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INTRODUCTION

Every Framing theory tells us that events or issues can be moved about and placed into different fields of meaning.[1] How we name and frame issues matters.[2] This is particularly evident for issues that touch the lives of marginalized or subordinated groups, because power is an understood element in the framing process.[3] Those in power often give the loudest or first voice to an issue, thereby picking a frame and often co-opting it.[4] Consider, for example, how President Trump came under fire for his decision to hound former Miss Universe contestant, Alicia Machado, and for remarks he made in a 2005 "Access Hollywood" video. To begin, Alicia Machado made a campaign video for Hillary Clinton in which she accused Donald Trump of misogynistic treatment of her during her reign as Miss America.[5] President Trump reacted with a series of early morning tweets, the last of which described Ms. Machado as "disgusting" and suggested that the public "check out [her] sex tape and past."[6] Later in the campaign, a recording of a conversation

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[1] JENNY KITZINGER, FRAMING ABUSE 133–35 (2004) (describing how frames lead to exaggerations or absences and effects one's ability to "confront" a story).

[2] *Id*.; Marie Hardin & Erin Whiteside, *Framing Through a Feminist Lens*, *in* DOING NEWS FRAMING ANALYSIS: EMPIRICAL AND THEORETICAL PERSPECTIVES 314 (Paul D'Angelo & Jim A. Kuypers eds., 2009).

[3] Hardin & Whiteside, *supra* note 2, at 314; Kimberlé Crenshaw, *The Urgency of Intersectionality*, TED (Oct. 27, 2009), https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality/details, at 9:05 (discussing the power of frames in problem identification).

[4] Crenshaw, *supra* note 3, at 4:07.

[5] Michael Barbaro & Megan Twohey, *Shamed and Angry: Alicia Machado, a Miss Universe Mocked by Donald Trump*, N. Y. TIMES (Sept. 27, 2016), https://www.nytimes.com/2016/09/28/us/politics/alicia-machado-donald-trump.html.

[6] Donald Trump (@realDonaldTrump), TWITTER (Sept. 30, 2016, 2:30 AM), https://twitter.com/realDonaldTrump/status/781788223055994880?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2F; *see also* Ben Mathis-Lilley, *Trump Tweeted at 5:30 am About Alicia Machado's Alleged "Sex Tape,"* SLATE (Sept. 30, 2016 9:35

caught on hot-mic was leaked to the press.[7] In it Donald Trump is heard bragging that he can grab women "by the pussy" and kiss them without consent, because he is a celebrity.[8] His remarks were named demeaning and his remarks were named locker room talk.[9] And so, the American public found ourselves discussing whether a nominee's instincts to engage in locker room talk while on a job make him fit for President. Some asked whether he had true regard for women, for our "precious girls" and our "wives and daughters."[10]

Trump's remarks, his actions, and his decisions could have been framed as something else. They could have been framed as evidence of our society's acceptance of gender based violence. And indeed, this frame would have proven to be prophetic given the outcome of the election. This alternate frame is less interested in what Trump's behavior says about him and more interested in what it says about all of

AM), http://www.slate.com/blogs/the_slatest/2016/09/30/donald_trump_tweets_about_alicia_machado_sex_tape.html.

[7] The Young Turks, *Trump Hot Mic LEAKED: "Grab 'Em By The Pu$$y,"* YOUTUBE (Oct. 7, 2016), youtube.com/watch?v=su-Rt4QJZ08.

[8] David A. Fahrethold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 7, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html?utm_term=.88d759c27882.

[9] Steph Solis & Josh Hafner, *The Phrase of the Night? "Locker Room Talk,"* USA TODAY (Oct. 10, 2016), https://www.usatoday.com/story/news/politics/onpolitics/2016/10/10/hillary-clinton-donald-trump-debate-by-the-numbers/91834986/ (noting that then-candidate Trump used the phrase "respect for women" five times during the second presidential debate).

[10] *See* Mitt Romney (@MittRomney), TWITTER (Oct. 7, 2016, 5:10 PM), https://twitter.com/MittRomney/status/784546373525966849; Jeb Bush (@jebbush), TWITTER (Oct. 7, 2016, 4:05 PM), https://twitter.com/JebBush/status/784530223605903360.

us.[11] Asking different questions inspires different conversations.[12] The gender-violence frame would lead us to discuss where we are as a people when allegations regarding women's sexual choices[13] and visuals of grabbing women's private bodies are available weapons in the arsenal of men; though notably, I must add, *white* men. Apparently, one can use these weapons to get a few laughs when one feels chummy.[14] One can use them to distract when they feel cornered or called out.[15] President Trump is not alone in this knowledge.[16] He was

[11] Kimberlé Crenshaw, from University of California, Los Angeles School of Law, was among the first legal scholars to articulate how framing frustrates problem identification. *See* L.P. Drew, *Gender Gap: Kimberlé Crenshaw '81 on the Intersection of Racism and Sexism*, CORNELL ALUMNI MAG., July– Aug. 2016, at 22, 23. In several recent lectures, including one attended by the author, Crenshaw has used an extended metaphor applying the framing principles to the importance of looking at potential environmental causes when discussing sick farm animals. *See* Taylor Galla, *Kimberlé Crenshaw Speaks at Scripps*, THE SCRIPPS VOICE (May 7, 2015), http://www.thescrippsvoice.com/articles/2015/5/7/kimberl-crenshaw-speaks-at-scripps ("[Crenshaw] then began to explain that facts and figures surrounding these issues mean nothing without the proper frames. To illustrate, Crenshaw showed the audience a picture of cows grazing in a field surrounded by smoke and smog from factories. She asked who we would fault for the sick cows, and said that many people would blame the farmer and not feel personally connected to the problem. She then showed another photo zoomed into the smoke and smog from the factories to emphasize the health factor that may have been ignored by viewers in the previous photo, and said that with this photo, people would have a different answer to whether they are connected to or implicated by the problem. Because of the emphasis of the smog which people created, they would see their life habits and their own health to be connected to these cows."). For another description of this lecture delivered at Brandeis University, *see* Jocelyn Gould, *Kimberlé Crenshaw Accepts Gittler Prize For Career Works*, THE JUSTICE (Oct. 31, 2017 6:00 AM), http://www.thejustice.org/article/2017/10/kimberl-crenshaw-accepts-gittler-prize-for-career-works.

[12] *Id.*; Hardin & Whiteside, *supra* note 2, at 314.

[13] Machado denied the existence of a sex tape, calling Trump's remarks "cheap likes with bad intentions." *See* Carolina Moreno, *Alicia Machado Speaks Out After Trump's "Sex Tape" Accusation*, HUFFINGTON POST (Oct. 3, 2016 1:00 PM), https://www.huffingtonpost.com/entry/alicia-machado-speaks-out-after-donald-trumps-sex-tape-accusation_us_57f26f75e4b0c2407cdebe04.

[14] *See* The Young Turks, *supra* note 7.

[15] Trump's tweets were seen as reaction to Hillary Clinton discussing Machado's experience of being called "Miss Piggy" and "Miss Housekeeping" by Trump. *See* Mathis-Lilley, *supra* note 5.

[16] *See* Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014), https://www.washingtonpost.com/news/the-

not, after all, talking to himself when he was discussing sexual exploits and conquests.[17] He was on a bus, engaged in active repartee with a minor-league celebrity: He was at work and he was not the only one laughing.[18] And President Trump did not utter his accusations of Machado's sex tapes into the darkness at 5:30 a.m.[19] He launched his voice through social media.[20] 33,181 people have "liked" this tweet[21] and 17,355 people shared it.[22] We have an appetite for this hostility, which is worrisome and shameful to say the least.[23]

Our society's acceptance of, and appetite for, gender based violence stems from unbridled entitlement to possess, occupy, and critique women's bodies and their sexual selves.[24] The culmination of

intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm_term=.7e02cc7a6aa4 (discussing the onslaught of virtual harassment of women in the gaming industry, referred to a "Gamergate"); Ashley Judd, *Forget Your Team: Your Online Violence Toward Girls and Women is What Can Kiss My Ass*, MIC (Mar. 19, 2015), https://mic.com/articles/113226/forget-your-team-your-online-violence-toward-girls-and-women-is-what-can-kiss-my-ass#.PRXwRvLlQ (describing the social media harassment actress Ashley Judd faced after posting a negative tweet during a basketball game).

[17] *See* The Young Turks, *supra* note 7.

[18] *See id*. Billy Bush, the other voice on the tape, was fired from NBC's "TODAY", where he had recently become a host, shortly after the tape was released. *See* NBC NEWS, *Billy Bush Leaving TODAY Effective Immediately* (Oct. 17, 2016 7:55 PM), http://www.foxnews.com/entertainment/2016/10/18/nbc-news-fires-billy-bush-after-lewd-donald-trump-tape-airs.html.

[19] Mathis-Lilley, *supra* note 5.

[19] *Id*.

[21] Donald Trump @realDonaldTrump, TWITTER (Sept. 30, 2016, 5:30 AM), https://twitter.com/realDonaldTrump/status/781788223055994880?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.slate.com%2Fblogs%2Fthe_slatest%2F2016%2F09%2F30%2Fdonald_trump_tweets_about_alicia_machado_sex_tape.html. Note, these numbers reflect retweets and shares as of December 2017. Numbers may have changed since the original incident.

[22] *Id*.

[23] *See, e.g.*, Dewey, *supra* note 16; Judd, *supra* note 16.

[24] This ranges from President Trump's tweets to ubiquity and violence of rape culture. *See* Amy Ellis Nutt, *A Shocking Number of College Men Surveyed Admit Coercing a Partner into Sex*, WASH. POST (June 5, 2016), https://www.washingtonpost.com/news/to-your-health/wp/2016/06/03/more-than-half-of-college-athletes-surveyed-at-one-university-admit-coercing-a-partner-into-sex/?utm_term=.50beffba4529 (discussing the prevalence of sexual violence among male college athletes and the acceptance of rape myth among male college athletes). This is embodied in the letter by the father of Brock Turner, a college student convicted of assaulting a woman at a fraternity party in 2015, which describes rape

the many voices articulating such gender based violence in the many and varied settings in which they speak, gives rise to communities of people who troll and harass female celebrities and activists, not with critiques of their work, but with calls for their rape.[25] Similarly, there is a thriving market for Non-Consensual Pornography, a market designed to provide space and voice to those who wish to post naked images and sexual content about others in order to shame or punish them.

Non-Consensual Pornography as a concept and a problem is finally starting to receive attention.[26] The telling of the story goes something like this: "girl meets guy, girls and guy have a relationship, girl takes naked pictures for the guy, guy turns out to be a scumbag who then posts her pics on the Internet."[27] Indeed, Non-Consensual Pornography was originally termed Revenge Porn.[28] As is common with other sexually assaultive language or behavior, the popular frame[29] for those speaking out against Non-Consensual Pornography features

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as "20 minutes of action," rather than a manifestation of a young man's willingness to take and hurt. *See* Letter from Dan A. Turner to Judge Aaron Persky, Superior Court of California, County of Santa Clara; https://www.documentcloud.org/documents/2852614-Letter-from-Brock-Turner-s-Father.html; *see also* Emma Gray, *This Letter from The Stanford Sex Offender's Dad Epitomizes Rape Culture*, HUFFINGTON POST (June 6, 2016, 1:07 PM), http://www.huffingtonpost.com/entry/brock-turner-dad-letter-is-rape-culture-in-a-nutshell_us_57555bace4b0ed593f14cb30.

[25] *See* Dewey *supra* note 16; Judd, *supra* note 16.

[26] *See, e.g.*, *Last Week Tonight with John Oliver: Online Harassment* (HBO broadcast June 21, 2015); Arthur Chu, *Mr. Obama, Tear Down This Liability Shield*, TECHCRUNCH (Sept. 29, 2015), http://techcrunch.com/2015/09/29/mr-obama-tear-down-this-liability-shield/; Sarah A. O'Brien, *Will Hillary Clinton Be the One to Crack Down on Revenge Porn?*, CNNTECH (Aug. 26, 2016, 11:59 AM), http://money.cnn.com/2016/08/26/technology/hillary-clinton-revenge-porn/.

[27] Nicole Chung, *An Interview with Sarah Jeong, Author of The Internet of Garbage*, THE TOAST (July 23, 2015), http://the-toast.net/2015/07/23/an-interview-with-sarah-jeong/.

[28] *Id. See also* Mary Anne Franks, *How to Defeat 'Revenge Porn': First, Recognize It's About Privacy, Not Revenge*, HUFFINGTON POST (June 22, 2015), http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html ("It's colloquially referred to as 'revenge porn,' but that term is misleading. While a number of cases do involve bitter exes whose express purpose is to harm or harass their former partners, many perpetrators don't know their victims at all. A more accurate term is nonconsensual pornography, defined as the distribution of private, sexually explicit material without consent.").

[29] Hardin & Whiteside, *supra* note 2, at 312.

people asking each other "what would you do if this were your daughter?"[30] The frame suggests that the problem is defined as bad boyfriends hurting our daughters. To fix this problem we see a legal landscape dominated by a focus on punishing the poster[31] and debating how we may or may not need to educate our daughters about the risks of taking or sharing nude pictures.[32] We remain relatively blind to how clumsily certain civil remedies map on to the problem of Non-Consensual Pornography and the problem of third party liability shields for the Internet Service Providers who host the content.[33]

Meanwhile, Non-Consensual Pornography is a more nuanced and insidious problem. The damage done by any perpetrator moves beyond story tale betrayal and a ruined love affair. Rather, subjects[34] of Non-Consensual Pornography suffer lasting consequences for their sense of privacy, safety, reputation, and control.[35] This damage may

[30] *Compare* Noel Brinkerhoff, *23 Women Sue GoDaddy over "Revenge Porn" Site*, ALLGOV (Jan. 27, 2013), http://www.allgov.com/news/controversies/23-women-sue-godaddy-over-revenge-porn-site-130127?news=846869, *with* Scott Wise & Joe St. George, *Va. Nursing Student Fights Back After 'Revenge Porn' Video Hits Internet*, CBS 6 (Jan. 14, 2014), http://wtvr.com/2014/01/14/revenge-porn-bill/ (noting the comments to the articles many of which ask the "what if it were your daughter" question; and other of which proclaim that the subjects of the attack need to "learn something," be mindful of their reputations, or be open to the risky consequences of the actions they took).

[31] Using "poster" here to refer to an individual who posted Non-Consensual Pornography content on the internet.

[32] TOMMY WELLS, CHAIRPERSON, COUNCIL OF THE D.C. COMM. ON THE JUDICIARY AND PUB. SAFETY COMM., R. ON BILL 20-902 THE "CRIMINALIZATION OF NON-CONSENSUAL PORNOGRAPHY ACT OF 2014" 3–4 (2014) (demonstrating a focus in the problem identification stage on revenge porn in the context of a dating relationship or former dating relationship; and concluding in the "[i]nadequacy of current legal remedies" section, that "criminal penalties may provide deterrence"). *See, e.g.*, Ken White, *Pepperdine Law School Debate on Criminalizing Revenge Porn*, POPE HAT (Apr. 16, 2015), https://popehat.com/2015/04/16/pepperdine-law-school-debate-on-criminalizing-revenge-porn/ (showing an example of a blog post and prototypical reaction to the issues). *See also supra* note 16 (showing other examples of articles and reader comments); PEGGY ORENSTEIN, GIRLS & SEX: NAVIGATING THE COMPLICATED NEW LANDSCAPE, 21–24 (2016).

[33] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 359 (2014).

[34] This paper consciously refers to these individuals as subjects, not victims.

[35] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 81–82 (2014).

well be instigated by a singular poster[36] but it is perpetuated and consumed by a culture that not only tolerates, but demands, the commodification, humiliation, and subjugation of women. To fix this problem we must consider a larger system of markets, incentives, and ownership to determine how to offer subjects of Non-Consensual Pornography power and control.

This article argues that the "daughter" frame is available and tempting because it essentializes women and reacts to sexual content in a tired and familiar way.[37] This article seeks to frame Non-Consensual Pornography differently, rejecting the *daughter* frame. Critical theories tell us that if we ask different questions we see different possibilities or angles.[38] In challenging the daughter frame and critiquing the current landscape, I am assisted by a feminist perspective, a perspective that rejects "'objectivity' and 'rationality' as neutral," acknowledges a patriarchal system, and advocates for change.[39]

Part I of this article proposes to further define and clarify Non-Consensual Pornography.[40] Part II offers an illustration of and experience with Non-Consensual Pornography to dismantle the "daughter" frame for Non-Consensual Pornography.[41] This section introduces a feminist perspective to argue that the "daughter" frame distracts from a critical understanding of the harm of Non-Consensual Pornography thus foreclosing an opportunity to discuss and debate the legal remedies and reforms that might empower those targeted by Non-Consensual Pornography.[42] Part III will highlight the trends in the emerging area of law by offering a brief overview of the popular criminal response to Non-Consensual Pornography and then employing a feminist lens to enliven critiques of it.[43] Part IV aims to initiate under-

[36] It is important to note that there is not a typical profile of, or approach for, a given perpetrator.

[37] *E.g.*, Emily Peck, *You Don't Need a Daughter to Know Trump Bragging About Sexual Assault Is Vile*, HUFFINGTON POST (Oct. 8, 2016, 12:43 AM), http://www.huffingtonpost.com/entry/you-dont-need-a-daughter-to-know-trumps-comments-on-sexual-assault-are-vile_us_57f85be0e4b0e655eab483af (showing how the "daughter" framing is common when discussing sexual violence).

[38] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

[39] Hardin & Whiteside, *supra* note 2, at 316, 318.

[40] *See infra* Part I.

[41] *See infra* Part II.

[42] *See infra* Part II.

[43] *See infra* Part III.

developed conversations about civil remedies for Non-Consensual Pornography and Sexualized Cyber Harassment.[44] This section will describe the theoretical framework for civil claims and the available, yet inadequate, take down protocols of the Digital Millennium Copyright Act (DCMA).[45] This part employs a feminist jurisprudence to evaluate the potential and limitations of claims including, right to privacy, right to publicity, and copyright while paying particular attention to the third party liability shields of the Communication Decency Act.[46] The article concludes with an invitation for continued conversations and advocacy in regards to take-down protocols and third party liability for Internet Service Providers who host Non-Consensual Pornography and Sexualized Cyber Harassment.[47]

I. NON-CONSENSUAL PORNOGRAPHY DEFINED AND DESCRIBED

"Cyber harassment involves threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks."[48] Non-Consensual Pornography is a brand of cyber harassment in which the violence and invasion involves posting nude or sexually explicit images[49] without the consent of the person in the image.[50] Non-Consensual Pornography is also the most explicit example of the gendered nature of cyber harassment generally.[51] The line between Non-Consensual Pornography specifically, and sexually explicit or gendered harassment generally, is a difficult (and arguably arbitrary) one to draw.[52] In a recent survey, for example, only about 25% of participants indicated that they experienced "Non-Consensual Pornography" harassment; yet when asked to comment on the "focus and method of harassment" many respondents indicated that they were

[44] *See infra* Part IV.
[45] *See infra* Part IV.
[46] *See infra* Part IV.
[47] *See infra* Part V.
[48] *See* CITRON, *supra* note 35, at 81–82.
[49] Chung, *supra* note 27.
[50] CITRON, *supra* note 35, at 17.
[51] *Id.*
[52] DAN TAUBE ET AL., WITHOUT MY CONSENT, PRELIMINARY REPORT: WITHOUT MY CONSENT SURVEY OF ONLINE STALKING, HARASSMENT AND VIOLATIONS OF PRIVACY (Sept. 2014), http://withoutmyconsent.org/sites/default/files/wmc_prelim_survey_report.pdf.

harassed by "sexist statements," "statements attacking gender," or "statements attacking sexual orientation."[53] So while certain subjects of harassment may have avoided their naked images appearing on screen, it was open season for commentary on their gender and sexual choices.[54] Many of the criminal laws for Non-Consensual Pornography concern themselves with Non-Consensual Pornography most strictly defined, which is to say, where the perpetrator uses nude images of the victim to affect the harassment.[55] The article looks beyond this strict definition, to consider the use of images generally, not just nude images where those images are linked to sexualized statements and are used without the consent of the subject of the image.

Non-Consensual Pornography can take varying forms, but it starts with somebody uploading an image of their target without that person's consent.[56] These images are often nude photographs or photographs accompanied by highly sexualized content.[57] Posters may choose to upload the images to any location on the web, a social media page such as Facebook or LinkedIn, a pornographic website, or an image board. [58] Once an image has been uploaded it will be viewed thousands of times; it can be shared and moved from one website to another.[59] Often times Non-Consensual Pornography is a tool in "trolling" campaigns.[60] Trolling is an internet slang term for the act of posting inflammatory material for the expressed purpose of provoking an argument or response, perhaps from your target, or from the community at large.[61] Non-Consensual Pornography is also often used as an act of "doxing" an individual.[62] Doxing is, alarmingly, where the person posting

[53] *Id*.
[54] *Id*.
[55] *See State Revenge Porn Laws*, C.A. GOLDBERG LAW, http://www.cagoldberglaw.com/states-with-revenge-porn-laws/ (last visited Dec. 26, 2017).
[56] Citron & Franks, *supra* note 33, at 346.
[57] *Id*.
[58] *Id.* at 353.
[59] Franks, *supra* note 28.
[60] *See* Noreen Malone, *Zoë and the Trolls*, N.Y. MAG. (July 26, 2017), http://nymag.com/selectall/2017/07/zoe-quinn-surviving-gamergate.html.
[61] *See* Jennifer Golbeck, *Internet Trolls are Narcissist, Psychopaths, and Sadists*, PSYCH. TODAY (Sept. 18, 2014), https://www.psychologytoday.com/blog/your-online-secrets/201409/internet-trolls-are-narcissists-psychopaths-and-sadists.
[62] *See* Joey L. Blanch & Wesley H. Hsu, *An Introduction to Violent Crime on the Internet*, THE U.S. ATT'YS.' BULL., May 2016 at 5–6.

material will publish private or identifying material about a person, or the person posting an image will request more details or information on the subject from others.[63] The poster may be a revengeful ex, an underhanded hacker, or a cruel stranger.[64] Some hosts of websites, some of which are dedicated to Non-Consensual Pornography, explicitly prey on perversions and hostilities of various types of perpetrators.[65] Other sites and image boards turn a blind eye to the obvious use of their forum.[66]

A common reaction to Non-Consensual Pornography and Sexualized Cyber Harassment is for people to ask one another "what would you do if this were your daughter?"[67] But why are we asking this

[63] *See id.* ("Another form of cyberharassment is 'doxing,' which refers to broadcasting personally identifiable information about an individual on the Internet. It can expose the victim to an anonymous mob of countless harassers, calling their phones, sending them email, and even appearing at the victim's home.").

[64] *See* Franks, *supra* note 28; *see also* Tara West, *Playmate Dani Mathers May Face Criminal Charges for Shaming, Posting Nude Photo of Woman in Gym Locker Room*, INQUISITR (July 16, 2015), http://www.inquisitr.com/3314613/playmate-dani-mathers-may-face-criminal-charges-for-shaming-posting-nude-photo-of-woman-in-gym-locker-room/.

[65] Indeed, depending on one defines the perpetrator of Non-Consensual Pornography, one comes out differently on believing a host of Non-Consensual Pornography is a perpetrator of Non-Consensual Pornography. Therefore, for the purpose of clarity of actors this article will identify those people who make an original post as a poster and those entities that solicit, host, or archive and given post as the host. *See*, *e.g.*, Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/. Moore created a website where he "publicly posted nude or compromising photos" without consent. *Id*. His sentence was a result of a plea deal for unrelated charges. *Id*.

[66] *See, e.g.*, Caitlin Dewey, *Absolutely Everything You Need to Know to Understand 4chan, the Internet's Own Bogeyman*, WASH. POST (Sept. 25, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/09/25/absolutely-everything-you-need-to-know-to-understand-4chan-the-internets-own-bogeyman/?utm_term=.19afbacc3f83 (describing use of 4chan.com, an image board site that is "responsible for some of the largest hoaxes, cyberbullying incidents and Internet pranks" in recent years.).

[67] *See supra* note 16 and accompanying text. This is also reflected in the author's own experience speaking with law enforcement officer, probation officers, and prosecutors across several jurisdictions. Without fail, each conversation includes a statement about the victims as daughters. *See also* CITRON, *supra* note 35, at 20–21

question? The "daughter" frame is available and tempting because it essentializes[68] women and sex: a young woman has made a questionable choice around sex and some trouble has now befallen her. Consider, for example, that some jurisdictions define the crime of Non-Consensual Pornography as depicting the images of "a current or former sexual or intimate partner."[69] Here the criminal code is communicating the (noble, perhaps) notion that those in intimate partnerships should be have their consent and their notion of intimacy exploited by their partner.[70] Yet, the law limits the criminal law intervention to those scenarios where there was an intimate relationship.[71] Moreover, the notion that the law's concern should be to regulate or intervene in sexual relationships, distances the response from one that understands that Non-Consensual Pornography is not just its unwanted intrusion on people's sex lives.[72] It is a systemic, marketable attack on a person's body and sexual identity; specifically, most commonly, women's bodies and sexual identities.[73]

Early feminist critiques of pornography generally sounded a similar, if not more piercing, kind of alarm: pornography subordinates its

(describing the typical law enforcement attitude of telling victims "to turn off their computers because 'boys will be boys'").

[68] There are varying definitions of essentialism in feminist legal theory. In the most basic sense, however, "essentialism assumes that all women share the same inherent characteristics." Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 275 (1999).

[69] H.B. 2107, 2014-115, Gen. Assemb., Reg. Sess. 2014 (Pa. 2014).

[70] John Kopp, *Lawmakers Seek Wider Net for Pennsylvania's 'Revenge Porn' Law*, PHILLY VOICE (Aug. 17, 2015), http://www.phillyvoice.com/lawmakers-changes-revenge-porn-law/.

[71] *Id*.

[72] *Id*.

[73] *See* Dan Tynan, *Revenge Porn: The Industry Profiting from Online Abuse*, THE GUARDIAN (Apr. 26, 2016), https://www.theguardian.com/technology/2016/apr/26/revenge-porn-nude-photos-online-abuse ("Revenge porn is just one of the many ways sites are profiting from internet abuse. And even sites that do not profit directly may benefit in other ways from the attention online abuse can bring."); Julie Bort, *Inside the Sleazy World of Reputation Management, Where People Pay to Control What You See on the Internet*, BUS. INSIDER (Dec. 25, 2013), http://www.businessinsider.com/reputation-management-2013-12.

subjects; subjects are dehumanized, objectified, and commodified.[74] While this article does not aim to center itself with the larger debate about whether a woman can ever consent to pornography, it does concern itself with Non-Consensual Pornography's dehumanization and objectification of its subjects. It worries that this dehumanizing and objectification is carried out with words and images that declare the presentation to be a presentation of sex; as if the depiction is the type of sex or sexual relationship that the subject of the Non-Consensual Pornography would choose for themselves.[75] When lawmakers look for the origin of the relationship between a subject of Non-Consensual Pornography and the poster, or the original act of sexual intimacy between the two parties, lawmakers are complicit in a deceit.[76] Put another way, they are complicit in the fiction that the Non-Consensual Pornography depictions have anything at all to do with the subject, her history, and her choices- sexual or otherwise.[77] An insistence that Non-Consensual Pornography is singularly about "daughters" safety in their sexual relationships, does not frame the matter widely enough to imagine all the people who are subjects of Non-Consensual Pornography, to imagine the nature or scope of the way in which they are harmed, or to imagine who is responsible for harming them.[78]

II. REFRAMING: ASKING A DIFFERENT QUESTION

[74] ANDREA DWORKIN & CATHERINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 138 (1988).

[75] *Id*. Dworkin and MacKinnon provide the following definition for pornography: "'Pornography' means the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (a) women are presented dehumanized as sexual objects, things, or commodities; or (b) women are presented as sexual objects who enjoy humiliation or pain; or (c) women are presented as sexual objects experiencing sexual pleasure in rape, incest or other sexual assault; or (d) women are presented as sexual objects tied up, cut up or mutilated or bruised or physically hurt; or (e) women are presented in postures or positions of sexual submission, servility, or display; or (f) women's body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (g) women are presented being penetrated by objects or animals; or (h) women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual." *Id*. at 138–39.

[76] *See* Franks, *supra* note 28.

[77] *See* Cindy L. Griffin, *The Essentialist Roots of the Public Sphere*, 60 W.J. OF COMM. 21, 23 (1996) (stating that essential view "leads to totalizing of women").

[78] *Id.*

A feminist perspective suggests the need for different interventions entirely for the empowerment of those targeted by Non-Consensual Pornography.[79] Imagine the following:

You dated a man in college. By senior year, you were quite serious about each other and talking about making a life together. For you, however, the situation was complicated. Your parents did not approve of your having this type of relationship; moreover, the job you were contemplating was on the west coast and your partner had a strong offer from an east coast employer. You were not sure you were ready for a long-distance relationship at age twenty-one. You and your partner broke up, but the relationship ended cordially enough. You remained in touch as valued friends to one another, visiting each other often and remaining in touch over the telephone and social media. A year or so after graduation, your ex met someone new and began a dating relationship. It was your ex's choice at that time to not share the full extent of your history and rather to simply introduce you as a friend. Like any relationship, theirs had its periods of strain and during one particularly difficult time, the new partner happened to stumble across some pictures that you and your ex had taken while intimate with one another over a year ago. The partner did not take the revelation your ex's history with you well. They began to fight with each other and with you.

Soon after the revelation you started getting odd messages from strangers on your Facebook page and your email. First, the people messaging you appeared to be trying to confirm a rendez vous, asking for your address or for a location where you might meet. You were not sure who they were or why they wanted to meet and when you said as much, you never heard from them again. When you asked them who they were or how they had your contact information you never heard back. Then one day, a new person messaged you and this person did not relent when you indicated your confusion. They called you a "tease" and worse. Their messages became more sexual and alluded to violence. You called the police but they told you that unless you knew who was sending you the messages, there was not much they could do for you.

Then, someone came to your apartment in the early morning hours. When you called out "who's there" the person answered, "It's me, from fetfun." You told the person you did not know anything about

[79] Hardin & Whiteside, *supra* note 2, at 316, 318.

"fetfun" and you wanted them to go away. They left. You were shaken and did not sleep the whole night. In the morning, you got on Google and entered "fetfun." You were directed to a website, fetfun.com. It was a website for people with self-declared fetishes of all descriptions. With some maneuvering, you made a shocking revelation: there on the website was a profile that contained a picture of you. The picture showed your body clothed, it was a picture you vaguely remember a college roommate taking years ago; you had given it to your ex back when you were dating. The narrative portion of your profile described your interest in violent sexual encounters and invited people to find you for rape fantasy encounters. The profile went on to list your address, your telephone number, and your employer.

You are horrified. You are in the process of looking for a new job. Could a potential employer stumble across these pictures with the simplest of internet searches? You move immediately to contact FetFun to tell them that the profile isn't your own, but will they believe you? You find a form through their website, but it is asking you to make certifications concerning copyright and the small print mentions something about copyright infringement. You are not even sure what copyright is. And what are they referring to- copy right for your picture? For the narrative? For the whole profile? That profile is you- your face, your contact information- but also, so very not you. Who has the copyright on that? Will they take the profile down? Even if they do, how many other sites are out there? As you find other sites, will they take posts down? How long will all this take you? Will more people show up at your house in the meantime?

You decide to go to the police. You print out what you have, your image and the violent, sexual language blurring on the pages as they come off your printer. You bring them to the local police station. You show them the images; you give them your theory about the jealous new girlfriend of your old boyfriend. You see a few eyes roll from other officers who are blatantly listening in as you describe your situation first to a desk sergeant, and then again to the duty detective. The detective takes your sordid packet and says someone will be in touch, but warns you that without more, it will be hard to prove who did this. You wonder what he means by that remark. Who will work on getting the "more?" Will they investigate? You hear, precisely, nothing for weeks.

Framing theory tells us that events or issues can be moved about and placed into different fields of meaning.[80] Power is now an understood element in the framing process.[81] Those in power often give the loudest or first voice to an issue, thereby picking a frame; that frame, in turn, gives those people in power the ability to co-opt an issue.[82] When considering the hypothetical above, one can see how the daughter frame for Non-Consensual Pornography is amiss. Of course, there is the obvious noticing that we are not clear if the subject of the Non-Consensual Pornography in our hypothetical is male or female.[83] The frame is also problematic in less obvious ways. The daughter frame affords the subject of Non-Consensual Pornography the status of a child and it finds a source for compassion and concern for a subject of Non-Consensual Pornography by arbitrarily imaging a relationship with the subject.

The daughter frame decides that subjects of Non-Consensual Pornography are women, or rather not even women really, but girls. The daughter frame infantilizes the subject of Non-Consensual Pornography, which in turn suggests that the subject is vulnerable and needs parental protection or involvement. Meanwhile, subjects of Non-Consensual Pornography are many and varied.[84] They are young and old, well-educated and powerful; moreover, they show remarkable reserves of tenacity, bravery, intelligence and imagination in advocating for themselves.[85] Not many subjects, as is the case with our hypothetical subject above, wish to involve their parents or other authority figures in their plight.[86]

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[80] *Id.* at 318.

[81] *Id.* at 314. *See also* Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. OF SOC., 304, 315 (2003).

[82] *See* Hardin & Whiteside, *supra* note 2, at 313.

[83] Males can also be vulnerable to Non-Consensual Pornography. *See, e.g.*, Natalie Corner, *Family of Revenge Porn Teen Who Committed Suicide Over Online Blackmail Beg Others Not to Suffer in Silence*, MIRROR (Nov. 12, 2015), http://www.mirror.co.uk/tv/tv-news/family-revenge-porn-teen-who-6813481.

[84] *See* TAUBE ET AL., *supra* note 52, at 5.

[85] *Id.* at 5.

[86] Many of the author's clients or consults who have been the subject of Non-Consensual Pornography struggle with a sense of shame, believing that they are fault and that their naked images will embarrass their family. These worries are even more acute within certain cultural contexts, where the images may provoke family retribution. *See, e.g.*, Patrick Cockburn, *How Picture Phones Have Fuelled Honor*

Beyond the problem of infantalization, the daughter frame positions the subject of Non-Consensual Pornography and the harm of Non-Consensual Pornography vis a vi a relationship with another. In this way, the idea of Non-Consensual Pornography offends or concerns only when we think about the subject of Non-Consensual Pornography as being my daughter or the daughter of another- she must be "a somebody" to someone else. The very insistence that the source of empathy or concern is positional misses the mark. Non-Consensual Pornography is offensive and problematic because the attack is deeply personal and the experience of it is isolating.[87] An analogy for the framing dilemma of Non-Consensual Pornography might be to consider the traditional framing of housewifery. The dominant frame for the housewife was to declare that her life was "a labor of love."[88] Feminist framing changed the view to contemplate housewifery as "actual tiring labor."[89] The original frame positioned the actor, the wife, vis a vi those in her family who supposedly (probably) she loved.[90] The second, more helpful, empowering frame, just looked directly at the housewife herself to recognize and unpack her experience independent of those around her.[91]

When the subject of Non-Consensual Pornography is considered from the vantage point of a father or mother; when the subject is reduced to the status of a child we, not surprisingly perhaps, react with a focus

Killing in Iraq, INDEP. (May 16, 2008), http://www.independent.co.uk/news/world/middle-east/how-picture-phones-have-fuelled-frenzy-of-honour-killing-in-iraq-829934.html. Consider our hypothetical. We do not know why the target does not want to involve his or her parent. Is it because they initially disapproved of the relationship? Is it because revelation to a parent might require conversations around their child having had a sexual relationship, one in which photos were exchanged? Why do the parents in our hypothetical not approve of the relationship? Is it because our subject and his/her ex were lovers? Is it because the relationship was a homosexual relationship? Is it because the relationship was a distraction from school? Do we know? Do we have to care? Is it not enough to understand that many subjects are highly motivated to react quickly and privately? Questions abound, deep, intertwining, rabbit holes of questions, many of which we avoid ensnaring ourselves with if we resist considering the target of the Sexualized Cyber-Harassment as a child.

[87] *See, e.g.*, CITRON, *supra* note 35, at 133.

[88] Hardin & Whiteside, *supra* note 2, at 314.

[89] *Id*.

[90] *Id*.

[91] *Id*.

on vengeance and punishment- i.e. get the guy who did this.[92] We also, perhaps not surprisingly, enter conversations about what our daughter, our child, may or may not have intended when she began a relationship with someone.[93] When confronted with the realities of our daughter having had a sexual relationship, we move to sanitize or clarify the terms of that sexual relationship, because this feels important to us, her mother, her father, her keeper.[94] Because otherwise we are embarrassed: we are embarrassed *for* her; we are embarrassed *by* her.[95] Meanwhile, in reality, the relationships between subjects and posters of Non-Consensual Pornography may not be as clear as the one the daughter frame insists.[96] Consider again our hypothetical.[97] Who posted the content? The ex or the new partner? What are the terms of the relationship between our subject and those two suspects? Subjects of Non-Consensual Pornography might not have had a relationship with the poster[98] or they might have had a relationship but not a sexual one.[99] If they had a sexual relationship it may have been mild, brief, enduring, or wildly provocative.[100]

To redeploy the analysis of Non-Consensual Pornography, we have to ask different questions. So rather than ask "what if she were my daughter;" let's ask instead "what if this were me?" This new frame seeks to provoke a more empathic response. Empathy generally is the ability to understand and share the feelings of another.[101] In psychosocial settings empathy is understood as "[perceiving] the internal frame of reference of another with accuracy and with the

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[92] Peck, *supra* note 37.
[93] Griffin, supra note 77, at 30 ("When individuals must convince others that they are or ought to be connected to, identified with, or protected by them, persuasion, dominance, mastery, and control are emphasized.").
[94] *Id*.
[95] *Id*.
[96] *See supra* note 11.
[97] *See* hypothetical, *supra* Part II.
[98] *See, e.g.*, West *supra*, note 64.
[99] Simon Alicea, *Woman Charged with Posting Friend's Topless Photos in Riverside*, CHI. SUN TIMES (Mar. 17, 2016 8:13 PM), https://chicago.suntimes.com/news/woman-charged-with-posting-friends-topless-photos-in-riverside/ (describing the arrest of a woman who posted sexually explicit photographs of a childhood friend online after the two had a falling out).
[100] *Id*.
[101] Claire Donohue, *Client, Self, Systems: A Framework for Integrated Skills-Justice Education*, 29 GEO. J. OF LEGAL ETHICS 439, 453–54 (2016).

emotional components and meanings which pertain thereto as if one were the person, but without ever losing the as if condition."[102] The daughter frame accesses only sympathy, and potentially a misguided one at that, rather than empathy.[103] The difference between sympathy and empathy is subtle but critical.[104]

To understand the difference, between sympathy and empathy, consider a deep dark hole[105] at the bottom of which you can see somebody peering out. From your vantage point you might suppose the person is scared. Based on this, what might you say to help them feel better, to assure them that help is on the way? What would you do to stay with them, to be with them, while you both waited? Now consider that you are in the hole with the person? We assumed earlier that the person in the deep dark hole was scared. But are they? You are close enough now to tell. Maybe you learn that they are embarrassed or angry about their predicament; maybe they are afraid and you can better appreciate the depths and lengths of their fear. What might you say now to help them feel better or assure them that help is on the way? The first scenario, where you are on higher ground, describes communicating sympathy.[106] Sympathy communicates awareness and distress, which are not unkind or unimportant things to communicate.[107] "A relationship based on sympathy, however, is susceptible hierarchies because a sympathetic reaction can leave a person feeling vulnerable or disempowered."[108] The latter scenario, where you joins the person and

[102] *Id.* at 452. Research has identified four components or areas of empathy: first, emotional empathy, which involves sharing the feelings of another; then cognitive empathy, which speaks to the ability to comprehend the feelings of the other; third is moral empathy which refers to the motivation to understand and relate to the other; lastly, there is behavioral empathy which involves being able to communicate your understanding of the other. JANE STEIN-PARBUY, PATIENT AND PERSON: INTERPERSONAL SKILLS IN NURSING, Ch. 6 (5th ed. 2013). *See also* Karen E. Gerdes et al., *Teaching Empathy: A Framework Rooted in Social Cognitive Neuroscience and Social Justice*, 47 J. SOC. WORK EDUC. 109, 112 (2011).

[103] Donohue, *supra* note 101, at 453.

[104] *Id*. at 452–54.

[105] Samantha A. Batt-Rawden et al., *Teaching Empathy to Medical Students: An Updated, Systemic Review*, 88 ACAD. MED. 1171, 1173 (2013); *see also Brené Brown on Empathy*, YOUTUBE (Apr. 1, 2016), https://youtu.be/1Evwgu369Jw.

[106] *Brené Brown on Empathy*, YOUTUBE (Apr. 1, 2016), https://youtu.be/1Evwgu369Jw.

[107] *See* Gerdes et al., *supra* note 102, at 125 (stating "pity rarely helps, sympathy commonly helps, empathy always helps" (citations omitted)).

[108] Donohue, *supra* note 101, at 453. *See also* Gerdes et al., *supra* note 102, at 125.

communicate from a position beside them describes empathy.[109] Empathy allows for more effective communication, because the communication occurs as if the subject and the observer were on equal footing; the observer is reserving judgment, remaining open, and willing to enter and learn from the subject's experience.[110]

The exercise of viewing Non-Consensual Pornography through a *me* frame requires the reader to resist the reaction that "I would never do such a thing. I would never have a relationship with such a creep. I would never share nude photos. Never! Not me!" Again, as discussed previously, subjects of Non-Consensual Revenge Porn have not always dated the poster.[111] Subjects of Non-Consensual Revenge Porn are not always tormented by nude photos that they took, or photos that were nude at all.[112] The common denominator between all Non-Consensual Pornography cases is not any given profile or behavior of a subject of Non-Consensual Pornography- some stock story of a torrid love affair and promiscuous behavior- it is that somebody posted unconsented to material.[113] The *me* frame does not, therefore, ask the observer to enter a state of suspended disbelief to suggest, straight facedly, that they, you, any one may be the subject of Non-Consensual Pornography.[114]

Having reframed things to position ourselves in a more empathic role, as the subject of Non-Consensual Pornography ourselves, we

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[109] Donohue, *supra* note 101, at 452.

[110] *Id.*at 452–53 (citing Denise Panosky & Desiree Diaz, *Teaching Caring and Empathy Through Simulation*, 13 INT'L J. FOR HUMAN CARING 44–46 (2009)) (describing simulation in which student nurses were obliged to "walk a mile in another's shoes" during a simulated exercise. The students were required to wear adult diapers and colostomy bags (with mock content) for forty-eight hours).

[111] Corner, *supra* note 83; CITRON, *supra* note 35, at 50–51.

[112] Consider our hypothetical where the initial content is a clothed photo accompanied by sexual commentary imagined, we begin to believe, by a third party, not an ex. *Compare Playboy Model Sentenced for 'Body-Shaming' in LA Locker Room*, BBC NEWS (May 24, 2107), http://www.bbc.com/news/world-us-canada-40038332 (involving a case in which a woman took a nude "body shaming" picture of a woman in a locker room), *with* a particular client of the author who suffered terrible indignities after sharing photos confidence and intimacy during the course of a many-year long relationship that started, banally enough with two college sweethearts.

[113] *See* CITRON, *supra* note 35, at 45–50; Vanity Fair, *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a "Sex Crime,"* VANITY FAIR (Oct. 7, 2014 8:58 AM), https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover.

[114] *See* CITRON, *supra* note 35, at 45–50; Vanity Fair, *supra* note 113.

wonder about the experience of waiting for the law enforcement response, we wonder about what happened next.[115]

You receive a few more personal electronic messages from people, though thankfully no one else shows up at your door. You can't sleep. At night, rather than sleep you use the profile name and other descriptors from the site and you start your own policing to make sure nothing else is out there, and to try and figure out who did this. You found pictures of yourself on forged Facebook and LinkedIn pages. The pictures here again depict you clothed, but the content of the pages had been manipulated away from their intended purpose of social and professional networking to pages that made ostensibly self-reported declarations of your being a "slut," and worse. You find collages of images in chatrooms and image boards, the most troubling of which was 4chan, an image board where users sign on without profiles and post images anonymously. Many pictures on the collage are the nude pictures you had and your ex's new partner found. Other pictures are pictures from college; a few are selfies you took yourself. These innocuous photos have been photo-shopped to render you pants-less or to depict penises, breasts, and backsides near your face. You finally hear back from FetFun. They remove the profile and also offer a customer service number of sorts. You call and the person on the phone tells you "more than she has to" (she is quick to say), and gives you the IP address for the person who created the profile.

You take the information to the police. They are enthusiastic for the material and thank you for it, indicating that they had not been able to find much. You are annoyed that you, with no training in investigation and with the same material they had, had been able to find the IP address, but you are optimistic that your new information might move things forward. You ask them if they will trace the IP address. You tell them you want them to find out who it is and just scare them into stopping. They tell you they will look into it, but once they trace the IP address to a person, they will want to hand the case over to the States Attorney, because the States Attorney's office will want to be involved in decisions about making contact with suspects or executing search warrants. You share a dawning theory that this may be your ex or your

[115] In a way, the daughter frame accesses only sympathy, and potentially a misguided one at that, rather than empathy. The difference between sympathy and empathy is subtle but critical. *Brené Brown on Empathy*, YOUTUBE (Apr. 1, 2016), https://youtu.be/1Evwgu369Jw.

ex's new girlfriend. They express some concern about the logistics of contacting those parties because they are out of state, which might mean involving the other state's law enforcement. Lastly, they tell you that it might be contrary to investigation priorities to alert the possible poster prior to their being ready to execute a search warrant, because the poster could delete incriminating material or otherwise destroy evidence. You ask them how long the various conversations and participation of the States Attorney or other law enforcement may take. They tell you that "it's hard to tell."

You ask them what you can do in the meantime, since whoever it is may still be posting. They tell you are sorry, but that you may just have to get used to a new normal. They suggest that you check the internet daily looking for your name or using reverse image search, change your cell number, change your landline number, and make sure it is unlisted; change your email address, change all passwords on internet based sites, and delete your social media presence; be conservative about what transactions you complete online, especially where they require you to enter an address; ask your employer not to list your name or picture online with your company; change your locks, call the police if there are any other knocks at your door, and also consider moving.

Now it strikes us that a person in this situation very well may want the perpetrator punished; but in the meantime (the incredibly long, tedious, and yet terrifying meantime) they would want to exercise some control of the available content. Simply put, they would want the content taken down. Desiring and then pursuing removal also crystalizes the realization that those in control of the content might not necessarily be the original poster.[116]

A *me* frame, informed by a feminist perspective pushes back on the co-opting of sexuality and self-determination.[117] The perspective situates the problem of Non-Consensual Pornography and Sexualized Cyber Harassment as being a matter of marketable sexual dominance and aggression.[118] Therefore, existing critiques of criminal Non-Consensual Pornography law gain traction. But also, the absence of

[116] *See* CITRON, *supra* note 35, at 142–43 ("Perpetrators can be hard to identify if they use anonymizing technologies or post on sites that do not collect IP addresses. Because the law's efficacy depends on having defendants to penalize, legal reform should include, but not focus exclusively on, harassers.").
[117] *See* Hardin & Whiteside, *supra* note 2, at 314; CITRON, *supra* note 35, at 81–82.
[118] Franks, *supra* note 28.

debate about legal reform for civil accountability and easy removal of material becomes more obvious and unacceptable.

III. CURRENT RESPONSE TO NON-CONSENSUAL PORNOGRAPHY

At the start, no laws existed on the books explicitly outlawing Non-Consensual Pornography or defining its furtherance as tortious conduct. Redress required, therefore, a cobbling together of off-point legal remedies. Eventually, however, different jurisdictions began to criminalize Non-Consensual Pornography in its most basic form at least; which is the say that criminalization focused on the poster.[119] Similarly civil liability as against the poster also seems possible, though limited.[120] In attempting to reclaim for herself,[121] therefore, any loss of privacy, safety, reputation, and control, a subject of Non-Consensual Pornography ostensibly has four avenues of redress: 1) holding the poster criminally liable;[122] 2) holding the host of the content criminally liable;[123] 3) holding the poster civilly liable;[124] and/or 4) holding the host civilly liable.[125] As shall be discussed in more detail in sections below, this last possibility remains elusive, beyond the Digital Millennium Copyright Act's feeble intervention requiring internet service providers to remove content from their website, if they wish to avoid liability for copyright infringement.[126] This is because the Communications Decency Act virtually assures that internet service providers can escape all other liability by providing safe harbor to

[119] *See, e.g.*, Invasion of Privacy, Degree of Crime; defenses, privileges, N.J. REV STAT. § 2C:14-9 (2004).
[120] *See* Brooke Jarvis, *How One Woman's Digital Life was Weaponized Against Her*, WIRED (Nov. 14, 2017, 6:00 AM), https://www.wired.com/story/how-one-womans-digital-life-was-weaponized-against-her/ (discussing that a civil case was brought because of the difficulty of bringing a criminal case in a harassment/stalking context).
[121] In a survey conducted by the Cyber Civil Rights Initiative in 2014, 90% of those who identified as Revenge Porn victims were women. *See* CYBER CIVIL RIGHTS INITIATIVE, REVENGE PORN STATISTICS (Dec. 2014), https://oag.ca.gov/cyberexploitation.
[122] *Infra* Section III.A-B
[123] *Infra* Section III.A-B
[124] *See infra* Part IV.
[125] *See infra* Part IV.
[126] *See infra* Section IV.A.

Internet Service Providers.[127] Shields against liability, and the availability of only weak legal interventions in limited cases, removes incentives for hosts to engage with the problem of Non-Consensual Pornography.[128] The most problematic extension of the lack of incentives is the insufficiency of protocols, procedures, or even opportunities for subjects of Non-Consensual Pornography to insist on take-down measures even in the situations where a subject of revenge porn can claim copyright in the image.[129] The overwhelming barriers that prevent removal of content is inapposite to the stated desires of subjects of Non-Consensual Pornography, who again and again voice the desire to take control of the situation and mitigate further damage by having content removed.[130] However, before we can critique the current state of affairs, it is necessary to start with an overview of what that state of affairs is.

A. Criminal Law Response

The daughter frame inspires reactions and assumptions. Meanwhile, when laws percolate up out of assumptions and interests ancillary to the precise experience of victimization, they are by design limited.[131] This paper suggests that one limitation has been in over

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[127] *But see* Doe v. Internet Brands, Inc., 824 F.3d 846, 852 (9th Cir. 2016).

[128] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 6 (1987). In fact, the safe harbors represented a major turnaround from the initial recommendations of the White House's Working Group on Intellectual Property (Working Group), which had concluded that such sweeping immunity for OSPs would be a bad thing: "It would be unfair—and set a dangerous precedent—to allow one class of distributors to self-determine their liability by refusing to take responsibility. This would encourage intentional and willful ignorance." Bruce Lehman & Ronald Brown, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995), https://www.eff.org/files/filenode/DMCA/ntia_dmca_white_paper.pdf.

[129] *See* CITRON, *supra* note 35, at 172. Some hosts offer costly content removal services, many costing several hundreds of dollars. *Id.* at 175; *see also infra* notes 133–36 and accompanying text.

[130] The website Undox.Me provides resources for individuals who have been subject to Non-Consensual Pornography and doxing, including guides on how to remove pictures from different websites and stop doxing in progress. *See, e.g.*, *Take Down Your Pics Take Back Your Life: A DIY Guide to Removing Images Posted Without Your Consent*, UNDOX.ME, http://www.undox.me/ (last accessed on Dec. 28, 2017).

[131] Griffin, *supra* note 77, at 8.

emphasizing the criminal response to Non Consensual Pornography: punishing the poster will stop him and then the problem (for my daughter) will be over and the poster will be exposed as the bad person (who stands in marked contrast to my good girl daughter). This paper hopes to be an intervention in the underdevelopment of law and scholarship by raising new questions and critiques, specifically in regard to civil remedies. That said, certain trends and critiques in the criminal response to Non-Consensual Pornography are relevant to the broader conversation on the subject so to that end, they will be outlined here.

As of December 2017, thirty-eight states have laws that expressly outlaw Non-Consensual Pornography; whereas before 2013, only three states criminalized this behavior.[132] There was even a bill introduced to define Non-Consensual Pornography as a federal crime.[133] The various laws have common features; as an example of a fairly typical statute, the District of Columbia's Criminalization of Non-Consensual Pornography Act states:

> It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when:
>
> (1) The person depicted did not consent to the disclosure or publication of the sexual image;
> (2) There was an agreement or understanding between the person depicted and the person publishing that that the sexual image would not be disclosed or published; and
> (3) The person published the sexual image with the intent to harm the person depicted or to receive financial gain.
>
> A person who violates this subsection shall be guilty of a misdemeanor. . . [134]

[132] *State Revenge Porn Laws*, C.A. GOLDBERG LAW, http://www.cagoldberglaw.com/states-with-revenge-porn-laws/ (last visited Dec. 26, 2017). Additionally, as of the last update, eight states had pending legislation. *Id.*

[133] *See* Rep. Jackie Speier, *Intimate Privacy Protection Act of 2015 Discussion Draft*, SANTA CLARA LAW DIGITAL COMMONS (2015), http://digitalcommons.law.scu.edu/historical/1003/. As of publication, this bill has not passed.

[134] D.C. CODE § 22-3051 (4). (Defining first-degree unlawful publication).

The language regarding consent of the person depicted and the exposure of nudity or sexual acts are common features of most statutes including that of one of the first Non-Consensual Pornography statutes, the New Jersey statute:

> An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person *whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.*[135]

Absent a tidy fit under Non-Consensual Pornography laws, a state may prosecute a poster for criminal harassment, voyeurism, or even threats to commit a crime.[136] And indeed, in the District of Columbia there is at least some evidence that the United States Attorney's Office struggles to proceed with many crimes under the District's Non-Consensual Pornography law, D.C. Code 544-30.51.[137] Since its inception in December 2014, only a handful of crimes have been formally charged.[138] Other jurisdictions have found that drafting

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[135] Invasion of Privacy, Degree of Crime; defenses, privileges, N.J. REV STAT. § 2C:14-9(c) (2004) (emphasis added).

[136] *See infra* Part III; *see also* TOMMY WELLS, REPORT ON BILL 20-903, THE "CRIMINALIZATION OF NON-CONSENSUAL PORNOGRAPHY ACT OF 2014," at 3 (2014) (existing legal remedies frequently are in adequate to protect victims of Non-Consensual Pornography or to deter perpetrators).

[137] In fact, it was not until April 2017 that someone was convicted under the law and here, notably, the defendant's campaign of harassment was not one of sophisticated cyberattacks, rather he papered her home and workplace with physical prints. Keith L. Alexander, *D.C. Man Becomes First to be Convicted Under District's New Revenge Porn Law*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/local/public-safety/dc-man-becomes-first-to-be-convicted-under-districts-new-revenge-porn-law/2017/04/19/2e6ab4ca-2516-11e7-b503-9d616bd5a305_story.html?utm_term=.b4ded5505; *see* Email from Janese Bechtol, Chief, Domestic Violence Section, Office of the Attorney General for the District of Columbia, to author (Aug. 4, 2016 6:55PM) (on file with author); Email from Jodi S. Lazarus, Deputy Chief, Sex Offense & Domestic Violence Section, United States Attorney's Office, to author (Aug 23, 2017 1:57 PM) (on file with author).

[138] *See also The Fight Against Cyber Exploitation*, CAL. DEPT. OF JUST., https://www.oag.ca.gov/cyberexploitation/timeline (last visited Dec. 28, 2017)

appropriate code is just part of the challenge; further amendments and legislation are needed to give law enforcement an effective arsenal to locate and forfeit offensive content.[139]

B. Critiques of the Criminal Response

There are several popular critiques to criminal Non-Consensual Pornography statutes including: critique of what action constitutes publication or distribution of Non-Consensual Pornography; whether the statutes should include intent to harm provisions; choices around what content to criminalize; and the corollary First Amendment challenges.[140] There are varying definitions of distribution in Non-Consensual Pornography criminal codes. New Jersey's law, as an

(explaining that far too often, police officers fail to address cyber harassment complaints because they lack familiarity with the law and the technology). In response to the graphic threats made to the journalist Amanda Hess, officers asked her, "What's Twitter?" CITRON, *supra* note 35, at 84.

[139] For example, in 2013, when California first passed Senate Bill 255, criminalizing Non-Consensual Pornography, the bill did not cover "selfies," which includes more than half of Non-Consensual Pornography cases. *Cannella Legislation to Strengthen Revenge Porn Law Passed by Legislature*, OFFICE OF SEN. ANTHONY CANNELLA (Aug. 25, 2014), http://cannella.cssrc.us/content/cannella-legislation-strengthen-revenge-porn-law-passed-legislature. A year later, the California Legislature passed Senate Bill 1255, the "Revenge Porn 2.0 Act" to "expand the law to protect a greater number of victims" by including "selfies." *Id*. *See also* Hunter Schwarz, *California's Revenge Porn Law, Which Notoriously Didn't Include Selfies, Now Will*, WASH. POST (Aug. 27, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/?utm_term=.b10f879a8d22.

[140] *See* Antigone Books, LLC v. Brnovich, No. 2:14-cv-02100-PHX-SRB, 2015 BL 225562 at *1 (D. Ariz., July 10, 2015) (enjoining enforcement of Arizona Revised Statute § 13-1425). The statute, in part, declared that "[i]t is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure." H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), ARIZ. REV. STAT. § 13-1425(A). The plaintiffs in the Brnovich case, which included the ACLU argued that the statute impeded First Amendment rights. Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona's Ridiculously Overbroad 'Nude Photo' Law*, ACLU (July 10, 2015 6:45 PM), https://www.aclu.org/blog/free-speech/internet-speech/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad. *See also* Franks, *supra* note 28; CITRON, *supra* note 35, at 124–25.

exemplar of those like it,[141] outlaws disclosure without consent and proceeds to define disclosure broadly: "for purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. . ."[142] D.C. punishes "publication" and restricts that definition to "transfer or exhibit to 6 or more persons, or to make available for viewing by uploading on the Internet."[143] Other states offer still narrower protection in restricting the application of the criminal code only to instances where the images are put on the internet.[144]

A feminist perspective would, of course, disagree: a publication of your image without consent is a "taking," an act of ownership over your body and choices; degree is irrelevant. Similar critique of degree is often employed by those critical of the stock response to rape: "[t]he duration of [the survivor's] enslavement could have lasted for twenty minutes or for twenty days, but its exploitative purpose and form remain regardless of duration."[145]

New Jersey's statute[146] also offers a nice example of broad protection for victims of Non-Consensual Pornography in that the

[141] N.J. STAT. ANN. § 2C:14-9 (c).
[142] *Id*.
[143] D.C. CODE ANN. § 22-3051(5).
[144] MD. CODE. ANN., CRIM LAW. § 3-809 (West 2017). Yet we seem to understand that "a woman's consent to sleep with one man [cannot] be taken as consent to sleep with his friends," so by extension a woman's consent to sleep with a man or have her nude photograph taken by a man was not a license to have him share her body with his friends. CITRON, *supra* note 35, at 147. The impropriety of thinking otherwise is not enhanced by degree. Whether a man endeavors to share a woman's body with one man or six men without her consent seems irrelevant to an understanding whether his actions violated the woman.
[145] Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J. L. & GENDER 263, 295 (2012).
[146] In relevant part, the statute states "[a]n actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, 'disclose' means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer." N.J. STAT. ANN. § 2C:14-9 (c) (2004).

statute does not contain an "intent to harm" provision.[147] Many statutes include an intent to harm requirement;[148] those that do not face steep challenges.[149] The intent to harm provision troubles scholars and practitioners alike.[150] To begin, it invites a discussion of the perpetrators motives which distracts from the harm that befalls subjects regardless of those motivations.[151] Are we looking to ensure that the subject has been victimized in some accessible way? Does it feel important to ensure that we can show that she has been hounded and hunted before we can justify recognizing and protecting her dignity? Barring breach of some code of relationship decorum, is the invasion of Non-Consensual Pornography not apparent or meaningful enough to us?[152] "The knowing violation of privacy is the substance of the harm."[153] Intent to harm provisions invite "a showing of "bad purpose" analysis.[154] Yet "[n]onconsensual pornography is not always about revenge, but it is always about privacy" and that violation of privacy occurs regardless of the posters motivations.[155] Privacy actions must be nimble enough to extend subjects of Non-Consensual Pornography the dignity of having a "multiplicitous" selves or at the very least allow that

[147] *See id*. *Compare* N.J. STAT. ANN. § 2C:14-9 (2004) (containing no "intent to harm" provision), *with* LA. STAT. ANN. § 14:283.2 (2015) (including an "intent to harm" provision), *and* H.B. 2107, Act 115, GEN. ASSEM. (Pa. 2014) (including an "intent to harm" provision).

[148] D.C. CODE ANN. § 22-3052(a)(3) (2015). *But see* D.C. CODE ANN. § 22-3054(a)(2) (2015) (involving conscious disregard).

[149] ACLU of Ariz. v. Ariz. Dep't of Child Safety, 377 P.3d 339, 348 (Ariz. Ct. App. 2016).

[150] *Compare* Franks, *supra* note 28, *with ACLU of Ariz.*, 377 P.3d at 349–50.

[151] Franks, *supra* note 28.

[152] Branches of feminism have evolved in thinking about sexual violence and have moved away from a preoccupation with woman as victim, realizing that such a focus does not "adequately account for a women's ability to resist, make choices, and contribute to the cultural meaning of gender in society." MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 25 (2nd ed. 2003).

[153] Franks, *supra* note 28 (stating further that "[i]t is for good reason that privacy laws, from trespass laws to confidentiality requirements to prohibitions against voyeurism, do not require that perpetrators be motivated by intent to harm or harass the victim").

[154] It is beyond the scope of this article to engage in the close analysis of each varying Non-Consensual Pornography statute to determine whether and which elements of each statute are indeed specific and general intent provisions. What sets general intent apart from specific intent is that "general intent may be inferred from the doing of the act." United States v. Kleinbart, 27 F.3d 586, 592 (D.D.C. 1994).

[155] Franks, *supra* note 28.

different subjects of Non-Consensual Pornography will have different entry points into their experience of Non-Consensual Pornography.[156] By extension, this means those subjected to Non-Consensual Pornography will have different experiences of, and reactions to victimization.[157] Historically, violations of privacy alone have been sufficient basis to criminalize behavior.[158] As early as 1890, Samuel Warren and Louis Brandeis noted that it would be "*[d]oubtless desirable*" that an individual's privacy should "receive the added protection of the *criminal law*."[159]

Aside from the critiques concerning intent and distribution provisions, there is a more general critique of all criminal statues for Non-Consensual Pornography, namely the requirement that the victim be nude in the photograph or video. As the hypo above demonstrates, there is a world of highly sexualized harassment that does not contain naked depictions.[160] A response might be that harassment or stalking laws would otherwise penalize the conduct, but those laws often have elements that are impediments to their use in the context of Sexualized Cyber Harassment. In New York, for example, harassment would require that the perpetrator sent the post to the victim; meanwhile, many perpetrators do not communicate directly with the victim, but rather post to online communities of strangers or send links and posts to the

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[156] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595 (1990).

[157] *Id*. at 601. It may well be that some subjects of Non-Consensual Pornography perceive, and by extension may be able to assist with making a case, that a poster is taking his revenge on them in some way. These subjects, however, may not wish to revisit the trajectory of their relationship and their sexual decisions in a public way. Yet they, unlike their celebrity counterpart, will have to. Still other subjects may be dumbstruck by the behavior as it flows from a relationship that they hitherto for experienced as functional and safe. Still others may not know the perpetrator well or may have had a platonic relationship with him such that the post seems out of step with anything they or anyone would have expected. These latter subjects of Non-Consensual Pornography are not well situated to understand or litigate their defendant's intent. One might hope that the defendants' actions will speak for themselves, but will they speak loudly enough?

[158] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890).

[159] *Id.* at 219. *See also* CITRON, *supra* note 35, at 146. In 1974 Congress criminalized disclosure of records that contain personally identifying information to anyone not authorized to receive it. *Id.*

[160] *See* TAUBE ET AL., *supra* note 52, at 5 (finding that abusive written statements are the most common method of harassment).

friends and acquaintances of the victim.[161] And stalking includes intent provisions or course of conduct provisions[162] that set a high bar for prosecution, all the while failing to reach the "threats, defamation, and privacy invasions. . . even though they were at the heart of the abuse."[163]

However, if we affirm that the harm suffered is a loss of privacy, dignity, or in other words, the right to control one's own sexual identity, we begin to see that the un-consented to descriptions of the victim's alleged sexual conduct and of her body are as harmful as images themselves.[164] Yet, the insistence that there be nudity may well track with the ways in which courts have historically dealt with pornography.[165] The court has tackled the "intractable obscenity problem" in the context of prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[166] The court then tasks itself with splicing "unorthodox ideas, controversial ideas, even [hateful] ideas" that nonetheless can be expressed lawfully, from those expressions that are obscene and "utterly without redeeming social importance."[167] The Court has struggled to determine what constitutes "obscene, pornographic material subject to regulation under the States' police power" and has declared that any state statute must be "carefully limited."[168] Perhaps pictures of genitals and sexual acts more readily tip

[161] CITRON, *supra* note 35, at 143 (citing People v. Barber, No. 2013NY059761, 2014 WL 641316 (N.Y. Sup. Ct. Feb. 18, 2014); Erin Donaghue, *Judge Throws Out New York Non-Consensual Pornography Case*, CBS (Feb. 25, 2014), http:// www.cbsnews.com/ news/ judge-throws-out-new-york-revenge-porn-case.
[162] D.C. CODE § 22-3133(a) (2009); N.Y. PENAL LAW § 240.26.
[163] CITRON, *supra* note 35, at 143. Harassment and stalking laws should be updated to "reach the totality of the abuse." *Id.* at 142; D.C. CODE § 22-3133 (2009).
[164] *See* CITRON, *supra* note 35, at 74 (explaining how commenters trivialize cyber harassment by insisting that unlike "real rape," words and images on a screen cannot really hurt someone).
[165] *See* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (finding that possessing and exhibiting an obscene film was protected by the First Amendment); Miller v. California, 413 U.S. 15, 18-19 (1973) (holding that a state offense must be limited to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which … do not have serious literary, artistic, political, or scientific value").
[166] *Miller*, 413 U.S. at 18–19.
[167] *Id.* at 20.
[168] *Id.* at 20, 23–24.

the scales in favor of state action.[169] The concern about justifying state action is particularly pronounced for proponents of Non-Consensual Pornography bills, where the countervailing voices loudly decrying Non-Consensual Pornography laws a danger to the principles of free speech.[170] While the court's standard for obscenity does allow for work that "depicts *or describes*"[171] sexual conduct, arguably a written description is not as patently graphic and is less likely than a visual image to so immediately engage or offend un-consenting adult and juvenile audiences.[172] As this brief discussion of the criminal responses to Non-Consensual Pornography and Sexualized Cyber Harassment suggest, there is much work to be done to improve the conceptualization of Non-Consensual Pornography and Sexualized Cyber Harassment, and reaction to Non-Consensual Pornography and Sexualized Cyber Harassment.[173] Nonetheless, the criminal responses seem decided

[169] *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring) (stating the infamous test for obscenity: "I know it when I see it").

[170] *See* Rowland, *supra* note 140; *see also* CITRON, *supra* note 35, at 190 (explaining how in the eyes of commentators, people should be allowed to say anything they want online and that if the law intervened, the internet "would cease to foster expression.").

[171] Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added). And indeed, most definitions of pornography indicate that pornography is about showing or describing "sexual organs or activity." *See Pornography*, GOOGLE, https://www.google.com/search?q=definition+of+pornography&oq=definition+of+pornography&aqs=chrome..69i57.6615j0j8&sourceid=chrome&ie=UTF-8 (last visited Sept. 23, 2014); *see also Pornography*, MIRIAM WEBSTER, http://www.merriam-webster.com/dictionary/pornography (last visited Sept. 23, 2017) (defining "pornography" as the depiction of erotic behavior).

[172] It may be that lawmakers' concern about perpetrators' intent, along with their insistence on the use of images, have a common denominator: they speak to an abiding concern that Non-Consensual Pornography laws might infringe on First Amendment rights of perpetrators. The argument would go that criminalizing descriptions of a victim's body, sexual acts, or her sexual proclivities is, on some level, criminalizing a perpetrators commentary or observations. To some this may feel like impermissible criminalization of speech. Stated intent for obscenity laws protect the innocent. *But see* CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 230–31 (1989) (arguing that the intent requirement defines the injury from the standpoint of the perpetrator. "If he did not mean harm, no harm was done").

[173] *See* Franks, *supra* note 28 (advocating, as one of the initial voices, against Non-Consensual Pornography and Sexualized Cyber-Harassment and for the re-conceptualizing of early criminal responses).

compared to the faltering, severely lacking civil responses that will be taken up in more detail below.

IV. FEMINIST JURISPRUDENCE AND CIVIL REMEDIES TO NON-CONSENSUAL PORNOGRAPHY

Feminist framing invites a consideration of civil legal redress as a means to control Non-Consensual Pornography and sexually harassing content, because feminist jurisprudence invites consideration of how we might empower those subjected to the harm of Non-Consensual Pornography.[174] We will see, however, that the remedies are not easily or obviously available to the subjects of Non-Consensual Pornography.[175] On some level it is not surprising that the subjects of Non-Consensual Pornography, typically women and girls, struggle for traction with this issue, because it has long been a battle to get attention for issues that plague women and girls.[176] The difficulty is heightened if lawmakers and the public are distracted by the notion that at some point in time the victim might have consented to certain actions, particularly sexual actions.[177]

There are several possible civil responses or remedies for claims involving photography and video content, but they are not often deployed against perpetrators of Non-Consensual Pornography.[178] When they are, they prove to have frustrating limitations when mapped

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[174] *See* Hardin & Whiteside, *supra* note 2, at 316, 318 (defining feminist perspective generally); MACKINNON, *supra* note 172, at 128–29 (taking issue with how male dominant societies and institutions "construct what sexuality means" in ways that very likely subordinate women's experiences and expressions").

[175] *See* WELLS, *supra* note 32, at 3–5; Franks, *supra* note 28.

[176] CITRON, *supra* note 35, at 146; MACKINNON, *supra* note 172, at 163 (explaining that governments only "right … what government has previously wronged," so if the lives and experiences of women and girls have been ignored, the government assumes that everyone is free and equal, even while such an assumption flies in the face of lived realities of subordination).

[177] *See, e.g.*, Patricia Mahoney & Linda M. Williams, *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*, NAT'L CENTER ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/nnfr_partnerviolence_a20-yearliteraturereviewandsynthesis.pdf (last visited Dec. 28, 2017) (explaining the "marital rape exemption," which was the presumed common law in the United States until the late 1970s).

[178] WELLS, *supra* note 32, at 3–5.

to the particular conduct and claims inherent in Non-Consensual Pornography.[179] Moreover, currently, Internet Service Providers (ISP) appear to be beyond the reach of even limited claims due to the law's safe harbor provisions for third parties.[180] But first, rather than beginning with the particular application to Non-Consensual Pornography, let us consider the civil law responses to the use of a photograph or video depicting one's image.

One's options for legal redress exist on a spectrum of responses depending on the circumstances. With the simplest case when someone reproduces a photograph in which I myself already have a registered copyright in or could readily establish that I have copyright, I could tell the person using the image to cease and desist.[181] If they refused, I could bring a case for copyright infringement.[182] Adding a layer of complexity, let us further assume that the person using my image, whether they owned the copyright or not, did so with some malfeasance. Here, in addition to, or instead of, my copyright claim, I may have some other claim in tort, intentional infliction of emotional distress or libel perhaps.[183] Let us further assume that the reproduction or distribution of the image amounted to an invasion on my personal affairs. Such a situation may give rise to a claim of invasion of privacy.[184] Now let us change my own personal circumstances. Let us suppose I am a person of some public celebrity or that I have a market in my own image. Here,

[179] *Id*.
[180] 47 U.S.C. § 230(1) (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").
[181] *See* 17 U.S.C. § 502 (2012). There are several "how-to guides" and samples for cease and desist letters online, including by professional organizations. *See, e.g.*, *Cease and Desist Sample*, NAT'L PRESS PHOTOGRAPHERS ASSOC. https://nppa.org/sites/default/files/cease_and_desist_sample.pdf (last visited Dec. 28, 2017).
[182] 17 U.S.C. § 501(a)–(b) (2012) (outlining who is liable for remedies of copyright violations).
[183] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (AM. LAW INST. 2012); DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 1:9.
[184] *See* RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977).

I may have additional intellectual property claims in the form of violation of the right of publicity.[185]

In all of these hypotheticals, I have yet to suggest a precise means of reproduction or distribution, so we default to contemplating a situation where someone has run off posters with my face on them and posted them around my town. Yet, of course, this is not the most probable method employed in today's day and age.[186] So as a final point of consideration, let us assume that the person reproducing or distributing my image does so through use of the world wide web. Here, an ISP, hosts the content placed there by our potential defendant. We might wonder, what, if any liability does the ISP have for the content on their page. The discussion below will clarify a troubling answer for subjects of Non-Consensual Pornography, namely: ISPs are practically judgment proof.[187] The only situation in which a party may hope to interact with an ISP with some modicum of success is in the limited instance when the subject of the offensive content can assert a copyright interest in the content.[188]

A. Take-Downs: The Digital Millennium Copyright Act, & Copyright

Regardless of whether a subject of Non-Consensual Pornography contacts law enforcement and regardless of whether that contact provokes a criminal justice response, a subject of Non-Consensual Pornography may consult with online resources, blogs, and legal services.[189] These sources will likely direct her toward resources

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[185] Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998) (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (1997).

[186] Laura Sydell, *Unlikely Allies Join Fight to Protect Free Speech on the Internet*, WAMU (Aug. 23, 2017), http://wamu.org/story/17/08/23/unlikely-allies-join-fight-to-protect-free-speech-on-the-internet/ (stating" [r]ight now, Google has more than 80 percent of the online search market, according to Net Market Share. Google and Facebook combined have 77 percent of the online ad market, and 79 percent of Americans on the Internet have a Facebook account, according to Pew Research").

[187] *But see* Doe No. 14 v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016) (finding that the CDA was not intended to be a shelter).

[188] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012).

[189] *See, e.g.*, Undox Me, *supra* note 130; WITHOUT MY CONSENT, http://withoutmyconsent.org/ (last visited Dec. 27, 2017) (providing victims of online privacy violations with a place to discuss and learn information about resources);

for take down.[190] The Digital Millennium Copyright Act of 1998 (DMCA) provides the most obvious or immediate hook for take-downs.[191] Section 512(c) of the DMCA limits the liability of ISPs for any material hosted on their website that might infringe the copyright of another.[192] In order to be eligible for the protection from copyright infringement claims, the ISP must:

1. Not have the requisite level of knowledge of the infringing activity;[193]
2. Receive no benefit from the infringing activity, if they have the right and ability to control the infringing activity;
3. Designate an agent to receive notifications of claimed infringement and file the designation with the Copyright Office;
4. Expeditiously *take down* or block access to the material, upon receiving proper notification of claimed infringement.[194]

The provisions of the DMCA that provide "take-down" mechanisms for subjects of Non-Consensual Pornography, are restricted to scenarios where the complaining party can claim copyright to the content that offends or upsets them.[195] Even here there are no requirements and clear guidelines about what constitutes expeditious take downs.[196] Moreover, as shall be discussed below, copyright is

Online Removal Guide, CYBER CIVIL RIGHTS INITIATIVE, http://www.endrevengeporn.org/online-removal/ (last visited Dec. 28, 2017) (offering resources to victims that include steps on how to report an incident).

[190] *See* sources *supra* note 189.

[191] 17 U.S.C. § 512(c) (2012).

[192] *Id*.

[193] "Under the knowledge standard, a service provider is eligible for the limitation on liability, only if it does not have actual knowledge of the infringement, is not aware of facts or circumstances from which infringing activity is apparent, or upon gaining such knowledge or awareness, responds expeditiously to take the material down or block access to it." U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPY ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 12 (Dec 1998) https://www.copyright.gov/legislation/dmca.pdf.

[194] *Id*. at 11.

[195] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012).

[196] *See* 17 U.S.C. § 512 (2012); *see also* CITRON, *supra* note 35, at 19, 172 (stating that many Non-Consensual Pornography sites ignore requests to remove content

deemed to reside with the author of a work, and with photographs this traditionally means the photographer.[197] This makes DCMA take-down protections inaccessible for many subjects of Non-Consensual Pornography: for example, those who consented in the first instance to their photo being taken by someone, but did not intend to see the photos distributed; those who consented to their photos being taken by one party only to have those photos stolen by a third party and distributed without their consent; those whose photographs were taken unbeknownst to them; those whose self-authored photographs were altered in a manner that amounts to fair use or a copyrightable derivative work.[198]

1. Copyright

Copyright has dual purposes which, on a certain level seem in competition with one another, and neither of which prove to assist the subjects of Non-Consensual Pornography. First, copyright is designed to "promote public disclosure and dissemination of works of 'authorship.'"[199] Any intervention or critique that deems to restrict access or limit distribution of content might be considered contrary to the spirit of copyright.[200] Second, copyright gives authors the right to "restrict or deny distribution of their work."[201] Here, we might hope to find some cover for subjects of Non-Consensual Pornography, but the interpretation of authorship does not always favor subjects of Non-Consensual Pornography.[202]

When the courts first began to wrangle with the notion of copyright for photography, the dominate concern was to determine what

because they assume victims cannot afford an attorney to follow through on a copyright infringement claim).

[197] *See infra* Section IV.A.1.

[198] *See* 17 U.S.C. §§ 101, 107 (2012) (defining key terms in copyright law and limitations on fair use); *see also*, U.S. COPYRIGHT OFFICE, CIRCULAR 14.1013, COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2013), copyright.gov/circs/circ14.pdf.

[199] Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 1991 DUKE L.J. 455, 463 (1991).

[200] *Id.* at 463–64.

[201] *Id*. at 463.

[202] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54–55 (1884) (defining an author as an "originator," or "he to whom anything owes its origin").

it meant to author a photograph.[203] Photographs were proving to charm the public. Lithography companies hoped to reproduce these marketable items with unrestrained abandon.[204] The photographers, naturally, objected.[205] Those wishing to reproduce the photos argued that there could be no author of a photograph as the photograph was merely a product of a mechanical operation.[206] Such a production stood in stark contrast, the argument continued, to a traditional work of art- a painting or a sculpture- something "imbued with something of the human soul."[207] A machine-produced work was, in contrast, "soulless."[208]

Thus, at least initially, the photographer disappeared into the machine; but she was not lost to this analysis for long. By 1862, French courts began to tout the theory that authorship could be assigned to any work, including a photograph so long as it bore the "imprint of personality." [209] By the 1880s, this same logic showed up in American courts; for example, in a famous case concerning "Oscar Wilde, No. 18," a portrait of the author by photographer Napoleon Sarony.[210] In finding for Mr. Sarony against the Burrow-Giles Lithographic company, a company that had produced 85,000 unauthorized copies of the portrait for sale, the court commented:

> The plaintiff made a [useful, new, harmonious, characteristic, and graceful picture] entirely from his own mental conception, to which he gave visible form by posing the said Osar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition,

[203] *See* Jaszi, *supra* note 199, at 455. (describing the "foundational and resonant" concept of copyright reprint).
[204] *See* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE & THE LAW 71 (1991) (discussing the rise of new technologies; specially, photography and cinema, and the unresponsiveness of the legal system); Jaszi, *supra* note 199, at 473 (describing how there was "commercialization and commodification" of print culture in general in the eighteenth century).
[205] *E.g.*, GAINES, *supra* note 204, at 52 (noting that Burrow-Giles Lithographic Co. was charged with producing 85,000 unauthorized copies of Oscar Wilde, No. 18).
[206] *Id.* at 46–47.
[207] *Id*. at 46.
[208] *Id.*
[209] *Id.* at 47.
[210] Burrow-Giles Lithographic Co. v. Saron, 111 U.S. 55, 60 (1884).

> arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.[211]

And so it went that while the case purposefully declared that "we decide nothing" in regards to ordinary photos, the case came to stand for the principle of copyrightability for all photography.[212] In both the early U.S. courts and French courts, investment of personality "is the crucial authorial deposit that turns preexisting material and immaterial property into intellectual property."[213] Yet U.S. courts were applying the analysis of *Burrow-Giles* and similar progeny to all photographs, and by 1909 the Copyright Act the United States codified and clarified protection for photographs "without regard to the degree of 'personality' which enters into them."[214]

In many respects, we might be comfortable with the progression away from imprecise and illusory focus on personality. Ansel Adams, for example, need not defend an attack that his famous photograph of the Tetons and Snake River[215] was nothing more than the output of a mechanical operation by explaining how the picture depicts his personality. Rather, he can insist that "[y]ou don't take a photograph, you *make* it"[216] and we can believe him or, at least as a matter of copyright, leave him alone.[217]

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[211] *Id.* at 60.

[212] *See* GAINES, *supra* note 204, at 55–56 (arguing that, despite the Court's silence with respect to ordinary photos, the case stood for the copyrightability of all "works of authorship," including photographs).

[213] *Id.* at 51 (discussing two French and American cases where "the investment of personality is the crucial authorial deposit that turns preexisting material and immaterial property into intellectual property").

[214] *See* GAINES, *supra* note 204, at 51 (discussing two French and American cases where "the investment of personality is the crucial authorial deposit that turns preexisting material and immaterial property into intellectual property").

[215] Ansel Adams, *Tetons and Snake River* (photograph), http://www.getty.edu/art/collection/objects/258882/ansel-adams-the-tetons-and-the-snake-river-grand-teton-national-park-wyoming-american-negative-1942-print-1980/ (last visited Dec. 31, 2016).

[216] While the original context of this quotation is unknown, the Contemporary Quotations Project at the American University School of Communications has verified it. *On Photography*, CONTEMPORARY QUOTATIONS, http://www.contemporaryquotations.org/quote/photography (last updated Dec. 7, 2017).

[217] Copyright Act of 1909, Pub.L. 60–349, 35 Stat. 1075 (*amended by* Copy Right Act of 1976, and codified as 17 U.S.C. 102) (stating that copyright protection applies

The departure from consideration of personalities was not without casualty. If the conversation about personality had continued with nuance then it may well have tracked with the logic or considerations of certain commentators: it is not just the photographer that invests herself when she decided how to pose a subject or light the scene, but also the person in the image who certainly brings something of *their* personality to bear on the creative outcome.[218] Even from these early days, scholars argued if photographer and the photographed are each in possession of themselves, each must be able to claim property in an image that contains personality.[219] And indeed, a photographer profiting from reproduction of portrait prints troubled early courts. In *Pollard v. The Photographic Co.* the Court of Chancery (United Kingdom) declared that "a person whose photograph is taken by a photographer is not [] deserted by the law."[220] The notion that personality, and by extension authorship, might somehow be collaborative is one that current copyright does not account for well.[221]

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to "original works of authorship fixed in any tangible medium of expression"). Works of authorship, in turn, include: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, or sculptural works, motion pictures and audiovisual works, and sound recordings, and ultimately architectural works. *Id.*

[218] *See* GAINES, *supra* note 204, at 81–82 ("An object is not property unless it is produced by a (creative) subject—by an author who intervenes in the mechanical—industrial production of the photograph, who 'invests' his personality in the real before the camera . . . And although in itself can be transferred to another party via contract (so the facial image can be owned by a second legal entity), the legal subjecthood of the person in the image still stands as a guarantee of personal property right in the abstract.").

[219] *See* GAINES, *supra* note 204, at 82 (discussing the theory that both the photographed and the photographer are "in possession of themselves" and each of them can assert property rights to an image that has "personality").

[220] *Cf.* Pollard v. Photographic Co., 40 Ch. Div. 345 (1888) (finding in favor of the subject of a photograph, a "lady[] shocked by finding that the photographer she employed to take her likeness of her own use is publicly exhibiting and selling copies thereof" via contract law, not copyright law). In this case, the court reasoned that, based on the terms of the employment contract between the photographer and Mrs. Pollard, and absent any expressed agreement in writing, the subject of the photograph owned the copyright, not the photographer. *Id.* at 349.

[221] Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 51 (Martha Woodmansee & Peter Jaszi eds., 1994) (stating that case law and copyright statutes interpret joint authorship as a "deviant form of individual 'authorship'").

Collaboration in the most basic sense is not necessarily protected by copyright law, let alone collaboration of personalities in the theoretical sense.[222]

Be that as it may, copyright for photographs and by extension video, developed as it did and author has come to mean person taking the "shot."[223] This resting point is highly problematic for subjects of Non-Consensual Pornography who did not take the picture that is being disseminated. Moreover, even when a subject did take the picture being used, a doctored photo might amount to fair use or a copyrightable derivative work.[224]

The recognized imprecision within the legal concept of authorship in copyright invites a feminist critique of authorship, because critical theories delight in the indeterminacy of law. In the context of Non-Consensual Pornography, it seems particularly problematic to afford the person who took the nude picture or doctored a picture, copyright.[225] The principles of authorship speak to character of the work.[226] Many scholars and lawyers were and remain troubled with the court siding with the photographer of Wilde in *Burrow-Giles Lithographic Co. v. Sarony* while the image of Wilde seems as much about the intrinsic Wilde-ness of the subject's expression and demeanor as it does about draping and lighting.[227] So too should we feel troubled with an insistence that a woman is not the author of a depiction of her

[222] *Id.* at 52 (discussing how 1976 Copy Right Act narrows definition of "joint authorship" to require "the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit"). *See* 17 U.S.C. 102 (2012) (stating that "copyright subsists. . . in original works of authorship. . .").

[223] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (explaining that the author of the photograph was the photographer); GAINES, *supra* note 204, at 52 (discussing the meaning of authorship in contemporary U.S. copyright law).

[224] *See* 17 U.S.C. § 107 (2012) (describing the fair use provisions for copyrighted works); 17 U.S.C. § 101 (2012) (defining derivative works as "worked based upon one or more pre-existing works").

[225] *See infra* Section IV.A.2.

[226] Katz v. Google, Inc., 802 F.3d 1178, 1179 (11th Cir. 2015) (articulating that "character" of the use of a given work is one of the factors that is accessed to determine fair use for purposes of contemporary copyright law).

[227] *Burrow-Giles Lithographic Co.*, 11 U.S. at 60 (explaining the photograph was "an original work of art"); *See* GAINES *supra* note 204, at 51 (discussing varying opinions about the weight of *Burrow-Giles v. Sarony* on contemporary copyright law).

own body, particularly where that body might have been be captured in its most private of moments and intimate of expressions.

To be certain, it would be unprecedented, or at least violate precedent since 1884, to assert that a subject of Non-Consensual Pornography is in fact the author of her image and therefore can be said to have copyright.[228] But is there not sufficient motivation to reject this precedent or deny its applicability to the specific facts? Consider that:

> Lines of precedent fully developed before women were permitted to vote, continued while women were not allowed to learn to read and write, sustained under a reign of sexual terror and abasement and silence and misrepresentation continuing to the present day are considered valid bases for defeating "unprecedented" interpretations or initiatives from women's point of view.[229]

While, copyright busies itself, as we just have, with the consideration of the character of a given work,[230] the very existence of copyright as a legal concept is not really about identifying and protecting artistic expression, but rather is due to commercial importance of asserting a copyright.[231] The agenda of those in opposition to reimaging authorship is likely a concern that reimagining would have dramatic ripple effects on their market interests.[232] Let us

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[228] *Burrow-Giles Lithographic Co*., 11 U.S. at 61.

[229] *See* MACKINNON, *supra* note 172, at 238.

[230] Katz v. Google, Inc., 802 F.3d 1178, 1178 (11th Cir. 2015) (articulating that "character" of the use of a given work is one of the factors that is accessed to determine fair use); *see* GAINES, supra note 204, at 51 ("…*Burrow-Giles* remains a definitive statement on "originality" in manually as well mechanically produced works.").

[231] GAINES, *supra* note 204, at 50; *see also* 47 U.S.C. § 230 (b)(2) (2012) (stating that it is U.S. policy "to preserve the vibrant and competitive free market"). There is concern or resistance about re-enlisting copyright law to promote content control. Danny O'Brien, *Breaking Section 230's Intermediary Liability Protection Won't Fix Harassment*, ELECTRONIC FRONTIER FOUND. (Oct. 2, 2015), https://www.eff.org/deeplinks/2015/10/breaking-section-230s-intermediary-liability-protections-wont-fix-harassment.

[232] *See Katz*, 802 F.3d. at 1184 (stating "the 'central question' is whether . . . the use would cause substantive economic harm such that allowing [the conduct] would frustrate the purpose of copyright"). When applied to a case of a disgruntled business man, prioritizing market harm may make a certain sense. However, allowing a carve

consider then the competing market interests in Non-Consensual Pornography and Sexualized Cyber Harassment.

On the one hand, it is undeniable that Non-Consensual Pornography specifically and pornography generally have a robust market.[233] Globally, pornography generally is a $97 billion industry, with the United States controlling approximately $10-12 billion of that.[234] At its peak, an ISP dedicated to revenge porn, IsAnyoneUp.com, had thirty million views a month.[235] And it's pay-per-click advertising module generated $1,200 a month. [236] Not satisfied with advertising revenues, some revenge porn site found another angle for profits, namely offering to remove content for a fee, and a greater fee for expedited removal.[237] The ISPs are not the only ones profiting in this market. One of the most prominent advertisers on the revenge porn ISPs are those in the "image scrubber" business; these businesses offer to assist with removal for a fee.[238] Prominent businesses charge tens-of-thousands of dollars for the service.[239] When we give posters of Non-Consensual Pornography authorship of the content, when we shield ISP,

out to protect markets and failing to provide a carve out for sexualized, often violent content, rings hallow when weighted against the calls for safety and equality, which is central narrative of those targeted by Non-Consensual Pornography. S*ee infra* Section IV.A.2.

[233] cnbc.com, *Things Are Looking Up in America's Porn Industry*, NBC NEWS BUS. (Jan. 20, 2015, 8:17 AM), http://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431 (citing Kassia Wosick, assistant professor of sociology at New Mexico State University).

[234] *Id*.

[235] Kevin Rose, *At Home with A Revenge Porn Mogul*, FUSION (Jan. 2016), http://fusion.net/video/252712/complaints-bureau-revenge-porn-mogul/?utm_source=rss&utm_medium=feed&utm_campaign=/feed/.

[236] *Id*.

[237] The revenge porn website MyEx.com says it will remove the image 24–48 hours after people pay. Bort, *supra* note 73. Kevin Christopher Bollaert had a revenge porn website and charged victims to take the images down. Tynan, *supra* note 73. He earned around $30,000 from people who paid to remove the image. *Id.*

[238] Reputation repair charges $14,459 for expedited removal and future attack prevention and IMC Media Direct charges $6,300 reputation control service positive press releases so the negative searches go further into google space. Tynan, *supra* note 73. A reputation manager can earn $5,00–20,000 per month per client and charge upwards of $10,00 a month to work on name space (person's name). *Id. See* Bort, *supra* note 73.

[239] *See* Bort, *supra* note 73.

we give these actors voice and control in that market.[240] Even if we accept for the sake of argument that the Non-Consensual Pornography market is a valuable market whose interests we should defend, the fact remains that it is not the only market in operation; the blind belief that it is subverts the needs and interests of those with stakes in a different market, the market in one's own body.

An individual has a market in her body. In a most concrete sense, a woman can choose to sell use of her body as a surrogate or an egg donor.[241] She can sell her services to her family: women disproportionately care for children and aging parents.[242] She can choose to bodily enter the labor market.[243] Indeed, the pornography market generally belies the suggestion that women swept up in the Non-Consensual Pornography market have no interest in the use of their

[240] *See* Tynan, *supra* note 73; Kevin Roose, *At Home with a Revenge Porn Mogul*, SPLINTER (Jan. 12, 2016 3:50 PM), https://splinternews.com/at-home-with-a-revenge-porn-mogul-1793854053 (profiling Scott Breitenstein, owner and moderator of ComplaintsBuerau.com, a page that hosted Non-Consensual Pornography). When individuals would attempt to "file copyright claims for their nude photos under the Digital Millennium Copyright Act" in an attempt to get images removed from the site. . . hoping to get them taken down. [Breitenstein] would sue them for $10,900 in "defamation" costs. *Id.* However, in 2015 Breitenstein halted this practice. *Id*.; *see also Terms and Conditions*, COMPLAINTSBUREAU.COM, http://www.complaintsbureau.com/term-of-use (last visited Dec. 29, 2017) ("To all patrons and individuals, familiar with Complaints Bureau.com. The website was recently the subject of a documentary film which will air on the Fusion Network with host Kevin Roose, in a few months. We, as site operators, now fully understand the damage and negativity that 'Revenge Porn' can cause. We are now removing All/Any/Every 'Revenge Porn' and/or sexually related material, from the website. We are also banning it to ever be allowed, at any time, in the future. If you are caught trying to post this type of material, you will be banned immediately and permantly [sic], without notice.").

[241] *See, e.g.*, Donna De La Cruz, *Should Young Women Sell Their Eggs?*, N.Y. TIMES (Oct. 20, 2016), www.nytimes.com/2016/10/20/well/family/young-women-egg-donors.html?mcubz=0 (sharing statistics and details about the procedure of egg donation).

[242] *Women and Caregiving: Facts and Figures*, FAMILY CAREGIVER ALL., (Dec. 31, 2003), https://www.caregiver.org/women-and-caregiving-facts-and-figures.

[243] TIAN SHAPIRO, DEMOCRATIC JUSTICE 145 (2001) (explaining that when a laborer enters the market she sets the use of her productive capacities, which affirms the laborers sense of self-ownership).

bodies. Female pornography actors are paid for their performance[244] and use of their likeness; in fact, it is one of the few industries that pays women more than men, an acknowledgement that the appetite for pornography has something to do with the appetite for the female body.[245] When entering the labor market, one capitalizes on their appearance, their reputation, and their relationships (contacts and connections).[246] Non-Consensual Pornography and Sexualized Cyber Harassment compromise all of this.[247] Some of those advocating and legislating against Non-Consensual Pornography in the criminal arena recognize the connection between the crime and the subject's market value in herself.[248] In Hawaii, for example, the intent provision of the statute reads: "with the intent to harm substantially the depicted person with respect to that person's health, safety, *business, calling, career, financial condition, reputation*, or personal relationships."[249] Yet in the civil arena, there is no corollary concern for one's calling, career, or reputation; that is, unless of course, you are a celebrity.[250]

2. Publicity

In 1953, the Second Circuit of the United States Court of Appeals named a new right "in addition to and independent of [the] right of privacy."[251] This right, the right of publicity, recognized that a person should have the right to the publicity value of her photograph.[252] The

[244] Chris Morris, *Porn's Dirtiest Secret: What Everyone Gets Paid*, CNBC (Jan. 20, 2016 7:35 AM), http://www.cnbc.com/2016/01/20/porns-dirtiest-secret-what-everyone-gets-paid.html.
[245] *Id*.
[246] *See* Citron & Franks, *supra* note 33, at 352 (discussing the importance of perceived "reputation" on hiring decisions in the context of Non-Consensual Pornography).
[247] *Id*. ("The professional costs of revenge porn are steep. Because Internet searches of victims' names prominently display their naked images or videos, many lose their jobs. . . . Victims may be unable to find work at all. Most employers rely on candidates' online reputations as an employment screen.").
[248] *Id.*
[249] HAW. REV. STAT § 711-1110.9(b) (2017).
[250] *See* Katz v. Google, Inc., 802 F.3d 1178 (11th Cir. 2015) (holding that a photo could be utilized if there was no impact on any actual or potential market).
[251] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[252] *Id.*

court's analysis was prefaced on the fact that the image in question was one of a famous baseball player and that the court could envision that a famous person would have an interest in protecting their ability to "receive[ ] money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."[253]

The right of publicity is an "outgrowth" of the right of privacy.[254] The line between the two rights appears to be one based on the nature of the harm suffered:

> [t]he appropriation type of invasion of privacy, like all privacy rights, centers on damage to human dignity. Damages are usually measured by "mental distress"—some bruising of the human psyche. On the other hand, the right of publicity relates to commercial damage to the business value of human identity. Put simplistically, while infringement of the right of publicity looks to an injury to the pocketbook, an invasion of appropriation privacy looks to an injury to the psyche.[255]

The differentiation between the right to privacy and the right to publicity hints at the laws deference to market forces.[256] If the use of one's image affronts an average citizen, there is an inquiry into the defendant's intentions, the plaintiff's reaction, and consideration of objective standards of reasonableness.[257] Right to publicity, meanwhile, simply asks: was an image for which there is a market used; and did the user pay or contract for it?[258] For celebrities or those with obvious

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[253] *Id*.

[254] Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 896–97. However, Johnson cautions against an overly simplistic view of the evolution of the right of publicity. *Id.* at 898.

[255] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (4th ed. 1997).

[256] Rosemary J. Coombe, *Authorizing the Celebrity, in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 103 (Martha Woodmansee & Peter Jaszi eds., 1994).

[257] RESTATEMENT (SECOND) OF TORTS INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977).

[258] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). *But see* Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1449 (11th Cir. 1998) (discussing first-sale doctrine).

markets in their identity, various uses of their image may give rise to claims under both right of privacy and rights of publicity doctrines.[259] The same cannot be said for the average citizen, and by extension many subjects of Non-Consensual Pornography.[260]

Meanwhile, the fixation with market seems to forsake the very people that so motivated Warren and Brandeis's analysis: the private person. Consider that Warren and Brandeis were apoplectic over the notion that "gossip [might] attain[ ] the dignity of print, and crowd[ ] the space available for matters of real interest to the community:"[261]

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. . . In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people . . . Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No

[259] *Haelan Labs.*, 202 F.2d at 868; *See also* Coombe, *supra* note 256, at 102 (stating the Anglo-American legal jurisdictions permit individuals to "protect publically identifiable attributes from unauthorized and unremunerated appropriation by others).

[260] *See* Coombe, *supra* note 256, at 104 (stating "[m]arket values arise only after property rights have been established and enforced").

[261] *See* Warren & Brandeis, *supra* note 158, at 193.

> enthusiasm can flourish, no generous impulse can survive under its blighting influence.[262]

One can only imagine how Warren and Brandeis might comprehend the capacity of the web to canvas vast available space with "details of sexual relations."[263] Consider how the arc of Non-Consensual Pornography so often plays out.[264] The subjects of Non-Consensual Pornography become (always) involuntary and (often) unwitting stars in a display.[265] A woman's body is taken, manipulated, displayed, and used.[266] Because her stardom is not formalized in any way and often plays out in underground settings, she does not achieve a celebrity status that the court would recognize and so she is entitled to none of the protections or entitlements that celebrities enjoy.[267] Celebrity status, as understood and protected by the courts, is essentially a protection of worth and degree: you do not matter until you start to matter to a public; nothing has been taken from you until you can establish you were worth taking.[268] Just as the feminist perspective questions the focus on degree in critiquing distribution requirements in criminal codes, so too does it push back here.[269] Nonetheless, right of publicity actions contemplate the market for images narrowly: "it does not invest a prominent person with the right to exploit financially every public use of name or picture (let alone a person of no prominence)."[270] It is only when such use is made "for advertising purposes, or for the purposes of trade"[271]

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[262] *Id.* at 196.
[263] Warren & Brandeis, *supra* note 158; *see also Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Dec. 29, 2017) (stating that Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute).
[264] *See supra* Part I, II.
[265] *See supra* Part I, II.
[266] *See* MACKINNON, *supra* note 172, at 138.
[267] *See* Jarvis, *supra* note 120 (explaining how a recent $8.9 million verdict in a cyber stalking and Non-Consensual Pornography case was "was a record for a cyberharassment case that didn't involve a celebrity.").
[268] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[269] *See supra* Section III.B.
[270] Ann Margaret v. High Society Mag., 498 F.Supp. 401, 406 (S.D.N.Y. 1980) (bringing suit after defendants used a nude image of the actress taken from a movie).
[271] *Id*.

A feminist perspective rejects prioritizing the notion of place or status in the public sphere as being determinative of whether one enjoys protection.[272] The public sphere, after all, is not a location or a visual space; rather it is "system of ideas that promote the interests of some while ignoring or marginalizing those of other."[273] Meanwhile, "over time, women have been. . . disenfranchised and excluded from public life."[274] Yet given the insistence in law that public and private selves are two separate spheres, can a subject of Non-Consensual Pornography at least find shelter when focusing on a privacy right? The answer is, unsettlingly, only a *qualified* yes.

3. Privacy & Third-Party Liability

Intrusion of privacy claims require the showing that: 1) the defendant must have intentionally invaded the private affairs of the plaintiff without authorization; 2) the invasion must be offensive to a reasonable person; 3) the matter that the defendant intruded upon must involve a private matter; 4) the intrusion must have caused mental anguish or suffering to the plaintiff.[275] Certainly when one considers the harm associated with Non-Consensual Pornography, one quickly realizes that it is an assault on the subject's personhood.[276] Given the difficulty in linking personhood to authorship, can we revisit notions of personhood as a matter of privacy instead?

According to one of the earliest articulations of privacy, the answer is a resounding yes.[277] Warren and Brandeis argued in 1890, that "[t]he right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for [ ] extension"[278] of the

[272] Coombe, *supra* note 256, at 104 (stating "[m]arket values arise only after property rights have been established and enforced" and then going on to argue that "the decision to allocate particular property rights is a prior question of social policy that requires philosophical and moral deliberations and a consideration of social costs and benefits."); Griffin, *supra* note 77, at 8.
[273] Griffin, *supra* note 77, at 8.
[274] *See* MACKINNON, *supra* note 172, at 160. Other feminist scholars question the division of life into two spheres. *See* Griffin *supra* note 77, at 10.
[275] RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977).
[276] CITRON, *supra* note 35, at 81–82.
[277] Warren & Brandeis, *supra* note 158, at 213.
[278] *Id*.

protections against the unauthorized dissemination of "handiwork;"[279] and that moreover "[t]he principle which protects personal writings and any other productions of the intellect or the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance."[280] After all, they concluded, "the right to privacy, as a part of the more general right to the immunity of the person, -- the right to one's personality"[281] and certainly if one argues that one's personality is bound up in her writings or her drawings, how can one argue her personality is absent from her very likeness?[282]

The trouble with privacy claims is that we do not just ask, as we might with reproduction of a celebrity likeness: is that her likeness? did she consent?[283] Rather we ask a more complicated litany of questions: is that her likeness? Is there something about that likeness that makes us believe there are privacy interests at play? Is this type of invasion of a privacy interest offensive? Are we sure the invasion was into a private affair? Are we sure he meant to invade her privacy in this way?[284] This concern about the circumstances and the nature of the intrusion feels reminiscent to intent provisions of some criminal Non-Consensual Pornography laws and conjures up similar critiques.[285] As criminal Non-Consensual Pornography laws have been imagined, legislated, and tested, the public and the court ask a lot about the nature of the relationship between the defendant and the victim.[286] The inquiry with privacy claims is even more intense; the claim must analyze what the defendant intended, but also the subjective nature of the intrusion and

[279] *Id.* at 214.
[280] *Id.* at 213.
[281] *Id.* at 207.
[282] Reasoning can be applied to celebrities and those with a market in their likeness. *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that the right to publication of a picture could be subject to exclusive rights).
[283] *Id.* at 867–68. But see Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1449 (11th Cir. 1998) (discussing first-sale doctrine).
[284] *See* Franks, *supra* note 28 ("Having to prove intent to harm or harass beyond a reasonable doubt will not only be practically impossible for those victimized by strangers; it will often be very difficult in domestic violence cases as well, as perpetrators can claim a number of plausible alternative motives.").
[285] *See supra* Section III.B.
[286] *See supra* Section III.A.

whether it was objectively offensive.[287] This, like the query into intent in criminal settings, will all too likely invite inquiry into the defendant and subject's prior interactions and communications.[288] A feminist perspective asks why.[289]

Women are not paid for their participation in Non-Consensual Pornography productions; the dramas play out in a medium defended as a space for (men's) private musing/moments.[290] Therefore, women are not afforded a public right of action and there is no public outcry.[291] If women attempt to articulate the public nature of the Non-Consensual Pornography happenings by linking the harm of Non-Consensual Pornography to their own sense of public self (our market: reputation, participation in job market, her right to brand her own sexual identity and choice),[292] it is ignored or undermined by a legal system that cannot comprehend it.[293] And so the subject pivots and describes the harm as critically private, an invasion of a very private (sexual, maybe naked) self.[294] Here the law allows our defendant to claim the private moments were never private- she was promiscuous, she was available- thus eroding her privacy action because "[n]o law takes away women's privacy[; m]ost women do not have any to take, and no law gives them what they do not already have."[295] Non-Consensual Pornography,

[287] RESTATEMENT (SECOND) OF TORTS: INTRUSION UPON SECLUSION § 652B (AM. LAW INST. 1977).
[288] *See supra* Section III.B.
[289] *See* CHAMALLAS, *supra* note 152, at 21.
[290] *See* MACKINNON, *supra* note 172, at 230–31. Terry Bollea, known professionally as Hulk Hogan, sued media company Gawker for distributing a sex tap depicting him and his ex-wife. Gawker Media, LLC v. Bollea, 129 So.3d 1196, 1198 (Fla. Dist. Ct. App. 2d Dist. 2014). The suit bankrupted Gawker, and a bankruptcy judge authorized a $31 million settlement. Matt Drange & Ryan Mac, *Judge Approves $31 Million To Hulk Hogan In Gawker Liquidation Plan*, FORBES (Dec. 13, 2016), https://www.forbes.com/sites/ryanmac/2016/12/13/judge-approves-gawker-settlement-as-hulk-hogan-is-set-to-be-paid/#559a9cd55db9.
[291] Griffin, *supra* note 77, at 31 ("'Famous' people are set in opposition to the 'common' person, with scholarly attention given to the former.").
[292] CITRON, *supra* note 35, at 39–45.
[293] *Id.* at 162.
[294] *See* CITRON, *supra* note 35, at 49 (describing a subject of revenge porn who quite rightly had trusted her video chats and photo exchanges with her long-term, long-distance boyfriend were confidential).
[295] *See* MACKINNON, *supra* note 172, at 239.

nestled safety in the false dichotomy between public and private, sits immune.[296]

At least the difficulties with privacy claims for subjects of Non-Consensual Pornography, whether be they legal or critogenic,[297] are not insurmountable, but there is still the question of how these actions might be available to the subjects of Non-Consensual Pornography as against the ISPs. Here, we see the more dire situations for subjects of Non-Consensual Pornography, because the existence of third party liability shields make the very people in control of offensive content judgment proof.[298]

4. Third Party Liability & The Communication Decency Act

Harkening back to our hypothetical above, we, as the subject of the Non-Consensual Pornography, had been confronted with more images as the months waned on.[299] Some were on various social media sites; others were on random websites, some of which were explicitly pornographic; and still others were on websites lurking at the fringe of the visible web and the "deep" or invisible web.[300] A first move, we understand implicitly when we assume the position of the subject of Non-Consensual Pornography, is to try and have content removed. The

[296] The "[r]ealm of private freedom becomes realm of women's collective subordination." MACKINNON, *supra* note 172, at 168. (stating that this bind that subjects of Non-Consensual Pornography find themselves in when attempting to articulate a right to publicity and copyright claims, or alternatively privacy, illustrate the problems with this essentialized, dichotomous thinking); Griffin, *supra* note 77, at 7 (stating that essentialism is a source of dichotomous thinking: one thing must be the opposite of, or different from another. Historically, private and public spheres are set apart as opposites).

[297] *See, e.g.*, Thomas Gutheil et al., *Preventing "Critogenic" Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 11 (2000). And of course, there is the reality that suing someone is rarely quick, easy, or affordable; three things one would want a remedy to be if we care about helping people in crisis. *See* Citron & Franks, *supra* note 33, at 358.

[298] *See* CITRON, *supra* note 35, at 170–71. (discussing the liability shield in 47 U.S.C. § 230(c)(1)); Electronic Frontier Found., *supra* note 263; *see also* Roose, *supra* note 240 (describing how, when informed that a woman whose image had been on his site, the host maintained it was "not his fault.").

[299] *See* hypothetical, *supra* Part II

[300] *See* Franks, *supra* note 28 ("As many as 3,000 websites feature nonconsensual pornography, and the material is also distributed through emails, text messages, social media applications, and hard copies.").

analysis of civil remedies above suggests that there may be action in civil law, albeit an imperfect one, that nonetheless would incentivize the poster to cease and desist. But what if, as in the hypothetical, we were not sure of the identity of the poster. Or what if we know our posters identity, but they were an abusive ex, someone with whom we want no contact.[301] Or what if we knew *who* they were but not *where* they were; in other words, how and where to serve them civil process? Moreover, the rub with internet content is that it recycles and perpetuates often moving away from an original poster and into the hands of unknown others.[302] So there are impediments to taking effective action against the poster.[303] There is also a certain lack of logic in the notion that one would first pursue the poster.[304]

Consider if you saw your nude picture on a poster on the side of a building, it being there without your consent and it being offensive to you. You would rip it down. When you imagine yourself as the subject of internet Non-Consensual Pornography, the reaction is likely no different. But ISPs stands between you and that proverbial wall. They are the gatekeeper of it.[305] It is as if the wall housing the poster of your nude image were behind a fence surrounding the building. If the building was labeled with the business's logo, would you stop, draft an order to the person you supposed hung the photo? No. Likely you would call up the business or knock on the door and ask them to take it down. The Communications Decency Act (CDA) then is akin to a recorded message telling you that you have the wrong number, or the CDA is a voice behind the door saying that no one is home.[306]

The CDA was promulgated on the desire to "promote the continued development of the Internet and other interactive computer services and other interactive media . . . to preserve the vibrant and

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[301] Gutheil et al., *supra* note 297, at 11.

[302] CITRON, *supra* note 35, at 66–68; Franks, *supra* note 28.

[303] It is increasingly possible for targets of non-consensual porn, to seek expedited, although limited, relief through civil protection orders. *See Something Can Be Done! Guide: Restraining Orders*, WITHOUT MY CONSENT (Jan. 2017), http://withoutmyconsent.org/sites/default/files/wmc_restraining_orders_v1.0.pdf.

[304] SARAH JEONG, THE INTERNET OF GARBAGE loc. 660–61 (2015) (ebook) (stating that subjects often prioritize "ownership, control, and deletion").

[305] *See* CITRON, *supra* note 35, at 27–30.

[306] The protections under 47 U.S.C. § 230 apply to "Internet Service Providers (ISPs), but also a range of 'interactive computer service providers,' including basically any online service that publishes third-party content." Electronic Frontier Found., *supra* note 263.

competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"[307] because the bill was premised on the findings that:

> The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> and
>
> The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation . . . Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[308]

To the extent the bill was designed to offer protection against offensive material, the means of doing so were to first encourage the development of technology to enhance user control and secondarily to provide protection for "Good Samaritan" wishing to block and screen offensive material.[309] These Good Samaritan ISPs were granted cover for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

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[307] 47 U.S.C. § 230(b)(1) (2012).

[308] 47 U.S.C. § 230(a)(1)–(5) (2012).

[309] *See CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Dec. 31, 2017) (stating that one might look to the Communications Decency Act (CDA) to consider its cover for those who have been subjected to objectively indecent posts and publications by perpetrators or facilitators of Non-Consensual Pornography. And indeed, the original purpose of the act was to control internet content, but this aim was met by strong opposition and so enter Section 230 of the CDA. Section 230 has been touted as "one of the most valuable tools for protecting freedom of expression and innovation on the Internet." Section 230 states: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). *But see* Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), https://concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html (stating that § 230 does not provide protection for unlawful content).

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[310]

The action legislators imagined, though, must have been those actions that ISPs would take on their own volition, because while it allowed a safe harbor for those ISPs who might restrict or block access voluntarily, the CDA simultaneously dismantled a motivating influence for forcing reluctant ISPs' hand by declaring that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[311] In other words, you cannot sue an ISP for hosting material you deem offensive or harassing, because you cannot claim that the ISP did or said the offensive thing.[312]

People have come out aggressively against amendments to the CDA.[313] They argue that the "CDA is currently on of the most valuable tools for protecting freedom of expression and innovation on the internet."[314] What these arguments miss, of course, is that there is already a current carve out to the CDA and the sky has not yet fallen.[315] Currently, copyright is the exception to the CDA.[316] The CDA protects

[310] 47 U.S.C. § 230(c)(2)(A) (2012).

[311] 47 U.S.C. § 230 (2012). This protection applies to "Internet Service Providers (ISPs), but also a range of 'interactive computer service providers,' including basically any online service that publishes third-party content." Electronic Frontier Found., *supra* note 263.

[312] However, there are several provisions of the CDA that provide grounds for suing an ISP, and 47 U.S.C. § 230(e). *See* 47 U.S.C. §230(e)(1) (2012) ("No effect on criminal law Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute."; §230(e)(2) (" No effect on intellectual property law Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."); §230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); §230(e)(4) (2012) ("(4) No effect on communications privacy law Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.").

[313] *See* O'Brien, *supra* note 26.

[314] *Id*.

[315] JEONG, *supra* note 304, at loc. 688.

[316] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012). The DMCA safe harbors only apply to copyright infringement, not trademark or patent infringement or other causes of action. *Id.* Most service providers,

third party hosts from all tort liability, *except* copyright.[317] Lest these hosts be subject to constant crippling copyright actions, the DMCA provides a copyright safe harbor to third party hosts.[318] It allows that hosts can avoid copyright infringement claims if they comply with certain protocols.[319] The existence of the copyright exception to CDA protection, and the related DCMA limitations on copyright actions came about due to the lobbying force of well represented copyright owners[320] and the powerful voice of big ISPs.[321] The reality is the product of intense negotiation between ISP and content owners, not an "overarching vision of the public interest."[322]

In contrast, a carve out to the CDA that allows for liability for the perpetuation of Non-Consensual Pornography defies the agenda of both big ISPs and big-market copyright owners, and it is animated entirely by public interest.[323] First, there is rising concern about the public health ramifications of pornography in general, let alone

however, also enjoy broad immunity from most state law causes of action because of Section 230 of the Communications Decency Act ("CDA 230"). *See, e.g.*, Perfect 10 v. CCBill, LLC, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (determining that 47 U.S.C § 230 preempts all state intellectual property statutes, including right of publicity); Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006). Functions Covered Under DMCA Safe Harbors: The DMCA safe harbors only apply to "service providers" (defined below) performing certain "functions" (defined in § 512(a), (b), (c) and (d)). "To qualify for these protections service providers must meet the conditions set forth in subsection [(i)], and service providers' activities at issue must involve a function described in subsection (a), (b), (c), (d) or [(g)], respectively." S. REP. NO. 105-190 at 41 (1998). Accordingly, copyright owners have an incentive to characterize their lawsuits as involving activities that fall outside the defined functions protected by the safe harbors (e.g., intermediate copying, trans-coding, server-side data processing).

[317] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012).

[318] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012).

[319] Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 LEGIS. & PUB. POL'Y 99, 100 (2005).

[320] *Id.* at 118

[321] *Id.* at 100.

[322] JESSICA LITMAN, DIGITAL COPYRIGHT 144–45 (2001) (stating "there is no overarching vision of the public interest" animating the Digital Millennium Copyright Act. None"); Scott, *supra* note 319, at 118.

[323] Jane Doe v. Backpage.com LLC., 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S.Ct. 622 (2017).

pornography that, by design, aims to shame or punish.[324] Second, the liability of several revenge porn platforms as co-conspirators in revenge porn seems distinguishable from those platforms that, at a remove, provide open space for those who wish to "speak[] up for an unpopular truth against powerful interests."[325]

A conversation about Non-Consensual Pornography could be a conversation about the tension between first amendment interests in digital space.[326] It could be a conversation about public health.[327] It could be a conversation about empowering targets of Non-Consensual Pornography and Sexualized Cyber Harassment,[328] not just against the one bad actor who may have put the course of torment in motion, but against the ISP who encourage, and benefit from, online abuse.[329] But we must be motivated to begin talking about something other than scumbag boyfriends and our precious daughters.[330]

V. A CONVERSATION ABOUT CHANGE

The daughter frame assigns the targets of sexually assaultive remarks the status of a child and finds a source for compassion and concern for them by arbitrarily imaging a relationship with them. The suggestion is that the conduct offends or concerns only when we think about the women conjured up by Non-Consensual Pornography and Sexualized Cyber Harassment as being our daughter, or the daughter of

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[324] Gail Dines, *Is Porn Immoral? That Doesn't Matter: It's a Public Health Crisis*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/is-porn-immoral-that-doesnt-matter-its-a-public-health-crisis/?utm_term=.ebe6847b2d45.

[325] *See* O'Brien, *supra* note 26 (stating that copyright exists because of the important commercial right of having copyright, it does not exist for victims of revenge porn).

[326] JEONG, *supra* note 304 at loc.781.

[327] *See* Dines, *supra* note 324.

[328] DWORKIN & MACKINNON, *supra* note 74, at 138.

[329] *See* CITRON, supra note 35, at 227–30.

[330] *See, e.g.*, Mitt Romney (@MittRomney), TWITTER (Oct. 7, 2016, 5:10 PM), https://twitter.com/MittRomney/status/784546373525966849; Jeb Bush (@jebbush), TWITTER (Oct. 7, 2016, 4:05 PM), https://twitter.com/jebbush/status/784530223605903360. *See also supra* note 11 (illustrating that a discussion of solutions sets is informed by our view of the problem. Are we only seeing scumbag boyfriends and precious daughters? Are we looking at a picture of sick cows only, or are we seeing everything on the periphery-the smoke stacks and the dirty stream water? Are we calling a veterinarian, our congresswoman, or both?).

another: She must be "a somebody" to someone else. The daughter frame is both not intimate enough and too narrow. Such remarks when directed toward specific targets are deeply personal attacks and the experience of them is isolating; meanwhile, the impulse to degrade and to own the sexual identity of women and girls touches us all. We should frame avoid narrow frames of the problem of sexually assaultive speech and action. We should not ask "what if it were your daughter?" We can try instead to ask, "what if it were me?" Or "what if I had done that to someone else?" Or "what if my son had done that to someone else?" Or better yet, we should ask "what if all of this humiliation and subjugation was happening in the world I find myself living in?"[331] Because it is. The difficult, necessary work, then becomes, how do we imagine reform that animates inherent dignity and worth, concepts that are not positional, but universal and unalienable.

Search engines have offered subjects of Non-Consensual Pornography and Cyber Harassment a door to knock or a number to call, so to speak, by offering mechanism to report offensive content.[332] Certain social media sites also offer users and audience members an opportunity to flag certain content as offensive or fraudulent and ask for its removal.[333] These actions do not trigger an obligation for removal, however; and certainly no obligation for timely removal.[334] If they, or any ISP, resists removal, a subject of Non-Consensual Pornography can be caught in a double bind: The only carve out to ISP's CDA shield from third party liability is the DCMA copyright carve out; yet barring copyright reform, subjects may well struggle to prove authorship. Meanwhile, subjects may have viable claims under right of publicity or privacy rights, but without an amendment to the CDA these claims are not available as against the most effective defendants, the ISPs.[335]

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[331] *See supra* Part I.

[332] *See, e.g.*, *Contact Us*, GOOGLE, www.google.com/contact (last visited Dec. 29, 2017) (noting invitation to contact regarding "privacy, security and online safety").

[333] *See Reporting Abuse*, FACEBOOK, https://www.facebook.com/help/www/1753719584844061?helpref=page_content&rdrhc (last visited Dec. 29, 2017) (using the settings tab, users can follow links to report offensive content).

[334] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012) (requiring, but not defining, expeditious take-downs).

[335] JEONG, *supra* note 304 at loc. 661 (describing how a target of online abuse may not know who the poster is or how to target them directly); CITRON, *supra* note 35, at

These barriers should not be inevitable or final: "[t]he law is first surprised by the question and its first answer is in 'resistance.'"[336] We see such resistance, for example, once we initiate the conversation about carve out amendments to the CDA to allow third party liability for Non-Consensual Pornography and Sexualized Cyber Harassment.[337] However, an insistence that the CDA third party liability shield is the only thing that stands between us and the decline of expression and innovation requires a belief that any adjustments to the third party liability shield is the same things as total elimination of it.[338] Such a false binary closes the door to an honest exploration of the harms that the shield allows and nuanced thinking about how we might prevent certain recognized harms while upholding the principles of open, expressive space.[339]

Let's consider what the conversation might look like. To begin, we might note that Non-Consensual Pornography and Sexualized Cyber Harassment's brand, if you will, is one defined by harassment and humiliation of a specific target where that target is an objectively non-consenting participant.[340] One particular perspective about pornography emerges as apt when considering Non-Consensual Pornography and Sexualized Cyber Harassment. Namely, "[t]he most efficient way to

113–19 (describing how content can be archived, recycled, and regurgitated in wider nets of distribution the longer is stays on an ISP's site).

[336] *See* GAINES, *supra* note 204, at 46.

[337] *See* ACLU of Ariz. v. Ariz. Dep't of Child Safety, 377 P.3d 339 (Ariz. Ct. App. 2016) (highlighting the difficulty in obtaining disclosure of some public records).

[338] JEONG, *supra* note 304 at loc. 685–707. (expressing concern over a broad exception to the CDA while remaining open to narrowly tailored amendments which may benefit those sites described by Danielle Citron and others as "the worst actors"); *See* CITRON, *supra* note 35, at 167 (defining the worst actors online).

[339] Indeed, this is not the first time the field of Intellectual Property and Copyright has had to re-evaluate its position on the ability of existing legal paradigms to answer, or respond to emerging issues. *See* GAINES, *supra* note 204, at 46. At the dawn of the invention, and subsequent commercialization, of photography the "new technologies did not produce a communications 'revolution' in any sense, but they did pose a problem that required institutional adjustments without which defects in the ideological mortar would begin to show."); *Id.* (highlighting that "[t]he law does not easily accommodate such challenges. . .").

[340] Unsurprisingly, revenge porn has been linked to several suicides and has been used to blackmail and sexually exploit minors. *See* Dines, *supra* note 324; Franks, *supra* note 28.

[appeal to male audiences for profit][341] appears to be eroticizing the degradation of women."[342] Moreover,

> no matter what you think of pornography . . . the science [about the ill effects of pornography] *is* there. After 40 years of peer-reviewed research, scholars can say with confidence that porn is an industrial product that shapes how we think about gender, sexuality, relationships, intimacy, sexual violence and gender equality — for the worse.[343]

One study, for example, revealed a correlation between regular porn use amongst teenage boys and their seeing females as "play things."[344] Another study found that male *and* female college students who reported recently watching pornography also reported believing that only strangers commit sexual assault and that victims "ask for it" by wearing "slutty" clothes and going out alone.[345] Conversations about these realities may support suggestions such as amending the CDA prohibit immunity for ISPs specifically designated for Non-Consensual Pornography, or where the ISP has been put on notice that the content was posted without consent.[346] In a similar vein, we might consider requiring ISPs in the pornography business to certify the consent of anyone depicted before such content will be posted. Such conversations

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[341] ORENSTEIN, *supra* note 32, at 34 (explaining the main goal of pornography producers is to appeal to male audiences).
[342] *Id*. (observing that a high percentage of pornographic scenes containing physically aggressive acts towards women).
[343] Dines, *supra* note 324.
[344] *See* ORENSTEIN, *supra* note 32, at 36.
[345] *Id*.
[346] *See* Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d. 1157, 1165 (9th Cir. 2008) (stating "the dissent tilts at windmills when it shows, quite convincingly, that Roommate's *subscribers* are information content providers who create the profiles by picking among options and providing their own answers. There is no disagreement on this point. But, the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles. As we explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user."); *see also* Batzel v. Smith, 333 F.3d 1018, 1033 (9th Cir. 2003); Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html.

would inspire fashioning take-down protocols beyond the one that the DMCA legislates. We might insist that *consent*, not just copyright, should inform mandated take-down protocols where a post contains naked or sexualized content of target.[347] Further, we would concern ourselves with the speed of take-downs to minimize the risk of recycled content.

If we can recognize, articulate, and value the market that a person has in her own body; then we can find the language to advocate for the reform that empowers subjects of Non-Consensual Pornography against those that harbor posts and profit from them.[348] Until we insist, radically perhaps, that precedent here gets it wrong, and that protections against Non-Consensual Pornography are possible,[349] then we further the reality that "[n]o government, yet, is in the pornography business. . . . This has not been necessary since no man who wants pornography [Non-Consensual Pornography or otherwise] encounters serious trouble getting it, regardless of obscenity laws [and the criminalization of Non-Consensual Pornography]."[350] The difficult, necessary work before us is to imagine reform that animates inherent dignity and worth concepts that are non-positional, but universal and unalienable.

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[347] Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2012) (only outlawing copyright infringement). Another law would be necessary to provide a vehicle for take down requests. Internet can be free space to use images and critique another, even a non-consenting other, but not where commentary on naked body and sex is involved.

[348] cnbc.com, *Things Are Looking Up in America's Porn Industry*, NBC NEWS BUS. (Jan. 20, 2015, 8:17 AM), http://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431.

[349] Fair Housing Council of San Fernando Valley v, Roommates.Com, LLC, 521 F.3d. 1157 (9th Cir. 2008); *see also* Doe No. 14 v. Internet Brands, Inc., 844 F.3d 846, 853 (9th Cir. 2016) (stating that "Congress has not provided an all-purpose get out-of-jail-free card for businesses that publish user content on the Internet, though any claims might have a marginal chilling effect on Internet publishing businesses."); Reuters, *Judges Are No Longer Giving Tech Companies an Automatic Pass on Civil Liability*, FORTUNE (Sep. 02, 2016, 12:26 PM), http://fortune.com/2016/08/18/judges-tech-companies/.

[350] MACKINNON, *supra* note 172, at 239.