

# Judicial Constructions of Responsibility in Revenge Porn: Judicial Discourse in Non-Consensual Intimate Image Distribution Cases – A Feminist Analysis

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A L I C I A D U E C K - R E A D \*

## ABSTRACT

Women are increasingly enmeshed within virtual, digital worlds of communication. In the context of sexual relationships, these communications frequently include sharing nude or partially nude photos. Alongside this emergence of consensual image exchanges, so too has non-consensual distribution increased. This phenomenon, often labeled as “revenge porn”, has procured significant popular and legal attention, cumulating in the passing of Bill C-13 and the enactment of section 162.1 of the *Criminal Code*. This article examines the phenomenon of non-consensual intimate image distribution (NCIID) and provides a discourse analysis of judicial decision-making on section 162.1 cases. I will ask whether judges adjudicating cases under section 162.1 draw upon privacy frameworks and/or the rape myths common to sexual assault trials.

## I. INTRODUCTION

[T]he profound emotional and psychological impact upon her clearly has been devastating, and seems likely to be permanent. In that regard, it should be recognized and emphasized again that her torment is not over. Nor does it seem likely to end.<sup>1</sup>

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\* The views expressed in the text are from a personal perspective and do not represent those of the Department of Justice or the Government of Canada.

<sup>1</sup> *R v JTB*, 2018 ONSC 2422 at para 97.

Responding to the disturbing incident of non-consensual intimate image distribution and attempted assault in *R v JTB*, Justice Leach of the Ontario Superior Court wrote the words above, labelling the complainant's harm as profound, long-lasting, and never-ending. The seriousness with which the offence is treated seemingly flies in the face of scholar and activist concerns that complainants' harms would not be taken seriously in the judicial treatment of non-consensual intimate image distribution (NCIID).<sup>2</sup> Both before and after the creation of the criminal offence of NCIID under section 162.1 of the *Criminal Code*, literature on NCIID and other forms of online sexualized violence suggested that there was a discursive tendency for rape myths and discriminatory stereotypes common to sexual assault to inform the treatment of NCIID within popular culture,<sup>3</sup> media,<sup>4</sup> every day understandings,<sup>5</sup> and among law enforce-

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- <sup>2</sup> Within the course of this article, I use the term non-consensual intimate image distribution (NCIID) to refer to the distribution of nude, semi-nude, and sexually explicit images –photographs or videos – without consent. Initially, these photos or videos may have been taken consensually in the context of an intimate relationship or taken unknowingly and/or without consent within or outside of the context of a relationship.
  - <sup>3</sup> Jordan Fairbairn, “Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age” in Jane Bailey and Valerie Steeves, eds, *eGirls, eCitizens* (Ottawa: University of Ottawa Press, 2015) 229 at 239; Lara Karaian, “Policing ‘Sexting’: Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers’ Digital Sexual Expression” (2014) 18:3 *Theoretical Criminology* 282 at 284; Hayley Crooks, “An Intersectional Feminist Review of the Literature on Gendered Cyberbullying: Digital Girls” (2016) 8:2 *Jeunesse: Young People, Texts, Cultures* 62; Murray Lee & Thomas Crofts, “Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People” (2015) 55:3 *Brit J Crim* 454; Nicola Henry & Anastasia Powell, “Beyond the ‘Sext’: Technology Facilitated Sexual Violence and Harassment Against Adult Women” (2015) 48:1 *Austl & NZ J Crim* 104 at 105 [Henry & Powell, “Beyond the ‘Sext’”].
  - <sup>4</sup> Fairbairn, *supra* note 3 at 239; Amy Adele Hasinoff, “Sexting and Privacy Violations: A Case Study of Sympathy and Blame” (2017) 11:2 *Intl J Cyber Criminology* 202 at 203.
  - <sup>5</sup> Alexa Dodge, “Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph” (2016) 12:1 *Crime, Media, Culture: An Intl J* 65 at 68 [Dodge, “Digitizing Rape Culture”]; Anastasia Powell, “Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault” (2010) 43:1 *Austl & NZ J Crim* 76 at 80; Danielle Keats Citron & Mary Anne Franks, “Criminalizing Revenge Porn” (2014) 49:2 *Wake Forest L Rev* 345 at 348; Shaheen Shariff & Ashley DeMartini, “Defining the Legal Lines: eGirls and Intimate Images” in Jane Bailey and

nt.<sup>6</sup> This article endeavors to answer whether these rape stereotypes and myths can also be found in judicial decision-making on section 162.1.

Rape myths are commonly understood to be beliefs or attributes held to justify and deny male aggression against women.<sup>7</sup> Such discriminatory stereotypes may hold women responsible for their own sexual victimization and affirm male sexual entitlement.<sup>8</sup> Such myths also serve to construct normative gender ideals of what it means to be a woman or a man. Scholars have long held that such myths have held a strong sway within judicial decision-making in sexual assault trials and that judges, without an understanding of the context of gendered violence, have not taken incidents of sexual assault seriously enough.<sup>9</sup> It is pertinent to note that such myths

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Valerie Steeves, eds, *eGirls, eCitizens*, (Ottawa: University of Ottawa Press, 2015) 281 at 294–95; Henry & Powell, “Beyond the ‘Sext’”, *supra* note 3 at 105.

<sup>6</sup> Alexa Dodge & Dale Spencer, “Online Sexual Violence, Child Pornography or Something Else Entirely? Police Responses to Non-Consensual Intimate Image Sharing Among Youth” (2017) 20:10 Soc & Leg Stud 1 at 10; West Coast LEAF, “#CyberMisogyny: Using and Strengthening Canadian Legal Responses to Gendered Hate and Harassment Online”, (2014) at 12 online: West Coast LEAF <[www.westcoastleaf.org/perma.cc/2ZD1-LZSX](http://www.westcoastleaf.org/perma.cc/2ZD1-LZSX)> [West Coast LEAF, “#CyberMisogyny”]; Fairbairn, *supra* note 3 at 239.

<sup>7</sup> Corina Schulze, Sarah Koon-Magnin & Valerie Bryan, *Gender Identity, Sexual Orientation, and Sexual Assault: Challenge the Myths* (Boulder, CO: Lynne Rienner Publishers, 2019) at 91.

<sup>8</sup> Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, 2018) at 191–92, 204.

<sup>9</sup> See e.g. Susan Ehrlich, “Perpetuating and Resisting: Rape Myths in Trial Discourse” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 389; Rosemary Cairns-Way & Donna Martinson, “Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada” (2019) 97:2 Can Bar Rev 367 at 369–73; Kate Puddister & Danielle McNabb, “#MeToo: In Canada, Rape Myths Continue to Prevent Justice for Sexual Assault Survivors” (5 March 2019), online: *The Conversation* <[theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568](http://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568)> [perma.cc/ZYQ3-8M7B]; Lise Gotell, “When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43:3 Alta L Rev 743; Lise Gotell, “The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship” in Dorothy Chunn, Susan Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver, BC: UBC Press, 2007) 127 at 134 [Gotell, “Discursive Disappearance”].

do not always inform judicial decision-making and that there are a variety of systemic issues within the criminal justice system, and society at large, which may result in traumatic experiences for sexual assault survivors navigating the criminal justice system and low rates of convictions.<sup>10</sup>

Furthermore, it should be highlighted that the legal landscape has not remained unchanged in relation to the judicial treatment of sexual assault. In 2017, the Canadian Judicial Council (CJC) implemented mandatory judicial training following public outcry over the mishandling of several sexual assault trials.<sup>11</sup> The CJC's decision was, in part, a response to Bill C-337, the *Judicial Accountability through Sexual Assault Law Training Act*, which was introduced into Parliament a few months before. Bill C-337 was a political response to Justice Robin Camp's conduct during a sexual assault trial in 2014, in which he notoriously told a complainant that "pain and sex sometimes go together" and questioned why she did not keep her "knees together".<sup>12</sup> While Bill C-337 did not become law, it sparked an important conversation on the judiciary and sexual assault.<sup>13</sup> Likewise, the trial of Jian Ghomeshi profoundly shaped the public narrative on sexual assault, calling attention to the inadequacy of legal reforms in protecting women.<sup>14</sup> Thus, discriminatory myths in judicial decision-making on sexual assault must be placed within the broader socio-legal context. Likewise, my conclusions within this article on judicial decision-making must be placed within the context of public discourses on NCIID and the broader criminal justice system.

This article examines 14 recent decisions on section 162.1, 12 of which are sentencing decisions. These cases were selected randomly from a list of 61 decisions citing section 162.1, which were decided between the

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<sup>10</sup> Dana Phillips, "Let's Talk About Sexual Assault: Survivor Stories and the Law in the Jian Ghomeshi Media Discourse" (2017) 54:4 Osgoode Hall LJ 1133 at 1145-46.

<sup>11</sup> Canada, Department of Justice, *Judicial Training in Sexual Assault Law and Social Context* (Ottawa: DOJ, last modified 10 March 2020), online: <[www.justice.gc.ca/eng/csjsjc/pl/jt-fj/index.html](http://www.justice.gc.ca/eng/csjsjc/pl/jt-fj/index.html)> [perma.cc/4BMC-PMCN]; Cairns-Way & Martinson, *supra* note 9.

<sup>12</sup> Cairns-Way & Martinson, *supra* note 9 at 370; Alison Crawford, "Justice Robin Camp Resigns After Judicial Council Recommends Removal", *CBC News* (9 March 2017), online: <[www.cbc.ca/news/politics/justice-robin-camp-judicial-council-1.4017233](http://www.cbc.ca/news/politics/justice-robin-camp-judicial-council-1.4017233)> [perma.cc/UX4U-M4ER].

<sup>13</sup> Cairns-Way & Martinson, *supra* note 9 at 396.

<sup>14</sup> Phillips, *supra* note 10 at 1136, 1148.

introduction of the section in 2015 and September 2019.<sup>15</sup> From these cases, 14 decisions were chosen at random to be included in this study. The cases were then examined and coded to identify themes which are commonly considered to be rape myths and discriminatory stereotypes. As the cases I surveyed represent a small sample of the decisions on section 162.1, this article is necessarily an incomplete snapshot of judicial discourse. Further study is needed to provide a more complete picture of the state of judicial discourse, as well as disparities in treatment which may exist between levels of court and provinces. Furthermore, it should be noted that some of the cases included in this study involved charges for NCIID as well as other offences committed at the same time, such as extortion. While it was beyond the scope of this article to unpack how the presence of other charges influenced the way in which the NCIID offence was discussed by judges, this is also an area ripe for further study.

This article makes a modest contribution to the literature by providing a preliminary analysis of judicial discourse in an isolated number of section 162.1 cases. While there is a range of literature which examines the composition of the offence<sup>16</sup> and that unpacks judicial discourse in relation to technology,<sup>17</sup> this work is unique for its examination of the inter-relationship between judicial discourse and rape myths.

I have utilized a critical discourse analysis to offer a systemic scrutiny of the structures and strategies of talk and text that communicate meaning within judicial decisions.<sup>18</sup> Discourse analysis provides a means of analyzing the social relationships and “structural relationships of dominance,

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<sup>15</sup> The search was conducted in WestlawNext Canada on September 4, 2019, utilizing the function within Westlaw which cross-references cases with the relevant *Criminal Code* section. See also Richard Jochelson et al, “Intimate Images and the Law”, in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bedford, ON: Demeter Press, 2019).

<sup>16</sup> Moira Aikenhead, “Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence” (2018) 30:1 CJWL 117 [Aikenhead, “Non-Consensual Disclosure”]; Moira Aikenhead, “A ‘Reasonable’ Expectation of Sexual Privacy in the Digital Age” (2018) 41:2 Dal LJ 273 [Aikenhead, “A ‘Reasonable’ Expectation”].

<sup>17</sup> Alexa Dodge, “Nudes are Forever: Judicial Interpretations of Digital Technology’s Impact on ‘Revenge Porn’” (2019) 34:1 CJLS 121 [Dodge, “Nudes are Forever”].

<sup>18</sup> Teun A van Dijk, “Editor’s Introduction: The Study of Discourses: An Introduction: The Emergency of a New Cross-Discipline” in Teun van Dijk, ed, *Discourse Studies* (London, UK: Sage, 2007) 1 at 5-6.

discrimination, power and control as manifested in language.”<sup>19</sup> However, discourse is not only descriptive of reality, but also is a means through which meaning is made. Thus, discourses are pervasive and performative in that they “enact what it names.”<sup>20</sup> In looking at judicial discourse, I aim to examine the power dynamics inherent in decision-making so as to allow us to consider how the structures of law and society impact our treatment of NCIID.<sup>21</sup> In her analysis of sexual assault, Lise Gotell posited that judicial discourses create gendered subjectivities, privileging some subject positions and devaluing others.<sup>22</sup> I aim to unpack legal discourses in the context of NCIID to both understand their power to describe reality and also make meaning through constructing normative sexual subjects and gender norms.<sup>23</sup>

## II. THE CONTEXT OF SECTION 162.1

Section 162.1 was spurred, in large part, in response to the high-profile suicides of two Canadian teens, Rehtaeh Parsons and Amanda Todd.<sup>24</sup> Framed in the context of discussions on cyber-bullying,<sup>25</sup> the section makes it an offence to knowingly, without consent, publish, sell, transmit, distribute, advertise, or make available an intimate image. The section reads:

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person

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<sup>19</sup> Ruth Wodak, “What CDA Is About: A Summary of Its History, Important Concepts and Its Development” in Ruth Wodak & Michael Meyer, eds, *Methods of Critical Discourse Analysis*, 1st ed (London, UK: SAGE Publications, 2001) 1 at 3. See also Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, 2nd ed (Oxon, UK: Routledge, 2013) at 3.

<sup>20</sup> Judith Butler, *Bodies that Matter: On the Discursive Limits of “Sex”* (New York, NY: Routledge, 1993) at 187. See also Clare Macmartin, “Judicial Constructions of the Seriousness of Child Sexual Abuse” (2004) 36:1 *Can J Behavioural Science* 66 at 69.

<sup>21</sup> Apeksha Vora, “Into the Shadows: Examining Judicial Language in Revenge Porn Cases” (2017) 18:1 *Geo J Gender & L* 229 at 244.

<sup>22</sup> Gotell, “Discursive Disappearance”, *supra* note 9 at 134.

<sup>23</sup> Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R v JA” (2012) 24:2 *CJWL* 359 at 362, 387.

<sup>24</sup> Mylynn Felt, “The Incessant Image: How Dominant News Coverage Shaped Canadian Cyberbullying Law” (2015) 66 *UNBLJ* 137 at 147; Aikenhead, “Non-Consensual Disclosure”, *supra* note 16 at 119.

<sup>25</sup> Felt, *supra* note 24 at 137; Jane Bailey, “Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliament Debates on ‘Cyberbullying?’” (2014) 37:2 *Dal LJ* 661.

depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

(2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.<sup>26</sup>

The responses to section 162.1 were mixed, with some praising the Bill for filling in a grey area in the law and through criminalization, recognizing, and legitimizing victim experiences. Furthermore, some argued that through criminalization, the law assigned an important moral blameworthiness to NCIID.<sup>27</sup> Given the increasingly common occurrence of NCIID,<sup>28</sup> the absence of a specific criminal offence to deal with NCIID

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<sup>26</sup> *Criminal Code*, RSC 1985, c C-46, s 162.1 [Code].

<sup>27</sup> Carissima Mathen, “Crowdsourcing Sexual Objectification” (2014) 3:3 *Laws* 529 at 530; Dodge & Spencer, *supra* note 6 at 4. Other concerns raised included that Bill C-13, the precursor to section 162.1, was too focused on criminal, punitive measures rather than efforts to examine and ameliorate border systemics attitudes such as rape culture and slut shaming which allowed for the distribution in the first place: Hannah Choo, “Why we are Still Searching for Solutions to Cyberbullying: An Analysis of the North American Responses to Cyberbullying Under the Theory of Systemic Desensitization” (2015) 66 *UNBLJ* 52 at 72-73; Shariff & DeMartini, *supra* note 5 at 281-94; Dodge, “Digitizing Rape Culture”, *supra* note 5 at 76. Others have noted that the criminalization of NCIID may deter youth from reporting incidences which occur: Patricia I Coburn, Deborah A Connolly & Ronald Roesch, “Cyberbullying: Is Federal Criminal Legislation the Solution?” (2015) 57:4 *Can J Corr* 566 at 571.

<sup>28</sup> Carolyn A Uhl et al, “An Examination of Non-Consensual Pornography Websites” (2018) 28:1 *Feminism & Psychology* 50 at 51; Kathryn Branch et al, “Revenge Porn Victimization of College Students in the United States: An Exploratory Analysis” (2017) 11:1 *Intl J Cyber Criminology* 128 at 138; Shari Madigan et al, “Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systematic Review and Meta-analysis” (2018) 172:4 *JAMA Pediatrics* 327 at 327; Asia A Eaton, Holly Jacobs & Yanet Ruvalcaba, “2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report” (June 2017) at 16, online (pdf): *Cyber Civil Rights Initiative* <[www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Resear](http://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Resear)

was becoming a concern for many activists.<sup>29</sup> While Canadian statistics are sparse,<sup>30</sup> some US studies estimate that between four to 12.8% of adults may have been victims of, or threatened with, NCIID.<sup>31</sup>

One concern regarding section 162.1 was that the requirement for the complainant to hold a reasonable expectation of privacy at the time that the image was created and distributed might lead judges to focus their attention on whether or not the expectation of privacy was unreasonable and lead to victim blaming, as opposed to understanding the offence as gender-based violence.<sup>32</sup> The section also raised concerns about the way in which privacy is conceived. Moira Aikenhead notes that both the voyeurism offence and section 162.1 in the *Code* “are gendered crimes, and if they are not taken seriously by governments, courts, and the general public, they pose a serious threat to women’s and girls’ equality rights. As such, it is worrisome that the legally amorphous concepts of “reasonableness” and “privacy” are central to each offence.”<sup>33</sup> The decision on voyeurism in *R v Jarvis*<sup>34</sup> is likely to have a significant, potentially positive, impact on the interpretation of section

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ch-Report.pdf] <[perma.cc/52JL-LBB6](https://perma.cc/52JL-LBB6)>; Amanda Lenhart, Michele Ybarra & Myeshia Price-Feeney, “Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of ‘Revenge Porn’” (December 2016), online (pdf): *Centre for Innovative Public Health Research: Data and Society Research Institute*, <[datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf)> [[perma.cc/HH5K-EJTY](https://perma.cc/HH5K-EJTY)].

<sup>29</sup> West Coast LEAF, “#CyberMisogyny”, *supra* note 6.

<sup>30</sup> Richard Jochelson et al, “Intimate Images and the Law” in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective*, (Bradford, ON: Demeter Press, 2019) 101 at 107; Vera-Lynn Kubinec, “More than 1,300 Manitobans Seek Help After Intimate Images Shared”, *CBC News* (27 April 2018), online: <[www.cbc.ca/news/canada/manitoba/revenge-porn-help-online-1.4637615](https://www.cbc.ca/news/canada/manitoba/revenge-porn-help-online-1.4637615)> [[perma.cc/YC4M-Z7V4](https://perma.cc/YC4M-Z7V4)]; Manitoba, News Release, “Province Announces New Law in Force Helps Victims of Revenge Porn, Unwanted Distribution of Sexual Pictures” (18 January 2016) online: <[news.gov.mb.ca/news/index.html?item=37330](https://news.gov.mb.ca/news/index.html?item=37330)> [[perma.cc/H22R-B5UL](https://perma.cc/H22R-B5UL)]; Statistics Canada, *Incident-Based Crime Statistics, by Detailed Violations, Canada, Provinces, Territories and Census Metropolitan Areas*, Table 35-10-0177-01 (Ottawa: Statistic Canada, 2018), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.257](https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.257)> [[perma.cc/N56K-V5QK](https://perma.cc/N56K-V5QK)].

<sup>31</sup> Some studies of youth have estimated that the incidence of NCIID among youth is higher than adults. One study found that one in eight youth have either forwarded or had an intimate sext forwarded without consent. See Eaton, Jacobs & Ruvalcaba, *supra* note 28 at 11, 16; Lenhart, Ybarra & Price-Feeney, *supra* note 28 at 4.

<sup>32</sup> Aikenhead, “Non-Consensual Disclosure”, *supra* note 16 at 133.

<sup>33</sup> Aikenhead, “A ‘Reasonable’ Expectation”, *supra* note 16 at 274.

<sup>34</sup> *R v Jarvis*, 2019 SCC 10.



162.1, as the provisions are so similar to each other.<sup>35</sup> While *Jarvis* treated privacy as a positive right which may lead to a more positive, equality grounded interpretation of privacy being used in section 162.1, Aikenhead notes that the failure of the Court to recognize the gendered nature of the offence is a missed opportunity.<sup>36</sup>

Objective standards, such as reasonableness, have been long critiqued by feminist scholars in relation to violent crimes against women.<sup>37</sup> Privacy, more generally, has also been subject to heavy critiques for its tendency to emphasize the importance of intimacy, body, home, and sex.<sup>38</sup> Aikenhead posits that privacy must be treated as a positive right which:

Would ensure that judicial determination of whether a REOP [reasonable expectation of privacy] exists will not turn exclusively on the degree to which a person exercises control over their body or intimate images, which, as demonstrated above, may be increasingly difficult in the digital age. Appearing in public, consenting to be photographed in a sexualized context, or sharing sexualized photographs with some limited audience will not result in an automatic waiver of all privacy expectations when privacy is understood as a positive right.<sup>39</sup>

Thus, in order to unpack discriminatory myths in the judicial treatment of NCIID, I will also look at how privacy is framed within decisions.

### III. FINDINGS

#### A. Framing as “Revenge Porn” and an “Abuse of Trust”

Within the context of sexual assault, scholars have noted the existence of the myth that sexual assault is only committed by strangers, rather than people known to the complainant,<sup>40</sup> and a differential in the treatment of sexual assault committed by strangers compared with known perpetrators.<sup>41</sup>

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<sup>35</sup> Aikenhead, “A ‘Reasonable’ Expectation”, *supra* note 16 at 278.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 282.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at 289.

<sup>40</sup> Elizabeth A Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 483 at 533.

<sup>41</sup> Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 613 at 627.

All of the cases that I examined dealt with perpetrators who committed acts of NCIID against current or former female partners. Therefore, any distinctions between acts of NCIID perpetrated by a stranger versus known perpetrators was not a notable factor. However, it is important to note how NCIID committed by former or current partners is framed within discourses of revenge and abuse of trust.

The use of the phrase “revenge porn” to frame the offence of NCIID has been criticized for the reason that the term revenge “validates a victim-blaming narrative in which a woman becomes an object whose consent was unnecessary or unwarranted given the presumed betrayal in the situation.”<sup>42</sup> Women thereby become the gatekeepers of sexuality, punished for taking the photo in the first place and reducing the extent to which they are seen as victims.<sup>43</sup> Furthermore, framing the image as pornography may serve to conflate images which may be captured and distributed with consent within commercial pornography with those distributed non-consensually.<sup>44</sup> As McGlynn and colleagues note, “the language of porn risks eroticizing the harms of image-based sexual abuse.”<sup>45</sup> This is in line with porn studies scholars who have noted that the inclusion of abusive behaviour under the label of pornography minimizes or even endorses abuse.<sup>46</sup> Pornography is most commonly defined in scholarly work as material deemed sexual in the context, which has the primary intention to sexually arouse the user.<sup>47</sup> What is deemed as pornography is often dependent on a judgement about what is sensible or reasonable in light of the context.<sup>48</sup> In other words, the label of pornography may be a stand-in to deem certain types of sex bad or abnormal, such as sex which may be queer, non-monogamous, and pleasure

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<sup>42</sup> Jochelson et al, *supra* note 30 at 104; Uhl et al, *supra* note 28 at 51.

<sup>43</sup> Nicola Henry & Anastasia Powell, “Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law” (2016) 25:4 Soc & Leg Stud 397 at 398 [Henry & Powell, “Sexual Violence”].

<sup>44</sup> *Ibid* at 401.

<sup>45</sup> Clare McGlynn, Erika Rackley & Ruth Houghton, “Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse” (2017) 25:1 Fem Leg Stud 25 at 38–39. See also Henry & Powell, “Sexual Violence”, *supra* note 43 at 400–01.

<sup>46</sup> Sarah Ashton, Karalyn McDonald & Maggie Kirkman, “What Does ‘Pornography’ Mean in the Digital Age? Revisiting a Definition for Social Science Researchers” (2019) 6:2 Porn Studies 144 at 162.

<sup>47</sup> *Ibid* at 157.

<sup>48</sup> *Ibid* at 152.

focused.<sup>49</sup> Thus, when images distributed without consent are labelled as pornography, it may be a means to deem the images as unacceptable.

A number of cases framed the perpetrator's motive as that of revenge or retribution for wrongs committed by the complainant. In *R v MR*, the Court highlighted the motive of the offender as a relevant and admissible circumstantial issue to establish the offender's identity, noting a series of betrayals on the part of the complainant, including her denial to a school administrator that her and the perpetrator were in a relationship.<sup>50</sup> In *R v Greene*, the Court noted that the perpetrator was motivated by revenge and explicitly drew reference to the frame of revenge porn:

Mr. Greene reacted to the breakup of his relationship with his former girlfriend (X) in a manner which is common to too many men: he threatened her. However, Mr. Greene went much further. He released a video of X, without her consent, in which X is shown having sexual intercourse with another man. This has come to be commonly referred to as "revenge porn". It provides men who are unable to accept the end of a relationship with a new and frightening manner of harming and humiliating their former female partners.<sup>51</sup>

While the Court in *Greene* makes mention of revenge as a motive and labels the NCIID as revenge porn, it simultaneously calls out the distribution as a "manner of harming and humiliating", thus countering somewhat the problematics of the revenge framework.<sup>52</sup> Several other cases explicitly noted that while revenge may have been a factor, particularly articulated by the accused in relation to why he committed the offence, it was not an excuse or justification for the behavior. In *R v AC*, the Court noted that the conduct in the case was known colloquially as "revenge porn".<sup>53</sup> However, the Court also went on to opine that while the accused explained that his behavior resulted from the victim's unfaithfulness and physical abuse, that information was irrelevant: "whether C.S. was

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<sup>49</sup> Clarissa Smith & Feona Attwood, "Anti/Pro/Critical Porn Studies" (2014) 1:1/2 Porn Studies 7 at 12; Clarissa Smith & Feona Attwood, "Emotional Truths and Thrilling Slide Shows: The Resurgence of Antiporn Feminism" in Tristan Taormino et al, eds, *The Feminist Porn Book: The Politics of Producing Pleasure*, (New York, NY: Feminist Press at CUNY, 2013) 41 at 45 [Smith & Attwood, "Emotional Truths"].

<sup>50</sup> *R v MR*, 2017 ONCJ 558 at para 143 [MR].

<sup>51</sup> *R v Greene*, 2018 CanLII 25580 (NL PC) at para 1, 146 WCB (2d) [*Greene*].

<sup>52</sup> *Ibid.*

<sup>53</sup> *R v AC*, 2017 ONCJ 317 at para 18 [AC 1].

unfaithful or physically abusive is irrelevant, and does not justify uploading private images of her for the world to see.”<sup>54</sup>

Similarly, in *R v JTB*, the Court quoted *R v Denkers*, noting that:

This victim, and others like her, are entitled to break off romantic relationships. When they do so they are entitled to live their lives normally and safely. They are entitled to live their lives free of harassment by and fear of their former lovers. The law must do what it can to protect persons in those circumstances.<sup>55</sup>

In addition, several cases referenced revenge porn in relation to the parliamentary intent behind the section. In these cases, revenge porn was found in direct quotes from parliamentary debates.<sup>56</sup>

One problematic framing took place in *R v Haines-Matthews*,<sup>57</sup> in which a sexually explicit video was distributed without consent. The fact that a video, rather than pictures, was distributed, it was deemed by the Court to be an aggravating factor because “[s]uch a recording tends to take on the appearance of a pornographic film which, in my view, exacerbates the harm caused.”<sup>58</sup> No other cases that I examined delineated between intimate images and photos in this way to deem a video as an aggravating factor.

Thus, while cases referenced revenge as a motive for the accused’s actions, overall, the victim blaming undercurrents of these frameworks were destabilized through explicit denunciation of the relevance of revenge for determining moral blameworthiness. At the same time, the evocation of pornography to justify film distribution as an aggravating factor in *Haines-Matthews*<sup>59</sup> problematically eroticizes the harm and can be viewed, potentially, as a means to ascribe a derogatory label to the initial video which was taken consensually.

Another interesting framing, resulting from the close relationship between the complainant and accused in cases, was that the close relationship provided a ground for the Court to deem the behavior more serious than it would be had there not been a prior relationship, seemingly reversing the paradigm found in cases of sexual assault. Under subparagraph 718.2(a)(iii) of the *Code*, breach of trust is a statutorily mandated aggravating

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<sup>54</sup> *Ibid* at para 48.

<sup>55</sup> *Supra* note 1 at para 40; *R v Denkers*, [1994 CanLII 2660 \(ON CA\) at 5–6](#), 69 OAC 391.

<sup>56</sup> *R v MR*, 2017 ONCJ 943 (CanLII) [*MR Sentencing*]; AC 1, *supra* note 53 at para 18.

<sup>57</sup> 2018 ABPC 264 at para 20 [*Haines-Matthews*].

<sup>58</sup> *Ibid* at para 20 [emphasis added].

<sup>59</sup> *Ibid*.

factor.<sup>60</sup> Breach of trust as an aggravating factor was drawn on with frequency in a number of the cases that I reviewed and given a liberal interpretation.<sup>61</sup>

In AC, the intimate videos were taken consensually within the context of a four-year dating relationship and after the relationship dissolved, were posted online:

Strictly speaking, the conduct here does not fall squarely within the statutorily aggravating breach of trust described in s.718.2(a)(iii) because when the offender committed the offence he was no longer in a position of trust. Nonetheless, it does constitute a breach of C.S.'s trust that I find to be an aggravating factor. The *Criminal Code's* list of sentencing factors does not purport to be exhaustive. The images were created consensually in the context of a romantic relationship. C.S. believed that the images would not be shared beyond that relationship. It is no surprise that C.S. said "I will never trust anyone again."<sup>62</sup>

Likewise, in *Greene*, the Court drew on subparagraph 718.2(a)(iii) in sentencing, although the offence took place after the relationship had ended.<sup>63</sup> Drawing on words from the Sentencing Council, the Court noted that:

[C]ourts should recognize that the "domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them."<sup>64</sup>

Similarly, in *R v NN*,<sup>65</sup> the Court did not know if the complainant and accused were common-law or not. The only information the judge had was that the dating relationship had been going on for one and a half years, yet the judge attributed breach of trust as an aggravating factor:

Certainly someone who for a year and a half is in an intimate relationship with an individual, it may be bordering on a common-law relationship. I don't know if that [s.718.1(a)(ii)] applies in this case, but the breach of trust that exists in respect of the intimate images that were provided by L.C. to N.N., I don't think there can be any doubt.<sup>66</sup>

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<sup>60</sup> *Code*, *supra* note 26, s 718.2(a)(iii).

<sup>61</sup> See e.g. *R v AC*, 2017 ONCJ 129 (CanLII) at para 83 [AC 2]; *MR Sentencing*, *supra* note 56; *R v JS*, 2018 ONCJ 82 (CanLII) [JS].

<sup>62</sup> *AC 1*, *supra* note 53 at paras 4–5, 44.

<sup>63</sup> *Supra* note 51 at para 36.

<sup>64</sup> *Ibid* at para 34.

<sup>65</sup> *R v NN*, 2019 ONCJ 512 at para 341 [NN].

<sup>66</sup> *Ibid*.

In the disturbing case of *JTB*,<sup>67</sup> the accused impersonated his wife online in an attempt to solicit a stranger to sexually assault her under the guise of acting out the victim's supposed rape fantasy. The accused distributed 42 intimate photos of the complainant, along with identifying information, including her name and workplace, and degrading hashtags.<sup>68</sup> At the time of the offence, the accused and the victim were spouses, although separated.<sup>69</sup> The Court deemed the close nature of the relationship to be an aggravating factor in accordance with subparagraph 718.2(a)(ii) and went on to note that:

Even without that statutory provision, however, Mr B. was tormenting his former romantic partner, simply because he could not tolerate the fact she no longer wanted to be with him. If Mr B. had not still been formally married to Ms B., I think that would have represented an aggravating factor in any event.<sup>70</sup>

The Court proceeded to explain how the accused's trusted position allowed him to take the images in the first place and effectively impersonate Ms. B in an attempt to solicit a stranger to rape her.<sup>71</sup>

These cases show that relationships between the complainant and perpetrator result in offences being seen as more serious than they would otherwise be deemed. In other words, the close relationship between the complainant and the accused is not being used to excuse or explain the act of non-consensual distribution. Rather, judges are perceiving the abuse of trust to be an aggravating factor. This correlates with scholarship which found that members of the public tend to attribute less blame to the victim in a hypothetical scenario when an intimate image was shared consensually in an established relationship compared with when such an image was initially provided early in a relationship.<sup>72</sup> This tendency to attribute less blame to the victim was due to the perception that, in the context of an existing relationship, there was a more serious breach of trust by the perpetrator.<sup>73</sup> This seemingly conflicts with some myths and trends in the context of cases of sexual assault wherein an assault by a partner is less likely to be recognized as an assault compared with an assault committed by a

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<sup>67</sup> *Supra* note 1 at para 11.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* at para 97.

<sup>71</sup> *Ibid.*

<sup>72</sup> Tegan S Starr & Tiffany Lavis, "Perceptions of Revenge Pornography and Victim Blame" (2018) 12:2 Intl J Cyber Criminology 427 at 434.

<sup>73</sup> *Ibid.*

stranger.<sup>74</sup> Furthermore, while revenge is acknowledged as a motive and the frame of revenge pornography is used in some cases, in general, judges do not appear to accept narratives which use such frames in order to attribute blame and responsibility to female victims or to deem the initial act of sharing an image as immoral.

## B. The Perfect Victim

Another discriminatory stereotype which has informed cases of sexual assault includes the construction of the perfect victim. The perfect victim is someone of undisputed high moral character, engaging in low risk behavior, who is a virgin, and who is suddenly attacked and violently forced into a sexual act.<sup>75</sup> Women who fall out of the perfect victim frame thereby become responsible for their own victimization. Gillian Balfour and Janice Du Mont note that “[w]omen have been long cast as responsible for their victimization because of their conduct and dress, and as lustful liars who deceive the courts as to their consent to sex.”<sup>76</sup> Indeed, within campaigns against NCIID, Karaian argued that white, heterosexual femininity was privileged and the campaigns focused on the behavior of the victim, rather than the perpetrator.<sup>77</sup> Thereby, these anti-NCIID campaigns promoted women’s digital abstinence or risk management.<sup>78</sup> Victim blaming tendencies, whereby women are called out for engaging in consensually sharing the image in the first place, have been noted in police<sup>79</sup> and media responses to NCIID.<sup>80</sup> Several scholars have pointed to the construction of the idealized victim in NCIID, noting that:

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<sup>74</sup> Sheehy, *supra* note 40 at 533; Johnson, *supra* note 41 at 627.

<sup>75</sup> Schulze, Koon-Magnin & Bryan, *supra* note 7 at 90.

<sup>76</sup> Gillian Balfour & Janice Du Mont, “Confronting Restorative Justice in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, (Ottawa: University of Ottawa Press, 2012) 701 at 716.

<sup>77</sup> Karaian, *supra* note 3 at 291.

<sup>78</sup> *Ibid* at 284; Samantha Bates, “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors” (2017) 12:1 *Feminist Criminology* 22 at 25.

<sup>79</sup> Dodge & Spencer, *supra* note 6 at 15; Hasinoff, *supra* note 4 at 203.

<sup>80</sup> Fairbairn, *supra* note 3 at 239; Hasinoff, *supra* note 4 at 203.

The idealized victim... is not a woman who has engaged in overt sexual expression outside of the bounds of acceptable femininity, such as voluntarily sending sexually explicit pictures. Such a victim is often blamed for inviting her own victimization.<sup>81</sup>

Within the cases reviewed, there was a general absence of overt examples of the idealized perfect victim, although there were some exceptions. The riskiness of the victim's behavior was commented upon in *NN*. The judge noted that "certainly there is a risk that when someone provides such images... that those images may find their way out into the public, and that is a cautionary tale,... to every member of our community."<sup>82</sup> The judge went on, however, to explicitly note that the risk did not lessen the culpability of the offender.<sup>83</sup>

It is notable that the complainant's initiation of the initial consensual intimate image sharing was commented upon in two different cases. In *R v Agoston*,<sup>84</sup> Agoston's co-worker sent two naked photos of Agoston to the complainant using Agoston's phone. Agoston claimed that while he knew that his co-worker was texting with the complainant using his phone, he did not know that any sexually explicit photos had been sent.<sup>85</sup> Agoston also denied that one of the two photos were of him.<sup>86</sup> The complainant, believing that the photos were of Agoston, responded by sending two sexually explicit photos of herself.<sup>87</sup> After the images were received by Agoston, he showed them to his co-workers, although did not share them online.<sup>88</sup> The judge determined that "[t]here was no planning or deliberation on the part of Mr. Agoston to obtain the images in question. Indeed, it is acknowledged that he did not solicit the images."<sup>89</sup>

Notably, the judge went on to ascribe a lack of planning to Agoston's distribution of the images, finding that "[t]here is nothing before me to suggest that this offence constituted something other than a momentary

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<sup>81</sup> Jochelson et al, *supra* note 30 at 160-61; Hasinoff, *supra* note 4 at 211-12; Shariff & DeMartini, *supra* note 5 at 286; Dodge, "Digitizing Rape Culture", *supra* note 5 at 74; Staff & Lavis, *supra* note 73 at 428.

<sup>82</sup> *NN*, *supra* note 65 at para 347.

<sup>83</sup> *Ibid.*

<sup>84</sup> 2017 ONSC 3425 (CanLII) at para 3 [*Agoston*].

<sup>85</sup> *Ibid* at para 6.

<sup>86</sup> *Ibid* at para 4.

<sup>87</sup> *Ibid* at paras 3-5.

<sup>88</sup> *Ibid* at paras 7, 17.

<sup>89</sup> *Ibid* at para 21 [emphasis added].



lapse in judgment.”<sup>90</sup> Although it is not explicitly delineated, it is conceivable that the fact that the accused received the images, allegedly without solicitation on his part, played into the judge’s decision to also attribute a lack of forethought to the accused concerning distribution. If we read Agoston’s receipt of the images as a form of non-consensual harassment by the complainant, we may wonder what motivations underpinned Agoston’s choice to subsequently share the images without consent. Perhaps it was for the purpose of shaming or humiliating the sender.<sup>91</sup> In this context, the judge’s decision to ascribe less responsibility to Agoston is perhaps understandable in some respects, although it is also arguable that revenge should never be an acceptable reason to excuse responsibility for later distributing an image without consent. However, if we presume that the complainant genuinely believed the person texting her was Agoston and responded to him in the context of that consensual exchange of images, it is highly problematic that Agoston’s later distribution of the images would be deemed unintentional or accidental. While another factor in this case that may have played into the lack of forethought ascribed to Agoston was that the images were not distributed online, the complainant, by consensually sharing her intimate images in response to images received, was seemingly made responsible for her later victimization.

In evaluating the credibility of both the complainant’s and accused’s testimony, the Court in *MR*<sup>92</sup> examined the argument made by the accused that the complainant had sent him intimate photos without his solicitation. The accused argued that not only had the complainant sent photos without his prompting, but that he had actually told the complainant to refrain from doing so.<sup>93</sup> When the accused failed to provide any proof that the photos were unwelcome, the Court rejected his argument, noting that:

If this was truly happening without his consent and participation, I think there would have been a more fundamental conflict in their relationship, centered around her unwillingness to cease sending forbidden material to him.<sup>94</sup>

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<sup>90</sup> *Ibid* at para 45.

<sup>91</sup> Andrea Waling & Tinonee Pym, “‘C’mon, No One Wants a Dick Pic’: Exploring the Cultural Framings of the ‘Dick Pic’ in Contemporary Online Publics” (2019) 28:1 *J Gender Studies* 70 at 75–76.

<sup>92</sup> *Supra* note 50.

<sup>93</sup> *Ibid* at paras 69–70.

<sup>94</sup> *Ibid* at para 72.

Given this decision, the Court did not further comment upon how an unsolicited image may have impacted an assessment of culpability following the later non-consensual distribution. These cases demonstrate how courts wrestle with questions of whether the initial receipt of the image was consensual and that the determination of this issue may shape how subsequent non-consensual distribution is viewed.

While in the cases I examined there were no explicit condemnations of a victim's resistance or lack of resistance, the behavior of the victim was commented upon in several instances. In *JS*,<sup>95</sup> the victim discovered hidden cameras and intimate images posted online and directed the offender to stop, "[s]he demanded that he fix it. He said that he would and, instead, continued to post videos of their sexual activity on a variety of online platforms."<sup>96</sup> The judge went on later to state again that "[s]he made it known that these recordings were only for his private viewing."<sup>97</sup>

In *MR*,<sup>98</sup> the judge provided an explanation as to why the complainant had not brought the issue of photo distribution to the attention of the perpetrator immediately by direct confrontation. The judge noted that:

Considered within the context of a rocky relationship, and her perception that it was touch and go as to whether the relationship would endure, I do not find it incredible that she failed to immediately confront the defendant as the source of photos being distributed, particularly when, as I will address in a moment, she could not find any evidence on Reddit immediately after being notified by the defendant.<sup>99</sup>

While this failure to resist was made in the context of the judge's assessment of the credibility of the victim's story, it shows how the appropriateness of a victim's resistance or lack of resistance calls the attention of the Court. We also see that, in some cases, the Court commented upon the riskiness of engaging in consensual intimate image sharing as well as commenting upon situations in which the complainant was the initiator of sharing intimate images. However, in general, there was an absence of courts engaging in constructing the perfect victim.

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<sup>95</sup> *Supra* note 61 at para 30.

<sup>96</sup> *Ibid* at para 1.

<sup>97</sup> *Ibid* at para 4.

<sup>98</sup> *Supra* note 50.

<sup>99</sup> *Ibid* at para 65.

### C. Accidents and Uncontrollable Sexual Desire

Another discriminatory stereotype identified in sexual assault cases is that perpetrators did not mean to assault the victim, that the incident happened by accident or unintentionally, or that alcohol or uncontrollable male sex drive are to blame.<sup>100</sup> In such a frame, men are inevitable perpetrators and victims are held responsible to avoid violence through the practice of certain activities.<sup>101</sup> Researchers examining sexting practices have similarly noted the way in which young men are conceived of as “natural violators of trust deployed to bolster heterosexual masculinity,” wherein women are perceived to be at risk of shame.<sup>102</sup> The notion that male sexuality is inherently dangerous, misogynistic, and predatory is a notion rooted in idealized discourses of masculinity and heteronormativity.<sup>103</sup>

In the cases that I reviewed, a high degree of intentionality was generally attributed to the actions of perpetrators and the offence was rarely framed as an accident. As discussed, revenge as a motive was perceived as an aggravating factor in several cases.<sup>104</sup> It is perhaps not surprising that revenge and intentionality were linked together as an aggravating factor in AC,<sup>105</sup> the judge noting that “[t]he offender deliberately set out to violate C.S.’s privacy in a most obscene and far-reaching way. He did so, motivated by revenge, with the intent to degrade and humiliate her.”<sup>106</sup>

In MR, the Court noted that the actions of the accused showed premeditation and steps to avoid detection, as the accused used an anonymizing email service to distribute the intimate images on two separate occasions, at least a month apart.<sup>107</sup> The Court opined that the accused was “totally responsible for his conduct.”<sup>108</sup> The Court went on to note that:

The distribution of intimate images is addressed by a single count, but the conduct occurred twice. Once in October and once in November, after arrest and release

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<sup>100</sup> Schulze, Koon-Magnin & Bryan, *supra* note 7 at 91; Clare MacMartin & Linda A Wood, “Sexual Motives and Sentencing: Judicial Discourse in Cases of Child Sexual Abuse” (2005) 24:2 J Language & Soc Psychology 139 at 139-40.

<sup>101</sup> Fairbairn, *supra* note 3 at 239.

<sup>102</sup> Waling & Pym, *supra* note 91 at 72.

<sup>103</sup> *Ibid.*

<sup>104</sup> See e.g. AC 2, *supra* note 61 at para 81; MR, *supra* note 50; Greene, *supra* note 51; AC 1, *supra* note 53; JTB, *supra* note 1.

<sup>105</sup> AC 1, *supra* note 53.

<sup>106</sup> *Ibid* at para 62.

<sup>107</sup> MR Sentencing, *supra* note 56 at para 5.

<sup>108</sup> *Ibid* at para 14.

on conditions. I cannot quantify how aggravating that factor is. This gentleman thumbed his nose at the police and the court conditions, and focused, singularly, on causing harm to the complainant, and in particular, her father.<sup>109</sup>

Thus, intentionality was linked together along with an intent to cause harm to the known complainant, drawing on revenge and breach of trust narratives. This is similarly reflected in *JS*, in which the Court attributed a high degree of intention to the offender after the perpetrator posted videos of his and the complainant's sexual activity online, even after the complainant had confronted the perpetrator regarding his conduct:

The inferred impact on victims is substantial and the moral responsibility of the offender will generally be high. The act involves a flagrant intrusion into the privacy and personal dignity of the victim. The accompanied intent will often involve a desire to degrade, humiliate and maintain the illusion of some control over the victim.

I am mindful that J.S. is a first time offender and has been struggling with addiction and mental health issues. However, this was not an offence driven by impulse. Rather, it was a repeated and calculated course of action apparently designed to diminish and degrade the vulnerable victim. The consequences have been significant and lasting.<sup>110</sup>

In *JTB*,<sup>111</sup> the Court noted that the accused's conduct, creating online profiles to entice strangers to sexually assault his spouse, demonstrated intentionality, planning, and forethought. The planning undertaken was a significant aggravating factor:

In my view, all of the crimes committed by Mr B. exhibited a remarkable degree of cold and calculated planning and forethought, distinguishing them considerably from crimes of opportunity, spontaneous or impulsive misconduct, or momentary lapses in moral judgment. That is perhaps most obvious in relation to his elaborate creation of website postings and sustained text messaging repeatedly publishing intimate images of Ms B. to lure and deceive persons such as Mr Y., and his careful and prolonged manipulation of Mr Y. to orchestrate the attack and sexual assault on Ms B.<sup>112</sup>

In *Haines-Matthews*,<sup>113</sup> the complainant consented to taking intimate photos and videos on the condition that they would not be distributed. The accused subsequently sent the photos of him and the complainant to his ex-girlfriend and also posted the video and photos onto Facebook and

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<sup>109</sup> *Ibid* at para 17.

<sup>110</sup> *Supra* note 61 at paras 34, 37.

<sup>111</sup> *Supra* note 1 at para 97.

<sup>112</sup> *Ibid*.

<sup>113</sup> *Supra* note 57 at para 5.

Instagram.<sup>114</sup> The Court noted that “[a]t any point in the not insignificant time it took to execute the plan, the offender could have stopped what he was doing. He chose not to do so.”<sup>115</sup>

In *R v Borden*,<sup>116</sup> the perpetrator came into possession of intimate images of her ex-partner’s new partner and shared the photos online. The Court attributed to her a high degree of responsibility:

In this case, Ms. Borden posted several photographs of Ms. X on-line. She was attempting to humiliate Ms. X and would have known that a significant number of individuals were likely to see what she had posted. This was not a mistake or an error in judgment. This was a willful and purposeful act.<sup>117</sup>

Alongside the attribution of intentionality to the accused, a related theme was the Court perceiving that technology made it easier for the offence to be committed. In *NN*, the Court noted the ease with which offences can be committed due to technological advances:

[I]t is certainly an offence that is starting to occur with more regularity than it did prior to the invention of cell phones that take instant pictures or SLR cameras that don't need film, and so there's certainly more opportunity for these types of images now to be taken between consenting adults... it may be that these types of offences can be committed with more ease today because of the technological advances.<sup>118</sup>

Although the Court determined that technology made the offence easier to commit, it nevertheless found that the accused had a high moral culpability “because he was the only person who could have published those images. They were given to him and him alone, and it was given to him in trust, in an intimate relationship.”<sup>119</sup> Thus, while technology may have reduced the intentionality of the accused, the breach of trust was so significant as to counter any reduction in the accused’s moral culpability.

Alexa Dodge echoes this finding, noting that judges are perceiving NCIID as easier to commit, yet perceiving the resulting harm to the victims as extremely high, thereby justifying harsher sentences:

I find that the majority of judges perceive digital/online technology as making NCIID easier to commit—with the simple “click of a mouse”—and as increasing the amount of harm caused by this act—as digital nude/sexual photos are seen as lasting “forever” and thus as resulting in ongoing and immeasurable harm to

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<sup>114</sup> *Ibid* at paras 14–15.

<sup>115</sup> *Ibid* at para 52.

<sup>116</sup> 2019 CarswellNfld 141 at para 1, 154 WCB (2d) 715 [*Borden*].

<sup>117</sup> *Ibid* at para 46.

<sup>118</sup> *Supra* note 65 at para 348.

<sup>119</sup> *Ibid* at para 347.

victims. I assert that these perceptions have substantive impacts on legal rationales and sentencing decisions, with the affordances of digital/online technology regularly being treated as justifying harsher sentences to denounce and deter this act.<sup>120</sup>

Dodge argues that a techno panic has influenced legal discourse to make the harms of NCIID seem novel and in need of enhanced reactions.<sup>121</sup> This techno panic has been highlighted as a specifically gendered phenomenon surrounding media representation of girls and technology. Several scholars point to the development of narratives around sexting which portray girls as either being in constant danger from online predators or loose cannons when it comes to technology.<sup>122</sup> Women's sexual agency in such a narrative is associated with vulnerability, whereas men are deemed to be lacking in intimate connections.<sup>123</sup> Furthermore, scholars have pointed to how contemporary debates on sexting have been framed in relation to heteronormative understandings of sexuality and cisgender ideals of gender.<sup>124</sup> Unsurprisingly, same-sex attracted women and men are not generally included in discussions of sexting or presumed to be vulnerable to sexualization.<sup>125</sup>

Dodge also discusses the notion that technology itself has become implicitly “leaky” or “promiscuous” such that individuals have little ability to resist its power:

He [the defendant] describes the technology as extremely easy to use, thus allowing him to share the images with-out actually *thinking* about it—it was just the “thoughtless push of a button.” We might call this the “just one click” defense. This defense deflects blame from the offender by relying on a perspective of technological determinism that sees new technologies as “causal agents” that act on individuals in ways they have “little power to resist”.<sup>126</sup>

It is this leakiness which has been used by police and others to undergird narratives which focus on nonconsensual distribution as the inevitable

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<sup>120</sup> Dodge, “Nudes are Forever”, *supra* note 17 at 122–23.

<sup>121</sup> *Ibid* at 130.

<sup>122</sup> Crooks, *supra* note 3 at 47; Lee & Crofts, *supra* note 3.

<sup>123</sup> Waling & Pym, *supra* note 91 at 79.

<sup>124</sup> Kath Albury & Paul Byron, “Queering Sexting and Sexualisation” (2014) 153:1 Media Intl Australia 138 at 138.

<sup>125</sup> *Ibid* at 140, 145.

<sup>126</sup> Dodge, “Nudes are Forever”, *supra* note 17 at 131–32.

outcome of sending images in the first place.<sup>127</sup> These types of narratives play into victim blaming and responsabilization myths.

This leakiness was not as apparent in the cases that I examined, although was present to some extent. For example, the close nature of the relationship, the perpetrator's uncontrollable anger, and limited electronic distribution was used to attribute less intentionality to the accused. In *R v PSD*,<sup>128</sup> the complainant returned after a night out with friends to find Mr. D, the accused, in her driveway. They left together in a car and at some point, Mr. D took pictures of the complainant, without consent, while she was only partially clothed and sent the photos to two of his friends.<sup>129</sup> While recognizing the harm caused by the transmission of the images, the judge determined that Mr. D's decision to take the pictures was a rash decision and forwarding them to his friends "shows some planning but nothing beyond that transmission has occurred."<sup>130</sup> In coming to the determination that Mr. D's actions were rash, the Court emphasized the tumultuous nature of the relationship: "Mr. D.'s behavior came at a time when he was very frustrated and angered by seemingly mixed signals – a putting off of communication by Ms. S. without a certain end to the relationship."<sup>131</sup> The Court went on to say that:

In the end, I conclude that, while the gravity of the offence in general is significant, the circumstances of this particular case are less egregious than, for example, a case involving significant planning and forethought and resulting in a transmission of identifiable intimate images widely distributed on the internet. The sentence must be proportionate to those considerations.<sup>132</sup>

Likewise, in *Agoston*,<sup>133</sup> as discussed, the accused allegedly did not solicit the pictures in question, but after receiving them from the complainant showed them with two friends. The Court attributed to the accused a lack of planning, both in terms of obtaining the images and in terms of showing the images to his friends.<sup>134</sup> Once again, in coming to this determination, the Court highlighted the limited distribution as an important factor.<sup>135</sup>

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<sup>127</sup> *Ibid.*

<sup>128</sup> 2016 BCPC 400 at para 5 [*PSD*].

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* at paras 12-13.

<sup>131</sup> *Ibid* at para 12.

<sup>132</sup> *Ibid* at para 15.

<sup>133</sup> *Supra* note 84 at paras 3-7.

<sup>134</sup> *Ibid* at para 17.

<sup>135</sup> *Ibid.*

Alexa Dodge notes that courts are weighing the level of digital dissemination when justifying sentencing decisions and determining the gravity of the offence.<sup>136</sup> These two cases suggest that some courts may be associating limited distribution with a lack of intentionality on the part of the accused.

## D. Gendered Violence and Victim Impact

Many scholars would argue that NCIID should be seen as a part of a continuum of gendered, sexualized violence.<sup>137</sup> While women are the primary victims of online sexualized violence, generally, some studies indicate that men may experience some forms of online sexualized violence at rates comparable to women.<sup>138</sup> Notably, the harassment which is directed at men and boys often includes denigration on the basis of actual or perceived sexual or gender identity.<sup>139</sup> Furthermore research also shows that those who have experienced NCIID are more likely to be racialized,<sup>140</sup> have disabilities,<sup>141</sup> or identify as LGBTQ2S\*.<sup>142</sup> Therefore, it is helpful to think of NCIID as a gendered phenomenon which also interplays with other marginalized identities.<sup>143</sup>

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<sup>136</sup> Dodge, “Nudes are Forever”, *supra* note 17 at 132.

<sup>137</sup> McGlynn, Rackley & Houghton, *supra* note 45 at 26; Dodge & Spencer, *supra* note 6; Powell, *supra* note 5 at 76; West Coast LEAF, “#CyberMisogyny”, *supra* note 6.

<sup>138</sup> Henry & Powell, “Sexual Violence”, *supra* note 43 at 399; Nicola Henry & Anastasia Powell, “Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence” (2015) 21:6 *Violence Against Women* 758 at 759 [Henry & Powell, “Technology-Facilitated”]; Eaton, Jacobs & Ruvalcaba, *supra* note 28 at 12.

<sup>139</sup> Anastasia Powell & Nicole Henry, *Sexual Violence in a Digital Age* (London, UK: Palgrave MacMillan, 2017) at 5 [Powell & Henry, *Digital Age*].

<sup>140</sup> Branch et al, *supra* note 28 at 138.

<sup>141</sup> Emma Bond & Katie Tyrrell, “Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales” (2018) *J Interpersonal Violence* 1 at 3, DOI: <10.1177/0886260518760011>.

<sup>142</sup> *Ibid.* See also Henry and Powell, “Technology-Facilitated”, *supra* note 138 at 198; Citizen Lab, Munk School of Global Affairs, “Submission of the Citizen Lab (Munk School of Global Affairs, University of Toronto) to the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Dubravka Simonovic” (2 November 2017) at 2, online (pdf): <citizenlab.ca/wp-content/uploads/2017/11/FinalUNSRVAG-CitizenLab.pdf> [perma.cc/UH9R-39EL].

<sup>143</sup> Powell & Henry, *Digital Age*, *supra* note 139 at 6.



Yet, some would contend that categorizing NCIID as sexual violence still involves “working against a strong social current of resistance.”<sup>144</sup> In an analysis of Canadian and US media coverage of NCIID between 2011 and 2014, the word ‘violence’ was only used once in reference to NCIID. Rather, NCIID was more commonly described with words labelling it as an experience of ‘harassment’, ‘humiliation’, and ‘cyberbullying’.<sup>145</sup> As Powell notes:

There is arguably a false distinction currently operating in law, policy and public debates between unauthorized sexual imagery as distinct from sexual violence. One is seen as merely a distasteful violation of privacy... and the other a criminal violation of bodily integrity.<sup>146</sup>

Similarly, the tendency to ignore sexual assault as a gendered, violent crime was noted in analyses of sexual assault cases. Lise Gotell, in her discussion of sexual violence more generally, notes that “[t]he judicial focus on privacy encourages a legal analysis that is both degendered and decontextualized.”<sup>147</sup> In Gillian Balfour and Janice Du Mont’s 2012 study of conditional sentencing decision of sexual assault, they argue that the legal narrative surrounding conditional sentences reflected the failure of the courts to denounce rape as a gendered, violent crime and show the invisibility of raped women and the harms experienced.<sup>148</sup> They posited that this tendency was a further manifestation of the role of gendered rape myths.<sup>149</sup>

While not highlighted in most cases, the gendered violence of NCIID was explicitly acknowledged in *R v McFarlane*.<sup>150</sup> In this case, the accused surreptitiously filmed his sister’s friend, the complainant, while undressing and showering. Five years later, the accused distributed these images to a limited number of people in an attempt to extort additional sexually explicit material or activity from the complainant.<sup>151</sup> The Manitoba Court of Appeal recognized the gendered, violent nature of the accused’s actions, noting that:

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<sup>144</sup> Fairbairn, *supra* note 3 at 235.

<sup>145</sup> *Ibid.*

<sup>146</sup> Powell, *supra* note 5 at 80.

<sup>147</sup> Gotell, “Discursive Disappearance”, *supra* note 9 at 141.

<sup>148</sup> Balfour & Du Mont, *supra* note 76 at 712-13, 720-21.

<sup>149</sup> *Ibid* at 720-21.

<sup>150</sup> 2018 MBCA 48 [*McFarlane*].

<sup>151</sup> *Ibid* at paras 3-4.

[S]extortion is a form of sexual violence even though it occurs through the medium of the internet. As with physical abuse, a victim's freedom of choice over his or her sexual integrity is violated. The long-term psychological harm to a victim, as was seen here, closely resembles what happens in a case of physical sexual assault.<sup>152</sup>

While less explicit, the Manitoba Provincial Court recognized the violence and power dynamics inherent within NCIID in *R v BS*, with a question: "What sentence is appropriate when intimate images are weaponized against a woman who ends a dating relationship?"<sup>153</sup> The Court went on to note that the offender's behavior was driven by "his need for control and power."<sup>154</sup>

In *Greene*, a more explicit acknowledgement was made in relation to the gendered nature of NCIID by framing the offence within the context of the history of domestic violence against women:

Our legal system has failed to recognize the extent of the violence that women who end relationships with their former male partners face. It has failed to acknowledge the reality that this violence can be deadly. This is not a novel suggestion. Over twenty years ago in its 1995 report, *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia*, the Law Reform Commission of Nova Scotia, described "violence against women by their spouses" as constituting "a life threatening situation which is not treated seriously by the legal system."<sup>155</sup>

The judge went on to note that the danger former male partners pose to women who have ended a relationship "is based upon male control."<sup>156</sup>

While it is promising that three cases recognized the gendered, violent nature of NCIID, it is somewhat problematic that this was the exception, rather than the norm. It was not uncommon to find cases which referenced NCIID in relation to cyberbullying. This is hardly surprising given the fact that the legislation was brought about within the frame of cyberbullying.<sup>157</sup> Indeed, when referencing the parliamentary intent behind the Bill, cases made reference to the section being there to address the social problem of cyberbullying<sup>158</sup> and revenge by former partners.<sup>159</sup>

In *AC*, the Court notes that:

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<sup>152</sup> *Ibid* at para 19.

<sup>153</sup> 2019 MBPC 26 at para 1 [*BS*].

<sup>154</sup> *Ibid* at para 14.

<sup>155</sup> *Supra* note 51 at para 2.

<sup>156</sup> *Ibid* at para 33.

<sup>157</sup> Felt, *supra* note 24 at 146.

<sup>158</sup> *MR Sentencing*, *supra* note 56; *AC 1*, *supra* note 53; *PSD*, *supra* note 128.

<sup>159</sup> *MR Sentencing*, *supra* note 56; *AC 1*, *supra* note 53.

The bill was part of the federal government's initiative against cyberbullying. It was introduced after two high profile incidents of young women taking their own lives after intimate images of them had been shared without their consent. Then Minister of Justice, the Hon. Peter MacKay, described the impetus behind Bill C-13 this way:

We are all aware of the issues of bullying and cyberbullying and how they have become priorities for many governments around the world. Cyberbullying is the use of the Internet to perpetrate what is commonly known as bullying, but it is of particular interest and concern of late. This interest is due in no small part to the number of teen suicides over the past few years in which cyberbullying was alleged to have played a part.

We have heard of cases involving Rehtaeh Parsons in my province of Nova Scotia, Amanda Todd on the west coast, a young man named Todd Loik in Saskatchewan recently, and countless others. It is clearly a case of the worst form of harassment, intimidation and humiliation of young people, which resulted in a feeling of hopelessness, that there was no other way out, and they took their lives.<sup>160</sup>

Scholars have critiqued framing NCIID within the cyberbullying or harassment lenses, noting that the term covers a broad range of behaviour and may be unhelpful in discussing NCIID.<sup>161</sup> In its traditional definition, cyberbullying is an act of reciprocal conflict in an online environment which does not capture the imbalance in power often present in situations of NCIID.<sup>162</sup> Furthermore, studies and understandings of cyberbullying often do not receive the intersectional analysis necessary nor recognize the gendered nature of NCIID.<sup>163</sup> So, while we see numerous cases which recognize the gendered, violent nature of NCIID, many others simply place the offence within a cyberbullying frame without a more intersectional understanding.

Scholars of NCIID have expressed fear that the harms perpetuated by NCIID would be ignored for their real-world impacts on women's lives or that the harms would be conceived as breaches of privacy or embarrassment,

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<sup>160</sup> AC 1, *supra* note 53 at para 17.

<sup>161</sup> Bailey, *supra* note 25.

<sup>162</sup> Coburn, Connolly & Roesch, *supra* note 27.

<sup>163</sup> Crooks, *supra* note 3 at 63, 71; West Coast LEAF, "Submission to the Standing Committee on Justice and Human Rights on Bill C-13: An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act, and the Mutual Legal Assistance in Criminal Matters Act" (2014) at 1, online (pdf): <[www.westcoastleaf.org/wp-content/uploads/2014/11/2014-05-13-SUBMISSION-Standing-Committee-on-JHR-on-Bill-C-13.pdf](http://www.westcoastleaf.org/wp-content/uploads/2014/11/2014-05-13-SUBMISSION-Standing-Committee-on-JHR-on-Bill-C-13.pdf)> [perma.cc/6TUZ-BFKN].

rather than recognizing NCIID as an attack on human dignity.<sup>164</sup> As noted by Alexa Dodge, the fear that harms arising from NCIID would be considered less real or less seriously has not been borne out.<sup>165</sup> Rather, “Canadian legal interpretations have regularly reasoned that the harm of NCIID is considerable and requires serious legal responses.”<sup>166</sup> This is shown in studies of NCIID sentencing decisions, in which the seriousness of the offence has been recognized through relying on the primary sentencing objectives of denunciation and deterrence with incarceration as the norm.<sup>167</sup> The seriousness with which NCIID has been treated is also evident within how privacy is conceived and how the impact on victims has been viewed.

Privacy, as it has traditionally been understood, has garnered skepticism from feminists. As noted by Moira Aikenhead, “[p]rivacy, when understood as a negative right to exclude others, remains a deeply masculine, classed, and individualized ideal.”<sup>168</sup> Some conceptions of privacy have also tended to view disclosures related to women’s bodies or sexuality as harmful. Historically, when the privacy of women was acknowledged, it was aimed “at protecting a particular version of raced and classed feminine ‘modesty’, designed to shield women (and their male partners) from embarrassment and humiliation associated with sexuality.”<sup>169</sup> If NCIID is understood within this type of framework, it could lead to scrutinizing women for their behavior whereby certain actions on the part of the woman diminishes the reasonableness of her privacy expectations.<sup>170</sup>

Several cases framed the privacy interests undergirding the NCIID offence as a positive right, focused around sexual integrity. In *Borden*,<sup>171</sup> the Newfoundland and Labrador Provincial Court recognized NCIID as a sexual offence which should focus on protecting the personal autonomy and sexual integrity of the individual rather than sexual propriety. The Court quotes Elaine Craig, noting that the legal system should give:

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<sup>164</sup> Henry & Powell, “Technology-Facilitated”, *supra* note 138 at 244.

<sup>165</sup> Dodge, “Nudes are Forever”, *supra* note 17 at 138.

<sup>166</sup> *Ibid.*

<sup>167</sup> Jochelson et al, *supra* note 30 at 124; PSD, *supra* note 128 at para 10; McFarlane, *supra* note 150 at para 22; Greene, *supra* note 51 at para 36; AC 2, *supra* note 61 at para 77; AC 1, *supra* note 53 at para 28; JS, *supra* note 61 at para 20.

<sup>168</sup> Aikenhead, “A ‘Reasonable’ Expectation”, *supra* note 16 at 282–83.

<sup>169</sup> *Ibid* at 283.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Supra* note 116 at para 45.

[G]reater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety).<sup>172</sup>

In *AC*, the Court noted that the provisions were in place to protect privacy and articulated privacy as a positive right, noting that:

[P]rivacy is about a person's ability to control access to something, whether it is private information or a private image. As in this case, someone like C.S. may agree to have private photographs or videos taken that will not be seen by anyone apart from a romantic partner. Where someone shares an intimate image without consent, he violates the depicted person's privacy because he has gone beyond that limited, consensual use. The more people to whom the image is exposed, the greater the invasion of privacy and the greater the harm caused to the victim.<sup>173</sup>

The Court's recognition that consent to being filmed or photographed in one context does not mean that there was consent to the distribution of those videos accords with a more contextualized, positive conception of privacy. Likewise, in *JS*, the Court echoes this positive conception of privacy:

The fact that the victim may have consensually participated in recording sexual activity in no way impacts or diminishes the moral responsibility of the offender. To conclude otherwise engages retrograde thinking surrounding the interplay of sex, privacy, consent and control.<sup>174</sup>

In another case, the Court referenced privacy more generally and that the act of conveying personal information to a large, unintended audience was a violation of privacy:

The core of the defendant's criminal blameworthiness is his wish to humiliate and harm the complainant...The complainant's privacy was manifestly compromised by this conduct. Private photos she meant only for her husband to be, were sent to a wide variety of friends and family around the world...The gravamen of the distribution of intimate images was the conveyance of highly personal intimate photos to a broad cross-section of the complainant's friends and family around the world.<sup>175</sup>

In short, I found an absence of explicit references to narratives on privacy which conflated consensual image sharing with non-consensual distribution. Rather, courts seemed to recognize that consent in one context

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<sup>172</sup> *Ibid*; Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity*, (Vancouver, BC: UBC Press, 2012) at para 127.

<sup>173</sup> *AC 1*, *supra* note 53 at para 20.

<sup>174</sup> *Supra* note 61 at para 35.

<sup>175</sup> *MR Sentencing*, *supra* note 56 at para 17.

could be distinguished from consent to distribute electronically and that the failure to abide by the parameters of consent constituted a breach of privacy.

The seriousness within which the offence is being considered is also apparent in how impacts on victims were generally framed as being profound. The main themes regarding impact on the victim included perceiving the harm as unknowable or not possible to quantify and unpunishable. In MR, the Court noted that despite the presence of a victim impact statement, the impact on the victim was “not ascertainable” and “incalculable”.<sup>176</sup> The Court went on to opine that “because of particular cultural and religious beliefs, the impact of this conduct on the complainant...is simply not ascertainable. The complainant has suffered an unquantifiable result.”<sup>177</sup> The Court held that “[t]his is reprehensible conduct on the part of this defendant, and it had a real, and immeasurable impact on the complainant and her family.”<sup>178</sup>

In AC, the accused posted several videos of the complainant on various revenge porn websites, along with identifying information. The Court articulated the impossibility to quantify the impact, noting that “[i]t is difficult to imagine a more significant breach of C.S.’ privacy than occurred here.”<sup>179</sup> The Court went on to note that “[i]t is difficult to overstate the seriousness of this offence.”<sup>180</sup> Furthermore, the Court labelled the act as unpunishable. Similarly, in a different AC case, the Court wrote that “no sentence can undo or even begin to remedy the harm done to the victim.”<sup>181</sup>

In addition to harm being unknowable and unpunishable, harm to victims was also framed as being limitless, both geographically and temporally. For example, in AC, the Court opined that “[t]hose private images were available for anyone with an internet connection.”<sup>182</sup> Likewise, “the offender did not simply send a few images to a small group of people... He shared the images with the world.”<sup>183</sup> In *Agoston*, the Court noted that distribution on the internet, “can result in the image being forever

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<sup>176</sup> *Ibid* at paras 11, 20.

<sup>177</sup> *Ibid* at para 11 [emphasis added].

<sup>178</sup> *Ibid* at para 13 [emphasis added].

<sup>179</sup> AC 1, *supra* note 53 at para 55 [emphasis added].

<sup>180</sup> *Ibid* at para 62 [emphasis added].

<sup>181</sup> AC 2, *supra* note 61 at para 75 [emphasis added].

<sup>182</sup> AC 1, *supra* note 53 at para 1 [emphasis added].

<sup>183</sup> *Ibid* at para 49 [emphasis added].

available.”<sup>184</sup> Likewise, in *JTB*, following the publishing of intimate images and identifying information about the complainant, the Court noted that:

[I]t should be recognized and emphasized again that her torment is not over. Nor does it seem likely to end. Her intimate images and personal information remain online and available to strangers, along with indications that she would welcome a sexual assault. She correspondingly is obliged to live in a state of constant humiliation, exposure and understandable anxiety related to the realistic possibility of further sexual violence by strangers unknown and unknowable.<sup>185</sup>

Further, the Court noted that the images distributed via the internet may be “forever available.”<sup>186</sup>

Not only is the harm geographically and temporally limitless, but there is also no way to control the harm. In *JTB*,<sup>187</sup> the Court noted that the accused’s online posts would result in an uncontrollable and possibly unending harm. Speaking generally, in relation to the principles of sentencing, the Court opined that:

[E]ven if the particular offender setting such events in motion is incarcerated, distant, restrained and/or completely rehabilitated, a former partner and victim in the position of Ms B. simply cannot know, and never *will* know with certainty, whether the serious threat to her privacy, personal integrity and safety created by the offender is contained or at an end.<sup>188</sup>

In *AC*, the Court noted that the harm to the victim was uncontrollable after the accused uploaded videos of her to several internet sites:

Uploading intimate images into the public domain clearly has lasting effects on victims. There is a popular saying that “the internet never forgets”...[t]here is no way to know how many people have access to the images. Every time someone views one of these images, C.S.’s privacy and dignity are violated. C.S. must live with the knowledge that strangers anywhere in the world may view her private images whenever they choose to. She has lost control over a very private part of her life forever. She faces the potential violation of her privacy, by total strangers, in perpetuity.<sup>189</sup>

Further, in a different *AC* case, the Court held that because the accused still had access to the intimate images of the complainant, she continued to live in fear of ongoing harm: “I also note that this does nothing to allay

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<sup>184</sup> *Supra* note 84 at para 16 [emphasis added].

<sup>185</sup> *Supra* note 1 at para 97 [emphasis added].

<sup>186</sup> *Ibid* at para 37.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid* at para 91 [emphasis in original].

<sup>189</sup> *AC 1, supra* note 53 at para 65 [emphasis added].

C.A.'s concerns that Mr. A.C. still has access to her image and that he might share this with even more people in the future."<sup>190</sup>

In *Haines-Matthews*, the loss of control was highlighted as an important factor underpinning the introduction of the offence:

One of the significant aspects of the harm which Parliament has sought to curtail arises from the fact that, in this day and age, most often, as it was in the case at bar, the intimate images are distributed electronically, and once the electronic images are transmitted, there is very little, if any, control over who may access them, where they may end up, or how long they will be accessible on some internet site. That aspect of the harm caused by the offending behaviour is unaffected, and unabated, by the motivation of the offender.<sup>191</sup>

Another common theme was that the harm was perceived as very serious. Cases made reference to the impact on the victim as significant,<sup>192</sup> devastating,<sup>193</sup> traumatic,<sup>194</sup> or substantial.<sup>195</sup>

References were also made to the risk victims faced of embarrassment<sup>196</sup> or psychological harm.<sup>197</sup> The risk of suicide was also mentioned.<sup>198</sup> Given the context in which the offence arose, the perception of extreme impact is no surprise. Parliamentary debates on Bill C-13, the precursor to section 162.1 of the *Code*, focused primarily on examples of extreme situations which cumulated in suicides.<sup>199</sup>

Thus, harm to the victims of NCIID is being framed by courts as unknowable, unpunishable, unending, uncontrollable, and profound. The use of strong language by the Court – for example, using words such as devastating – further undergirds the message that there is something particularly unique and damaging about the harm resulting from NCIID. Alexa Dodge similarly notes that digital technology is being seen within popular and judicial understandings as something which is bringing about

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<sup>190</sup> AC 2, *supra* note 61 at para 87.

<sup>191</sup> *Supra* note 57 at para 48 [emphasis added].

<sup>192</sup> *Borden*, *supra* note 116 at para 53.

<sup>193</sup> AC 1, *supra* note 53 at paras 14, 23, 63; MR sentencing, *supra* note 56 at paras 13, 20; *JTB*, *supra* note 1 at para 97.

<sup>194</sup> AC 2, *supra* note 61 at para 84.

<sup>195</sup> *JTB*, *supra* note 1 at para 37.

<sup>196</sup> *Agoston*, *supra* note 84 at para 15; *JTB*, *supra* note 1 at para 37.

<sup>197</sup> *Agoston*, *supra* note 84 at para 15; *JTB*, *supra* note 1 at paras 37, 97; *McFarlane*, *supra* note 150 at para 11.

<sup>198</sup> *JTB*, *supra* note 1 at para 37; *PSD*, *supra* note 128; *JS*, *supra* note 61 at para 30.

<sup>199</sup> *Felt*, *supra* note 24 at 137; *Bailey*, *supra* note 25.



the “end of forgetting.”<sup>200</sup> This is based on a notion of “digital images as difficult – or impossible – to control or delete.”<sup>201</sup> Dodge goes on to argue that this understanding of technology may be overly simplistic and has resulted in legal responses which have perhaps, at times, overreached in their assessments of harm:

While the anxiety of being unaware of an image’s future may persist, it is important to note that digital memory is not always as functionally everlasting as it may feel (Karaian 2016; Hand 2016) and that the particular future of an image will also be dependent on factors such as whether it is able to be removed from search engine results. Regardless, it is clear that various understandings of digital memory have significant impacts on cases of NCIID. While the increased harm of NCIID due to the affordances of digital memory is often treated as self-evident in both legal and governmental responses, a more nuanced understanding of the role of digital technology demonstrates the need to assess the impact of digital technology on a case-by-case basis.<sup>202</sup>

#### IV. CONCLUSION

This article sought to look at judicial discourse on section 162.1 of the *Code* to understand whether rape myths and discriminatory stereotypes common to sexual assault inform the treatment of NCIID within judicial decision making. While scholars and activists, before and after the creation of section 162.1, suggested that there was a discursive tendency for such stereotypes to inform the treatment of NCIID, this theory has not been held up within the cases that I examined.

While literature has lamented the differential treatment of strangers compared with known perpetrators in sexual assault, in most of the cases that I examined, judges are perceiving the abuse of trust arising from a close relationship to be an aggravating factor in sentencing. While revenge is acknowledged as a motive and the frame of revenge pornography is used in some cases, in general, judges do not appear to accept narratives which use such frames in order to attribute blame and responsibility to female victims.

Similarly, I found scant evidence of the existence of the construction of the perfect victim in the NCIID cases that I examined. In one case, the appropriateness of the victim’s resistance was commented upon and in

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<sup>200</sup> Dodge, “Nudes are Forever”, *supra* note 17 at 136.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid* at 138.

another case, the Court commented upon the riskiness of engaging in consensual intimate image sharing. In two cases, the fact that the complainant was the initiator of the intimate image sharing in the first instance was commented upon and may have informed the judicial understanding of the accused's intentionality in distributing the image. However, in general, there is an absence of courts engaging in the construction of the perfect victim.

Another discriminatory stereotype identified in sexual assault cases is that perpetrators do not act intentionally or their actions can be explained by other factors. Once again, a high degree of intentionality was generally attributed to the actions of perpetrators and the offence was rarely framed as an accident. This intentionality was sometimes linked together along with revenge and breach of trust narratives.

A related theme was the Court perceiving that technology made it easier for the offence to be committed. In one case that I examined, while technology may have reduced the intentionality of the accused by making the offence easier to commit, the breach of trust brought about was so significant as to counter any reduction in the accused's moral culpability. Overall, the leakiness of technology was not particularly apparent in the cases that I examined. However, there may be evidence that courts are associating limited distribution with a lack of intentionality on the part of the accused.

While many scholars feared that NCIID would not be considered seriously by courts, I found that, in general, this did not hold true. The gendered, violent nature of NCIID was recognized in several cases. At the same time, several other cases drew upon frames of cyberbullying which may undermine an appreciation for the violent, gendered nature of NCIID. Another concern from scholars was that the harms perpetuated by NCIID would be ignored for their real-world impacts on women's lives or that the harms would be conceived as breaches of privacy, rather than recognizing NCIID as an attack on human dignity. Overall, I found an absence of narratives on privacy which conflated consensual image sharing with non-consensual distribution. Rather, courts seemed to recognize that consent to capture the image in one context could be distinguished from consent to distribute electronically and that the failure to abide by the parameters of consent constituted a breach of privacy. Furthermore, the seriousness within which the offence is being considered by courts is also apparent in how impacts on victims were generally framed as being profound, as well as

unknowable, unpunishable, unending, and uncontrollable. In general, judicial decision-making appears to be informed by an understanding of privacy and bodily integrity which avoids discriminatory stereotypes.