

# Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's *Famous* Music Video

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*In June 2016, American rapper Kanye West premiered the music video for Famous from his seventh studio album "The Life of Pablo." West's Famous music video, inspired by Vincent Desiderio's painting Sleep, features nude replications of several celebrities lying together on a bed. The cinematography is voyeuristic, with one journalist describing the video as "predatory." In making and publicizing the infamous music video, West failed to seek and acquire the consent of several of the individuals featured. The production received both considerable praise and backlash from artists, critics, and the celebrities depicted.*

*This Note discusses the jurisprudence of non-consensual pornography, known as "revenge porn," in the United States. While non-consensual pornography legislation advocates push for federal criminalization of non-consensual pornography, opponents raise issues of First Amendment violations and "Internet exceptionalism." This Note explores*

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\* J.D. Candidate 2018, University of Miami School of Law; Executive Editor, University of Miami Law Review. I would like to thank my advisor, Professor Annette Torres, for her guidance, commitment, and invaluable insights throughout the writing of this Note. I am grateful to Professor Mary Anne Franks for her feedback and immense contributions to the area of non-consensual pornography. Most importantly, I thank my family, for their endless sacrifices and dedication to my pursuits, and my boyfriend, Jordan, for his patience and constant encouragement. Finally, I would like to thank the University of Miami Law Review for selecting this Note for publication and providing me the opportunity to work with a wonderful group of people.

*West's Famous music video's relation to NCP, examining instances in which art has blurred the line between legal and illegal conduct or content.*

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## I. INTRODUCTION

Non-consensual pornography (“NCP”) is the publication or distribution of sexually explicit content without the featured individual’s consent.<sup>1</sup> This does not include photographs and recordings of people taken in public, or of individuals engaged in flashing or other “unsolicited and unlawful sexual” conduct.<sup>2</sup> NCP is commonly known as “revenge porn,” but this label underrepresents the various forms this conduct can take.<sup>3</sup> NCP includes the non-consensual distribution of images originally obtained with consent; the recording and distribution of sexual assaults; and the publication of intimate, sexual images procured through hacking or other unlawful means.<sup>4</sup> In fact, not all perpetrators are driven by “revenge.” Some are motivated by jealousy, potential notoriety, or an increase in their web-

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<sup>1</sup> Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper 3* (Sept. 7, 2014) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336537](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537) [hereinafter *Combating NCP*].

<sup>2</sup> *Id.*

<sup>3</sup> Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <https://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> [hereinafter *Why We Need a Federal Criminal Law*].

<sup>4</sup> *Id.*

site's traffic; others engage in this behavior as a way to fulfill a sexual desire, or even for no reason at all.<sup>5</sup> Abusers in intimate relationships, rapists, and traffickers and pimps use the threat of disclosure of NCP to humiliate, control, and prevent their victims from reporting their abuse to law enforcement.<sup>6</sup> NCP has been described as a form of sexual assault, transforming "unwilling individuals into sexual entertainment for strangers."<sup>7</sup>

NCP can cause irreversible harm—victims are often subjected to extreme embarrassment, fired from jobs, and harassed by others on the Internet.<sup>8</sup> Such results can escalate to more serious and violent consequences, including stalking and sexual assault threats (especially if the images or recordings are posted with the victim's contact information).<sup>9</sup> Up to 10,000 websites reportedly feature NCP, and NCP is widely shared through social media, emails, and text messages.<sup>10</sup> A 2017 survey by the Cyber Civil Rights Initiative ("CCRI") reported that 12.8% of respondents were either victims of or had been threatened with NCP.<sup>11</sup> An earlier survey conducted by

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<sup>5</sup> *Id.*; Sarah E. Driscoll, Comment, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech*, 21 ROGER WILLIAMS U.L. REV. 75, 79 (2016).

<sup>6</sup> Mary Anne Franks, *Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators* 3 (Aug. 17, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2468823](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823) [hereinafter *Drafting an Effective 'Revenge Porn' Law*].

<sup>7</sup> Combating NCP, *supra* note 1, at 4.

<sup>8</sup> Driscoll, *supra* note 5, at 79–80.

<sup>9</sup> *Drafting an Effective 'Revenge Porn' Law*, *supra* note 6, at 2, 10–11. Eighty-two percent of victims suffer "significant impairment in social, occupational, or other important areas of functioning," 49% "have been harassed or stalked online by users that have seen the material" online, and 30% "have been harassed or stalked outside of the Internet (in person, over the phone) by users that have seen the material online." *Id.* For an example of the potential reach of the harassment that victims and their families endure, see Brooke Jarvis, *How One Woman's Digital Life Was Weaponized Against Her*, WIRED (Nov. 14, 2017, 6:00 AM), <https://www.wired.com/story/how-one-womans-digital-life-was-weaponized-against-her/>.

<sup>10</sup> Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1260 (2017) [hereinafter *Revenge Porn Reform*]; *Drafting an Effective 'Revenge Porn' Law*, *supra* note 6, at 2.

<sup>11</sup> ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 11 (2017).

the CCRI found that 93% of victims “suffered significant emotional distress,” with 51% revealing they had experienced “suicidal thoughts due to being a victim.”<sup>12</sup>

In June 2016, American rapper Kanye West premiered the music video for *Famous* from his seventh studio album “The Life of Pablo.”<sup>13</sup> West’s *Famous* music video, inspired by Vincent Desiderio’s painting *Sleep*, features nude replications of several celebrities lying together on a bed.<sup>14</sup> The cinematography is voyeuristic, with one journalist describing the video as “predatory.”<sup>15</sup> In making and publicizing the infamous music video, West failed to seek and acquire the consent of several of the individuals featured.<sup>16</sup> The production received both considerable praise and backlash from artists, critics, and the celebrities depicted.<sup>17</sup>

The First Amendment of the United States Constitution protects freedom of expression, but labeling content as “art” does not automatically shield it from governmental intrusion.<sup>18</sup> Although the United States government seldom restricts art based on its content, art continues to be regulated through content-neutral restrictions affecting numerous activities and disciplines.<sup>19</sup> The effects of these restrictions on artistic expression are exemplified by child pornography laws, which have played a substantial role in proscribing the subjects and muses featured in acclaimed photographers’ oeuvres.<sup>20</sup>

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<sup>12</sup> *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 10–11.

<sup>13</sup> Dirk Standen, *Exclusive: Kanye West on His “Famous” Video, Which Might Be His Most Thought-Provoking Work Yet*, VANITY FAIR (June 24, 2016, 10:54 PM), <http://www.vanityfair.com/culture/2016/06/kanye-famous-video-interview>.

<sup>14</sup> Janelle Zara, *Naked Bodies ‘Expanding and Contracting’: A Look Inside Kanye West’s Exclusive ‘Famous’ Exhibition*, CNN: STYLE, <http://www.cnn.com/style/article/kanye-west-famous-exhibition/index.html> (last updated Aug. 29, 2016).

<sup>15</sup> T.C. Sottek, *Kanye West’s Video for Famous Is Damn Genius Clickbait*, THE VERGE (June 25, 2016, 7:49 PM), <https://www.theverge.com/2016/6/25/12031774/kanye-west-taylor-swift-donald-trump-kim-kardashian-rihanna-bill-cosby-george-bush-caitlyn-jenner>.

<sup>16</sup> *See infra* Section IV.A.2.i.

<sup>17</sup> *See infra* Section IV.A.2.

<sup>18</sup> Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 174, 184 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> *See infra* Section III.B.

Part II of this Note describes the jurisprudence of NCP in the United States by examining current laws and remedies afforded to victims. Part II also explores proposed additions to and changes in NCP law suggested by scholars and NCP law advocates. Part III addresses the First Amendment's application in combating NCP legislation, and counterarguments to the First Amendment protection of NCP. Additionally, Part III examines instances in which art has blurred the line between legal and illegal conduct or content. Part IV discusses Kanye West's *Famous* music video, including its production and reception, as well as the legal remedies the nonconsenting individuals featured may have. Part IV also analyzes West's *Famous* video's relation to NCP by considering potential additions to anti-NCP legislative proposals that would protect individuals from virtual NCP and preserve freedom of expression. Finally, Part V concludes by addressing the blurred line between legal and illegal expression, especially in the art realm.

## II. THE JURISPRUDENCE OF NON-CONSENSUAL PORNOGRAPHY

### A. *Federal Law*

Over the past several years, the enactment of anti-NCP legislation has been gaining traction at an international level. The Philippines became the first country to criminalize NCP in 2009.<sup>21</sup> In 2013, the Australian state of Victoria outlawed NCP.<sup>22</sup> In 2014, Canada criminalized NCP, followed by England, Wales, and New Zealand in 2015.<sup>23</sup> In 2014, Israel classified NCP as a form of sexual assault, becoming the first country to do so.<sup>24</sup> Other countries—including Brazil, Germany, Japan, and the United States—have also taken strides to combat NCP.<sup>25</sup>

Currently, the United States has no federal laws expressly prohibiting the distribution of NCP.<sup>26</sup> While our nation has laws regulating computer hacking, video voyeurism, stalking, and record-

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<sup>21</sup> *Drafting an Effective 'Revenge Porn' Law*, *supra* note 6, at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Driscoll, *supra* note 5, at 80 n.17.

<sup>26</sup> Combating NCP, *supra* note 1, at 3.

keeping requirements for pornography producers, these laws are critiqued as offering incomplete protection to NCP victims and are deemed inadequate in deterring NCP distribution.<sup>27</sup>

For example, the Computer Fraud and Abuse Act prohibits and punishes certain forms of computer hacking and distribution of information obtained from such conduct.<sup>28</sup> While this legislation may protect the subset of NCP victims whose images have been obtained and distributed pursuant to a computer hacking scheme, it is inapplicable to the majority of NCP cases.<sup>29</sup> The Video Voyeurism Prevention Act of 2004 prohibits “the intent to capture an image of a private area of an individual without their consent” when “the individual has a reasonable expectation of privacy.”<sup>30</sup> This Act too is considered inadequate in addressing the full scope of NCP for two main reasons: (1) the Act’s language limits the prohibition to the “maritime and territorial jurisdiction of the United States”; and (2) the Act fails to acknowledge the context and importance of consent in situations where the sexually explicit material is initially consensually produced or shared with an individual, but that same individual’s subsequent access to or distribution of the material is not consented to.<sup>31</sup> In this situation, the consent provided is limited. For example, a man decides to share a sexually explicit photograph of himself with his partner but does not consent to his partner sharing or distributing the photograph.

The Record Keeping Requirements Act sets record-keeping requirements for producers of sexually explicit content.<sup>32</sup> This Act is inapplicable to NCP because it focuses almost exclusively on documentation regarding the name and age of those portrayed, not the verification of the portrayed individual’s consent to the use and distribution of his or her images or videos.<sup>33</sup> The Interstate Anti-Stalking Punishment and Prevention Act prohibits the use of “mail, any interactive computer service, or any . . . interstate or foreign com-

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<sup>27</sup> *Id.* See generally *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>28</sup> 18 U.S.C. § 1030 (2012).

<sup>29</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>30</sup> 18 U.S.C. § 1801 (2012).

<sup>31</sup> *Id.*; accord *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>32</sup> 18 U.S.C. § 2257 (2012).

<sup>33</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

merce to engage in a course of conduct that causes substantial emotional distress to [a] person or places [a] person in reasonable fear of the death of, or serious bodily injury to” that person, a member of the immediate family of that person, or a spouse or intimate partner of that person.<sup>34</sup> The Act requires the actor to have an “intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person.”<sup>35</sup> While this Act has the potential to apply to some NCP instances, it is not generally interpreted in this manner, with sanctions usually reserved for those who are persistent in their harassment.<sup>36</sup> Additionally, many perpetrators claim their sole intention in distributing NCP is “to obtain notoriety, fulfill some sexual desire, or increase traffic for their websites,” and therefore do not satisfy the Act’s intent requirement.<sup>37</sup>

Making matters more difficult for NCP victims and anti-NCP legislation advocates, Section 230 of the Communications Decency Act (“CDA”) explicitly shields website hosts and providers from NCP suits.<sup>38</sup> Section 230 was enacted after *Stratton Oakmont, Inc. v. Prodigy Services Co.*, in which a New York court held that an Internet service provider’s (“ISP”) exercise of editorial control and regulation of content in its online bulletin board rendered the provider a publisher, and therefore liable for defamatory comments posted on the bulletin board.<sup>39</sup> Following *Stratton*, ISPs were apprehensive over potential liability for the acts and postings of their users, and were therefore discouraged from monitoring hosted content.<sup>40</sup> In response, legislators enacted Section 230, which states that “[n]o provider or user of an interactive computer shall be treated as the publisher or speaker of any information provided by another.”<sup>41</sup>

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<sup>34</sup> 18 U.S.C. § 2261A (2012).

<sup>35</sup> *Id.*

<sup>36</sup> *Why We Need a Federal Criminal Law*, *supra* note 3; Salina Tariq, Comment, *Revenge: Free of “Charge?”*, 17 SMU SCI. & TECH. L. REV. 227, 244 (2014).

<sup>37</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>38</sup> 47 U.S.C. § 230 (2012); Jenna K. Stokes, Comment, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 932 (2014).

<sup>39</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995).

<sup>40</sup> Stokes, *supra* note 38, at 932–33.

<sup>41</sup> 47 U.S.C. § 230; *accord* Stokes, *supra* note 38, at 932–33.

In 1997, *Zeran v. America Online, Inc.* expanded Section 230's reach by broadening immunity to distributors, not just publishers, of content.<sup>42</sup> Today, Section 230 has been broadly read by courts to immunize providers and users of interactive computer services from claims involving defamation, "negligent assistance in the distribution of child pornography, misappropriation of the right of publicity, and invasion of privacy."<sup>43</sup>

In 2008, the Ninth Circuit provided a narrow interpretation of Section 230's protection by declining to grant immunity to an ISP when its actions, in the form of solicitation of discriminatory housing preferences, constituted a direct contribution to unlawful conduct.<sup>44</sup> In 2014, NCP victims sought to hold GoDaddy liable for NCP content uploaded to the website *Texxxan.com*.<sup>45</sup> The Texas Court of Appeals held that GoDaddy, the former domain registrar and hosting provider for *Texxxan.com*, was protected by Section 230 of the CDA and consequently not liable for NCP content uploaded to *Texxxan.com*.<sup>46</sup> The court reasoned that GoDaddy was not involved in the creation or development of the content.<sup>47</sup> These two cases, taken together, demonstrate that courts interpreting Section 230 sharply distinguish between ISPs "who simply host third-party content and those who actively participate in the creation of illegal content."<sup>48</sup>

In March 2017, Thomas Brennan, a journalist and Marine veteran, discovered a Facebook page where active and veteran service members of the United States "were allegedly sharing nude photo[graph]s of female Marines without their consent."<sup>49</sup> Members

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<sup>42</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (stating that the theory of distributor liability "is merely a subset, or a species, of publisher liability"); Stokes, *supra* note 38, at 933.

<sup>43</sup> Stokes, *supra* note 38, at 934 (footnote omitted).

<sup>44</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–71 (9th Cir. 2008); Stokes, *supra* note 38, at 935.

<sup>45</sup> *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753 (Tex. App. 2014); Stokes, *supra* note 38, at 935–36.

<sup>46</sup> *GoDaddy.com*, 429 S.W.3d at 762.

<sup>47</sup> *Id.* at 756–62.

<sup>48</sup> Andrew McDiarmid, *Decisive Section 230 Victory for GoDaddy in Revenge Porn Case*, CDT: BLOG (April 15, 2014), <https://cdt.org/blog/decisive-section-230-victory-for-godaddy-in-revenge-porn-case/>.

<sup>49</sup> Rebecca Kheel, *Senators Introduce Military 'Revenge Porn' Bill*, THE HILL (June 7, 2017, 2:44 PM), <http://thehill.com/policy/defense/336771-senators->

of the Facebook page left distasteful and, at times, violent comments about the women featured in the posted photographs.<sup>50</sup> The situation was dubbed the “Marines United” scandal, named after the title of the Facebook page.<sup>51</sup> Following the initial discovery, numerous additional websites and sharing platforms used by members of all branches of the military to share NCP featuring active and veteran female service members came to light.<sup>52</sup> Although the Uniform Code of Military Justice (“UCMJ”), which enumerates criminal offenses under military law, “bans [the] taking [of] nude photo[graph]s without consent, it does not address [the] sharing [of] photo[graph]s without consent.”<sup>53</sup> Following the scandal, Arizona Representative Martha McSally introduced a bill titled the Protecting the Rights of Individuals Against Technological Exploitation (PRIVATE) Act.<sup>54</sup> At the time of this writing, the PRIVATE Act passed in the House of Representatives, was received by the Senate, and “read twice and referred to the Committee on Armed Services.”<sup>55</sup> If the PRIVATE Act becomes law, it will amend the UCMJ to make the sharing of NCP a punishable offense under military law,

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introduce-military-revenge-porn-bill; accord Ryan Browne, *First Marine Tied to ‘Marines United’ Facebook Group Court-Martialed*, CNN (July 10, 2017, 5:56 PM), <http://www.cnn.com/2017/07/10/politics/marines-united-facebook-group-court-martial/index.html>; Christine Schmidt, *After Blowing the Life Off of the Marines United Scandal, The War Horse Wants to Improve Journalism on Veterans and Trauma*, NIEMANLAB (Aug. 1, 2017, 10:16 AM), <http://www.niemanlab.org/2017/08/after-blowing-the-lid-off-of-the-marines-united-scandal-the-war-horse-wants-to-improve-journalism-on-veterans-and-trauma/>.

<sup>50</sup> Kheel, *supra* note 49.

<sup>51</sup> See Alex Ward, *The Military May Soon Consider Revenge Porn a Criminal Act*, VOX (Sept. 20, 2017, 3:10 PM), <https://www.vox.com/2017/9/20/16340140/military-congress-revenge-porn-marines-united>.

<sup>52</sup> David Martin, *Marines Nude Photo Scandal Expands to All Branches of Military*, CBS NEWS (Mar. 10, 2017, 11:30 AM), <https://www.cbsnews.com/news/marines-nude-photo-scandal-expands-to-military-wide-explicit-message-board/>; Paul Szoldra, *The Marine Corps’ Nude-Photo-Sharing Scandal Is Even Worse than First Realized*, BUSINESS INSIDER (Mar. 9, 2017, 4:04 PM), <http://www.businessinsider.com/nude-photo-marine-corps-pentagon-scandal-2017-3>.

<sup>53</sup> Kheel, *supra* note 49; accord Ward, *supra* note 51.

<sup>54</sup> Kheel, *supra* note 49; *H.R.2052 - PRIVATE Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2052> (last visited Dec. 6, 2017).

<sup>55</sup> H.R. 2052, 115th Cong., 2017 CONG US HR 2052 (Westlaw).

essentially protecting service members “regardless of where they are serving.”<sup>56</sup>

### B. *State Criminal Laws*

Despite, and perhaps because of, the lack of express federal law prohibiting the creation and distribution of NCP in the United States, thirty-eight states and Washington, D.C. have enacted NCP laws, with New Jersey becoming the first to do so in 2004.<sup>57</sup> Punishments in these jurisdictions range from monetary fines to prison time, and may even carry felony penalties.<sup>58</sup> Advocates for a federal NCP law highlight that although state recognition and state-enacted NCP laws are steps in the right direction and necessary to address conduct that does not cross state lines, this state-specific approach is inherently limited.<sup>59</sup> The most obvious limitation is the restricted jurisdiction of state laws, which varies by statute and in some instances leaves victims outside Washington, D.C. and the thirty-eight states that have enacted NCP laws without criminal remedies against their perpetrators.<sup>60</sup> Additionally, some state laws are challenged as being unconstitutional and consequently subjected to strict scrutiny analysis, thus requiring the state to prove that “it has a compelling interest in enacting the legislation and . . . the legislation is narrowly tailored to achiev[e] [this] . . . interest.”<sup>61</sup> Furthermore, some state NCP

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<sup>56</sup> Kheel, *supra* note 49 (quoting statement by Republican Senator Dean Heller of Nevada); *accord* Ward, *supra* note 51.

<sup>57</sup> 38 States + DC Have Revenge Porn Laws, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Dec. 6, 2017); Stokes, *supra* note 38, at 941.

<sup>58</sup> Driscoll, *supra* note 5, at 83; *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 4.

<sup>59</sup> Stokes, *supra* note 38, at 941–46; *Why We Need a Federal Criminal Law*, *supra* note 3; *Combating NCP*, *supra* note 1, at 9.

<sup>60</sup> *Why We Need a Federal Criminal Law*, *supra* note 3. Many states claim jurisdiction not only in cases in which the victim is a resident of the state, but also in cases in which the perpetrator resides in the state. Some broad statutes claim jurisdiction in cases in which the NCP is viewed in the state. *See generally* 38 States + DC Have Revenge Porn Laws, *supra* note 57; *Revenge Porn Laws by State*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/revenge-porn-laws-by-state.html> (last visited Mar. 21, 2018).

<sup>61</sup> Driscoll, *supra* note 5, at 95 (footnote omitted). For a more in-depth analysis of the challenges and limitations of current state-enacted NCP laws, see *id.* at 97–107.

laws are criticized as providing little to no improvement to victims' remedies, requiring a majority of those harmed by NCP to resort to civil litigation.<sup>62</sup>

### C. *Civil Remedies*

In the absence of federal legislation, and in states where no NCP law has been enacted or has been enacted but deemed inadequate to address victim claims, NCP victims resort to civil litigation remedies.<sup>63</sup>

#### 1. PRIVACY LAW

Privacy rights are not expressly enumerated in the Constitution, but the right to privacy is recognized judicially and statutorily in many states.<sup>64</sup> In 1890, Justices Earl Warren and Louis Brandeis wrote *The Right to Privacy*, an article recognizing that privacy rights stem from the rise in use of new technologies, which caused worry over the public exposure of private information.<sup>65</sup> The duty of trust, Warren and Brandeis specified, precludes an individual from publishing, without consent, content pertaining to another's private life.<sup>66</sup> Privacy law has been codified into four separate tort claims incorporated in the Restatement (Second) of Torts, including: "(1) intrusion of solitude, (2) public disclosure of private facts, (3) placing a person in false light in the public eye, and (4) appropriation of name or likeness."<sup>67</sup>

##### a. Intrusion of Solitude

An intrusion of solitude claim<sup>68</sup> is valid when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of

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<sup>62</sup> Stokes, *supra* note 38, at 943.

<sup>63</sup> See *id.* See generally Combating NCP, *supra* note 1; Driscoll, *supra* note 5; Benjamin A. Genn, Comment, *What Comes Off, Comes Back to Burn: Revenge Pornography as the Hot New Flame and How It Applies to the First Amendment and Privacy Law*, 23 AM. U.J. GENDER SOC. POL'Y & L. 163 (2014).

<sup>64</sup> Genn, *supra* note 63, at 171, 171 n.46.

<sup>65</sup> *Id.*; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890).

<sup>66</sup> Genn, *supra* note 63, at 172.

<sup>67</sup> *Id.* (footnote omitted).

<sup>68</sup> The elements required for an intrusion of solitude claim are as follow: (1) a defendant physically or electronically intrudes into an individual's solitude

another or his private affairs or concerns.”<sup>69</sup> In *Cason v. Baskin*, the Supreme Court of Florida, referencing Warren and Brandeis, stated that matters concerning the “private life, habits, acts[,] and relations of an individual” are protected from intrusion.<sup>70</sup> In *Cason*, the court, noting that individuals retain possessory interests in the content of personal facts, held that the unauthorized publication of the plaintiff’s life history violated her privacy.<sup>71</sup>

In the case of NCP, when an individual shares an intimate photograph or video of himself with his partner, he likely trusts the private content will not be published by his partner without his consent. In accordance with *Cason* and the elements required for the tort, intrusion of solitude could occur if the depicted individual’s partner shares the private content without the individual’s consent or authorization, especially if the individual intended the “sexually explicit [material] to remain private and protected through an implied contract, duty of trust, or duty of confidence”;<sup>72</sup> “all of which are present and relied upon in . . . dating, spousal, and sexual relationship[s].”<sup>73</sup>

#### b. Public Disclosure of Private Facts

A public disclosure of private facts<sup>74</sup> occurs when unwanted publicity is given “to a matter concerning the private life of another,” and the matter publicized is not of public concern and

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without authorization; (2) a reasonable person would find the intrusion objectionable or highly offensive; (3) the defendant intruded upon a private matter; and (4) the intrusion caused harm in the form of anguish and suffering. *Id.*; *see also* Melvin v. Burling, 490 N.E.2d 1011, 1013–14 (Ill. App. Ct. 1986).

<sup>69</sup> RESTATEMENT (SECOND) OF TORTS: PRIVACY § 652B (1977).

<sup>70</sup> *Cason v. Baskin*, 20 So. 2d 243, 252 (Fla. 1944) (quoting Warren & Brandeis, *supra* note 65, at 216).

<sup>71</sup> *Id.* at 248.

<sup>72</sup> Genn, *supra* note 63, at 186.

<sup>73</sup> *Id.* at 185 (footnote omitted). These “dut[ies] generally continue[] after a separation . . .” *Id.* at 186.

<sup>74</sup> For a public disclosure of private facts claim to be valid, a plaintiff must demonstrate that: (1) the defendant published information not known to the public; (2) the information published is personal and neither a legitimate concern to the public nor newsworthy; (3) a reasonable person would be offended by its disclosure; and (4) the personal information was widely communicated to the public. *Id.* at 173; *see also* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 WL 3126229, at \*4 (D. Kan. Sept. 29, 2009) (stating publication to the public can consist of the public at large, or as little as five people).

“would be highly offensive to a reasonable person.”<sup>75</sup> A fact is deemed private when society is willing to accept the plaintiff’s expectation of privacy as reasonable.<sup>76</sup> Relevant to NCP, *Peterson v. Moldofsky* concludes that an individual’s sexual activity is personal and not newsworthy information, such that a reasonable person would be offended by the wide disclosure of such information.<sup>77</sup> Additionally, the publicity requirement does not require the content to be disclosed to the public at large; “publicity may also include disclosure to those with ‘a special relationship with the plaintiff,’” such as family members and work colleagues.<sup>78</sup> While several courts have found defendants liable under this tort in NCP cases,<sup>79</sup> once the images are made public, “the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade,” thus leaving NCP suits to fail under this cause of action.<sup>80</sup>

### c. False Light in the Public Eye

False light in the public eye<sup>81</sup> occurs when an individual knowingly or with reckless disregard publicizes content that places the person depicted in a false light before the public.<sup>82</sup> The theory animating this cause of action in NCP cases is that when an individual

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<sup>75</sup> RESTATEMENT (SECOND) OF TORTS: PRIVACY § 652D (1977).

<sup>76</sup> *Zieve v. Hairston*, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004).

<sup>77</sup> *Peterson*, 2009 WL 3126229, at \*2–5; accord *Genn*, *supra* note 63, at 174 n.60.

<sup>78</sup> Adrienne N. Kitchen, Comment, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI-KENT L. REV 247, 256 (2015) (quoting *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 838 (7th Cir. 2005)).

<sup>79</sup> *Id.* at 256–57; see, e.g., *Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 WL 2319052, at \*2 (D. Colo. June 13, 2012); *Taylor v. Franko*, No. 09-00002JMS/RLP, 2011 WL 2746714, at \*2, \*5 (D. Haw. July 12, 2011).

<sup>80</sup> Kitchen, *supra* note 78, at 256–57 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975)).

<sup>81</sup> A false light in the public eye claim is valid when the plaintiff demonstrates that: (1) the defendant published facts that render a false impression of the plaintiff; (2) the facts were published with knowledge of their falsity or in reckless disregard for the truth; (3) the publication was distributed to a reasonable number of people; and (4) a reasonable person, under the circumstances, would object to the publication. *Genn*, *supra* note 63, at 174; see also *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 249–50 (1974).

<sup>82</sup> RESTATEMENT (SECOND) OF TORTS: PRIVACY § 652E (1977).

posts a sexually explicit photograph of his current or former partner to an adult services website, including with it personal facts and details, he may be knowingly and falsely portraying his partner as an escort.<sup>83</sup> Alternatively, if the sexually explicit content is posted to a website that specifically operates as an NCP website, there is no false portrayal that the individual depicted is an escort, but that posting may still render a false impression.<sup>84</sup> These theories are weak because false light claims only have the potential to cover a narrow band of NCP cases.

d. Appropriation of Name or Likeness

To succeed on an appropriation of name or likeness claim, a plaintiff must show his or her name or likeness was used by the defendant, without authorization, for commercial benefit.<sup>85</sup> This claim includes the use of both photographs and portraits.<sup>86</sup> To prove such a claim in an NCP matter, the plaintiff has the difficult burden of demonstrating his or her name or likeness has substantial value and the defendant used his or her name or likeness in a commercial capacity.<sup>87</sup> The plaintiff's burden is heightened because NCP is rarely used for commercial benefit, but "more as an avenue of retribution and schadenfreude."<sup>88</sup>

Despite their application in some NCP cases, the troubling irony of privacy actions is that to be effective, they often require further disclosure of the very content that is harming the victim.<sup>89</sup>

2. TORT LAW

a. Intentional Infliction of Emotional Distress

According to the Restatement (Third) of Torts, the tort of intentional infliction of emotional distress<sup>90</sup> ("IIED") originated as a

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<sup>83</sup> Genn, *supra* note 63, at 189.

<sup>84</sup> *Id.* at 189–90.

<sup>85</sup> *Id.* at 175.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 190.

<sup>88</sup> *Id.* at 190–91 (footnote omitted).

<sup>89</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>90</sup> In establishing a claim for IIED, a plaintiff must show that: (1) the defendant acted with an intention to cause severe emotional harm or with reckless disregard of consequential harm; (2) the action was extreme or outrageous; (3) and the

catch-all covering the narrow instance when an individual's "conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable."<sup>91</sup> At the heart of the tort is the outrageousness element, which takes into account the relationship of the parties, whether there was an abuse of a position of power, the vulnerability of the individual harmed and the actor's knowledge of this, the actor's motive, and the persistence of the conduct.<sup>92</sup> Outrageousness under IIED is contextual, fact-driven, and flexible enough to evolve with society.<sup>93</sup> Given this flexibility, some scholars have deemed IIED to be particularly applicable in addressing NCP claims.<sup>94</sup>

Notwithstanding this support, some critics have maintained that NCP plaintiffs have difficulty proving the "intent to cause severe emotional harm" and "extreme or outrageous conduct" elements.<sup>95</sup> Moreover, "[t]he general rule in the Restatement is there is no liability for pure emotional distress, without resulting bodily harm or any other invasion of the [plaintiff's] interests."<sup>96</sup> Consequently, if an NCP victim is unable to demonstrate he incurred more than reputational or mental harm, his IIED claim fails as a matter of law.

#### b. Defamation

Defamation<sup>97</sup> occurs when an individual makes a false and defamatory statement or representation regarding another, and publishes it to a third party.<sup>98</sup> Because truth constitutes a complete de-

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action caused the plaintiff actual severe emotional harm. Driscoll, *supra* note 5, at 113.

<sup>91</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 cmt. a (2012).

<sup>92</sup> Stokes, *supra* note 38, at 948.

<sup>93</sup> *Id.* (stating courts have found words to sometimes fit the standard).

<sup>94</sup> *Id.* at 949–52.

<sup>95</sup> Driscoll, *supra* note 5, at 112–14.

<sup>96</sup> Kitchen, *supra* note 78, at 257–58 (alteration in original)(internal quotations omitted).

<sup>97</sup> For a defamation claim to be valid, the plaintiff must show that: (1) the defendant made a false, defamatory statement about the plaintiff; (2) the statement was published to a third party; (3) the publisher acted with negligence; and (4) either the plaintiff was harmed by the publication, or the publication is actionable irrespective of harm. Driscoll, *supra* note 5, at 112.

<sup>98</sup> *Id.*

fense, a defamation suit is better suited for untrue statements or depictions.<sup>99</sup> In NCP cases, a defendant may avoid liability if she demonstrates that because the victim is the individual depicted in the sexually explicit content, “[he] committed the depicted acts.”<sup>100</sup> Despite this, at least one court (a district court in Hawaii) has found that when an individual publishes another’s sexually explicit image with identifying information and without authorization, such conduct constitutes a defamatory statement.<sup>101</sup>

### 3. COPYRIGHT LAW

Copyright law allows the individual who took the photograph or video to register the copyright of the material, and consequently prohibits the unauthorized and non-consensual publication or distribution of the material.<sup>102</sup> Copyright law is especially helpful to NCP victims because Section 230 of the CDA does not immunize ISPs from copyright claims, meaning victims who own the copyright to their images or videos can demand the ISP remove the content.<sup>103</sup> Sadly, this law covers only the fraction of NCP victims who took the photographs or videos themselves, which encompasses only about 20% of all NCP victims.<sup>104</sup> Although, pursuant to the Digital Millennium Copyright Act, registration of a copyright is not required to send a notice and takedown request to an individual or entity one believes is infringing on his or her copyright, it is still required to file a lawsuit against that individual or entity in the event they refuse to do so.<sup>105</sup> As with privacy law concerns, registering the copyright may require the victim to disclose more personal information, and in extreme cases can require the victim to send nude

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<sup>99</sup> Kitchen, *supra* note 78, at 255–56.

<sup>100</sup> *Id.*

<sup>101</sup> Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 WL 2746714, at \*5 (D. Haw. July 12, 2011); Driscoll, *supra* note 5, at 113.

<sup>102</sup> See Stokes, *supra* note 38, at 937; *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>103</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>104</sup> *Id.*; Stokes, *supra* note 38, at 941 n.80.

<sup>105</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.); see Mallory Donick, *Is a Registered Copyright Necessary for a DMCA Takedown?*, TRAVERSELEGAL (July 21, 2017), <https://www.traverselegal.com/blog/is-a-registered-copyright-necessary-for-a-dmca-takedown/>.

photographs of him- or herself to the copyright office in Washington, D.C.<sup>106</sup>

#### 4. THE LIMITS OF ALL

While the above civil actions have helped many NCP victims, they are riddled with limitations that render them inadequate in addressing various NCP situations.<sup>107</sup> For example, civil litigation imposes a tremendous financial burden on the plaintiff/victim and, in most cases, the commencement of an NCP lawsuit means that the objectionable content will become public record.<sup>108</sup> Another limitation is that civil remedies, except for copyright law, are sought against the uploader directly, and finding, identifying, and proving the uploader's identity may be an impossible feat considering the anonymity of the Internet and Internet service providers' reluctance to disclose user identities.<sup>109</sup> Moreover, most civil actions award only monetary damages and do not result in the content being removed from websites, which is the priority of most NCP victims, thus leaving victims with an inadequate remedy.<sup>110</sup> Even in cases where damages have been awarded, findings show that many civil defendants cannot satisfy any significant monetary judgments.<sup>111</sup> Although criminal litigation suffers from many of the same limitations civil litigation does, it may still be a more beneficial and effective route for victims because it shifts the burden of pursuing the

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<sup>106</sup> LastWeekTonight, *Online Harassment: Last Week Tonight with John Oliver* (HBO), YOUTUBE (June 21, 2015), at 9:00, <https://www.youtube.com/watch?v=PuNIwYsz7PI&feature=youtu.be> [hereinafter *John Oliver*].

<sup>107</sup> See Combating NCP, *supra* note 1, at 4–6. See generally Stokes, *supra* note 38; *Why We Need a Federal Criminal Law*, *supra* note 3; *John Oliver*, *supra* note 106.

<sup>108</sup> Stokes, *supra* note 38, at 950; *John Oliver*, *supra* note 106, at 8:20; *Why We Need a Federal Criminal Law*, *supra* note 3; Combating NCP, *supra* note 1, at 5.

<sup>109</sup> *Why We Need a Federal Criminal Law*, *supra* note 3; Combating NCP, *supra* note 1, at 4; see Stokes, *supra* note 38, at 950; see, e.g., Jarvis, *supra* note 9.

<sup>110</sup> This does not include copyright claims, which if proven can result in the removal of the image or video. *Why We Need a Federal Criminal Law*, *supra* note 3; see Combating NCP, *supra* note 1, at 4; Stokes, *supra* note 38, at 937, 950.

<sup>111</sup> *Why We Need a Federal Criminal Law*, *supra* note 3; see Driscoll, *supra* note 5, at 115.

case to the government and “offer[s] greater potential for deterrence than the . . . threat of civil action.”<sup>112</sup>

D. *Proposed Additions and Changes to the Law*

“[T]here is a serious push from state lawmakers and victims alike for more state laws to be enacted, for currently enacted laws to have harsher consequences, or, ultimately, for a federal law criminalizing [NCP] to be proposed and enacted.”<sup>113</sup>

1. EXPANDING SECTION 230 OF THE CDA

Section 230 of the CDA explicitly states that ISPs in federal criminal cases cannot claim immunity.<sup>114</sup> Some NCP victim advocates propose an expansion of this restriction to include NCP content and material, but such expansion is critiqued as having the potential to complicate the law.<sup>115</sup> Additionally, critics argue that broadening this restriction to NCP cases may affect the entire “free speech ecosystem” by influencing ISPs to pick and choose which content they will host, even if the content is legal.<sup>116</sup> But the language of Section 230 demonstrates this argument is without merit. Section 230 contains a provision granting ISPs immunity from constitutional claims brought against them in situations where they voluntarily and in good faith, “restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”<sup>117</sup> Thus far, Twitter and Reddit have banned NCP from their websites, Google has begun to remove images of NCP victims upon request, and, since the Marines United scandal, Facebook has developed and released guidelines for “curb[ing] the sharing of [NCP].”<sup>118</sup> Moreover,

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<sup>112</sup> *Revenge Porn Reform*, *supra* note 10, at 1300.

<sup>113</sup> Driscoll, *supra* note 5, at 83 (footnote omitted).

<sup>114</sup> 47 U.S.C. § 230 (2012); *see* Stokes, *supra* note 38, at 930.

<sup>115</sup> Stokes, *supra* note 38, at 930–31.

<sup>116</sup> *See id.*

<sup>117</sup> 47 U.S.C. § 230(c)(2)(A). In fact, the stated policy behind Section 230 is “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* § 230(b)(5).

<sup>118</sup> Emma Grey Ellis, *Facebook’s New Plan May Curb Revenge Porn, but Won’t Kill It*, WIRED (Apr. 6, 2017, 10:00 AM), <https://www.wired.com/2017/04/>

the gap in the law forcing many NCP victims to live with the fact that their non-consensual sexually explicit images will remain online was arguably created by the expansion of Section 230's immunity, which resulted in online entities receiving more favorable legal treatment than offline entities.<sup>119</sup>

## 2. PROFESSOR MARY ANNE FRANKS' MODEL STATE LAW

Mary Anne Franks, a Professor of Law at the University of Miami School of Law and a prominent figure in NCP law, drafted a model state law that aims to address the shortcomings of currently enacted state laws and fill the gaps present in other causes of action to which NCP victims are forced to resort.<sup>120</sup> The suggested state law provides that “[a] person may not knowingly disclose an image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act with knowledge of or reckless disregard for the fact that the person depicted did not consent to such disclosure.”<sup>121</sup>

Professor Franks' proposal is lauded as a narrow law, fit to face potential First Amendment challenges.<sup>122</sup> But critics take issue with some of the terminology, including the use of “identifiable person,” reasoning the term itself is vague, and arguing that there is no evidence a person “has to be identifiable . . . to experience severe emotional distress from the non-consensual distribution of a private, sexual image.”<sup>123</sup> Notwithstanding the praise and critiques, Franks' model state law faces the same jurisdictional limitation plaguing all state-enacted NCP laws.

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facebook-revenge-porn/; accord *John Oliver*, *supra* note 106, at 13:10. See generally *Jarvis*, *supra* note 9.

<sup>119</sup> *Stokes*, *supra* note 38, at 934.

<sup>120</sup> See *Driscoll*, *supra* note 5, at 108.

<sup>121</sup> Mary Anne Franks, *CCRI Model State Law*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/model-state-law/> (last visited Mar. 21, 2018) [hereinafter *CCRI Model State Law*] (definitions, exceptions, and severability sections omitted).

<sup>122</sup> See *Driscoll*, *supra* note 5, at 108.

<sup>123</sup> *Id.* at 109 (footnote omitted).

### 3. FEDERAL CRIMINALIZATION

The federalization of anti-NCP legislation has been gaining traction, with several countries enacting federal laws against the conduct, and anti-NCP advocates fighting for similar enactments in the United States. In addition to a model state law, Professor Franks drafted a model federal law against NCP that reads as follows:

Whoever knowingly uses the mail, any interactive computer service, electronic communication service, electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or whose naked genitals or post-pubescent female nipple are exposed, with knowledge of or reckless disregard for the fact that the depicted person did not consent to the distribution, shall be fined under this title or imprisoned not more than \_\_ years, or both.<sup>124</sup>

Federal criminalization of NCP is an attractive option because it relieves victims of the burden of funding civil litigation by shifting the burden to the government, and escapes Section 230 immunity, thus allowing victims the opportunity to go directly after the ISPs and websites hosting the NCP content.<sup>125</sup> Labelling NCP a crime is arguably “the most accurate and principled characterization of its harm” because even though NCP may also be considered a violation of privacy or, in some cases, a copyright infringement, at its core it is an act of sexual use of an individual without consent.<sup>126</sup> Federal criminalization is considered the best way for law enforcement to

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<sup>124</sup> Mary Anne Franks, *CCRI Model Federal Law*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/ccri-model-federal-law/> (last visited Mar. 21, 2018) (exceptions, telecommunication and ISPs, definitions, and severability sections omitted).

<sup>125</sup> See Stokes, *supra* note 38, at 940–42. See generally 47 U.S.C. § 230(e)(1) (2012).

<sup>126</sup> *Why We Need a Federal Criminal Law*, *supra* note 3 (arguing that conduct does not have to involve physical contact or proximity to be considered harmful, e.g. child pornography).

protect victims because the imposition of criminal penalties on the creation and distribution of the material can effectively “dry up the [NCP] market.”<sup>127</sup> Moreover, state laws, while important, have limited jurisdiction and are unfit to fully appreciate the interstate realities of this conduct.<sup>128</sup> Despite these benefits, those opposed to the enactment of federal anti-NCP legislation maintain that NCP can be deterred and punished effectively with existing civil and criminal laws and causes of action.<sup>129</sup>

Professor Franks’ model federal law is an example of a time, place, and manner restriction on NCP, as opposed to a content restriction.<sup>130</sup> Adrienne Kitchen provides an additional example of this kind of restriction:

Given the physical and psychological dangers to the subject, an actor is prohibited from posting a nude or sexually explicit image of another on a website designed to harass, demean, or cause professional, psychological or emotional harm to the victim. The fact a poster claims he posted the images as a joke alone shall not constitute a defense, particularly when then defendant knew or should have known the act could lead to harassment or harm to the victim.<sup>131</sup>

Time, place, and manner restrictions have generally been upheld by courts when they “restrict conduct such as ‘harassment’ or ‘stalking.’”<sup>132</sup> Specifically restricting the manner in which NCP is shared arguably prevents the law from being overly broad.<sup>133</sup> Consequently, time, place, and manner restrictions, at least as expressed in Kitchen’s example, can be under-inclusive. By failing to account

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Stokes, *supra* note 38, at 947.

<sup>130</sup> Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul to the First Amendment*, 90 CHI-KENT L. REV 247, 286 (2015).

<sup>131</sup> *Id.* at 288.

<sup>132</sup> *Id.* at 286.

<sup>133</sup> *Id.* at 288.

for NCP that is not posted on websites “designed to harass, demean,” etc.,<sup>134</sup> perpetrators could easily escape the bounds of Kitchen’s example. Even if an alternative manner restriction would include these additional methods of dissemination, as long as technology continues to advance, and perpetrators become more creative, the law will essentially be playing “catch-up.”

#### 4. “INTERNET EXCEPTIONALISM”

“Internet exceptionalism” is used to address the proposal and enactment of Internet-specific laws, based on the Internet’s perceived novelty, that differ from precedent in other types of media.<sup>135</sup> Alternatively, “Internet exceptionalism” is described as an attempt to transform the Internet into its own jurisdiction.<sup>136</sup> All of the above-mentioned proposed laws against NCP fall into this category and are sometimes characterized as “regulatory panic.”<sup>137</sup> Additional examples of “Internet exceptionalist” proposals include: (1) amending the Copyright Act to allow those who did not “author” the images of themselves to still be able to sue under copyright, a concept sometimes referred to as “joint authorship”;<sup>138</sup> and (2) changing the way courts view NCP by establishing an implied contract of confidentiality between parties who share intimate images and videos with each other, and an implied “right to be forgotten” upon the conclusion of the relationship.<sup>139</sup> Critics of the “Internet exceptionalist” approach suggest lawmakers and NCP advocates adhere to and use the remedies and avenues the law already provides to avoid cluttering the legal system and complicating the law.<sup>140</sup> Importantly, all of the above-mentioned proposals for new and amended laws run the risk of offending the First Amendment because, as free speech advocates indicate, “[c]onsensually recorded intimate [content] does not seem to fit within the categories of unprotected speech.”<sup>141</sup>

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<sup>134</sup> For example, NCP that is instead disseminated through e-mail, posted on websites such as Facebook, or printed and physically mailed or shared.

<sup>135</sup> Stokes, *supra* note 38, at 946.

<sup>136</sup> *Id.* at 930.

<sup>137</sup> *Id.* at 932, 947, 950–51.

<sup>138</sup> *Why We Need a Federal Criminal Law*, *supra* note 3; Stokes, *supra* note 38, at 937.

<sup>139</sup> Stokes, *supra* note 38, at 938.

<sup>140</sup> *Id.* at 947.

<sup>141</sup> *Id.* at 944.

### III. THE FIRST AMENDMENT: SHIELD OR WEAPON?

The First Amendment of the United States Constitution states, in relevant part, “Congress shall make no law . . . abridging the freedom of speech.”<sup>142</sup> This protection encompasses an individual’s right to freedom of expression through various mediums, but is not absolute, and does not protect *all* forms of speech.<sup>143</sup> The Supreme Court has recognized categories of speech that are not protected by the First Amendment, including obscenity, perjury, blackmail, child pornography, and speech tantamount to “fighting words” or “true threats.”<sup>144</sup> In *Spence v. Washington*, the Supreme Court stated that nonverbal action may qualify as speech, dependent on the context in which the conduct is performed and the actor’s intent to communicate a particularized message that would be understood by those who observe it.<sup>145</sup> The conduct of disclosing and publishing NCP is considered speech because it “is a communicative, symbolic act that expresses an idea”; this is evident considering the context of the posting, especially when the explicit material is posted on a website dedicated to NCP.<sup>146</sup>

#### A. *Non-consensual Pornography and the First Amendment*

##### 1. COMBATING NON-CONSENSUAL PORNOGRAPHY LEGISLATION

Courts employ different levels of analysis when reviewing First Amendment claims, depending on whether the restriction is related

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<sup>142</sup> U.S. CONST. amend. I.

<sup>143</sup> Driscoll, *supra* note 5, at 84; *see* *Breard v. City of Alexandria*, 341 U.S. 622, 642 (1951), *abrogated on other grounds by* *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (noting that not all types and forms of speech are protected by the First Amendment); *see also* Stokes, *supra* note 38, at 948 (noting NCP “is objectionable to society for reasons that are not Internet-specific, but instead grounded in . . . moral instincts”).

<sup>144</sup> KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1–5 (2014); *accord First Amendment FAQ*, NEWSEUM INST., <http://www.newseuminstitute.org/first-amendment-center/first-amendment-faq/#speech> (last visited Dec. 6, 2017).

<sup>145</sup> *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

<sup>146</sup> Driscoll, *supra* note 5, at 85.

to the message expressed by the speech being regulated.<sup>147</sup> In determining whether a regulation is content-based or content-neutral, courts ask whether the legislation favors one type of speech by burdening a different type of speech because of the message being conveyed.<sup>148</sup> Content-based laws disfavor speech based on the message expressed therein, while content-neutral laws regulate speech with no consideration for the views or ideas expressed (e.g., time, place, and manner restrictions).<sup>149</sup> Some NCP laws are considered content-based because they seek to prohibit a type, or subset, of pornography based on the views or ideas expressed by the content, essentially favoring other forms of pornography (i.e., consensual pornography) over NCP.<sup>150</sup> Content-based restrictions on speech are reviewed under strict scrutiny, while content-neutral regulations are reviewed under intermediate scrutiny.<sup>151</sup> Under a strict scrutiny analysis, the government, whether state or federal, must prove that: (1) it has a compelling interest in enacting the regulation, and (2) the regulation is narrowly tailored to address the compelling governmental interest.<sup>152</sup>

Some state NCP laws have been challenged as unconstitutional for allegedly infringing on First Amendment speech rights and for failing to meet the strict scrutiny standard due to over-inclusive and exceptionally broad language.<sup>153</sup> For example, Delaware's NCP law's definition of "nudity," which includes "buttocks," has been critiqued as overbroad.<sup>154</sup> Professor Franks' model state law<sup>155</sup> is praised for suggesting a narrow definition of "intimate parts," including "the naked genitals, pubic area, anus, or female post-pubescent nipple of the person."<sup>156</sup> The model state law is further lauded

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<sup>147</sup> *Id.* at 95.

<sup>148</sup> *Id.*; RUANE, *supra* note 144, at 5.

<sup>149</sup> Driscoll, *supra* note 5, at 95; RUANE, *supra* note 144, at 9.

<sup>150</sup> Driscoll, *supra* note 5, at 96.

<sup>151</sup> *Id.* at 95–96; RUANE, *supra* note 144, at 9.

<sup>152</sup> The courts have found general health, morality, and welfare to be compelling governmental interests. Driscoll, *supra* note 5, at 96–97.

<sup>153</sup> *Id.* at 97–107.

<sup>154</sup> DEL. CODE. ANN. tit. 11, § 1335(a)(9)(a)(1) (2017); *accord* Driscoll, *supra* note 5, at 98.

<sup>155</sup> *See supra* Section II.D.2.

<sup>156</sup> Driscoll, *supra* note 5, at 108; *CCRI Model State Law*, *supra* note 121.

for including two exceptions, excluding from liability those who disclose or publish NCP content “involving voluntary exposure in public or commercial settings,” and “[d]isclosures made in the public interest.”<sup>157</sup> But critics take issue with the model state law’s specification of an “identifiable person” and its failure to include an intent to cause harm requirement.<sup>158</sup>

The American Civil Liberties Union (“ACLU”) strongly objected to California’s proposed NCP law because it did not include an intent to cause harm requirement, and thus could hold liable individuals with legal possession of another’s image or videos.<sup>159</sup> The California legislators subsequently amended the bill to include this language.<sup>160</sup> The resulting final version of California’s bill is celebrated by some as preserving freedom of speech protections while focusing on the concerns of NCP victims, yet is also criticized for not adequately protecting the right to privacy.<sup>161</sup>

According to Lee Rowland, an attorney with the ACLU’s Speech, Privacy, and Technology project,

any legislation that hopes to withstand strict scrutiny must include four elements—(1) the legislation must require malicious intent; (2) the distribution of the image must cause actual harm to the victim; (3) the distributor of the image must act knowingly without the consent of the victim; and (4) the victim had a reasonable expectation that the image would be kept private.<sup>162</sup>

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<sup>157</sup> *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 9; *accord* Driscoll, *supra* note 5, at 108.

<sup>158</sup> Driscoll, *supra* note 5, at 108–09, 109 n. 173 (explaining that not all NCP content is posted with identifiable information and victims may experience severe emotional distress based on mere knowledge of the fact their images are being displayed in pornography websites without their consent, and noting that the use of “identifiable person” in the model law leads to ambiguity “as to who must be able to identify the subject of [NCP]”).

<sup>159</sup> *Id.* at 100.

<sup>160</sup> *Id.* at 101; CAL. PENAL CODE § 647(j)(4) (West 2017) (the law now requires that “the person distributing the image knows or should know that distribution of the image will cause serious emotional distress”).

<sup>161</sup> Driscoll, *supra* note 5, at 107.

<sup>162</sup> *Id.* (footnotes omitted).

Given that strict scrutiny analysis is notoriously difficult to satisfy, with courts tending to err on the side of caution to preserve freedom of expression, these elements pose an additional hurdle in reconciling anti-NCP legislation with the First Amendment.<sup>163</sup> Notwithstanding these challenges, advocates argue NCP can survive First Amendment defenses, including strict scrutiny analysis.

## 2. COUNTERARGUMENTS TO THE FIRST AMENDMENT PROTECTION OF NON-CONSENSUAL PORNOGRAPHY

### a. Non-Consensual Pornography Laws Can Survive Strict Scrutiny Analysis

In *Paris Adult Theatre I v. Slaton*, the Supreme Court said, “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.”<sup>164</sup> This reasoning supports the proposition that states have a compelling interest in protecting both the individuals depicted in NCP and the community at large from the general harm and threat of NCP.<sup>165</sup>

But a compelling interest in protecting individuals and communities is not enough. In *New York v. Ferber*, the Supreme Court held that states have a “compelling interest in protecting children from the actual dangers posed by the existence of child pornography.”<sup>166</sup> Decades later, in *Ashcroft v. Free Speech Coalition*, the Supreme Court drew a line, holding that computer-generated child pornography could not be prohibited because it does not pose an actual danger to children.<sup>167</sup> These cases demonstrate that legislation will not pass the strict scrutiny analysis absent actual harm to NCP victims.<sup>168</sup> Evidenced by studies showing that 93% of victims experienced significant emotional distress because of NCP, with 51% of

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<sup>163</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 374–75 (2014).

<sup>164</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

<sup>165</sup> Driscoll, *supra* note 5, at 96–97.

<sup>166</sup> *Id.* at 97; *accord* *New York v. Ferber*, 458 U.S. 747, 759–64 (1982).

<sup>167</sup> Driscoll, *supra* note 5, at 97; *accord* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002).

<sup>168</sup> Driscoll, *supra* note 5, at 97.

victims claiming they experienced suicidal thoughts, NCP has a strong capacity to cause actual harm, and laws can easily be tailored to narrowly address this issue by including “intent to cause harm” language.<sup>169</sup>

According to Professor Franks, however, “intent to cause harm” language is not necessary, and the constitutional doctrine does not support the ACLU’s claim that NCP laws must include a motive requirement.<sup>170</sup> Specifically, Franks emphasizes that (1) it is insufficient to invalidate a law merely because it has the potential for overbroad application; (2) the ACLU characterized the “intent to cause substantial emotional distress,” “intent to harass,” and “intent to intimidate” elements proposed in federal stalking provisions of the Violence Against Women Act as “unconstitutionally overbroad,” and now insists the same language is pertinent in ensuring the constitutionality of NCP laws; and (3) the constitutionality of NCP laws is weakened by allowing disclosures that are not intended to cause distress, while prohibiting disclosures only when such intent is present, because such differentiation renders NCP laws vulnerable to “objections of constitutional under-inclusiveness and viewpoint discrimination.”<sup>171</sup>

b. Non-Consensual Pornography Should Be Categorized as “Obscene”

Many NCP law advocates maintain that NCP should not be considered constitutionally protected speech because NCP should be categorized as “obscene” material.<sup>172</sup> As there is no national standard for “obscenity,” courts use the three-prong test articulated in

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<sup>169</sup> *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 10–14 (noting that 82% of victims said they “suffered significant impairment in social, occupational, or other important areas of functioning” and 42% of victims “sought out psychological services”); Driscoll, *supra* note 5, at 97 (highlighting the importance of the “intent to cause harm” element). It should be noted that making “intent to cause harm” to the victim an element of the crime will require the victim to prove he or she has been harmed—in practice, this will entail testifying about intensely private and possibly humiliating details.

<sup>170</sup> *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 6–7.

<sup>171</sup> *Id.* at 7.

<sup>172</sup> See Genn, *supra* note 63, at 176–85; Stokes, *supra* note 38, at 944–46; Driscoll, *supra* note 5, at 86–94.

*Miller v. California* to evaluate whether material is legally “obscene” by reference to local community standards.<sup>173</sup> The *Miller* obscenity test is confined to materials involving sexual conduct, but the mere presence of consensual and artistic nudity does not transform sexually graphic material into “obscene” material, and the Court has held that sexual expression is not inherently obscene, even if considered indecent or offensive by some.<sup>174</sup> The three prongs used to determine whether content is considered obscene, as outlined in *Miller*, are as follow:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . .
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>175</sup>

Although courts have held that the government cannot punish possession of obscene content alone, it can “ban public distribution of such material.”<sup>176</sup> In *Miller*, the appellant conducted an unsolicited mass mailing campaign to advertise sexually explicit material.<sup>177</sup> The Supreme Court held that the brochures mailed—which featured images of men and women engaged in sexual activities—constituted obscenity, thus allowing the state to regulate their dissemination without infringing on the First Amendment.<sup>178</sup>

Those who oppose the categorization of NCP as “obscene” argue that the Supreme Court in *Miller* concentrated on the content of the sexually graphic material and gave no indication that obscenity

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<sup>173</sup> Driscoll, *supra* note 5, at 87–88; see *Miller v. California*, 413 U.S. 15, 24–25, 30–38 (1973).

<sup>174</sup> Genn, *supra* note 63, at 167–68; Stokes, *supra* note 38, at 945. See generally *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>175</sup> *Miller*, 413 U.S. at 24–26 (internal quotation marks and citations omitted); accord Stokes, *supra* note 38, at 944–45.

<sup>176</sup> Genn, *supra* note 63, at 168.

<sup>177</sup> *Miller*, 413 U.S. at 16–18.

<sup>178</sup> *Id.* at 30–37.

is determined by distribution.<sup>179</sup> Critics have further argued that NCP cannot be categorized as “obscene” because it does not satisfy the three-part *Miller* test.<sup>180</sup> More specifically: (1) NCP “does not *categorically* appeal to the prurient interest” because most of NCP does not depict sexual conduct, but mere nudity, and the court in *Miller* stated “that mere nudity did not constitute obscenity”;<sup>181</sup> (2) NCP “is not, in itself, patently offensive,” and “[a]n image posted as [NCP] that consists of mere nudity . . . is not more offensive than any other form of accepted nudity”;<sup>182</sup> and (3) “[NCP] [m]ay [h]ave [l]iterary or [p]olitical [v]alue” because an individual’s intimate and sexual history and experiences are part of that individual’s story, one he or she may wish to share.<sup>183</sup>

Those who advocate for the categorization of NCP as “obscene” counter these objections as follows: (1) “content, context, and circumstances are all relevant in determining whether a work tends to excite lustful thoughts in the viewers; as such, [NCP]’s depiction” of an individual in the nude “or in a sexually suggestive position should be viewed with its original purposeful intent in mind: to arouse the recipient at the time it was sent”;<sup>184</sup> (2) NCP as a whole represents more than mere nudity or pornography and can potentially offend the average person because it attempts to diminish the individual featured and subject him or her to unauthorized sexual objectification, and, as in *Miller*, the material is sometimes sent to unwilling recipients, such as the victim’s friends, family, and coworkers;<sup>185</sup> and (3) unlike depictions of nudity and sexual conduct found in art “as part of a larger display,” NCP is disclosed and shared with malicious intent, aimed at hurting the individual depicted, which essentially “nullifies any potential artistic or literary

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<sup>179</sup> See Stokes, *supra* note 38, at 945 (emphasizing that the court has not “held that transmission of material, such as the act of uploading pornography to a website, can render material obscene if it is not otherwise so under relevant state law”).

<sup>180</sup> Driscoll, *supra* note 5, at 88–94.

<sup>181</sup> *Id.* at 88–89.

<sup>182</sup> *Id.* at 89–90 (footnote omitted).

<sup>183</sup> *Id.* at 91–92.

<sup>184</sup> Genn, *supra* note 63, at 177–78 (emphasizing that NCP moves beyond mere nudity because sexually graphic material posted with malicious intent narrows the observer’s view to the sexual aspects of the content to embarrass or harass the depicted person).

<sup>185</sup> *Id.* at 177–81.

value.”<sup>186</sup> Additionally, an unauthorized publication of an individual in the nude or engaged in sexually explicit activity constitutes a shameful interest in sexual conduct that exceeds society’s customary limits of pornographic material.<sup>187</sup>

All speech is not equal under the First Amendment.<sup>188</sup> While some private matters are protected by the First Amendment, the Supreme Court has emphasized that matters concerning the public at large are at the core of the First Amendment’s protection.<sup>189</sup> NCP law advocates urge that while some private matters may be protected by the First Amendment, there should be a compelling interest in the publication and disclosure of NCP.<sup>190</sup> Others recommend that “the law should distinguish between images that are meant to be public—protest art, for instance, which should get the highest First Amendment protection—and those that are meant to be private, like nude pictures.”<sup>191</sup>

### B. *Art and the Law*

The United States government seldom polices art based on its content.<sup>192</sup> When the government regulates art, it does so through content-neutral restrictions that encompass many activities, and therefore do not violate, and rarely trigger, the First Amendment.<sup>193</sup> Child pornography laws vary from state to state, but the federal law against child pornography includes “any visual depiction of sexually explicit conduct involving a minor.”<sup>194</sup> This definition does not re-

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<sup>186</sup> *Id.* at 183 n.120, 183–84; see Combating NCP, *supra* note 1, at 16 (“The First Amendment does not serve as a blanket protection for **malicious, harmful conduct** simply because such conduct may have an expressive dimension.”).

<sup>187</sup> Genn, *supra* note 63, at 180.

<sup>188</sup> Combating NCP, *supra* note 1, at 15, 15 n.36.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 15–16.

<sup>191</sup> Somini Sengupta, ‘Revenge Porn’ Could Be Criminal Offense in California, N.Y. TIMES: BITS (Aug. 27, 2013, 8:18 AM), [https://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california/?\\_r=0](https://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california/?_r=0) (statement of Professor Danielle Citron at the University of Maryland); accord Citron & Franks, *supra* note 163, at 383–84.

<sup>192</sup> Tushnet, *supra* note 18, at 174.

<sup>193</sup> *Id.* at 174, 184.

<sup>194</sup> *Citizen’s Guide to U.S. Federal Law on Child Pornography*, U.S. DEP’T. OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law->

quire that the minor be engaged in sexual activity, and the Department of Justice emphasizes that “[a] picture of a naked child may constitute illegal child pornography if it is sufficiently sexually suggestive.”<sup>195</sup>

Acclaimed photographer Jock Sturges’ oeuvre focuses on the members of “naturist” communities and their children.<sup>196</sup> Most of Sturges’ work features young women and girls in the nude, including models as young as four years old.<sup>197</sup> In 1990, Sturges’ equipment and photographs of unclothed pre-pubescent girls on a nude beach in France were confiscated after his San Francisco studio was raided by the FBI and the San Francisco Police Department pursuant to child pornography charges.<sup>198</sup> After much time and roughly \$100,000 in legal fees, Sturges avoided indictment by a federal grand jury.<sup>199</sup>

In 1992, photographer Sally Mann published a book of photographs titled “Immediate Family.”<sup>200</sup> The book’s introduction contained four photographs of phallic sculptures made by Mann’s father that decorated Mann’s childhood home.<sup>201</sup> These photographs were meant to show the peculiarities of the Mann family, but also added, perhaps unintentionally, “an explicitly sexual element to the frame of the project.”<sup>202</sup> “Immediate Family” consists of sixty photographs chronicling the growth of Mann’s three children—Emmett, Jessie,

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child-pornography (last updated Dec. 12, 2017) [hereinafter *Citizen’s Guide*]. See generally 18 U.S.C. § 2251 (2012).

<sup>195</sup> *Citizen’s Guide*, supra note 194.

<sup>196</sup> Sarah Parsons, *Public/Private Tensions in the Photography of Sally Mann*, 32 HIST. OF PHOTOGRAPHY 123, 132 n.26 (2008).

<sup>197</sup> Ana Moriarty, *Nudes in the Jock Sturges Photos – On the Verge of Taboo*, WIDEWALLS (Dec. 14, 2017), <http://www.widewalls.ch/jock-sturges-photos/>.

<sup>198</sup> Parsons, supra note 196, at 132 n.26; Richard B. Woodward, *The Disturbing Photography of Sally Mann*, N.Y. TIMES MAG. (Sept. 27, 1992), <http://www.nytimes.com/1992/09/27/magazine/the-disturbing-photography-of-sally-mann.html?pagewanted=all>; Sally Mann, *Sally Mann’s Exposure*, N.Y. TIMES MAG. (April 16, 2015), <https://www.nytimes.com/2015/04/19/magazine/the-cost-of-sally-manns-exposure.html>.

<sup>199</sup> Doreen Carvajal, *Pornography Meets Paranoia*, N.Y. TIMES: THE NATION (Feb. 19, 1995), <http://www.nytimes.com/1995/02/19/weekinreview/the-nation-pornography-meets-paranoia.html>.

<sup>200</sup> Mann, supra note 198.

<sup>201</sup> Parsons, supra note 196, at 126.

<sup>202</sup> *Id.*

and Virginia—for over a decade, who were about six, four, and one, respectively, at the start of the project.<sup>203</sup> The photographs featured Mann’s children in the nude, dirty from playing outdoors, flirtatious, and bruised and bloodied after sustaining injuries.<sup>204</sup> The publication of “Immediate Family” propelled Mann to success, with her printing of the series selling out in three months.<sup>205</sup> Unsurprisingly, this success came at a price. The depictions of Mann’s children in the nude were problematic for many publications.<sup>206</sup> The *Wall Street Journal* censored a nude photograph of Virginia (then four years old) with black bars covering her eyes, chest, and genitals;<sup>207</sup> and one of the most traditionally radical New York magazines at the time, *Artforum*, refused to run a photograph of Jessie swinging on a hay hook in the nude.<sup>208</sup>

Mann was warned by a federal prosecutor in Virginia, from whom she sought advice prior to publication, that distribution of some of the photographs could lead to her arrest.<sup>209</sup> But unlike the Sturges case, the FBI neither raided Mann’s studio nor confiscated her photographs and equipment; in fact, Mann was spared the litigation surrounding other photographers who have featured nude minors in their work.<sup>210</sup> Yet, Mann’s collection was not sheltered from controversy and harsh criticism. In an article Mann wrote for the *New York Times*, she discussed the various letters she received after her work was released.<sup>211</sup> According to Mann, these letters ranged from the supportive to the critical, and even the creepy.<sup>212</sup> The gen-

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<sup>203</sup> Mann, *supra* note 198.

<sup>204</sup> Parsons, *supra* note 196, at 124.

<sup>205</sup> See Mann, *supra* note 198; Woodward, *supra* note 198.

<sup>206</sup> See Woodward, *supra* note 198.

<sup>207</sup> *Id.*; Mann, *supra* note 198 (Mann recalling Virginia did not like this censorship, and the black bars placed over her body made Virginia feel uncomfortable in her skin for the first time. In response, Virginia sent the *Wall Street Journal* a letter expressing her disappointment. Mann herself saw the censorship of Virginia’s photograph as a disfigurement that made it appear “as if it were Exhibit A in a child pornography prosecution”).

<sup>208</sup> See Woodward, *supra* note 198.

<sup>209</sup> See Parsons, *supra* note 196, at 126; Woodward, *supra* note 198.

<sup>210</sup> See Woodward, *supra* note 198.

<sup>211</sup> Mann, *supra* note 198.

<sup>212</sup> One letter “queried: ‘[w]as it really art, Ms. Mann, or was it covert incest?’” *Id.*

eral negative reception of the photographs concentrated on the subjects being children photographed by their mother, with many accusing Mann of sexualizing her children.<sup>213</sup> Kiku Adatto, who served as director of Children's Studies at Harvard, critiqued Mann for photographing "her own young children nude in erotic poses, or posed as victims of abuse and incest."<sup>214</sup> In a review of Mann's collection, British writer Nicci Gerrard described the photographs as "all disturbing and confrontational," taking specific issue with a photograph titled *Wet Bed*, which she notes makes Virginia, the model in the photograph, appear as though she were "a prostitute, with her lover just departed not like a little girl, fast asleep, who has just wet her bed."<sup>215</sup> Others saw past the alleged sexual connotation of the photographs, with one critic, who emphasized her own role as a mother, saying of *Wet Bed*, "I could come up with a hundred associations before arriving at prostitute, but I marvel at Mann's ability to make Virginia look absolutely beautiful lying in a pee puddle."<sup>216</sup> In describing the photographs that featured her children in the nude, Mann said, "[w]hen I saw their bodies and photographed them, I never thought of them as being sexual; I thought of them as being simply, miraculously and sensuously beautiful."<sup>217</sup>

For Mann, hiring professional models was not an option in creating "Immediate Family," because the collection "is not just about . . . childhood" and the experience of growing up, "it is also about motherhood."<sup>218</sup> Mann maintained she photographed and published the pictures of her children with their full support and consent.<sup>219</sup> Before publication, Mann gave each child the pictures of themselves and asked them to remove those they did not want published.<sup>220</sup> Surprisingly, the children did not care that the photographs featured them in the nude; indeed, they removed only photographs

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<sup>213</sup> Parsons, *supra* note 196, at 123–24.

<sup>214</sup> *Id.* at 127. See generally HARV. UNIV., Kiku Adatto, COMMITTEE ON DEGREES IN SOC. STUD., <http://socialstudies.fas.harvard.edu/people/kiku-adatto> (last visited Dec. 6, 2017).

<sup>215</sup> Parsons, *supra* note 196, at 130.

<sup>216</sup> *Id.*

<sup>217</sup> Mann, *supra* note 198.

<sup>218</sup> Parsons, *supra* note 196, at 129.

<sup>219</sup> Woodward, *supra* note 198; Mann, *supra* note 198.

<sup>220</sup> Mann, *supra* note 198.

they felt made them look like “dorks.”<sup>221</sup> Mann even considered not publishing the photographs until her children were much older, but her children insisted that she not wait.<sup>222</sup> The oldest two children, Emmett and Jessie, were then sent to a psychologist to verify they understood the implications of the photographs and their publication.<sup>223</sup> In contrast to Sturges’ work, perhaps the fact that Mann’s subjects and muses were her children carries a greater appearance of consent and diminishes a sexual tie between model and photographer, at least enough to keep child pornography charges at bay.<sup>224</sup>

In the wake of child pornography attacks and allegations surrounding the publication of “Immediate Family,” Mann found support among artists and lawyers. Sarah Parsons, Associate Professor at the Department of Visual Art in York University, described the photographs as challenging the public and the private, and stated that “when child pornography displays real abuses against children, it is clearly criminal, but vague laws that might encompass works like Mann’s endanger freedom of expression.”<sup>225</sup> Some art critics stress the photographs are not about the children’s “sexual parts,” but about a “deeper look into the spirit of the individual,” drawing attention to the idea that societal trends pertaining to sexuality change as society and culture do.<sup>226</sup> The late Edward de Grazia, civil liberties expert and law professor at Cardozo School of Law, defended Mann’s work and argued that the Supreme Court would recognize Mann’s artistic motives and value.<sup>227</sup> Grazia stated that Mann’s collection is entitled to First Amendment protection, emphasizing that the outrage over “Immediate Family” highlights the vagueness and overreach of current child pornography laws.<sup>228</sup> In

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*; Parsons, *supra* note 196, at 126.

<sup>223</sup> Parsons, *supra* note 196, at 126.

<sup>224</sup> This is not true for all. In an article for the New York Times regarding Mann’s photography, Woodward asked, “[c]an young children freely give their consent for controversial portraits, even if—especially if—the artist is their parent?” Woodward, *supra* note 198.

<sup>225</sup> Parsons, *supra* note 196, at 132.

<sup>226</sup> Nicole Williams, *The Controversial Art of Sally Mann*, ARTIFICE (June 18, 2015), <http://the-artifice.com/the-controversial-art-of-sally-mann/> (highlighting the use of the Coppertone girl in mainstream society).

<sup>227</sup> Woodward, *supra* note 198.

<sup>228</sup> *Id.*

defense of her work, Mann insisted she had a right to tell her story about family and motherhood. She quoted Oscar Wilde, asserting that when he was condemned “in a similar ad hominem way, [he] insisted that it is senseless to speak of morality when discussing art, asserting that the hypocritical, prudish and philistine English public, when unable to find the art in a work of art, instead looked for the man in it.”<sup>229</sup>

#### IV. “I MADE THAT B\*\*\*\* FAMOUS”

##### A. *Kanye West’s Famous Music Video*

##### 1. MUSIC VIDEO DESCRIPTION, PRODUCTION, AND INSPIRATION

In June 2016, American rapper Kanye West premiered the music video for his song *Famous*<sup>230</sup> from his seventh studio album “The Life of Pablo.”<sup>231</sup> The music video premiered at a viewing party at Forum, an arena located in Inglewood, California.<sup>232</sup>

West’s *Famous* music video begins with a grainy image of a pink sky, followed by a compilation of fast moving images, while audio of West’s 2013 interview with Zane Lowe from BBC Radio 1 is heard, in which West states, “[w]e culture. Rap is the new rock ‘n’ roll. We the rock stars . . . [i]t’s been like that for a minute, Hedi Slimane!”<sup>233</sup> A zoomed camera begins to panel over naked bodies—close enough so viewers can make out only one body part at a time.<sup>234</sup> The song *Famous* by Kanye West begins to play as the only image on the screen is that of silky white bed sheets, scrunched up

<sup>229</sup> Mann, *supra* note 198; Parsons, *supra* note 196, at 129.

<sup>230</sup> See generally KanyeWestVEVO, Kanye West – *Famous*, YOUTUBE (July 1, 2016), [https://www.youtube.com/watch?v=p7FCgw\\_GlWc](https://www.youtube.com/watch?v=p7FCgw_GlWc) [hereinafter *Famous*].

<sup>231</sup> Standen, *supra* note 13. See generally KANYE WEST, *Famous*, on THE LIFE OF PABLO (GOOD Music 2016).

<sup>232</sup> Standen, *supra* note 13; Gerrick D. Kennedy, *Kanye West to Premiere ‘Famous’ Video at the Forum on Friday*, L.A. TIMES (June 22, 2016), <http://www.latimes.com/entertainment/music/la-et-ms-kanye-west-famous-forum-20160622-snap-story.html>.

<sup>233</sup> *Famous*, *supra* note 230. See generally Zane Lowe Sessions: Kanye West, BBC RADIO 1, <http://www.bbc.co.uk/programmes/p01h0cmy> (last visited Dec. 6, 2017).

<sup>234</sup> *Famous*, *supra* note 230, at 0:30.

as if they had just been used.<sup>235</sup> The focus shifts to show some of the faces (and at times breasts) of those featured in the video, who can all be described as “major cultural icons,” lying on a bed together, seemingly asleep.<sup>236</sup> The footage has a voyeuristic and amateur feel to it as the camera haphazardly scans over the nude bodies on the bed.<sup>237</sup> At the 1:40 minute mark, the focus is completely on a pair of breasts as artist Rihanna sings the song’s hook.<sup>238</sup> It now becomes clear who is featured on the bed. In order of display are President George W. Bush,<sup>239</sup> Anna Wintour,<sup>240</sup> President Donald Trump,<sup>241</sup> Rihanna,<sup>242</sup> Chris Brown,<sup>243</sup> Taylor Swift,<sup>244</sup> Kanye West,<sup>245</sup> Kim

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<sup>235</sup> *Id.* at 0:35.

<sup>236</sup> Zara, *supra* note 14; *accord Famous*, *supra* note 230, at 0:52.

<sup>237</sup> *Id.* at 1:20.

<sup>238</sup> *Id.* at 1:40.

<sup>239</sup> 43<sup>rd</sup> President of the United States of America (2001–2009). *George W. Bush*, WHITE HOUSE, <https://www.whitehouse.gov/1600/presidents/georgewbush> (last visited Dec. 6, 2017).

<sup>240</sup> Artistic director of Condé Nast Publications. *Anna Wintour*, FORBES: PROFILE, <http://www.forbes.com/profile/anna-wintour/> (last visited Dec. 6, 2017).

<sup>241</sup> Business man, television personality, and current President of the United States of America. When the *Famous* music video was released, Trump was a candidate in the 2016 presidential election. Michael Scherer, *2016 Person of the Year Donald Trump*, TIME, <http://time.com/time-person-of-the-year-2016-donald-trump/> (last visited Dec. 6, 2017).

<sup>242</sup> Musician who sings the hook in Kanye West’s *Famous* music video. *See Bio*, RIHANNA, <http://www.rihannanow.com/bio/> (last visited Dec. 6, 2017); WEST, *supra* note 231.

<sup>243</sup> Musician. *Chris Brown*, BIOGRAPHY, <https://www.biography.com/people/chris-brown-265946> (last visited Dec. 6, 2017).

<sup>244</sup> Musician. *Taylor Swift*, BIOGRAPHY, <https://www.biography.com/people/taylor-swift-369608> (last visited Dec. 6, 2017).

<sup>245</sup> Fashion designer and rapper. Zara, *supra* note 14.

Kardashian West,<sup>246</sup> Ray J,<sup>247</sup> Amber Rose,<sup>248</sup> Caitlyn Jenner,<sup>249</sup> and Bill Cosby.<sup>250</sup> The music stops playing at the 2:39 minute mark, and for the following four minutes the viewer can only hear and see the nude bodies breathing and snoring.<sup>251</sup>

Around the 6:38 minute mark, the screen cuts to black and the words “SPECIAL THANKS” appear, followed by “BILL COSBY” “CAITLYN JENNER” “AMBER ROSE” “RAY J” “KIM KARDASHIAN WEST” “TAYLOR SWIFT” “CHRIS BROWN” “RIHANNA” “DONALD TRUMP” “ANNA WINTOUR” “GEORGE W. BUSH” “FOR BEING FAMOUS.”<sup>252</sup> The music restarts at the 7:25 minute mark, as the camera zooms and focuses on Kanye West and his wife, Kim Kardashian West, on the bed.<sup>253</sup> The camera slowly zooms out, adding two more individuals into the frame at a time, until the audience has a full view of the bed, with all those depicted in the frame.<sup>254</sup> The footage is now clear and the image resembles Vincent Desiderio’s painting *Sleep*.<sup>255</sup> In the last

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<sup>246</sup> Television personality, businesswoman, and wife of Kanye West. Natalie Robehmed, *Kim Kardashian West, Mobile Mogul: The Forbes Cover Story*, FORBES (July 11, 2016, 9:50 AM), <http://www.forbes.com/sites/natalierobehmed/2016/07/11/kim-kardashian-mobile-mogul-the-forbes-cover-story/#3a6e42a77aea>.

<sup>247</sup> Musician. *Ray J: Artist Biography of Bradley Torreano*, ALLMUSIC, <http://www.allmusic.com/artist/ray-j-mn0000405142/biography> (last visited Dec. 6, 2017).

<sup>248</sup> Model and activist. See Soraya Nadia McDonald, *The Complicated Feminism of Amber Rose’s SlutWalk*, WASH. POST (Oct. 5, 2015), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/10/05/the-complicated-feminism-of-amber-roses-slutwalk/?utm\\_term=.d36c02d0f008](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/10/05/the-complicated-feminism-of-amber-roses-slutwalk/?utm_term=.d36c02d0f008).

<sup>249</sup> 1976 Olympic gold medalist, television personality, and former step-father of Kim Kardashian West (formerly known as Bruce Jenner). See Katy Steinmetz, *Person of the Year: The Short List No. 7 Caitlyn Jenner*, TIME, <http://time.com/time-person-of-the-year-2015-runner-up-caitlyn-jenner/> (last visited Dec. 6, 2017); Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (June 25, 2015, 10:00 AM), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>.

<sup>250</sup> Former comedian, actor, and producer. See *Bill Cosby Fast Facts*, CNN, <http://www.cnn.com/2013/06/24/us/bill-cosby-fast-facts/> (last updated Feb. 28, 2018, 5:15 PM).

<sup>251</sup> *Famous*, *supra* note 230, at 2:39.

<sup>252</sup> *Id.* at 6:38.

<sup>253</sup> *Id.* at 7:25.

<sup>254</sup> *Id.* at 7:27.

<sup>255</sup> *Id.* at 8:35.

couple of seconds, West, lying on the bed, turns his head and looks to the camera.<sup>256</sup>

For the creation of the *Famous* music video, West instructed his team at DONDA, a “Content, Experience, [and] Product Company,” to produce “anatomically correct representations” of each individual.<sup>257</sup> The team charged with the project meticulously researched those who would be depicted in the music video.<sup>258</sup> To adequately capture every small detail, West’s DONDA team examined thousands of photographs and spoke with celebrity stylists.<sup>259</sup> The final piece was produced using animation, scanning, 3-D software, and hand-sculpting—each strand of hair applied individually.<sup>260</sup> This feat proved successful, with the final product leaving many viewers to wonder which celebrities featured were playing themselves and which were prosthetic replicas.<sup>261</sup> The video, filmed over three months, was inspired by artist Vincent Desiderio’s painting titled *Sleep*, which similarly features a row of nude, but unknown, individuals tangled in white sheets, lying side by side.<sup>262</sup> According to West, the music video is not intended to be sexual, and he and his team were very careful not to include any sexually charged footage of the replicas.<sup>263</sup> Additionally, West has expressed the music video is not meant to show support or negativity towards any of those depicted, but is instead meant to be “a comment on fame.”<sup>264</sup> In August 2016, West displayed the sculpture(s) at an exclusive two-day art exhibition at the Los Angeles gallery Blum & Poe.<sup>265</sup> The piece has been described as “extraordinarily lifelike” and “eerily convincing.”<sup>266</sup>

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<sup>256</sup> *Id.* at 8:52.

<sup>257</sup> Zara, *supra* note 14.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*; Standen, *supra* note 13.

<sup>262</sup> Standen, *supra* note 13; Zara, *supra* note 14.

<sup>263</sup> Standen, *supra* note 13; Sottek, *supra* note 15.

<sup>264</sup> Standen, *supra* note 13.

<sup>265</sup> Zara, *supra* note 14.

<sup>266</sup> *Id.*

2. RECEPTION<sup>267</sup>

## a. The Individuals Depicted

After the *Famous* music video premiered, a representative for President George W. Bush told *Billboard* magazine that President Bush did not participate in the video, adding that he is in “much better shape” than depicted.<sup>268</sup> President Donald Trump’s representative denied Trump’s involvement in the production.<sup>269</sup> Chris Brown demonstrated his approval for the music video in the caption of an Instagram post.<sup>270</sup> Kim Kardashian West consented to the use of her likeness for the music video and even took part in the creation of her anatomical replica.<sup>271</sup> Ray J was confronted by reporters from the celebrity news outlet TMZ in downtown Los Angeles after the video’s release.<sup>272</sup> In the videotaped encounter, Ray J is asked his

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<sup>267</sup> Because the *Famous* video involved celebrities, most of the information regarding their reactions was reported by tabloid magazines. Therefore, the content in this Section should be considered in the context of sensational tabloid news.

<sup>268</sup> Gil Kaufman, *George W. Bush Responds to Kanye West’s ‘Famous’ Video: I’m in ‘Much Better Shape,’* *BILLBOARD* (June 27, 2016), <https://www.billboard.com/articles/news/7416672/george-w-bush-naked-kanye-west-famous-video>.

<sup>269</sup> *Kanye’s ‘Famous’ Video Features Nude Donald Trump, Taylor Swift and Caitlyn Jenner*, *VARIETY* (June 24, 2016, 9:41 PM), <http://variety.com/2016/music/news/kanyes-famous-video-features-nude-donald-trump-taylor-swift-and-caitlyn-jenner-1201803563/>.

<sup>270</sup> Mitchell Peters, *Chris Brown Responds to Kanye West’s Provocative ‘Famous’ Video*, *BILLBOARD* (June 25, 2016), <http://www.billboard.com/articles/columns/hip-hop/7416565/chris-brown-responds-to-kanye-west-provocative-famous-video>. Instagram is a mobile phone application and website that allows users to post photographs and videos to share either privately or publicly. Elise Moreau, *What Is Instagram, Anyway?*, *LIFEWIRE* (last updated Feb. 8, 2018), <https://www.lifewire.com/what-is-instagram-3486316>.

<sup>271</sup> Standen, *supra* note 13; Spencer Kornhaber, *Kanye West’s ‘Famous’ Indecency*, *ATLANTIC* (June 27, 2016), <https://www.theatlantic.com/entertainment/archive/2016/06/kanye-wests-famous-indecency-taylor-swift/488978/>; Zara, *supra* note 14.

<sup>272</sup> *Ray J Manager’s Pissed at Kanye ‘WATCH YOUR F\*\*\*\*\* MOUTH!’*, *TMZ* (June 27, 2016, 8:34 AM), <http://www.tMZ.com/2016/06/27/ray-j-kanye-west-threat-wack-100/>.

thoughts on the use of his likeness for the music video.<sup>273</sup> Ray J replied that he was not interested in discussing the matter, but his manager, who goes by the name of “Wack 100,” took the opportunity to threaten West.<sup>274</sup> Anna Wintour, Rihanna, Taylor Swift, Caitlyn Jenner, and Bill Cosby have not officially responded to the music video’s release.

b. The Public

In an interview with *Vanity Fair* magazine, West stated that he showed the music video to some of his celebrity friends who did not appear in it: “[g]uess what the response is when I show it to them?” he asked, “[t]hey want to be in the bed.”<sup>275</sup> Tim Blum, co-founder of the gallery Blum & Poe, where West’s piece was exhibited, described the piece as “extraordinary,” stating it “completely succeeds as a sculpture and multi-media installation.”<sup>276</sup> Despite the praise, many have asked whether this can actually be considered “art.”<sup>277</sup> In response to the critics, Blum asserts that if this piece were created by someone other than West, such as a known artist, the public’s perception would be different—“it would be celebrated and universally supported at the highest level.”<sup>278</sup> Acclaimed director Werner Herzog raved over the music video, describing it as “deceivingly well-cast” and possessing caliber.<sup>279</sup> Others have criticized the piece as plagiarism of another artist’s work, referring to Desiderio’s painting *Sleep*, which itself was based on Jackson Pollock’s 1943 painting *Mural*.<sup>280</sup> Despite the plagiarism accusations, Desiderio stated

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Standen, *supra* note 13.

<sup>276</sup> Zara, *supra* note 14.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Jen Yamato, *Watch: Werner Herzog Analyzes Kanye West’s ‘Famous’ Music Video*, DAILY BEAST (Aug. 12, 2016, 12:36 AM), <http://www.thedailybeast.com/articles/2016/08/12/watch-werner-herzog-analyzes-kanye-west-s-famous-music-video.html>; accord Sarah Lindig, *Director Werner Herzog Analyzes Kanye West’s ‘Famous’ Music Video*, MARIE CLAIRE (Aug. 14, 2016), <http://www.marieclaire.com/celebrity/music/a22056/werner-herzog-kanye-west-famous-music-video/>.

<sup>280</sup> Zara, *supra* note 14.

that he admires West for attempting to work at the highest artistic level.<sup>281</sup>

Unsurprisingly, the *Famous* music video has received considerable backlash. Some have described the cinematography as “voyeuristic” and “predatory,”<sup>282</sup> and others have compared the music video to “leaked sex tapes and the violation they represent,” doubting the intended message of the project.<sup>283</sup> The biggest critic thus far has been writer, producer, and actress Lena Dunham, who highlighted the untimeliness of the video’s release in regards to the now infamous Brock Turner rape case and recent incidents of sexual assaults livestreamed on Periscope.<sup>284</sup> Dunham, who acknowledged her friendship with Taylor Swift in her critique, labelled the music video as “sickening,” condemning it as “one of the more disturbing ‘artis-

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<sup>281</sup> *Id.*

<sup>282</sup> Sottek, *supra* note 15.

<sup>283</sup> Kornhaber, *supra* note 271.

<sup>284</sup> Ella Hunt, *Lena Dunham Condemns Kanye West’s New Music Video Famous as ‘Sickening,’* GUARDIAN (June 28, 2016, 2:14 AM), <https://www.theguardian.com/culture/2016/jun/28/lena-dunham-condemns-kanye-wests-new-music-video-famous-as-sickening>. See generally Ashley Fantz, *Outrage over 6-Month Sentence for Brock Turner in Stanford Rape Case*, CNN (last updated June 7, 2016, 8:45 AM), <http://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/>; Sam Levin, *Brock Turner Laughed After Bystanders Stopped Stanford Sex Assault, Files Show*, GUARDIAN (Aug. 26, 2016, 3:43 PM), <https://www.theguardian.com/society/2016/aug/26/brock-turner-stanford-sexual-assault-victim-testimony-laugh>; Matt Hamilton, *Brock Turner to Be Released from Jail After Serving Half of Six-Month Sentence in Stanford Sexual Assault Case*, L.A. TIMES (Aug. 30, 2016, 12:05 AM), <http://www.latimes.com/local/lanow/la-me-ln-brock-turner-release-jail-20160829-snap-story.html>; Emanuella Grinberg & Catherine E. Shoichet, *Brock Turner Released From Jail After Serving 3 Months for Sexual Assault*, CNN (last updated Sept. 2, 2016, 8:52 PM), <http://www.cnn.com/2016/09/02/us/brock-turner-release-jail/>; Steve Olenski, *What Is Periscope and How Can You Use It for Business Video Streaming?*, FORBES (Dec. 5, 2015, 9:00 AM), <http://www.forbes.com/sites/steveolenski/2015/12/05/what-is-periscope-and-how-can-you-use-it-for-business-video-streaming/#424abe4671b8> (explaining Periscope is a service in which users can live-stream videos and broadcast them to the Periscope community). For use of Periscope in the livestream of sexual assaults, see Mike McPhate, *Teenager Is Accused of Live-Streaming a Friend’s Rape on Periscope*, N.Y. TIMES (April 18, 2016), [https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html?\\_r=0](https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html?_r=0).

tic' efforts in recent memory," specifically taking issue with identifiable women "being reduced to a pair of waxy breasts."<sup>285</sup> Dunham ended her critique by asserting that she admires West, and urging him to make his statements about privacy and celebrity, but not in a manner that "feels informed and inspired by the aspects of our culture that make women feel unsafe even in their own beds, in their own bodies."<sup>286</sup>

The *Famous* music video was nominated for the "Video of the Year" award at the 2016 MTV Video Music Awards, but ultimately lost.<sup>287</sup> During the awards ceremony, West recognized the controversy surrounding the music video and reiterated that it was "an expression of our now, our fame right now . . . [w]e all came over in the same boat and now we all ended up in the same bed."<sup>288</sup>

#### B. *Kanye West's "Famous" Music Video and Its Relation to NCP*

Kanye West's *Famous* music video is featured on YouTube's website with an age-restriction notice.<sup>289</sup> YouTube's age-restricted content categorization is reserved for videos that do not necessarily "cross the line, but still contain sexual content."<sup>290</sup> Factors that YouTube takes into consideration when categorizing a video as age-restricted include: whether the video contains nudity as the focal point, such as breasts, buttocks, or genitals; "whether the video[']s setting is sexually suggestive . . . , such as a bed;" and whether the content of the video is "educational, documentary, scientific, or artistic."<sup>291</sup>

Although West has been adamant that the music video is about fame and great care was taken to exclude sexual footage, similar to the effect Mann's inclusion of photographs of phallic sculptures had in the introduction to "Immediate Family," the highly publicized real-life sexual drama among those depicted in West's video adds a

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<sup>285</sup> Hunt, *supra* note 284.

<sup>286</sup> *Id.*

<sup>287</sup> Zara, *supra* note 14.

<sup>288</sup> *Id.*

<sup>289</sup> *Famous*, *supra* note 230.

<sup>290</sup> *Nudity and Sexual Content Policies*, YOUTUBE: HELP, <https://support.google.com/youtube/answer/2802002> (last visited Dec. 6, 2017).

<sup>291</sup> *Id.*

layer of sexual connotation to the work.<sup>292</sup> For example, Kanye West and Kim Kardashian West are married;<sup>293</sup> Rihanna and Chris Brown have reportedly been in an “on-again-off-again” relationship since 2008;<sup>294</sup> Amber Rose and Kanye West were in a relationship for about two years;<sup>295</sup> Kim Kardashian West and Ray J were in a relationship and made a “sex tape” that is widely known and circulated;<sup>296</sup> at the time of the music video’s release, Bill Cosby was publicly accused of sexual assault by many women and subsequently faced trial for those accusations;<sup>297</sup> and although Taylor Swift has not been romantically linked to any of those featured, the camera pans over her replica in the music video as the lyrics, “I feel like me and Taylor might still have sex/ Why? I made that b\*\*\*\* famous” are heard.<sup>298</sup> Armed with this knowledge, viewers may very likely suspend West’s purported message and interpret the video as sending a different message loaded with malicious intent—whether to embarrass the individuals depicted without their consent, as much NCP is intended to do, or as some sort of power display. As one reviewer noted, “nudity *is* sexual in our culture,” especially our popular culture.<sup>299</sup>

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<sup>292</sup> Standen, *supra* note 13; Parsons, *supra* note 196, at 126.

<sup>293</sup> William Defebaugh, *Why No One Is Coming After Kanye For His ‘Famous’ Video*, V MAG. (June 27, 2016), <http://vmagazine.com/article/no-one-coming-kanye-famous-video/>.

<sup>294</sup> Aggi Ashagre, *Rihanna’s Relationship Timeline*, BILLBOARD (Sept. 16, 2015), <http://www.billboard.com/articles/columns/pop-shop/6699613/rihanna-relationship-timeline>.

<sup>295</sup> Samantha Schnurr, *Amber Rose Reacts to Kanye West’s Controversial ‘Famous’: ‘I’ve Worked My F—king Ass Off’*, E! NEWS (July 1, 2016, 9:04 AM), <http://www.eonline.com/news/777254/amber-rose-wants-everyone-to-stop-giving-men-credit-for-making-her-famous-i-ve-worked-my-f-king-ass-off>.

<sup>296</sup> Bryan Hood, *Ray J Reminds Everyone He Had Sex with Kim Kardashian*, PAGE SIX (Jan. 4, 2017, 5:56 PM), <http://pagesix.com/2017/01/04/ray-j-reminds-everyone-he-had-sex-with-kim-kardashian/>.

<sup>297</sup> *Bill Cosby Fast Facts*, *supra* note 250. The first trial ended in a mistrial in June 2017. *Id.* A new trial date has been announced for Spring 2018. Jon Hurdle, *Judge Delays Bill Cosby Retrial Until Spring*, N.Y. TIMES (Aug. 22, 2017), [https://www.nytimes.com/2017/08/22/arts/bill-cosby-retrial-to-start-next-spring-norristown-pennsylvania.html?\\_r=0](https://www.nytimes.com/2017/08/22/arts/bill-cosby-retrial-to-start-next-spring-norristown-pennsylvania.html?_r=0).

<sup>298</sup> *Famous*, *supra* note 230, at 1:00.

<sup>299</sup> Sarah Rense, *Will Kanye West Be Sued for His ‘Famous’ Video?*, ESQUIRE (June 27, 2016), <http://www.esquire.com/lifestyle/sex/news/a46196/kanye-famous-video-lawsuit/>. Mere nudity may be enough to be considered pornography

Whether the *Famous* music video may be considered NCP is, at least partially, a question of law.<sup>300</sup> California, where the music video premiered and where many of those featured live, is one of thirty-eight states with NCP laws.<sup>301</sup> California's NCP law prohibits, in relevant part, the use of concealed recording devices of any type to secretly film an

identifiable person . . . in a state of full or partial undress, for the purpose of viewing the[ir] body . . . without the consent or knowledge of that [] person, in the interior of . . . any . . . area in which that [] person has a reasonable expectation of privacy, with the intent to invade the privacy of that [] person.<sup>302</sup>

This law does not seem to cover the *Famous* music video because there was no use of a concealed recording device to capture the images and videos of the individuals depicted; rather, West created anatomical replications of the individuals in the nude, or what West and his team believe the individuals look like in the nude, and filmed his replicas. Additionally, the music video was not filmed in the interior of an area in which those depicted have a reasonable expectation of privacy as required by the California law. Given these facts, and the applicable statutory language, it would seem an unsubstantiated stretch to apply California's NCP law to West's *Famous* music video.

Alternatively, one can view West's *Famous* music video through the lens of proposed anti-NCP legislation. Professor Franks' model state law prohibits the knowing distribution of an image of an identifiable person, whether "identifiable from the image itself or

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in the NCP context because it is an attempt to diminish the individual depicted and subject him or her to unauthorized sexual exploitation. *See supra* Section III.A.2.ii.

<sup>300</sup> I say this in terms of a remedy. There are instances in which the applicable law does not identify a situation as NCP, even though that situation may otherwise fit the non-legal definition of NCP. *See supra* Part II.

<sup>301</sup> 38 States + DC Have Revenge Porn Laws, *supra* note 57.

<sup>302</sup> Other provisions of this law cover NCP situations in which an individual initially gives a sexually explicit image of themselves to a person who later distributes the image without the individual's consent. CAL. PENAL CODE § 647(j)(3)(A) (West 2017).

information displayed in connection with the image . . . whose intimate parts are exposed . . . when the actor knows that or consciously disregarded a substantial and unjustified risk that the depicted person has not consented to such disclosure.”<sup>303</sup> Professor Franks’ model federal law prohibits the knowing disclosure, through interstate commerce, of “an image of another, identifiable person whose intimate parts are exposed . . . when the actor knows or should have known that the depicted person has not consented to such disclosure.”<sup>304</sup> Under both proposed laws, West’s *Famous* music video may be considered unlawful NCP. The music video and the human replicas are images. The individuals featured are famous celebrities, identifiable in the video itself and by name in the credits sequence, whose bodies were replicated and turned into nude imitations. Additionally, the creation of the nude sculptures using the celebrities’ likeness and subsequent filming was done without the consent of most.

The fact that the music video was created with replications of identifiable individuals, not footage of the individuals themselves, should not diminish this characterization. In 1996, Congress passed the Child Pornography Prevention Act (“CPPA”), which expanded the federal law against child pornography to include virtual child pornography.<sup>305</sup> Virtual child pornography consists of “sexually explicit images that appear to depict minors but were produced without using any real children.”<sup>306</sup> Provisions of the CPPA that outlawed any apparent “visual depiction . . . of a minor” engaged in sexually explicit conduct, and any sexually explicit image that is “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct” were held to be unconstitutional by the Supreme Court in *Free Speech Coalition*.<sup>307</sup> The Court reasoned that these provisions prohibited a form of speech that is considered neither

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<sup>303</sup> *Drafting an Effective ‘Revenge Porn’ Law*, *supra* note 6, at 9.

<sup>304</sup> *Id.*

<sup>305</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239–41 (2002).

<sup>306</sup> *Id.* at 239.

<sup>307</sup> *Id.* at 241–44, 258 (internal quotations omitted).

child pornography under *Ferber* nor obscene under *Miller*.<sup>308</sup> Nevertheless, the constitutionality of Section 2256(8)(C) of the CPPA, which prohibits the digital “morphing” or alteration of images of real children “so that the children appear to be engaged in sexual activity,”<sup>309</sup> was held constitutional in *United States v. Hotaling*.<sup>310</sup> *Hotaling* concludes that minors are harmed by image alteration because the connection between the actual minor and the sexually explicit conduct affects the actual minor’s reputation and may lead to psychological harm stemming from the knowledge that his or her image was exploited.<sup>311</sup> Unlike child pornography, NCP has not been explicitly federally outlawed, but this example demonstrates a great potential for harm when, similar to those featured in West’s music video, an identifiable individual’s innocent image or likeness is altered to depict a sexually explicit context.

Even if the music video escaped application of the California state law against NCP, that does not necessarily preclude West’s production from being categorized as NCP. The video could easily be described as the publication of sexually explicit content without the featured individual’s consent, and therefore falls squarely within the definition of NCP.<sup>312</sup>

### C. *Celebrities, They’re Just Like Us!: Alternative Causes of Action*

After the music video’s release, Kanye West tweeted, and then deleted, the following: “Can somebody sue me already #I’llwait.”<sup>313</sup> So, if not NCP, how can the celebrities depicted sue West?<sup>314</sup> Similar to NCP victims who live in states without NCP laws, or with deficient NCP laws, the celebrities in West’s *Famous* music video

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<sup>308</sup> *Id.* at 239–40. See generally *New York v. Ferber*, 458 U.S. 747, 759–64 (1982); *Miller v. California*, 413 U.S. 15, 24–26 (1973).

<sup>309</sup> *Free Speech Coalition*, 535 U.S. at 242.

<sup>310</sup> 634 F.3d 725, 728 (2d Cir. 2011).

<sup>311</sup> *Id.* at 728–31.

<sup>312</sup> *Id.* at 3.

<sup>313</sup> Defebaugh, *supra* note 293.

<sup>314</sup> The causes of action mentioned below are only an example, and not an exhaustive list, of possible claims the celebrities featured in West’s *Famous* music video may bring.

will have to resort to other areas of law,<sup>315</sup> such as the right of publicity or the Lanham Act.

The right of publicity theory was developed to protect a celebrity's commercial interest in his or her identity, which is considered valuable in the promotion and endorsement of, and association with, products and services.<sup>316</sup> California recognizes the statutory and common law right of publicity. California's statutory right of publicity prohibits any person from "knowingly us[ing] another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods . . . without such person's prior consent."<sup>317</sup> The common law right of publicity is similar, but not identical, to its statutory counterpart. The elements of California's common law claim proscribe an individual from using another person's identity, for the individual's advantage, whether commercial or otherwise, without such person's consent.<sup>318</sup> The unauthorized use of another's identity may include the use of the person's "name, voice, likeness, etc."<sup>319</sup>

The Lanham Act is considered "the federal equivalent of a right of publicity claim."<sup>320</sup> Section 43(a) of the Lanham Act states that any person using, "in connection with any goods or services . . . any false . . . or misleading description . . . or representation . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."<sup>321</sup> At the heart of a Lanham Act claim lies proof of a "likelihood of confusion";<sup>322</sup> in other words, whether a consumer or viewer is likely to believe that the individual depicted endorsed the product or consented to the use of his or her image or likeness by the creator of the product.<sup>323</sup>

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<sup>315</sup> See *supra* Section II.C.

<sup>316</sup> *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983).

<sup>317</sup> CAL. CIVIL CODE § 3344(a) (West 2014).

<sup>318</sup> *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d. 607, 612–13 (Cal. Ct. App. 2006).

<sup>319</sup> *Id.* at 612.

<sup>320</sup> *Id.* at 614.

<sup>321</sup> 15 U.S.C. § 1125(a) (2012).

<sup>322</sup> *Kirby*, 50 Cal. Rptr. 3d at 613–14; accord *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

<sup>323</sup> *White*, 971 F.2d 1395 at 1399–1400.

Although the common law and statutory right of publicity, as well as the Lanham Act, aim to protect the commercial interests of celebrities in their images, they are limited by the right to free expression provided by the First Amendment.<sup>324</sup> In balancing the right to free expression versus a celebrity's right of publicity, the Supreme Court of California developed a "transformative" test.<sup>325</sup> In *Comedy III Products, Inc. v. Gary Saderup, Inc.*, the Supreme Court of California held that a defendant may raise a First Amendment defense in the use of a celebrity's likeness when such likeness is used as a form of expression, such as art, whether or not sold for profit, if the defendant's work "adds something new, with a further purpose or different character, altering the [image or likeness] with new expression, meaning, or message."<sup>326</sup>

The rationale behind this transformative test is that if a work has been sufficiently transformed, it "is less likely to interfere with the economic interests protected by the right of publicity, because a distorted image . . . is a poor substitute for more conventional forms of celebrity depictions, and thus less likely to threaten [their] market."<sup>327</sup> The transformative test asks "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question."<sup>328</sup> If the work containing the individual's likeness is transformed to the point that it "has become primarily the defendant's own expression," rather than a literal recreation of the celebrity's image, the work is protected by the First Amendment.<sup>329</sup>

At first glance, unless nudity is considered "transformative," West's creation may not appear to have "transformed" the images of the celebrities featured; indeed, as mentioned above, West and his team worked to meticulously copy the physical appearances of those portrayed, down to the most minute details.<sup>330</sup> We are left with not

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<sup>324</sup> *Id.* at 1401 n.3.

<sup>325</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799–800, 809–10 (Cal. 2001).

<sup>326</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)); accord *Kirby*, 50 Cal. Rptr. 3d at 614–15.

<sup>327</sup> *Kirby*, 50 Cal. Rptr. 3d at 614–15.

<sup>328</sup> *Comedy III Prod., Inc.*, 21 P.3d at 809.

<sup>329</sup> *Id.*; *Kirby*, 50 Cal. Rptr. 3d at 614–15.

<sup>330</sup> *Zara*, *supra* note 14.

caricatures or lampoons, but exact replicas of the individuals that left many stumped and wondering how West persuaded such icons to lie in bed together.<sup>331</sup> But one may easily counter that the images, taken together and in the context of the music video, were transformed into a larger, albeit ironic, new message: a metaphor for fame and the scrutinized exploitation today's celebrities endure.<sup>332</sup> Celebrities' lives are always on display, even during their most vulnerable and intimate moments, and West allegedly intended to demonstrate the offensive, distasteful element in our society's obsession with celebrity.<sup>333</sup>

Some of the celebrities depicted were reportedly upset and harmed by West's production,<sup>334</sup> yet they have not challenged West and his message in court. Some hypothesize that no lawsuit has been filed because the piece is "undeniably genius" as a metaphor for fame.<sup>335</sup> Others believe filing a lawsuit could lead to further publicity for the music video, essentially popularizing the very thing sought to be extinguished.<sup>336</sup> Moreover, filing a lawsuit could potentially lead to a grueling discovery process, as demonstrated by other right of publicity actions that have required the production of endorsement contracts and long depositions aimed at uncovering the true value of a celebrity's fame.<sup>337</sup> And perhaps the subjects are reluctant to sue because the court of public opinion is paramount to the court of law, and the public's outcry has not been loud enough to warrant West's legal condemnation.<sup>338</sup>

West's *Famous* music video does not suggest any person may now produce virtual NCP with the use of an identifiable individual's innocent image and avoid prosecution or civil liability—even if he or she were to add a soundtrack to it and announce the work is intended to communicate an innocent, artistic message. But the piece

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<sup>331</sup> *Id.*

<sup>332</sup> Defebaugh, *supra* note 293.

<sup>333</sup> *Id.*

<sup>334</sup> *See supra* Section IV.A.2.i.

<sup>335</sup> Defebaugh, *supra* note 293.

<sup>336</sup> Eriq Gardner, *Kanye West's 'Famous' Video Is Infamous, But Will Any Celebrity Dare Sue?*, BILLBOARD (June 28, 2016), <http://www.billboard.com/articles/news/7423175/kanye-west-famous-legal-analysis>.

<sup>337</sup> *Id.*

<sup>338</sup> This may also be why Sally Mann was not subject to the same legal treatment as Jock Sturges. *See supra* Section III.B.

demonstrates the variations of NCP that current and proposed laws have not necessarily taken into consideration. There may very likely be instances where a perpetrator uses a victim's innocent image, alters it to make the victim appear as if he or she were posing or engaged in sexual conduct, and distributes it for the same reasons perpetrators distribute traditional forms of NCP.<sup>339</sup> As discussed above, the use of an identifiable individual's image in this manner has the potential to cause great reputational and psychological harm.<sup>340</sup>

If a federal NCP law were enacted to prohibit the use of an identifiable individual's innocent, non-sexual image in the creation of NCP, situations similar to West's *Famous* music video, where the material may fall within the definition of NCP, features public figures, and is intended to be and is considered art by community standards, may still be protected. This could be accomplished by including an exception, just as Franks' model state law does, to "[d]isclosures made in the public interest."<sup>341</sup> Similar to defamation suits that place a higher burden of proof on celebrities and public figures due to the nature of their profession, a higher burden requiring a demonstration of reputational or psychological harm, or evidence that the material does not contain a larger, artistic message, may be placed on morphed-image NCP claims brought by public figures.<sup>342</sup>

## V. CONCLUSION

Like child pornography, as evidenced by controversies surrounding Sturges and Mann's oeuvres, it is difficult to create and enforce an NCP law that reasonably encompasses all instances in which one may be offended or rattled by non-consensual nude depictions of individuals without offending the First Amendment right to freedom of expression.<sup>343</sup> But West's *Famous* music video and

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<sup>339</sup> *Why We Need a Federal Criminal Law*, *supra* note 3.

<sup>340</sup> *United States v. Hotaling*, 634 F.3d 725, 729–30 (2d Cir. 2011).

<sup>341</sup> *Drafting an Effective 'Revenge Porn' Law*, *supra* note 6, at 9.

<sup>342</sup> *See Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803–04 (Cal. 2001) (stating, in the court's discussion of defamation, that public figures are given differential treatment because they have "greater access to the media and therefore greater opportunity to rebut defamatory statements . . . and . . . those who have become public figures have done so voluntarily and therefore invite attention and comment") (internal quotations omitted).

<sup>343</sup> *See supra* Part III.

the Supreme Court's holding in *Hotaling* demonstrate the potential for harmful situations and variations of NCP that neither the current nor proposed laws have accounted for, with the rise in the use and advancement of technology likely worsening the situation.<sup>344</sup>

West's *Famous* music video was produced and distributed without the consent of all those depicted, consequently leaving many upset and uneasy.<sup>345</sup> The fact that West is sheltered by his characterization as an artist and the music video by the label of "art," highlights the competing interests and rights we have as individuals. Perhaps West's intended message is true and those attacking the production, in the words of Oscar Wilde and in the spirit of Sally Mann, are part of a hypocritical culture that exploits celebrities, shamelessly gawking and consuming every bit of information possible, yet rejecting the idea when it is thrown in its face; or maybe it's covert NCP.<sup>346</sup>

Notwithstanding, an effective NCP law should proscribe the use of an identifiable individual's innocent picture in the production of "virtual" or "morphed" NCP, while protecting disclosures made in the public interest and content considered as art by the community. West may have intended to send a message about fame, but his work sends a broader message about where we, as a society, draw lines in the development and enforcement of our laws. When it comes to the law and art, the lines are muddled, and sometimes what distinguishes the legal from the illegal is public perception and points of view. What message is being sent? What message is *intended*? And what do we want to hear?

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<sup>344</sup> See *supra* Part II. See generally *Hotaling*, 634 F.3d at 728–31.

<sup>345</sup> See *supra* Section IV.A.2.

<sup>346</sup> Mann, *supra* note 198. To complicate things further, these two categorizations may not be mutually exclusive.