for instance—sexual privacy, psychological harm, sexual violence, and new technology. Through analyzing law as a discursive practice, I am able to explore the ways culturally-imbued concepts related to NCIID are developed and wielded in law and how particular judicial assumptions about and conceptualizations of the act of NCIID impact diffuse social responses to and regulations of NCIID and related acts.

Data Collection

To gain insight into the various ways meaning about NCIID is made in law, this research looks at both youth and adult, and both civil and criminal law responses to NCIID. By analyzing a broad spectrum of cases I am able to gain better insight into how the act of NCIID is being understood, developed, and mobilized in the everyday workings of law. I have also utilized cases from all court levels because, when considering law discursively, "all cases are equally important regardless of their precedent-setting effect" (Crocker 2008, 101); this is because, as Crocker (2008) explains, the "fact that they exist in the official record contributes to how" a particular act "can be, talked about and, therefore, what it has come to mean in law" (101).

To find court cases responding to acts of NCIID, I used three Canadian case law databases: CanLII, WestlawNext Canada, and LexisNexis Quicklaw. These databases were selected because they allow access to primary source case law from across Canada and are recognized by Canadian legal professionals as reliable resources for legal research (Zivanovic 2002, Kerr, Kurtz and Blatt 2006, Best 2015). While many cases are available on all three of these databases, and therefore much of the data found on each was repetitive, I chose to search multiple databases as some contain more cases from certain regions or time periods than others (Best 2015). Within each of these databases I utilized a Boolean search (Dobinson and Johns 2007) to collect cases containing one or more of the following search terms: “nude photograph”; “nude picture”; “nude image”; “naked photograph”; “naked picture”; “naked image”; “sexting”; “revenge porn”; “sex tape”; “intimate video”; “sexual video”; “intimate image”; “162.1”. These search terms were selected based on a review of the literature (Kerr, Kurtz and Blatt 2006) related to NCIID (e.g. literature on cyberbullying, sexting, digital forms of sexual violence, and both digital and pre-digital forms of NCIID), a review of media reports on cases of NCIID, and a preliminary reading of selected legal cases involving NCIID. Through this review of literature, media, and law it was determined that the terms “nude photograph”, “sexting”, “revenge porn”, “intimate image” and “sex tape” were commonly used to discuss acts of NCIID. Synonyms of search terms (e.g. “nude picture” and “sexual video”) were utilized to account for the fact that not all databases search for synonyms of a selected search term and that cases may describe the issue of NCIID in a variety of ways (Zivanovic 2002, Kerr, Kurtz and Blatt 2006). Additionally, the search term “162.1” was selected to ensure that recent cases under s.162.1 of the Canadian Criminal

Code dealing with the non-consensual distribution of intimate images were captured.

While the non-consensual distribution of intimate images has been specifically recognized as a criminal offence within Canadian law since 2015 (see: Criminal Code of Canada, section 162.1), my research is also interested in how the treatment and understanding of these cases have changed over time. Thus I ensured that I captured cases of non-consensual sharing that pre-dated this law. By selecting search terms used to describe cases of NCIID (e.g. “sex tape” or “nude image”) rather than only search terms related to a specific area of law or specific statute (e.g. “162.1”) (Kerr, Kurtz and Blatt 2006), I was able to find cases of NCIID that pre-date both the recent law and recently developed terms (e.g. revenge porn) used to describe this issue. For example, I utilized search terms such as “nude photograph” and “sexual video” to capture references to this act that pre-date the emergence of NCIID as a specific issue. As a result, in addition to cases charged under section 162.1, I found cases where the charges laid included: criminal harassment, voyeurism, child pornography charges, extortion, public disclosure of private facts, defamation, and mischief to property (see Table #1 for full list of charges laid). Case law searches were not limited to a particular time period⁶ and searches were conducted up to March of 2018. The oldest cases that were found to meet the definition of NCIID were two cases from 1993.

One or more of the selected search terms were found in 407 cases on CanLII, 498 cases on LexisNexis Quicklaw, and in 487 cases on Westlaw Next. I reviewed each of these cases to determine those that described NCIID as a central aspect or the only aspect

⁶ Online legal databases vary in the amount of historical cases they include for various jurisdictions and court levels. For example, CanLII’s case records for the Saskatchewan court of appeal go back to 1979 but CanLII’s provincial court records for Saskatchewan only go back to 2001. This provides some limitations to finding older cases of NCIID that may have existed in Canada.

of the charges being brought against the accused. Cases were preliminarily reviewed by first reading the found search term within a sentence of the article (e.g. the list of cases found in LexisNexis can be preliminarily assessed through the “cite view” which allows the researcher to see the search terms in context for each case found). When this contextual reading demonstrated a potential for the case to be describing an act of non-consensual sharing, the full case was reviewed to determine if it fit within the above-described definition of NCIID. Cases were only selected that involved all aspects of NCIID: Images had to be *intimate* in nature (showing nudity, partial nudity, or explicit sexual acts) and they had to have actually been non-consensually *distributed* (e.g. disseminated or shown to one or more person). Cases that describe *threats* to share intimate images, but do not include actual dissemination were not included (although some are cited for context within Chapter 2). Additionally, the act of NCIID had to be part of the acts being adjudicated, for instance the case of *R v JT* (1994) is not included in the dataset because the act of NCIID is only used as evidence of Mr. JT’s controlling behaviour and is not being actually responded to in law (*R v JT* 1994).

The selected search terms for this research resulted in many cases that included charges of child pornography. Because child pornography charges have been used against youth who non-consensually distribute intimate images of their peers (as sexually explicit and nude images of those under the age of 18 constitute child pornography under Canadian child pornography laws), these cases had to be carefully reviewed to determine which cases fit within the definition of NCIID and which represented the power-imbalance of adults victimizing children. For instance, a case such as *R v CNT* (2015), wherein a 14-year-old boy was convicted of a child pornography offence for sharing

images of 14-16 year-old girls, would be included as a case of NCIID as I am in agreement with literature asserting that such acts among youth are more in line with definitions of NCIID than child pornography (See Chapter 3 for further arguments in this regard) (Dodge and Spencer 2017, Shariff and DeMartini 2015). However, the line between a case of NCIID and one of child pornography was not always easy to determine, such as in my decision to include *R v Schultz* wherein the victim was 16-years-old and the offender 20. I ultimately decided to include this case as the offender and victim were in a sexual relationship that was understood by both themselves and the law as a consensual relationship⁷, therefore the facts of this case did not have the adult and child power differential that I believe differentiates child pornography cases from cases of NCIID (See Chapter 3 for further support of this position). Therefore, cases involving child pornography charges were included if the victims and offenders were close-in-age youths that were all under the age of 18 or if the offender was over the age of 18 but was close enough in age to the victim to be legally involved in sexual acts.

A limitation of this methodology is that not all legal cases are made available on legal databases⁸ (Best 2015). In order to alleviate this issue, I have included news articles covering NCIID court cases in my data set. This allows me to capture some of the legal rationales and outcomes of both high profile cases of NCIID that are unpublished (such as the Rehtaeh Parsons case) and lower court and youth cases that are less likely to be published. News articles were only added to the data set if they included legal findings

⁷ The age of consent to sexual activity in Canada is 16 years, however the age of consent is higher if there is a relationship of authority, trust, or dependency between the parties. There are also close in age exceptions that allow, for instance, a 14 or 15 year old to consent to sexual activity with someone less than 5 years older than them (if the relationship is not one of authority, trust, or dependency) (Department of Justice 2017).

⁸ Cases that are precedent setting or are appealed are more likely to be reported in online databases. Cases that are perceived as less important may still be published if transcription is requested by a judge or other interested party.

regarding the case, quotes from judges, and/or details about the sentences received. To find news articles covering NCIID cases I activated several Google Alerts throughout the research and data collection phase of the project from March 2014-March 2018. These Google Alerts were filtered to capture Canadian content only and to search for the following key terms: child pornography; cyberbullying; intimate image; revenge porn; sexting. These key terms were selected based on preliminary media research that demonstrated the common occurrence of these terms in media coverage of cases of NCIID. In addition to resulting news items from national news media, resulting local news media results were also utilized in order to gain coverage of cases that might be seen as less serious or interesting and therefore were not covered at the national level.

The amount of media cases included in the data set was limited by the fact that many articles discuss charges being laid but do not have follow up articles regarding what became of these charges in the court context (this was especially true of articles about child pornography charges being used against youth). For each of the relevant media reports found, attempts were made to find the case law record for the case referred to or to order court transcripts of these cases. These attempts were made via contacting the courts in which the case occurred (if this was mentioned in the article, which was rare) or contacting the lawyers involved in the case (if these names were mentioned in the article, which was rare). In all cases but one (that of *R v Wheaton*⁹), these attempts were unsuccessful for various reasons. For instance, the media coverage of cases often did not provide enough information for a court clerk to search for the case (for instance court clerks might require information such as the offender's date of birth or the courtroom in

⁹ I received a recording of this trial via mail and transcribed it verbatim.

which the case was heard), many of these cases are required to be anonymized to protect the victim's identity making it extremely difficult to track down a case without the offenders name or to access the case through the lawyers involved, and many lawyers did not respond to requests or did not follow-up after an initial response. When court cases could not be found for these cases, the news articles themselves were analyzed as data. Only quotes from judges and discussion of legal reasoning and decisions were analyzed as this data analysis is focused on legal discourse rather than media treatment of these cases.

Regarding the limitations of my dataset, it is important to note that those cases that make it to the trial level may not necessarily represent the nature of NCIID in general. For example, a MediaSmarts survey of 3,158 Canadian students in grades 7-11 found that 26% of boys and 20% of girls had an intimate image of themselves non-consensually forwarded (Steeves 2014); Yet, only one case in my data set has a male complainant. Therefore, it is recognized throughout this research that the ways NCIID is understood within case law may be influenced by the types of cases that are reported and that make it to the trial level. Legal conceptions of NCIID must, therefore, be balanced with research about cases of NCIID that do not enter the court process. The other limitation of note is that, due to my lack of French language fluency, the dataset only considers case law published in the English language.

The data collection process resulted in a 49 case dataset (44 unique cases and 5 cases where both the trial and appeal case is considered). Table 1 displays the characteristics of the data set by case name. Cases are listed in alphabetical order, with media cases listed separately at the bottom. In some news media cases the official case

name is not known, in these cases placeholders are used based on the location of the case and the year in which it was tried (e.g. Halifax 2014).

Table 1: Case Characteristics

Case Name/ Year ¹⁰	Court ¹¹	Sentence Received for Charges Related to Act of NCIID ¹²	Charges Related to Act of NCIID ¹³	Gender/ Age of Accused	Gender/ Age of Complain- ant
<i>R v AC</i> 2017	Ontario Court of Justice	Conditional discharge & 3 years probation	Non-consensual distribution of an intimate image	M / 21	F /
<i>R v Agoston</i> 2017	Ontario Superior Court	Conditional discharge & 1 year probation	Non-consensual distribution of an intimate image	M	F
<i>R v Barnes</i> 2006	Alberta Provincial Court	20 months incarceration & 3 years probation (for pattern of harassment of which act of NCIID was a part)	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M / 32	F /
<i>R v Barnes</i> 2006 (Appeal)	Alberta Court of Appeal	Appeal by defense dismissed	“ ”	“ ”	“ ”
<i>R v BH</i> 2016	Ontario Court of Justice	90 days incarceration & 12 months probation (consideration of both recording and sharing images of sexual acts without consent)	Voyeurism (consideration of both recording and sharing images of sexual acts without consent)	M	F /
<i>R v CNT</i> 2015	Provincial Court of Nova Scotia (Youth)	6 months deferred custody & 12 months probation (Consideration of both sharing the images with one other person and for the potential coercion used to obtain the images originally)	Possession of child pornography (Consideration of both sharing the image with one other person and for the potential coercion used to obtain the images originally)	M / 14	F (Multiple) / 14-16

¹⁰ If the case is an appeal case, “appeal” is noted in brackets.

¹¹ If the case is a youth case, “youth” is noted in brackets.

¹² It is noted in brackets when sentences were given for a pattern of criminal actions or for multiple offences of which the act of NCIID was only a part. When multiple charges were sentenced separately, only the sentence received for the act of NCIID is noted.

¹³ The charges noted are sometimes responding only in part to an act of NCIID. For instance, in many criminal harassment cases the charge is responding to a pattern of criminal harassment of which the act of NCIID was only one part, in these cases the broader acts being charged are noted in brackets.

<i>R v BMS</i> 2016 (formerly CNT) (Appeal)	Nova Scotia Court of Appeal (Youth)	Appeal by defense allowed & sentenced to 18 months probation	“ ”	“ ”	“ ”
<i>R v Dewan</i> 2014 (Appeal)	Court of Appeal for Ontario	Appeal by defense dismissed, 90 days incarceration affirmed	Criminal harassment	M	F
<i>Doe 464533</i> <i>v ND</i> 2016	Ontario Superior Court	\$141,708.03 in favor of the plaintiff (decision since put aside)	Breach of confidence; intentional infliction of mental distress; public disclosure of private facts	M / 18	F / 18
<i>R v Fader</i> 2009	Provincial Court of British Columbia	Found guilty, Sentence unknown	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M / 46	F
<i>R v Fader</i> 2014	Provincial Court of British Columbia	2 years incarceration & 3 years probation (for pattern of harassment of which act of NCIID was a part and an act of break and enter to obtain the intimate images)	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M / 54	F
<i>R v Greene</i> 2018	Provincial Court of Newfound- land and Labrador	5 months incarceration & 3 years probation	Non-consensual distribution of an intimate image	M	F
<i>R v Hirsch</i> 2017 (Appeal)	Court of Appeal for Saskatchewan	Appeal by defense dismissed, sentence of 6 months incarceration & 12 months probation affirmed (For a social media post that included a threat to cause bodily harm and an intimate image)	Utter threats to cause bodily harm (For a social media post that included a threat to cause bodily harm and an intimate image)	M	F/28 (apx.)
<i>R v JS</i> 2018	Ontario Court of Justice	18 months incarceration & 3 years of probation	Non-consensual distribution of an intimate image	M / 30	F / 19
<i>R v JTB</i> 2018	Ontario Superior Court of Justice	4 years incarceration	Non-consensual distribution of an intimate image	M	F
<i>R v Kapoor</i> 2012	Provincial Court of Alberta	(Although Mr. Kapoor is sentenced for harassment including threats to distribute	Criminal harassment (for pattern of harassment of	M / 26	F

		intimate images, the actual distribution was not proven and therefore not considered in sentencing)	which alleged act of NCIID was a part)		
<i>R v KF</i> 2015	Provincial Court of British Columbia (Youth)	1 year probation	Possession & distribution of child pornography	F / 17	F / 15
<i>R v Korbut</i> 2012	Ontario Court of Justice	6 months incarceration and 3 years probation (for act of NCIID, theft of the images, and pattern of harassment)	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M	F
<i>LaRose v Yavis</i> 1993 (Appeal)	British Columbia Court of Appeal	Defence appeal dismissed, \$132,539.54 for plaintiff affirmed	Defamation & violation of privacy	M	F
<i>R v Lepore</i> 2001	Ontario Superior Court	Guilty	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M / 30 (apx.)	F
<i>R v Maurer</i> 2014	Provincial Court of Saskatchewan	Not guilty (Was acknowledged that the new NCIID law would apply, but was not yet in affect)	Unauthorized use of a computer; mischief	M	F
<i>R v Maurer</i> 2015 (Appeal)	Queen's Bench for Saskatchewan	Crown appeal dismissed	“ ”	“ ”	“ ”
<i>R v MB</i> 2016 (Appeal)	British Columbia Court of Appeal (Youth)	Defence appeal allowed in part	Possession & distribution of child pornography	F	F
<i>Milton v Savinkoff</i> 1993	British Columbia Supreme Court	Dismissed without costs	Violation of privacy	M	F
<i>R v MK</i> 2004	Ontario Court of Justice	6 months incarceration & 2 years probation	Criminal harassment; mischief to property; mischief to data; distributing child pornography	M / 20	F / <18
<i>R v MR</i> 2017	Ontario Court of Justice	5 months incarceration & 30 months probation	Non-consensual distribution of an intimate image	M	F

<i>R v NG & GG</i> 2014	Provincial Court of Manitoba (Youth)	16 months secure custody, 8 months community supervision & 12 months probation (for all charges, including: invitation to sexual touching; possession & distribution of child pornography; & transmission of sexually explicit material to a child)	Possession & distribution of child pornography	M, M / 17, 17	F / 14
<i>R v NG & GG</i> 2015 (Appeal)	Court of Appeal of Manitoba (Youth)	Defence appeal allowed. Sentenced to 12 months secure custody, 6 months community supervision, & 6 months probation	“ ”	“ ”	“ ”
<i>R v PSD</i> 2016	Provincial Court of British Columbia	2 years probation	Non-consensual distribution of an intimate image	M / 22	F / early 20s
<i>R v SB et al.</i> 2014	Provincial Court of British Columbia (Youth)	(Conditional discharge with 6 months probation given for the perceived coercion used to obtain the intimate images, the distribution itself was not considered in sentencing)	(Charged with child pornography offences for acts of NCIID and criminal harassment for the way the images were obtained, the child pornography charges were dropped & guilty pleas were offered for criminal harassment)	M, M, M / 14, 14, 14	F (Multi) / 13-15
<i>R v Schultz</i> 2008	Court of Queen's Bench of Alberta	12 months incarceration & 2 years probation	Transmission of child pornography	M / 20	F / 16
<i>R v TCD</i> 2012	Provincial Court of Alberta	Suspended sentence, 12 months probation	Criminal harassment (For act of NCIID & related harassment) (Child pornography charges related to NCIID were dropped)	F / 18	F / 14
<i>R v Verner</i> 2017	Ontario Court of Justice	Guilty	Non-consensual distribution of an intimate image	M	F

<i>R v W 2014</i>	Provincial Court of British Columbia	(60 days intermittent imprisonment for extorting the complainant into sending intimate images, with consideration of the impact of related acts of NCIID)	Extortion (Acts of NCIID were considered as part of a broader act of extortion)	M / 20	F / 21(apx)
<i>R v Wenc 2009</i>	Provincial Court of Alberta	90 days intermittent imprisonment	Criminal harassment (for pattern of harassment of which act of NCIID was a part)	M / 37	M
<i>R v Wenc 2009 (Appeal)</i>	Court of Appeal of Alberta	Crown appeal dismissed	“ ”	“ ”	“ ”
<i>R v Wheaton 2017</i>	Nova Scotia Provincial Court	3 months imprisonment & 2 years probation (probation portion applies to additional charges as well)	Non-consensual distribution of an intimate image	M	F
<i>R v X 2016</i>	Newfoundland & Labrador Provincial Court (Youth)	18 months probation	Possession of child pornography	M / 16	F / 15
<i>R v Y 2015</i>	Youth Justice Court of Nova Scotia (Youth)	Guilty	Possession of child pornography & possession of child pornography for the purpose of distribution (& a related charge of extortion for the manner the images were obtained)	M / 16	F / 16
<i>R v Zhou 2016</i>	Ontario Court of Justice	6 days incarceration (time served) & 12 months' probation	Criminal harassment	M / 19	F / 17
Media					
Bridgewater 2017	Youth Justice Court of Nova Scotia (Youth)	Conditional discharge, 9 months probation	Non-consensual distribution of an intimate image	Six males / <18	Nineteen females / 13-17
Halifax A (AKA 1 st accused in the Rehtaeh Parsons Case) 2014	Youth Justice Court of Nova Scotia (Youth)	Conditional discharge, 1 year probation	Child pornography offence	M / 17	F / 15

Halifax B (AKA 2 nd accused in the Rehtaeh Parsons Case) 2015	Youth Justice Court of Nova Scotia (Youth)	1 year probation	Child pornography offence	M / 17	F / 15
Huntsville 2017	Ontario Court of Justice	80 days incarceration	Non-consensual distribution of an intimate image	M / 22	F /
<i>R v Perron</i> 2018	Ontario Court of Justice	12 months probation	Non-consensual distribution of an intimate image	M / 21	F
Saskat- chewan 2017	Saskatchewan Provincial Court	2 years probation	Non-consensual distribution of an intimate image	M / 18	F / 18
<i>R v</i> <i>Warrington</i> 2013	British Columbia Provincial Court	Conditional discharge, 18-months probation	Distribution of obscene material	M / 19	F / 16
Winnipeg A 2016	Manitoba Provincial Court	5 months incarceration (time served)	Non-consensual distribution of an intimate image	M / 35	F / 31
Winnipeg B 2016	Manitoba Provincial Court	90 days imprisonment (intermittent) & 3 years probation	Non-consensual distribution of an intimate image	M / 29	F

Data Analysis

To analyze the resulting data set I utilized QSR NVivo qualitative research software. This software allows the user to organize and code large amounts of data into “nodes” and, thus, assists in ensuring the methodological rigor of qualitative research projects (Leech and Onwuegbuzie 2011). Nodes represent various themes and demographic information related to the data being analyzed. Said another way, “nodes are what a researcher uses to place meaning on different parts of the text” (Leech and Onwuegbuzie 2011, 74). To determine the set of nodes for this project, in the first stage of coding a portion of the cases were read using “open coding” (Charmaz 2006) to establish emerging themes without being unduly influenced/theoretically narrowed by a predetermined set of themes based on preexisting assumptions. Once initial themes were translated into nodes, all

cases were read and coded in full. To ensure the inclusion of unexpected themes emerging from the totality of the cases, new nodes that emerged throughout the coding process were included (Miles, Huberman and Saldana 2014), and previously analyzed cases were analyzed again with attention to these themes. For instance, the node titled “what victims want” was added due to a notable level of cases in the later stages of coding that included portions of victim impact statements in which victims expressed their desired outcome for the case. Twenty-five nodes were ultimately determined to analyze this data set. All nodes are listed in alphabetical order below:

Table 2: Nodes

Accused	Expressed assumptions/beliefs about the type of people that commit NCIID (e.g. people lacking social skills, people with technology know-how).
Accused Demographics	Indicators regarding the accused’s identity/demographic information (e.g. age, gender, race, and class).
Anti-Carceral	Discussion of non-legal and rehabilitative responses to NCIID and/or responses that avoid, or give limited, carceral sentences.
Carceralism	Discussion of the need for criminal sanctions in response to NCIID and/or responses that focus on carceral sentences.
Child pornography	NCIID being charged as child pornography and/or compared/contrasted to child pornography.
Corporeal	Discussion of the presence or absence of the physical body or physical harm in cases of NCIID.
Digital Technology	Conceptions of the impact of digital technology or social media platforms on NCIID (the reverse of the pre-existing digital technology node).
Gender Conceptions	Reference to the relevance of gender in NCIID offences or the use of/reference to gendered assumptions/stereotypes.
Harm of NCIID	Discussion of the nature or extent of the harm that is caused by NCIID or discussion of factors believed to aggravate/mitigate the harm experienced.
Legal Shortcomings	Discussion of the legal system/existing laws being ill equipped to respond to cases of NCIID or references to past shortcomings of the legal system/laws.
Motivation	Discussion of perceived/documentated motivations for committing NCIID.

NCIID law	References to or the use of Canada’s non-consensual intimate image sharing law (CCC s162.1).
News Media Influence	Reference to news media portrayals of NCIID.
Non-responsibilizing	Discussion of complainants as not responsible for being victimized by acts of NCIID (the reverse of the responsabilization node).
Offence Charged	Used to indicate what offence(s) the accused is charged with.
Pre-existing Digital Technology	Conceptions of NCIID as an issue that pre-exists digital technology or social media platforms (the reverse of the digital technology node).
Reasoning for Sentence	Node to track the judge’s stated reasons for their sentencing decision.
Responsibilizing	Discussion of complainants as responsible or partially responsible for being victimized by acts of NCIID (the reverse of the non-responsibilizing node).
Sentence Received	Node to track the finding of guilt and/or sentence received in each case.
Sex-Negativity	The expression of negative conceptions of sexuality and sexual expression (the reverse of the sex-positivity node).
Sex-Positivity	Expressions of positive conceptions of sexuality or sexual expression (e.g. assertions that sexual expression and sexual experimentation are good and/or indicative of healthy sexuality) (the reverse of the sex-negativity node).
Sexting	References to the concept of “sexting”/consensual intimate image sharing or comparing/contrasting sexting and NCIID.
Victim Demographics	Conceptions of the type of person who is victimized by NCIID and demographic information about victims.
What Victims Want	Victims’ assertions of what responses/punishments they would like to see for acts of NCIID.
Youth Issue	Conceptions of NCIID as a youth-specific issue or as aggravated by youth culture/practices/naiveté.

Theoretical Framework

The theoretical grounding for this research relies principally on feminist theory. More specifically—considering scholarly discussion of NCIID has widely asserted that this act must be understood as part of the continuum of sexual violence¹⁴ (Benoit, et al. 2014, Citron and Franks, 2014, West Coast LEAF 2014, Kitchen 2015)—feminist theorizations

¹⁴ Sexual violence is an umbrella term that is used to refer to coercive or non-consensual sexual acts, comments, or advances ranging from sexual harassment to sexual assault (Benoit, et al. 2014).

of sexual violence are particularly relied upon. While I remain open to many framings of NCIID (e.g. as a form of domestic violence or as bullying) as discussed in Chapter 3, I concede that regardless of the particular context of a case of NCIID this act generally fits within the broad continuum of sexual violence¹⁵ that feminist theory considers and, thus, theorizations of sexual violence are useful for analyzing responses to NCIID.

The feminisms that I most rely on in this research are critical of: essentialist conceptions of gender and identity, sex negativity, carceral justice and the criminal justice system, and simplistic/binary understandings of power. These feminisms include: critical feminist legal studies (Smart 1989, Randall 2010, Valverde 1985, Sheehy 2012), intersectional feminism (Crenshaw 1991, MacDonald, Osborne and Smith 2005), anti-carceral feminism (Bumiller 2008, Bernstein 2012, McGlynn, Westmarland and Godden, 2012), sex positive feminism (Rubin 1999, Friedman and Valenti 2008, Karaian and Van Meyl 2015, Khan, 2017, Wodda and Panfil 2018), and postmodern feminism (Moore 2008, McHugh, Livingston and Ford 2005). These theories are useful for critically assessing understandings of legal responses to NCIID and analyzing the numerous conceptions of—for instance—sexual violence, sexual privacy, harm, and carceral justice that underpin understandings of and responses to NCIID. I also borrow from other theoretical approaches when I find them more productive¹⁶. Namely, in Chapter 2 I

¹⁵ While accepting the definitional fit of NCIID within the sexual violence continuum, and thereby the usefulness of feminist theorizations of sexual violence, I remain interested in analyzing this particular framing and in questioning the related extrapolation that acts of NCIID should be generally understood as a form of *sexual assault* (See Chapter 2 for a further discussion of this framing and its potential implications).

¹⁶ It is worth noting that my approach is also influenced by theorizations of the shortcomings of feminist theory (Halley 2006, Gurnham 2015). Halley (2008) and Gurnham (2015) express concerns regarding the theoretical assumptions and shortcomings that limit the critical and discursive possibilities of some feminist works. For instance, Halley argues for the need to “take a break from feminism” to critique the ways that feminist theory may limit our perspective of harm and constrain our understandings of power (Halley 2008). While relying prominently on feminist theory, I am careful not to utilize feminist theories dogmatically and to bring in additional theoretical approaches (e.g. queer theory) when dynamics arise in

primarily utilize theories of digital technology (Mayer-Schonberger 2009, boyd 2011, Baym 2010, Chun and Friedland 2015, Bivens and Fairbairn 2015) and photography (Hand, *Persistent Traces* 2016, Hand, *Ubiquitous Photography* 2012, Sontag 2003) deriving from science and technology studies and communication studies to attend to the impacts and interpretations of technology in NCIID cases. These theories are hugely important to the study of NCIID as they allow for a critical examination of how the affordances of digital technology and our changing relationship to images in the digital age have impacted experiences of and responses to NCIID. These theories allow for the recognition that, while NCIID and related acts predate the advent of digital technology, digital technology has particular impacts on socio-legal understandings of acts of NCIID and on related concepts such as “cyber” harm and digital memory.

Before providing a deeper description of my theoretical approach in the sections below, it is important to note that my project is indebted to and influenced by those scholars who have previously utilized feminist theories, queer theory, and/or theories of digital technology and photography to approach the topic of consensual and non-consensual intimate image distribution (Powell 2010, Karaian 2012, Angelides 2013, Salter and Crofts 2015, Ringrose and Harvey 2015, Hasinoff 2015, Chun and Friedland 2015, Bivens and Fairbairn 2015, Wodda and Panfil 2018). I am not the first scholar to bring together these disparate frameworks to discuss NCIID and related issues (e.g. the

the research that are not adequately explained through a feminist frame (Gurnham 2015). I resist relying on any one particular theoretical approach, and rather am interested in critically mapping and analyzing the production and deployment of NCIID as a socio-legal issue. I seek to approach this research with “a politics of theoretic incommensurability” (Halley 2008, 3) as I attend to the messiness of reality and the many situations that do not fit with a given theory. Although I recognize the substantial influence that feminist theory has had in understanding sexual violence and NCIID, I also recognize how an unwavering commitment to this theory could invisibilize cases, harms, and subjects that do not fit within the typical purview of feminist theorizing (Halley 2008, 32).

regulation of *consensual* intimate image sharing and acts of sexual violence that involve digital technologies). For instance, a cohort of scholars have combined theorizations of digital technology and sex-positive feminism to critique the ways that both youth sexuality and technology use are regulated in responsabilizing reactions to “sexting” and digital forms of sexual violence (Karaian 2012, Bivens and Fairbairn 2015, Milford 2015, Hasinoff 2015). Similarly, Chun and Friedland (2015) provide a distinct example of how to bring theorizations of digital technology and feminist theorizations of sex positivity to analyze understandings of and responses to NCIID, as they argue for an understanding of NCIID that rethinks the “boundary between private and public” by questioning popular assumptions regarding sexual privacy *and* data privacy (5).

Karaian (2014), Chun and Friedland (2015), and Hasinoff’s (2015) theoretical approaches were particularly impactful on the framework used here. Their deeply critical and interdisciplinary theorizations of consensual and non-consensual intimate image distribution were integral to the kinds of questions I was able to ask and the assumptions about NCIID that I was interested in troubling from the early stages of this research. My project builds on the theoretical approaches of this previous research and further expands these approaches by bringing them into conversation with critical feminist legal theory and applying them to a critical discourse analysis of law.

Feminist Theories

I utilize critical feminist legal theory as one of my primary theoretical tools. Critical feminist legal theorists are interested in the way legal responses to sexual violence both produce and reproduce social stereotypes and myths about victims, offenders, and the

nature of sexual violence (Bumiller 2008, 52, Smart 1989, Mulla 2014, Randall 2010). While some feminist legal theorists are primarily interested in reworking the legal system to further the project of gender equality through the law, the critical vein of feminist legal theory is more skeptical of the law's ability to address issues of sexual violence, domestic violence, and gender inequality. As Smart (1989) asserts, because law "claims to have the method to establish the truth of events" and the ability to define issues and identities, even feminist inspired "wins" within the law must be critiqued for the norms and "truth" they construct (10). Exemplifying this kind of critique, Franke (2009) argues that the legal feminist focus on establishing the right to say "no" through sexual assault law, without asserting the connected right to say "yes", results in the reaffirmation of the idea that women are not sexually desiring subjects. As she explains, "the overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women might actually want to indulge" (Franke 2009). Thus, as I demonstrate in Chapter 4 in the context of NCIID, critical legal feminist analysis is useful for exposing, for instance, the ways ostensibly feminist legal responses to sexual violence may reaffirm problematic social beliefs about gender and sexuality.

Although recognizing the positive reforms created by legal feminist efforts to address gender equality and sexual violence through law to varying degrees¹⁷, critical feminist legal scholars assert that this recognition must be balanced with socio-legal

¹⁷ For instance, many years of dedicated feminist scholarship and activist work led to revisions of the *Criminal Code of Canada* to address some of the problematic language in sexual assault laws, challenge the legal adherence to stereotypes, and reform rules regarding evidence and the cross-examination of victims of sexual violence (Sheehy 2012, Randall 2010). Criminal Code amendments passed in 1983 reformed the law that excluded spouses from being charged with sexual assault (Randall 2010, 401) and in 1997 limits were placed on defense lawyers' access to victims' personal records (Sheehy 2012, 7).

critiques of “feminist jurisprudence” and a recognition of the limits of law to address complex and systemic issues such as sexual violence (Smart 1989, Sheehy 2012, Randall 2010, Gotell 2007). Critical feminist legal theory engages with the shortcomings of law’s response to sexual violence, such as: law’s tendency to de-politicize and individualize sexual violence; the fact that legal reforms are often most advantageous to the most privileged women; the fact that feminist inspired legal reforms can have unanticipated consequences; and the fact that law often disregards victims’ needs and has the power to mold victims and their experiences to fit its own scripts and agendas (Sheehy 2012, Moore 2008, Randall 2010, Mulla 2014). Due to law’s limitations for addressing sexual violence, many feminist legal scholars “express deep skepticism about the utility of criminal law reform strategy, arguing that even progressive reforms merely intensify social control” (Gotell 2007, 133). This dissertation takes up a critical feminist legal inquiry by analyzing law’s power to define in the context of NCIID.

There is some overlap between critical feminist legal studies and anti-carceral feminism, as both theories are concerned with the ways certain feminist responses to sexual violence have become intertwined with carceral politics¹⁸ (Bumiller 2008, Bernstein 2012, Gotell 2007, Kim 2018). Anti-carceral feminism critiques the ways some mainstream feminist analysis has engaged in problematic alliances with the criminal justice system and related forms of power/regulation (Bumiller 2008, Bernstein 2012, Gurnham 2015, Gotell 2007). Gurnham describes carceral feminism in the following manner:

¹⁸ Carceral politics refers to the way that, since the 1970s, the criminal justice system, and mass incarceration in particular, has played an increasing role in social control and governance practices (e.g. “the increased social reliance on upon the imprisonment of entire populations deemed dangerous, as opposed to the apprehension and rehabilitation of particular individuals”) (Bernstein 2012, 234).

[carceral feminism] represents a view that more criminal convictions of men signifies an advancement for gender justice. Carceral feminism has been criticized already for variously fetishizing female victimization and disempowerment, disingenuously denying its own influence on legal policy, and for ignoring the harmful effects of using the violence of state coercion as a means of promoting women's interests. (Gurnham 2015, 2)

As Gurnham describes, many mainstream feminists perceive criminal justice responses to sexual violence as proof that sexual violence is being taken seriously and that law and society are progressing toward gender equality; however, critics of carceral justice point out that “tough on crime” laws are often applied unevenly across marginalized groups and that lengthier prison sentences do not necessarily address the systemic issues that cause sexual violence or provide victims with something that feels like justice (Bumiller 2008, Crenshaw 1991, Sokoloff and DuPont 2005, Taylor 2018). Bumiller refers to the alliance between some feminisms and the carceral system as “a joining of forces with a neoliberal¹⁹ project of social control” (Bumiller 2008, 15) and Bernstein explains that “neoliberalism and the politics of sex and gender have intertwined to produce a carceral turn in feminist advocacy movements previously organized around struggles for economic justice and liberation” (Bernstein 2012, 233). Both anti-carceral and critical legal feminists argue that a narrow focus on legal reform or incarceration can severely limit the possibilities for responding to sexual violence and to imagining what justice might look like for victims of sexual violence (Mulla 2014, Randall 2010, Smart 1989,

¹⁹ Carceral politics is interlaced with neoliberal politics in that the neoliberal disinvestment in social programs and the provision of material welfare necessitates the growth of the carceral system to “contain” the resulting disenfranchised populations (Bernstein 2012, 237, Wacquant 2009, Kim 2018).

Doe 2004, Taylor 2018). Additionally, these scholars assert that the criminalization of sexual violence can make some women less safe through such collateral consequences as exposing their own criminal involvement, having their children taken away as a result of witnessing violence, or bringing attention to their immigration status (Sokoloff and DuPont 2005, Bumiller 2008). As Sokoloff and DuPont (2005) elaborate, some groups of people are more at risk when they are criminalized and take more risks when they criminalize others. For instance, in African American communities, victims may fear that by calling the police they are subjecting their abusers to racist treatment such as police brutality and disproportionate prison sentences (Sokoloff and DuPont 2005, 55, Kim 2018). Additionally, critics of carceral responses note that feminist assertions of the widespread and “epidemic” nature of sexual violence can be used to “legitimize[] control over the unruly practices of women, homosexuals, and others who depart from the conventions of the nuclear family” (Bumiller 2008, 21).

Feminists who are critical of carceral responses have, to varying degrees, argued for a movement away from the focus on law and incarceration toward approaches such as restorative justice, transformative justice, education, and broader social justice movements (e.g. to address income inequality) (Bumiller 2008, Smart 1989, Kim 2018, Taylor 2018). Critiques of carceral feminism are pertinent to discussions of NCIID because the present debate around and response to this issue has been ripe with calls for, and the implementation of, a criminal justice response to acts of NCIID. Anti-carceral feminist theory provides a framework for analyzing the pitfalls of NCIID criminalization and for considering the potential affordances of responses outside of the criminal justice system. This theoretical approach is especially relevant to my analysis of the efficacy of

criminal justice responses to NCIID in Chapter 6.

Due to their critical approaches to understanding the limits and impacts of law, anti-carceral feminism and critical feminist legal theory also often dovetail with intersectional feminism. In Crenshaw's (1991) widely influential piece "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", she coins the term intersectionality to describe how "the violence that many women experience is often shaped by other dimensions of their identities, such as race and class" (Crenshaw, 1992: 1242). That is, Crenshaw brings attention to the ways that those who inhabit multiple marginalized identities differently experience violence; she asserts that this can create distinct shortcomings in terms of responses to violence that do not recognize the diverse needs and experiences of victims. These shortcomings manifest in such forms as rape crisis centers that are largely focused on accompanying victims to court, without recognizing that women of color are less likely to have their cases ever make it to the court level (Crenshaw 1992), and carceral responses that do not account for the impacts of criminalization and racist criminal justice practices on communities of color (Crenshaw 1992, Razack 2005, Kim 2018). Many scholars now integrate intersectional analysis into their work on sexual violence to challenge the simplicity of a model that assumes gender is always the sole or primary explanation for this violence (Sokoloff and DuPont 2005, MacDonald, Osborne and Smith 2005, Wodda and Panfil 2018). Expanding beyond Crenshaw's main focus on the intersections of gender, class, and race, these scholars now discuss how "other forms of inequality and oppression" (e.g. heterosexism and ableism) "intersect with gender oppression" (Sokoloff and DuPont 2005, 39, Wodda and Panfil 2018).

In relation to NCIID, Hassinoff (2015) and Karaian (2012) consider how the intersectional identities (e.g. race, gender, class, and sexual orientation) of those who *consensually* share nude photos can influence the ways these subjects are extra-legally regulated (Hassinoff 2015, Karaian, 2012 and 2014). Chun and Friedland (2015) similarly provide an intersectional analysis of NCIID, considering how “the extremely limited attention in the media given to revenge porn victims who are women of color reflects the way in which the publicized subject of sexual assault has been racialized as a white woman” (Chun and Friedland 2015, 14). It is now widely accepted within critical literature on sexual violence that the intersectional identities of victims and perpetrators results in the need to trouble uniform responses to sexual violence that are based on simplistic understandings of victims’ and offenders’ identities and of the impacts of criminal justice responses. The influence of intersectional theory is woven into the entirety of my research; however, Chapter 5 is a particularly relevant section for utilizing this theoretical approach, as this Chapter unpacks the numerous ways that intersections of marginality influence a person’s experience of NCIID victimization. Additionally, this Chapter demonstrates the shortcomings in understanding NCIID that have arisen due, in part, to the lack of intersectionality in some feminist approaches to this issue.

In combination with intersectional feminism, post-modern feminist theory helps to further nuance my analysis of NCIID (Moore 2008, McHugh, Livingston and Ford 2005). This theory works in conjunction with my critical discourse analysis methodology to undertake what Moore (2008) describes as a project of disruption. Post-modern feminism disrupts mainstream feminist approaches by recognizing the complexity of power relations and asserting that women must be seen as both individuals being acted on

by power and as wielders of power that can oppress others (Moore 2008, McHugh, Livingston and Ford 2005). As Moore (2008) explains, feminists using the postmodern approach are “more inclined to start with power relations, not patriarchy, as their point of inquiry” (54). Post-modern feminist theory is beneficial for this research as, compared to mainstream feminist responses to NCIID, it allows for more nuanced understandings of the power dynamics in particular cases of NCIID. For instance, while many feminist responses to NCIID have focused on those cases involving female victims and male offenders (Aikenhead 2018, Citron and Franks, 2014, May 2016, Fairbairn, 2015, McGlynn, Rackley and Houghton, 2017), the postmodern feminist approach allows me to account for the complex and differing power dynamics in cases of NCIID that do not fit this typically imagined scenario. This theory also works alongside intersectional feminist analysis to help consider how experiences of NCIID and responses to NCIID differently affect individuals who inhabit various, intersecting identities. Post-modern feminist theory is especially influential in Chapter 5, in which I seek to nuance understandings of power dynamics in particular cases of NCIID and trouble the adequacy of the “paradigmatic” NCIID case. Throughout this research, I utilize post-modern feminist theory in conjunction with critical discourse analysis to map, deconstruct, and critically assess the construction of NCIID as an issue.

The final aspect of the feminist portion of my theoretical framework is sex-positive feminist theory. While a great deal of important work has been done by feminists to address sexual violence and the right to say no to unwanted sexual acts (Franke 2009), sex positive feminists understand the interlocking need to understand the right to say “yes” (Glickman 2000, Hasinoff 2015, Karaian, 2014, Friedman and Valenti 2008,

Chemaly, 2015, Khan, 2017, Wodda and Panfil 2018). Khan explains that, “although there had been sex-positive feminist rumblings at least as far back as the 1960s”, the early 1980s “ushered in the sex wars” in which sex-positive feminist theorists pushed back against the radical feminist framing of sexuality as “the preeminent stage for exploitation, misogyny and violence” (Khan, 2017, 347, Glick 2000, Wodda and Panfil 2018). Sex-positive theorists and activists sought to open up space to discuss the pleasures of sexuality and to question the “sex-as-danger truism” that, to this day, often dominates (especially legal) feminist approaches to addressing sexual violence (Khan, 2017, 351, Valverde 1985, Rubin 1999).

As Friedman and Valenti assert in the influential sex positive collection *Yes Means Yes!: Visions of Female Sexual Power and a World Without Rape*, promoting the importance of women’s pleasure should be a critical part of education about and responses to sexual violence (Friedman and Valenti 2008). This collection responds not only to the “rape myth” that “women who dare to take pleasure in their bodies and live their lives on their own terms deserve whatever they get” (Friedman and Valenti 2008), but also to the ways that some feminisms focus “solely on the ‘no means no’ model—which, while of course useful, stops short of truly envisioning how suppressing female sexual agency is a key element of rape culture, and therefore how fostering genuine female sexual autonomy is necessary in fighting back against it” (Friedman and Valenti 2008, 6). The marginalization of sex-positive feminism in some circles may be due to the perspective that there is a more urgent need to address sexual violence against women before dealing with women’s sexual pleasure (Kimmel 2005); however, sex positive feminists understand that the ability to say “no” is entangled in important ways with the

ability to say “yes” as both aspects are needed to understand that “sex is about consent and enjoyment, not violence and harm” (Filipovic, 2008, 20). Positive conceptions of sexuality are extremely important in regard to NCIID because, as discussed further in Chapter 4, the harm associated with NCIID is partially informed by ideas of sexuality as shameful and of the sexual expression of particular populations (namely women and sexual minorities) as needing to be kept private. As Chun and Friedland (2015) demonstrate, beliefs about female sexuality as private are reiterated in particularly visible ways through responses to NCIID. Taking up a sex-positive approach to responding to NCIID, they argue that, rather than striving towards the increased privatization of female sexuality, “we need to fight for the right to be vulnerable—to be in public—and not be attacked” (Chun and Friedland 2015, 17). Karaian (2014) and Hasinoff’s (2015) work likewise takes up sex-positive feminist theory to critique the ways teenage girls who consensually share nude images are responsabilized for acts of NCIID. For instance, taking up the sex positive mantra of “yes means yes”, Karaian argues that “relying on the technique of slut shaming to ensure that girls restrict their virtual mobility and/or refine their behaviours and attire (or lack thereof) undermines the challenges that all girls who sext pose to the sexual status quo, specifically the idea that they may be a desiring sexual subject who can be respectable, worthy of protection and not delegitimized by legal actors when they say ‘yes’ to sexual expression” (Karaian, 2014, 28). These sex-positive critiques of the regulation of consensual intimate image sharing are invaluable for my analysis of NCIID.

Theorizations of Digital Technology and Photography

Acts of NCIID involve various kinds of photographic and digital technology, from analog cameras (that can be used to capture nude photographs that can be processed and physically distributed) to smartphones (that can be used to both capture and distribute sexually explicit photographs and videos). Thus, theorizations of technology (Mayer-Schonberger 2009, Baym 2010, boyd 2011, Wajcman 2010) and photography (Hand 2012, Hand 2016, Sontag 2003, Venema and Lobinger 2017) offered by science and technology studies and communication studies are necessary for analyzing the nature of and responses to NCIID. Theorists in these areas offer nuanced perspectives on reactions to new technology (Baym 2010), the nature of digital memory (Mayer-Schonberger 2009, Wagman 2016), conceptions of digital privacy (Calo 2015, Chun and Friedland 2015, Hand 2012), the role of photographs in society (Battye 2014, Hand 2012, Venema and Lobinger 2017), and the affordances of digital technology (boyd 2011). My engagement with critical theorizations of technology and photography allows me to recognize how NCIID is impacted by digital technology and changing social relationships to photography in the digital age, while maintaining that digital technology has not *created* the issue of NCIID and that the role digital technology plays in these cases varies. For instance, the concept of *mutual shaping* (Baym 2010) is useful for understanding how technological affordances influence, but do not dictate, the behaviours of those involved in cases of NCIID (Bivens and Fairbairn 2015). Mutual shaping understands technology as “both a source and consequence” of broader social dynamics (Wajcman 2010, Baym 2010) and thus, for this project, allows for nuanced understandings of the relationship between NCIID and particular technologies (e.g. analog cameras, smartphones, social

media platforms). Responses to NCIID that understand the influence of technology in this way are better able to discuss what exactly is new or challenging about cases that involve digital technology; for instance (as elaborated in Chapter 2), boyd describes how digital data is unique in terms of the affordances of persistence, replicability, scalability, and searchability (boyd 2011).

These theories are also necessary to critically analyze judicial interpretations of the role of digital technology/photography in NCIID cases. For instance, judicial interpretations of the permanency of digital images or the accessibility of digitally disseminated images may impact legal reasoning and sentencing decisions (e.g. if a digitally disseminated nude image is understood as everlasting and universally accessible, this could result in a lengthier prison sentence for a NCIID offender and judicial assertions that the victim will experience unending harm). Theories of digital technology and photography provided by science and technology studies and communication studies are of most relevance to Chapter 2, in which I discuss legal perceptions of digital technology's impact on NCIID cases and the ways NCIID has evolved in relation to changing social conceptions of photography. Throughout this dissertation, theories of technology and photography are weaved together with the feminist theories described above to critically analyze socio-legal understandings of and responses to NCIID in ways that account for the diverse roles of technology in these cases and the impact of variable social understandings and uses of photographic images.

Chapter 2

Is ‘Revenge Porn’ New? : Judicial Interpretations of Digital Technology’s Impacts on Non-Consensual Intimate Image Distribution

As described in the Introduction, non-consensual intimate image distribution has increasingly become an issue of international and popular concern (Powell and Henry 2017, Yar 2013). Cases of NCIID are now frequently featured in the media, and politicians from around the world are debating potential responses to this issue. In jurisdictions such as Canada, parts of the United States, the United Kingdom, the Philippines, Israel, parts of Australia, and Japan, the growing attention to this issue has resulted in various criminal and civil law responses (Powell and Henry 2017, Farries and Sturm 2018). While the issue of NCIID pre-dates the popularization of digital technology, the increasingly widespread governmental and media attention to and legal regulation of this act have been largely spurred by cases involving *digital* sharing and have often been connected to fears about the effects of digital technology and online platforms (Hasinoff 2015, Salter and Crofts, Responding to Revenge Porn: Challenges to Online Legal Impunity 2015).

In Canada, government responses to NCIID have cast this issue as intimately related to the advent of digital technology. The Canadian government’s decision to create a specific criminal law to respond to NCIID was justified by the need to address the “dark side” of new digital technologies and this law was passed via an act named the *Protecting Canadians from Online Crime Act (The Act)* (Puzic 2015, House of Commons 41st Parliament, 2nd Session 2013). In House of Commons debates on *The Act*, NCIID was often described by government officials as fitting under the umbrella term of “cyberbullying”, with then Minister of Justice Peter MacKay describing NCIID as a

“particularly vile and invasive form of cyberbullying” (House of Commons 41st Parliament, 2nd Session 2013). This focus on the role of new technologies in NCIID has also been common in Canadian media coverage of NCIID cases, with *The Act* being commonly referred to as the “Anti-Cyberbullying Bill” and the issue of NCIID being framed as the tech-specific act of non-consensually posting intimate images *online* (Csanady 2016, Puzic 2015, Tencer 2014). These responses demonstrate the extent to which NCIID has been understood as an issue deeply related to digital technology (e.g. the ease of sharing digital information online). Considering the increasing legal regulation of this act around the world, in this Chapter I assert that it is necessary to understand how legal decision makers perceive the relationship between digital technology and NCIID, as well as to assess the impacts of various judicial perceptions of digital technology in NCIID cases.

While a cohort of scholars have begun exploring how understandings of digital technology might broadly impact the legal and extra-legal regulation of NCIID (Salter and Crofts 2015, Hasinoff 2015, Karaian 2017), scholars have yet to analyze the way digital technology is actually understood in NCIID case law and how these understandings impact judicial reasoning and sentencing in practice. Thus, in this Chapter I undertake a critical discourse analysis (Wodack 2001) of NCIID cases to map judicial interpretations of digital technology. I find that the majority of judges perceive digital technology as making NCIID easier to commit—with the simple “click of a mouse”—and as increasing the amount of harm caused by this act—as digital nude/sexually explicit photos are seen as lasting “forever” and thus as resulting in ongoing and immeasurable harm to victims. I assert that these perceptions have substantive impacts on legal

rationales and sentencing decisions, with the affordances of digital technology regularly being treated as justifying lengthier sentences to denounce and deter this act. Thus, I argue that judicial interpretations of digital technology can significantly influence the way NCIID is understood and responded to in law and, therefore, that more attention must be paid to various judicial conceptions of new technologies' impacts.

In this Chapter I draw on my analysis of 49 cases of NCIID to: map the history of pre-digital cases of NCIID; demonstrate what exactly is new about NCIID in the digital age; and analyze how legal conceptions of digital technology influence legal understandings of and responses to NCIID. My case law analysis finds that legal interpretations of digital technology significantly impact what responses are seen as appropriate in these cases. These findings spark important questions about the impacts of judicial anxieties regarding new technologies in law and about how judicial conceptions of digital memory, digital dissemination, online networks, and “cyber” harms are being taken up in social and legal attempts to regulate and punish NCIID.

A Pre-Digital History of NCIID

Despite much media and governmental discourse linking NCIID with the advent of digital technology and the dangers of the digital age (See for example: Puzic 2015, Csanady 2016, House of Commons 41st Parliament, 2nd Session 2013, Revenge Porn 2013), this act pre-dates the development and popularization of digital technology. The history of nude and sexually explicit photographs is nearly as old as the history of photography itself (Whitman 2004), however the point at which these images were first

non-consensually shared is difficult to determine²⁰. One potential beginning is an incident in 1867 that draws parallels to the 2014 “Fappening” wherein nude photographs of multiple female celebrities, such as Jennifer Lawrence, were non-consensually shared online. According to Whitman (2004), in 1867 a photographer attempted to disseminate private “amorous” photographs he had taken of *The Three Musketeers* author Alexandre Dumas posing with his mistress Adah Isaac Menken. After a legal battle over the copyright versus privacy rights related to these images, the photographer was forbade from disseminating photographs of Adah in her underwear but was allowed to share other photographs from the session showing the couple in “amorous poses”. The dissemination of these photos led to an “international scandal” for the couple (Whitman 2004, 1176). This demonstrates that issues of privacy regarding intimate images certainly predate the advent of digital technology.

While concerns about the effects of new technology on privacy have “pervaded personal photography from its inception” (Hand 2016, 11), Salter and Crofts (2015) describe the history of NCIID specifically as related to the popularization of the Polaroid camera. First on the market in 1948, the new technological affordances of the Polaroid camera—that is self-developing film that did not require professional processing—were increasingly used to easily and confidentially produce sexual images. This technology’s use as a tool in sexual life was widely known by at least the 1960s (Bonanos 2012) and by the 1970s both the Polaroid²¹ and the home video camera were known for allowing

²⁰ See Chapters 3 and 4 for a discussion of how NCIID might also be related to other, non-photograph based, forms of privacy violation (e.g. sharing a nude drawing of a person or a sexual story about a person without their consent).

²¹ Sturken holds that while the Kodak camera was marketed and understood as a tool for documenting the nuclear family, Polaroid was understood as being “about photography and parties, swinging culture, sex, and hipsters” (Sturken 2016, 100-3).

individuals to produce and share intimate photographs and videos (Salter and Crofts, 2015). Unfortunately, along with this new ability to easily and confidentially create sexual images came more opportunities to misuse these materials by non-consensually sharing, or threatening to share, them (Salter and Crofts, 2015). The beginning of the trend of celebrity “sex tape” leaks in the late 1980s—such as that experienced by Rob Lowe and Jayne Kennedy—demonstrates public knowledge of the issue of NCIID before the popularization of digital technology²² (Longstaff 2018, Salter and Crofts, 2015).

As demonstrated by the case from 1867, cases at least partially analogous to NCIID have a long legal history that predates the widespread adoption of digital technology. In modern law, NCIID has been a documented issue at least since the 1980s. The 1984 case of *Wood v Hustler Magazine Inc.* in the United States was the result of *Hustler* magazine publishing an amateur nude photograph of a woman named LaJuan Wood without her consent (Salter and Crofts, 2015). Wood’s neighbour had broken into her house, stolen private nude photos her husband had taken of her, and sent them to the magazine claiming to be Wood. Wood was awarded \$150,000 in compensatory damages based on a finding of the public disclosure of private facts (*Wood v Hustler Magazine Inc* 1984).

My case law data set finds that cases of NCIID have also existed in the Canadian legal context for much longer than is often implied by government and media responses. For instance while the case of *Doe v ND* (2016), in which Jane Doe’s ex-boyfriend non-consensually posted a sexually explicit video of her on a pornography site, is widely heralded as the first Canadian civil suit against an act of NCIID (Csanady 2016, *Doe v ND* 2016), the 1993 case of *Larose v Yavis* predates *Doe* by 23 years. In *Larose v Yavis*

²² See Gareth Longstaff (2018) for additional information on the history of the celebrity sex tape.

the defendant posted nude photographs of his ex-girlfriend in public washrooms along with her telephone number and statements implying she would exchange sexual acts for cocaine. This case resulted in an affirmative finding of defamation and violation of privacy and the plaintiff was awarded \$132,539 in damages (*LaRose v Yavis* 1993). While the defence in *Doe v ND* argued that the precedent-setting nature of the case could create a “new and dangerous area of tort law with respect to an invasion of privacy in the new electronic era of ‘sexting’” (Csanady 2016), the case of *Larose v Yavis* demonstrates that there *is* precedent for civil responses to NCIID. The ruling in *Doe v ND* of \$141,708.03 in damages was set aside after the defence successfully argued that, because the defendant was not represented in the original trial, a new trial was necessary due to the “precedent-setting” nature of the case (Porter 2016). This finding demonstrates how the construction of NCIID as an issue specific to the digital age can have important effects on the legal reasoning in and responses to these cases.

Other early Canadian cases dealing with NCIID include the 1993 case of *Milton v Savinkoff* wherein the plaintiff alleged that, after accidentally leaving a topless vacation photo of herself in an acquaintances jacket she was borrowing, the acquaintance refused to return the photo and showed it to one of their mutual friends (*Milton v Savinkoff* 1993). The criminal case of *R v Lepore* (2001) demonstrates another example of a case of NCIID that did not involve the use of digital technology. *R v Lepore* describes a violent domestic relationship between the victim and Mr. Lepore that included Mr. Lepore distributing a sex tape the couple consensually made together in 1997. Mr. Lepore distributed the VHS tapes by placing them in the mailboxes of at least 10 of the victim’s neighbours along with a note providing the victim’s home and work numbers and

suggesting that she could be reached to provide sexual favours (R v Lepore 2001). Additionally, although the 1994 case of *R v JT* is based on charges of assault unrelated to the act of NCIID²³, the facts of this case describe JT committing two acts of NCIID due to being angry with the victim and wanting to control and punish her. In the first instance he gave a nude photograph of her to a person near her work that she saw daily and in the second instance he left nude photographs outside of her friend's apartment (R v JT 1994).

Additional evidence of the potential extent of NCIID prior to its widespread online presence is demonstrated by the existence of multiple cases where, although images were not actually *distributed*, the threat of distribution was made. For example, in the 1988 case of *R. v. Guerrero* the complainant testified that she only agreed to have sex with the accused because he threatened to send nude photographs of her to her school if she did not (R v Guerrero 1988).²⁴ In the 1991 case of *R v DKP* a man was convicted of extortion for calling his ex-partner's brother and mother to tell them he was upset about the breakup and would disseminate nude photographs of his ex-partner if he were not given \$4000 (R v DKP 1991). These cases show that the issue of having intimate images non-consensually shared—or the threat of sharing—was one affecting individuals long before the widespread media and governmental attention to this issue.

Additionally, even in our current digital age, digital technologies are not always a main component in cases of NCIID. For instance, in the 2010 custody case of *FR v AKA* it is noted that FR distributed photocopied flyers picturing nude photographs of his ex-partner on car windshields and in mailboxes in the neighbourhood where AKA's mother

²³ As mentioned in the methodology section above, *R v JT* (1994) is not included in the dataset because the act of NCIID was not central to the case or responded to in law.

²⁴ The use of NCIID as a threat within a case of sexual violence can also be seen in the cases of *R v Davis* (1999) and *R v S* (2004).

lived (*FR v AKA* 2010). Such examples demonstrate that NCIID not only pre-dates the digital age, but that the role digital technology plays in contemporary cases also remains variable.

Law, New Technologies, & Techno panics

It is important to understand the consequences of various interpretations of new technologies in law because, as discussed further below, interpretations may be used to support either more carceral or more lenient responses to offences involving new technologies. A focus on technology as creating *new* dangers and crimes can illicit panicked social and legal reactions that argue for new, tougher regulations to respond to the seemingly novel and daunting dangers of a given technology. That is, offences involving new technology often inspire moral panics (Baym 2010). Moral panic type responses to new technology, or what can be called a *techno panic* (Thierer 2012, Herrman 2017), rely on the age-old tendency to fear new technologies and to blame them for social issues (Baym 2010, Bluett-Boyd, et al. 2013, Hasinoff 2015).

While new technologies often aggravate or modify pre-existing issues in ways that must be accounted for, it is uncommon that they actually create wholly new concerns and offences (Ellison and Akdeniz 1998, Yar 2013, Baym 2010). Those working at the intersection of law and technology have warned that legal actors must be careful to avoid techno panic type responses. Legal actors mustn't become so focused on the role of new technology in an offence that they respond in ways that misconstrue or overblow the nature of the harm caused and the extent to which the issue is new and in need of a novel regulatory response (Calo 2015). The above history of NCIID demonstrates that digital

technology has not *created* the issue of NCIID and that the role digital technologies play in these cases varies. Thus developing a nuanced view of the variable role that digital technology plays in these cases is necessary.

The potential for the presence of digital technologies to influence legal reasoning and responses can be seen in a number of NCIID cases. In a 2006 case of “cyber stalking”²⁵ that included an act of NCIID, the Judge asserted that “a penitentiary term is very possible, particularly with resort to electronic devices where the harassment and the harm far exceeds, or at least is a whole new dimension to [...] harassment” (R v Barnes 2006, para 35). Likewise, in a 2004 case in which the offender secretly posted nude images of his girlfriend online, the Judge reasons that a harsher sentence—of six months imprisonment and two years probation—is required to communicate the message that “we had better pay some respect here to these computers that we’re dealing with” (R v MK 2004, para 8). As these comments demonstrate, interpretations of the role of digital technology can have substantive effects on legal responses to cases. This highlights the need to analyze how digital technology is being understood and wielded in law. In the following section I map legal interpretations of the impact of digital technology in NCIID cases and trouble common legal understandings of digital technology’s impact on NCIID.

Digital Technology’s Impact

While acts of NCIID have not—and do not—always involve the use of digital technology, the advent of digital technology has changed and amplified this issue in notable ways.

The frequency and notoriety of NCIID has surely increased in recent years. Websites

²⁵ The Judge in this case referred to Barnes’ offences as ‘cyber stalking’. The actual charge laid was criminal harassment. Mr. Barnes was found guilty of criminal harassment and received a sentence of 12 months imprisonment and 3 years probation.

devoted to the posting of non-consensual intimate images (e.g. Hunter Moore's 2010 creation of isanyoneup.com) and the trend of non-consensually posting intimate images on pornography sites (Tsoulis-Reay 2013, Bates 2017) led to the 2010 coining of the term "revenge porn" to describe cases of NCIID (Tsoulis-Reay 2013). The increasing ubiquity of cases of NCIID has been influenced at least in part by the affordances of digital technologies that make it much easier to create, copy, and share images (boyd 2011). While the issue of NCIID is not new and specific to the digital age, the particular features of digital technology in conjunction with online/networked technologies have certainly affected—at least—the ease and scope of many cases of non-consensual sharing.

boyd (2011) details how the affordances of digital technology—in conjunction with the affordances of online and networked technology (e.g. social media) that digital technology make possible—allow digital information to be: easily copied (replicability); easily shared with large audiences (scalability); easily recorded and archived (persistence); and easily accessed by others and found in the future (searchability) (45). In the context of NCIID, replicability and scalability have increased the ease with which an act of NCIID can be committed and the ease with which a nude/sexual image can be spread to a large audience. Additionally, persistence and searchability have increased/extended the impact of this act in some cases by allowing nude/sexual images to be more easily found by others and to potentially reemerge and affect a victim in the future. In this section I will describe how these effects of digital technology are understood in the cases I examined.

My analysis of 49 legal cases from across Canada found that the affordances of digital technology were seen as having significant impacts on the nature of NCIID. The

main impacts discussed in the case law reflect the impacts of scalability, replicability, persistence, and searchability described by boyd. In general, digital technology was seen as making NCIID easier to commit (via replicability and scalability) and as increasing/extending the harm caused by NCIID (via scalability, persistence, and searchability). I find that the role digital technology is seen as playing in a case of NCIID often influences legal interpretations of the level of harm caused and the extent to which general and specific deterrence²⁶ needs to be emphasized. Thus, interpretations of digital technology regularly influence sentencing decisions in cases of NCIID. While recognition of the impact of digital technology in these cases is necessary, I demonstrate that legal interpretations of these impacts need to be further nuanced and that the affects various interpretations of digital technology can have on legal responses to NCIID need to be recognized.

Digital Dissemination: Scalability & Replicability

In response to a case of NCIID, Canadian criminal lawyer Deanne Gaffar commented: “in this day and age, with Internet and digital images which can be shared in a millisecond, you lose control over [nude images] if you're placing the trust in someone else” (Zeidler 2014). This quote implies that the affordances of digital technology make NCIID a bigger threat as it is easier to commit and thus more likely to occur. The ability to copy and disseminate *non-digital* nude or sexual images is limited at least in part by the time and effort required to make copies and to physically share them. For instance,

²⁶ Specific deterrence is focused on punishing the individual involved in the case in a way that will deter them from committing future criminal acts, while general deterrence aims to send a message about how such acts will be punished that effectively deters individuals in the community at large from committing the same act (Cohen 1981).

when ‘sex tapes’ were recorded on VHS, an act of NCIID might require accessing two VHS players and blank tapes and then individually recording each copy. And disseminating these copies would require, for instance, driving to a victim’s neighbourhood to distribute the videos door-to-door. The video could only be further spread by physically sharing the tape with other individuals; As *Ebony* magazine simply put it, before the Internet and digital technology videos and photographs had to be physically “passed from perv to perv” (Kennedy v Johnson Publishing 2014). On the other hand, digital images are made of binary digits that allow information to be quickly shared with unprecedented ease and on an unprecedented scale (Hand 2012, boyd 2011). Although NCIID is not a new phenomenon, in the digital age a wider distribution of nude/sexual images (to a victim’s family, friends, and coworkers) can now be accomplished with a few clicks on a digital device (e.g. by posting an image on social media).

Digital technology is designed with the assumption that users want their information shared and thus “the design encourages the widespread distribution of content” (Hasinoff 2015, 147). This has led some scholars to refer to digital technology as being “promiscuous” and “slutty” (Calo 2015, Chun and Friedland 2015). This promiscuous digital technology works in tandem with the equally “promiscuous” Internet to allow people from around the world to easily and cheaply access information (Calo 2015). The affordances of digital replicability and scalability “challenge people’s sense of control” by allowing for almost instant sharing to multiple people or to publicly available websites (boyd 2011, 49). As a Winnipeg Police officer recently commented, “we all know as soon as you’ve uploaded an image that it can be shared hundreds of times within

minutes” (Police Arrest 2017). Likewise, in the House of Commons debates on “cyberbullying” in November of 2013, Peter MacKay described digital technologies as making intimate images “difficult to control” and as increasing the “speed and the scope in which statements and images can be made and shared with many others” (House of Commons 41st Parliament, 2nd Session 2013). These alterations to scalability and replicability are now being grappled with by victims of NCIID and by the government and legal officials who are attempting to respond to this issue.

In the Canadian case law, judges commonly expressed the belief that acts of NCIID have been made easier to commit and more impactful due to the fact that digital images are easier to copy (e.g. replicability) and to widely share (e.g. scalability). In terms of the ease of replicability, multiple judges refer to the ability of offenders to create impactful privacy violations through the simple click of a mouse. Judges express that “*with the single click of a mouse*, information can be circulated instantly and globally” (R v DaSilva 2011, para 33, emphasis added) and that “in this case *the instant click of a mouse* circulated harmful and damaging material” (R v Fader 2014, para 25, emphasis added). These cases hold that online forms of NCIID “can be particularly harmful because the content can be spread widely [and] quickly” (R v NG & GG 2015).

While the ease of the “click of a mouse” could be used to argue that offenders should receive more lenient sentences due to a lower level of intent/planning (as I discuss in relation to *R v Warrington* and *R v Zhou* below), many judges argue that the ease of digital sharing requires a harsher response to act as a deterrent to others who wish to commit this easy offence. For example, in *R v DaSilva* (2011) the judge explains that a strong sentence is necessary to act as a general deterrent to the “increasingly common”

use of new technologies in the commission of crime:

With the single click of a mouse, information can be circulated instantly and globally and once circulated, the ability to undue any harm caused, is very limited [...] Given the common use of social networking sites and their potential for enormous harm, general deterrence plays a significant principle in this sentencing. A clear message to all users of social networking sites is a valuable sentencing objective in this case (para 33-35).

In this case, a sentence of six months of incarceration is justified, in part, by the need to emphasize general deterrence due to the ease with which this act can be committed. Likewise, as part of the reasoning for a sentence of 2 years incarceration in *R v Fader* (2014)²⁷, the Judge argues that it is necessary for the court to emphasize not only specific deterrence but also general deterrence due to the fact that “harmful and damaging material” can be circulated with “the instant click of a mouse” (para 25). The judge asserts that this sentence will provide general deterrence as it will “get [...] the word out that if people send sexually explicit photos and videos out into the stratosphere, periods of imprisonment are likely” (*R v Fader* 2014, para 25-26).²⁸

The legal rationale of “just one click” that I’ve identified in cases of NCIID can also be found in child pornography case law. Some legal scholars argue that the ability to “gather hundreds of [child pornography] images with the click of a mouse” problematizes assessments of offender blameworthiness that are based on the quantity of images

²⁷ Other considerations include the fact that Mr. Fader had committed an act of NCIID against a previous partner in *R v Fader* (2009) and the fact that this act was carried out in the context of ongoing acts of domestic abuse.

²⁸ Under Canadian sentencing principles the use of general deterrence is not allowed in youth cases. Therefore this specific finding would only apply in adult cases, though it may manifest in other—less explicit—ways within youth court cases as well.

downloaded (Rogers 2013, 1023). They assert that the ease of accessing large amounts of digital child pornography results in the need for “a more nuanced approach that focuses on case specifics [...as a] measure of harm” (Rogers 2013, 1027). However, in practice, the ease of digital downloading and dissemination is often used to support harsher punishments in child pornography cases (Rogers 2013). Despite attempts by defence lawyers to use “one click” as a defence—as in *R v CWF* (2006) wherein the defence argued that “vast quantities of material can be downloaded and saved with one mouse click” (*R v CWF* 2006, para 10)—the ease of download and dissemination is commonly used as an argument for harsher sentences in Canadian child pornography case law (See: *R v TLB* 2007 and *R v Moen* 2006). While possession of child pornography was much more difficult to commit in the pre-digital age—requiring concerted intention, effort and funds to locate, purchase, and receive pricey magazines, photographs and videos—the ability for “anyone [to] obtain it *at the click of the internet search engine*” is often used to argue for harsher sentences to send “a strongly punitive and deterrent message” (*R v Moen* 2006). It seems that, in both child pornography case law and in NCIID case law, the perceived increase in ease caused by “one click” digital affordances often wins out over an interpretation of “one click” as diminishing the need for forethought and thus as lowering offender culpability. Thus, harsher sentences aimed at general deterrence are often utilized to combat user-friendly digital devices that are perceived as making it all too easy to share private images. Additionally, it is possible that “techno panic” type thinking influences these harsher responses as the presence of digital technology in these cases could make them appear more dangerous in all cases—rather than considering the nuanced role of digital technology in these cases—and make the harms of image sharing

appear novel and in need of an enhanced reaction. The legal discourse certainly represents a widespread argument that the harms of NCIID have increased due to the affordances of digital technology.

While the above examples show interpretations of the ease of digital sharing as requiring longer sentences to act as a general deterrent, there is still the potential for the user-friendly and tempting qualities of digital devices to support more lenient sentences. For instance, in *R v Warrington* (2013), Mr. Warrington's court ordered apology letter seems to use the concept of "one click" to partially redeem his actions by placing some of the blame on the affordances of digital and networked technology. Mr. Warrington, who disseminated images on social media of an alleged sexual assault that took place at a rave in British Columbia (See: Stueck 2013), wrote in part:

To think that just the *thoughtless push of a button* could change so many outcomes is hard to believe and yet so easily overlooked until the consequences surface. As I am sure you are well aware, our generation has become so reliant on social media [...]. I am sorry to say that I was one of those people, so dependent on this window into other people's lives that I did not realize *the power it held* until it was used irresponsibly. It was *all too easy to upload and share* something that wasn't mine to share. *Just a few clicks* and it changed your life and how the world viewed the person you are. That *ease of access* is not something to be taken as lightly as so many do and I hope that they are able see that from what has happened here (Port Coquitlam Provincial Court 2013, emphasis added).

The technology-focused view of NCIID that Mr. Warrington describes allows the affordances of technology to partially take the blame in this case. He describes the

technology as extremely easy to use, thus allowing him to share the images without actually *thinking* about it—it was just the “thoughtless push of a button”. We might call this the “just one click” defense. This defense deflects blame from the offender by relying on a perspective of technological determinism that sees new technologies as “causal agents” that act on individuals in ways they have “little power to resist” (Baym 2010, 24).

The case of *R v Zhou* (2016) demonstrates both the potential and limits of the “one click” defense when the Judge rejects the idea that Zhou’s actions were a quick mistake:

Thought and planning went into posting the photos. Mr. Zhou would have to have chosen which photos he would post, think about the comment he would post them with, and according to the agreed statement of facts, he checked the comments of the viewers with some frequency. This was not a momentary lapse of judgment or a thoughtless one-time mistake. It was a continuing offence. For all of these reasons, I would rate the degree of responsibility of the offender as high (para 25-27).

The reasons for sentencing in *Zhou* demonstrate that while this particular offence was seen as requiring notable planning and revisiting, cases where the posting was more akin to “a momentary lapse of judgment or a thoughtless one-time mistake” (e.g. the few clicks required to share a single image to Instagram without any comment and without returning to check for comments) could be treated with more leniency due to understandings of the ease of posting.

This potential for leniency due to the ease of digital copying and sharing is arguably supported by conceptions of digital technology as implicitly “leaky” or

“promiscuous” (Calo 2015, Chun and Friedland 2015). For instance, this conception of technology has been used by police and lawyers to assert that there is regularly a high level of risk associated with sending images in the digital age (Zeidler 2014, Csanady 2016, Alex 2017). For instance, the Thunder Bay Police Service recently published a “reminder” to individuals that “anytime they send nude images of themselves to other people there is always a risk of the photo being uploaded to file sharing sites or social media pages without their consent” (Alex 2017). Likewise, the defence in the case of *Doe v ND* (2016) argued that the monetary award to Jane Doe was too high considering that Doe sent the intimate video knowing that “there [was] always the risk of it becoming public” (Csanady 2016). These responses may imply that sexual images are likely to be disseminated—or that victims should have at least realized the risk²⁹—and therefore that offenders’ blameworthiness is diminished. Legal interpretations of the affordance of digital replicability can have significant impacts on understandings of offender culpability as they influence the level of intent attributed to offenders.

In addition to considering the ease of digital copying, judges also weighed the level of digital dissemination (scalability) when justifying sentencing decisions and determining the gravity of an offence. For example, in *R v PSD* (2016), the fact that digital images were forwarded to two friends—rather than posted publicly online—was seen as diminishing the gravity of the offence. In *R v PSD* (2016) the judge argues that the difference in dissemination between this case and a case such as *R v Zhou* (2016)—wherein intimate images were posted on a pornography site and viewed a recorded 1,333 times—is significant:

²⁹ It is important to note that these responses often do not account for the fact that not all images in NCIID cases are created consensually at the outset. Some cases involve images that were taken surreptitiously or received through coercion.

In the end, I conclude that, while the gravity of the offence in general is significant, the circumstances of this particular case are less egregious than, for example, a case [...] resulting in a transmission of identifiable intimate images widely distributed on the internet. The sentence must be proportionate to those considerations. (para 15)

Likewise, in *R v AC* (2017)—wherein a woman’s nude photos were sent via private Instagram message to her employer and to several friends from her university—the Judge notes “the absence of circumstances that would be even more aggravating. Mr. A.C. posted the photographs once only. He circulated them amongst a rather small number of people” (para 85). In this case, the Judge’s perspective on limited digital dissemination contributes to his decision that imprisonment is not required and that the offender should be given a conditional discharge. However, while the Judge in this case understands the affordances of digital and networked technology in a way that leads to his perception that these photos were not widely shared, the victim perceived that Mr. A.C. “has shared my body with [the] entire world. Friends, colleagues, classmates, people who I interact with and see every day of my life” (*R v AC* 2017, para 51). These different interpretations of the scalability of digital images shared via Instagram message shows the impact that comes from various understandings of digital distribution.

In both *R v PSD* and *R v AC* the fact that images were sent to a select few people was seen as making the offences less egregious, however these interpretations do not fully account for the ways these images could still be saved on various devices and archives—and therefore be at risk for a later leak. Due to the ease of spreading and the fact that digital images are easily saved and shared in the future, an image that is shared

with even just one person has the potential to be disseminated or leaked in the future. The judge in *R v Greene* (2018) takes this fact into account saying that, while Mr. Greene did not widely share the images by posting them online, “when Mr. Greene sent the video to X’s friend, he no longer had any control over where it subsequently went. This increases his level of moral responsibility” (para 65).³⁰ These varying perspectives on the potential spread of a digital image complicate legal rationales and sentencing decisions influenced by the extent an image has been shared.

The leaky nature of digital images and digital devices creates questions about whether or not we think the law should account for the *potential leak* and for the *potential harm* to the victim in the future (these questions will be discussed further in the subsection on digital memory). The importance of these questions becomes even more pronounced in light of the fact that conceptions of digital spread were even considered as an aggravating factor in a case where images were not *actually* shared. In a 2017 case in Newfoundland, Kyle Hunt threatened to share intimate photos of his ex-girlfriend on Facebook after she broke up with him. The Judge in this case asserted that a strong sentence was required due to the fact that “a present day threat to release intimate photographs through social media sites allows for the dissemination of such photographs on a worldwide basis” and because “technology also makes it impossible for the victim to limit circulation or to retrieve the photographs. This modern day form of extortion is much different and more serious than older forms of extortion. The sentencing for such offences must reflect the changes in the sharing of information and the impact upon victims” (Man Jailed 2017). Although the Crown requested a six-month prison sentence,

³⁰ Mr. Greene received a sentence of 5 months imprisonment for the Canadian Criminal Code s.162.1 charge of disseminating an intimate image without consent.

the Judge imposed a nine-month sentence due to this interpretation of the seriousness of digital spread and of crimes involving new technologies. Thus, various interpretations of digital spread—and of the related dangers of new technologies—can have significant impacts on sentencing decisions.

The responses in *R v PSD* and *R v AC* also do not fully account for the potential greater impact of having nude photos shared with a few people that you see everyday versus hundreds of people that you may never meet. As the victim in *R v AC* (2017) put it, her image was not just seen by a few random people, but by “people who I interact with and see every day of my life” (para 51). The case of *R v MR* (2017) provides a salient example of the fact that the extent of an image’s dissemination may not be the most important factor for determining the extent of harm caused or the malicious intent of the offender. In *R v MR* the images were only shared with the victims’ family members (via email) and were not posted publically online; However, due to the fact that the victim came from a very traditional religious family, the limited sharing of these images had—what the Judge describes as—an “immeasurable” impact on both the victim and her family (*R v MR* 2017, np). Thus, judges must be careful when basing the impact of a given case of image sharing on the level of digital dissemination involved. The impact of a digital image shared with a few people known to the victim will not necessarily cause less harm than an image shared with hundreds of people on a pornography site³¹.

While the affordances of digital technology make images easier to widely share, it is also necessary to nuance discussions of exactly how much this changes the impact of NCIID and the nature of dissemination in particular cases. For instance, the case of *R v*

³¹ A more general discussion of the variables impacting levels of harm in cases of NCIID will be available in my forthcoming work on legal conceptions of harm in these cases.

Agoston (2017) involves a digital image, but the spread in this case is very limited. In *Agoston* the image is viewed by two people who are shown the image on Mr. Agoston's cellphone, but the image is never digitally copied or disseminated. On the other hand, the spread of pre-digital images was sometimes quite widespread. For example in a case described above images were posted in public washrooms and in another flyers were distributed throughout a neighbourhood (*LaRose v Yavis* 1993, *FR v AKA* 2010). The difference here between showing an image and then having it returned to you versus publishing or displaying an image to a wider audience is therefore not one that is determined by the presence of digital technology in a case. While the affordances of digital technology can allow images to be shared more easily and widely, the substantive impact of these affordances is highly case specific and requires a nuanced understanding of digital technology and particular online platforms to determine.

Digital Memory: Persistence & Searchability

The effects that the affordances of digital technology have had on the persistence and searchability of information have been at the forefront of popular understandings of NCIID in the digital age, as NCIID is now seen as having potentially life-long reputational impacts (Bailey 2015, Hasinoff 2015, Dodge 2016). For instance, during a discussion about 'revenge porn' on MSNBC, one of the hosts begins by asking "how long will it be before we learn that, in this day and age, anything you do in your digital life is forever?" (Revenge Porn 2013). The huge capacity for digital storage and the ease with which digital archives can be searched change both what and how we remember in the digital age. Hand asserts that the affordances of online digital archives are "reshaping

individual and collective memories” as they allow “previous thoughts, words, images, and deeds [to] be recalled, reworked, and reflected upon again” (Hand 2016, 270).

The impact of these changes to memory in the digital age is further amplified by a changing relationship to photographs. Digital camera technology has become incredibly ubiquitous and the widespread inclusion of cameras as part of smartphones means that for many of us our cameras are always with us (Battye 2014). As a result of smartphones and social media sites that allow (and encourage) users to share photos, both photo creation and sharing have become an extremely common and frequent activity for many people (Hand 2016, Sturken 2016). The fact that 350 million photos are uploaded to Facebook per day demonstrates both the ubiquity of digital photo-sharing and the ways that photography has become “networked” as photographs are now regularly created for the purpose of visual communication rather than for memory preservation purposes (Venema and Lobinger 2017, Hand 2012). Where once most photos were shown to only a few friends and family members, photos now easily circulate on social media platforms, websites, and via text and instant message (Battye 2014). While the move towards “the structuring of life to create photographable moments” has been underway at least since the introduction of the “Kodak moment”, the social media focus on documenting and communicating our lives through pictures has increased the ubiquity of photography in unprecedented ways (Sturken 2016, 100). While Sontag once wrote that “photographs are fragile objects, easily torn or mislaid” (Sontag 2003, 174), digital photographs are now seen as excessively persistent.

The affordances of digital memory create an environment in which non-consensually shared images have come to be seen by many victims as a permanent blow

to their reputation³² (Bailey 2015, Chun and Friedland 2015, Langlois and Slane 2017). For instance, young women now commonly report fears that the sharing of an “inappropriate” sexualized image “could expose them to permanent reputational harm and social ruin” (Bailey 2015, 29). And these fears are encouraged by police and child protection agencies that advance this claim as a scare-tactic to dissuade youth from both consensual and non-consensual intimate image sharing (Karaian 2014, McGovern et al. 2016). Scholars also express concerns that digital memory increases the impact of NCIID, such as Bates’ assertion that “once a photo is posted online, it is challenging to completely remove from the Internet, which means the harm is continuous and long lasting” (Bates 2017, 23, Bailey 2015, Hasinoff 2015). The ability to manage our identities and reputations is an old issue that is reinvigorated by the digital age wherein online profiles are curated to represent our identities and information about who we are and what we’ve done can be saved and searched for online (boyd 2011, Handyside and Ringrose 2017, Wagman 2016, Langlois and Slane 2017).

While we often think of the act of forgetting something as negative and remembering as positive, in the digital age we hear expressions of nostalgic longing for forgetting (Mayer-Schonberger 2009). These dreams of deletion are spurred by fears of information—such as intimate images—returning to haunt us (Wagman 2016, Bailey 2015). This fear of a digital haunting is strengthened by the, questionably supported yet increasingly common, assertion that universities and prospective employers are regularly sleuthing online and disqualifying applicants who have had nude photos shared (How to talk about sexting 2016, Bloom 2016, McGovern et al. 2016). News articles regularly

³² See Chapters 3 and 4 for an in depth, intersectional analysis of how the harm of this act varies based on an individual’s identity and the context of an act of NCIID.

warn youth that employers and university admissions staff will look at their online presence and social media profiles and that they could “miss out on an opportunity or never achieve a goal of theirs” due to having nude photos leaked online (How to talk about sexting 2016, McGovern et al. 2016). Likewise Kitchen asserts—based on news media claims—that “victims are often unable to attend college or find a job” (Kitchen 2015, 248). The anxieties of digital memory are vividly expressed in the Victim Impact Statement included in *R v Zhou* (2016):

There was no way I could erase the images off of the computers of the people who downloaded them. There was no way I could prevent these images from surfacing in the future and destroying my career and life that I have worked so hard to build. I have never felt more violated, belittled, and vulnerable. (para 3)

In response to fears such as these, sites like reputation.com and reputationdefender.com offer to manage your online reputation as it is the “key to success in our digital world” (Wagman 2016, 116) and individuals from around the world have begun to demand—sometimes successfully—the “right to be forgotten” (Tirosh 2017). Scholarly and media discussions of digital memory often cite NCIID as the ultimate example of why we should be concerned about digital archives, affirming the digital intimate image’s role as a menace that will live on forever (Wagman 2016, How to talk about sexting 2016, Revenge Porn 2013).

The ubiquity of photography coupled with the affordances of digital memory creates anxieties that ‘the end of forgetting’ (Mayer-Schonberger 2009) might indefinitely extend the harm of having an image shared non-consensually (Dodge 2017, Bailey, A Perfect Storm 2015, Kitchen 2015). This understanding of digital memory’s

effect on NCIID is one that is commonly held in Canadian case law. Many judges assert that the harm caused by NCIID is amplified by the fact that digital images can exist and continue the violation of NCIID “forever”. In *R v Schultz* (2008) the Judge comments that the “violation of the complainant’s privacy rights may continue *indefinitely* given the nature of the Internet” (para 45, emphasis added) and in *R v W* (2014) the Judge comments that “there is the potential that the video will be circulated in the future and be available *forever*” (para 20, emphasis added). These quotes demonstrate that many judges see digital memory as increasing the harm of NCIID as the impact of the act is seen as ongoing. From this perspective, as demonstrated in *R v Korbut* (2012), the harm of NCIID can be seen as “unquantifiable” (para 17) and resulting in the need to consider not only the harm experienced thus far but also the potential harm the victim could experience in the future.

This perspective is based on understandings of digital images as difficult—or impossible—to control or delete. In *R v Korbut* (2012) the need to consider the ongoing harm caused is based on the assertion that the images are “*irretrievable* and may continue to be accessible on the internet *in perpetuity*—with the potential to revictimize the complainant at some time in the future” (para 17, emphasis added). Commenting on the inability to truly delete these photos, in *R v CNT* (2015) the Judge asserts that once an image is transmitted “its digital footprint is embedded in binary cement” (para 11). In *Doe v ND* (2016), the Judge expresses concerns that digital images are “out of the defendant’s (and the plaintiff’s – and the Court’s) control” and that there is no way to know how many times an intimate image is “viewed or downloaded or if and how many times it may have been copied onto other media storage devices (where it may remain) or

recirculate” (para 10). Likewise, the Judge in *R v Shultz* (2008)³³ comments that “the moment Mr. Schultz posted the photographs to his web page, he lost control of them and their ultimate destination” (para 119). As these cases demonstrate, digital images are widely regarded within Canadian case law as difficult to control and delete and, therefore, as possessing the potential for infinitely lasting harm.

As is the case with conceptions of “just one click” and digital spread, conceptions of digital memory are also influential in judicial reasonings and sentencing decisions. In many cases digital memory is explicitly described as an aggravating factor in determining the appropriate response to digital forms of NCIID. One Judge states that an aggravating factor in the case is the fact that the transmitted image will “forever have a potential for further transmission” (*R v PSD* 2016, para 13). Likewise, in *R v KF* (2015) it is reasoned that “the image of AK is *forever* available. Its distribution through the anonymity of the Internet is an aggravating feature” (para 7). And in *R v BH* (2016) the Judge finds that “the moral gravity of this offence requires the imposition of a denunciatory sentence which will deter others from such flagrant breaches of privacy that have *lifetime consequences*. Neither probation or a conditional sentence are appropriate in this matter, they do not reflect the proper principles of sentencing” (para 27, emphasis added).

In *Doe v ND* (2016) the influence of digital memory is taken to its extreme when the Judge argues that digital memory not only extends the harm caused, but is equivalent to multiple assaults: “[due to the] potential for the video still to be in circulation, it is appropriate to regard this as tantamount to multiple assaults on the plaintiff’s dignity” (para 57). These kinds of responses aim to punish offenders based, not only on the harm

³³ Received a sentence of 12 months incarceration followed by two years probation.

caused, but on the potential future harm that *could* be incurred in light of digital memory. *R v Agoston* (2017) demonstrates that a *lack* of perceived digital memory can likewise influence case outcomes as the Judge holds that—because images were only *shown* to others on a cellphone rather than *distributed* online—the offence “falls on the less serious end of the spectrum” because the images will not be available “forever” (para 17). Mr. Agoston thus received a sentence on the very low end of the spectrum for these cases, receiving a conditional discharge and one year probation.

The above examples demonstrate that judicial understandings of digital memory have considerable effects on assessments of offender culpability and on ideas of appropriate sentences in cases of NCIID. Thus, it is important to scrutinize how judges may take up ideas about digital memory in ways that may not always get at the nuances of digital and networked technology’s characteristics (not to mention the fact that non-digital photographs have the potential to be saved and redeployed in the future as well). For instance, in the *Agoston* case the images are seen as completely deleted from the cellphone and therefore as no longer a threat, but this does not account for the ways our “promiscuous” (Calo 2015) devices tend to archive—and sometimes leak—even those images we “delete”. On the other hand, common assertions that a digital image will exist and be accessible “forever” may overstate the potential future of an image in certain contexts, as images may eventually disappear into the increasingly vast amount of digital data available online (Hand 2016; Karaian 2016). The immortality of a digital image is often at the mercy of algorithmic digital archives and its persistence has the potential to become increasingly irrelevant—resulting in its effective “disappearance” (Hand 2016). As Hand describes, networked technology makes information “permanently accessible in

principle” but the reality is that some information remains “dormant” and is vulnerable to “decay or deletion” (Hand 2016, 271). For instance, a nude image non-consensually shared on a pornography site can quickly become like a drop in the ocean of digital nudes. While Kitchen counters this more nuanced analysis of NCIID impacts, saying that “some argue information on the internet lasts only as long as interest in it remains or someone keeps it on the web. However, although some revenge porn sites no longer exist, new ones continually appear, and the images often appear on dozens of websites” (Kitchen 2015, 250), this only accounts for a very particular “revenge porn” experience and may overstate the likelihood of an images’ presence being regularly reinstated online. While the anxiety of being unaware of an image’s future may persist, it is important to note that digital memory is not as functionally everlasting as it may feel (Karaian 2016, Hand 2016). Regardless, it is clear that various understandings of digital memory have significant impacts on cases of NCIID. While the increased harm of NCIID due to the affordances of digital memory is often treated as self-evident in both law and society, a more complex and case-specific understanding of the role of digital technology questions the adequacy of this “common sense” approach.

Conclusion

In response to the infusion of digital technology into many cases of NCIID, I have provided insight into the ways judges are grappling with the increasing need to conceptualize digital technology and its various implications for law. My examination reveals that the majority of judges see digital technology as having important impacts on the nature and effects of NCIID. Judicial interpretations of digital technology are often

used to argue: that NCIID is now easier to commit—and therefore that sentences must be harsh enough to deter others—and that the harm of NCIID has been amplified and extended—and therefore that this act requires serious civil and criminal law responses to recognize this impact and to denounce this behaviour. Thus, I have argued that interpretations of digital technology have substantive impacts on legal responses to NCIID. These findings demonstrate the need to better understand the role played by digital technology in various cases of NCIID and the ways this role is understood within law. While some scholars have expressed concern that NCIID would not be taken seriously enough in law, due to ideas about “cyber” forms of harm as less “real” (Citron and Franks, 2014, Powell and Henry, 2017, Fairbairn, 2015, Hill, 2015), the opposite seems to be true in the Canadian legal context. Legal interpretations have regularly reasoned that the presence of new technologies in these cases makes them more severe.

Recognition of the fact that these cases existed before digital technology is helpful for teasing apart the impact of digital technology on experiences of and responses to NCIID. What exactly is new about crime in the digital age—and how this should affect the regulation of misconduct related to its use—remains a hotly contested issue (Yar 2013, Calo 2015, Grabosky 2001). In this Chapter I map what is new about the crime of NCIID in the digital age and complicate some of the assumptions about how this newness should be responded to. Calo asserts that “an academic and policy-oriented community that understands at the outset what challenges a technology poses stands a better chance of fashioning a sensible theoretic, empirical, and (if indicated) regulatory agenda” (Calo 2015, 518). This advice is equally pertinent to legal practitioners who may need to take a step back from “common sense” assumptions about the effects of digital technology to

understand the nuances of its impact. While the affordances of scalability, persistence, replicability, and searchability have had important impacts on many cases of NCIID, social and legal responses to NCIID must be careful to consider the specific role of digital technology on a case-by-case basis and to scrutinize common assumptions (and fears) about the impact of digital technology. As a result of the nuanced and variable influence of digital technology in these cases, policy makers and legal practitioners should be left with questions regarding how their interpretations of digital technology may influence their understanding of and responses to cases of NCIID and to cases involving digital technology more broadly. As digital technology is increasingly a factor in a wider variety of civil and criminal cases (Yar 2013), it is necessary for policy makers and legal practitioners to possess a certain level of digital literacy. Additionally, for those dedicated to challenging punitive responses to crime (See Chapter 6), it is necessary to question the sentencing impacts of treating offences involving digital technology as easier to commit and as creating *unending* harms. Legal interpretations of digital technology have implications not only for understandings of NCIID, but also for other digitally-related crimes that might be seen as easy to commit offences resulting in harms without an expiry date.

This chapter has explored the specific impacts of digital technology on the way the issue of NCIID is framed and on how the harm of NCIID is understood. In Chapters 3 and 4 I take up a broader exploration of these discussions of framing and harm. In Chapter 3 I discuss how, in addition to framings of NCIID as a “cyber” issue, this act has also been framed as one related to issues such as gender-based violence and domestic violence. In that Chapter I map these various interpretations and analyze their impacts. In

Chapter 4 I further explain and analyze the ways that the harm of NCIID has been understood in law and society. I look at how these understandings have impacted arguments about appropriate legal responses to NCIID and I explore what it might mean to think of this harm differently or to question the assumption of harm in these cases.

Chapter 3

From Cyberbullying to Sexual Assault: The Many Social and Legal Framings of Non-Consensual Intimate Image Distribution

As described in the Introduction, NCIID has experienced an influx of attention as a result of tragic high profile cases (Dodge, 2016, Powell and Henry, 2017) and widespread anxiety regarding related concerns, such as, sexual privacy in the digital age, youths' sexual expression, sexual violence, and the “dark side” of digital technology (Ringrose, Gill, et al. 2012, Bivens and Fairbairn 2015, Karaian, 2014, Hasinoff 2015, Wodda and Panfil 2018). The concern with NCIID has grown to a fever pitch over the last decade and has resulted in myriad academic and popular framings of this act—such as the “cyberbullying” framing mentioned in Chapter 2. As society and scholarship has grappled with NCIID, it has been framed in a multitude of ways, including as an issue of: cyberbullying; child pornography; gender-based violence; sexual violence/sexual assault; domestic violence; or as a privacy violation. These widely varying frames speak to the present debate about how exactly these cases should be understood in society and, thus, responded to in law.

Demonstrating the contested understandings of this issue, Karaian (2016) discusses how the 2014 “Fappening”—wherein nude images of multiple celebrities were non-consensually shared online—was at first “predominantly described by media sources as a theft and a ‘major breach of privacy’” but was quickly reframed as a “sex crime” (np). The switch from privacy violation to sex crime is an important one, as these two framings constitute very different social and legal meanings, with sex crimes generally carrying much more social stigma. Thus, the socio-legal stakes of this issue fluctuate

considerably when various conceptions are popularized or legally entrenched. In this Chapter I unpack the various popular understandings of NCIID in law and society and interrogate their implications for how we respond to this act.

Framings of NCIID have varied from assertions that this act constitutes a *cyber* form of bullying amongst youth (Shariff and DeMartini 2015, House of Commons 41st Parliament, 2nd Session 2013) to claims that it is an increasingly pervasive form of sexual violence or even equivalent to sexual assault (Citron and Franks, 2014, Bloom 2016). In this chapter I seek to chart the popular framings of NCIID and analyze how these have been variously utilized within legal discourse. I contend that some of these framings are entirely inappropriate to apply to NCIID and, additionally, that framing NCIID in any one way misrepresents the extreme variability of these acts. Based on my discursive analysis of various social and legal framings of NCIID, I argue for a more individualized approach to these cases that recognizes how the context surrounding an act of NCIID (e.g. as part of a pattern of domestic violence versus for the purposes of “showing off” to friends) might radically change the appropriate social framing of and legal response to a given case.

The Many Socio-Legal Framings of NCIID

Cyberbullying

Although cyberbullying is regularly understood as a serious and pervasive social issue, what exactly is meant by this term is difficult to pin down (Lidsky 2012, Bailey, Time to Unpack 2014). Cyberbullying seems to most often refer broadly to any form of bullying using digital technology (e.g. bullying via text message or on social media sites) (What is

bullying 2014, MacKay 2012). Bailey's analysis of Canadian governmental debates regarding cyberbullying found that it is often understood as a more severe form of traditional bullying, due to factors such as the anonymity provided by electronic communication and the ubiquity and permanency of bullying committed through online platforms (Bailey, Time to Unpack 2014). Yet, what constitutes an act of cyberbullying remains undefined, with some definitions seemingly including all manner of "common childhood wrongdoing" that involve the use of technology (Lidsky 2012, 697). In fact, Bailey argues that Canadian governmental debates and responses to cyberbullying "reveal cyberbullying less as a problem and more as an intellectual and political juggernaut for transporting a broad range of individual and social issues, as well as political ideologies, onto the public agenda" (Bailey, Time to Unpack 2014, 664).

Despite the very loose use of the term cyberbullying, the inclusion of NCIID within this definition has been popular in political discourse, news media, education campaigns, and academia (Shariff and DeMartini 2015, Mishna, et al. 2018, Cooper 2012, Hasinoff 2015, Fairbairn, 2015). As described in Chapter 2, in the Canadian context governmental debates have habitually framed NCIID as a form of cyberbullying (House of Commons 2013, House of Commons 2014, Bailey 2014). For instance, in 2013, then Minister of Justice Peter MacKay referred to NCIID as a "contemptible form of cyberbullying" and as a "particularly vile and invasive form of cyberbullying" (House of Commons 2013). And Canadian news media regularly refer to the Bill that created Canada's NCIID law as the "Anti-Cyberbullying Bill" (Puzic 2015, Tencer 2014).

Framing NCIID as cyberbullying may be useful as a way to highlight the fact that image sharing sometimes occurs within a broader context of bullying/harassment.

However, there are a few notable issues with this framing. First, as discussed at length in Chapter 2, the inclusion of NCIID within the term *cyberbullying* wrongly implies that all cases of NCIID involve the use of digital technology and that these technologies are always an important aspect of this act. The second issue with the cyberbullying framing is that the word *bullying* tends to incorrectly imply that this issue is one only, or primarily, involving youth and “*childhood* wrongdoing” (Lidsky 2012, emphasis added). Taken together, the focus on cyberbullying as an issue involving youth and technology has often resulted in the problematic use of this term to express general fears regarding youths’ use of technology for the purpose of sexual expression (Hasinoff 2015). As Hasinoff describes, both consensual *and* non-consensual intimate image sharing among youth are regularly framed as part of a “cyberbullying epidemic” that is most often articulated through anxiety-ridden discussions about “the images that teenage girls create of themselves” (Hasinoff 2015, i, Cooper 2012, Lee and Crofts 2015). Thus, framings of NCIID as cyberbullying often result in responses that are not solely focused on addressing non-consensual sharing, but are more broadly concerned with all forms of sexual image sharing due to anxieties regarding youth sexual expression (Hasinoff 2015, Karaian 2014, Ringrose et al. 2013, Bivens and Fairbairn 2015, McGovern et al. 2016, Wodda and Panfil 2018). Inspired by these anxieties about—primarily—girls’ use of new technology for the purposes of sexual expression, responses to cyberbullying often result in legal, governmental, and educational responses that attempt to shame and discipline youth for consensual intimate image sharing (Ringrose et al., 2013; Bivens & Fairbairn, 2015; Milford in Bailey & Steeves, 2015; Karaian, 2012 and 2014; Hasinoff, 2015, Wodda and Panfil 2018). For example, “anti-cyberbullying” and “anti-sexting”

campaigns regularly responsabilize victims of NCIID for their own victimization by targeting those who consensually create and share intimate images, particularly girls, with warnings about the devastating potential consequences of consensual image sharing (See Chapters 4 and 6 for a further discussion of these trends) (Angelides 2013, Karaian, 2012 and 2014, West Coast LEAF 2014, Shariff and DeMartini 2015). As well as reiterating problematic victim-blaming rhetoric that has long been used in response to privacy and sexual violations against women and girls (Hasinoff 2015), these kinds of campaigns have been found to result in largely ineffective responses that focus on controlling youths' sexual expression and use of technology rather than promoting more effective and relevant discussions regarding privacy violations, respectful relationships, and the importance of consent (Bluett-Boyd, et al. 2013, Fairbairn, Bivens and Dawson, 2013, Angelides 2013, Dodge and Spencer, 2017).

Understandings of NCIID as a form of cyberbullying are less common within Canadian case law. References to cyberbullying appeared in six cases in my dataset, however these appearances were generally cursory, with judges only fleetingly mentioning “cyberbullying” as an example of the new dangers of digital technology (Doe v ND 2016, R v CNT 2015) or repeating the Canadian government’s framing of NCIID as cyberbullying when referring to the creation of the *Protecting Canadians from Online Crime Act* (R v Greene 2018, Verner 2017, R v CNT 2015). Notably, in one case, cyberbullying is mentioned but, contrary to the Canadian government’s framing, is treated as a separate issue to that of NCIID: In *R v Zhou* (2016) the Judge explicitly treats NCIID and cyberbullying as distinct issues saying that, while Mr. Zhou non-consensually

posted intimate images of the victim on a pornography website, “there is no evidence in this case of [...] cyberbullying” (para 35).

Although the framing of NCIID as cyberbullying was not widespread in the case law and was even rejected in *R v Zhou*, there is evidence that—like in media and political responses—there is the potential for this term to be used in a manner that evokes general fears of youths’ use of new technology for the purposes of sexual expression. In *R v CNT* (2015)—wherein 14-year-old C.N.T. is charged with child pornography offences for sending intimate images of his 14-16-year-old peers to another individual—the Judge broadly references “the dangers inherent in cyberbullying, cyberstalking, sexting, revenge porn and other similar offences against the person” (para 14). The Judge here seems to be interested in condemning several activities involving technology, including consensual sexual expression via “sexting”. He goes on to express his distaste for youth sexting saying, “‘sexting’—the term used commonly to describe sexual photo sharing, typically by means of smartphones—almost inevitably inflicts serious harm upon young people [...]” (*R v CNT* 2015, para 11). The Judge in *CNT* is arguably less concerned with the actual, very limited, distribution of intimate images in this case and more concerned with conveying broad anxieties regarding youth technology use and sexual expression. However, despite this potentially concerning framing in *CNT*, it is promising that the judges in *R v Zhou* (2014) and *R v SB et al.* (2014) regard consensual youth image sharing as “a normal part of the exploration of sexuality during puberty” (*R v Zhou* 2014, para 22) and clearly differentiate this behaviour from NCIID.

While the cyberbullying framing may be useful for contextualizing the way that NCIID is sometimes used as a tactic of bullying/harassment, this framing becomes

problematic when its potential baggage is considered. In light of Bailey’s suggestion that the term cyberbullying can act as an “intellectual and political juggernaut”, it is important to consider the ways that the cyberbullying framing can serve as a medium for expressing widespread cultural anxieties towards youth sexual expression (and thus can act as a form of victim blaming/shaming towards consensual youth sexual expression and potentially as an excuse to further regulate and surveil consensual youth sexual expression and sexuality). While it is a positive finding that this anxiety-burdened term has not broadly proliferated legal responses to cases of NCIID, this does not mean that legal responses have been free of assumptions and implicit messages regarding youth sexual expression. As elaborated in Chapter 4, while legal responses to NCIID in Canada have largely avoided blaming or shaming victims for their sexual expression, frequent legal assertions that acts of NCIID are necessarily devastating and ruinous—especially for young women—can act to reaffirm sex-negative ideas about female sexual expression as extremely shameful and risky. Setting aside these concerns about sex-negativity in law for now, it is a positive finding that the victim-responsibilizing narratives sometimes expressed in governmental and educational responses to NCIID (Karaian, 2014, Shariff and DeMartini 2015) have not been widely reproduced in Canadian law and have, at times, even been rejected.

Child Pornography

While the framing of NCIID as an issue of “cyberbullying” is potentially burdened with fears of youths’ sexual expression, the framing of this issue as one of child pornography represents an even more worrying trend. Canada’s child pornography law, at section

163.1 of the *Canadian Criminal Code*, makes it illegal to make, possess, distribute, or access photographs or video of a person under the age of 18 that depicts the person engaged in explicit sexual activity or depicts their sexual organs or anal region for a sexual purpose (Canadian Criminal Code 1985). While typically associated with addressing the sexual exploitation of children and youth by adults (Shariff and DeMartini 2015, R v Y 2015) and harms associated with “pedophilia” (R v Sharpe 2006), the law also can—and has—been used against youth who commit acts of NCIID. Demonstrating the commonality of this charge as a response to NCIID, child pornography charges were laid in 11³⁴ cases out of the 44 unique cases in the dataset for this research. As child pornography charges are highly stigmatizing and generally associated with the power imbalance of an adult offender and child victim (Dodge and Spencer, 2017, Shariff and DeMartini 2015), the application of these charges to youth who commit acts of NCIID is concerning.

While a number of scholars have expressed concern with using child pornography laws against youth who consensually share intimate images (Bailey and Hanna 2011, Angelides 2013, Hasinoff 2015, Thomas and Cauffman 2014, Karaian, 2012, McGovern et al. 2016), it is also necessary to address the applicability of this framing to those who share images without consent (Dodge and Spencer, 2017, Shariff and DeMartini 2015, Slane, 2013). While consensual image sharing amongst youth has never resulted in a child pornography conviction in Canada (though it is a technical possibility), the charge of child pornography has been used to respond to NCIID amongst youth in multiple Canadian cases. This includes two child pornography convictions in the well-known case

³⁴ As discussed further below, this includes two cases where adults were charged with child pornography in cases that meet my definition of NCIID.

of Rehtaeh Parsons, a child pornography conviction against a teenage girl in British Columbia, child pornography charges laid against nine 13 to 15-year-olds in Quebec, and child pornography convictions for a 12-year-old and 14-year-old boy in Quebec (Shariff and DeMartini 2015, Segal 2015, Kelly 2014, CBC 2018). Despite Canada's introduction of a specific criminal law to address NCIID, youth who non-consensually share intimate images of their peers continue to be charged under child pornography laws (Teens charged 2018, Hants County Teens 2016, CBC 2018, *R v X* 2016) and some educational materials and media statements by Canadian police and governmental organizations continue to frame the issue as one of child pornography (Dodge and Spencer, 2017). Child pornography charges are extremely stigmatizing and their application to youths should not be taken lightly (West Coast LEAF 2014, Shariff and DeMartini 2015). In fact, police in Canada are often apprehensive about using child pornography charges in youth cases of NCIID and, while some officers continue to charge youth with child pornography offences at times, many officers believe that these charges are far too harsh and generally inappropriate to use against youth, as they perceive the charge as having been created to respond to the high level of predation and social scorn associated with adult "sex offenders" (Dodge and Spencer, 2017).

In the case law, judicial beliefs about the appropriateness of framing NCIID as child pornography vary widely. Some judges have been uncritical in their application of child pornography charges to youth. In *R v KF* (2015) the Judge responded to a 17-year-old girl non-consensually distributing an image of a 15-year-old girl performing oral sex saying, "the public has a keen interest in ensuring that offences involving child pornography are prohibited" (para 7). Likewise, in *R v Y* (2015) the Judge asserts that it is

“immaterial that ‘Y’, 16 years old [...], is not the accused who typically comes to mind when we think of the harms associated with child pornography. The child pornography legislation is intended to protect children but not immunize them if they offend against the provisions. [...] As this case shows, even other vulnerable teens can be perpetrators” (R v Y, 2015, para 21). These judges take the cases at face value and conclude that, because nude images of those under 18 are involved, the cases fall within the definition of child pornography, despite the fact that the accused is not the person that “typically comes to mind” (i.e. an adult with undue power over the victim) in these cases.

Despite the acceptance of child pornography charges and a child pornography framing in several cases, the use of child pornography offences has also begun to be questioned in law. Most notably, a new trial has been allowed by the British Columbia Court of Appeal in the case of *R v MB* (2016) based on M.B.’s argument that her child pornography conviction was unconstitutional. Child pornography charges were laid against M.B., a teenage girl, after she sent intimate images of her boyfriend’s ex-girlfriend to the ex-girlfriend herself and to a friend as part of a series of aggressive messages between the two girls. M.B. has argued that child pornography charges are unconstitutional in her case as her actions were unrelated to “the evils associated with child pornography or to child sexual abuse” and thus that the law is grossly disproportionate or overly broad (R v MB, 2016). While the appeal court judges in M.B.’s case caution that it will be an “uphill battle” to establish a constitutional infringement in this case, they also assert that “the stigma associated with child pornography convictions is a factor that distinguishes M.B.’s constitutional challenge from other unsuccessful challenges to criminal prohibitions” (R v MB, 2016).

Additional judicial support for questioning the use of child pornography charges in these cases is demonstrated in response to a Nova Scotia youth case. Charges of child pornography against six Nova Scotian teens were dropped in favour of using charges of non-consensual intimate image distribution (at s.162.1 of the Criminal Code of Canada), and it was noted that child pornography charges were not a good fit for the case (MacIvor, 2017). Likewise, in the British Columbia case of *R v SB et al.* (2014)—wherein three 14-year-old boys exchanged and distributed intimate images of several of their female peers—Justice Dickey expresses concern that the youth offenders were originally charged with distributing child pornography. Dickey asserts that these charges, and the implied framing of child pornography, resulted in the “matter receiving widespread media attention in Kamloops, provincially, and possibly nationally” and the offenders being ostracized and harassed as a result of school rumours that they were part of a “child pornography ring” (*R v SB et al.*, 2014, para 9). In this case, the three youths chose to plead guilty to single counts of criminal harassment and the Judge comments that “it is unfortunate that the offenders were originally charged with distribution of child pornography or in any way referred to as being part of a child pornography ring. The stigmatization that comes with the use of such terms is totally disproportionate to the circumstances before me. The evidence does, however, support the charge of criminal harassment” (*R v SB et al.*, 2014, para 19-20).

Like those judges who have refused to utilize child pornography charges in cases of NCIID, I argue that there is a notable lack of congruence between this charge and acts of NCIID. Several scholars have argued that child pornography laws are inappropriate to apply to *consensual* image sharing amongst youth, because this act is not seen to reflect

the issues of child abuse and child sexual exploitation that child pornography laws were created to address (Bailey and Hanna 2011, Slane 2013, Thomas and Cauffman 2014, Shariff and DeMartini 2015, Wodda and Panfil 2018); however, there has been much less discussion regarding whether it is appropriate to apply child pornography charges to youth who share images without consent (Shariff and DeMartini 2015, Slane, 2013, Dodge and Spencer, 2017). Slane broaches this issue, asserting that the reluctance on the part of some Canadian police and Crown prosecutors to charge youth with child pornography offences, even for widespread distribution of intimate images, “seems to be seated in the sense that child pornography offences are meant to address the use of images of minors for sexual ends” (Slane, 2013, 119). Therefore, the multiple motivations of youth that share images without consent (e.g. for the purposes of bullying, harassment, or to “show off”) are out of step with this provision’s intention to punish sexual exploitation and abuse—namely that committed against children/youth by adults (Slane, 2013). From this perspective, those judges who have used child pornography laws against youth have judged cases on their face without considering that the underlying motivations of those involved diverge considerably from the motivations of sexual predation that the law was created to address.

Despite the different intentions of youth involved in NCIID, arguments for using child pornography charges could still be sustained based on the belief that “even mere possession of child pornography harms children in that it contributes to the market for child pornography (which in turn drives production involving the exploitation of children)” (Slane, 2013, 118). In the 2001 Supreme Court of Canada case of *R v Sharpe*, exceptions to the applicability of child pornography laws were made for self-created

nude/sexual images and private recordings of consensual sexual activity between youths that were found to raise “little or no risk of harm to children” (Bailey and Hanna 2011, 415); however, there is still room within this interpretation to charge youth based on the possibility of images getting into the hands of adult “sexual predators” and being used for the purpose of sexual gratification. The majority in *Sharpe* found that the purpose of prohibiting possession of child pornography was to address the risk of: exposing, and thereby normalizing, the sexual abuse of children; fuelling the fantasies of pedophiles that could lead to sexual offences against those under 18; the use of child pornography images to groom/lure those under 18; and the possibility of an increased child pornography market that supports the abuse of children (*R v Sharpe* 2001). Although Bailey and Hanna find that there is a “very uneasy fit” between consensual acts of sexting and “any risk of reducing [...] ‘defences and inhibitions’ to sexually exploiting and abusing younger children” (Bailey and Hanna, *Gendered Dimensions* 2011, 434), they assert that those who take part in non-consensual redistribution “seem[] much more directly connected with the risk that the material will be subverted for use in fuelling the pedophilic fantasies and cognitive distortions that normalize exploitation and abuse of youth and their sexuality” (Bailey and Hanna, *Gendered Dimensions* 2011, 434). However, in cases of NCIID amongst youth, the possibility of images finding their way into the hands of adult predators is often very unlikely and depends on the particular way an image is shared in a given case. Many acts of NCIID involve only dissemination amongst a few youth (with no widespread online availability), making it rather unlikely for the image to somehow make it into an online child pornography cache. For instance, in *R v MB*, described above, the image was only privately messaged to the victim herself

and to one other youth and in *R v CNT* the image was only shared with one other individual. Additionally, even though several youth were involved in a case of NCIID in Nova Scotia, the images were only shared via text messages between youths and within a private Dropbox folder involving only youth (MacIvor 2017). As discussed in Chapter 2, contrary to popular assertions, the extent to which an image proliferates online is highly case specific. Thus, in certain cases, a child pornography framing is difficult to support on the basis of a concern with potential redistribution to an adult who will use the images for the purpose of sexual exploitation. Additionally, some judges have rejected the use of these charges on the more simplistic basis that the presumed intention behind child pornography laws (i.e. to deter the sexual exploitation of children by adult “sexual predators”) is simply not related to the issue of youth who non-consensually share images of each other.

In some cases, judges have avoided charges of child pornography by applying seemingly less-stigmatizing criminal harassment charges instead (e.g. *R v Zhou* 2016, *R v SB et al.* 2014). In Canada, the avoidance of these charges should be even easier in the present day due to the existence of a specific NCIID law. Hopefully, as police and courts become more familiar with this new charge, the issue of child pornography charges and the child pornography framing of NCIID becomes one of the past. However, even if child pornography charges become less common in cases where offenders are under the age of 18, several issues remain regarding where exactly the law should draw the line between NCIID and child pornography and how to determine cases in which these charges should be avoided. For instance, those above the age of 18 may continue to be convicted of child pornography offences for non-consensually sharing images of those they have had

consensual and legal sexual relationships with; these scenarios have not been addressed in scholarship to date, but they seem to engage many of the same concerns that have been expressed in regard to charging those under 18 with child pornography offences for acts of NCIID. That is, in some cases it is questionable whether the scenario involves the power imbalance of an adult victimizing a child and the intention to sexually exploit a child: for instance the presence of an adult/child power imbalance is not clear when the offender and victim are very close in age (e.g. in *R v Zhou* wherein the victim is 17-years-old and the offender is 19) and the intention to sexually exploit may be less clear in cases, such as *R v Schultz*, wherein it appears the main intention was to punish an ex-partner for ending the relationship.

For instance, Brian Schultz was charged with (and pled guilty to) one count of transmitting child pornography stemming from photographs taken during a consensual sexual relationship he had with a 16-year-old girl when he was 20. After the complainant ended their relationship, Mr. Schultz repeatedly posted her nude image online (*R v Schultz* 2008). Although Mr. Schultz pled guilty to child pornography charges in this case, this scenario provides a challenging example for thinking through the sometimes-thin line between child pornography and NCIID. For instance, while the charges may be seen as fitting as Mr. Schultz shared the images online, and therefore these images could potentially be used to “fuel[] the fantasies of abusers and pedophiles” (*R v Schultz*, 2008, para 88), the context of attempting to punish an ex-partner for ending a (consensual and legal sexual relationship) might make this case more suited to a charge of criminal harassment or the (now available) NCIID charge. Although Mr. Schultz pled guilty to the child pornography charge, he argues at sentencing that it is inappropriate for him to be

subject to the mandatory minimum sentence of one-year imprisonment and to be placed on the national sex offender database. His lawyer asserts that “there is no evidence he is a pedophile” and that “the stigma he will have if labelled as a sex offender will be significant and that forcing him to serve a period of incarceration for at least one year in addition to this stigmatization could be devastating to him. He will be removed from a secure family and social network and thrust into prison at a young age with the label of ‘sex offender’” (R v Schultz 2008, para 73). These arguments demonstrate the stakes of a child pornography framing (e.g. highly stigmatizing and requiring a minimum sentence) and the need to consider the suitability of using child pornography charges in those cases that seem to sit on the fence between child pornography and NCIID.

The Judge in *R v Zhou* (2016)—wherein 19-year-old Mr. Zhou non-consensually posted nude photographs of his 17-year-old girlfriend on a pornography website—asserts that child pornography charges are inappropriate in this case of NCIID despite the victim being under 18-years-old and offender over 18 (R v Zhou 2016). In this case, Mr. Zhou pleads guilty to criminal harassment and the Judge expresses concern that Mr. Zhou was originally charged with possessing, accessing, and distributing child pornography. The Judge comments that “the stigma associated with child pornography exceeds any that would accompany a charge of criminal harassment or some of the other options available under the Criminal Code for criminalizing non-consensual sexting or distribution of intimate images” and that “the stigma that resulted from the original charges related to ‘child pornography’ remains and has had a significant impact on him. As one could imagine, when his colleagues became aware of these charges they were dumbfounded” (R v Zhou 2016). This sentiment, that child pornography charges are far too stigmatizing

to apply to cases of NCIID that stem from consensual and legal relationships, seems an easy extension to existing arguments that youth offenders do not possess the same intent and do not represent the level of power imbalance that child pornography charges were created to address. If the decision of whether or not to use child pornography charges is not based on the blanket belief that all intimate images of those under 18 “fuel[] the fantasies of abusers” (*R v Schultz*, 2008, para 88), something that is already clearly disagreed upon within the judiciary, then a new test to differentiate NCIID from child pornography will need to be established. While a detailed grappling with these questions would potentially lead to a broader undermining of the rationality of child pornography laws, it is at least possible for police and judges to avoid the use of child pornography laws when other options are available (e.g. criminal harassment charges or NCIID charges).

While some scholars have begun to articulate arguments regarding the inappropriateness of charging those under 18 with child pornography charges (Shariff and DeMartini 2015, Slane, 2013, Slane, 2013, Dodge and Spencer, 2017), it is equally necessary to question the use of child pornography charges in cases where offenders are above 18 but the facts do not necessarily involve a child/adult power imbalance, an intention to sexually exploit a child, and/or a potential contribution to the child pornography market. As I will discuss further below, the broader context of these cases must be considered. For instance, the details in *R v Zhou* could be understood as primarily a privacy violation, as no attempts to harass the victim were made in Mr. Zhou’s anonymous online posting, while the details in *R v Schultz* could support a domestic violence framing as his actions represent a pattern of attempting to punish the victim in

the aftermath of their breakup. Thus, it is necessary to question the appropriateness of a child pornography framing in cases where offenders are youths as well as in some cases involving adult offenders.

Sexual Violence/Assault

It has become extremely common in scholarly literature to see NCIID framed as a form of sexual violence (Powell and Henry, 2017, Bates 2017, Fairbairn, 2015, Citron and Franks, 2014, Kitchen 2015, Marwick 2017, Bloom 2016, McGlynn, Rackley and Houghton, 2017). For example, Bloom holds that NCIID “is comparable to other sexual misconduct crimes because of the nature of the wrongful act, the harm that the victim experiences, and society’s attitude towards the transgression” (Bloom 2016, 278). Rejecting other framings of NCIID, anti-revenge porn advocate Leah Juliett likewise asserts that NCIID is “not just an act of cyberbullying or cybercrime. It is a sex crime” (Ehrenkranz 2018). Similarly, the Australian Legal and Constitutional Affairs References Committee discussed NCIID as a “sex crime” (McGlynn, Rackley and Houghton, 2017, 36). The argument that NCIID should be understood as a form of sexual violence aligns with the broader feminist argument that sexual violence must be understood as a continuum that includes both physical and psychological harms (Powell and Henry, 2017, Citron and Franks, 2014, Fairbairn, 2015, Dodge, 2016)³⁵. Echoing this assertion, Citron and Franks argue that “when sexual abuse is inflicted on an individual’s physical body, it is considered rape or sexual assault. The fact that non-consensual pornography does not involve physical contact does not change the fact that it is a form of sexual abuse” (Citron

³⁵ Several offences that do not involve physical contact, such as voyeurism, are also deemed sexual offences within Canadian criminal law.

and Franks, 2014, 362). As mentioned in the Introduction, I concede that NCIID certainly fits within the broad conception of sexual violence as a continuum—with sexual violence referring broadly to coercive or non-consensual sexual acts, comments, or advances ranging from sexual harassment to sexual assault (Benoit, et al. 2014)—and that the inclusion of NCIID within this continuum provides a useful place from which to understand many aspects of and responses to this act; however, the sexual violence framing becomes potentially problematic when it is used to make the related claim that NCIID should be understood as a form of sexual assault.

While the framing of NCIID as sexual violence or as a sex crime may *imply* that NCIID is *similar* to an act of sexual assault, sometimes this claim of NCIID *as* sexual assault is made explicitly. For instance, cyber-security expert David Shipley comments that NCIID "is not sexual harassment. This is sexual exploitation. This is sexual assault using technology" (Fahmy 2017) and Anna Hartmann, a digital violence officer at the German Federation of Women's Counselling and Women's Emergency Service, asserts that "revenge porn is, above all, a form of gender-specific sexual assault" (Baden 2018). Additionally, an article in Huffington Post argues that "revenge porn is digital sexual assault and should be approached with more accurate language" (Wilson 2015). A slightly different take on this comparison can be seen in the assertion that, in cases of NCIID where an image *of* sexual assault has been shared, the image sharing "may even be thought of as a 'second assault'" (Powell and Henry, 2017, 89-90). Additionally, in Israel, NCIID laws "stipulate that those found guilty of posting such content will be prosecuted as sexual offenders, while those who are targeted will be recognized as victims of sexual assault" (Yaakov 2014). While some victims may experience NCIID

as akin to sexual assault, it is important to consider the potential outcomes of this equivalence in law and society. As with child pornography, the crime of sexual assault carries a great deal of stigma and can result in the branding of offenders as sexual predators for life. The carceral implications of treating all cases of NCIID as sexual assault or sexual violence—regardless of the broader context of the crime or the intentions of the offender—requires further analysis (Karaian, Mind Fuck 2016).

While conceptions of NCIID as sexual violence and even sexual assault are increasingly common in academic and policy responses to this issue, this framing is much less common in the case law. An exception to this rule is the Judge’s comments in *Doe v ND* (2016) (Karaian, Mind Fuck 2016). In this case, Ms. Doe’s ex-boyfriend posted a sexually explicit video of her to a pornography site with the title “college girl pleasures herself for ex boyfriends (*sic*) delight” (para 8). The Judge in *Doe* asserts that the impact on Ms. Doe is “similar[] to the impact of sexual assault”, and that a higher award for Ms. Doe is justified because “this case involves much more than an invasion of a right to informational privacy; as I have observed, in many ways it is analogous to a sexual assault” (*Doe v ND*, 2016, para 58). Comments such as these demonstrate that the social framing of NCIID as sexual assault can be taken up in law and can result in harsher punishments for NCIID (e.g. higher awards in civil cases and potentially lengthier sentences if taken up in criminal cases).

Although there are strong arguments for framing NCIID as sexual assault, in a legal context it is necessary to consider the impacts this framing could have on sentencing. The framing of NCIID as sexual abuse has been used by some “feminist-minded advocacy groups”—such as the Cyber Civil Rights Initiative (CCRI) and

EndRevengePorn.com—to push for increased criminal sanctions for acts of NCIID (Lageson, McElrath and Palmer 2018, 5); While the use of a sexual abuse/assault framing to support criminalization and more punitive responses can be seen as a victory for those victims who desire harsher criminal law responses, this framing might be somewhat inflammatory in certain cases. That is, the value-laden nature of a sexual abuse framing might bring to mind a case where the offender shared images with the specific intent to abuse the victim and wherein the victim experiences ongoing trauma as a result of image dissemination. This framing does not reflect the facts of certain cases, such as that of *R v Agoston* (2017), wherein there was seemingly no intention to abuse or assault the victim (as it is unclear that the victim would have even known an image of her vagina was shown to two of Mr. Agoston’s coworkers had it not been for the criminal charges laid when a supervisor called the police) and the harm experienced by the victim, though not detailed, may have been mitigated by the fact that the images included no identifying markers and were deleted after being shown to two individuals. While the Judge in *Agoston* gives a conditional discharge—after considering factors such as Mr. Agoston’s lack of a criminal record, expression of remorse, the fact that he did not solicit the photos, and the Judge’s opinion that the offence was “a momentary lapse in judgment by Mr. Agoston” (para 45)—the increasing commonality of a sexual assault framing may influence judges to understand all acts of NCIID as more closely related to abusive intentions and severe harms and therefore as requiring lengthy sentences to denounce and deter this act. Demonstrating this possibility, the framing of child pornography distribution as “equivalent-to-or-worse-than” physical child abuse, based on the argument that viewing child pornography is “itself a form of child sex abuse”, has helped to support

lengthy periods of incarceration for some individuals who may pose little risk of physically assaulting children³⁶ and to support mandatory minimum sentences for these acts in Canada and elsewhere (Hessick 2011). Although it is increasingly argued that all cases of NCIID should be framed as sexual abuse/violence/assault (McGlynn, Rackley and Houghton, 2017) (and the case for framing NCIID as part of the continuum of sexual violence is strong), legal responses based on this framing—especially those that make NCIID analogous to sexual assault—may be taken up in a way that implies that lengthy criminal sanctions are always necessary in these cases. Judges should continue to consider the context of particular cases and should be wary of responding to all cases as creating harms equivalent to sexual assault (see Chapter 4 for a further discussion of the range of harms experienced as a result of NCIID) and requiring deterrence and denunciation at the level of an act intended to assault or abuse.

Gender-Based Violence

Many scholars and feminist activists have also framed NCIID as a form of gender-based violence (West Coast LEAF 2014, Bailey, Sexualized Online Bullying 2014, Citron and Franks, 2014, Powell and Henry, 2017, Filipovic, ‘Revenge Porn’ is about degrading women sexually and professionally 2013, Marwick 2017, Fairbairn, 2015). This framing is based on claims that “nonconsensual pornography primarily affects women and girls” (Citron and Franks, 2014, 353, Aikenhead 2018) and that this issue is one fundamentally related to misogyny and sexism (West Coast LEAF 2014, Marwick 2017). While scholars

³⁶ Scholarship to date has not validated the assumption that child pornography viewing leads to physical child sexual abuse and existing studies making this claim are limited in their scope and speak more to a correlation rather than a causation between child pornography viewing and physical child abuse (Hessick 2011).

such as Aikenhead claim there is increasing evidence that most victims of NCIID are women and girls³⁷ (Aikenhead 2018), this justification for treating NCIID as a gender-based harm is questioned by recent studies showing that men and women may be equally likely to have images shared without consent (Henry, Powell and Flynn 2017, Lenhart, Ybarra and Price-Feeney, 2016) and one study showing that among children and youth boys are slightly more likely to have their images non-consensually shared (Steeves 2014) (See Chapter 5 for a further discussion of the gendered dynamics of NCIID). While these studies challenge the statistical basis for treating NCIID as a primarily gender-based issue, it can be argued that the nature of this act is still related to misogyny and gender inequality and is still justified on the basis that women may experience more “severe and long-term damage to reputation” (Aikenhead 2018, 124) and may be more at risk of “shaming and humiliation” than men due to double-standards regarding sexual expression and promiscuity (Shariff and DeMartini 2015). However, even this persuasive argument needs to be nuanced somewhat as—according to Henry, Powell, and Flynn’s study—women (40%) are only somewhat more likely than men (36%) to report feeling afraid for their safety as a result of having images non-consensually shared (Henry, Powell and Flynn 2017, 6).

In the case law, NCIID was not explicitly labeled as gender-based violence, but (as discussed further in Chapter 5) the gendered nature of this act was regularly referenced. In *R v Zhou* (2016)—wherein Mr. Zhou non-consensually posted nude photographs of his girlfriend onto a pornography site—Justice Ray states that “there is a disparate impact on vulnerable young females of precisely what Mr. Zhou did to the

³⁷ This finding is partially based on reports of NCIID made to police across Canada, and therefore does not account for the possibility that men, boys, and gender variant folks may be less likely to report their victimization to police for various reasons.

Complainant in this case [...], such that they merit being characterized as a vulnerable class of victims requiring the Court’s protection” (R v Zhou, 2016, np). The Judge goes on to say that the inclusion of the victim within this vulnerable class of young women results in a heightened need for general deterrence in this case (R v Zhou, 2016, np). The Judge in *R v PSD* (2016) likewise argues that cases of NCIID have “resulted in significant emotional trauma to victims” and that this has been “particularly the case where the victim is a young person and a female” (R v PSD, 2016, para 9). In the Nova Scotia youth court case of *R v CNT* (2015) the Judge asserts that “it is important to note the date of these offences: 9 November 2014. That is over a year and a half since the tragic death of Rehtaeh Parsons. In that intervening time, this province and this country underwent a transformational shift in recognizing the vulnerability of young people—*particularly females*—to trauma, psychological harm, serial victimization and predation as a result of people [...] doing precisely what C.N.T. did to his victims” (para 9, emphasis added). Finally, in *R v JS* (2018) Justice Ghosh comments on the gender dynamics in cases of NCIID saying “the offenders are almost exclusively male—their victims, often girls and women” (para 33). These cases show that many judges are concerned with articulating the gendered dynamics of this act and understand women and girls as particularly vulnerable to the exposure of their nude or sexual image.

Aikenhead (2018) sees gender-based dynamics as defining cases of NCIID, and asserts that NCIID should be understood as a form of gender-based violence within the law. She argues that while judges in Canada are presently treating cases of NCIID as a “serious criminal offence”, the discourse in early case law so far has placed “far too much emphasis on individual victims’ privacy expectations, ignoring the broader, systemic

harms of gender-based violence” (Aikenhead 2018, 119). She further argues that “the harms being framed so consistently in privacy-related terms ignores the objectification and degradation of women inherent in this behaviour and distances this crime from sexual assault and other forms of sexualized violence against women” (Aikenhead 2018, 140). Based on my case law analysis, I believe Aikenhead may overstate the legal focus on privacy and underestimate the level of gender-based analysis that influences judicial reasoning in these cases. Additionally, while Aikenhead asserts that it is necessary for the law to understand NCIID as a specifically gender-based violation, judges using this framing will need to grapple with how to recognize the role of gender-based violence without legally ingraining the sexist and sex-negative belief that women should be more ashamed of their bodies and sexuality than men (see Chapter 4 for a further discussion of this issue) and implying the misguided belief that this is a crime only (or largely) affecting women (See Chapter 5).

Framing NCIID as principally an issue impacting women/girls and motivated by misogyny may also work to invisibilize cases where, for instance, images are shared as part of homophobic³⁸ or racist harassment. An intersectional analysis of this issue is needed to account for the potentially overlapping dynamics of homophobia, transphobia, racism, ableism, and classism that can be woven into cases of NCIID. For example, NCIID could be used as a tool to humiliate queer folks or to “out” sexual minorities. Tyler Clementi’s suicide as a result of the homophobic shaming and harassment that occurred when his roommate secretly recorded him being intimate with another man

³⁸ Although some definitions of gender-based violence also account for homophobic and transphobic violence (e.g. Ringrose et al. (2012) describe the relationship between sexism and homophobia) the NCIID literature to date has largely focused specifically on the impact of NCIID on women and girls (in part because it has been thought, until recently, that the vast majority of victims are women and girls).

(Lewinsky 2015), acts as an example of the potential ways that NCIID could be used to shame and violate men/boys as well. While some journalists and scholars hold that “revenge porn does not stick to men because no one really cares” (Wilson 2015), this may not be true for those men who are part of a sexual minority or for men from traditional (e.g. sex-negative) communities or families. As discussed further in Chapter 5, emerging research has shown that, while men and women are equally as likely to be victims of NCIID, lesbian, gay, and bisexual individuals are statistically more likely to have their intimate images shared without consent (Lenhart, Ybarra and Price-Feeney, 2016, Henry, Powell and Flynn 2017), as are some racial minority groups (Lenhart, Ybarra and Price-Feeney, 2016, Henry, Powell and Flynn 2017), and those with disabilities (Henry, Powell and Flynn 2017).

Relatedly, female victims may not always experience NCIID as principally or solely an issue of gender-based violence. This is exemplified by the leak of Leslie Jones’ nude photos which were accompanied by racist comments (Cuen 2016), showing that NCIID can be used as a tool of gender-based violence and racism concurrently (Farries and Sturm 2018). As Miller describes, “slut-shaming is not only a gendered and sexualized discourse, but one that also reflects existing racialized and classed hierarchies (Bettie 2003; Wilkins 2008; Wilkins and Miller, forthcoming). These hierarchies are reinforced through a history of ‘controlling images’ that position white, middle-class women as sexually ‘pure’ in comparison to low-income whites and women of color (Collins 1990)” (Miller 2016, 725, Farries and Sturm 2018). Supporting this intersectional approach, Langlois and Slane’s analysis of posts on “revenge porn” sites shows that, for women of colour, racist comments as well as slut-shaming comments

often accompany the non-consensual posting of their image (Langlois and Slane 2017). Unfortunately, as discussed further in Chapter 5, my study's focus on legal cases results in a somewhat limited ability to address many of the intersections of marginality that may impact cases of NCIID (as the case law rarely described victims' identities beyond their gender and age), thus it is important to balance conclusions regarding victims and victimization based on case law with the findings of less cite-specific studies that have shown the relevance of factors beyond gender.

While gender-based violence plays an important role in many cases of NCIID, this framing may not account for the fact that those with disabilities, Indigenous peoples, and sexual minorities reportedly experience NCIID at much higher rates than the general population (Henry, Powell and Flynn 2017). Sexual minorities and those who practice non-normative forms of sexuality and sexual expression are likely also exposed to a higher level of risk when their images are shared. For instance, we know that youth commonly report that much bullying and harassment at their schools is based in homophobia as well as sexism and that, while girls are bullied for "hooking up too much", boys are also bullied for not hooking up enough or for appearing gay (Bailey, *A Perfect Storm* 2015, 33). Finally, a gender-based violence framing may also imply that offenders in these cases are always men or boys when, especially in youth cases, there are reports that it is common for young women to use NCIID as a way to slut-shame each other (Miller 2016) and three cases in my dataset include a female victim *and* perpetrator.

As a result of the work of intersectional feminism (Crenshaw 1991), many scholars now integrate intersectional analysis into their work on violence and marginalization to challenge the simplicity of a model that assumes gender is always the

sole or primary explanation for harm (Sokoloff and DuPont 2005, Halley 2006). The numerous ways that intersections of marginality influence a person's likelihood of victimization and experience of the harm of NCIID may be oversimplified or misconstrued by a legal response focused on a generalized gender-based violence framing. While the framing of gender-based violence may be appropriate for certain cases of NCIID, the insistence that NCIID be principally understood as a form of gender-based violence within society and law may limit who can claim to be a victim of NCIID and what cases receive social and legal attention. Additionally, as I detail in Chapter 4, the assumption that NCIID is always an extremely harmful and ruinous act for women in particular reasserts problematic stereotypes about women's worth being intimately tied to their "sexual purity" (Chun and Friedland 2015, Karaian, Mind Fuck 2016). As I argue in Chapter 4, we may not want our legal rationales to continue to be based on the idea that women's nudity and sexual expression is inherently ruinous when exposed.

Domestic Violence

In domestic violence scholarship, NCIID is often understood as one of the many ways that domestic abusers have begun using digital technology to stalk, control, or punish victims (Stonard, et al. 2017, 2102, Dragiewicz, et al. 2018, Woodlock 2017). Domestic violence (i.e. intimate partner violence) can be defined as a pattern of "physical, sexual, or psychological harm by a current or former partner or spouse" (Violence Prevention 2018). Academics and activists are increasingly framing NCIID as a form of domestic violence (Salter, Crofts and Lee, Beyond Criminalisation 2013, Dragiewicz, et al. 2018, Powell and Henry, 2017, Citron and Franks, 2014, Conger 2018, Woodlock 2017); in this

framing, NCIID is understood as an increasingly common tool to commit the longstanding abuse tactic of using rumors and sexual shaming to isolate, control, threaten, and punish intimate partners (Henry, Powell and Flynn 2017, Citron and Franks, 2014, Salter, Crofts and Lee 2013). Because intimate images can be posted on victims' online profiles or distributed along with personal details (e.g. name, phone number, address, social media profiles, or place of work), these images can be weaponized by abusers for the purposes of humiliation or coercion (Langlois and Slane 2017, 120). For instance, nude images (accompanied by defamatory remarks and sexual rumours) are sometimes sent directly to victims' employers or schools with the explicit purpose of causing professional harm as "punishment" for a breakup or in an attempt to coerce a victim into communicating with their abuser (Bloom 2016, Langlois and Slane 2017, Kitchen 2015).

A majority of NCIID cases in this study involve an intimate partner relationship (28/44) and many acts of NCIID occurred within a broader pattern of domestic violence. For instance, in the case of *R v JTB* (2018) images were non-consensually shared multiple times within the relationship and JTB had been convicted of assaulting the victim in the past. In the particular act of NCIID considered in this case, JTB created a fake dating profile with intimate images that claimed his ex-partner was interested in a rape fantasy; as a result, a stranger began to assault the victim before neighbours came to help and the stranger realized he'd been fooled. And in *R v Lepore* (2001), following numerous instances of physical and psychological abuse, Mr. Lepore distributed videotapes door-to-door of him and his ex-partner having sex along with letters claiming the victim was interested in sharing more videos (*R v Lepore* 2001). Demonstrating the willingness for NCIID to be understood as domestic violence in the law, thirteen cases in my dataset

involve charges of criminal harassment, a charge created with the principle aim of “preventing violence and protecting women from being stalked by intimate or formerly intimate partners” (Crocker 2008, 88). For instance, the act of NCIID in *R v Wenc* (2009) occurs within a broader context of domestic violence and all of the behaviour is charged as criminal harassment. When the victim in this case broke off his sexual relationship with Mr. Wenc, Mr. Wenc began a two-year campaign of harassment that—in addition to posting nude photos of the victim online and faxing nude photos to the victim’s friend— included: sending the victim “hundreds of threatening, harassing, and sexually suggestive emails, text and voice mail messages” (para 2); threatening to send naked pictures of the victim to his relatives; following the victim and reporting on his location and activities; posting fake social media profiles claiming the victim was spreading HIV; and posing as the victim in chat rooms and inviting strangers to the victim’s house for sexual encounters. The court in this case recognizes all of this behaviour as criminal harassment and asserts that these threatening and harassing behaviours “caused the victim to fear for his safety and even for his life” (*R v Wenc* 2009 [appeal] para 10).

Several other cases show a link between NCIID and criminal harassment/domestic violence. In the criminal harassment case of *R v Kapoor* (2012), an act of NCIID is used as a threat to attempt to keep Ms. A.S. from leaving Mr. Kapoor and is committed as part of a larger campaign of criminal harassment against the victim that includes: repeatedly calling the victim’s family during the day and night; stalking her home; and threatening to ‘cut her fuckin throat’, ‘cut [her] into small pieces’, ‘beat the fuck’ out of her, and kill her (*R v Kapoor*, 2012, para 5). In *R v Fader* (2009), Mr. Fader likewise distributed images as part of a broader campaign of controlling and threatening

behaviour that included distributing explicit sexual pictures and videos to his first wife's new partner and threatening to distribute them to her neighbors and work colleagues if she didn't agree to certain terms of their divorce regarding property (R v Fader 2009, para 11). In 2014 Mr. Fader was found guilty of criminal harassment a second time for "sending sexually explicit photographs and videos to a variety of his [third] wife's work colleagues, as well as her son", as well as committing other harassing acts and breaking into the victim's new home (R v Fader 2014, para 6). The Judge in this case finds "the serious breach of trust between husband and wife" an aggravating factor and asserts that "the word has to get out, both to people in general in the community, but also to Mr. Fader in particular, that if he chooses to behave in this kind of fashion towards his partners, people with whom he has been in a relationship, he is going to go to jail and he will go to jail for a very long time" (R v Fader 2014, para 36-7).

While the link between NCIID and domestic violence is often implied in case law, in *R v Wheaton* (2017) the Judge explicitly recognizes NCIID as fitting within the parameters of domestic violence saying: "the 162 [non-consensual intimate image distribution] charge [...] is also domestic violence. [...] The picture on Facebook that was simply an act of revenge, of violence against your intimate partner. Violence in any fashion, and these are acts of violence, is not acceptable" (R v Wheaton, 2017, np). In the case of *R v Dewan* (2014) the judges similarly gesture to the framing of NCIID as intimate partner abuse saying "[...] imposing a conditional discharge would be contrary to the public interest. Intimate partners must be free to terminate a relationship without fear of abuse, whether physical or psychological, or retaliation of any kind" (R v Dewan, 2014, para 13). In *R v Greene* (2018), Mr. Greene pled guilty to a NCIID charge and two

counts of uttering a threat. After the breakdown of his relationship with Ms. X, Mr. Greene threatened to kill her on two occasions and sent a video of X having sexual intercourse to one of her friends. The judge in this case asserts that Mr. Greene's actions fit within the broader context of domestic violence saying:

Mr. Greene reacted to the breakup of his relationship with his former girlfriend (X) in a manner which is common to too many men: he threatened her. However, Mr. Greene went much further. He released a video of X, without her consent, in which X is shown having sexual intercourse with another man. This has come to be commonly referred to as "revenge porn." It provides men who are unable to accept the end of a relationship with a new and frightening manner of harming and humiliating their former female partners. [...] Our legal system has failed to recognize the extent of the violence that women who end relationships with their former male partners face. It has failed to acknowledge the reality that this violence can be deadly. This is not a novel suggestion. Over twenty years ago in its 1995 report, *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia*, the Law Reform Commission of Nova Scotia, described "violence against women by their spouses" as constituting "a life threatening situation which is not treated seriously by the legal system". [...] for many women, the experience of existing with a violent man is akin to living with a time bomb which will eventually result in death. (R v Greene, 2018, para 1-2)

Rather than treating NCIID as a new and unfamiliar criminal act created by the dangers of digital technology, the Judge in this case frames NCIID as just another tactic used by intimate partners who cannot accept the end of a relationship and attempt to continue

controlling and punishing an ex-partner as a result.

Even when domestic violence or criminal harassment are not explicitly discussed in case law, many cases in the dataset can be read as examples of domestic violence as they demonstrate NCIID occurring as part of a pattern of abuse (Violence Prevention 2018, Dragiewicz, et al. 2018) against a partner or ex-partner. For instance, in a case in Huntsville, Ontario—wherein a man posted intimate photos of his ex-girlfriend on Instagram because she refused to be coerced into contacting him—the Judge considers these actions related to the man’s previous conviction for assaulting his ex-girlfriend in “a string of incidents that included holding the victim by the neck, tackling her to the ground, pushing her back into his apartment and numerous incidents of property damage including him punching the front windshield of her vehicle” (Huntsville, 2017).

While many cases in the dataset seem to fit well within a domestic violence framing, there are none-the-less many cases where this framing is inappropriate or more tenuously applicable. As domestic violence is usually defined as involving a *pattern* of abuse (Dragiewicz, et al. 2018, Violence Prevention 2018, Woodlock 2017), it might be less appropriate to use a domestic violence framing in cases of NCIID that do not include a broader context of controlling or abusive behaviour. Again, it is important here to consider acts of NCIID on a case-by-case basis as, for instance, it may be appropriate to differently frame a case where an image is shared in a one-off moment of emotional upset following the breakdown of a relationship and a case where an image is shared as a pattern of harassment and abuse. For instance, in a NCIID case in Manitoba, the offender posted intimate images of his ex-partner on Facebook after finding out she had cheated on him. The man received 90 days in jail for posting the images and taking them down

less than 2 hours later (McIntyre 2016). While this was a cruel act against an ex-partner, and the victim in this case reported a high level of harm, this act may be seen as less closely related to a domestic violence framing than those cases involving a broader pattern of control or abuse—although it is necessary to consider the myriad of ways that domestic violence can be defined, experienced, and perpetrated (Johnson 2006).

Framing NCIID as a form of domestic violence is useful for understanding how this act can often be one factor among many used in an abusive relationship. However, cases of NCIID must be assessed on an individual bases to allow for the recognition that, while many cases involve a broader context of domestic violence, some do not. For example, while dynamics of domestic violence are common in adult cases of NCIID, many youth cases—and some adult cases such as *R v Agoston* (2017) and *R v Zhou* (2016)—may not include patterns of harassment, coercion, or control within an intimate relationship and may look more like offenders sharing images in an attempt to “show off”.

Privacy Violation

Though the framing of NCIID as a privacy violation is sometimes discussed by scholars (Slane, 2010, Karaian, Mind Fuck 2016), NCIID is much more often understood as something more than “just” a privacy violation (McGlynn, Rackley and Houghton, 2017) and is therefore framed in one of the ways discussed above. The above framings—such as domestic violence or sexual abuse—are often held to be more appropriate as, it is argued, NCIID is an extremely harmful and reputation destroying act that cannot be subsumed under the category of privacy violation (Aikenhead 2018, West Coast LEAF 2014, Cycle

2013). For example, Aikenhead argues that framing NCIID in “privacy-related terms ignores the objectification and degradation of women inherent in this behaviour and distances this crime from sexual assault and other forms of sexualized violence against women” (Aikenhead 2018, 140) and McGlynn et al. assert that “while these acts of abuse are without doubt egregious breaches of privacy, conceptualizing the harm in this way inhibits recognition of the gendered, sexualised and abusive nature of the practices of image-based sexual abuse” (McGlynn, Rackley and Houghton, 2017, 37). However, a privacy framing may allow for a contextualized and case-specific approach to acts of NCIID. That is, the framing of a privacy violation and the framings described above are not mutually exclusive and this framing may allow for the recognition of the variable systemic issues that are most relevant in a given case. In the case law, the recognition of a privacy violation framing and other systemic issues have not been mutually exclusive. For instance, the Judge in *Doe v ND* (2016) finds both that Doe’s right to informational privacy was violated and that the act of NCIID she experienced was “in many ways [...] analogous to a sexual assault” (*Doe v ND*, 2016, para 58). Similarly, in *R v Zhou* (2016) the Judge asserts that the posting of an intimate image online along with the comment “rate and what you do to her. Cum on her pics”, “not only violates the victim’s privacy, but also invites other users to degrade her by describing the sexual acts they would perform. This element of sexual objectification and degradation increases the potential for psychological harm” (*R v Zhou* 2016). Finally, in *R v Greene* (2018) the Judge asserts that Mr. Greene’s actions “constituted a gross breach of X’s privacy interests” (para 66) while also emphasizing that NCIID is a tool of domestic abuse that Mr. Greene used against his ex-partner due to “his inability to accept the end of the relationship” (para 85).

Thus, legal recognition of individual privacy concerns does not seem to be incompatible with recognizing systemic issues and this framing may be a viable option for assessing the broader context of particular cases.

Discussion & Conclusion

Breaking from prominent academic and legal framings, Karaian argues that some acts of NCIID among youth can be understood as modern day, visual versions of the longstanding sexual rumour mill (Karaian, Rumour Mill 2017). In the context of youth cases of NCIID, Karaian questions why it is presumed necessary to respond to NCIID with criminal law, when other kinds of sexual rumour spreading have not been formally responded to in this way (Karaian, Rumour Mill 2017). For instance, it is commonly accepted that people verbally share the content of intimate phone calls and sexual experiences with friends and acquaintances (Karaian, Rumour Mill 2017). Karaian asserts that “the sexual rumour mill has always been the source of embarrassment, humiliation and other sorts of negative, and sometimes serious, consequences, but we’ve never criminalized youth for taking part in it, until now” (Karaian, Rumour Mill 2017). In light of the fact that youth increasingly understand photo-sharing as a form of conversation (Karaian, Rumour Mill 2017, Venema and Lobinger 2017), Karaian’s provocation questions the primacy given to acts of NCIID over other forms of sexual rumour spreading. Building on this critical intervention, and considering the multitude of framings described above, I assert that it is necessary to consider very different responses to cases of NCIID that might be more akin to sexual rumour spreading or a privacy violation versus those that take place within, for instance, a broader context of domestic

violence, coercion, or abuse. The tremendous variability of NCIID creates a dilemma for assessing appropriate legal responses, as it is necessary to both consider the extreme circumstances of cases involving a context of psychological and physical abuse while remaining aware of the potential to frame cases, such as those amongst youth and adults that appear to be misguided attempts to “show off”, in overly inflammatory ways due to the association between NCIID and sexual assault, child pornography, and domestic violence.

In cases of NCIID, the context surrounding the act is much more important to focus on than simply the act itself. For instance, while an act of NCIID amongst youths might appear on its face to meet the definition of child pornography, I argue that this framing is inappropriate to apply to, or conflate with, cases wherein there is no evidence of child sexual abuse or an age-based power imbalance. Likewise, it is also ill-advised to argue for a general framing of NCIID as gender-based violence or domestic violence when not all cases involve these dynamics. Universal framings of NCIID may conceal the difference between a youth “showing off” a topless photo of his girlfriend to a friend and an adult who distributes nude images of his ex-wife to her family and employer as part of a pattern of domestic violence, differences that judges will need to grapple with when determining a sentence that is “proportionate to the gravity of the offence and the degree of responsibility of the offender” (Canadian Criminal Code 1985, s.718.1, Crofts and Kirchengast 2019). Without considering the very different intentions and case dynamics in these two examples, social and legal responses may be overblown or wholly inappropriate. The presumed need for a criminal law intervention in the youth case may disallow educational responses that could be more appropriate/helpful in addressing

issues of privacy/consent and educating other youths about this act (See Chapter 6); on the other hand, a response to the adult case that does not consider the context of abuse in which the image distribution occurred, may not account for the way an act of NCIID within an abusive relationship might signal stalking behaviour or an increased potential for physical violence.

With specific criminal and civil offences in response to NCIID being crafted around the world (Clarke-Billings 2016, Powell and Henry, 2017), it is increasingly pertinent to resist attempts to fit this act within any one framing that would imply it is *always* an issue akin to sexual assault or *always* one of gender-based violence. Treating NCIID in any one way will result in conflating serious acts of abuse and stalking with one-off behaviours of image sharing that represent a moment of anger (e.g. the case of the Manitoba man discussed above) rather than an ongoing threat to safety and with images that seem to be shared out of a naïve attempt to joke or show off. For instance, in the case of *R v Agoston* (2017), Mr. Agoston seems to have shown nude images of an acquaintance to his coworkers in an attempt to show off or to joke, and there is thus no evidence that he had intentions related to harassing the victim but was rather inspired by something more akin to sharing the intimate details of a sexual experience. Responses should try as much as possible to consider not just the harm caused to the victim in cases of NCIID, but also the culpability of the particular perpetrator (Crofts and Kirchengast 2019)³⁹. For instance, Crofts and Kirchengast (2019) argue for a hierarchy of criminal offences to respond to NCIID, with the highest penalties reserved for those cases where offenders intended to cause emotional harm or to humiliate the victim. As I argue in

³⁹ In jurisdictions such as England and Wales, NCIID offences require that images be distributed with the *intention* to humiliate or cause emotional harm (Crofts and Kirchengast 2019). Canada's criminal law does not require a particular intention on the part of the perpetrator.

Chapter 6, this could also be addressed through recourse to options outside of criminal law.

An acknowledgment of the contextual dynamics of individual cases in law and society may result in more measured or relevant framings that address the systemic issues and intentions that might be involved in a particular case. Conflating all acts of NCIID as equally serious, and thus as requiring the same kind of legal intervention, may result in responses that unnecessarily involve the criminal justice system in some cases and may ignore serious underlying issues in others cases. In Chapter 4 I further demonstrate the need for a contextualized response to NCIID cases by analyzing the varying sources and experiences of harm in these cases. The contextualized treatment of NCIID I argue for in this Chapter, combined with an argument for a nuanced view of the harm of NCIID in Chapter 4 and a more complex understanding of offenders and victims in Chapter 5, influences my critique of legal responses to NCIID in Chapter 6. While it may be tempting to fit NCIID within a single framing, this act has proven to be one with many meanings, intentions, and contexts surrounding it.

Chapter 4

“Try Not to be Embarrassed”: Conceptualizing the Harm Caused by Non-Consensual Intimate Image Distribution

Canadian media and governmental discussions of NCIID regularly reference the cases of Rehtaeh Parsons and Amanda Todd, two teenage girls who died by suicide after having intimate images shared without consent and experiencing harassment from their peers as a result (House of Commons 2013, Dodge 2016). Tragic stories such as these have caused considerable anxiety about NCIID both within Canada and internationally, and have often been part of the motivation for criminal and civil law responses to this issue around the world (Powell and Henry, 2017). In Canada, for instance, the stories of Rehtaeh Parsons and Amanda Todd were major catalysts for the creation of a specific criminal offence for NCIID (Dodge 2016, House of Commons 2013, House of Commons 2014). While cases of NCIID that have resulted in extreme harms are often the ones that receive the most academic and media attention and inspire legislative responses, in this Chapter I argue that it is necessary to recognize the variability of harms experienced as a result of NCIID and to trouble the common assumption that this act is always and necessarily extremely harmful to victims. Building on Chun and Friedland’s sex positive attempt to “disable the ‘ruinous’ logic” that pervades responses to the non-consensual sharing of nude and sexual images (Chun and Friedland 2015, 1), I argue that questioning the socio-legal construction of the harm of NCIID is necessary to effectively respond to this act.

While some victims of NCIID feel that their lives and reputations have been irreparably damaged by this act, others are largely unaffected or refuse to be embarrassed by having their nude/sexual image shared (Fitzpatrick 2018, My Sex Tape 2017, Holten

2015). Despite this wide continuum of harm experienced, activist and academic response to NCIID have largely focused on the most extreme harms that can result from NCIID (Bates 2017, Kitchen 2015, Ehrenkranz 2018, McGlynn, Rackley and Houghton, 2017). This focus is likely an attempt to ensure that this act is taken seriously in law and society and, thus, that actions are taken to deter the commission of NCIID and/or to deliver justice (typically in the form of criminal “justice”) to victims; however, in this Chapter I argue that a nuanced understanding of the harm of NCIID is in fact integral to addressing the underlying societal beliefs that allow nude and sexual images to be weaponized in ways that cause such extreme harms.

In this Chapter I first review the range of harms experienced as a result of NCIID and discuss the prevalent socio-legal construction of this issue as necessarily and extremely harmful. I find that, despite activist and academic concerns that the potentially extreme harms of NCIID would not be recognized in law, NCIID is regularly understood and responded to as a serious and harmful act in Canadian case law. While this recognition of harm in law would likely be understood as a success from the perspective of many ‘revenge porn’ activists, victims, and scholars, in the second section of this Chapter I seek to reveal the potential downfalls of this perception of extreme harm. Using the theoretical frameworks of sex-positive feminism and queer theory, I assert that—rather than treating NCIID as necessarily *ruinous* and *devastating*—the harm of NCIID should be understood as variable and contingent on the societal acceptance of sex-negative beliefs. While it can be validating for some victims of NCIID to see the extreme harm they experienced recognized and punished in law and society, if this recognition is not accompanied by an undermining of sex-negative societal beliefs it may ultimately

exacerbate the problem and uphold the beliefs that imbue this act with the potential for great harm.

Socio-Legal Interpretations of the Harm of NCIID

Acts of NCIID have been found to result in a diversity of harms, including: humiliation; sexual problems; body image issues and low self-esteem; employment impacts; risks to physical safety; trust issues; severe depression; suicidal ideation; and PTSD (Powell and Henry, 2017, Bates 2017, Langlois and Slane 2017, Hall and Hearn, 2017). Several factors can influence the amount of harm that is experienced as a result of NCIID. For instance, image distribution may be more or less harmful depending on the amount of nudity that is shown in the image and whether or not the individual is engaged in sexual acts (e.g. different impacts could be caused by the distribution of a posed topless photo versus a video of sexual intercourse). Additionally, the *way* in which an image is shared may impact the extent of harm that is caused. While having one's image shown to a few friends may be experienced as extremely harmful, a victim who has their intimate image sent to family, friends, and coworkers or posted to their social media profiles for all to see may be more likely to experience embarrassment and anxiety that permeates many aspects of their life and impacts multiple personal and professional relationships. For instance, when images are shared broadly online and linked to an individual's online identity, NCIID has been found to cause impacts such as job loss (Bloom 2016, Kitchen 2015, Langlois and Slane 2017) and has caused some victims to feel unsafe due to having strangers contact them or come to their homes (Hall and Hearn 2018, Police 2018, Bates 2017). On the other hand, a victim of NCIID who has their image shared or shown to

only one other person (depending on who that other person is) or shared on a “revenge porn site” without any personal details to connect the image to the victim, may experience little or no harm as a result and may never even know their image was shared. For example, in the case of *R v CNT* (2015) images were only shared with one other person and those pictured in the photographs only found out their image had been shared as a result of police laying charges after searching the offender’s phone.

Although the potential impacts of NCIID represent a wide continuum of harm, focus is often placed on the more severe end of this spectrum: with activist, academic, and political responses to NCIID often concentrating on harms such as depression and suicidal ideation (Kitchen 2015, Ehrenkranz 2018, Bates 2017, House of Commons 41st Parliament, 2nd Session 2013), without discussing cases where victims experienced little harm or refused to be embarrassed. For instance, in the 2013 and 2014 Canadian House of Commons debates on “cyberbullying”, then Minister of Justice Peter MacKay based his concern with NCIID on the tragic stories of Rehtaeh Parsons and Amanda Todd and stressed that “the non-consensual distribution of intimate images can literally take lives” (House of Commons 2014, House of Commons 2013). This focus on the extreme end of the continuum, such as those cases that have resulted in suicide, was used to justify the need for criminal justice responses to NCIID.

Exemplifying this focus on severe harms, many academics and activists have begun to assert that the harm of NCIID is equivalent to that of serious acts of sexual abuse as, they argue, it results in the same psychological impacts as other forms of sexual abuse—such as depression and feelings of a loss of bodily integrity and ability to trust others (Henry, Powell and Flynn 2017, Bates 2017, Citron and Franks, 2014, Fairbairn,

2015). Taking this similarity to the harms of sexual violence a step further, some scholars have argued that the psychological impacts of NCIID are equivalent to those experienced by victims of sexual assault (Bates 2017, Kitchen 2015, Bloom 2016). A small study by Bates asserts that victims of NCIID experience harms similar to that of sexual assault as they are often “given official medical diagnoses of PTSD, anxiety, and depression” (Bates 2017, 31). Likewise, clinical social work professor Kristen Zaleski states that—based on her clinical and research experience with sexual assault—she believes that “the post-assault symptoms associated with a sexual assault such as shame, self blame, nervous system arousal (including sleeping and eating disturbances, fear of being safe in public spaces) all apply to an individual who has had sexual images shared in a non-consensual way [...]. To me, revenge porn *is* sexual assault. I do not see a distinction” (Ehrenkranz 2018, emphasis added). And Leah Juliette, a victim of NCIID who went on to organize the March Against Revenge Porn, likewise said she often calls revenge porn “cyber sexual assault” because of the shame and PTSD she experienced in the aftermath (Ehrenkranz 2018). Taking this comparison to sexual assault another step further, Kitchen argues that the harm of online forms of NCIID can be *worse* than physical assaults as “the images last indeterminately, and because websites are accessible internationally, the images can cause widespread reputational damage. Thus, there is no comparison to harm in the real world” (Kitchen 2015, 254). This understanding of the harm of NCIID as similar, equivalent to, or even worse than that of sexual assault is a growing trend that demonstrates the broader move toward constructing NCIID as an essentially devastating act.

Interpretations of the Harm of NCIID in Canadian Law

The focus on NCIID as equivalent to sexual assault or as a catalyst for suicide is often used to support arguments that this act must be criminalized and to demand that the harm of NCIID be taken seriously in law (Kitchen 2015, House of Commons 41st Parliament, 2nd Session 2014, Hill 2015); said another way, the academic and activist concern that the harm of NCIID will not be recognized as serious in law (Kitchen 2015, Aikenhead 2018, Powell and Henry, 2017) has partially spurred this focus on extreme harms. Despite these concerns, my research has found that—in Canada at least—the law *does* treat these harms as extremely impactful and traumatic. For instance, the Judge in *R v PSD* (2016) asserts that cases of NCIID have “resulted in significant emotional trauma to victims” (para 9). Likewise, In *R v KF* (2015), wherein a teenage girl distributed an image of another teenage girl performing oral sex, Justice Hoy asserts that this act was done to create “emotional harm” and that it had the impact of degrading the victim’s “self-worth” and creating “confusion, embarrassment, and shame” (para 6-7). In the 2012 case of *R v TCD*, in which an 18-year-old female spread nude pictures of a 14-year-old female around her school, Justice Semenuk finds evidence of criminal harassment saying “it appears that the offence was vindictive, and meant by the accused to cause the complainant humiliation, embarrassment and, psychologically, to fear for her safety” (para 27). The findings in these cases, that victims experienced significant psychological impacts or were made to fear for their safety, demonstrate a legal understanding of NCIID as a significantly harmful act.

Such assertions in the case law also demonstrate a legal recognition that non-physical acts can cause real harm and danger, and that it is appropriate to respond to these cases with criminal law sanctions. While academics and activists have expressed

concerns that a “hierarchy of violence” may disallow serious response to NCIID by positioning physical forms of violence as more harmful than non-physical forms (Powell and Henry, 2017, Kitchen 2015), this did not appear to be an issue within the majority of Canadian case law. Exemplifying the legal acceptance of non-physical impacts as amounting to “real” and serious harm, in *R v Korbut* (2012)—in which Mr. Korbut sent sexually explicit photos and videos of his ex-partner to her relatives and friends—the Judge states that it is possible for these non-physical acts to cause a person to “fear for his or her safety” and that the meaning of the term “safety” “extends beyond physical safety and includes psychological safety” (para 19). These findings echo Crocker’s analysis of Canadian criminal harassment cases, which found that “judges have explicitly rejected arguments that ‘safety’ refers only to physical safety or that physical injuries, or threats of physical injuries, need to have occurred” (Crocker 2008, 99). While academics and policy makers have expressed concern that NCIID will not be understood as a serious or “real” harm (Powell and Henry 2017, Bluett-Boyd et al. 2013), this concern was not borne out in the case law.

Showing how seriously these cases have been taken in law, in *R v MR* (2017) Justice Felix describes how the already serious harms of NCIID can be further amplified if the victim’s community is particularly sensitive to the exposure of nudity and sexuality. In this case, the fact that the victim comes from a very traditional, religious family was seen to increase the harm caused. The victim’s ex-fiancé distributed intimate images of her to her friends and extended-family and Justice Felix found that “because of particular cultural and religious beliefs, the impact of this conduct on the complainant, in this case, is simply not ascertainable” and that it has “had a real, and *immeasurable impact* on the

complainant and her family” (R v MR, sentence, 2017: np, emphasis added). The belief expressed in this case, that the harm of NCIID is unquantifiable, shows not only a legal *acceptance* of the harm of NCIID, but an assertion that this harm is considerable and is appropriate to respond to with serious criminal sanctions. Judges also asserted in multiple cases (e.g. *R v Barnes* 2006; *R v JTB* 2018; *R v Korbut* 2012; *R v Dewan* 2014) that the harm of NCIID is increased when it takes place within a trusted, intimate relationship. For example, in *R v Fader* (2014)—wherein Mr. Fader sent sexually explicit images of his wife to her son and at least ten of her work colleagues after the breakdown of their marriage—Justice Rounthwaite finds that these acts of NCIID have had “a significant impact” on the victim including experiences of “stress, panic attacks, fear, anxiety, uncontrollable crying” and that she “lives in fear” (R v Fader, 2014, para 16). Further, Rounthwaite reasons that because these acts took place within an intimate relationship there is an increased harm experienced, as it constitutes a breach of trust that aggravates the severe emotional harm to the victim (R v Fader, 2014, 33). As with other cases, the finding of a high level of harm in *R v Fader* was seen as an aggravating factor contributing to the need for both general and specific deterrence. As the Judge put it, “the word has to get out, both to people in general in the community, but also to Mr. Fader in particular, that if he chooses to behave in this kind of fashion towards his partners, people with whom he has been in a relationship, he is going to go to jail and he will go to jail for a very long time” (R v Fader, 2014, para 37). In this case, Mr. Fader received 2 years incarceration and 3 years probation for acts of criminal harassment that included NCIID.

While academics and researchers express concern that NCIID may be treated as less “real” than offline forms of violence because it might be understood as only affecting

one's "cyber" existence (Powell and Henry, 2017, Bluett-Boyd, et al. 2013), judges in fact often asserted that the harm of an act of NCIID was aggravated by digital forms of sharing (See Chapter 2 for a further discussion of judicial interpretations of the impact of digital technology on NCIID). Judges regularly discuss how the harm is ongoing when—due to the ease of digital sharing and archiving—images cannot be fully scrubbed from the Internet, leaving victims to deal with ongoing anxiety about the potential future of the images. For instance, in the case of *R v JTB* (2018), wherein fake dating profiles were created of the victim on multiple websites, Justice Leach emphasized the ongoing emotional harm caused by the inability to delete all of the intimate images and fake profiles that were posted online: "It should be recognized and emphasized again that her torment is not over. Nor does it seem likely to end. Her intimate images and personal information remain online and available to strangers, along with indications that she would welcome a sexual assault. She correspondingly is obliged to live in a state of constant humiliation [...]" (*R v JTB*, 2018). Leach further describes how it has been "devastating to [the victim's] sense of personal dignity and self-esteem. The realization that complete strangers continue to view and rate her naked images, while posting hideous comments about her, has made her hate herself and her own body. She feels extremely exposed and violated. She wants to 'disappear' and 'become invisible'. She cannot see anyone without wondering if they too have viewed the images" (*R v JTB* 2018). As discussed in Chapter 2, legal assertions that digital (and particularly online) sharing of intimate images can create harms that last *forever* and are immeasurable are common. The above examples show the extent that the law has recognized the particular harms to victims of NCIID who have their images shared online; More broadly, these

legal responses demonstrate the increasing recognition of psychological harm in law and a willingness to take the harm of NCIID very seriously.

As in academic and media responses, the serious harm of NCIID was also discussed through regularly referencing a connection between NCIID and suicide. In the youth case of *R v NG & GG* (2015) the Judge warns that the effects of NCIID and related “cyberbullying” have been “significant, long-lasting and have even been the cause for suicide” (*R v NG & GG* 2015, para 33). Likewise, in *R v PSD* (2016) Justice Sudeyko describes how NCIID has led to tragedy in some cases with “young women seemingly taking their own lives as a result” (para 9). The Judge in *R v Perron* (2018) suggests that Mr. Perron read about Rehtaeh Parsons to understand the extent of harm he could have caused, thereby implying that he could have caused a death. Finally, in *Doe v ND* (2016) Justice Stinson describes the potential harms caused by NCIID saying “we now understand the devastating harm that can result from these acts, ranging from suicides by teenage victims to career-ending consequences when established persons are victimized” (para 16). While the rates of suicide among victims of NCIID have not yet been studied, this extreme outcome—which seems to occur in a small subsection of cases that normally involve young people and widespread slut-shaming (or other discriminatory shaming) and harassment—is commonly referenced in the case law. The common legal reference to cases of suicide offers further evidence of the seriousness with which this issue is taken in law. For example, in *R v JTB* (2018) Justice Leach states that “in notorious instances, those who have been the subject of such non-consensual publication of their intimate images on the internet have killed themselves. The inferred impact on victims accordingly is substantial, and the moral responsibility of such offenders generally will be

high” (R v JTB 2018, para 29). The connection between NCIID and suicide that is regularly discussed in media, government, and scholarship, is thus also regularly noted in law and can be used to support harsher penalties.

The reputational, and specifically economic and professional harms, resulting from NCIID are also regularly recognized in the case law. For instance, in *R v Korbut* (2012) NCIID is described as “a devastating blow to [the victim’s] reputation and self-esteem”. In *Doe v ND* (2016) it is acknowledged that part of the actionable harm caused to the victim includes “the possible future adverse impact on the plaintiff’s career and employment prospects arising from the possibility that the video may someday resurface” (para 24). This acknowledgement recognizes not only the harm that the victim has presently incurred, but also recognizes potential future impacts to employability. In *R v BH* (2016) it is likewise acknowledged that, as a result of her partner secretly recording their sex acts and posting them on a pornography site, the victim “has suffered humiliation as she has had to disclose this to her superior as she works in the education sector and any disclosure of this would reflect negatively on the organization. She had explained this repeatedly to the defendant during the relationship. She fears losing her career if this is revealed publicly” (R v BH 2016, para 14). The Judge in this case also recognizes the *potential* career impacts of non-consensual image sharing and includes this as a factor in understanding the harm, and potential harm, caused by this act. This demonstrates the common legal recognition of NCIID as causing noteworthy reputational and/or economic harm and as potentially resulting in such impacts into the future.

The one notable difference between legal framings and academic/popular framings of NCIID is that judges were much less likely to compare the harm of NCIID to

that of sexual assault. However, this comparison was not wholly absent, for instance in the case of *Doe v ND* (2016) the Judge asserts that the impact on Ms. Doe is “similar[] to the impact of sexual assault” (*Doe v ND*, 2016, para 58). In general this comparison was not made so directly, yet some judges discussed acts of NCIID as sexually objectifying (*Bridgewater*, 2017; *R v Zhou*, 2016) and degrading (*R v Zhou*, 2016, para 5) and others conceptualized the harm as a “violation [...] of the victim’s sexual integrity” (*R v DaSilva*, 2011, para 27; *R v Korbut*, 2012). Despite the slightly differing framings of the harm of NCIID in this regard, the various impacts of this act (e.g. risk of suicide, psychological impact, and reputational damage) were still understood as significant and judges, overall, interpreted the harm of NCIID as severe and long lasting.

Discussion

I have demonstrated that the non-consensual distribution of nude or sexually explicit images is widely regarded as causing severe psychological, reputational, and sometimes physical harm in law and society. While this recognition of harm can be seen as a victory for activists and academics that have fought for this acknowledgment and argued for civil and criminal law punishments, it is necessary to nuance understandings of the harm of NCIID. While the above examples of dominant socio-legal framings of NCIID demonstrate the common acceptance of the potentially extreme impacts of NCIID; these same discourses rarely discuss why it is that intimate images are able to have such devastating effects and whether they have such impacts in all cases. In this section, I review cases in which victims of NCIID have reported negligible harm as a result of having their intimate image shared without consent. I use these experiences of NCIID as

“relatively harmless” to demonstrate that the harm of NCIID is extremely subjective and that the typical understanding of NCIID’s severe harms may be reliant, in many cases, on sex-negative cultural beliefs. By discussing how conceptions of the harm of NCIID rely on the belief that public nudity and sexuality is inherently shameful and degrading, I argue that the way one’s community responds to an act of NCIID can be more impactful/harmful than the image dissemination itself. From this perspective, the harm of NCIID is not inherently devastating or ruinous (Chun and Friedland 2015, Karaian, 2014); rather, this harm might be mitigated by responses focused on cultural change and sex-positive interventions. In making this argument, I do not intend to imply that individual victims of NCIID must (or should) take on a sex-positive response to their victimization (i.e. replace a sex-negative imperative with a sex-positive imperative) (Glick 2000, Wodda and Panfil 2018); rather, I seek to expand the potential responses to NCIID to include sex-positive options and to reveal how a more sex-positive culture could alleviate some of the harms associated with NCIID. That is, I seek to hold open the possibility of harmlessness as a way to complicate the dominant discourse that has not treated this response as possible.

Relatively Harmless

In a few publicized cases⁴⁰, those who have had their intimate images shared without consent express concern with the assumption that they would be “devastated” by this act.

While the above examples demonstrate the serious impacts that NCIID can have, it is

⁴⁰ Case law, of course, will be more likely to capture those acts of NCIID wherein a victim experienced a greater amount of harm, as someone must report the act to bring it within the purview of the legal system. However, cases reported by those other than the victim may be more likely to represent a continuum of harm (e.g. those cases where intimate images were found by police and their distribution was unknown to the victim).

important to trouble the universality of this experience. Challenging this dominant framing, some victims of NCIID have spoken out to undermine the assumption that they have been traumatized and deeply shamed by having their nude or sexually explicit images non-consensually shared. These victims question the assumption that NCIID is inherently ruinous by demonstrating instances where the harm was negligible or—in one case—even resulted in potential positive side effects.

Melissa Johns, a former *Coronation Street* actor and a disability rights activist, questioned the assumption of extreme harm and reputational ruin in response to her experience of having intimate images shared without consent. After having nude photos leaked online by a hacker, Johns published a statement on Instagram saying:

The papers are saying that I'm 'devastated' [...] That's not my take on it at all. I dedicate almost everything I do to fighting for female empowerment and the empowerment of people with disabilities. I'm not about to go back on my principles now. [...] it is completely unacceptable when people have their privacy disrespected in this way. However, as a vocal champion of women being totally at one with their bodies and not being ashamed of them, I am not about to turn around now and go back on my own principals [sic]. I am proud of my body. It is beautiful. And I am entitled to enjoy it and to have a personal and a romantic life just as all women, of all different body shapes and sizes, are entitled to do. Women get these types of photos leaked all the time, but what is more unusual is to see a woman with a disability depicted in this way. If any good has come out of this, it is to show that women with all different types of body shapes and sizes

send photos, have sex lives, engage in intimate exchanges in the same way as everybody else (Fitzpatrick 2018).

In this response, Johns both undermines the assumption of ruin and devastating harm that is often presupposed in cases of NCIID and asserts that—while the privacy violation involved is unacceptable—some good might even come out of people seeing an image of a woman with a disability being sexual and unashamed of her body. In another celebrity case, model Lira Galore also questioned the assumption that she was devastated after having images of her performing oral sex on her ex-partner non-consensually shared. In response to this act of NCIID, she tweeted “Y’all never seen nobody suck dick b4?? ... everybody let’s relax” (My Sex Tape 2017). In a follow-up interview on her Twitter reaction, she further stated: “Yo it’s not that big of a deal, like y’all never seen this before? Or what’s going on? Cause it’s like ‘OMG!’ everybody’s in such an uproar over some pictures of me like doing something completely normal, you know? [...] So that’s why I said that [on Twitter]. I just like really tried to like lighten the mood” (My Sex Tape 2017). Like Johns, Galore intervened on responses to her case to undermine the assumption that she was experiencing something extremely harmful. Galore asserts that while her image has been shared without permission and she will therefore be reporting this to police, she doesn’t feel that the fact that she is a sexually active person that engages in and enjoys sex should be seen as a reason for shame or harm (beyond that of a privacy violation). Relatedly, Lauren Miranda, a schoolteacher who was fired from a middle school in Long Island as a result of having her topless image shared without consent at her school (Knox 2019), has responded by separating the harm of being fired from assumptions that the image is something to be ashamed of. Miranda has filed a

lawsuit against the school for firing her, while maintaining that: “my upper torso is no more offensive than a man's” (Nashrulla 2019, np, Knox 2019).

In another celebrity example, singer-songwriter Sia reacted to news that paparazzi were planning to publish nude photos of her by posting the photos herself on Twitter saying “someone is apparently trying to sell naked photos of me ... save your money, here it is for free” (Hanna 2017). Sia’s response affectively critiques the idea that there is an inherent shame to public female nudity or sexuality. She undermines the media’s ability to non-consensually utilize her nude image (whether for purposes of shaming or profit), while simultaneously denying any shame toward her body and sexuality. Danish journalist Emma Holten made a similar statement when, in response to having nude images shared without consent, she chose to share nude photos of herself that she felt showed her as an active subject. This act was meant to portray that pictures shared with and without consent are “completely different things” (Holten 2015). As Holten explains, “it was important to me not to distance myself from my body, not to blame it for causing me this humiliation, and not to be cowed into denying my sexuality” (Holten 2015). The commonality between each of these reactions to acts of NCIID is that they all took a sex-positive perspective that sexuality and nudity is not inherently harmful, and that NCIID doesn’t *have to be* experienced as a devastating blow to one’s reputation and self-esteem. While still regarding these acts as violations of privacy, they pulled these feelings of privacy violation apart from the assumption of ruin. The multiple ways that these responses trouble common understandings of and responses to the harm of NCIID are discussed further below.

Sex-Positivity

The responses described above align with the intentions of sex-positive movements such as SlutWalk and Free the Nipple that are working to destigmatize female sexuality and nudity, and to deconstruct the cultural sexual standards that frame women's bodies and sexuality as inherently shameful. These examples of sex-positive victim responses contrast dramatically with the experiences of devastation that are most commonly discussed in media, academic, and legal responses⁴¹.

From a sex-positive perspective (See: Theoretical Framing section for a further discussion of sex-positivity), it is necessary to recognize sexuality as a positive and healthy part of life (Franke 2009). Sex-positive feminists aim to create a culture wherein individuals (especially those marginalized due to, for instance, their gender or sexual orientation) can engage in sexual expression without fearing that it will cause them embarrassment or compromise their reputation and self-worth (Hasinoff 2015, Chemaly, 2015, Karaian 2014, Friedman and Valenti 2008, Karaian 2012, Wodda and Panfil 2018, Shefer and Munt 2019). When analyzing the social and legal discourse regarding NCIID, it is necessary to question the underlying assumption that sex should be kept private in order to avoid harm (Warner 1999). The belief that sex must be relegated to private space reaffirms traditional beliefs about sex as negative and shameful and reasserts the idea that the exposure of one's sexuality—namely for women and sexual minorities—is “ruinous” (Chun and Friedland 2015). The theories of sex-positive feminists and queer theorists are useful for troubling the assumptions of harm in cases of NCIID and for assessing whether certain social and legal responses may reaffirm the harm of NCIID rather than undermining the idea of sexual exposure as ruinous (Karaian 2014). These perspectives

⁴¹ It is difficult to determine how common or uncommon these sex positive responses to NCIID victimization are, as those who respond in this way may be less likely to report their victimization to police or to share their story with news media.

also help to pin down exactly where the harm is coming from in a particular case, rather than treating this act as necessarily extremely harmful.

In a recent article for *Vice*, Sofia Barrett-Ibarria describes how she decided to share her own nude photos to take the power to hurt her away from a man she had sent them to. Barrett-Ibarria's response, like the sex-positive responses discussed above, complicates understandings of what aspect of NCIID causes harm. While the common understanding of this issue has been that harm is caused by the exposure of nudity and sexuality, those who choose to share images themselves (an option only available in cases where the images are also possessed by the victim and not in those cases where images are also created without consent) demonstrate that, for them, the harm stems from a breach of privacy or trust rather than a sexual humiliation. As Barrett-Ibarria further explains, for her the exposure of herself as a sexual being is not particularly harmful because, "I'm not famous, I don't work with kids, and my family already knows I'm kind of a slut, so there's not a lot I stand to lose" (Barrett-Ibarria 2018); however, she does understand herself as standing to lose a feeling of autonomy and control if someone is able to breach her privacy or hold the possibility of this breach over her. From this perspective, it is the breach of privacy that is seen as problematic, and therefore the concern with NCIID is not dependent on an understanding of sexuality or nudity as shameful. The sharing of an intimate image that was sent in confidence is therefore understood similarly to any other privacy violation, such as the sharing of credit card information that was intended to be kept private (Hasinoff 2015) or the threat of spreading a secret that was shared in confidence. Of course, as discussed further below, the ease with which one can take a sex-positive approach in response to NCIID

victimization is dependent on the level of sex-positivity in one's community, family, or workplace. Nevertheless, the potential to refuse to be shamed by this act provides an important perspective for understanding where the harm of NCIID comes from in particular cases and how social and legal responses might try to respond to NCIID cases without further ingraining the idea that the exposure of sexuality and nudity are inherently devastating.

Sex-Negativity

The experience of NCIID as more harmful than other, non-sexual, privacy violations seems to be based in sexual exceptionalism. Rubin explains that the treatment of sex as exceptional within Western Christian cultures is due to our cultural construction of sex as a “dangerous, destructive, negative force” (Rubin 1999, 150) that results in sexual acts being “burdened with an excess of significance” (Rubin 1999, 151, Glickman 2000). The excess of significance given to sexual privacy violations creates the context within which victims express that NCIID “can absolutely ruin your life in a heartbeat” (Barrera 2018).

While I seek to trouble the *assumption* of ruin in cases of NCIID, it is—of course—important to recognize that many victims experience this harm as devastating and ruinous. Victims have reported that having their image non-consensually shared felt like a sexual assault (Giese 2016, Ehrenkranz 2018, Hall and Hearn 2018) and some victims who have had images of their sexual assault shared experienced more harm from the act of NCIID than from the assault itself (Bluett-Boyd, et al. 2013, Dodge, 2016). For instance, Rehtaeh Parsons—who had nude images of her allegedly being sexually assaulted shared amongst her peers—reportedly had a stronger reaction to the

dissemination of the photos than to the alleged assault she experienced (Segal 2015). Exemplifying this perspective, in the case of *R v BH* (2016) a victim of NCIID describes how she would have preferred to experience a private act of physical assault instead of the public disclosure of sexually explicit videos. She asserts:

If B.H. had assaulted me physically in some way and there was no video or pictures, no audience, I would have an easier time to deal with this privately and move on with my life. Because of the extreme fear of the unknown I now have, because he stripped me of control over my own image, because he made pictures and videos of me naked, that I didn't know about, and then distributed them, which I also did not know about, I don't believe my life will ever be the same again. No amount of rehabilitation or punishment for B.H. will ever make me whole again. (*R v BH* 2016)

In this victim impact statement, the victim clearly asserts that she would rather have experienced a physical assault than have to deal with the harm of having her nude image distributed. She also states that, from her perspective, the harm of NCIID is everlasting and more difficult to “move on” from than a physical assault. This perspective demonstrates the extreme harm that is often associated with the public exposure of nudity and sexuality, especially for women and sexual minorities (Chun and Friedland 2015).

While throughout this Chapter I consider the efficacy of a more sex-positive legal response to NCIID, I do not intend to demand a consideration of sex-positivity at the expense of recognizing individual experiences of harm. As Wodda and Panfil suggest in their theorization of a sex-positive criminology, I want to strive for “a concentration on structural issues while remaining compassionate about individual concerns” (Wodda and

Panfil 2018, 600). This includes recognizing the increased harm that may be experienced by victims of NCIID involved in cultural or religious communities in which the exposure of nudity or sexuality takes on increased meanings. For example, as described above, in the case of *R v MR* (2017) a victim of NCIID from a traditional religious family experienced significant emotional and family turmoil as a result of having images shared. The harm in this case was amplified by the fact that the images functioned not just as a violation of trust within an intimate relationship, but as proof that the victim had been sexual outside of marriage, something that was seen as deeply shameful to her family and community. The particular cultural and religious beliefs held by a victim's community may impact the experience of harm in important ways; for instance, as Abeyasekera and Marecek (2019) describe, sexualized shame carries various degrees of severity across cultures. They describe how, for Sri Lankan women for instance, "sexual improprieties—rumoured or real—threaten loss of respectability" that not only impact the woman herself but also "her family's honour" (Abeyasekera and Marecek 2019, 1). I hope to "work[] towards a more positive relationship with sex" (Glickman 2000) in responses to NCIID, while also recognizing the particularly high stakes for some victims of NCIID.

While it is necessary to recognize victims' individual experiences of harm, it is also necessary to confront the structures of sex-negativity that often contribute to this harm and to trouble the common assumption that all NCIID victims are deeply shamed by this act. As Chun and Friedland (2015) hold, "a discourse of 'ruin' still mediates the treatment of female sexuality that is open and visible. The notion of 'ruin,' of the end of a female subject, has a long and sexist history in which 'virtue' is upheld as a patriarchal ideal of contained, and virginal, white female sexuality" (9). For instance, the ability of

NCIID to “degrade” a “victim’s personal self-worth” (R v KF 2015) is often based in the belief that sexual expression is degrading, and is thus influenced by “whore-phobic and discriminatory attitudes towards public sexual expression” (Karaian, *Mind Fuck* 2016). That is, experiences of the harm of NCIID are often influenced by traditional ideas of—namely women—needing to protect their sexual purity (Chun and Friedland 2015) and of sex as a private matter (Warner 1999). Therefore, contrary to common assertions that all victims of NCIID experience deep shame and degradation, the harm experienced can be dramatically different (e.g. perceived as a privacy violation or violation of trust) for those who have rejected the idea that they are tarnished by public sexual exposure.

The ability to harm through sexual exposure is supported by sexism, racism, classism, homophobia, and other stereotypes that “position white, middle-class women as sexually ‘pure’ in comparison to low-income whites and women of color”⁴² (Miller 2016, 725, Chun and Friedland 2015, Karaian, 2014, Shefer and Munt 2019). For instance, Miller’s study of rumour spreading/bullying amongst young women found that sexualized rumours about young women being “sluts” were the most common and seen as the most ruinous (Miller 2016). “Slutty behaviour” was seen to degrade women’s femininity and sexual attractiveness, which was seen as core to their worth (Miller 2016). These findings echo previous work on female sexuality that found women and girls are required to be sexually desirable while not appearing to be sexually desiring subjects

⁴² Although much more research is needed to understand the particular impacts of NCIID on racialized, disabled, queer, and gender-nonconforming folks (as discussed further in Chapter 5), it appears increasingly likely that these factors also contribute to the experience of harm (and the frequency of victimization) of those at the intersections of these identity categories as well (Powell and Henry, 2017, Lenhart, Ybarra and Price-Feeney, 2016). Although I focus on the impacts of sex-negativity in this Chapter (due to its ubiquity in socio-legal responses to NCIID), the harm experienced by victims can also be amplified by discriminatory beliefs related to, for instance, race or ability (See Chapter 5).

(Valenti 2008). The fact that sexualized images of (straight, gender-confirming) men and boys are sometimes responded to with less shaming, or even with praise, points to the possibility of various interpretations of this exposure and further exemplifies the sex-negative and sexist roots of much of the harm of NCIID (See Chapter 5 for a nuanced engagement with boys' and men's experiences of NCIID). For example, in studies by Handyside and Ringrose (2017) and McGovern et al. (2016), young women discussed how their online activity is often sexualized and judged as slutty while the same activity by their male peers is seen as funny. As one of Handyside and Ringrose's interviewees explained "it's like, it's like when me and this guy were—like doing stuff on Snapchat—um, he was like, people found out, and everyone—they kind of took the piss out of him in, like in a funny way, but everyone, or apparently everyone was talking about how much of a slut I was, when it was like, it's not a one person thing, it's like a two people thing" (Handyside and Ringrose 2017, 354). Likewise, in Miller's study of young people's rumour spreading, she found that rumours about heterosexual couples engaging in sexual acts were often used to shame young women while the actions of the young men in the stories were often invisibilized or completely forgotten (Miller 2016). These examples demonstrate how nude and sexual image exposure of certain individuals (e.g. straight, normatively attractive, gender-conforming men and boys) may be read or experienced as lacking harm (or even as positive social capital) in some cases while responses to the exposure of women and girls' nudity and sexuality reaffirms ideas of their sexuality as highly shameful.

The double standard applied to males and females in some cases is vividly demonstrated in the Rehtaeh Parsons case. In this case, images of an alleged sexual

assault were used to viciously shame Parsons, while the teenage-boy engaging in a sex act in the same photo was not treated as a subject of ridicule; in fact the boy poses excitedly for the photograph seeming to know it will be used as evidence of his sexual prowess (Dodge, 2016). The neutral, playful, and even positive reactions to publicly disclosed male nudity and sexuality, in some cases, demonstrates that the harm of NCIID is often influenced by Western ideas about female and non-normative sexuality as shameful.

The extent of harm experienced by victims of NCIID is dependent on factors such as “the deeply embedded beliefs about gender and sexuality that make visual representations of bodies, especially female, feminine or non-conforming bodies, such a powerful tool of harassment, abuse and violence” (Powell and Henry, 2017, 141). If, as sex-positive feminists hope to (Friedman and Valenti 2008), we successfully change the existing beliefs that demonize sex (especially for women, sexual minorities, gender non-conforming folks, and other marginalized individuals), then the exposure of nude bodies and sexual activity would no longer be seen as capable of reputational ruin and could no longer be weaponized against individuals in these particular ways (Chun and Friedland 2015). While acts of NCIID may continue to be experienced as privacy violations or as a breach of trust, it would take a portion of the harm out of many of these acts if the “discourse of ruin” (Chun and Friedland 2015) was undermined and if, therefore, those who saw the images didn’t use them to shame the victim or to deprive them of safety or career opportunities. As Chun and Friedland (2015) argue, claims of sexually exposed women as “ruined” are based on the idea that women’s virtue must be protected, and their sexuality contained: “the traditional idea of female virtue—one that is destroyed by

sexual experience or physical exposure—positions ideal female sexuality as contained, private, and invisible” (9).

Sex-Negativity in Law

As described above, the popular understanding of NCIID as inherently ruinous to women has been taken up in several legal cases. While this legal recognition may be empowering and legitimizing for some victims, legal responses have the potential to further ingrain the sex-negative beliefs that bolster the harm of NCIID and disallow alternative victim responses. For instance, in the youth case of *R v CNT* (2015)—wherein a 14-year-old boy was found to have shared nude photos of several teenage girls with another person—the Judge finds that all of C.N.T.’s victims were severely psychologically impacted by having their image shared, despite the fact that some of the victims did not provide an impact statement. This assumption demonstrates a belief that NCIID is severely harmful to all those who experience it. The Judge in *CNT* further argues that even if the victims aren’t feeling psychologically impacted yet, the harm of NCIID is “a ticking time bomb” and they will feel its impacts eventually. He explains:

I am confident that I am able—both legally and as an exercise of common sense—to infer the existence of serious psychological victim impact. Furthermore, in my view, it is immaterial that the full impact of this crime might not be felt by the victims until sometime in the future; inevitable prospective harm may render an act violent, much as planting a time bomb doesn’t hurt anybody right away. Offences of this nature are, yes, psychological time bombs, and no one who commits this sort of crime can claim ignorance. [...] Accordingly, there is no

doubt in my mind that what C.N.T. did was a crime of violence. (R v CNT 2015, para 14-15)

The assertion that it is “common sense” that having one’s nude image viewed results in serious psychological impacts perpetuates sex-negative beliefs that—especially for young women—one’s self-worth and reputation is compromised by the exposure of sexual expression. In this case, the images were sent to one person and the victims were not aware their images had been shared. Charges were only laid in the case because police found nude photos on 14-year-old C.N.T.’s phone while searching him due to an unrelated act. Despite the lack of a complaint from a victim, the Judge feels confident in concluding that the teenage girls who have had their nude images viewed will experience severe psychological impacts, this assumption of harm seems to be based less on the subjective feelings of the victims and more on the belief that the exposure of girls’ bodies or sexuality is necessarily devastating.

On appeal, it was found that the Judge in *CNT* overstated the harm expressed by even those victims who provided a victim impact statement and that these statements were not sufficient to support the inference of harm to the other victims. The appellant Judge asserts:

Neither of the [victim impact] statements was lengthy. One consisted of three short bullet points: the matter had affected the victim’s grades; she was nervous to go to school because the appellant might be there; and, it made it hard to trust some people. The second statement filled less than half a page. That victim indicated that she was angry with herself because she had not realized the consequence of her actions. Her parents were angry and disappointed, and she felt

ashamed. Because she had chosen to send the selfies to the appellant, she had not felt like a victim at the time. The victim impact statements describe the effect the offence had on those victims. However, these particular recounts, either alone or in combination, are far from sufficient to support the inference that the judge made. While they may speak of shame, regret, and occasional anxiety, there is no indication of any turbulent emotion or continued distress. There is no suggestion of any impairment of function or serious consequence upon which an inference of psychological harm or serious psychological harm could be founded. (R v BMS [formerly CNT] 2016, para 14-15)

The Judge in this appeal reinterprets the harm caused by this act of NCIID by asserting that, while some anxiety and shame was experienced by some of the victims, this was not enough to support a finding of psychological harm. Additionally, in the above quote, one of the “victims” describes having “not felt like a victim at the time”, but now feeling ashamed in light of her parents’ anger and disappointment. This path to victimhood creates some questions about the causal relationship of the harm in this case. That is, it is unclear if the victim was harmed by having her nude image acquired by C.N.T. and shared with one person, or if she was primarily harmed by the police laying criminal charges against C.N.T. which resulted in her parents learning of the nude images and expressing their anger and disappointment regarding her sexual expression. If the harm experienced is most related to the latter, it may have been mitigated by a more sex-positive response from her parents and may have been avoided if the police had not formally charged C.N.T. In such cases, the laying of charges seemingly incentivizes young women to claim harm, and to assert that their acts of sexting were coerced, in

order to mediate the effects of being seen as “slutty” or sexually desiring by others. Sex-negative social and legal discourse leaves very little room for, especially young women, to assert that they originally shared their nude image as a consensual sexual expression (Hasinoff 2015, McGovern et al. 2016), to admit their enjoyment of sexual expression and sexual acts, or to assert that they are not devastated by non-consensual sharing.

In another example of legal assumptions regarding harm, the Judge in *R v Korbut* (2012) argues that any woman would experience NCIID as a “devastating blow” saying:

It seems to me that to argue that a woman who has had her most private and intimate personal images distributed electronically to every friend, relative and church attending associate has not necessarily suffered a grave and serious fear-inducing harm is to ignore the perspective of women. For Ms. K., the non-consensual sharing of embarrassing pornographic images with a parent, grandparent, close friends, and members of a church congregation must have constituted a profound interference with her physical integrity and a devastating blow to her reputation and self-esteem [...]. The publication and wide distribution of these images constituted an action of such catastrophic (a word used by Mr. Korbut) significance that, in my view, impacted heavily upon the life and health of A.K. and would have had the same effect on any woman who found herself in the same position. (*R v Korbut*, 2012, para 24)

Again, this kind of legal response has likely been legitimizing for some women who have experienced NCIID as a life altering act; however, we know from the above examples of women such as Barrett-Ibarria and Galore that having one’s “pornographic” image shared publicly is not a “catastrophic” experience for “any woman”. Although we

certainly continue to live in a society where sex-negativity is rampant, many individuals (such as sex-positive feminists and sex workers) have rejected ideas of nudity and sexuality as shameful and have created activist groups and friendship communities wherein public expressions of sexuality are not seen as negative or harmful. The assertion that this act must be “devastating” to all women works to erase the theories and practices of sex-positive feminists, queer theorists, and sex workers who have worked to imagine and create communities and ways of relating that refuse sexist, normative, and privatizing conceptions of sex. This erasure has particular legal effects as it assumes serious harm in all cases of NCIID and thus supports more carceral legal responses. This sex-negative legal discourse also has broader social effects as it entrenches the idea that these acts are inherently harmful and that legal penalty—rather than cultural change—is the only appropriate response to this issue.

The legal interpretation of harm in *R v Barnes* (2006) provides a particularly salient example to think through potential sex-positive framings of NCIID in law. In this case, Mr. Barnes sent nude photos of his ex-partner to her friends and family as part of a broader pattern of harassment. In response to this act, the Judge both recognizes the harm experienced by this particular victim and troubles the belief that this harm is inherently ruinous. While recognizing the harm experienced by this victim as extreme and explaining that harm does not need to be physical to be serious, the Judge also states “as a trial judge and a male I will say to [the victim], it happened. Try not to be embarrassed by it. One is better off if one can accept it in that fashion. This man is the abuser. You are not. And acting as a mature person in an intimate relationship is hardly anything to criticize of any human being in my opinion” (Barnes, 2006, para 29). While some might

critique the Judge's comments in *Barnes* for undermining the victim's experience of harm or questioning the seriousness of the offence by asserting that one can simply *choose* not to be embarrassed, this statement demonstrates the way law might recognize the harm the victim has experienced while pointing to the fact that this harm is not inherent to the act and is often contingent on beliefs about sexuality as shameful. Though the particular wording of this sentiment in *Barnes* comes off somewhat condescending, it provides an example to think through how legal responses might balance a recognition of the harm of NCIID experienced by a particular victim with a recognition that this harm is often contingent on sex-negative social structures and responses.

As Chun and Friedland (2015) argue, claims of sexually exposed women as "ruined" are based on the idea that women's sexual virtue must be protected and contained. The Judge in *Barnes* questions this idea by suggesting that the woman has nothing to be ashamed of (at least in the normative sexual situation of a "mature person" in an "intimate relationship"), and thereby (partially) undermines traditional ideas about the exposure of women's sexuality as deeply destructive to their being. In *Barnes*, the harm of NCIID is contextualized within a campaign of harassment by an ex-partner and understood as part of the defendant's attempts to harm the complainant, but the act of image sharing alone is not seen as a ruinous experience from which this woman will never recover. This response affectively leaves open the possibility of feeling unashamed by an act of NCIID or of coming to understand the harm as related to a violation of trust but not as an affront to "sexual purity".

Leaving Room for Harmlessness

In *Barnes*, the Judge's comments leave room for the possibility that NCIID does not need to be experienced as ruinous. The need for such an opening is especially important in youth cases of NCIID, as sex-negative legal and social affirmations of harm are especially acute, and therefore especially in need of undermining, in the context of youth. For example, despite a lack of generalizable research on the career impacts of youth who have been victims of NCIID, it is commonly asserted in media coverage and education campaigns that having intimate images shared as a youth will affect future employability and the ability to get into university (How to talk about sexting 2016, Maru 2018, Mitchell, et al. 2012, Angelides 2013). For example, a recently developed education campaign for youths in Essex County, Ontario called *#KeepYourPrivatesPrivate* explains the dangers of "sexting" with a video campaign of a young animated girl saying: "I've heard that sexy images posted of me today could affect me in the future, and that posted images can be accessed by anyone in the world forever. This could hurt my school and scholarship applications, even future jobs! Sexting has long-term consequences. Protect your social reputation!" (Maru 2018). These kinds of assertions, commonly made by police and government "anti-sexting" campaigns (Dodge and Spencer, 2017, Karaian, 2014), imply that having one's image shared as a youth amounts to life-long reputational ruin. This leaves very little room for youth victims of NCIID to experience this privacy violation as anything less than catastrophic. This is an especially salient concern due to early research findings that many youths just want to move on from an act of NCIID, and are rarely interested in extending the attention to this issue through a legal trial (Dodge and Spencer, 2017, Lockhart 2018). Additionally, Fairbairn et al.'s (2013) research finds that education initiatives for youth that rely on shaming youth sexuality and sexual

exploration can result in victims of NCIID being less likely to seek help and support. These campaigns can have the unintended side effect of framing victims as responsible for their own privacy violation and as deserving of violation because they were not careful enough with protecting and privatizing their sexual expression (Karaian, 2014, Salter and Crofts, 2015). As Bluett-Boyd et al. put it, “there is a very real risk of reproducing the very attitudes and social norms about sex and gender that facilitate sexual violence, particularly those that draw on ‘good girl/bad girl’ dichotomies, in which women who are sexually active or sexually adventurous are ‘cheap’. More subtly, this dichotomy is communicated through warnings about ‘reputation’” (Bluett-Boyd, et al. 2013, 56). Sex-negative framings of NCIID can create further victimization by legitimizing shaming responses. The sex-negative messages that youths are being fed by many “anti-sexing” and “anti-revenge porn” campaigns are buttressed by legal responses that further entrench the idea that victims of NCIID *should* be ashamed and express deep feelings of humiliation.

Social and legal response to NCIID should leave room for a potential future wherein this act is not seen as ruinous. Especially for youth, the assumption of ruin—and the reaffirmation of ruin through education campaigns and legal responses—can disallow them from coping with this act on their own terms. When responses to NCIID are more concerned with shaming teenage sexual expression than discussing consent and the right to privacy, deeply held cultural anxieties about youth sexuality can result in “simplistic, sensationalist, shock discourses” focused on regulating teenage girls’ sexual expression rather than working to eliminate sexual coercion (Ringrose et al., 2013:15). For example, Karaian analyzes the Canadian Centre for Child Protection’s “respect yourself” anti-

sexting campaign and finds that it responsabilizes girls and relies on normative ideas of the young, white, middle-class, heterosexual, female as a subject whose sexual morality must be staunchly protected (Karaian 2014, 3). She argues that such campaigns use slut-shaming discourses to responsabilize girls and protect a normative social and sexual order (Karaian 2014, 3). Such responses do nothing to undermine, and can in fact reaffirm, the sexual double standard that “marks female sexuality as deviant, and works to control girls’ behaviour and social positioning” (Attwood 2007, 235). Thus, many sex-positive scholars have asserted that educational responses to issues such as NCIID should recognize youth sexuality rather than shaming it (Bivens & Fairbairn, 2015; Karaian, 2014; Milford in Bailey & Steeves, 2015); as Bivens and Fairbairn assert, “youth should be accepted and embraced as sexual beings. At a societal level, healthy relationships and sex education that includes conversations about power, consent, and coercion should be promoted” (Bivens and Fairbairn 2015, 193) (as discussed in Chapter 6, there have been positive changes in this regard in some education campaigns). Canadian youth interviewed for the *eGirls Project* worried about the “the danger of making that one mistake that could expose them to permanent reputational harm and social ruin, a danger they often associated with ‘bad’ or ‘inappropriate’ images, which frequently revolved around sexualized self-representations” (Bailey 2015, 29)⁴³, responses to NCIID should act to question rather than affirm the belief that an ‘inappropriate’ image will taint a young woman for the rest of her life. By paying attention to those victims who do not feel ruined and forever damaged by acts of NCIID, legal and extra-legal responses can leave

⁴³ Australian youth express similar concerns (mirroring the extreme reputational impacts regularly focused on by news media coverage of “sexting gone wrong”) (McGovern et al. 2016).

room for alternative ways of experiencing an act of NCIID and challenge the forces that support problematic ideals of sexual purity rather than reaffirming them.

Complicating the Cause of Harm

Considering the impacts of sex-negative and discriminatory community responses to NCIID, the harm experienced as a result of NCIID may be largely based on the context in which the offence is committed and by the way that third parties and those in the victim's community respond to the offence. The ways that friends, family, employers, and the victim's broader community react to an act of NCIID might be hugely influential in mitigating or amplifying the harm experienced. For example, in the youth case of *R v X* (2016) the victim describes the harm of having images non-consensually shared saying:

I feel like I am never going to get my old life back again, for people have been treating me differently ever since the incident. I feel ashamed of my body and I try to hide it the best way possible. Before, I did not think negatively of my physical appearance, now I feel very self-conscious. I feel like I am not as close as I was before with my friends or family especially my mom and dad. I feel like there are pieces missing between us and I miss those pieces. I feel people think differently of me now since the incident, I hear them talking about it, it makes me feel worse than I already feel. Attending school was hard for me and still is, for me knowing that people knew about the incident. They talk about it in the hall ways when I walk past, I hear them saying bits and pieces of the incident, making fun of me and calling me names. (para 7)

The harms described by this victim are largely based on friends, family, and schoolmates treating her differently because she has had her nude pictures exposed. These responses

from her community may be based on discomfort with female/youth sexuality and norms around female sexual expression and nudity (Valenti 2008, Valverde 1985) that lead to shaming and disappointment in the aftermath of NCIID. To trouble the seemingly “common sense” response of her parents, it is useful to consider—as discussed above—that the sexual expression of heterosexual teenage boys is often met with much less concern (and sometimes seen as a joke or a point of pride) (McGovern et al. 2016, Handyside and Ringrose 2017). Although the treatment of specific boys who have their images shared would depend on multiple factors (e.g. gender expression, level of popularity, normative attractiveness, and class) (see Chapter 5), it seems less likely for heterosexual boys’ reputations to be seen as significantly compromised by image sharing, as their sexual desire and expression is often assumed and seen as unproblematic (McGovern et al. 2016, Miller 2016). It doesn’t seem that the victim in *R v X* is focused on the initial harm of having her image shared, but rather she describes her sorrow at the way her peers have bullied her in response and the way her family now seems to see her in a new light. From this perspective, the harm experienced is not focused on the violation committed by the defendant, but rather on the impact this act had on her relationship with friends and family because their idea of who she was (seemingly informed by expectations that girls are not sexually desiring and that they should keep their sexual expression private and contained) is tarnished by the exposure of her sexuality.

Likewise, in *R v AC* (2017) the victim explains the harm she has experienced as a result of NCIID saying, “he has shared my body with the entire world. Friends, colleagues, classmates, people who I interact and see every day of my life. To me, it is an

automatic assumption people have a different outlook or perspective on who I really am. [...] This has affected not only how people see me, how my employers see me, my friends, my families outlook on me, but most important how I now see myself” (para 51). The idea these victims express, that having one’s intimate image shared changes the way people understand who you are, is a harm that seems to be anchored in cultural beliefs about nudity and sexuality as shameful. These responses demonstrate that the amount of harm experienced can be largely dependent on community and third party responses to these image leaks, and point to the importance of socio-legal responses that both recognize the harm experienced and attempt to undermine the assumption of ruin that influences and aggravates the harm of NCIID. When third parties treat these acts as ruinous, it reaffirms the ability for nudity and sexuality to be weaponized.

While I am exploring the sex negative roots of some of the harms of NCIID, I do not want to imply that victims are unenlightened if they experience this violation as extremely harmful. The documented harms of NCIID are multiple and can be amplified by, for instance, racist and homophobic stereotypes and beliefs (See Chapter 5). As a result of having nude or sexual images shared, some victims have felt their reputation so damaged that they have changed their name or moved to a new area and others report losing, quitting, or being unable to find jobs due to reputational impacts (Bloom 2016, Kitchen 2015, Powell and Henry, 2017, Langlois and Slane 2017). For instance, in text messages included in the appendix of *R v Zhou* (2016), the victim describes her perception of how the disclosure of nudge images will affect her future saying, “my life is ruined. I can say goodbye to the prospect of ever having a high-profile career—now that the world has these pictures. If anyone out of the 1000+ that saw [the image] and possibly

downloaded it ever recognizes me, I'll lose my job, my reputation, my everything” (appendix). Likewise, in *R v AC* (2017) the victim impact statement describes the potential reputational and employment impacts of NCIID when the victim asks: “how am I supposed to go back to work in the summer, when he sent these pictures to my employees and even BOSS. I feel absolutely horrified, embarrassed and disgusted. [...] This has affected not only how people see me, how my employers see me, my friends, my families outlook on me, but most important how I now see myself” (para 51, emphasis in original). And *R v W* (2014) describes the victim quitting her job and no longer attending her university classes as a result of the blow to her reputation caused by an act of NCIID. While these victims were clearly severely impacted by this act, victims’ and bystanders’ beliefs about nudity and sexuality may be able to temper the amount of harm experienced. While “attacks on reputation” have been experienced as both “economic attacks as well as social ones” (Langlois and Slane 2017, 133), this relies on bosses and colleagues treating nude image exposures as a reason for dismissal. Citing a study showing that 81% of employers Google job candidates, Bloom concludes that “this means that [non-consensually shared intimate images] will taint almost every future job application for the rest of the woman’s life” (Bloom 2016, 279); however, this assertion relies on every employer treating these images as proof that the woman is not a fit employee rather than as proof that she is a sexually active person or a person that experienced a privacy violation⁴⁴ (not to mention that Bloom’s framing might imply or leave unanalyzed the belief that those who have *consensually* uploaded nude or sexual images online deserve to have their future job prospects affected).

⁴⁴ Not to mention, as discussed in Chapter 2, that some images will be less likely to appear in search results based on the way an image is shared or whether or not the person has a common name that skews the search results away from them.

Some victims describe the third party harassment and shaming they experience in response to an act of NCIID as the most harmful part of having their intimate image shared. For instance, in describing her experience of NCIID, Danish journalist Emma Holten focuses on the harm that came from the multiple men who harassed her with slut-shaming comments in response to the images (Holten 2015). The case of Lori Douglas provides a salient example of how the sex-negative reactions of, in this case, the Manitoba legal community largely influenced the harm experienced. In 2003 Lori Douglas, a Manitoba judge, was forced to undergo an inquiry by the Canadian Judicial Council after having intimate images involving bondage non-consensually shared. Giese reports that “the case centered largely on whether Douglas was fit to sit on the bench and whether she should have disclosed what occurred in her application to become a judge. Her reputation was savaged, with little concern paid to her privacy or her innocence” (Giese 2016). Rather than responding to this act as a privacy violation, or simply ignoring it as irrelevant to her job, many in the Canadian legal community argued that the images meant Douglas did not have the “credibility to be a judge” and should lose her job⁴⁵ (Giese 2016). Due to the length of the inquiry (four years without reaching a conclusion) and the additional harm Douglas incurred by having members of her legal community view and analyze the photographs as part of the inquiry, Douglas ultimately decided to retire as a judge to put an end to the inquiry (Giese 2016). Describing the particular gendered dynamics of the professional harm in her case, Douglas says “I was expendable to protect the view of what the judiciary should be. I was judged by a white male-dominated group of people who had a very particular take on how women should behave

⁴⁵ Similarly, in the case of Lauren Miranda discussed above, Miranda was fired from her teaching job because her intimate image was understood as disqualifying her from acting as a good role model for students.

and what women should be about” (Giese 2016). This case demonstrates how the particular response of one’s community plays a large role in how much harm can be caused by an act of NCIID. Douglas had largely moved on from the original act of NCIID and had forgiven those involved, it was only when the images were taken up by the legal community and interpreted as evidence of something shameful and unprofessional that they had an irreparable impact on her life. Thus, it is necessary to draw attention to how social and legal framings of this issue, such as those discussed in Chapter 3, have the ability to either reaffirm or question the understanding of NCIID as necessarily resulting in devastation and reputational ruin.

The impact of third party responses to NCIID is extremely relevant when considering how this act should be understood in society and punished in law. As described above, it is increasingly common for the harm of NCIID to be framed as equivalent to sexual assault and to be understood as potentially causing suicide; as a result, it is important to question (especially considering the impacts of carceral punishments discussed in Chapter 6 and the stigma of particular offences discussed in Chapter 3) whether we want the image sharer to be treated as if they committed sexual assault or drove a victim to suicide. The fact that a portion of this harm is created or amplified by sex-negative or sexist third party responses creates questions about how much responsibility the image sharer holds, whether third party harassers should be held accountable in some way, and whether sex-positive responses focused on cultural change rather than legal punishment might be more appropriate in certain cases (See Chapter 6 for further discussion of alternatives to criminal justice responses). It is necessary to recognize the multiplicity of factors that lead to harm in these cases; for instance, claims

that NCIID leads to suicide often leave out the fact that, in these particular cases, the distribution of images is often followed by extremely cruel and long-lasting harassment and slut-shaming from peers in combination with inadequate interventions from institutions such as schools, employers, and the mental health system. As Wayne MacKay explains in his report on cyberbullying, “suicides are complex issues of mental health and there is rarely a clear cause and effect” (W. MacKay 2012).

For example, in the Rehtaeh Parsons case—which is regularly cited in Canadian law, media, and governmental responses as an example of the harm of NCIID—an act of NCIID triggered many of the events that resulted in her suicide, but it is difficult to say exactly what factors ultimately pushed her to this tragic outcome. The distribution of an image of Parsons allegedly being sexually assaulted was not met with sympathy and concern from her peers, but rather triggered years of relentless slut-shaming and harassment from youth at multiple schools (Dodge, 2016, No Place to Hide 2015). Additionally, when she attempted to seek help to deal with the image distribution and harassment, she was let down by a number of institutions: she was forced to give two statements to police due to a procedural mishandling of her report and felt mistreated by some officers; she felt that her behaviour was under more investigation by police than that of the boys who spread the photograph of her and allegedly sexually assaulted her; nothing was done to attempt to stop the spread of the images or to punish or educate those who were harassing and slut-shaming her; and the mental health response offered in Nova Scotia was reportedly negligent—and even traumatizing—and worsened her suicidal thoughts (No Place to Hide 2015, Segal 2015).

While having an intimate image or an image of abuse non-consensually shared

can be extremely traumatizing for some victims on its own, it is necessary to consider the impacts of bystanders who pile-on additional abuse and harassment (MacKay 2012, Segal 2015). This is especially necessary to consider in light of research findings that young people who experience online forms of bullying more generally, that do not necessarily include the dissemination of intimate images, are also “more likely to think about and attempt suicide” (as are those who commit the bullying) (Broll 2018, np). For instance, this can include the common practice of youths spreading sexualized rumours or stories about their female peers (Miller 2016, Attwood 2007, Bailey, *A Perfect Storm* 2015). Miller (2016) describes how, between 2006 and 2016, news media in the United States covered “the suicides of 24 adolescent girls who were the subjects of sexual rumors or labeled ‘sluts,’ ‘whores,’ or ‘lesbians’ in the months prior to their deaths” (722). While Miller notes that these cases also likely had many contributing factors, these cases demonstrate that factors such as sex-negative and discriminatory rumor spreading and harassment can have serious impacts on their own and can contribute to the way an act of NCIID is experienced. Thus, it is necessary to grapple with how to understand the level of responsibility held by the initial distributor of the image versus those who use the image to bully/harass/abuse the victim. Sex-negative, homophobic, transphobic, and racist harassment is a rampant issue that can take place without the spreading of intimate images. Addressing some of the shame and harm associated with both image and non-image based harassment will require a broader undermining of shaming related to, for instance, the policing of the gender binary, heterosexuality, race, and class (Shefer and Munt 2019, 146). In addition to undermining sex negativity, challenging the weaponization of NCIID will require attention to this larger culture of “normative

practices of shaming” (Shefer and Munt 2019, 146).

In the criminal trial for the teenage boy who shared the image of Rehtaeh Parsons, the defendant stated that while he “made a huge mistake” by sharing the photograph he “will not live with the guilt of someone passing away” (Halifax 2015). While the actions of this teenage boy put in motion the series of events that tragically ended in a loss of life, his refusal to feel the full guilt and responsibility of this loss may be justified. The non-consensual sharing of intimate images represents a violation of privacy, and in the Parsons case the documentation of an alleged sexual assault, but this violation likely requires the nurturing of a sex-negative and discriminatory culture to morph into a weapon capable of ruining a career, severely damaging self-worth and mental health, or ending a life.

Conclusion

In this Chapter I have shown that, contrary to concerns that the harm of NCIID would not be taken seriously enough in law, this harm is in fact understood as extremely impactful by many judges. While this recognition of harm is useful for providing healing, justice, and resources to some victims, in some forms it may also act to reaffirm the belief that the public exposure of nudity and sexuality—namely for women and sexual minorities—is inherently harmful and ruinous. As Chun and Friedland describe, a “discourse of ‘ruin’ still mediates the treatment of female sexuality that is open and visible” and this discourse will not be undermined by responses that further stigmatize these exposures (Chun and Friedland 2015, 9). Thus, it is necessary to examine how the harms associated

with acts of NCIID may be less dependent on the actual act than on how others respond and either pile on or provide support in the aftermath of image distribution.

Understandings of the harm of NCIID as necessarily devastating have important social and legal effects. For instance, this understanding can be used to support the idea that all cases of NCIID should be responded to with criminal law (See Chapter 6 for a further discussion of the criminalization of NCIID) and to ignore the multiplicity of contexts and outcomes associated with this act. As I have argued, it is also necessary to consider how implications that women and girls are forever scarred by this act could help to support a social context wherein this is the case. If we begin to see these acts as sometimes resulting in negligible harm or as a harm that can be mitigated through community response and sex-positive education, we might garner more support for non-criminal alternatives and attempts at broader cultural change. As discussed in Chapter 3, while the harm caused is an important factor to consider in legal and social responses, the context of various cases (e.g. NCIID as a part of an ongoing campaign of domestic violence versus image sharing as an attempt to “show off” to friends) may be even more important to consider.

As demonstrated in *R v Barnes* (2006), legal responses have the potential to question the framing of NCIID as necessarily devastating and to pull apart the harm of having one’s intimate image shared without consent from the harm of being harassed by an ex-partner or shamed based on sex-negative beliefs about sexual exposure. As Chun and Friedland assert, “a more positive reading of the prevalence and deep resonance of these cases” is that “they point to the fact that we need to fight for the right to be vulnerable—to be in public—and not be attacked. We need to grapple with the ways that

trust and publicity have always entailed risks” (Chun and Friedland 2015, 17). In the face of widespread sex-negativity in response to this issue, it is worthwhile to consider how the law might recognize the harm of NCIID while also encouraging victims to “try not to be embarrassed” and to continue believing in the possibility of a society wherein sexual privacy violations cannot be so easily weaponized for the purpose of reputational ruin.

Chapter 5

Vengeful Men & Victimized Women: Complicating Conceptions of Victims & Offenders of Non-Consensual Intimate Image Distribution

Popular and scholarly responses to NCIID often frame this activity as a harm mostly perpetrated by boys and men against women and girls (Aikenhead 2018, Citron and Franks 2014, Valenti 2014, May 2016, European Institute for Gender Equality 2017, Fairbairn 2015, McGlynn, Rackley and Houghton 2017, West Coast LEAF 2014). Relatedly, it is often asserted that boys and men who commit NCIID are motivated by misogynistic and sexist beliefs and are primarily concerned with harassing, embarrassing, abusing, or getting “revenge” against female partners or ex-partners (European Institute for Gender Equality 2017, McGlynn, Rackley and Houghton 2017, Fairbairn 2015, Hill 2015). As Hill asserts, “many instances of [non-consensual pornography] seem to be assertions of control, revolving around inherent disrespect for women’s autonomy” (Hill, 2015, 120). In contrast to this gendered construction of male perpetrator and female victim, several quantitative studies offer alternative evidence regarding who commits acts of NCIID (and why) and who is impacted by these acts (Henry, Powell and Flynn 2017, Lenhart, Ybarra and Price-Feeney 2016, Steeves 2014). In light of these findings, and building on the arguments for nuancing popular framings and understandings of the harm of NCIID in Chapters 3 and 4, I seek to explore and complicate popular conceptions of victims and offenders of NCIID and of the motivations behind non-consensual image sharing.

Based on my analysis of 49 Canadian legal cases involving NCIID and a review of scholarly and media responses to this issue, in the first two sections of this Chapter I discuss popular constructions of victims and offenders and trouble assumptions about the demographics of those who experience and commit NCIID. Although I begin with a focus on troubling gendered ideas of NCIID specifically (as this has been the dominant framing of NCIID and is particularly in need of unpacking), I move on to develop understandings of victims and offenders based on an intersectional analysis of those involved in acts of NCIID. In the final section of this Chapter, I ask what might be missed in prominent constructions of NCIID and I analyze the dynamics of some of those cases that do not fit within the paradigmatic scenario of a vengeful male seeking to harm his female partner/ex-partner. Drawing from the work of intersectional feminism (Crenshaw 1991, Sokoloff and DuPont 2005, MacDonald, Osborne and Smith 2005, Kim 2018) and postmodern feminism (Moore 2008, McHugh, Livingston and Ford 2005) (see Theoretical Framing section for further discussion of these approaches), in this Chapter I show that understandings of NCIID have been limited by a binary understanding of women as victims and men as vengeful offenders. I argue that this reductionist conception of who is impacted by NCIID and who commits NCIID (and why) might limit our understanding of how to affectively and appropriately respond to this issue. As I consider scenarios beyond the typical vengeful man/victimized woman paradigm, I argue for a more nuanced understanding of the way power dynamics and gender norms circulate within particular cases of NCIID.

Conceptions of Victims

It is often asserted that victims of NCIID are generally female and that male victims are a rare anomaly (Valenti 2014, Citron and Franks 2014, Aikenhead 2018, De Angelis 2018, Chemaly 2014, European Institute for Gender Equality 2017, Hill 2015). For instance, Citron and Franks describe NCIID as one of the many “harms that take women and girls as their primary targets” (Citron and Franks, 2014, 347) and contend that this issue “affects women and girls far more frequently than men and boys, and creates far more serious consequences for them” (Citron and Franks 2014, 348). Likewise, well-known feminist attorney and author Jill Filipovic asserts that “revenge porn” is “explicitly purposed to shame, humiliate and destroy the lives and reputations of young women” (Filipovic 2013). And Aikenhead (2018) claims there is increasing evidence that most victims of NCIID are women and girls. The victimization of primarily women is often described in media coverage (De Angelis 2018, Nikolov 2018) and scholars regularly rely on a single study by the Cyber Civil Rights Initiative that found 90% of “revenge porn” victims are female (Hill 2015, Aikenhead 2018, Citron and Franks 2014). The bases for these demographic claims are often precarious. For instance, the often relied on Cyber Civil Rights Initiative data has several shortcomings: the data is based on a survey that was hosted on endrevengeporn.org with participants self-selecting into the study by visiting the website on their own accord and results regarding victimization rates are based on a small “female-heavy sample” of 361 respondents who reported being victims of NCIID (Cyber Civil Rights Initiative 2014). Additionally, claims regarding the gender of victims that are based in part on police reports—such as Aikenhead’s (2018) assertion that NCIID predominately affects women based partially on reports of NCIID to Canadian police—do not consider the possibility that certain populations are less likely to

report their victimization. Similar limitations would apply to my dataset, which includes only one male victim, as these findings solely account for the types of cases and types of victims that make it to the court level.

Male Victims

Although assertions regarding the gendered nature of NCIID victimization are so widespread that the fact almost goes without saying, methodologically rigorous⁴⁶ studies out of the United States, Canada, and Australia have found very different results from those of the Cyber Civil Rights Initiative and those based on case law or police report data. Henry, Powell, and Flynn’s study—a national online survey of 4,274 Australians with 56% female respondents and 44% male respondents that ranged in age from 16-49—found that males and females are equally likely to be victims of NCIID (Henry, Powell and Flynn 2017). Lenhart, Ybarra and, Price-Feeney’s 2016 study—based on a nationally representative telephone survey of 3,002 American internet users aged 15 and older—likewise found that “men and women are equally likely to have sensitive photos posted” (Lenhart, Ybarra and Price-Feeney 2016, 5). With slightly different results, Steeves’ 2014 research for Media Smarts—based on a sub-section of survey data from 5,436 Canadian students in grades 4-11—found that “sexts”⁴⁷ of boys are somewhat more likely to be non-consensually shared than those of girls (26% versus 20%) (Steeves 2014). Relatedly, research on “sextortion” victimization rates for 12-17 year olds in the United States found that, of the 5 percent of respondents who had been *threatened* with the dissemination of

⁴⁶ These studies contained much larger datasets (n=>3000) than the Cyber Civil Rights Initiative study (n=361) and took steps to avoid self-selection bias and a skewed population makeup by relying on large, nationally representative surveys.

⁴⁷ This research used the term “sext” to refer to sexy, nude, or partially nude images (Steeves 2014, 4). It should be noted, therefore, that not all “sexy” images might be included within the sexually explicit or partially/fully nude definition of NCIID used in my research and in the Canadian law.

intimate images, males were more likely to be targeted (5.8% versus 4.1%) (Patchin and Hinduja 2018, 1). Thus, while the gendered perspective of NCIID has allowed “feminist-minded advocacy groups” to “successfully push[] for criminal laws based on the framing of revenge porn as sexual abuse and women as primary victims” (Lageson, McElrath and Palmer 2018, 6), this construction may have invisibilized certain populations that are subjected to these acts, such as boys and men⁴⁸. Thus, while continuing to engage with research showing that the impacts of NCIID are more severe when committed against women and girls (Aikenhead 2018, Shariff and DeMartini 2015, Chemaly 2014, Hill 2015, Citron and Franks 2014, Fairbairn 2015, Lee and Crofts 2015), future research in this area should seek to illuminate the particular impacts experienced by men and boys and to question how assumptions about the gendered nature of consensual and non-consensual intimate image sharing may have impacted previous studies.

Although there seems to be a dearth of male victimization being reported to police (Aikenhead 2018) and making it to the court level (only one case in this study’s dataset), the statistics above show that this absence should not be used to conclude that men and boys are not experiencing acts of NCIID. Rather, important questions are raised by the discrepancy between the statistically similar likelihood of victimization for males and females and the much larger proportion of case law and news articles (Fairbairn 2015) describing women’s victimization. Although more research is needed to determine why men and boys are seemingly less likely to report an act of NCIID, Patchin and Hinduja’s study of threats of intimate image sharing provide some clues as to why this might be.

⁴⁸ It is necessary to consider the potential shortcomings of victim-reported victimization rates, such as the fact that many victims of NCIID may never know that their image was shared. Henry et al. (2017), for instance, suggest those images shared on “revenge porn” sites may circulate without the victim’s knowledge.

Their research found that 34.8% of boys who were threatened with image dissemination told an authority figure in their lives (parent, police, or someone at school), whereas 47% of girls told an authority figure (Patchin and Hinduja 2018, 10). Although this research only discusses youth cases and looks at all threats to disseminate intimate images (regardless of whether the image was ultimately disseminated), these findings hint at the possibility that male victims may be more likely to attempt to deal with an act of NCIID on their own or with the support of a peer, and may therefore be less likely to involve authority figures such as police (although they are still reporting to authority figures 34.8% of the time, raising questions regarding whether authority figures are taking cases involving male victims less seriously). As Patchin and Hinduja explain, this discovery aligns with broader research findings that “males report certain types of victimization (e.g., sexual assault and abuse) much less than females (Davies, 2002; Dube et al., 2005), often because of barriers to disclosure like the stigma related to expected gender norms and roles, or even because they believe that limited support is available to them” (Patchin and Hinduja 2018, 14). It might also be argued that men and boys are less likely to report NCIID victimization because they experience less severe harms from having their intimate images non-consensually shared, however it has been found that women (40%) are only somewhat more likely than men (36%) to report feeling afraid for their safety as a result of having images non-consensually shared (Henry, Powell and Flynn 2017, 6). While more research on men and boys’ experiences of NCIID is needed, and many men and boys may indeed experience NCIID as relatively harmless, it seems unlikely that a relative lack of harm accounts for the whole story of why men and boys are less likely to report their victimization.

Considering the impact of news media on the way individuals may interpret their victimization (Kitzinger 2004), how often (and in what way) cases involving men and boys are covered in the news media may also impact the likelihood of men and boys reporting their victimization to police or choosing to discuss their experience in the media.⁴⁹ Because this issue has largely been framed as a women’s issue (Aikenhead 2018, Citron and Franks 2014, Filipovic 2013, Nikolov 2018, Levant 2018), men and boys could be made to feel that their victimization will not be understood or responded to with support. The fact that well-known feminist Jessica Valenti felt inspired to write an article for *The Guardian* titled “It’s still revenge porn when the victim is a man and the picture is of his penis” (Valenti 2014) speaks to the way male victims of NCIID are often dismissed in popular culture. In this article, Valenti discusses media coverage of two male victims of NCIID in the United States—conservative pundit John Schindler and Ohio political staffer Adam Kuhn—who had images of their genitals shared by “women seeking to embarrass them” (Valenti, 2014). Valenti comments that these cases “have been played more for laughs than seen as serious crimes—perhaps in part because they happened to men” and asserts that “instead of laughing or gawking at adults—even men, even conservative men—who sent ‘naughty’ pics to other consenting adults (and forcing them to leave their jobs in shame), let’s simply punish those who broke their trust. A culture of consent demands that both women and men ask for and receive it, and not proceed without it” (Valenti 2014). As Valenti’s intervention demonstrates, while news coverage and scholarship has increasingly framed the image exposure of women as a serious issue tantamount to a sex crime or an act of domestic violence (See Chapter 3 for

⁴⁹ For instance, the New York Times recently reported that an increase in the amount of men reporting sexual violence victimization in England and Wales is related to increased media coverage of boys and men as victims of sexual abuse (Yeginsu 2018).

a further discussion of the many framings of NCIID), this framing seems to be much less widespread for cases involving men; rather, the impacts of NCIID on men have often been downplayed and their cases have even been treated as a punch line (Valenti 2014, The Current 2018).

A strikingly similar intervention to Valenti's was made by Julie Lalonde—an advocate for survivors of sexual assault—in the aftermath of a high profile Canadian case of threatened image distribution. In November of 2018, Conservative Member of Parliament Tony Clement announced he was stepping down from many of his committee duties as a result of having been extorted with sexually explicit videos and photos he had sent to an individual online that he believed to be a consenting woman (Gatehouse 2018). Clement was asked to leave the Conservative party shortly after due to evidence of a similar incident in the past (Gatehouse 2018). Rather than framing Clement as a victim of extortion or as someone being threatened with NCIID, news outlets regularly referred to the extortion attempt against Clement as either a “sexting scandal” (The Current 2018, Gatehouse 2018, Maclean's 2018) or a “nude photo scandal” (Lemiski 2018), and articles for *CBC* and *The Star* quipped that Clement was now part of the list of politicians that “seem to have difficulty keeping their privates private” (Gatehouse 2018) and that “to hold public office is to never point a camera below your bare waist—that’s why they’re called *private parts*” (emphasis in original) (Menon 2018). Critiquing such responses, Julie Lalonde asserts that it is necessary to question the treatment of this act of extortion as a scandal or as a joke; rather, she argues, we should think about how this victim-blaming rhetoric will be heard by other victims who are threatened with or experience NCIID. Lalonde asserts that “the cultural conversation around Tony Clement in the last

24 hours has been a lot of glee around: 'He basically got catfished, he was married, he shouldn't have been sending nudes, blah, blah, blah. But I think we still need to set a hard line that says blackmailing people with their nudes is bad" (The Current 2018).

It seems that the push to frame NCIID as an issue committed by men against women has made it difficult for some cases against men to be read as fitting within this category. For instance, in an article titled "Posting Hulk Hogan's Sex Tape Isn't Revenge Porn, But is it Legal?", the non-consensual dissemination of a sexually-explicit video of Hulk Hogan is assumed to be somehow different from cases of "revenge porn" (Daileda 2015), despite what is described as attempts by Hogan's legal team to "liken his situation to the many celebrities whose nude images were infamously stolen and spread across the Internet late last year" (Daileda 2015). Similarly, when ex-NHL player Mike Zigomanis had nude images he shared with his then-girlfriend disseminated online, news articles did not frame Zigomanis as a victim; rather most media responses focused on how D'Angelo Brands attempted to end their promotional contract with Mr. Zigomanis based, in part, on their belief that the "nude photo scandal" was a breach of the contract's morals clause⁵⁰ (Perkel 2018, Westhead 2016, *Zigomanis v D'Angelo Brands* 2016).

Although Aikenhead (2018) argues that the victimization of women in particular must be more overtly recognized in legal responses to NCIID, it is necessary to grapple with how to recognize the specific impacts experienced by women without invisibilizing male victims. Based on the available quantitative data at this point, there is good reason to pay more attention to male victims of NCIID and, based on popular media responses,

⁵⁰ Fortunately, D'Angelo Brands was not successful in their civil suit against Mr. Zigomanis. The Judge denied that privately sharing nude photos between consenting adults is an offence to public morals and decency and, contrary to D'Angelo Brands' framing of the issue as a "nude photo scandal" (*Zigomanis v D'Angelo Brands* 2016, para 40), spoke to the fact that civil and criminal laws have been created in Canada to protect the privacy of such communications (*Zigomanis v D'Angelo Brands* 2016, para 57).

there is a need for more critical analysis of responses to these cases. While it may be generally true that women are more seriously impacted than men when their images are shared (due, in part, to the gendered nature of sex-negativity discussed in Chapter 4) (Aikenhead 2018, Shariff and DeMartini 2015, Chemaly 2014, Hill 2015, Citron and Franks 2014, Fairbairn 2015, Lee and Crofts 2015), more research is needed to understand the particular harms that men and boys might experience as a result of NCIID. For instance, Aikenhead describes the (potential) disparate impact on women and girls saying:

Studies demonstrate that girls understand the severity and long-term damage to reputation that can result from being labeled promiscuous, concerns not generally shared by young men. Women can suffer significant economic and professional consequences as a result of NCDII, such as being fired from their jobs when their employers discover nude or sexualized images of them online, essentially being punished for their own victimization (Aikenhead 2018, 124).

While boys may not be as likely to fear being labeled promiscuous (though this might be less true within more traditional/conservative or religious communities), the context of a particular case may reveal images being used to bully boys for their sexual orientation or for failing at normative expressions of masculinity. As Mishna et al. find, while girls disproportionately experience gendered and sexualized bullying, “boys commonly experience homophobic bullying and bullying linked to masculine norms” (Mishna, et al. 2018, 5). Thus, assertions that NCIID is necessarily more severe for female victims based on the belief that “women would be seen as immoral sluts for engaging in sexual activity, whereas men’s sexual activity is generally a point of pride” (Citron and Franks, 2014,

353), may be more or less true based on factors such as: a man/boy's sexual orientation attractiveness (including in relation to penis size and aesthetics⁵¹); cultural capital; and gender presentation. It is also necessary to recognize those men who have experienced career impacts and other serious harms as a result of NCIID. For instance, Ohio political staffer Adam Kuhn was seemingly forced to resign after a former lover tweeted an image of his penis out of "revenge" (Bresnahan 2014). Additionally, as is common in cases involving female victims, in the case of *R v Wenc* (2009) NCIID was used as part of a pattern of domestic violence. After breaking off his sexual relationship with Mr. Wenc, the victim in this case experienced a campaign of harassment from Mr. Wenc that included, amongst other acts, posting nude photos of the victim with his phone number on public websites (para 4). Referring to the totality of harassment the victim experienced in *Wenc*, the court finds that that Mr. Wenc's actions "caused the victim to fear for his safety and even for his life. To escape the relentless harassment, at one point the victim moved to Toronto, but Mr. Wenc's misconduct reached him even there" (*R v Wenc* 2009, para 10). Although the focus on women's victimization has provided many important insights into the dynamics of this issue, responses should be careful not to imply that boys and men have not also experienced, at times severe, impacts as a result of image distribution. And the relative lack of male victims of NCIID within the criminal justice system should not be used to argue that these victims do not exist, but rather should spark important questions about why these victims are choosing not to report or are not having their cases carried to the court level.

⁵¹ In terms of NCIID associated with perceived unattractiveness and the policing of masculine norms, Hearn and Hall's (2018) study of posts on myex.com found instances where male victims of NCIID were disparaged using comments about their "penis size or aesthetics" (e.g. crooked, of narrow girth, or having an unattractive glans) (10).

Beyond Gender

The above analysis has argued for further research on the impacts of NCIID on men and boys, however existing statistical research points to the need for a much more complex understanding of who is victimized by acts of NCIID. Although, statistically, gender is not a dominant determinate of rates of victimization, factors such as sexual orientation, race, and ability do appear to be significant. Lenhart, Ybarra, and Price-Feeney (2016) find that those who identify as lesbian, gay, or bisexual are much more likely to be victims of NCIID than those who identify as heterosexual (7% versus 2%) and that black internet users are more likely to have their image shared than white internet users (5% versus 2%). Henry, Powell, and Flynn (2017) find that rates of victimization are well above the average (11%) for Australians with a disability (42%), Indigenous Australians (37%), and for lesbian, gay, and bisexual Australians (21%). And in terms of being threatened with NCIID, the sextortion survey mentioned above finds that non-heterosexual youth are significantly more likely to have been the victim of sextortion (10.9% versus 4.5%). Thus, treating NCIID as a primarily gender-based issue affecting women and girls, without considering an intersectional viewpoint, may lead to a lack of recognition and analysis of the importance of race, indigeneity, ability, and sexual orientation in responses to NCIID. For instance, despite well-supported quantitative research findings that lesbian, gay, and bisexual people are more likely to be victimized, very few qualitative academic articles or news articles discuss this issue as one particularly affecting sexual minorities. Additionally, to date, quantitative analysis has not looked specifically at the experiences of gender non-binary folks—due to seemingly lacking participants in this category (Lenhart, Ybarra and Price-Feeney 2016) or having

too small of a sample size for this group to make statistically robust findings (Henry, Powell and Flynn 2017)—and have not undertaken research on those under the LGBTQ2+ umbrella that do not identify as lesbian, gay, or bisexual.

Arguing for the consideration of factors beyond gender should not be seen as an argument that gendered dynamics are not important to consider; rather, following the theoretical approach of intersectionality (Crenshaw 1991, Razack 2005, Sokoloff and DuPont 2005, Kim 2018), it is a call to question the assumption that gender is always the sole or primary explanation for experiences of NCIID victimization. In terms of NCIID, it seems that more attention to intersectional approaches—that consider the potential impacts of, for instance, those marginalized by racism, classism, homophobia, transphobia, and ableism—is required to understand the dynamics of this issue.

Unfortunately, my focus on a dataset of legal cases for this research limits my ability to determine the identities of many of the victims in my dataset beyond their gender identity—as the legal cases in my dataset did not regularly discuss the identities of victims (or offenders) beyond their gender. Some limited identity indicators of victims (and offenders⁵²) beyond gender were gleaned from the case law and coded under the node “victim demographics”. In terms of sexual orientation, one case (*R v Wenc* 2009)

⁵² Limited identity indicators were also coded for offenders under the “offender demographic” node. In terms of sexual orientation, one case (*R v Wenc* 2009) included a male offender in a sexual relationship with the male victim (though the sexual identities of the individuals were not explicitly stated), one case included an accused that self-identified as bi-sexual (*R v BH* 2016), and all other cases described only heterosexual dynamics between victim and offender (though the sexual identities of individuals were not explicitly stated). In terms of racial identity, the race of an accused was only mentioned in two cases, as one offender was described as “First Nations” in *R v SB et al.* (2014) and one was described as non-European (*R v MR* 2017). Markers of class were rare aside from a few mentions of an accused’s employment status, which generally indicated a variety of employment situations: with some accused individuals being unemployed or under-employed (*R v Shultz* 2008; *R v Wheaton* 2017; *R v Greene* 2018), others working in customer service (*R v Wenc* 2009; *R v TCD* 2012), and others holding careers generally associated with a somewhat higher social class such as a chemical engineer (*R v Kappoor* 2012) and osteopath (*R v Korbut* 2012).

included a romantic relationship between two men (though the sexual orientation of the victim was not explicitly stated) and all other cases described only heterosexual dynamics (though the sexual orientations of victims were not explicitly stated). Although the particular impacts of victims' sexual orientations were not discussed in the case law, the case of *R v Wenc* (2009) might be read as involving attempts by Mr. Wenc to use homophobic cultural beliefs as part of his campaign of harassment against the victim. For instance, Mr. Wenc's posting of false claims that the victim was spreading HIV (as mentioned in Chapter 3) might be linked to particular harms related to the victims sexual orientation/sexual practice, as fears of HIV have often been interwoven with homophobia and used to justifying the marginalization, harassment, and criminalization of gay men (Avert 2018). Additionally, Mr. Wenc's threats to share intimate images with the victim's relatives could take on harms related to homophobia if, for instance, the victim's family was unaware of his sexual orientation or otherwise expressed homophobic beliefs. In terms of other identity categories, the race of one victim (Rehtaeh Parsons) has been identified as white through media attention to this case and it is implied that the victim in *R v MR* (2017) is non-European. Although the impacts of victims' racial identities were not discussed in the case law, in *R v MR* the Judge mentions that the victim is non-European as part of acknowledging how her family's involvement in a "very ancient" faith⁵³ increased the impact of NCIID on her and her family. As mentioned in Chapter 4, this indicates how victims' cultural and religious beliefs (and those of their community), namely those related to traditional ideas regarding sex and sexuality, may aggravate the experience of harm for particular victims.

⁵³ The judge comments that both the victim and offender's families practice a "very ancient" faith and that "the practitioners of that faith were living in organized advanced societies, focused on education, and prosperity, when Europe was still in the dark ages" (*R v MR* 2017, 17).

While the extent of diversity amongst NCIID victims in Canada cannot be fully determined from the case law, it seems that those who do not fit into the “normal” idea of what a victim of NCIID looks like (e.g. heterosexual women and girls) are less likely to report their victimization or have their case continue to the court level. Although more research is needed regarding the particular dynamics of NCIID for male victims and victims with various and overlapping marginalized identities, it is probable that many critiques of the treatment of female victims of NCIID will need to be elaborated and/or revised to address their implications for what we now know is a broader set of victims. For instance, concerns with victim blaming that have focused primarily on girls and women (Salter and Crofts, Responding 2015, Bates 2017, Ringrose, Harvey and Gill, et al. 2013, Angelides 2013), may need to extend their purview to consider the ways these “risk management strategies to avoid revenge porn” (Bates 2017, 25) may be differently deployed against various groups. While, to date, the critique of victim blaming has sought to undermine the belief that victims of NCIID are careless women and girls that “send nude photos to anyone without considering the potential risks” (Bates 2017, 24, Salter and Crofts, Responding 2015), this could eventually change in light of findings from Henry et al. that “males (54%) were more likely than females (47%) to have ever sent another person a sexual self-image” and that males were “more likely than women to send a sexual self-image to someone they only knew online (37% of men compared to 21% of women)” or to “someone they had just met (31% of men compared to 17% of women)” (Henry, Powell and Flynn 2017, 6). While Henry et al. use this statistic to make the important point that women and men seem to be equally likely to be victimized despite women being “more cautious about who they share a sexual image with” (Henry,

Powell and Flynn 2017, 6)⁵⁴, these findings also point to the ways that men and boys might be more at risk of having their victimization ignored or downplayed as a result of acting in a less risk-averse manner. While Bates attempts to question typical victim blaming rhetoric by citing research showing that “women generally do not send nude photos to men they do not know” and that “a level of trust is likely necessary before women feel comfortable sending a nude photo” (Bates 2017, 24), this approach to countering the “‘she should have known better’ argument [...] prominent in revenge porn cases” (Bates 2017, 24) also works to reaffirm the standard of the ideal neoliberal, security-conscious victim and thus does not undermine the responsabilization of those victims who are seen as less prudent photo sharers.

Reaffirmations of the need for cautious photo sharing may be especially problematic for men who are queer, as a more “permissive view of sex” in some queer communities may result in more commonplace/casual photo sharing as a way to “entice potential partners” (Corner 2017). As Henry et al.’s research finds, gay and bisexual males are “the most likely of any group to report consensually taking and sending sexual self images, with 79% reporting doing so, compared with 64% of lesbian and gay females, 48% of heterosexual males, and 41% of heterosexual females taking and sending sexual selfies” (Henry, Powell and Flynn 2017, 7). Similar concerns might exist for sex workers who could be seen as less deserving of sexual privacy because they have questioned the norms around sex as private in other aspects of their lives. For instance, when Rob Kardashian disseminated intimate images of his ex-partner Blac Chyna, responses were reportedly much less sympathetic than they were for the leak of Jennifer

⁵⁴ In Steeves’ (2014) Canadian study of youth, approximately the same percentage of boys and girls had sent a sexy, nude, or partially nude image, yet boys were more likely to report having their image non-consensually shared.

Lawrence's photos⁵⁵; writing for *Wired*, Ellis explains that many online commentators asserted that "because she was [...] a stripper, leaking nude photos of her doesn't matter" (Ellis 2017). Additionally, "racist stereotypes of black women as sexually voracious and constantly available" (Smart 1989, 38) and of Indigenous women as "incapable of appropriate feminine modesty" (Bailey 2014, 732) may allow their victimization by an act of NCIID to be perceived less seriously than the victimization of white women. Thus, racist beliefs may also influence how certain bodies are seen as less worthy of protection (Karaian 2014); as Mary Anne Franks points out, "the leaked nude photos of black celebrities like Gabrielle Union, Jill Scott, and Leslie Jones garnered far less righteous outrage than their white counterparts" (Ellis 2017, np, Chun and Friedland 2015).

Thus, while it is important to recognize how responsabilization narratives can be used against women and girls, it is also necessary to consider the "racialized, classed and heteronormative dimensions of responsabilization" (Karaian 2014, 288) and the ways that all those who step outside of typical norms of sexual privacy or modesty may be seen as less worthy of protection based on the victim's perceived sexual virtue (Chun and Friedland 2015, 14, Karaian, 2014). While the presumed norm of the NCIID victim has often been a white, heterosexual, woman or girl (Karaian 2014), further analysis of victims whose identities do not fit within this category is needed to understand the particular dynamics and stereotypes that may come into play in those cases of NCIID that are less likely to make it into a headline or a courtroom.

⁵⁵ Although Lawrence and other celebrities were also subject to arguments that their celebrity status or nude/sexual appearance in films made their privacy less in need of protection (Farries and Sturm 2018).

Conceptions of Offenders

Those who commit NCIID are generally understood to be men and boys that are motivated by a desire to abuse, harass, or humiliate their (largely female) victims (European Institute for Gender Equality 2017, McGlynn, Rackley and Houghton 2017, Hill 2015, Fairbairn 2015, Powell and Henry 2017). As Fairbairn explains, “revenge porn is generally described as the practice of someone (usually a man) sharing intimate photos in order to humiliate an ex-partner (usually a woman)” (Fairbairn 2015, 238). This set of beliefs is demonstrated in Kitchen’s assertion that “revenge porn occurs when an *ex-paramour* posts sexually explicit images of *his* former lover on the web, often with ‘disparaging descriptions’ and contact information for the victim’s work and home, and sometimes even for her family members. The purpose of revenge porn is to *humiliate and harass* former lovers” (emphasis added) (Kitchen 2015, 247). Despite the commonality of this vengeful man framing of NCIID offenders, research on offender demographics and motivations depicts a less clear gender make up (Henry, Powell and Flynn 2017, Steeves 2014) and more variability in the relationship between offender and victim and in offender motivations (Hall and Hearn 2018, Henry et al. 2017, McGlynn, Rackley and Houghton 2017, Crofts and Kirchengast 2019).

In terms of the gender demographics of offenders,⁵⁶ while Henry et al.’s study finds that 71% of gay and bisexual men reported that their nude/sexual images were disseminated by a male perpetrator, for other populations the gender division was more equal: with “55% of heterosexual female victims, 50% of heterosexual male victims, and 44% of lesbian and bisexual female victims reporting a male perpetrator” (Henry, Powell

⁵⁶ More research is needed to determine offender demographics beyond gender, as quantitative research to date has focused on understanding mainly the identities of victims.

and Flynn 2017, 7). Although rates of male perpetration could be higher than these statistics imply, as the remaining percentages account for both female and unknown perpetrators, they point to a potentially more gender-diverse group of NCIID offenders. Further troubling the idea that this is an act rarely perpetrated by females, Steeves found that boys are only “somewhat more likely than girls to have forwarded a sext sent to them (16% compared to 12% of girls)” (Steeves 2014, 5). Thus, while 72% of those charged with Canada’s NCIID offence in 2016 were male (Aikenhead 2018), the gender make up of those committing NCIID might be even less stark than this finding implies.

In addition to troubling the previously assumed gender dynamics of NCIID, research has also found that the relationship between victim and offender does not always align with the typically imagined intimate partner/ex-partner scenario (Henry, Powell and Flynn 2017, Powell and Henry 2017, Hall and Hearn 2017, McGlynn, Rackley and Houghton 2017). For example, Henry et al. found that young people (aged 16-19) are much less likely to have their image shared by a partner or ex-partner (30%) than they are to have them shared by “another known person” (64%), and those aged 40 to 49 are also somewhat less likely to have their image shared by a partner or ex-partner (40%) than another known person (49%). Rates of non-partner distribution were even higher for those with a disability, at 74% compared with 52% for victims without a disability (Henry, Powell and Flynn 2017, 7). Additionally, based on their review of “revenge pornography” postings on *MyEx.com*, Hall and Hearn found that the relationship between victim and offender included “ex-partners, current partners, (ex)friends, hackers, and other individuals both known and unknown to the victim” (Hall and Hearn 2018, 18).

Considering the more gender diverse make up of offenders and the variety of relationships between victim and offender, it seems necessary to also question the assumption that NCIID is normally carried out for the sole purposes of harassing, embarrassing, or abusing the victim. Discussing the possible scenarios and motivations for NCIID beyond the “revenge porn” framing, McGlynn et al. assert that a focus on “revenge” “overlooks alternative reasons for the sharing of images, such as group bonding, notoriety or financial gain” (McGlynn, Rackley and Houghton, 2017, 38). Likewise, a cohort of scholars that have looked into motivations for committing NCIID have found that images are shared by a variety of people, “either by persons known to the victim (friends, family members, intimate partners, ex-partners, acquaintances), or strangers”, for a variety of reasons, “including control, intimidation, sexual gratification, monetary gain and social status building” (Henry, Powell and Flynn 2017, 3). Similarly, based on their review of “revenge pornography” postings on *MyEx.com*, Hall and Hearn find a wide range of offender motivations, including: “for commercial profit, increasing peer status, revenge, entertainment, opportunity, empowerment, and so on” (Hall and Hearn, *Revenge* 2018, 27). And Powell and Henry likewise provide a long list of motivations including: revenge against a partner or ex-partner, sexual voyeurism, humour/entertainment, to prove manhood/sexual prowess to peers, and sexual gratification (Powell and Henry, 2017). These findings complicate typical understandings of NCIID offending and point to a need for further research on the demographics of offenders, the relationship between victim and offender, and the motivations of those that distribute intimate images without consent. Research on the variability of offender motivations will be particularly important to consider when drafting future NCIID laws

or changing existing language, as there is continued disagreement in some jurisdictions regarding whether these laws should require the offender to have had the intention to cause distress (Hill 2015, Crofts and Kirchengast 2019). Additionally, though intention does not need to be proven in the Canadian context, an offender’s “motive for offending” can be considered by judges when deciding the “moral blameworthiness” of, and thus appropriate sentence for, NCIID offenders (R v Greene 2018, para 64).

Legal Cases that Break the “Revenge Porn” Mold

The majority of cases in my dataset involve a female victim and male perpetrator (40/44⁵⁷) and a smaller majority of cases were committed against a partner or ex-partner (28/44). Thus, many cases in my dataset seem to align with the typical “revenge porn” scenario, with 22 cases clearly describing a scenario wherein a male offender has distributed intimate images as a way to harass, abuse, embarrass, or hurt a female partner/ex-partner. Examples of such cases include: the Ontario case of *R v AC* (2017), wherein A.C. shared images of his ex-girlfriend because, according to the Judge, “he wanted revenge” (R v AC 2017, para 71); *R v PSD* (2016), wherein the dissemination of partially nude images of Ms. S., following a break up between P.S.D. and Ms. S., is seen as undertaken with “the intention at that time to cause her emotional harm” (para 4); *R v Shultz* (2008), wherein Mr. Schultz is described as acting with the “intention to embarrass, humiliate and intimidate” his former partner as a result of not taking a break-up well (R v Schultz 2008, para 92); *R v Fader* (2009), in which Mr. Fader is similarly seen as having committed a course of threatening actions that included image dissemination “for the specific purpose

⁵⁷ There are 44 unique cases in the dataset and 5 appeals. The appeals are not separately considered here as they included the same individuals.

of harassing” (para 22) Ms. Fader following the breakdown of their marriage; *R v Greene* (2018), wherein Mr. Greene is likewise seen as having committed NCIID with the intention to “intimidate and humiliate a former partner” (*R v Greene* 2018, para 66); and *R v Verner* (2017), wherein Mr. Verner was regarded as having disseminated an intimate image of his ex-partner “to humiliate” her—potentially “because she had a new boyfriend” (*R v Verner* 2017). Each of these cases seems to fit within the paradigmatic “revenge porn” scenario. These cases demonstrate that many legal cases can be understood through the existing scholarly research that has often focused on the particular dynamics of a vengeful man seeking to abuse, harass, or embarrass his female partner/ex-partner.

While acknowledging the commonality of vengeful men and victimized women in the dataset, several cases do not fit the typically imagined “revenge porn” scenario. The case of *R v Wenc* (2009) is only slightly outside of this framing, as it fits within the pattern of image dissemination for the purpose of harassing/abusing a partner/ex-partner, however it troubles the assumed gender makeup of this crime as both offender and victim are men. Further outside the typically imagined dynamics, many cases in the dataset do not involve an intimate partner relationship: a considerable amount of cases were committed against a peer, acquaintance, or friend (13 cases) and 3 cases were committed against strangers that lived in the offender’s community (*R v NG & GG* 2014; *R v Warrington* 2013; *R v Y* 2015). Additionally, while a majority of cases were seemingly committed in an attempt to harass, abuse, or embarrass the victim (28), in 16 cases the motives were either unclear/unstated or varied from the typically understood desire to harass, abuse, or embarrass. Thus, although many cases in the dataset fit within the paradigmatic form of a male sharing images of their female partner/ex-partner in an

attempt to get “revenge” or to harass, abuse, or embarrass the victim, these were not the only scenarios present in the case law.

Examples of cases in the dataset that lay outside of the typically imaged revenge porn scenario—because of either offender identity, offender/victim relationship, or offender motivation—include: cases with female victims and offenders where NCIID is committed seemingly out of jealousy/anger towards a romantic rival (R v MB 2016; R v KF 2015; R v TCD 2012); cases where judges assert that “sexual gratification” was potentially part of the motivation for image dissemination (R v W 2014; Bridgewater 2017); cases in which male offenders seem to share images—at least in part—to brag to other men/boys (R v BH 2016; R v Zhou; Milton v Savinkoff 1993); a case where a man was sent images of a sex act occurring at a rave (that he seems not to have known was an alleged sexual assault) and posted them on Facebook with the “thoughtless push of a button” (his words) (R v Warrington 2013, Apology Letter); and a case involving two teenagers extorting images from a victim in their community—with whom they had no prior relationship—wherein the Judge states that the “only apparent motivation for this attack” is a “desire to exploit, demean and humiliate the victim” (R v NG & GG 2014, para 36).

Although my findings regarding case dynamics are somewhat limited by the amount of detail provided in certain cases and the particular framing that a judge may provide in presenting the facts, my dataset provides examples of the variety of scenarios in which NCIID is carried out. Based on these findings, I want to consider two particular scenarios that came forward in the case law, these include: 1) Cases in which boys/men might share images of girls/women with each other for homosocial reward and 2) Cases

in which girls/women might share images in an attempt to harass or embarrass another girl/woman that is seen as a romantic threat. I have selected these two scenarios for further analysis because of the ways they complicate dominant understandings of the way power and gendered dynamics circulate in these cases and because they appeared multiple times within the case law yet seem under-researched in existing scholarship.

Homosocial Rewards

Ringrose and Harvey's research on 13-15 year olds in the United Kingdom cites the motivations for acts of NCIID committed by boys as including pressure for boys to acquire and share images for "homosocial reward" (i.e. to gain social benefits from other males) or to prove sexual prowess/desirability to other boys (Ringrose and Harvey, 2015, 206). Echoing these findings, and troubling the common assertion that acts of NCIID are "explicitly purposed to shame, humiliate and destroy the lives and reputations of young women" (Filipovic 2013), a minority of NCIID offenders in the case law seem to be motivated more by the desire to prove their sexual prowess to other boys/men (Ringrose and Harvey 2015, Ringrose et al. 2012) than to harm the women pictured in the images they share (though this is, of course, regularly the result). For example, in *Milton v Savinkoff* (1993), the Judge finds that a topless photo of the plaintiff was not shared "out of spite", but rather that the defendant may have shown the photo to a friend to "falsely convey the meaning that the defendant had vacationed with the plaintiff and that he and she were romantically involved" (para 2). In *R v BH* (2016) the offender himself claims to have posted sexual videos of the victim on amateur porn websites and shared the link with online friends "as a type of bragging that he was having sexual relations with a

beautiful woman” (para 11), and the Judge in this case asserts that B.H. “essentially used someone who loved him for the purpose of advancing his own sexual interest and status amongst an online group of acquaintances” (R v BH 2016). Similarly, in *R v Zhou* (2016) the Judge finds that, while the offender “should have known his actions were an affront to [the victim’s] dignity”, he asserts that Mr. Zhou’s “subjective intention” was to “brag about how attractive his girlfriend was [...] rather than humiliate or degrade” (R v Zhou 2016).

In each of these cases, judges seem to accept motivations beyond revenge or an attempt to hurt the victim, and recognize that NCIID can be committed for the purpose of status building/“bragging” to other men. In addition to cases where “bragging” is explicitly recognized by judges as a possible motivation, other cases in the dataset could potentially be understood as being motivated by the desire for homosocial rewards. For instance, while there is not enough information provided in the case of *R v CNT* (2015) to determine C.N.T.’s motivations, it seems unlikely he was motivated by a desire to harm his victims as he only shared their images with one other person and the victims were only made aware that their images were shared because police happened to access the images while searching C.N.T.’s phone for unrelated reasons. Thus, it is possible that C.N.T. had shared these images for social benefit (or for other reasons outside of the revenge porn scenario—such as sexual gratification). Likewise, in *R v Perron* (2018), although the offender’s motives are unclear, it seems unlikely that Mr. Perron intended to emotionally impact the victim when he attempted to secretly share an image of his friend’s girlfriend with another man online (who turned out to be an undercover police officer) (Nugget Staff 2018).

Additionally, although little information on potential motivations is provided in *R v SB et al.* (2014), Crown counsel in this case asserts that the three 14-year-old offenders traded images of 13-15 year-old girls in a way “similar to the trading of hockey cards” (para 6), a characterization that seems more related to a desire to gain social rewards than to harm the girls involved. Similarly in a case from Bridgewater, Nova Scotia, wherein six teens exchanged intimate photos of their female peers, the Crown argues that the offenders “treated the victims’ sexual integrity as bartering chips or baseball cards that could then be traded and circulated amongst friends” (Auld 2017). The use of the hockey/baseball trading card analogy in both of these cases speaks to the way that NCIID cases committed by boys might fit within the broader context of boys’ attempts to impress one another or gain social rewards through the expression of normative masculinity, be it through proving one’s knowledge of sports or one’s access to girls’ bodies. Although it is unclear exactly what motivated these acts based on the information provided in the case law (in *R v SB et al.*) and news coverage (in the Bridgewater case), it is certainly worth considering the role of a desire or pressure to impress other boys/men rather than assuming that all cases involve an explicit intention to abuse or harass girls/women.

In terms of youth cases of NCIID specifically, Johnson describes how “some youth may have difficulty in opting out of the ‘sexual banter, gossip, discussion’ that happens online” which can push “boys in particular to share sexts they receive with their peers to win social approval—or to avoid the social risks that can come from refusing to do so” (Johnson 2015, 345). Karaian likewise suggests that, amongst youths, images may be non-consensually shared with others in an attempt to prove one’s “desirability or as

evidence of the other person's intentions towards them (go steady/date/hook-up)" (Karaian 2017). Based on their interviews and focus groups with youth in London, UK, Ringrose et al. describe how intimate images can act as "proof" of boys' "desirability and access to girls' bodies" and can contribute to "their popularity or 'ratings'" (Ringrose, Harvey and Gill, et al. 2013, 15). Thus, while academic and news media focus is generally placed on how images are used to harass, shame, or seek revenge against girls/women, it is important to consider how motivations may be less explicitly sexist/misogynistic or intended to harm and may, rather, represent the victimization of girls as a consequence of boys' attempts to gain homosocial rewards.

Because boys are often bullied for a lack of sexual experience or for not meeting normative standards of masculinity and heterosexuality (Bailey 2015, Mishna et al. 2018, Kimmel 2005), boys might sometimes share intimate images not only for social benefit, but to avoid harassment/bullying. Kimmel posits that "the fear of being seen as a sissy, of being gay-baited, taunted, and bullied because one is not a real man is certainly what lies behind so much adolescent masculine risk-taking and violence" (Kimmel 2005, 146). Considering this context, some cases of NCIID could be motivated by what Kimmel describes as, a "deeply rooted fear of other men—a fear that other men will see us as weak, feminine, not manly" (Kimmel 2005, 145). From this perspective—paraphrasing Ringrose et al. (2012)—attempts by boys to avoid being labelled as "fags", can result in girls being constructed as "sluts". Thus, a recognition of the ways gender and sexual norms are forced upon boys/men, in addition to the more common discussion of how they are experienced by girls/women, may be necessary to fully address the issue of NCIID. For instance, education campaigns may need to address the issue of homophobic and

gender-norm enforcing bullying amongst boys/men and the pressure boys/men experience that can influence their choice to share images with others. Moving beyond the explanation for NCIID as an act perpetrated by vengeful and/or abusive men/boys, non-revenge NCIID scenarios necessitate a consideration of both bullying and social bonding practices amongst men/boys.

Female Offenders

Also laying outside of the paradigmatic NCIID case, are the three cases in my dataset wherein both the victim and offender are teenage girls. In *R v KF* (2015) a 17-year-old girl is convicted of possession and distribution of child pornography for posting an image of a 15-year-old girl performing fellatio on Facebook and sending the image to the victim's mother. The judge in this case asserts that "the reason for committing such an act was driven by jealousy" as a result of a "love triangle" between the victim, offender, and a mutually known male (*R v KF* 2015, para 1-3). In a similar scenario (with much more limited image distribution), M.B. is found guilty of child pornography offences (currently on appeal to the Supreme Court of Canada) for sending a nude image of her boyfriend's ex-girlfriend to her friend and to the ex-girlfriend herself (as a kind of threat). In the facts of this case, it is explained that M.B.'s act of NCIID was motivated by jealousy upon finding out the ex-girlfriend still had feelings for M.B.'s boyfriend (*R v MB* 2016, *R v KF* 2015). In another similar case, an 18-year-old girl shared an intimate image of a 14-year-old girl; the two teenagers were reportedly friends until they became involved with a 17-year-old boy "who became a love interest for both of them" and images were ultimately shared as part of this "fight over a boy" (*R v TCD* 2012, np). The offender in this case, "with the co-operation and participation of the male" that originally received

the intimate image of the victim, sent nude photographs to peers at the victim's school (resulting in a successful charge of criminal harassment and an unsuccessful charge of child pornography) (*R v TCD* 2012, np). These three similar cases call for a consideration of the ways that girls can use NCIID to attempt to harass, embarrass, or abuse other women⁵⁸/girls. These cases trouble popular understandings of women and girls as only the victims of NCIID and show the more complicated reality of how power relations circulate in particular cases and how gender and sexual norms are enforced and used as a shaming/harassment tactic by both boys/men and girls/women.

There is some existing research discussing how girls can use boys' acts of NCIID to bully girls, however more research is needed that addresses girls' acts of NCIID. An interviewee in Miller's (2016) study of bullying towards girls explains that girls often used boys' acts of NCIID "to slut-shame other girls" and to spread sexual rumours about them (733). Miller explains that, in such cases, "a boy's offense offers an opportunity for girls to shame other girls, both for being sexual and for trusting boys" (Miller 2016, 733). Likewise, in a documentary on the Rehtaeh Parsons case, a case in which a boy distributed an image of Parsons' allegedly being sexually assaulted, it is explained by one of Parsons' friends that the boy's act of NCIID was used mostly by girls to call Parsons a whore, slut, and "prostitot" (No Place to Hide 2015). These acts of bullying in response to NCIID, demonstrate how women and girls can be both victimized by acts of slut shaming surrounding NCIID and the perpetrators of this shaming. The case law described above shows how girls may also be the ones to distribute the images, although in each of these cases boys who were originally sent the image were also required to first show the

⁵⁸ This kind of dynamic seems to also be present in cases involving adult women as well. For instance, in a 2019 case from Newfoundland 23-year-old Felicia Borden received a 90-day jail sentence for distributing intimate images of her ex-boyfriend's new partner online (*R v Borden* 2019).

image to the person that then shared them as a way to harass/embarrass the victim. The typical understanding of offenders as vengeful or sexist boys/men invisibilizes the acts of girls/women who use intimate images (either shared by themselves or others) to bully and harass other girls/women; moving forward, arguments for criminalizing or more harshly sentencing offenders of NCIID will have to contend with how these laws will not only be used to protect girls/women who are victimized by NCIID but will also be used to criminalize girls/women (including convicting teenage girls of highly stigmatizing child pornography offences). Additionally, it seems that education and other (extra) legal responses aimed at preventing acts of NCIID will need to begin addressing how slut-shaming, victim-blaming, and privacy violations are committed by both boys/men and girls/women.

Based on the scant existing research regarding female offenders of NCIID, men and women should not be treated as belonging to two radically separate and homogenous groups when it comes to understanding potential motivations and applicable legal/extra-legal responses; rather, it is necessary to consider the potentially diverse motivations of female offenders and the ways that women/girls' acts of NCIID can also be motivated by a desire to slut-shame, seek revenge, and so on. For instance, while Hall and Hearn's findings are limited by their attention to a single "revenge porn" site, thus representing a relatively small sample and a particular kind of NCIID that is committed through public online posting, their findings are interesting in terms of the overlap between male and female posters. Their research shows that, for both male and female posters, "by far the most popular" stated reason for posting was an ex-partner's "promiscuity" that was associated with the breakdown of the relationship (Hall and Hearn 2018, 80 & 94). They

also find that both male and female offenders justify their actions by positioning themselves as the victims as a result of treatment that occurred within the intimate relationship, with men stating that their ex-partners deserved to have their image posted because “they were reported to have controlled the relationship, committed infidelity, passed on an STD and deemed unclean more generally, stolen money or committed sexual acts in return for money, and stolen ‘his’ children” (Hall and Hearn 2018, 89) and women claiming their ex-partners deserved to be posted “because they were reported to have been violent, a poor father, sexual predator (both online and offline), homosexual, effeminate, liar and not fulfilling their intimate partner sexual duties” (Hall and Hearn 2018, 104). Thus it seems that women also distribute intimate images as a way to seek “revenge” against partners/ex-partners. Scant media reports on female offenders of NCIID also provide examples of women seemingly sharing images out of an attempt to embarrass, harass, or get revenge against a partner/ex-partner: an Ontario woman allegedly distributed images of her ex-girlfriend on Facebook (Barrera, Akwesasne woman charged in connection with Ontario revenge porn case 2018); a 49-year-old Ontario woman allegedly distributed intimate images of her ex-husband (Canadian Press 2017); and an Ohio woman (discussed above) Tweeted intimate images of political staffer Adam Kuhn because she was upset he had ended their relationship and—in her own words—wanted “revenge” (Bresnahan 2014). Although only preliminary thoughts on female offending can be offered due to the relative lack of research in this area, these examples show that women/girls seem to also share intimate images for both “revenge” against ex-partners and for other reasons, such as jealousy towards a romantic rival.

In the context of intimate partner violence, McHugh et al. (2005) explain that a

reluctance to acknowledge women's acts of violence can be related to a fear of undoing the "considerable time and energy" that has gone into politicizing men's violence against women (324); a similar dynamic could also be present in responses to NCIID cases, as a complication of the construction of victim and offender in these cases might be seen to detract from the considerable energy that has gone into creating recognition of the, sometimes extreme, harms girls/women have experienced at the hands of boys/men as a result of this act. Despite such concerns, McHugh et al. argue, in regard to domestic violence, that "there are compelling reasons why, as feminists, we should acknowledge, investigate, and try to understand women's use of violence [...]" (McHugh, Livingston and Ford 2005, 324). For instance, they argue that a "reluctance to acknowledge women's aggression results in limited theoretical models and ineffective interventions" (McHugh, Livingston and Ford 2005, 324). Following postmodern feminism's call to recognize the complexity of power relations and to understand women as both individuals being acted on by power and wielders of power (Moore 2008, Halley 2006), it is necessary to recognize those cases that lay outside of the typically imagined gender dynamics of this issue and the paradigmatic case of the vengeful man (McGlynn, Rackley and Houghton, 2017, 26).

Conclusion

Henry, Powell, and Flynn explain that "previously, and in the absence of research, it has been assumed that image-based abuse was the passing action of a jilted ex-lover and that it affected primarily women at the hands of men" (Henry, Powell and Flynn 2017, 9). The widespread assumption that NCIID is an issue primarily impacting women and

perpetrated by men has somewhat constrained academic and popular understandings of who is impacted by cases of NCIID and who has committed this act and for what reasons. It is necessary to consider how certain framings of NCIID victims and offenders have contributed to the marginalization of cases that do not fit within this framing. For instance, while the construction of NCIID as a “women’s issue” (Hill 2015) has allowed for a rallying point to get this act on the political agenda, it has also resulted in misconceptions about who is involved in these acts and how power dynamics might circulate in those cases that do not fit the vengeful man/humiliated woman framing. This has sometimes led to the downplaying of male victimization and the invisibilization of female offenders, as well as a sidelining of considerations aside from gender. As I will discuss in Chapter 6, this limited perspective of who commits NCIID and why may likewise limit the kinds of responses and punishments that are considered in these cases. It is not just the actions of vengeful men and the victimization of women and girls that will that need to be addressed by legal and extra-legal responses; rather, responses to NCIID need to grapple with, for instance, the actions of teenage girls involved in “love triangles” and the victimization of queer men.

In the context of domestic violence, Sokoloff and Dupont argue that “the traditional feminist approach to domestic violence has generally been to emphasize the common experiences of battered women in the interests of forging a strong feminist movement to end woman abuse” (Sokoloff and DuPont 2005, 41); a similar approach seems to have been taken in the majority of responses to NCIID, yet this emphasis on the sameness of NCIID cases (e.g. male offender, female victim, a motive for revenge or a desire to abuse or humiliate) has limited the kinds of cases that are being analyzed and

has left the experiences of certain victims and the motivations of certain offenders unacknowledged. Following Henry et al.'s recommendations, future qualitative research should look beyond those cases that make it into the legal system to consider the particular dynamics of cases with female offenders, male victims, LGBTQ+ victims, victims with disabilities, and victims and offenders that identify at the intersections of these (and other) categories.

Chapter 6

“This Sentence Must Have a Chilling Effect”: Considering the Efficacy of Criminal Law Responses to NCIID

In light of the previously detailed complexity of NCIID cases, in this final Chapter I consider the opportunities and limitations of criminal justice responses to NCIID and the potential role of civil law, restorative/transformative justice, education, and technological innovation in response to this issue. I begin by considering understandings of criminal law responses as necessary to denounce and deter NCIID and to recognize the harm of this act. I then discuss the shortcomings and potential negative impacts of criminal justice responses and, finally, consider the potential of alternative responses to this issue. While legal scholarship has largely been concerned with highlighting the extreme potential harms of NCIID and rallying for its criminalization (Kitchen 2015, Hill 2015, Citron and Franks 2014), I provide a critical legal analysis of the efficacy of criminal justice responses in practice.

The efficacy of criminal law responses to acts included in the spectrum of sexual violence (which, as discussed in Chapter 3, is widely understood to include acts of NCIID) is a contested issue within feminism. While mainstream and legal feminists see criminal law responses as necessary to protect victims (and potential victims), punish offenders, and demonstrate that sexual violence is being taken seriously (Citron and Franks 2014, Hill 2015, Kitchen 2015, Aikenhead 2018), others are concerned with the way that sexual violence advocacy focused on legal reform has been used: to create a more inflexible carceral system, to support the creation of mandatory minimum sentences and other “tough on crime” approaches, and to move feminist focus away from “grassroots and social service remedies” (Bumiller 2008, Bernstein 2012, 239, Taylor

2018). Critiques of criminalization further assert that criminal law is a blunt, costly, and reactive tool that is unable to address many of the harms victims experience and is not always able to help rehabilitate offenders (Smart 1989, Doe 2004, Randall 2010, Mulla 2014, Taylor 2018). With this debate as the background, in this Chapter I consider the particular stakes of criminalizing NCIID. I take up anti-carceral (Bumiller 2008, Bernstein 2012, Taylor 2018), critical legal (Smart 1989, Randall 2010), and intersectional (Kim 2018, Crenshaw 1991) feminisms to demonstrate that, as with other forms of sexual violence, criminal law responses to NCIID have negative impacts and shortcomings that have sometimes been sidelined by those primarily interested in addressing sexual violence through the criminal justice system. The legal feminist and judicial assertion that criminal law's symbolic and carceral power is necessary to appropriately respond to NCIID must be balanced with the recognition that criminal laws have uneven impacts on marginalized communities and have many shortcomings in terms of addressing victim and community needs (Cohen 1981, Farries and Sturm 2018, Taylor 2018).

Perceptions of Criminal Law's Utility in Responding to NCIID

In jurisdictions such as Canada, parts of the United States, the United Kingdom, the Philippines, Israel, parts of Australia, Germany, and Japan, various criminal law responses have been implemented to specifically address NCIID (Powell and Henry 2017, Hall and Hearn 2017, Farries and Sturm 2018, Crofts and Kirchengast 2019). The criminalization of NCIID is argued to be necessary despite the fact that several pre-existing criminal and civil law offences can, and have, been applied to cases of NCIID

(e.g. criminal harassment, voyeurism, extortion, public disclosure of private facts). As described in the Introduction, calls to specifically criminalize NCIID arose in the aftermath of several widely reported cases of victims experiencing extreme harms from this act (e.g. the death by suicide of Rehtaeh Parsons in the Canadian context) (Powell 2015, Powell and Henry 2016, Dodge 2016) and were spurred on by connections to existing anxieties regarding youth sexual expression (Hasinoff 2015, Karaian 2014, McGovern et al. 2016), fears of the societal impacts of digital technologies (Bivens and Fairbairn 2015, Milford 2015, McGovern et al. 2016), and growing (mainstream) concern towards sexual and gender based violence (Powell and Henry 2017, Hill 2015).

Taking up increasingly mainstream concerns with NCIID, the need to respond to NCIID with criminal law has been promoted by feminist legal advocacy organizations (such as the Cyber Civil Rights Initiative and West Coast LEAF) and scholars who argue that criminal responses are required to recognize the severe harm that these acts can cause (Citron and Franks 2014, Kitchen 2015, Bloom 2016, Hill 2015, Aikenhead 2018). For instance, feminist legal scholars have asserted that “revenge porn’s serious consequences warrant its criminalization” (Citron and Franks 2014, 350) and that these acts “should be treated as a felony, because a severe classification reflects the amount of harm experienced by victims” (Bloom 2016, 278).

In the Canadian case law, judicial discourse also asserts the necessity of criminal law sanctions to acknowledge the extreme harms association with this act. For instance, in *R v JS* (2018)⁵⁹ the Judge reflects that the specific criminalization of NCIID was

⁵⁹ In *R v JS* (2018) the offender both consensually and non-consensually recorded sexual activity between himself and his girlfriend. JS posted these videos on various online platforms on several occasions without the victim’s consent. JS pled guilty under the s.162.1 NCIID law and received a sentence of eighteen months imprisonment and three years probation.

required due to the act's severe potential harms: "it is valuable to be reminded that the impetus behind the enactment of this offence provision was to address the tremendous human toll associated with this generally vile conduct. Victims frequently experience depression and anxiety. In notorious instances, they have killed themselves. [...] The inferred impact on victims is substantial and the moral responsibility of the offender will generally be high" (para 33-34). As discussed in Chapter 4, judicial discourse often emphatically supports the necessity of criminal responses based on recognition of the extreme harms (e.g. death by suicide) that have been documented in some cases of NCIID. Further, the assertion that incarceration will "ordinarily be called for" in these cases (R v JS 2018, para 20)—despite section 718 of the *Criminal Code of Canada* (1985) stating that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" (s718)—demonstrates the common belief among the judiciary that this is a serious crime (generally) requiring the separation of offenders from society. Although in some adult cases it was asserted that the objectives of sentencing could be achieved through non-custodial sentences (R v Agoston 2017; R v AC 2017; R v PSD 2016; R v TCD 2012; R v Perron 2018; Saskatchewan 2017; R v Warrington 2013), a period of imprisonment was deemed necessary in the majority of adult cases (R v Zhou 2016; R v Barnes 2006; R v BH 2016; R v Dewan 2014; R v Fader 2014; R v Greene 2018; R v JS 2018; R v JTB 2018; R v Korbut 2012; R v MK 2004; R v MR 2017; R v Schultz 2008; R v W 2014; R v Wenc 2009; R v Wheaton 2017; Huntsville 2017; Winnipeg A 2016; Winnipeg B 2016). The general agreement on the need for imprisonment demonstrates that the gravity of this offence—"including the harm or likely harm caused to the victim, society and societal values" and the "degree to which

the conduct deviates from acceptable standards of behaviour” (R v Bosco 2016 para 32)—is seen as high and that (in adult cases) the sanction of incarceration offered by criminal law is perceived as necessary.

Legal scholars and activists also commonly argue—based on the belief that criminal law holds the symbolic power to demonstrate social disapproval of an act (Cohen 1981)—that criminalization is a necessary deterrent to this behaviour (Bloom 2016, Kitchen 2015, Hill 2015) and that it is required to adequately denounce NCIID (Citron and Franks 2014, West Coast LEAF 2014). For instance, commenting on the need for criminalization in Scotland, Hill asserts that “deterrence may only be achieved by a new criminal offence. This is partly due to the stigma that attaches to criminal sanctions, which would serve important expressive values by conveying social condemnation to those who distribute sexual images without consent” (Hill 2015, 130) and Bloom similarly comments that criminalization “would put others on notice that posting intimate photographs without another’s consent will not be tolerated” (Bloom 2016, 278).

In Canadian criminal case law⁶⁰ involving adult offenders, judges have also focused on the need to denounce and deter this behaviour through criminal law. The purpose of criminal sentencing in Canada, as outlined at section 718 of the *Criminal Code*, is to address one or more of the following goals: “to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; to deter the offender and other persons from committing offences; to separate offenders from society, where necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community” (CCC

⁶⁰ 46/49 cases in the dataset are criminal cases.

1985, s718). While sentencing for particular cases is “a highly individualized process” (R v Suter 2018, para 4, Cohen 1981) that balances these objectives of sentencing with sentencing principles,⁶¹ judicial discourse in sentencing decisions can tell us what general objectives of sentencing are most often being relied on and what beliefs about NCIID (and NCIID offenders) support the focus on these particular objectives. For instance, the Judge in the criminal harassment case of *R v Fader* (2014) reviews the cases of *R v Da Silva* (2011) and *R v Wenc* (2009) to demonstrate a precedent of sentencing aimed at denunciation and deterrence—rather than, for instance, rehabilitation—in cases involving NCIID. The Judge notes that in *Da Silva*, wherein sexually explicit images were posted on Facebook and sent to the victim’s family and friends, the court “imposed a sentence of six months jail, emphasizing the need for specific and general deterrence, as well as denunciation of the behaviour” and highlighted that the harm caused by distribution is grave and long-lasting (R v Fader 2014, para 24); Thus, it is concluded in *Fader* that:

Deterrence and denunciation of this kind of behaviour is paramount [...] When I weigh all of the circumstances, the prior criminal record, the aggravating and mitigating circumstances, when I look at the cases and what has been said there, I am satisfied that Crown’s global position of two years’ imprisonment is required. The word has to get out, both to people in general in the community, but also to Mr. Fader in particular, that if he chooses to behave in this kind of fashion towards his partners, people with whom he has been in a relationship, he is going to go to jail and he will go to jail for a very long time (R v Fader 2014, para 36-

⁶¹ Canadian sentencing principles require consideration of the offender’s degree of responsibility, the gravity of the offence, and aggravating or mitigating circumstances. They also state that sentences should be similar to those “imposed on similar offenders for similar offences committed in similar circumstances” and should consider “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community” (CCC 1985, s718).

37).

Likewise, in *R v Greene* (2018) the Judge, citing *R v JS* (2018) as precedent, argues that Canada's NCIID law "engages deterrence and denunciation" as "the primary sentencing objectives" and that "the separation of the offender by way of a term of conventional incarceration will ordinarily be called for" (*R v JS* 2018, para 20). The Judge in *Greene* further argues that "this relatively new form of intimidation must be clearly denounced" and, considering the intimate partner relationship between Mr. Greene and the victim (an aggravating factor according to sentencing principals at s.718.2 of the Criminal Code of Canada), sentences Mr. Greene to 5 months imprisonment and 3 years probation (*R v Greene* 2018, para 81). Providing considerable precedent for the judicial finding that criminal law responses are necessary to denounce and deterrence this act, the Judge in *R v JTB* (2018) explains:

While other sentencing goals such as rehabilitation of an offender obviously must not be forgotten, denunciation and general deterrence accordingly are the paramount sentencing goals in relation to s.162.1 crimes. See, for example: *R. v. Calpito* [...]; *R. v. A.C.* [...]; and *R. v. J.S.* [...]. Denunciation and general deterrence similarly have been accorded paramount importance in relation to crimes of voyeurism and criminal harassment involving the surreptitious taking and/or non-consensual sharing of intimate images via the internet. See, for example: *R. v. Desilva*, [2011] [...]; *R. v. Dewan* [2014] [...]; *R. v. Trinchi*, [2016] [...]; and *R. v. Zhou* [2016] [...] (*R v JTB* 2018).

Additionally, in a 2016 case of NCIID from Manitoba that was charged under Canada's NCIID law, the Judge asserts that—although she felt the accused was ashamed of his

actions and would not commit this act again—it was necessary to impose a sentence that would deter others: “It’s trite to say the accused won’t be the last person to be upset by the breakup of a relationship or infidelity, and many will have access to the Internet and applications such as Facebook. This sentence must have a chilling effect on them as well” (Winnipeg B 2016). Thus, judicial discourse—along with legal feminist advocacy and scholarship—regularly asserts that criminal law responses to NCIID are necessary to acknowledge the extent of harm caused by this act and to effectively denounce and deter this behaviour.

As the extent to which criminal law serves to effectively denounce and deter remains highly debateable (especially in relation to general deterrence) (Cohen 1981, Crofts and Kirchengast 2019), in this Chapter I assert that it is worth considering alternative responses to—at least a portion of—NCIID cases and that it is necessary to balance the use of criminal law with a recognition of its negative impacts and shortcomings. Although I concede that criminal law is capable of “educative, moralizing and habituating” functions (Crofts and Kirchengast 2019, 103) that prevent behaviours to some extent, the legal feminist focus on criminal law responses has largely sidelined discussions regarding the shortcomings of criminal law and the potential for non-criminal responses to express societal denunciation of behaviours and to address the complex needs of victims, offenders, and society both before and in the aftermath of harmful behaviour (Bumiller 2008).

Negative Impacts & Shortcomings of Criminal Responses to NCIID

While recognition, deterrence, and denunciation are laudable goals that are partially addressed through criminal law, legal analysis must also take seriously the potential

negative impacts of criminalization and the shortcomings of a criminal justice approach to NCIID. Legal feminists such as Citron and Franks (2014) largely disregard these impacts and shortcomings, asserting that “while we share general concerns about overcriminalization and overincarceration, rejecting the criminalization of serious harms is not the way to address those concerns. To argue that our society should not criminalize certain behavior because too many other kinds of behavior are already criminalized is at best a non sequitur” (362). This attempt to pre-empt critiques of criminalization (based on a simplistic binary of being either for or against criminalization) does not recognize the complexity that anti-carceral (Kim 2018, Bernstein 2012, Bumiller 2008), intersectional (Crenshaw 1991, Kim 2018), and critical feminist legal (Smart 1989, Randall 2010) analysis can bring to this debate. These critical theories—far from arguing simply that there are too many crimes and thus no new ones should be created—provide generative challenges for considering the shortcomings and negative impacts of criminal responses to NCIID. Taken together, these theories provide a framework for analyzing: the uneven impact that criminalization has on marginalized communities, the criminal law’s inability to address victims’ needs, and the potential efficacy of responses outside of the criminal justice system. Each of these theories argue that criminal law responses that appear as “wins” for feminism (Smart 1989) should be assessed for their negative implications and for their differential effects on marginalized communities (Crenshaw 1991, Kim 2018). In the sections below I utilize these critical theoretical frames to address the shortcomings of criminal law responses for offenders, victims, and the community.

Uneven Impacts on Offenders

Legal feminist support for criminal responses to NCIID tends to ignore the diversity of offenders who commit this act and, thus, the variable impacts that criminalization will have on marginalized and youth populations. As Hasinoff (2015) discusses in terms of *consensual* intimate image sharing among youth, it is important to consider that the most marginalized individuals (e.g. racialized, poor, and queer youth) may be more likely to be criminalized and may experience more severe impacts as a result of their interaction with the criminal justice system. As Coburn et al. assert in regard to youth “cyberbullying”, this may result “in too many youth and a disproportionate number of marginalized youth becoming involved in the criminal justice system” (Coburn, Connolly and Roesch 2015, 566-7). While it may be easy to argue, as Citron and Franks do, that the successful prosecution of “revenge porn” site operator Hunter Moore is “cause for celebration” (Citron and Franks, 2014, 368), it must be acknowledged that criminal law responses will capture marginalized individuals as well and that their criminalization may result in unforeseen impacts and forms of stigmatization.

For instance, the particular stigma attached to D.L. in the case of *R v SB et al.* (2014)—in which three 14-year-old boys exchanged photos of their female peers—may represent an instance of how marginalized groups can experience greater stigmatization when they are brought into the criminal justice system (Bumiller 2008, Crenshaw 1991, Sokoloff and DuPont 2005); it is notable that D.L., the sole Indigenous⁶² defendant in this case, is the only boy who was reportedly labeled a “sex offender” by other youths—a designation that can be described as “a singularly demonic figure in contemporary

⁶² The Judge in *R v SB et al.* (2014) describes the offender as “First Nations”.

culture” (Bernstein 2012, 238, Wacquant 2009). While many legal feminists perceive criminal justice responses to sexual violence as proof that sexual violence is being taken seriously and that law and society are progressing toward gender equality (Gurnham 2015), it is necessary to consider the increased stigmatization that criminalization may cause for those individuals who are already marginalized within society (and, in the case of Indigenous people, are already overrepresented within Canadian prisons) (Gotell 2015, Wodda and Panfil 2018). Beyond the increased risk of social stigmatization, some marginalized groups are more at risk of police mistreatment, disproportionate prison sentences, and social stigmatization when they are brought within the purview of the criminal justice system (Sokoloff and DuPont 2005, 55, Crenshaw 1991, Wodda and Panfil 2018). For instance, considering the high rates of NCIID that appear to exist in sexual minority populations (see Chapter 5), it is necessary to consider that LGBTQ inmates are reportedly the victims of 50% of prison sexual assaults in the United States and therefore that there are particular implications for increasing this populations’ interactions with the criminal justice system (Taylor 2018). Criminal responses to NCIID must consider the implications of criminalizing not just the Hunter Moores of the world, but also offenders such as already marginalized youth and sexual minority populations.

Speaking to the potential negative impacts of criminalizing youth perpetrators of NCIID—and the particular impacts of child pornography charges on youth—the court of appeal in *R v MB* (2016) granted leave to appeal to the Supreme Court of Canada and commented on the need to weigh the “nature of harm caused by youths distributing intimate images as compared to the harm they suffer by encountering the criminal justice system” (*R v MB* 2016). As illustrated by *R v SB et al.*, some of those impacts can be

incurred from the very outset of being brought into contact with the criminal justice system. Such impacts cannot be mitigated simply by Canadian sentencing principles for youth that—in an attempt to address the adverse impacts of youths’ interactions with the criminal justice system—provide several constraints on the use of incarceration (Department of Justice Canada 2015). Rather, a broader troubling of the impacts of criminalization and a real assessment of its assumed capacities is necessary.

Shortcomings for Victims

The above discussion points to the potentially unforeseen or uneven impacts of criminalization on certain offenders, however the criminal justice response to NCIID can also fall short for victims. Criminal justice approaches provide a particular set of responses that may not be able to address the case-specific needs that are most important to particular victims of NCIID. For instance, Murray Segal’s independent review of the Rehtaeh Parsons case found that the criminal justice response in this case failed to address the continued circulation of the images of Parsons or to deal with the harassment that she experienced as a result of the image distribution; this leads Segal to conclude that the police can no longer address such cases solely through traditional approaches to investigation and that “in the cyberbullying context, the objective may not be to conduct the perfect criminal investigation. The bullied child’s needs must come first. The response must be quick. In future cases, the focus will need to be on taking action to put an immediate halt to the cyberbullying” (Segal 2015, v). In the Parsons case, the police may have not been best suited to address issues of harassment related to NCIID (as the police are meant to investigate particular individuals rather than transform student

cultures and support victims). Rather, a widespread educational or restorative/transformational justice approach along with adequate mental health supports could have been more useful (such multi-pronged approaches will be discussed further below) (Shariff and DeMartini 2015). Further demonstrating the shortcomings of criminal law to deal with some of the most pressing needs of NCIID victims, the victim in *R v AC* (2017) expresses frustration that the criminal justice process up to the point of the trial provided her with no reassurance that her intimate images had been deleted. Her victim impact statement reads in part: “[...] where are the rest of my photos? Are they all deleted and away from him? Who monitors this? Does he have access to his laptop? These are questions I need answers to” (*R v AC* 2017, para 52). While the Judge in this case orders a prohibition on the offender possessing intimate images, it seems that the victim required assurances in this regard much earlier.

However regardless of victims’ expressed needs, adversarial criminal justice practices are, by their nature, not about the victim (Mulla 2014, Smart 1989, Moore 2008, Randall 2010, Farries and Sturm 2018, Taylor 2018). Within the adversarial criminal justice system, NCIID—like other acts of sexual violence—is treated as a crime against the state and the victim is primarily a witness (Doe 2004, Randall 2010, Mulla 2014). As Smart (1989) asserts in regard to sexual assault cases, “the trial is truly Kafkaesque for the woman who has experienced terror and/or humiliation but who is treated like a bystander to the events” (34). Said more explicitly, “the needs of survivors of sexual assault are ‘diametrically opposed’ to the inherently antagonistic and defensive structure of the criminal trial” (Taylor 2018, 96). More concerned with punishing offenders, it is not criminal law’s priority to provide NCIID victims with “the remedies that they need,

such as advice and counseling, and most importantly, takedown of non-consensual imagery” (Henry, Powell and Flynn 2017, 8, Farries and Sturm 2018, Crofts and Kirchengast 2019).

In terms of sexual violence more broadly, Taylor (2018) explains that “while it is a fact that some survivors of sexual violence, such as those involved in victims’ rights movements, do seek retribution for the harms done to them, the outcomes that many survivors would like from the justice system are not incarceration and punishment for offenders, but recognition and validation of their stories, respect, dignity, voice, agency, an apology or accountability on the part of the person who harmed them, to feel safe again, and for what occurred not to happen to someone else” (n.p.). Exemplifying these needs, in her victim impact statement, Rehtaeh Parsons’ mother expresses that:

Some may think I want the people involved and the guilty party to go to jail and be punished severely. Truth is, I don’t want that for him at all. I don’t feel jail time would serve anyone in this situation. My wish is that the accused actually felt remorse, that the accused does see the wrongdoing in this situation, not because he was caught and held accountable but because he actually FELT accountable. I wish that he make a life for himself where other females he encountered are treated with respect and dignity. That he somehow learns to value females and that he does so in memory of my daughter. To me, that is the only way to move forward in a healing manner. What I do know is that I have to forgive him. I know this to be true. (Halifax 2014, n.p.)

Speaking to the power of having one’s offender apologize and take responsibility for their actions, the victim in *R v Warrington* (2013) expresses in her victim impact statement that

she appreciated receiving an apology from the offender and was not upset that he was not given any jail time for his act of NCIID. She commented to a reporter that “[Mr. Warrington] learned from what he did and he should put the second chance to good use because you don’t get them every day” (Hall 2013). As discussed below, needs such as respect, agency, and apology may be met more effectively outside of the criminal justice system. While longer jail sentences for offenders of NCIID are sometimes framed as equivalent to justice for victims or as proof that this act is being taken seriously (Citron and Franks 2014, Kitchen 2015), jail sentences were seen as unnecessary by some victims of NCIID or were seen as secondary to their desire for an apology/admission of guilt, assurance that the offender had learned from their mistake, or assurance that their images were deleted (Crofts and Kirchengast 2019).

In terms of sexual and domestic violence, both anti-carceral and critical legal feminists argue that criminal justice responses do not always provide something that feels like justice for victims and that a focus on criminalization can limit the ability to imagine how justice for victims might otherwise be served (Mulla 2014, Randall 2010, Smart 1989, Doe 2004, Taylor 2018). For instance, in terms of meeting the needs of victims of criminal harassment/stalking behaviours, Crocker’s research on victims found that:

Victims felt generally unsatisfied by their encounter with the criminal justice system. They described criminal justice personnel, especially police officers, who trivialized their experiences and left them out of the process. Victims also reported that they did not feel safer and that their lives were no less disrupted after reporting their experiences to police. Given that most were having, or had had in the past, a relationship with their harasser, they did not want harsh punishment but,

rather, just wanted the harassment to end. (Crocker 2008, 98)

As many adult case of NCIID are related to contexts of harassment within intimate partner or ex-partner relationships (as demonstrated in Chapters 3 and 5), these findings may reflect the feelings of some victims of NCIID as well. Therefore, more attention should be given to the shortcomings of the formal criminal justice process for victims. Additionally, as intersectional feminist work reveals, a focus on criminal justice responses may also be problematic for marginalized victims who are less likely to utilize and benefit from traditional legal responses (Crenshaw 1991, Kim 2018, Sokoloff and DuPont 2005). For instance, in terms of domestic violence, it has been found that “many women of color feel ambivalent about using the police to deal with domestic violence” due to their knowledge of the “mass incarceration of young men of color and police brutality” (Sokoloff and DuPont 2005, 55). Relatedly, research on responses to sexual violence has found that those who do not fit into the mold of the ideal victim may not report their victimization due to “fear of stigma and general distrust of the efficacy and neutrality of the Canadian judicial system. This may especially be the case for vulnerable women, including lesbian and bisexual women; indoor and street-based sex workers; as well as Aboriginal women” (Benoit, et al. 2014, 6). It is important to consider how a focus on legal remedies may divert resources away from alternative responses that could be more appealing to some individuals (or may offer different opportunities for cultural change or meet different victim and offender needs). Providing an example of the shortcomings of overinvesting in carceral responses as *the* way to access justice, Crenshaw describes how rape crisis centers that were created by and for white women have focused their resources on accompanying victims to court without recognizing that

women of color are less likely to have their cases ever make it to the trial level or may have misgivings (as discussed above) with seeking justice through the criminal justice process (Crenshaw 1991). Thus—like with other forms of sexual and domestic violence—certain populations of victims may require alternative options to gain a sense of justice in the aftermath of NCIID. As described in Chapter 5, it appears that only a subset of NCIID victims are currently choosing to engage with the criminal justice system (namely heterosexual women), and thus that male victims and sexual minority victims (and likely others) are not receiving formal institutionalized support for acts of NCIID against them and therefore may particularly benefit from considerations of alternative responses.

In terms of youth victims of NCIID, it is also necessary to consider emerging evidence that many youth do not want to criminalize their peers or engage in a criminal process to deal with acts of NCIID (Dodge and Spencer, 2017, Lockhart 2018, Roumeliotis 2016). Interviews with police officers from across Canada found that police regularly encounter youth who want help having intimate images removed from online platforms or digital devices but do not want to engage in a formal criminal justice process (Dodge and Spencer 2017). Likewise, a representative for the website NeedHelpNow.ca, which supports youth victims of NCIID, explains that “when kids come to us, what they want is, No. 1, they don't want their parents involved and they don't want the police involved. They want the content to come down” (Roumeliotis 2016). Relatedly, Lockhart’s (2018) forthcoming research—based on interviews with 25 Nova Scotian youth between the ages of 13 and 17—found that youth often understand NCIID as a

common occurrence that is only in need of the intervention of an authority figure in certain—more extreme—situations. As one youth in Lockhart’s study explains:

[In most instances of NCIID] teens are doing their own things and kinda resolving things themselves and the only time it becomes an issue is when it’s something like really bad where someone is really getting harassed [...]. [...] it’s not like you’re like, ahhh so and so just sent my nude, I’m gonna go tell my mom...ummm no. Students and young people just resolve it in their own group (Lockhart 2018).

Lockhart (2018) finds that, for many youth, the harm of having one’s parents or an authority figure find out about the act of image sharing is seen as worse than the harm of having an image shared with other youths. This is emphasized by one participant who asserts that, even if she was being bullied everyday as a result of having an intimate image non-consensually shared, she would not report an act of NCIID committed against her as she would not want her mother to be upset that she consensually shared a nude photograph (Lockhart 2018). These findings point to the desire by some youth victims to avoid using the criminal justice system to respond to NCIID and rather to access more informal options for image removal and (private) support. Relatedly, in addition to the shortcomings youth might associate with a criminal justice response, it is also worth considering how the stakes of criminalization may legitimize additional, unwanted surveillance of teens’ consensual sexual practices (Karaian 2014, McGovern et al. 2016).

Inability to Effect Broader Change

As argued in Chapter 4, many of the impacts described by victims also point to the need for broader social change to address not only those who share images without consent, but also the cultural beliefs that result in bystanders who shame/harass victims, fire victims from their jobs, or aggravate the harm caused in other ways. For instance, the victim in *R v Warrington* (2013) comments on how the harm she experienced was aggravated by responses from her peers in the aftermath of image distribution: “I have lost friends and nobody looks at me for the good things I do anymore [...] It drastically changed my life. I dropped out of high school because of constant bullying. [...] For two years, I was bullied especially over Facebook and Twitter. People verbally attacked me and my family, spreading lies. My life was threatened and I was continuously harassed” (*R v Warrington* 2013). She goes on to say that she does not solely blame the offender for sharing a video of her alleged sexual assault, as there were several people who she describes as present when the video was posted: “I don’t solely blame Dennis. There were how many of you guys at White Spot that morning? I personally think you are all to blame. No one stood up and told you not to post them” (*R v Warrington* 2013). These comments point to how, in some cases, the criminalization of certain individuals involved in an act of NCIID does not hold all relevant actors responsible or create the cultural change that allows bystanders to accept the posting of intimate images and even to harass/bully the victim in the aftermath of posting. The need for cultural change is likewise demonstrated by cases where victims express concern that their intimate image will be used by prospective employers to deny them career opportunities (*R v Zhou* 2016, *Doe v ND* 2016). As asserted in Chapter 4, broader cultural shifts and multi-pronged

approaches are needed to adequately address these adjacent harms (Shariff and DeMartini 2015).

In terms of youth cases of NCIID specifically, a cohort of scholars express concern that the criminalization of individual youths for acts of NCIID does not address youths' potential confusion regarding the legal and moral lines between consensual and non-consensual image sharing and may not actually help to prevent this issue among youth or address the systemic issues that inform these acts (Coburn, Connolly and Roesch 2015, Bailey 2015, Shariff and DeMartini 2015, Wodda and Panfil 2018). For instance, Bailey explains that, during the House of Commons discussions on amendments to the Criminal Code of Canada to address "cyberbullying" (including acts of NCIID), "a number" of claims-makers expressed that "punitive criminal measures" may be "unlikely to prevent youth from cyberbullying in the future because youth either ignore or are unaware of the law or do not expect that they will be caught or punished" (Bailey, 2014, 698). Emerging research has provided evidence to support this theory, finding that youth are often unaware or confused about legal sanctions for NCIID (Lockhart 2018). And Bailey and Short both note that criminalization is limited in its ability to address the "identity-based prejudices and systemic discrimination" (e.g. sex-negativity, homophobia, and/or transphobia) that may underlie youths' acts of NCIID (Bailey, 2014, 707, Short 2013). As Short asserts in regard to youth bullying:

The Criminal law is a mostly ineffective way to achieve the cultural transformation of schools that is needed to deal with harassment based on difference. [...] as with all punitive solutions, criminalizing bullying is a responsive approach, paying attention to undesirable behaviours only after the fact

and ignoring transformative possibilities that implicate culture. Approaching bullying generically, and not in terms of homophobic and transphobic bullying, for example, and emphasizing criminal measures in response is simply a way for us, as a culture, to avoid confronting our cultural demons and avoiding our fears (Short 2013, 351).

These findings emphasize that criminal law responses are likely unable to fully tackle the cultures that cause NCIID among youth.

Critiques of criminal law responses to sexual violence more broadly have questioned the ability for criminal law to address the root causes of sexual violence, citing the limits of criminal law's reactive and individualistic approach (see Theoretical Framework for more on this) (Smart 1989, Bumiller 2008, Gotell 2015). As Bumiller and others assert, "it is not necessarily true that more severe criminal sanctioning actually produces harm reduction" (Bumiller 2008, 163, Taylor 2018, Crofts and Kirchengast 2019). In terms of NCIID specifically, although Powell and Henry acknowledge that criminal law "plays an important role in providing redress to victims and [...] acknowledging the harms associated with the non-consensual [...] distribution of intimate images", they also support considering alternative dispute resolutions and acknowledge that criminal law is "an imperfect remedy that is overly reactive and individualistic and does not squarely tackle the underlying causes of the problem" (Powell and Henry 2017, 209). Considering the various shortcomings and negative impacts of criminal law responses to NCIID in particular and broader critiques of criminal justice responses to sexual violence, in the following section I discuss the potential of various alternative responses to NCIID.

Alternatives to the Criminal Justice Response

In the context of sexual violence more broadly, many feminists argue that a focus on criminal law reform can severely limit the possibilities for responding to sexual violence and to imagining what justice might look like for victims (Smart 1989, Doe 2004, Randall 2010, Mulla 2014, Taylor 2018). Thus, these feminists have argued for moving outside of the law to respond to sexual violence or for taking a multi-pronged approach that addresses the root causes and impacts of this issue. For instance, some feminists call for education-based responses to sexual violence that have the possibility of broadly affecting the ways that consent is understood and practiced (Doe 2004, Randall 2010, Friedman and Valenti 2008). In the context of NCIID more specifically, potential alternative responses that researchers and activists have brought attention to include: civil law responses; restorative and transformative justice responses; education campaigns; technological training and tools; and mental health supports.

One possible alternative to criminal law is to engage civil law remedies to address acts of NCIID (Farries and Sturm 2018). Across Canada, several provinces have implemented civil law remedies, including Nova Scotia, Newfoundland, Manitoba, Alberta, and Saskatchewan (Tutton 2018, Government of Nova Scotia 2017, Kubinec 2018, Newfoundland and Labrador 2018). Additionally, existing civil law remedies have been applied in cases such as Ontario's *Doe 464533 v ND* (2016) and British Columbia's case of *LaRose v Yavis* (1993). While civil law addresses some shortcomings of the criminal law response (e.g. by compensating victims for their suffering and by giving victims more control over the proceedings), Salter and Crofts (2015) note that civil cases can be expensive and emotionally taxing for victims to pursue. These limitations might

be addressed by further support for civil law remedies, such as providing government funding to support victims' claims and investing in counseling supports for victims. Additionally, scholars in the United States have expressed concern that civil cases will have adverse impacts due to the lack of anonymity for victims; however, in Canada there is some precedent for allowing victims to have their identities protected (e.g. *Doe v ND* and the "sexualized cyberbullying" case of *AB v Bragg Communications Inc.*).

There are signs that civil law can be effective in procuring financial awards for some victims of NCIID and for allowing more flexible remedies in some cases (Crofts and Kirchengast 2019, Farries and Sturm 2018). In terms of compensating victims for the harm they experience as a result of NCIID, two of the three civil cases in my dataset resulted in considerable financial awards⁶³: *Doe v ND* (2016) resulted in \$141,708.03 for the plaintiff (although this decision was successfully appealed due to the appeal court's judgment that it was too important a case to be decided as a default judgment) and *LaRose v Yavis* (1993) resulted in \$132,539.54 for the plaintiff. In terms of providing flexible responses, Nova Scotia's *Intimate Images and Cyber-protection Act (The Act)* is an example of how civil law based legislation can offer a range of options to victims, by allowing them to choose from either informal or civil law based resolutions. *The Act* gives Nova Scotia's CyberScan unit the ability to attempt more expedient, informal remedies to have images taken down and help put an end to related harassment or additional image spreading, while also providing victims with the option to utilize civil law remedies if these informal processes are unsuccessful (Tutton 2018, Government of Nova Scotia 2017). Although recognizing that a formal civil case can be a "lengthy and expensive process" (Tutton 2018), the head of CyberScan claims that most complaints

⁶³ In the third civil case considered, *Milton v Savinkoff* (1993), the case was dismissed without costs.

that come through the unit are able to be resolved informally through “allowing staff to advise people of a cyberbullying complaint that’s been made against them or their children, and to offer to resolve disputes and to assist with restorative justice” (Tutton 2018). If informal measures fail, victims may also seek “just and reasonable” civil orders such as orders to prohibit distribution of the intimate image and orders for dispute-resolution services (Tutton 2018, Government of Nova Scotia 2017).

While civil remedies certainly have their own shortcomings, they offer options such as compensation and protection orders (Crofts and Kirchengast 2019) and, when paired with informal/restorative approaches, allow for flexible options that may be appreciated by some victims that are most interested in ensuring expedient removal of their images and informally resolving related harassment or relational conflict (such as youths or those remaining in an intimate relationship with the offender). This alternative to criminal law might be most likely to be taken up in youth cases as the vast majority of Canadian youth cases already avoid the use of the criminal law sanction of incarceration⁶⁴ and opt for sanctions such as probation and community service. For instance, in the 2017 Bridgewater case—wherein six boys exchanged intimate images of their female peers through a Dropbox account—the offenders were given conditional discharges that included nine months of probation, completing community service, and counselling (Bridgewater 2017). Even in youth cases where the impact on the victim is severe, such as the Rehtaeh Parsons case and the case of *R v Y* (2015) (wherein the victim is said to have attempted suicide), judges regularly find that jail time is not appropriate (Halifax

⁶⁴ The principals of sentencing for youth indicate that “custody sentences are intended primarily for violent offenders and serious repeat offenders” and that general deterrence cannot be considered in youth cases (Department of Justice Canada 2015). Considering these principles, in the majority of youth cases in my dataset no jail time was given (Bridgewater 2017; Halifax 2014; Halifax 2015; *R v X* 2016; *R v SB et al.* 2014; *R v KF* 2015)⁶⁴.

2014; Halifax 2015); with judges noting, for instance, that “accountability will be achieved through the duration of his sentence order [including being banned from social media sites, completing 100 hours of community service, and taking part in counselling, and not contacting the victim] and the nature of the conditions imposed on him. I fail to see how a conditional discharge is too little accountability” (R v Y 2015). Such responses suggest that, in youth cases especially, there is an openness to accountability being achieved without incarceration⁶⁵ and that further attention to responses outside of the criminal justice system could be popular.

Other alternative approaches to justice for NCIID cases—that can substitute for or work alongside civil or criminal law responses—are restorative and transformative justice practices (Powell 2015, Karaian 2017, Hamilton 2018). In terms of restorative justice, contemporary restorative justice approaches have roots in Indigenous communities, with contemporary practices being implemented most notably in Indigenous communities in New Zealand, Australia, Canada, and the United States (Kim 2018). Although practices included under the restorative justice umbrella vary widely, they are distinct from criminal justice responses in that the adversarial model is replaced with a model focused on “elevating the voice of the victim or survivor”, recognizing the impact on the broader

⁶⁵ *R v NG & GG* (2015) is the only youth case in my dataset in which a period of custody was applied and affirmed on appeal, as the deferred custody in *R v CNT* was overturned on appeal. In *NG & GG* two brothers used threats to obtain a nude image from the victim, then used that image to extort the victim into providing additional sexually explicit images (including instructing her to record herself inserting an object into her vagina), and then distributed some of those images via social media (R v NG & GG 2015). The two offenders in this case received sixteen months incarceration that was lowered to twelve months on appeal (due to the trial Judge’s misapplication of youth sentencing principals) (R v NG & GG 2015). The sentence received was for all charges in this case, including: invitation to sexual touching, possession of child pornography, distribution of child pornography, and transmission of sexually explicit material to a child. Both the trial Judge and appeal court in this case affirmed that a “lengthy period of custody” (R v NG & GG 2015, para 9) was needed to account for the particularly aggravating facts of this case. However, the appeal court asserted that this case was more egregious than some other youth cases involving NCIID (citing *R v SB* et al. as an example) and that, because the dynamics of a given NCIID case can vary widely, the appropriateness of incarceration for future cases of youth NCIID will need to be scrutinized closely.

community, and reintegrating “all parties back into the community” in a healthy way (Kim 2018, 226). Restorative justice offers a response that accounts for the negative impacts of the typical criminal justice process and the overrepresentation of marginalized groups within the criminal justice system. In the context of NCIID, this alternative process could alleviate some of the negative impacts described above by, for instance: avoiding the criminalization of marginalized youths and of offenders seeking to take accountability and make amends; allowing victims to have their voices heard and to have more control over the process; and—by recognizing the impact on the broader community—potentially engaging with processes to educate the community on issues related to the particular act of NCIID (e.g. homophobia, sex-negativity, domestic violence, or bullying). Nova Scotia’s CyberScan unit, mentioned above, provides restorative justice options by allowing victims who report acts of NCIID to choose if they want to avoid the criminal justice process and instead engage in restorative practices (CyberScan 2019).

Although offering an alternative form of justice, restorative justice practices have been largely coopted by the state and are often administered within the purview of the criminal justice system. This cooptation has resulted in critiques that, by continuing to rely on typical policing practices and the threat of criminal justice, restorative justice does not act to fully undermine the negative impacts of the criminal justice system (Kim 2018). Due to the cooptation of restorative justice, transformative justice practices have been developed and popularized within social movement spaces that are dedicated to eradicating the criminal justice system or alleviating its impacts on (primarily) racialized and poor communities. These community level processes recognize “that interpersonal

forms of violence take place within the context of structural conditions including poverty, racism, sexism, homophobia, ableism, and other systemic forms of violence” and, therefore, assert that a criminal justice system that is entrenched within (and a perpetrator of) these inequalities will not be able to adequately address acts of violence (Kim 2018, 226, Taylor 2018). Transformative justice practices are based on the belief that communities must not only be *restored* to their previous state of inequality, but must be *transformed* to account for the many systemic factors influencing individual acts of violence (Taylor 2018, Hamilton 2018). Transformative justice includes a number of practices, such as “listening to the victim’s perspective, apologizing, making reparations to individuals and to the community, committing to stopping the harmful behaviour, committing to working on self-transformation, and participating in group efforts to shift power imbalances in the community” (Taylor 2018, np). In the context of NCIID, Hamilton (2018) argues that transformative justice practices are particularly useful because they seek to engage the broader community in response to violence. Thus, they would be able mitigate certain harms associated with NCIID by, for instance, educating employers on “how to exercise empathy” and not fire employees “upon discovering that their intimate media has been disseminated” (Hamilton 2018, 31). In cases of NCIID among youths, transformative justice approaches might be especially helpful in alleviating the harm caused to victims by third-party shaming and harassment as, instead of focusing on investigating and punishing a particular offender, they could focus on transforming student cultures (e.g. those that support whorephobia and homophobia).

Although the use of restorative and transformative justice practices is contentious in cases of sexual violence (Taylor 2018), they have the potential in some cases to allow

victims to express their own experience, to give victims more control over and involvement in the justice seeking process, and to encourage offenders to acknowledge their actions and understand their impact (McGlynn, Westmarland and Godden, 2012, Taylor 2018, Kim 2018). The fact that many cases of NCIID occur in a context of domestic violence may be understood to further problematize the use of alternative justice approaches; however some scholars suggest that restorative justice can be used in certain cases of domestic violence and can be effective in asking offenders to take responsibility for their actions while acknowledging the broader structural factors that can influence offenders' choices (Sokoloff and DuPont 2005, Kim 2018, Taylor 2018). Kim (2018) describes how "segments of the mainstream anti-violence sector" have begun to take seriously the potential of these practices, due to undertaking an investigation of "the consequences of [the sector's] long-term investments in criminalization and its negative impacts particularly on communities most targeted by state violence" (230). With a focus on their potential in the most marginalized communities, Kim describes how alterative justice approaches can "foster notions of community self-determination, culturally meaningful practices, and the building or rebuilding of community health" (Kim 2018, 230). Research on the success of alternative justice approaches in some cases of domestic violence and sexual violence speak to the potential for considering these alternative responses in those cases of NCIID that occur within these contexts.

Education-based responses are one of the most widely discussed alternatives/complementary approaches to criminal law responses to NCIID. Specifically in regard to youth cases of NCIID, it is held that criminal law responses are limited in their ability to prevent NCIID without "evidence-based educational supports to help

young people understand the lines between harmless and harmful forms of online expression”, “to understand the rights and entitlements of others” (Shariff and DeMartini 2015, 296), and to “proactively address rape culture and misogyny, not just its symptoms” (Shariff and DeMartini 2015, 297). In youth cases, research has found that policy makers, criminal justice personnel, and educators want more recognition that, in some cases, educational responses are more appropriate than punitive responses (Bluett-Boyd et al. 2013, Dodge and Spencer 2017) and that scare tactic approaches to educating youth about NCIID are less effective than educational responses that recognize youth as sexual beings and help them navigate what respectful relationships look like (Bluett-Boyd et al. 2013, Fairbairn, Bivens and Dawson 2013, Milford 2015, Wodda and Panfil 2018). As mentioned above, educational responses may be particularly necessary to help youths understand the moral and legal lines between consensual and non-consensual sexting (Lockhart 2018, Shariff and DeMartini 2015)—a line that, as mentioned below, some criminal justice officials and education campaigns continue to struggle with or intentionally misrepresent (Châteauguay Police 2018, Karaian 2014, Lockhart 2018, Dodge and Spencer 2017).

Additionally, Henry et al.’s research has found that—amongst all age groups—there is an “urgent need” for community education campaigns and information resources to “meet the information and support needs of victims; encourage ‘witnesses’ or ‘bystanders’ to take action to support a victim and/or challenge the perpetrator; [and to] challenge the culture of victim-blaming that both excuses perpetrator behaviour and prevents victims from seeking assistance” (Henry, Powell and Flynn 2017, 1). Educational responses are understood as having the potential to reduce victim-blaming

tendencies and to address related systemic issues and stereotypes (such as sexism and homophobia) that, as demonstrated in Chapters 4 and 5, can aggravate the harm experienced as a result of NCIID (Henry, Powell and Flynn 2017, Shariff and DeMartini 2015, Bluett-Boyd et al. 2013, Fairbairn, Bivens and Dawson 2013, Bailey 2015). For instance, to address cases of girls who share intimate images of other girls, educational responses may need to address the many kinds of sexual rumour spreading that flourish when girls are not “supported to talk about their own sexual experiences or curiosities” in a positive way and may, thereby, use sexual rumours to “collectively negotiate and make meaning about gendered sexuality” (Miller 2016, 738). As Miller (2016) asserts in regard to bullying amongst girls more broadly, more inclusive sex education in schools that looks at, for instance, queer identities and female pleasure would allow for youth to explore their sexuality in a more informed and less judgmental context. She explains, however, that to adequately provide this education “adults must interrogate and adjust their institutional practices to better support girls in developing healthy sexual subjectivities as well as critical consciousness about gendered sexuality” (Miller 2016, 738).

Education campaigns have the power to potentially change the way acts of NCIID are understood within our society, but only if they can effectively challenge the idea that the victim has done something wrong and deserves reputational impacts. Research has shown that educational responses must be careful not to reproduce victim-blaming attitudes, as when providing education around this issue there is a “very real risk of reproducing the very attitudes and social norms about sex and gender that facilitate sexual violence” (Bluett-Boyd, et al. 2013, 61) and cause victims of NCIID to fear seeking help

(Henry, Powell and Flynn 2017, 9, Fairbairn, Bivens and Dawson 2013). There have been some positive signs in Canada that campaigns and resources are moving toward more sex-positive and non-victim blaming approaches to addressing NCIID (Canadian Centre for Child Protection 2018, Edmonton Police Service 2018). For instance, in contrast to their previous campaigns focused on warning potential victims (namely white heterosexual girls) about the risks of *consensual* image sharing (Karaian 2014), new educational material from the Canadian Centre for Child Protection includes bus ads that are targeted at the behaviours of those who might share images *without* consent. The bus ad shows a text-message conversation wherein an individual is being pressured to non-consensually share nude photos he has received, in response the pressured individual responds “Bro stop! [...] sending them is against the law [...] it is a big deal!!!!!! Look it up” (Canadian Centre for Child Protection 2018). This campaign is targeted at would be NCIID offenders rather than consensual youth sexters. Likewise, an anti-NCIID education campaign by SAVEdmonton, created by a coalition of police and sexual assault centres in Edmonton, Alberta, focuses on the actions of potential offenders. The campaign includes images of youthful looking individuals of various genders looking at their phones thoughtfully, in large font a caption reads “Delete: without consent, it’s not sent” and smaller font explains that “sharing an intimate image of someone without their consent is never okay. It is also against the law” (Edmonton Police Service 2018).

In addition to these campaigns addressing potential NCIID offenders, supports for youth sexters (e.g. potential victims from a risk management perspective) offered by Kids Help Phone now offer sex-positive supports that provide safety suggestions for “sexting” while acknowledging that youth are sexual beings that might engage in consensual

sexting as “a way to explore sexuality, trust, boundaries and intimacy” (Kids Help Phone 2019). And [webwise.ca](#)’s page on sexting explains the potential risks of consensual image sharing while also exclaiming “like we said from the start – sexting is fun and no one can keep you from doing it (you do you!). But if you are going to do it, here’s a tip on how to keep the risks to a minimum” (Webbing with Wisdom 2016). These campaigns may help to alleviate some of the fear and embarrassment that victims of NCIID can feel by providing non-victim blaming education that discusses the risks of consensual image sharing while recognizing that this is still a legitimate choice that should not be shamed (or criminalized). Building on my argument in Chapter 4, these sex-positive responses to NCIID may be able to address some of the harm of NCIID experienced in particular cases by moving away from sex-negative educational discourse that might affirm consensual sexters as deserving of shame. In addition to recognizing how education campaigns can create this change, it should also be noted that youths themselves are capable of creating communities and resources that “challenge normative standards” of gender, sexuality, and sexual expression (Milford 2015, 65, Naezer and Ringrose 2019) that might be used to combat the culture that enforces the harm of NCIID. While education campaigns may be able to create some measure of cultural change, research on “cyberbullying” has also suggested that educational resources should be implemented alongside additional mental health supports for those youth who continue to be victimized (Bailey 2014, Shariff and DeMartini 2015, Coburn, Connolly and Roesch 2015).

Some commentators have also discussed various technology-based responses to NCIID that may partially address the shortcomings of criminal law responses by, for instance, making online platforms more responsive to image removal requests,

encouraging tech companies to be involved in anti-harassment education campaigns, and encouraging tech companies to design tools to help curb the ease of committing NCIID (Bluett-Boyd, et al. 2013, 61, Bivens and Fairbairn 2015, Hasinoff 2015). For example, while Canada’s NCIID law allows for costs to be granted for image removal—as occurred in a case in Saskatchewan in 2017 where \$30,500 was provided for the victim to hire a private firm to remove her intimate images (Saskatchewan 2017)—changes to reporting mechanisms for social media platforms or search engines could allow images to be removed much more quickly and cheaply. There has been some positive movement in this regard, with Google and Microsoft beginning to delist “revenge porn” from search results upon request (though of course they can only remove the results not the actual site content) (Powell and Henry, 2017, 258, Langlois and Slane 2017) and the developing of technology, such as that piloted by Facebook, that uses past reports of “revenge porn” to learn what these images look like and to automatically remove the images without requiring someone to first see the image and report it (CBC 2019). Providing another approach, Slane and Langlois have argued for legal accountability for “online platforms, hosts, and fora that allow users to post sexual images”, arguing that this accountability could help to lessen the incentive to participate in “promoting or facilitating this type of wrongdoing by users” (Slane and Langlois, 2018, 80).

Some researchers have also discussed how online platforms can be used by victims of NCIID to find support or to engage in (often feminist inspired) activism against NCIID (Mendes, Ringrose and Keller 2018, Powell and Henry, 2017, Salter and Crofts, 2015). Online activist initiatives include the websites “End Revenge Porn”, “Women Against Revenge Porn”, and “Army of She” that “vehemently resist the

stigmatisation of revenge porn victims by publicising women’s experiences of victimisation and providing practical advice and legal referrals” (Salter and Crofts, 2015, 8). Other relevant technological forms of justice include the platform Heartmob—which allows users to support those who are being harassed online by helping to report abuse and by sending individuals supportive messages (Misener 2016)—and Badass Army—an activist group composed of “hundreds of revenge porn victims” that helps teach members how to respond to NCIID by giving them the tech and legal know-how to lock down their online accounts, send legal orders to remove photos, “flood[] revenge porn forums with a flurry of innocuous images to make non-consensual pictures harder to view”, and identify people who are uploading images without consent (Cox 2018). Powell argues that such online activism, supported by social media platforms and the affordances of digital technology, allows for “new mechanisms of informal justice outside of the state, in turn challenging meanings of justice in western liberal democracies” (Powell 2015, 1).

Coburn et al. (2015) argue that “the costs of investigating, prosecuting, and sanctioning youth who engage in cyberbullying would be better placed in prevention and early intervention programs to reduce cyberbullying” and in “mental health services for young people who might be at risk for depression, anxiety, self-harm, and suicide” (575). In terms of acts of NCIID (among both youth and adults), it is also worth thinking about how a focus on criminal justice responses may move resources away from alternatives that could be appealing to particular victims, could address some of the shortcomings of criminal law approaches, and/or could offer broader cultural change than criminal law is capable of achieving. For instance, in the aftermath of the Rehtaeh Parsons case a great deal of popular and governmental attention was given to the implementation of criminal

law changes, while much less public outcry and government discussion was given to findings that the Parsons case also revealed deficits in the mental health resources available in Nova Scotia and demonstrated the need for restorative justice programs and better supports for mental health and sexual violence victims in schools (Goodyear 2013). Additionally, Shariff and DeMartini (2015) express concern that the creation of new criminal laws to respond to NCIID may provide a false sense that the issue of NCIID has been adequately addressed; they argue that, contrary to this belief, cultural change and multi-pronged approaches are needed to truly address and prevent this act. Heading this concern—and considering the above demonstrated limitations of criminal law—activists, educators, and policy makers should not treat this issue as solved and should continue to seek solutions on other fronts.

Conclusion

In the previous chapters I have demonstrated that, when responding to acts of NCIID, judges are left to assess complex cases that can involve variable relationships to digital technology, variable contexts (e.g. within a relationship involving domestic violence or amongst youths vying for social benefits), variable levels of harm, and a diverse group of victims and offenders (with a variety of offender motivations). Having recognized the variability of this act, it is therefore necessary to consider the limitations of criminal law's ability to adequately respond to particular cases and to address the broader issues associated with NCIID. While NCIID case law reveals that judges often see criminal law responses as necessary to denounce and deter this behaviour and to acknowledge the level of harm caused, critical feminist theories reveal the potential negative impacts of criminal

law responses—such as the sidelining of victims’ needs and the stigmatization of already marginalized communities—and the inability for criminal law to address the underlying causes of NCIID. Thus, although criminal justice responses and periods of incarceration may be appropriate in certain case of NCIID, the limitations of criminal law responses to these cases and the need for flexibility in responses and sentences should be acknowledged.

While the criminalization of NCIID has generally been regarded as a feminist accomplishment—as were other criminal law responses to sexual violence in the past (Bumiller 2008, Bernstein 2012)—anti-carceral feminism offers a perspective from which to trouble the assumption that criminalization will lead to justice across the board and to analyze the potential negative side-effects of criminalization. For instance, as discussed in Chapter 5, the criminalization of NCIID has brought not only vengeful/abusive men into contact with the criminal justice system, but also, for instance, teenage boys and girls who are acting with limited knowledge regarding the law and are still learning to negotiate and understand how to have respectful and consensual relationships with others. It is necessary to consider whether some cases might be best dealt with through alternative means (e.g. civil law, education, transformative justice, or mental health supports) and, at the very least, it is clear that the presumed “chilling effect” (Winnipeg B 2016) of criminal law will not adequately tackle the issue of NCIID on its own and will continue to have adverse/unanticipated consequences.

Conclusion

Do we want a future that is forever unforgiving because it is unforgetting?

-Mayer-Schonberger (2009, 4)

While academics and activists have expressed concerns that a “hierarchy of violence” may disallow NCIID from being taken seriously in the law—by positioning physical forms of violence as more harmful than non-physical forms (Powell and Henry, 2017, Kitchen 2015)—this dissertation has shown that Canadian judges have largely understood NCIID as an extremely harmful act requiring denunciation and deterrence. In particular, judicial concerns with the impacts of new technologies and the humiliation of sexual exposure are regularly used to support the use of carceral sentences and/or to express that victims have been impacted in a lasting and irreparable manner. While stakeholders may disagree on whether or not this amounts to taking NCIID “seriously” enough in law, this dissertation has shifted the focus away from arguments for criminalizing NCIID and has rather sought to understand legal conceptions of this act and the socio-legal implications of various constructions of NCIID. Halley asserts that “we can’t make decisions about what to do with legal power in its many forms responsibly without taking into account as many interests, constituencies, and uncertainties as we can acknowledge” (Halley 2006, 9). Each of the preceding chapters has engaged with the many interests, constituencies and uncertainties related to NCIID by revealing that NCIID is a complex issue involving: a diversity of victims and offenders (Chapter 5), a range of harms (Chapter 4), a plethora of potential framings (Chapter 3), and a variable relationship to digital technologies (Chapter 2). Ultimately, I have argued that an analysis of the efficacy of responding to NCIID in law (Chapter 6) must consider the social impacts of various legal constructions of NCIID and the legal impacts of various social constructions of NCIID.

My discursive analysis of legal responses to NCIID finds that anti-carceral, pro-sex, intersectional, and critical legal feminist analysis are generative theoretical approaches for discovering what NCIID is “coming to mean” (Crocker 2008, 90) in law and for analyzing the theoretical and material implications of these meanings. For instance, the application of child pornography charges to youth cases of NCIID results in both the material effect of a 14-year old Indigenous boy being labeled a “sex offender” by his peers (R v SB et al. 2014) and a theoretical challenge to our understanding of what child pornography is and who can be properly designated as a child pornographer. While legal feminist activists and scholars have argued that NCIID’s harms are most appropriately addressed through criminalization (Citron and Franks, 2014) and that, for instance, judges should ensure they do not “distance [the crime of NCIID] from sexual assault” (Aikenhead 2018, 140), my critical feminist analysis of these claims leaves me to assert that we should remain critical—as Smart (1989) suggests—of even those legal responses that appear to be feminist “wins” and remain aware of the norms and truths these “feminist” legal responses to sexual violence construct (10). Through analyzing the “meaning-making activity” (Crocker 2008, 90) of law in respect to NCIID I have shown, for instance, that law’s unintended consequences may include reaffirming the sex-negative cultural beliefs that allow NCIID to be so easily weaponized by abusers.

Building on my findings in this dissertation, future research should determine the experiences and needs of those victims of NCIID (e.g. LGBTQ+ and male victims) who seem to be choosing not to engage with the criminal justice system. This research should, for instance, seek to discover whether victims who do not align with the typically imaged “revenge porn” victim are choosing to respond to these acts outside of the law or are

being relegated out of the legal system by gatekeepers or socio-economic factors. By understanding a broader diversity of experiences of NCIID, it might be possible to expand understandings of the potential and limitations of responding to NCIID outside of formal legal mechanisms or to discover new ways to address the broader sex-negative and discriminatory culture that contributes to the harm of non-consensual intimate image sharing. This research should look beyond formal legal responses, to understand how NCIID is responded to through, for instance, school or workplace policies or community based interventions. Researchers should continue to develop complex and intersectional understandings of NCIID victims and offenders and nuanced understandings of the dynamics and harms of this act.

Although scholars, activists, and judges are just beginning to form understandings of and responses to NCIID, these understandings and responses are already being challenged by social and technological developments that are shifting the borders of this discussion. For instance, increasingly sophisticated “deepfake” technology—which allows for the creation of realistic fake sexually explicit videos—is now being argued as requiring the expansion of NCIID laws (Harris 2019, McGlynn, Rackley and Houghton, 2017). In fact, the Virginia General Assembly has now passed a bill to expand their misdemeanor NCIID law to include “falsely created videographic or still images” (House Bill Number 2678 2019) and criminal offences in England, Wales, and New South Wales already criminalize the dissemination of “images which are not actually of the subject of the image but have been modified in some way to make them appear to be an intimate image of the complainant” (Crofts and Kirchengast 2019, 95). Canada’s NCIID law could potentially be expanded to include fake materials (especially in cases involving youths),

as child pornography offences already apply to “entirely manufactured depiction[s]” (R v CNT 2015, para 8). Questions around the regulation or criminalization of deepfakes also provide challenges for Canadian stakeholders who will have to decide (again) where they draw the line between immoral and criminal acts. Additionally, deepfakes create further fodder for questioning where the harm of NCIID resides by removing any “real” privacy violation, and thus seemingly relying solely on the ideas of reputational damage discussed in Chapter 4. This technology creates additional questions regarding what makes NCIID more deserving of criminalization than other forms of sexual rumour spreading.

Additional arguments for NCIID expansion include McGlynn et al.’s concern that some NCIID offences, because they use the term “sexually explicit” to describe images that fall under the criminal offence, limit the “range of images covered to those which include considerable nudity and/or sexual acts, perhaps overlooking images that are equally harmful but where the woman is, for example, wearing underwear” (McGlynn, Rackley and Houghton, 2017, 39). Arguments for including images of those wearing underwear within criminal offences—as has been implemented in criminal law in New South Wales (Crofts and Kirchengast 2019)—also create questions for conceptualizing NCIID, as this expansion would seem to suggest that it is solely the sexual nature of an image that makes it harmful when exposed. This framing results in questions about whether certain images of people in bathing suits should be included if they are deemed sexual enough—a position that seems overbroad in terms of carceral expansion. In this regard, it is also necessary to consider that ideas about what amount of nudity and what kind of “sexual acts” are deemed private enough to amount to a criminal violation will

likely change overtime along with social norms (and are culturally and geographically contingent in the present⁶⁶—especially in regard to topless women). While harm can certainly be caused by the distribution of fake images or images of individuals in their underwear⁶⁷, it will be necessary to grapple with which harms are decidedly criminal and which are morally reprehensible.

While many stakeholders might continue to simply argue for the extension of “revenge porn” laws in light of future technological and social challenges, this dissertation has provided a critical legal analysis to question the efficacy and simplicity of arguments reliant on carceral outcomes. I have shown that legal responses to NCIID have several limitations and negative impacts. Considering the limits of law to actually ameliorate the harm experienced by victims, I argue, for instance, that cultural changes to sex-negative beliefs will be required to undermine the association between acts of NCIID and reputational ruin. Mayer-Schonberger asks us to question how we will choose to cope with the “durability of digital memory” (Mayer-Schonberger 2009, 112). The answer to this question in the context of NCIID has commonly been a turn to criminal law to punish those who disseminated the digital image; however, in terms of digital memory more broadly, boyd asserts that “people, particularly younger people, are going to come up with coping mechanisms. That’s going to be the shift, not any intervention by a governmental or technological body” (Mayer-Schonberger 2009, 154). While, in the context of NCIID, this might sound like an unwelcome and unhelpful suggestion that

⁶⁶ For instance, current laws have focused only on privacy violations regarding Western notions of nudity/sexuality and have not included privacy violations such as disseminating images of a woman who regularly wears a hijab without her hijab on. See Crofts and Kirchengast (2019) for a further discussion of how various countries have justified drawing these lines in law.

⁶⁷ Canadian law criminalizes images of nudity *or* “explicit sexual activity” (CCC 1985, s162.1), therefore it is important to recall here that images where an individual is wearing underwear or clothing but is engaged in explicit sexual activity (e.g. giving oral sex) would be included within the current definition of an intimate image.

victims simply “not be embarrassed” (as discussed in Chapter 4), I hope that it might also serve as an encouraging reminder that the culture of sexual shame and discrimination that (at least in part) allows NCIID to ruin lives is something that we are capable of modifying.

Hopefulness has not been common in activist, academic, and judicial responses to NCIID that have tended to highlight those cases where the harm of NCIID was *ruinous* and *everlasting* (as discussed in Chapters 2 and 4). However, I argue that hope is possible and that it is useful to shed light on both those who have suffered tragic consequences as a result of NCIID *and* those who have understood this experience otherwise. As Chun and Friedland argue in regard to NCIID victims who have been exposed as “sluts” yet refuse to go offline or to otherwise privatize and seal off their lives, the “slut” can emerge as a radical figure who “despite her exposure, continues to be active online – ruined and yet undead” (Chun and Friedland 2015, 16). Although not a victim of “revenge porn”⁶⁸, I like to imagine Monica Lewinsky as one of these radical “undead” figures. As a result of President Bill Clinton’s affair with Lewinsky, she became (in her own words) “patient zero” of the kind of “public shaming as a blood sport” (Lewinsky 2015) that has become increasingly ubiquitous in our digital age. Despite having intimate details of her sex life revealed to the public and experiencing slut-shaming on an international scale (Lewinsky

⁶⁸ It is necessary to question the basis on which NCIID has been constructed as worse than other sexual exposures or privacy violations. In particular cases, *image* sharing may not be more harmful than other forms of non-consensual sexual information sharing. While photographs may be seen to carry a special weight as, according to Sontag “a photograph passes for incontrovertible proof that a given thing happened” (Sontag 2003, 175), there is certainly evidence that non-image based rumour spreading can also be impactful. See Langlois and Slane (2017) and Karaian (2017) for differing perspectives on conceptions of the dissemination of sexual exposures that do not include images. Karaian argues that NCIID is just one form of sexual rumour spreading and thus that the criminalization of youths who commit this act should be questioned, while Langlois and Slane argue that the potential implications of non-image based exposures necessitates further attention to legal consequences for websites that profit from non-image based forms of rumour spreading/exposure.

2015), Lewinsky not only survived but has recently returned to the spotlight to provide a nuanced and vulnerable perspective on her experience. Her example, along with those discussed in Chapter 4, provide a hopeful antidote to the narrative of “ruin” that is often highlighted and, arguably, reaffirmed in popular responses to NCIID (Chun and Friedland 2015).

Beyond acts of NCIID, our digitally memorialized lives will increasingly require us to confront the past (perceived) humiliations of others (e.g. digitally searchable criminal records or video of drunken hijinks) (Wagman 2016, Langlois and Slane 2017, Shefer and Munt 2019), and to decide what we want to do when digitally confronted with this information. As Wagman asserts, we will need to decide how we are going to “live with each other against the backdrop of the presence of embarrassing things and persistent concern about the management of future embarrassments” (Wagman 2016, 111). In terms of NCIID, Wagman’s question provides an opportunity to think through how community responses to NCIID can help to ameliorate at least the aspects of NCIID’s harms that are the result of third-party shaming/harassment. I do not intend here to downplay the harm of the original privacy violation or the broader context of abusive/coercive behaviour in which some cases of NCIID take place. The tragic consequences associated with some cases of NCIID are not to be taken lightly and questions of how to respond to NCIID and punish offenders are multi-faceted and context specific; however, we should not let these challenges limit our analysis of the many possible responses to NCIID or to invisibilize the possibility of a sex-positive and less discriminatory future in which NCIID’s power to harm is increasingly diminished.

Bibliography

- Abeyasekera, Asha and Jeanne Marecek. "Embodied Shame and Gendered Demeanours in Young Women in Sri Lanka." *Feminism and Psychology* 29, no. 2 (2019): 157-176.
- Aikenhead, Moira. "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence." *Canadian Journal of Women and the Law* 30, no. 1 (2018): 117-42.
- Avert. *Homophobia and HIV*. 2018. <https://www.avert.org/professionals/hiv-social-issues/homophobia> (accessed May 23, 2019).
- Alex, Cathy. "Avoid victimization, don't send nude photos says Thunder Bay police." *CBC News*, December 20, 2017.
- Angelides, Steven. "'Technology, hormones, and stupidity': The affective politics of teenage sexting." *Sexualities* 16, no. 5 (2013): 665–689.
- Attwood, Feona. "Sluts and Riot Grrrls: Female Identity and Sexual Agency." *Journal of Gender Studies* 16, no. 3 (2007): 233-247.
- Auld, Alison. "Sentencing delayed for N.S. teens in intimate photo-sharing case." *CTV News*, July 31, 2017.
- Baden, Rebecca. "My Nude Photos Were Stolen While I Was At School ." *Vice*, February 23, 2018.
- Bailey, Jane. "A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls' Lives." In *eGirls, eCitizens*, edited by Jane Bailey and Valerie Steeves, 21-54. Ottawa: University of Ottawa Press, 2015.
- . "Sexualized Online Bullying." *McGill Law Journal* 59, no. 3 (2014): 709-37.
- . "Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliamentary Debates on 'Cyberbullying'." *Dalhousie Law Journal* 37, no. 2 (2014).
- and Mouna Hanna. "The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision." *Canadian Journal of Women and the Law* 23, no. 2 (2011): 405-441.
- Barrera, Jorge. "Akwasne woman charged in connection with Ontario revenge porn case." *CBC*, October 31, 2018.
- . "Revenge porn victim feels delayed police response allowed spread of intimate photos to continue." *CBC*, October 12, 2018.
- Barrett-Ibarria, Sofia. "I Posted My Own Nudes on Instagram Before My Ex Could." *Vice*, July 24, 2018.
- Bates, Samantha. "Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors ." *Feminist Criminology* 12, no. 1 (2017): 22-42.
- Battye, Greg. *Photography, Narrative, Time: Imaging our Forensic Imagination*. Chicago: University of Chicago Press, 2014.
- Baym, Nancy. *Personal Connections in the Digital Age*. Cambridge: Polity, 2010.
- Benoit, Cecilia, Leah Shumka, Rachel Phillips, Mary Kennedy, and Lynn Belle-Isle. *Issue Brief: Sexual Violence Against Women in Canada*. Ottawa: Status of Women Canada, 2014.

- Bernstein, Elizabeth. "Carceral politics as gender justice? The 'traffic in women' and neoliberal circuits of crime, sex, and rights." *Theory and Society* 41, no. 3 (2012): 233-259.
- Best, Catherine. *Canadian Case Law Collections* . 2015. legalresearch.org (accessed September 6, 2017).
- Bivens, Rena, and Jordan Fairbairn. "Social Media and Sexual Safety: Quit Facebook, Don't Sext, and Other Futile Attempts to Protect Youth." In *Gender, Sex, and Politics: In the Streets and Between the Sheets in the 21st Century*, edited by Shira Tarrant. London: Routledge, 2015.
- Bloom, Sarah. "No Vengeance for 'Revenge Porn' Victims: Unraveling Why this Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It." *Fordham Urban Law Journal* 42, no. 1 (2016): 233-88.
- Bluett-Boyd, Nicole, Bianca Fileborn, Antonia Quadara, and Sharnee Moore. *The Role of Emerging Communication Technologies in Experiences of Sexual violence: A New Legal Frontier?* Melbourne: Australian Institute of Family Studies , 2013.
- Bonanos, Christopher. *Instant: The Story of Polaroid* . New York: Princeton Architectural Press, 2012.
- boyd, danah. "Social Networked Sites as Networked Publics: Affordances, Dynamics, and Implications." In *Networked Self: Identity, Community, and Culture on Social Network Sites*, edited by Zizi Papacharissi, 39-58. New York : Routledge, 2011.
- Bresnahan, John. "Porn star's tweet prompts resignation." *Politico* , June 24, 2014.
- Broll, Ryan. " Cyberbullying: Four steps to protect your kids ." February 21, 2018: np.
- Broughton, Peta. "Jurisprudence: Discourse Analysis of the Law." *Southern Cross University Law Review* 3 (1999): 136-152.
- Bumiller, Kristin. *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*. Durham: Duke University Press, 2008.
- Calo, Ryan. "Robotics and the Lessons of Cyberlaw." *California Law Review* 103, no. 3 (2015): 513-564.
- Canadian Centre for Child Protection . *Intimate Images and Sexual Violence*. 2018. https://www.cybertip.ca/app/en/internet_safety (accessed January 24, 2018).
- Canadian Press. "Sault woman distributed intimate photos of ex with another woman: police." *CBC* , March 20, 2017.
- CBC News*. "Facebook launches AI to find and remove 'revenge porn'." March 15, 2019.
- . "2 Quebec City teens plead guilty to sharing nude photos of classmates." November 26, 2018.
- . "Sexual health author offers advice for parents on how to talk about sexting." September 08, 2016.
- . "Hants County Teens." January 11, 2016.
- Châteauguay Police. *Launch of the "SEXTING, is PORN!" Campaign*, 2018.
- Charmaz, Kathy. *Constructing grounded theory: A practical guide through qualitative analysis*. Thousand Oakes: SAGE Publications Inc., 2006.

- Chemaly, Soraya. "Slut-Shaming and the Sex Police: Social Media, Sex, and Free Speech." In *Gender, Sex, and Politics: In the Streets and Between the Sheets in the 21st Century*, edited by Shira Tarrant. London: Routledge, 2015.
- . "There's No Comparing Male and Female Harassment Online." *Time*, September 09, 2014.
- Choudhary, Vidhi. "17-year-old girl commits suicide after man posts her intimate photos on Facebook." *Hindustan Times*, July 10, 2018.
- Chun, Wendy Hui Kyong, and Sarah Friedland. "Habits of Leaking: Of Sluts and Network Cards." *differences* 26, no. 2 (2015): 1-28.
- Citron, Danielle, and Mary Anne Franks. "Criminalizing Revenge Porn." *Wake Forest Law Review* 49 (2014): 345-391.
- Clarke-Billings, Lucy. "Revenge Porn Laws in Europe, U.S. And Beyond." *Newsweek*, September 9, 2016.
- Coburn, Patricia, Deborah Connolly, and Ronald Roesch. "Cyberbullying: Is Federal Criminal Legislation the Solution?" *Canadian Journal of Criminology and Criminal Justice* 57, no. 4 (2015): 566-579.
- Cohen, Stanley. "An Introduction to the Theory, Justifications, and Modern Manifestations of Criminal Punishment" *McGill Law Journal* 27 (1981): 73-91.
- Conger, Kate. "For Survivors of Domestic Violence, Revenge Porn Is the Awful New Norm." *Gizmodo*, February 06, 2018.
- Conley, John, and William O'Barr. *Rules Versus Relationships: The Ethnography of Legal Discourse*. Chicago: University of Chicago Press, 1990.
- Cooper, Glenda. "Sexting: a new teen cyber-bullying 'epidemic'." *The Telegraph*, April 12, 2012.
- Corner, Lewis. "Chappy launches Screenshot Alert feature to protect users from revenge porn." *Gaytimes*, October 17, 2017.
- Cossman, Brenda. "Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler Decision." In *Bad attitude/s on trial: pornography, feminism, and the Butler decision*. Toronto: University of Toronto Press, 1997.
- Cox, Joseph. "The 'Badass Army' is Training Revenge Porn Victims to Fight Back." *Motherboard*, March 14, 2018.
- Crenshaw, Kimberle. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." *Stanford Law Review* 43, no. 6 (1991): 1241-1299.
- Crocker, Diane. "Criminalizing Harassment and the Transformative Potential of Law." *Canadian Journal of Women & Law* 87 (2008).
- Crofts, Thomas and Tyrone Kirchengast. "A Ladder Approach to Criminalising Revenge Pornography". *The Journal of Criminal Law* 83, no.1 (2019): 87-103.
- Csanady, Ashley. "Man who lost landmark revenge porn case seeks new trial because he couldn't afford lawyer." *National Post*, July 26, 2016.
- CTV News*. "Man jailed nine months for extorting ex-girlfriend with nude photos." December 28, 2017.
- "Teens charged with alleged sexual assault of 13-year-old girl and filming the attack." April 23, 2018.
- Cuen, Leigh. "Let's call the Leslie Jones attack what it is: revenge porn, not trolling ." *Mic*, August 25, 2016.

- Cyber Civil Rights Initiative. *End Revenge Porn*. 2014.
- CyberScan. 2019. <https://novascotia.ca/cyberscan/> (accessed May 07, 2019).
- Cycle, The. "'Revenge porn' the latest proof that your digital life lasts forever." *MSNBC*, May 29, 2013.
- Daileida, Colin. "Posting Hulk Hogan's sex tape isn't revenge porn, but is it legal?" *Mashable*, June 17, 2015.
- De Angelis, Robin. "Sudbury police say social media posts being used to solicit intimate images without consent." *CBC*, March 19, 2018.
- Department of Justice Canada. *Sentencing of Young Persons*. March 05, 2015. <https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/syp-dpaa.html> (accessed January 28, 2019).
- Department of Justice Canada. *Age of Consent to Sexual Activity*. August 08, 2017. <https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html> (accessed May 15, 2019).
- Dobinson, Ian, and Francis Johns. "Qualitative Legal Research." In *Research Methods for Law*, edited by Mike McConville and Wing Hong Chui. Edinburgh: Edinburgh University Press, 2007.
- Dodge, Alexa, and Dale Spencer. "Online Sexual Violence, Child Pornography or Something Else Entirely? Police Responses to Non-Consensual Intimate Image Sharing among Youth." *Social & Legal Studies Online First* (2017).
- Dodge, Alexa. "Digitizing rape culture: Online sexual violence and the power of the digital photograph." *Crime, Media, Culture* 12, no. 1 (2016): 65-82.
- Doe, Jane. *The Story of Jane Doe: A Book About Rape*. Toronto: Vintage Canada, 2004.
- Dragiewicz, Molly, et al. "Technology Facilitated Coercive Control: Domestic Violence and the Competing Role of Digital Media Platforms." *Feminist Media Online First* (2018).
- Duke, Alan. "5 Things to know about the celebrity nude photo hacking scandal." *CNN*, October 12, 2014.
- Edmonton Police Service. *Without consent, it's not sent. Delete it*. 2018. <http://www.edmontonpolice.ca/CommunityPolicing/PersonalPropertyCrimes/SexualAssault/Campaigns/DeleteIt> (accessed January 24, 2019).
- Ehrenkranz, Melanie. "We Need to Study the Effects of Revenge Porn on Mental Health". *Gizmodo*, June 22, 2018.
- Ellis, Emma. "Sorry, But You Need to Care About Blac Chyna and Rob Kardashian." *Wired*, July 08, 2017.
- Ellison, Louise, and Yaman Akdeniz. "Cyber-stalking: the Regulation of Harassment on the Internet." *Criminal Law Review*, 1998: 29-48.
- European Institute for Gender Equality. *Cyber violence against women and girls*. European Institute for Gender Equality, 2017.
- Fahmy, Gabrielle. "Victim of 'revenge porn' in campus emails files complaint with RCMP." *CBC News*, February 28, 2017.
- Fairbairn, Jordan. "Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age." In *egirls, ecitizens*, edited by Jane Bailey and Valerie Steeves, 229-52. Ottawa: University of Ottawa Press, 2015.

- Fairbairn, Jordan, Rena Bivens, and Myrna Dawson. *Sexual Violence and Social Media: Building a Framework for Prevention*. Ottawa: OCTEVAW & Crime Prevention Ottawa, 2013.
- Farries, Elizabeth and Tristan Sturm. "Feminist Legal Geographies of Intimate-Image Sexual Abuse: Using Copyright Logic to Combat the Unauthorized Distribution of Celebrity Intimate Images in Cyberspaces." *Environment and Planning A: Economy and Space* (2018): Online First.
- Filipovic, Jill. "Offensive Feminism: The Conservative Gender Norms that Perpetuate Rape Culture, and How Feminists can Fight Back." In *Yes Means Yes!: Visions of Female Sexual Power and a World without Rape*, edited by Jaclyn Friedman and Jessica Valenti, 13-28. Berkeley: Seal Press, 2008.
- . "'Revenge Porn' is about degrading women sexually and professionally." *The Guardian*, January 28, 2013.
- Fitzpatrick, Katie. "Former Coronation Street Actress Gives Inspirational Message After Intimate Photos Leaked Online ." *Manchester Evening News*, January 21, 2018.
- Foucault, Michel. *An Introduction*. Vol. I, in *The History of Sexuality Vol .* New York: Pantheon Books, 1978.
- . *The Archaeology of Knowledge*. London: Tavistock, 1972.
- . "The Order of Discourse: Inaugural Lecture at the College de France." *Untying the Text: A Post-Structuralist Reader*. Boston: Routledge & Kegan Paul Ltd., 1970. 48-78.
- Franke, Katherine. "Theorizing Yes: An Essay on Feminism, Law, and Desire." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, edited by Martha Fineman, Jack Jackson and Adam Romero. 2009.
- Friedman, Jaclyn, and Jessica Valenti. "Introduction." In *Yes Means Yes!: Visions of Female Sexual Power and a World Without Rape*, edited by Jaclyn Friedman and Jessica Valenti, 5-12. Berkeley : Seal Press, 2008.
- Gatehouse, Jonathan. "Why would politicians engage in sexting? There's complex psychology at play." *CBC* , November 08, 2018.
- Gee, James. *An Introduction to Discourse Analysis* . Third Edition . New York: Routledge, 2011.
- Giese, Rachel. "Indecent Exposure." *Real Life Magazine*, July 2016.
- Glick, Elisa. "Sex Positive: Feminism, Queer Theory, and the Politics of Transgression." *Feminist Review* 64 (2000): 19-45.
- Glickman, Charlie. "The language of sex positivity." *Electronic Journal of Human Sexuality*, 3 (2000): 1-5.
- Goodyear, Sheena. "Rehtaeh Parsons report calls for changes to Nova Scotia curriculum." *Toronto Sun*, June 14, 2013.
- Gotell, Lise. "Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism." In *Rape Justice: Beyond the Criminal Law*, edited by Anastasia Powell, Nicole Henry and Asher Fylnn, 53-71. New York: Palgrave, 2015.
- . "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship." In *Reaction and*

- Resistance: Feminism, Law, and Social Change*, 127-163. Vancouver: UBC Press, 2007.
- Government of Nova Scotia . "Intimate Images and Cyber-protection Act." Bill No. 27, 2017.
- Gurnham, David. "A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts ." *New Criminal Law Review* 19, no. 2 (2015): 141-170.
- Hall, Matthew, and Jeff Hearn. "Revenge pornography and manhood acts: a discourse analysis of perpetrators' accounts." *Journal of Gender Studies Online First* (2017).
- . *Revenge Pornography: Gender, Sexuality, and Motivations*. London: Routledge, 2018.
- Hall, Neal. "Man Escapes Jail Time for Posting Facebook Photos in Pitt Meadows Rave-Assault." *Metro News*, March 03, 2013.
- Halley, Janet. *Split Decisions: How and Why to Take a Break from Feminism*. Princeton: Princeton University Press , 2006.
- Hamilton, Ashlee. "Is Justice Best Served Cold?: A Transformative Approach to Revenge Porn". *UCLA Women's Law Journal* 25, no.1 (2018): 1-45.
- Hand, Martin. "Persistent traces, potential memories: Smartphones and the negotiation of visual, locative, and textual data in personal life." *Convergence: The International Journal of Research into New Media Technologies* 22, no. 3 (2016): 269-286.
- . *Ubiquitous Photography*. Cambridge: Polity Press, 2012.
- Handyside, Sarah, and Jessica Ringrose. "Snapchat memory and youth digital sexual cultures: mediated temporality, duration, and affect." *Journal of Gender Studies* 26, no. 3 (2017): 347-360.
- Hanna, Chris. "Paparazzi tried to sell nude photos of Sia — so she posted them on Twitter herself." *National Post*, November 07, 2017.
- Harris, Douglas. "Deepfakes: False Pornography is here and the law cannot protect you." *Duke Law & Technology Review* 17 (2019): 99-128.
- Hasinoff, Amy. *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* . Illinois: University of Illinois Press, 2015.
- Hearn, Jeff and Matthew Hall. "“This is my Cheating Ex’: Gender and Sexuality in Revenge Porn.” *Sexualities* (2018): Online First.
- Henry, Nicola, Anastasia Powell, and Asher Flynn. *Not just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse*. Melbourne: Gendered Violence and Abuse Research Alliance, Centre for Global Research, and Centre for Applied Social Research, 2017.
- Herrman, John. "The Return of the Techno-Moral Panic." *New York Times*, December 5, 2017.
- Hessick, Carissa. "Disentangling Child Pornography from Child Sex Abuse." *Washington University Law Review* 88, no. 4 (2011): 853-902.
- Hill, Rachel. "Cyber-Misogyny: Should ‘Revenge Porn’ Be Regulated In Scotland, And If So, How?" *Scripted* 12, no. 2 (2015): 118-140.
- Holten, Emma. "Someone Stole Naked Pictures of Me. This is what I did about it." *The Guardian*. YouTube. 2015.
- "House of Commons 41st Parliament, 2nd Session." Hansard #25, November 27, 2013.

- "House of Commons 41st Parliament, 2nd Session." Hansard #120 , October 01, 2014.
- Johnson, Matthew. "Digital Literacy and Digital Citizenship: Approaches to Girls' Online Experiences." In *eGirls, eCitizens*, edited by Jane Bailey and Valerie Steeves, 339-360. Ottawa: University of Ottawa Press, 2015.
- Johnson, Michael. "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence." *Violence Against Women* 12, no. 11 (2006): 1003-1018.
- Karaian, Lara. "Are Nudes the New Sexual Rumour Mill?" *Centre for Free Expression*. September 15, 2017. <https://www.cfe.ryerson.ca/blog/2017/09/are-nudes-new-sexual-rumour-mill> (accessed October 03, 2017).
- . "Lolita speaks: 'Sexting,' teenage girls and the law." *Crime, Media, Culture* 8, no. 1 (2012): 57-73.
- . "Mind Fuck: Revenge Porn as Privacy Violation or Virtual Rape?" *Terms of Privacy Conference*. Montreal: McGill University, 2016.
- . "Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention responses to Teenagers' Digital Sexual Expression." *Theoretical Criminology* 18 (2014): 1-18.
- and Katherine Van Meyl. "Reframing Risqué/Risky: Queer Temporalities, Teenage Sexting, and Freedom of Expression." *Laws* 4 (2015): 18-36.
- Kelly, Amanda. "Case of Laval teens charged with child porn after sexting delayed." *Global News*, January 20, 2014.
- Kerr, Margaret, JoAnn Kurtz, and Arlene Blatt. *Legal Research: Step by Step*. 2nd Edition. Toronto: Emond Montgomery Publications Limited, 2006.
- Khan, Ummni. *Vicarious kinks: s/m in the socio-legal imaginary*. Toronto: University of Toronto Press, 2014.
- . "Let's Get It On: Some Reflections on Sex-Positive Feminism." *Women's Rights Law Reporter*, 2017: 346-354.
- Kids Help Phone. *What is sexting?* 2019. <https://kidshelpphone.ca/get-info/what-sexting/> (accessed February 04, 2019).
- Kim, Mimi. "From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration." *Journal of Ethnic & Cultural Diversity in Social Work* 27, no. 3 (2018): 219-233.
- Kimmel, Michael. "Men, Masculinity, and the Rape Culture." In *Transforming a Rape Culture*, edited by Emilie Buchwald, Pamela Fletcher and Martha Roth, 139-158. Milkweed Editions, 2005.
- Kitchen, Adrienne. "The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment." *Chicago-Kent Law Review* 90 (2015): 247-99.
- Kitzinger, Jenny. *Framing abuse: media influence and public understanding of sexual violence against children*. London: Pluto Press, 2004.
- Knox, Patrick. "Topless Selfie Riddle." *The Sun*, April 02, 2019.
- Kubinec, Vera-Lynn. "More than 1,300 Manitobans seek help after intimate images shared." *CBC*, April 27, 2018.
- Lageson, Sarah, Suzy McElrath, and Krissinda Palmer. "Gendered Public Support for Criminalizing 'Revenge Porn'." *Feminist Criminology* Online First (2018): 1-24.

- Langlois, Ganaele, and Andrea Slane. "Economies of Reputation: The Case of Revenge Porn." *Communication and Critical/Cultural Studies* 14, no. 2 (2017): 120-138.
- Lee, Murray, and Thomas Crofts. "Gender, Pressure, Coercion, and Pleasure: Untangling Motivations for Sexting Between Young People." *British Journal of Criminology* 55 (2015): 454-473.
- Leech, Nancy, and Anthony Onwuegbuzie. "Beyond Constant Comparison Qualitative Data Analysis: Using NVivo." *School of Psychology Quarterly* 26, no. 1 (2011): 70-84.
- Lemiski, Mica. "A Handy Guide for Not Getting Blackmailed Over Your Nudes." *Vice*, November 08, 2018.
- Lenhart, Amanda, Michele Ybarra, and Myeshia Price-Feeney. *Nonconsensual image sharing: one in 25 Americans has been a victim of 'revenge porn'*. New York: Data & Society Research Institute & Center for Innovative Public Health Research, 2016.
- Levant, Nova. *Revenge Porn: How Tech Lawyers Are Helping Women*. May 02, 2018.
- Lewinsky, Monica. "The Price of Shame." *TED2015*, 2015.
- Lidsky, Lyrisa. "How Not to Criminalize Cyberbullying ." *Missouri Law Review* 77 (2012): 693-726.
- Lockhart, Emily. "'I Feel Like it Takes Something to Happen for People to Know About it or do Something About it Now': Youth Navigating Sexuality in post-2013 Nova Scotia." *Law & Society Association*. Toronto, 2018.
- Longstaff, Gareth. "Celebrity Sex Tapes." In *The Routledge Companion to Media, Sex and Sexuality*, edited by Clarissa Smith, Feona Attwood and Brian McNair. Oxon: Routledge, 2018.
- MacDonald, Gayle, Rachel Osborne, and Charles Smith. *Feminism, Law, Inclusion: Intersectionality in Action*. Toronto: Sumach Press, 2005.
- MacIvor, Angela. "5 teens guilty of sharing intimate images in Bridgewater Dropbox case." *CBC*, March 22, 2017.
- MacKay, Wayne. *Respectful and Responsible Relationships: There's No App for That*. Halifax: Nova Scotia Task Force on Bullying and Cyberbullying, 2012.
- Maclean's. "Tony Clement resigns as justice critic over sexting scandal." November 07, 2018.
- Maru, Sanjay. "Youth organization launches sexting awareness campaign for preteens." *CBC News*, June 19, 2018.
- Marwick, Alice. "Scandal or sex crime? Gendered privacy and the celebrity nude photo leaks." *Ethics & Information Technology* 19, no. 3 (2017): 177-191.
- May, Gareth. "What It's Like to Run a Phone Line for Victims of Revenge Porn." *Broadly*, April 10, 2016.
- Mayer-Schonberger, Viktor. *Delete: The Virtue of Forgetting in the Digital Age*. Princeton: Princeton University Press, 2009.
- McGovern, Alyce, Thomas Crofts, Murray Lee, and Sanja Milivojevic. "Media, Legal and Young People's Discourses around Sexting." *Global Studies of Childhood* 6, no. 4 (2016): 428-441.

- McGlynn, Clare, Erika Rackley, and Ruth Houghton. "Beyond 'Revenge Porn': The Continuum of Image- Based Sexual Abuse." *Feminist Legal Studies* 25 (2017): 25-46.
- McGlynn, Clare, Nicole Westmarland, and Nikki Godden. "'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice." *Journal of Law & Society* 39, no. 2 (2012): 213-40.
- McHugh, Maureen, Nichole Livingston, and Amy Ford. "A Postmodern Approach to Women's Use of Violence: Developing Multiple and Complex Conceptualizations." *Psychology of Women Quarterly*, 2005: 323-336.
- McIntyre, Mike. "90 days for revenge porn." *Winnipeg Free Press*, March 22, 2016.
- Mendes, Kaitlynn, Jessica Ringrose, and Jessalynn Keller. "#MeToo and the promise and pitfalls of challenging rape culture through digital feminist activism." *European Journal of Women's Studies* 25, no. 2 (2018): 236– 246.
- Menon, Vinay. "I was going to write about Donald Trump, but Tony Clement wouldn't let me." *The Star*, November 07, 2018.
- Menzie, Lauren. "Conscious Representations: Critically Interrogating the Engagements and Representations of Extralegal Discourse in R. v. J.A." *The Annual Review of Interdisciplinary Justice Research* 7 (2018): 292-314.
- Miles, Matthew, Michael Huberman, and Johnny Saldana. *Qualitative Data Analysis: A Methods Sourcebook*. 3rd Edition . Sage , 2014.
- Milford, Trevor. "Revisiting Cyberfeminism: Theory as a Tool for Understanding Young Women's Experiences ." In *eGirls, eCitizens*, edited by Jane Bailey and Valerie Steeves, 55-81. Ottawa: University of Ottawa Press , 2015.
- Miller, Sarah. "'How You Bully a Girl': Sexual Drama and the Negotiation of Gendered Sexuality in High School." *Gender & Society* 30, no. 5 (2016): 721-744.
- Misener, Dan. "HeartMob provides support for online harassment victims." *CBC* , February 02, 2016.
- Mishna, Faye, et al. "Gendered and Sexualized Bullying and Cyber Bullying: Spotlighting Girls and Making Boys Invisible." *Youth & Society Online First* (2018): 1-24.
- Mitchell, Kimberly, David Finkelhor, Lisa Jones, and Janis Wolak. "Prevalence and Characteristics of Youth Sexting: A National Study." *Pediatrics* 129, no. 1 (2012): 13-20.
- Moore, Dawn. "Feminist Criminology: Gain, Loss and Backlash." *Sociology Compass* 2, no. 1 (2008): 48-61.
- MSNBC*. "'Revenge porn' the latest proof that your digital life lasts forever." May 29, 2013.
- Mulla, Sameena. *The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention*. New York: NYU Press, 2014.
- Nashrulla, Tasneem. "A middle school teacher was fired after a student obtained her topless selfie." *BuzzFeed News*, April 05, 2019.
- Naezer, Marijke, and Jessica Ringrose. "Adventure, Intimacy, Identity, and Knowledge." In *The Cambridge Handbook of Sexual Development*, edited by Sharon Lamb and Jen Gilbert. Cambridge: Cambridge University Press, 2019.

- Niemi-Kiesiläinen, Johanna, Päivi Honkatukia, and Minna Ruuskanen. "Legal Texts as Discourses." In *Exploiting the Limits of Law*, edited by Asa Gunnarsson, Eva-Maria Svensson and Margaret Davies, 69-88. London: Routledge, 2007.
- Newfoundland and Labrador. "Fall Legislative Session Focused on Health, Safety, Labour and a Healthy Work Environment." December 06, 2018.
- Nikolov, Nikolay. "Women Warriors: There's a global movement forming to fight online misogyny." *Mashable*, September 11, 2018.
- No Place to Hide: The Rehtaeh Parsons Story*. Produced by Trineta Productions. 2015.
- Nugget Staff. "The pictures are a 'horror someone has to live with all their life'." *North Bay Nugget*, January 24, 2018.
- Patchin, Justin, and Sameer Hinduja. "Sextortion Among Adolescents: Results From a National Survey of U.S. Youth." *Sexual Abuse Online First* (2018): 1-25.
- Perkel, Colin. "Nude photos of ex-NHL player Mike Zigomanis not 'shocking,' Appeal Court rules." *National Post*, February 6, 2018.
- Porter, Catherine. "Defendant in revenge porn case seeking a do-over." *The Star*, July 28, 2016.
- Powell, Anastasia. "Configuring Consent: Emerging Technologies, Unauthorized Sexual Images and Sexual Assault." *Australia & New Zealand Journal of Criminology* 43 (2010): 76-90.
- . "Seeking Rape Justice: Formal and Informal Responses to Sexual Violence Through Technosocial Counter-Publics." *Theoretical Criminology* 19, no. 4 (2015): 571-588.
- and Nicola Henry. "Policing technology-facilitated sexual violence against adult victims: police and service sector perspectives." *Policing and Society Online First* (2016): 1-18.
- and Nicola Henry. *Sexual Violence in a Digital Age*. London: Palgrave Macmillan, 2017.
- Puzic, Sonja. "Anti-cyberbullying law, Bill C-13, now in effect." *CTV News*, March 9, 2015.
- Randall, Melanie. "Sexual assault law, credibility, and "ideal victims": Consent, resistance, and victim blaming." *Canadian Journal of Women & the Law* 22, no. 2 (2010): 397-433.
- Razack, Sherene. "R.D.S. v. Her Majesty the Queen: A Case About Home ." In *Feminism, Law, Inclusion: Intersectionality in Action*, edited by Gayle MacDonald, Rachel Osborne and Charles Smith, 200-219. Toronto: Sumach Press, 2005.
- Ringrose, Jessica, and Laura Harvey. "BBM Is Like Match.com: Social Networking and the Digital Mediation of Teens' Sexual Cultures." In *eGirls, eCitizens*, edited by Jane Bailey and Valerie Steeves, 199-228. Ottawa: Ottawa University Press, 2015.
- Rosalind Gill, and Sonia Livingstone. "'Teen girls, sexual double standards and 'sexting': Gendered value in digital image exchange'." *Feminist Theory* 14, no. 3 (2013): 305-323.
- Ringrose, Jessica, Rosalind Gill, Sonia Livingstone, and Laura Harvey. "A qualitative study of children, young people and 'sexting': a report prepared for the

- NSPCC." National Society for the Prevention of Cruelty to Children, London, UK, 2012.
- Rogers, Audrey. "From Peer-to-Peer Networks to Cloud Computing: How Technology is Redefining Child Pornography Laws." *St. John's Law Review* 87, no. 4 (2013): 1013-1049.
- Roumeliotis, Ioanna. "'Think about the future': Kids face up to the dangers of sexting." *CBC*, October 05, 2016.
- Rubin, Gayle. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality ." In *Culture, Society, and Sexuality* , edited by Richard Parker and Peter Aggleton. London: UCL Press , 1999.
- Salter, Michael, and Thomas Crofts. "Responding to Revenge Porn: Challenges to Online Legal Impunity ." In *New Views on Pornography: Sexuality, Politics, and the Law* , edited by Lynn Comella and Shira Tarrant, 233-256. Westport: Praeger, 2015.
- and Murray Lee. "Beyond Criminalisation and Responsibilisation : Sexting, Gender and Young People." *Current Issues in Criminal Justice* 24, no. 3 (2013): 301-16.
- Segal, Murray. *Independent Review of the Police and Prosecution Response to the Rehtaeh Parsons Case*. Toronto: Murray D Segal Professional Corporation , 2015.
- Shariff, Shaheen, and Ashley DeMartini. "Defining the legal lines: egirls and intimate images." In *eGirls, eCitizens*, edited by Jane Bailey and Valerie Steeves , 282–307. Ottawa: University of Ottawa Press, 2015.
- Sheehy, Elizabeth. *Sexual Assault In Canada: Law, Legal Practice, and Women's Activism*. Ottawa: University of Ottawa Press, 2012.
- Shefer, Tamara and Sally Munt. "A Feminist Politics of Shame: Shame and its Contested Possibilities." *Feminism and Psychology* 29, no. 2 (2019): 145-156.
- Short, Donn. "AB v Bragg Communications Law's Next Steps: Should Bullying be a Tort ... or Even a Crime?" *Manitoba Law Journal* 37, no. 1 (2013): 341-352.
- Slane, Andrea. "From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law." *Osgoode Hall Law Journal* 48, no. 3 (2010): 543-593.
- . "Sexting and the law in Canada." *Canadian Journal of Human Sexuality* 22, no. 3 (2013): 117–122.
- and Ganaele Langlois. "Debunking the Myth of 'Not My Bad': Sexual Images, Consent, and Online Host Responsibilities in Canada." *Canadian Journal of Women and the Law* 30, no. 1 (2018): 42-81.
- Smart, Carol. *Feminism and the Power of Law*. London: Routledge, 1989.
- Sokoloff, Natalie, and Ida DuPont. "Domestic Violence and the Intersections of Race, Class, and Gender." *Violence Against Women* 11, no. 1 (2005): 38-64.
- Sontag, Susan. "On Photography." In *Communication in History: Technology, Culture, and Society* , by David Crowley and Paul Heyer, 174-178. London: Pearson, 2003.
- Steeves, Valerie. *Young Canadians in a Wired World, Phase III: Sexuality and Romantic Relationships in the Digital Age*. Ottawa: MediaSmarts, 2014.
- Stonard, Karlie, Erica Bowen, Kate Walker, and Shelley Price. "'They'll Always Find a Way to Get to You': Technology Use in Adolescent Romantic Relationships

- and Its Role in Dating Violence and Abuse ." *Journal of Interpersonal Violence* 32, no. 14 (2017): 2083-2117.
- Sturken, Marita. "Facebook photography and the demise of Kodak and Polaroid." In *Images, Ethics, Technology*, edited by Sharrona Pearl, 94-110. New York: Routledge, 2016.
- Taylor, Chloe. "Anti-Carceral Feminism and Sexual Assault—A Defense: A Critique of the Critique of the Critique of Carceral Feminism." *Social Philosophy Today* Online First (2018).
- Tencer, Daniel. "Harper's Anti-Cyberbullying Bill Critized By Global Tech Companies." *The Huffington Post Canada*, June 07, 2014.
- The Current. "'Glee' over Tony Clement sexting scandal minimizes victims facing similar blackmail, says advocate." *CBC* , November 08, 2018.
- Thierer, Adam. "The Six Things that Drive "Technopanics"." *Forbes*, March 4, 2012.
- Thomas, April, and Elizabeth Cauffman. "Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 4 (2014): 631-651.
- Tirosh, Noam. "Reconsidering the 'Right to be Forgotten' – memory rights and the right to memory in the new media era." *Media, Culture & Society* 39, no. 5 (2017): 644-660.
- TMZ. "My Sex Tape, My Rules... I'm Going After the Leakers!" March 06, 2017.
- Tsoulis-Reay, Alexa. "A Brief History of Revenge Porn ." *New York Magazine* , July 21, 2013: np.
- Turkel, Gerald. " Michel Foucault: Law, Power, and Knowledge." *Journal of Law and Society* 17, no. 2 (1990): 170-193.
- Tutton, Michael. "New cyberbullying law can force removal of intimate images online." *CBC*, July 05, 2018.
- Valenti, Jessica. "Purely Rape: The Myth of Sexual Purity and How it Reinforces Rape Culture." In *Yes Means Yes!: Visions of Female Sexual Power and a World Without Rape*, edited by Jaclyn Friedman and Jessica Valenti, 299-304. Berkley: Seal Press , 2008.
- . "It's still revenge porn when the victim is a man and the picture is of his penis." *The Guardian*, June 26, 2014.
- Valverde, Mariana. *Sex, Power, and Pleasure*. Toronto: The Women's Press, 1985.
- van Dijk, Teun. "Aims of Critical Discourse Analysis". *Japanese Discourse* 1 (1995): 17-27.
- Venema, Rebecca, and Katharina Lobinger. "'And somehow it ends up on the Internet': Agency, trust, and risk in photo-sharing among friends and romantic partners." *First Monday* 22, no. 7 (2017). *Violence Prevention*. June 11, 2018. (accessed October 1, 2018).
- Wacquant, Loïc. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham: Duke University Press, 2009.
- Wagman, Ira. "Forgiving Without Forgetting: Contending with Digital Memory." In *Images, Ethics, Technology*, edited by Sharrona Pearl, 111-125. New York: Routledge, 2016.

- Wahlquist, Calla. "First person charged under Western Australia's new revenge porn laws." *The Guardian*, May 06, 2019.
- Wajcman, Judy. "Feminist theories of technology." *Cambridge Journal of Economics* 34 (2010): 143-152.
- Warner, Michael. *The Trouble with Normal*. Cambridge: Harvard University Press , 1999.
- Webbing with Wisdom. *Sexting with my Boo*. 2016. webwise.ca.
- West Coast LEAF. *#CyberMisogyny: Using and Strengthening Canadian Legal Responses to Gendered Hate and Harassment Online*. Vancouver: West Coast LEAF, 2014.
- Westhead, Rick. "Former Leaf player, fired for morals clause, wins lawsuit." *TSN*, November 17, 2016.
- What is bullying and cyberbullying?* <http://antibullying.novascotia.ca/> (accessed January 20, 2014).
- Whitman, James. "The Two Western Cultures of Privacy: Dignity versus Liberty ." *Yale Law Journal* 113 (2004): 1153-1219.
- Wilson, Olivia. "Revenge Porn Is More Than a Violation of Privacy it is Digital Sexual Assault." *Huffington Post*, June 23, 2015.
- Winnipeg Free Press*. "Police arrest teen for posting nude images of ex-girlfriend." November 07, 2017.
- Wodda, Aimee and Vanessa Panfil. "Insert Sexy Title Here: Moving Toward a Sex-Positive Criminology." *Feminist Criminology* 13, no. 5 (2018): 583-608.
- Wodak, Ruth. "What CDA is about - a summary of its history, important concepts and its developments." In *Methods of Critical Discourse Analysis* , edited by Ruth Wodak and Michael Meyer, 1-13. Los Angeles: Sage, 2001.
- Woodlock, Delanie. "The Abuse of Technology in Domestic Violence and Stalking." *Violence Against Women* 23, no. 5 (2017): 584-602.
- Yaakov, Yifa. "Israeli law makes revenge porn a sex crime." *The Times of Israel*, January 06, 2014.
- Yar, Majid. *Cybercrime and Society*. 2nd Edition. London: Sage, 2013.
- Yi, Beh Lih. "Women live in fear as spycam epidemic takes hold in South Korea." *The Japan Times*, October 22, 2018.
- Zeidler, Maryse. "Anisa Salmi speaks out after nude photos leaked online." *CBC News* , October 08, 2014.
- Zivanovic, Aleksandra. *Guide to Electronic Legal Research*. 2nd Edition . Markham: Butterworths Canada, 2002.

Cases Cited

- Doe 464533 v ND*, 2016 ONSC 541.
- FR v AKA*, 2010 ONCJ 242.
- Kennedy v Johnson Publishing Company and John Does 1-5*. 14L1038 (Circuit Court of Cook County Illinois, July 09, 2014).
- LaRose v Yavis*, [1993] BCJ No. 3050.
- Milton v Savinkoff* [1993] BCJ No. 2396.
- R v AC*, 2017 ONCJ 129.
- R v Agoston*, 2017 ONSC 3425.

R v Barnes, [2006] AJ No. 965.
R v Barnes, [2006] AJ No. 1601.
R v BH, [2016] OJ No. 7080.
R v BMS, 2016 NSCA 35.
R v Borden, 2019 NLPC 26389.
R v Bosco, 2016 BCCA 55.
R v CNT, 2015 NSPC 43.
R v CWF, 2006 BCPC 545.
R v DaSilva, 2011 ONCJ 1298
R v Davis, [1999] 3 SCR 759.
R v Dewan, 2014 ONCA 755.
R v DKP (1991), 5 BCAC 308.
R v Fader, 2009 BCPC 61.
R v Fader, 2014 BCPC 327.
R v Greene, 2018 NLPC 25580.
R v Guerrero, [1988] OJ No 627.
R v Hirsch, 2017 SKCA 14.
R v JS, 2018 ONCJ 82.
R v JT, [1994] OJ No 3937.
R v JTB, 2018 ONSC 2422.
R v Kapoor, 2012 ABPC 299.
R v KF, 2015 BCPC 417.
R v Korbut, 2012 ONCJ 691.
R v Lepore, [2001] OJ No 2053.
R v Maurer, 2014 SKPC 118.
R v Maurer, 2015 SKQB 175.
R v MB, [2016] BJC No. 2511.
R v MK, [2004] OJ No 2574.
R v Moen, 2006 SKPC 1.
R v MR, 2017 ONCJ 558.
R v NG et al., 2014 MBPC 63.
R v NG et al., 2015 MBCA 81.
R v PSD, 2016 BCPC 400.
R v S, 2004 OJ No. 3440.
R v SB et al., 2014 BCPC 0279.
R v Schultz, 2008 ABQB 679.
R v Sharpe, 2001 SCC 2.
R v Suter, [2018] 2 SCR 496.
R v TCD, 2012 ABPC 338.
R v TLB, 2007 ABCA 61.
R v Verner, 2017 ONCJ 415.
R v W, 2014 BCPC 0197.
R v Wenc, 2009 ABPC 126.
R v Wenc, 2009 ABCA 328.
R v Wheaton, 2017 NSPC (Unpublished, case No. 2928688).
R v X, [2016] NJ No. 398.

R v Y, 2015 NSPC 14.

R v Zhou, 2016 ONCJ 547.

Wood v Hustler Magazine Inc, 736 F.2d 1084 (1984).

Zigomanis v. 2156775 Ontario Inc. (D'Angelo Brands). (ONSC, 2016).

Legislation Cited

Canadian Criminal Code. 1985.

House Bill Number 2678. Virginia's Legislative Information System. 2019.

Youth Criminal Justice Act. 2002.