

CRIMINALISATION OF THE DISSEMINATION OF NON-CONSENSUAL SEXUAL DEEPFAKES IN THE EUROPEAN UNION. A COMPARATIVE LEGAL ANALYSIS.

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Abstract

The dissemination of non-consensual sexual deepfake is the most common (mis)use of deepfake technology, which disproportionately targets women. In 2021, the European Union Parliament's report on deepfake stated that 'the legal roadmap for victims of deepfake pornography often remains unclear.' The paper asserts that adding criminal law to this roadmap is preferable and more legitimate than not doing so because non-consensual sexual deepfake causes serious harm, and technical measures and civil remedies fall short of effectively tackling this issue. In this light, the paper employs desk research, legal dogmatic method, and fundamental canons of legal interpretation to scrutinize to what extent criminal laws of selected fourteen European Union Members can effectively criminalize dissemination of non-consensual sexual deepfake. The findings demonstrate that the criminal codes of eight out of fourteen countries do not effectively criminalize the dissemination of non-consensual sexual deepfake. The upper limits of punishment differ significantly among countries, and some member states employ defamation, the violation of privacy, and the non-consensual sharing of sensitive personal data to penalize dissemination of non-consensual sexual deepfake, which disregards the sexual and gendered nature of the wrongdoing. Lastly, this paper focuses on the potential shortcomings of the recently adopted European Union Directive on Combating Violence Against Women and Domestic Violence concerning the criminalization of dissemination of non-consensual sexual deepfakes.

1 Introduction

'It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.'¹ The old maxim of the pioneers of the right to privacy holds true for the emerging technology issues of the 21st century, such as deepfake. This technology has enormous potential for prosocial uses;² however, the primary (mis)use of deepfake has been image-based sexual

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¹ Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.

² Can Yavuz, 'Deepfake for Human Rights: Disregarded Prosocial Uses of Deepfake and Their Nexus to Human Rights' (forthcoming).

abuse. The research³ shows that the vast majority of deepfakes are intimate/sexual, almost all of them target women and are manufactured and shared without consent.⁴

Prior to delving deeper, it is crucial to clarify the terminology. The term non-consensual sexual deepfake in this paper refers to synthetic but realistic-looking image or video that is non-consensually edited or created by AI and identifiably depicts the subject in an intimate or sexual setting. This paper purposely avoids the terms non-consensual deepfake pornography or revenge pornography to define this phenomenon in a victim friendly fashion. Also, this paper solely concentrates on visual non-consensual sexual deepfakes (video and image), although non-consensual sexual deepfake, in theory, can take the form of audio.

Non-consensual sexual deepfake can take three forms: 1) face swap (superimposition), 2) strip naked, and 3) synthesis. Face swap non-consensual sexual deepfake superimposes one's face onto another person's face who is displayed in an intimate/sexual setting (typically a pornographic video) without the consent of the parties involved. Strip naked non-consensual sexual deepfake is characterized by the unauthorized removal of clothing from an image or video. Synthesis non-consensual sexual deepfake consists of entirely novel and non-existent sexual/intimate image/video of an identifiable person, which is created without consent. This paper addresses all three categories of non-consensual sexual deepfake (as long as the subject[s] are identifiable in non-consensual sexual deepfake).

The law and social norms lag behind the rapid development and misuse of technology and fall short of effectively protecting the victims of non-consensual sexual deepfake.⁵ For instance, four years after the emergence of non-consensual sexual deepfake, the European Union Parliament's report on deepfake stated that 'the legal roadmap for victims of deepfake pornography often remains unclear.'⁶ This raises the question of should this roadmap take the path of criminal law?'

³ Home Security Heroes, '2023 State of Deepfakes Realities, Threats, and Impact' (*Home Security Heroes*) <<https://www.homesecurityheroes.com/state-of-deepfakes/>> accessed 27 October 2023.

⁴ See also Henry Ajder and others, 'The State of Deepfakes: Landscape, Threats, and Impact' (Deeptime 2019) 1-2.

⁵ Rebecca A. Delfino, 'Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act' (2019) 88 *Fordham Law Review* 887; Anne Pechenik Gieseke, "'The New Weapon of Choice': Law's Current Inability to Properly Address Deepfake Pornography' (2020) 73 *Vanderbilt Law Review* 1479; Matthew Hall and Jeff Hearn and Ruth Lewis, *Digital Gender-Sexual Violations Violence, Technologies, Motivations* (1st edn, Routledge 2022) 162-164; Law Commission, *Intimate Image Abuse: A Final Report* (Law Com No 407 2022) 4; Bart van der Sloot and Yvette Wagenveld and Bert-Jaap Koops, *Deepfakes: the legal challenges of a synthetic society* (Tilburg University 2022) 6-7.

⁶ Mariëtte van Huijstee and others, *Tackling Deepfakes in European Policy* (European Parliamentary Research Service 2021) 50.

Criminal law is a blunt instrument that needs to be employed as a last resort. Before using it, we should ponder whether non-consensual sexual deepfake is harmful, and if so, its harms are serious enough to justify criminalization. Can non-consensual sexual deepfake be effectively tackled by non-criminal law measures, or is the last resort required to counter this emerging issue?⁷ If the assistance of criminal law is preferable and legitimate, what is the ideal crime category to criminalize non-consensual sexual deepfake? Let's deal with these questions, respectively.

The qualitative research 'suggest[s] that women experience particularly pernicious and long-lasting harms from deepfake and digitally altered imagery abuse.'⁸ Researchers contend that non-consensual sexual deepfake inflicts harms akin to traditional image-based sexual abuse.⁹ Citron states that 'deepfake sex videos say to individuals that their bodies are not their own and can make it difficult to stay online, get or keep a job, and feel safe.'¹⁰ Similarly, the United Kingdom Law Commission found that 'sharing an altered intimate image without consent may cause serious harm and is a significant violation of the individual's bodily privacy, personal integrity and their dignity, and in some cases, their sexual privacy, autonomy and freedom.'¹¹ These arguments are visible in victim statements, demonstrating non-consensual sexual deepfake causes serious health problems, silencing effect, underachievement in work and educational life, and damages employability.¹² Citron also underlines that democracy is the loser due to the silencing

⁷ According to John Stuart Mill's famous argument, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' Stanford Encyclopedia of Philosophy, 'The Harm Principle' (Stanford Encyclopedia of Philosophy 29 January 2022) <<https://plato.stanford.edu/entries/law-limits/#HarmPrin>> accessed 4 December 2023. The paper acknowledges the divergent schools of thought on harm principle theory and, for practical reasons, considers the harms of non-consensual sexual deepfake as a legitimate basis for coercion.

⁸ Asher Flynn and others, 'Deepfakes and Digitally Altered Imagery Abuse: A Cross-Country Exploration of an Emerging form of Image-Based Sexual Abuse' (2022) 62 *The British Journal of Criminology* 1341.

⁹ *ibid* 1343; Huijstee (n 6) 30; Clare McGlynn and Erika Rackley, 'More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 14 *Irish Probation Journal* 38.

¹⁰ Henry Ajder and others (n 4) 6.

¹¹ Law Commission (n 5) 159.

¹² Noelle Martin, 'Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist's Perspective' in Anastasia Powell and Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Palgrave Macmillan 2021); Rana Ayyub, 'I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me' (*HuffPost* 21 November 2018) <https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316> accessed 29 November 2023; Felicity Jackson, 'Behind Every Image is a Person' (*Now Then Magazine* 26 January 2021) <<https://nowthenmagazine.com/articles/helen-mort-behind-every-image-is-a-person-violence-against-women-deepfakes>> accessed 11 September 2023; *itv*, 'Sheffield woman's campaign after 'deepfake' image used in internet pornography' (*itv* 1 July 2021) <<https://www.itv.com/news/calendar/2021-07-01/sheffield-womans-campaign-after-deepfake-image-used-in-internet-pornography?s=08>> accessed 29 November 2023; Jesselyn Cook, 'Here's What It's Like to See Yourself in A Deepfake Porn Video' (*HuffPost* 23 June 2019) <https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself_n_5d0d0faee4b0a3941861fced> accessed 29 November 2023.

effect of non-consensual sexual deepfake.¹³ Lastly, non-consensual sexual deepfake can be weaponized for sextortion and cyberbullying, as exemplified in the cases of a girl who committed suicide after being blackmailed with non-consensual sexual deepfake and another girl who took her own life after being subjected to non-consensual sexual deepfake-driven cyberbullying.¹⁴ Considering its serious harms, criminalizing non-consensual sexual deepfake is an emerging global trend.¹⁵

Despite the serious harms of non-consensual sexual deepfake, tackling this issue proves to be challenging in the absence of a criminal law framework. Non-consensual sexual deepfake perpetrators can carry out wrongdoing remotely and anonymously with relative ease. Identifying non-consensual sexual deepfake perpetrators and collecting evidence without the support of law enforcement can be burdensome. Civil case legal costs are expensive, and proving the suffered emotional distress can be emotionally taxing for victims, potentially leading to secondary trauma. Reflecting on these, a growing body of literature underlines the difficulty of tackling non-consensual sexual deepfake with the tools of privacy, tort, intellectual property rights, and defamation laws and favours criminalization.¹⁶

¹³ Danielle Citron, *The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age* (e-book 1st edn W. W. Norton & Company).

¹⁴ BBC News, 'Two arrested in Egypt after teenage girl's suicide sparks outrage' (*BBC News* 4 January 2022) <<https://www.bbc.com/news/world-middle-east-59868721>> accessed 30 November 2023; BBC News, 'Mia Janin: Schoolboys made fun of girl before her death' <<https://www.bbc.com/news/uk-england-london-68071440>> accessed 24 January 2024 (*BBC News* 23 January 2024)

¹⁵ Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence Art. 5; Australia (Online Safety Act 2021 No. 76, 2021, Chapter 6); the United Kingdom (Online Safety Act 2023, sch 187-188); Iceland (General Penal Code of Iceland Art. 199a); Singapore (Penal Code of 1871 Art. 377BE[5]); South Korea (Act on Special Cases concerning the Punishment, etc of Sexual Crimes); and the US states New York (Law No. S1042A); Virginia (Code of Virginia 18.2-386.2); Hawaii (Law No. SB309); Texas (Penal Code Section §21.165); Wyoming (Law No. HB0085).

¹⁶ Douglas Harris, 'Deepfakes: False Pornography Is Here and the Law Cannot Protect You' (2019) 17 *Duke Law & Technology Review* 99; Danielle Citron, 'Sexual Privacy' (2019) 128 *Yale Law Journal* 1870; Gieseke (n 5) 1496-1501; Delfino (n 5) 902-903; Law Commission (n 5) 157-163; The Group of Experts on Action against Violence against Women and Domestic Violence, *GREVIO General Recommendation No. 1 on the digital dimension of violence against women* (the Council of Europe 2021) 18-19.

Suslavich notes that intellectual property rights are useful against commercial misuses of non-consensual sexual deepfake but less effective against non-commercial misuses. Benjamin Suslavich, 'Non-consensual Deepfakes: A 'Deep Problem' for Victims' (2023) 33 *Albany Law Journal of Science and Technology* 160. Karasavva and Noorbhai point out that a disclaimer showing that non-consensual sexual deepfake is fake and does not depict real events can be an effective defense against defamation cases and simultaneously harms the depicted person. Vasileia Karasavva and Aalia Noorbhai, 'The Real Threat of Deepfake Pornography: A Review of Canadian Policy' (2021) 24 *Cyberpsychology, Behavior and Social Networking* 203. Wang underlines that defamation requires making the publication available to third parties and cannot be helpful in the case of sextortion or sharing with the victim. Moncarol Y. Wang, 'Don't Believe Your

Turning to the Internet law, once shared online, it is impossible to control the dissemination of non-consensual sexual deepfake because it can easily be downloaded, (re)uploaded, and (re)shared. Non-consensual sexual deepfake cannot be considered illegal content without criminalization, which makes it more difficult to remove it from the Internet. Moreover, Internet intermediary immunity does not allow the pursuit of remedies against online platforms. With regards to technical measures, perceptual hashing, labeling, deepfake detection, and content provenance prove to be useful in the context of deepfake-powered dis- and misinformation but do not mitigate the harms of non-consensual sexual deepfake (because its harms do not solely stem from its inauthenticity). In other words, technical measures can be instrumental only if non-consensual sexual deepfake is weaponized in the context of dis- and misinformation.

Criminal law cannot tackle a complex societal issue by itself, and this is particularly true for a gendered, technological, and sexual issue like non-consensual sexual deepfake. Thus, a multifaceted response is required to tackle non-consensual sexual deepfake, including different branches of law, educational initiatives, policy interventions, and technical measures. However, recalling the serious harms of non-consensual sexual deepfake and the shortcomings of technical measures and other branches of law, this paper concludes that criminalizing dissemination of non-consensual sexual deepfake is preferable and more legitimate than not doing so. This conclusion raises the question of which crime category is most suitable for the criminalization of the dissemination of non-consensual sexual deepfake.

Non-consensual sexual deepfake can be considered sexual violence due to several reasons. Research suggests that the experiences of image-based sexual abuse victims parallel those of individuals affected by sexual offenses.¹⁷ Additionally, the harms of non-consensual sexual deepfake stem from its sexualized nature. Mundane daily images become worthy of attention and go viral after transformation (sexualization) by AI. This sexualized nature of non-consensual sexual deepfake harms sexual autonomy and dignity, which is particularly true for women victims due to gendered and sexual double standard norms on women's bodies and sexuality.¹⁸ Therefore, criminalizing non-consensual

Eyes: Fighting Deepfaked Non-consensual Pornography with Tort Law' (*The University of Chicago Legal Forum*) <<https://legal-forum.uchicago.edu/print-archive/dont-believe-your-eyes-fighting-deepfaked-non-consensual-pornography-tort-law>> accessed 4 December 2023. Franks and Waldman affirm that counter-speech is ineffective against non-consensual sexual deepfake. Mary Anne Franks and Ari Ezra Waldman, 'Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions' (2019) 78 Maryland Law Review 892.

¹⁷ Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 Feminist Criminology 22. '[Victim] does not distinguish between the representations of her body and the body itself.' P. Patella-Rey, 'Beyond privacy: bodily integrity as an alternative framework for understanding non-consensual pornography' (2018) 21 Information, Communication & Society 786.

¹⁸ See also Clare McGlynn, *Anonymity for Complainants of Image-Based Sexual Abuse* (Durham University 2016) 2-3; Citron (n 13).

sexual deepfake as a sexual crime is deemed desirable as it properly recognizes and addresses the sexual nature of the wrongdoing.

To clarify the scope of this paper, image-based sexual abuse is an umbrella term that consists of non-consensual 1) manufacture, 2) dissemination, 3) threatening to create and disseminate intimate or sexual private audiovisual content.¹⁹ Nevertheless, this paper solely focuses on the dissemination of non-consensual sexual deepfake.²⁰

2 Methodology

The paper employs desk research, legal dogmatic method, and fundamental canons of legal interpretation to scrutinize to what extent criminal law of selected fourteen European Union Members can effectively criminalize dissemination of non-consensual sexual deepfake. After identifying the most relevant provisions in the criminal codes, it employs case law, doctrine, and legal interpretation principles to attain its goal.

The paper's main limitations are the absence of statutory interpretation and difficulty foreseeing case law development. The primary delimitation is the language barrier, insufficient resources in the English language on the topic. Thus, the paper does not cover all member states and delimits its scope to only fourteen European Union Members (Austria, Belgium, Croatia, Denmark, France, Germany, Italy, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain, and Sweden). The paper is based on the criminal codes of the selected countries and does not engage with other laws (eg, data protection law) that may criminalize non-consensual sexual deepfake. Besides, the criminal laws may be amended after the findings of this paper. For these reasons, the paper's findings should be interpreted cautiously.

The paper categorizes the selected criminal codes into three groups as follows:

- 1) The criminal code specifically criminalizes non-consensual sexual deepfake: A provision in the criminal code specifically and clearly criminalizes the dissemination of non-consensual sexual deepfake.
- 2) The interpretation of the criminal code criminalizes non-consensual sexual deepfake: There is no specific provision in the criminal code on non-consensual sexual deepfake. The interpretation of the criminal code in line

¹⁹ Clare McGlynn and others, *Shattering Lives and Myths: A Report on Image-Based Sexual Abuse* (Australian Research Council 2019) 2.

²⁰ Law Commission (n 5) 169-171 suggested not criminalizing mere possession of intimate images. Similarly, Norwegian lawmakers concluded that the criminalization of mere possession of image-based sexual abuse material is unreasonably far-reaching. Justis- og beredskapsdepartementet, 'Prop. 159 L (2020–2021) Endringer i straffeloven mv. (deling av krenkende bilder mv.) 8 Nærmere om utformingen av straffebudet' (Justis- og beredskapsdepartementet) <<https://www.regjeringen.no/no/dokumenter/prop.-159-l-20202021/id2842654/?ch=8>> accessed 19 October 2023. Extortion could be a remedy in the case of threatening to create and disseminate non-consensual sexual deepfake material.

with fundamental principles of legal interpretation criminalizes the dissemination of non-consensual sexual deepfake without prejudice to reasonable foreseeability of the judicial interpretation. There is no requirement in the criminal code that hampers its effective enforcement.

- 3) The criminal code does not criminalize non-consensual sexual deepfake: There is no specific provision in the criminal code on non-consensual sexual deepfake. If the interpretation of the criminal code extends to the dissemination of non-consensual sexual deepfake, it violates fundamental principles of legal interpretation and/or reasonable foreseeability of the judicial interpretation. Alternatively, the interpretation of a provision in the criminal code criminalizes dissemination of non-consensual sexual deepfake, yet the provision is highly impracticable due to certain constituent elements.

3 Comparative Legal Analysis: The Criminalization of the Dissemination of Non-consensual Sexual Deepfake in the Selected European Union Member States

This chapter critically traces whether the criminal codes of Austria, Belgium, Croatia, Denmark, France, Germany, Italy, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain, and Sweden can effectively criminalize the dissemination of non-consensual sexual deepfake. Afterwards, the paper focuses on the potential shortcomings of the recently adopted European Union Directive on Combating Violence Against Women and Domestic Violence concerning the criminalization of dissemination of non-consensual sexual deepfakes.

3.1 Austria

The government of Austria recognized the threat of misuse of deepfake and developed an action plan²¹ against it. However, whether the plan and criminal law provisions can tackle the primary misuse of deepfakes remains a matter of uncertainty.

The Austrian Criminal Code Art. 120(a) punishes taking photographs of intimate parts or underwear covering these parts of a person in private settings without consent by a fine or up to six months imprisonment. Non-consensual sharing of these images is punishable by a fine or prison sentence of up to twelve months. Article 120(a) centers on taking (authentic) photographs in private settings and their non-consensual dissemination. The issue is that non-consensual sexual deepfake is the outcome of AI manufacturing or editing audiovisual material, not taking authentic photos in private settings. Thus, Art. 120(a) is impracticable against non-consensual sexual deepfake. In this legal vac-

²¹ Bundesministerium für Inneres, *Aktionsplan Deepfake* (Bundesministerium für Inneres 2022).

uum, the Austrian government regards the Austrian Criminal Code Art. 107(c) as a measure against deepfakes.²² The provision criminalizes ‘continued harassment by means of telecommunications or computer systems’ as follows.

‘1) Anyone who, by means of telecommunications or the use of a computer system in a manner likely to cause an unreasonable inconvenience to a person’s lifestyle continuing for an extended period of time

1. perceptibly injures a person’s honour for a larger number of people or

2. makes facts or images of the highly personal sphere of a person’s life perceptible to a larger number of people without their consent.’²³

This article is introduced to combat cyberbullying, thus far from being an effective remedy against non-consensual sexual deepfake. Firstly, non-consensual sexual deepfake shall be made available to at least ten people, meaning that sharing with fewer—even sending to the victim or their family, partner, or employer—is non-punishable under Art. 107(c).²⁴ Secondly, ‘to cause an unreasonable inconvenience’ shall continue for an extended period. If non-consensual sexual deepfake is shared and deleted before an extended period, it is excluded from the scope of the article. Altogether, it is exceptionally burdensome to enforce this article.

Ultimately, the Austrian Criminal Code does not have a specific article on non-consensual sexual deepfake, and the broadest interpretation of cyberbullying and image-based sexual abuse articles seems to abandon victims.

3.2 Belgium

An Antwerp University study revealed the emerging trend of manufacturing and sharing non-consensual sexual deepfake among young people in Belgium.²⁵ Additionally, non-consensual sexual deepfake grabbed the headlines in Belgium after former Miss Belgium Celine Van Ouytsel became a victim.²⁶ She had legal tools at her disposal thanks to the 2022 amendment of the Belgian Criminal Code.

²² *ibid* 16-18.

²³ Anna Sophia Tiedeke and others, ‘What can be said online in Germany and Austria? A legal and terms of service taxonomy’ (SSRN 5 December 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735932> accessed 25 September 2023.

²⁴ *ibid*.

²⁵ University of Antwerp, The Institute for The Equality of Women and Men, and Child Focus, *Deepnudes Among Young People in Belgium* (The Institute for The Equality of Women and Men 2024).

²⁶ VRT News, ‘Ex-Miss Belgien Celine Van Ouytsel “am Boden zerstört” durch gefälschte KI-Nacktbilder, Dutzende andere ebenfalls Opfer’ (VRT News 29 September 2023) <<https://www.vrt.be/vrtnws/de/2023/09/29/ex-miss-belgien-celine-van-ouytzel-am-boden-zerstoert-durch-ge/>> accessed 12 October 2023.

The Belgian Criminal Code Art. 417/9 criminalizes the non-consensual distribution of the content of a sexual nature by imprisonment of six months to five years. Art. 417/10 serves as the aggravated offense, punishes the act conducted with intent or profit motive, and imposes a 200 to 10,000 euro fine and imprisonment of one to five years. The content of a sexual nature is defined as the audio or visual content of a naked person or a person engaging in sexual activity. Non-consensual distribution connotes showing, making accessible, or broadcasting the content without the consent or knowledge of the depicted person. The articles cover initially shared or produced with consent and subsequently disseminated without consent.

The term content can be reasonably interpreted more broadly than images, photographs, recordings, and audio, seems more technology-neutral, and arguably includes deepfake. The definition of content of sexual nature solely focuses on nakedness or sexual activity. Furthermore, the term distribution has an extensive coverage that eases the implementation. In this light, Art. 417/9 and the aggravated offense of Art. 417/10 seem broad enough to cover non-consensual sexual deepfake.

An important technicality is that partially edited images are punished under voyeurism (the Belgian Criminal Code Art. 417/8), and images entirely generated by AI fall under the non-consensual distribution of content of a sexual nature (the Belgian Criminal Code Art. 417/9 and 417/10).²⁷ In conclusion, the Belgian criminal law seems capable of combating non-consensual sexual deepfake.

3.3 Croatia

The Croatian Criminal Code possesses two articles related to image-based sexual abuse and seemingly falls short against non-consensual sexual deepfake. Art. 144 states that:

‘Whoever, without authorisation, takes pictures of another person located in a dwelling or an area especially protected from view or uses or makes available to a third party such a picture and thereby violates that person’s privacy shall be punished by imprisonment not exceeding one year.’²⁸

²⁷ Collège Des Procureurs Généraux, *Circulaire N° 05/2022 Du Collège Des Procureurs Généraux Près Les Cours D’Appel* (Collège Des Procureurs Généraux 2022) 22; Belgische Kamer Van Volksvertegenwoordigers, *Verslag van de eerste lezing namens de Commissie voor Justitie* (DOC 55 2141/006 Belgische Kamer Van Volksvertegenwoordigers 2021) 64-66.

²⁸ Miha Šepić and Melanija Lango, ‘Virtual Revenge Pornography as a New Online Threat to Sexual Integrity’ (2020) 15 *Balkan Social Science Review* 117.

Although Andrade²⁹ and Neethling³⁰ claim that the violation of the right to privacy requires revealing facts against the targeted person's will and determination, the dissemination of non-consensual sexual deepfake can violate the right to privacy (in the European Union). This is particularly true in the case of face swap and strip naked deepfakes as they partially include authentic content of the subject (for instance, the body or face of the subject) as well as identifiably depict the subject in a hyperrealistic manner.

A local NGO claims that Art. 144, in theory, has the potential to tackle non-consensual sexual deepfake.³¹ It is highly debatable that taking pictures in a dwelling or an area especially protected from view or making them available to third parties falls within the scope of non-consensual sexual deepfake manufacture or sharing. Consequently, non-consensual sexual deepfake escapes from the reach of Art. 144.

The alternative criminal law provision is the Croatian Criminal Code Art. 144(a), which as follows:

'Whoever abuses a relationship of trust and, without consent of the person depicted, makes accessible to a third party a sexually explicit footage taken with consent of the person depicted for personal use, and in that manner infringes the privacy of the person depicted in the footage, shall be punished by imprisonment of up to one year.'^{32'}

The narrow approach of Art. 144(a) seems to make it impracticable. The article regards footage taken consensually for personal use, and intimate/sexual deepfakes generated by AI and shared without consent fall outside of this definition. The breach of trust requirement narrows down the scope because anyone who does not have a trust relation with the victim cannot be the perpetrator of the offense.³³ Local NGO reports support the

²⁹ Norberto Nuno Gomes de Andrade, 'Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights' in Simone Fischer-Hübner and others (eds) *Privacy and Identity Management for Life* (1st edn Springer 2010) 100-101.

³⁰ J Neethling, 'Personality Rights: A Comparative Overview' (2005) 38 *The Comparative and International Law Journal of Southern Africa* 233-235. Similarly, Mary Anne Franks reminds, 'the basis for non-consensual porn laws is that it is private, true information being disclosed without your consent, and you can regulate that. But if it is created — false information — it is no longer considered a privacy violation.' Kristen Dold, 'Face-Swapping Porn: How a Creepy Internet Trend Could Threaten Democracy' (Rolling Stone 17 April 2018) <<https://www.rollingstone.com/culture/culture-features/face-swapping-porn-how-a-creepy-internet-trend-could-threaten-democracy-629275/>> accessed 29 September 2023.

³¹ B.a.B.e., 'Policy Paper with Recommendations for Combating Gender-Based Online Violence in Croatia' (October 2022) <<https://babe.hr/wp-content/uploads/2022/10/Policy-Paper-with-Recommendations-for-Combating-Gender-Based-Online-Violence-in-Croatia.pdf>> accessed 30 October 2023.

³² Ivana Živković and Valentina Čubrilo and Katarina Dujić, 'Revenge Porn': An Exploration into Re-definition in the Interest of Changing Legislation' (*The European Judicial Network*) <https://portal.ejtn.eu/PageFiles/20512/Team%20Croatia_Revenge%20Porn%20An%20Exploration%20into%20Re-definition%20in%20the%20Interest%20of%20Changing%20Legislation.pdf> accessed 12 October 2023.

³³ Ibid.

difficulty of enforcing Art. 144(a). Between the entry into force and June 2022, only three out of fifty-one cases resulted in a conviction.³⁴ In essence, the Croatian criminal code does not work as intended.

3.4 Denmark

As reported by the media, non-consensual sexual deepfake is a growing problem in Denmark that generally targets young women.³⁵ Three articles of the Danish Criminal Code seem relevant to this mounting issue.

The Danish Criminal Code Art. 264(d) punishes ‘the unlawful forwarding of private pictures concerning another person’s private life or pictures of the person in circumstances which can obviously be expected to be withheld from the public’ by a fine or up to six months imprisonment.³⁶ Two Danish NGOs stress that this article covers non-consensual sexual deepfake.³⁷ Even though the laws do not directly address synthetic images, the Freedom of Speech Commission of Denmark’s report remarks that Art. 264(d) covers disinformation material, including manipulated images.³⁸ Nevertheless, it is contestable that the term ‘pictures’³⁹ covers deepfake considering the rule of lenity and the ordinary-meaning rule⁴⁰ of semantic interpretation.

³⁴ Miroslava Edvina Habeka, ‘Online nasilje nad ženama – za osvetničku pornografiju dosad samo tri pravomoćne presude’ (*Zagrebi* 15 December 2022) <<https://www.zeneimediji.hr/online-nasilje-nad-zenama-za-osvetnicku-pornografiju-dosad-samo-tri-pravomocne-presude/>> accessed 11 December 2023.

³⁵ Charlotte Hansen and Frederikke Dammark, ‘23-årig tiltalt: 229 billeder af uskyldige kvinder omdannet til pornografisk indhold’ (*TV Midtvest* 12 March 2019) <<https://www.tvmidtvest.dk/midt-og-vest-jylland/23-arig-tiltalt-229-billeder-af-uskyldige-kvinder-omdannet-til-pornografisk>> accessed 13 October 2023; Trine Birk and others, ‘Kunstig intelligens klæder danske kvinder af på nettet: ‘Det er jo alt, der bliver blottet på én’ (*DR* 11 April 2021) <<https://www.dr.dk/mitliv/kunstig-intelligens-klæder-danske-kvinder-af-paa-nettet-det-er-jo-alt-der-bliver-blottet-paa>> accessed 13 October 2023.

³⁶ The Government of Denmark, *Stepping up initiatives against digital sexual abuse* (2017) <https://digmin.dk/Media/638084343139518978/engelsk_version_digiale_sexkrænkelser_endelig.pdf> accessed 15 September 2023.

³⁷ Digitalt Ansvar, *Digital vold - delrapport om digital afpresning 2023* (September 2023) <<https://digitaltansvar.dk/wp-content/uploads/2023/09/Digital-vold-i-Danmark.-Anden-del-Nye-former-for-afpresning.pdf>> accessed 11 December 2023; StopChikane, ‘Hvad er digitale krænkelse?’ (*StopChikane*) <<https://stopchikane.nu/om-digiale-krænkelser/hvad-er-digiale-krænkelser/>> accessed 13 October 2023.

³⁸ Ytringsfrihedskommissionen, *Betænkning om ytringsfrihedens rammer og vilkår i Danmark Del 2* (Danish Ministry of Justice 2020) 693.

³⁹ Oxford Advanced Learner’s Dictionaries provides four definitions of the noun picture: 1) painting/drawing, 2) photograph, 3) an image on a television screen, and 4) description. Oxford Advanced Learner’s Dictionaries, ‘Picture’ (*Oxford Advanced Learner’s Dictionaries*) <https://www.oxfordlearnersdictionaries.com/definition/english/picture_1?q=picture> accessed 5 December 2023. Considering the context, the term picture in the provision refers to a photograph, which differs from deepfake with its manufacturing method and authenticity.

⁴⁰ Under this canon, ‘words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.’ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (1st edn Thomson/West 2012).

An alternative provision can be Art. 232 of the Criminal Code. It punishes indecent exposure—including non-consensual sharing of intimate images—up to two years imprisonment. Based on the Danish government’s report, ‘if the nude picture forwarded is of a sexual or pornographic nature, the offence may be punishable as indecent exposure under Section 232 of the Danish Criminal Code, while at the same time being punishable under Section 264 d.⁴¹’ Nonetheless, indecent exposure may not be a suitable fit to punish non-consensual sexual deepfake. The active subject of indecent exposure is the person who exposes themselves, and the passive subject is the public offended by exposure. These are entirely different from the passive and active subjects of non-consensual sexual deepfake. Furthermore, the ambiguity regarding whether the term ‘pictures’ encompasses deepfakes remains unresolved, as previously highlighted.

The safest option to combat non-consensual sexual deepfake may be Art. 267 of the Criminal Code, which punishes defamation by a fine or imprisonment for up to a year. In the case of an untrue serious accusation or accusation made through mass media and likely to cause serious harm to the defamed person, the punishment can be increased to two years.⁴² While this solution helps bring perpetrators to justice, the nature of defamation that revolves around reputation is inadequate against non-consensual sexual deepfake as it overlooks the gendered and sexual nature of the issue.

In conclusion, the scope of unlawful forwarding of private pictures and indecent exposure articles of criminal law remains unsettled. Non-consensual sexual deepfake does not go unpunished in Denmark owing to the defamation provision, which may not be an ideal criminal law tool for the purpose.

3.5 France

Non-consensual sexual deepfake targeted actresses and female influencers in France⁴³ and became a matter that raised the concern of the French High Council on Equality between Women and Men.⁴⁴ The worry is not unfounded from the legal perspective because the French Criminal Code struggles to cope with non-consensual sexual deepfake.

⁴¹ The Government of Denmark (n 36) 3.

⁴² Baker McKenzie’s Resource Hub, ‘Prosecutorial considerations’ (*Baker McKenzie’s Resource Hub*) <<https://resourcehub.bakermckenzie.com/en/resources/fighting-domestic-violence/europe/denmark/topics/5-prosecutorial-considerations>> accessed 30 October 2023.

⁴³ Elle, ‘Qu’est-ce que le deepfake porn? Pratique illégale dont a été victime Léna Situations’ (*Elle* 10 August 2023) <<https://www.elle.fr/Societe/News/Qu-est-ce-que-le-deepfake-porn-Pratique-illegale-dont-a-ete-victime-une-streameuse-americaine-4097124>> accessed 16 October 2023; Juliette Hochberg, ‘Mon corps n’est pas un objet dont on peut se servir sans ma permission’ (*Marie Claire*) <<https://www.marieclaire.fr/deepfake-pornographique-mon-corps-n-est-pas-un-objet-dont-on-peut-se-servir-sans-ma-permission,1425880.asp>> accessed 16 October 2023.

⁴⁴ L’Express, ‘Alerte sur les deepfakes pornos: “Les réseaux pédocriminels s’emparent de cette pratique”’ (*L’Express* 30 August 2023) <<https://www.lexpress.fr/societe/alerte-sur-les-montages-pornos-generes-par>>

The French Criminal Code Art. 226(2)(1) criminalizes the non-consensual sharing of images or words of a sexual nature obtained by recording, fixation, or transmission with the express or presumed consent of the targeted person up to two years of imprisonment and a fine of up to 60,000 euro. This article misses the mark because it only covers images of a sexual nature obtained with the consent of the targeted person. The training data of non-consensual sexual deepfake is principally (nonsexual and nonintimate) daily images retrieved from media accounts, dating applications, and public websites. Researchers also note that the law only covers images obtained by recording, fixation, or transmission, which does not apply to AI-powered non-consensual sexual deepfake manufacturing.⁴⁵

A two-decade old offense against the image of a person article of the Criminal Code, at first sight, seems capable of filling the legal vacuum. The French Criminal Code Art. 226(8) as follows:

‘A sentence of one year’s imprisonment and a fine of €15,000 apply to the publication by any means of any montage made that uses the words or the image of a person without the latter’s consent, unless it is obvious that it is a montage, or this fact is expressly indicated.

When the misdemeanour set out under the previous paragraph is committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.⁴⁶

Fontaine observes two major problems with this article.⁴⁷ It focuses on copy-paste montages (cheapfakes) instead of deepfakes (manufacturing or editing by AI).⁴⁸ Secondly, the article completely neglects the gendered and sexual nature of non-consensual sexual deepfake. Having noticed the shortcomings of the criminal code, the French lawmakers proposed two bills⁴⁹ in July 2023 that aim to amend Art. 226(8) and criminalize non-consensual sexual deepfake.

To conclude, the French criminal law as it stands lets non-consensual sexual deepfake victims down, but amendments hold promise in addressing this deficiency. The French

ia-on-peut-creer-25-images-pour-10-euros-4X5BBGTL2ZA4FE3BMNUT2PXUKU/> accessed 16 October 2023.

⁴⁵ Šepec and Lango (n 28) 126; Claire Langlais-Fontaine, ‘Démêler le vrai du faux : étude de la capacité du droit actuel à lutter contre les deepfakes’ (2020) 18 *Revue des droits de l’homme* <<https://journals.openedition.org/revdh/9747/>> accessed 11 December 2023.

⁴⁶ Equal Rights Trust, ‘French Penal Code English Translation’ (*Equal Rights Trust*) <https://www.equal-rightstrust.org/ertdocumentbank/french_penal_code_33.pdf/> accessed 12 October 2023.

⁴⁷ One of the objects of bill no. 127 and 128 of July 3 2023 is to broaden the scope of Art. 226(8) to include deepfakes. Sénat, Amendment 128 - Sécuriser et réguler l’espace numérique de July 3, 2023; Sénat, Amendment 127 - Sécuriser et réguler l’espace numérique de July 3, 2023.

⁴⁸ Henry Ajder suggests that “deepfakes are ‘technically entirely new pieces of media (not composites)’” Law Commission (n 5) 163.

⁴⁹ Sénat (n 47).

High Council for Equality Between Women and Men also stressed the need for additional funding for medical care and psychosocial support for non-consensual sexual deepfake victims, alongside the proposed amendments.⁵⁰

3.6 Germany

Despite the right to privacy is greatly respected in Germany, the German Criminal Code on some occasions fails to grant effective remedies to non-consensual sexual deepfake victims like YouTuber Mrs. Bella and climate activist Luisa-Marie Neubauer.⁵¹ The following scrutinizes two articles of the German Criminal Code that are relevant to non-consensual sexual deepfake.

The German Criminal Code Art. 201(a) criminalizes the violation of intimate privacy and personality rights by taking photographs or other images. The Federal Court of Justice invoked this article with regard to image-based sexual abuse despite the fact that it was introduced for the protection of intimate privacy and personality rights.⁵² The article as follows:

‘(1) Whoever

1. without being authorised to do so creates or transmits photographs or other images of another person in private premises or in a room which is specially protected from view, and thereby violates the intimate privacy of the person depicted,
2. without being authorised to do so produces a photograph or other image exhibiting the helplessness of another person or transmits such image, and thereby violates the intimate privacy of the person depicted,
3. without being authorised to do so creates or transmits a photograph or other image which in a grossly offensive manner exhibits a deceased person,
4. uses a photograph or other image produced by an offence under no. 1 to no. 3 or makes it available to a third party or
5. makes available to a third party, in the awareness of lacking authorisation to do so, a photograph or other image of the type set out in no. 1 to no. 3 which

⁵⁰ The French High Council for Equality Between Women and Men, *PORNOCRIMINALITE: mettons fin à l’impunité de l’industrie pornographique!* (The French High Council for Equality Between Women and Men 2023) 94.

⁵¹ Das Erste, ‘Gefälschte Sexvideos: Immer mehr Frauen Opfer von Deepfakes’ (*Das Erste* 14 February 2023) <<https://www.daserste.de/information/politik-weltgeschehen/report-mainz/sendung/2023/230214-rep-deepfakes-100.html>> accessed 16 October 2023.

⁵² Marthe Liljana Rebecca Goudsmit, ‘Revenge pornography: A conceptual analysis undressing a crime of disclosure’ (Master’s Thesis, Leiden University, 2017) 73.

was produced with authorisation, and, in the cases under no. 1 and no. 2, thereby violates the intimate privacy of the person depicted,

incurs a penalty of imprisonment for a term not exceeding two years or a fine.

(2) Whoever, without being authorised to do so, makes available to a third party a photograph or other image of another person which is of such a nature as to significantly damage the reputation of the person depicted incurs the same penalty. This also applies, under the same conditions, to a photograph or other image of a deceased person.^{53'}

Golla and Solmecke state that Art. 201(a)(2) can cover deepfakes (and other photomontages), and the non-exclusive term other image can be seen as a support for this argument.⁵⁴ On the other hand, the German Women Lawyers Association stressed that Art. 201(a) does not apply to non-consensual sexual deepfake manufacture and also does not cover all cases of making non-consensual sexual deepfake available.⁵⁵ Another downside is the classification of image-based sexual abuse as a privacy invasion that disregards the sexual and gendered nature of the wrongdoing.

Turning to another provision of the German Criminal Code, Art. 184(k) expressly addresses image-based sexual abuse and as follows:

‘(1) Whoever

1. intentionally or knowingly, without being authorised to do so, creates or transmits a photograph or other image of the genitals, buttocks, female breast of another person, or of underwear which is covering those parts of the body, insofar as those parts are protected from view,

2. uses or makes available to a third party a photograph or other image created through an act of the type set out in no. 1 or

⁵³ Germany Federal Ministry of Justice, ‘German Criminal Code English Translation’ (*Germany Federal Ministry of Justice*) <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed 18 September 2023.

⁵⁴ Sebastian J. Golla, ‘Fake-Strafrecht in Wahlkampfzeiten’ (*Verfassungsblog* 9 September 2021) <<https://verfassungsblog.de/fake-strafrecht-in-wahlkampfzeiten/>> accessed 29 September 2023; Christian Solmecke, ‘„Deepfakes“ und Face-Swap-Apps können Personen in Pornos austauschen – Welche Rechte haben Geschädigte?’ (*WBS Legal* 1 December 2022) <<https://www.wbs.legal/it-und-internet-recht/datenschutzrecht/deepfake-fakeapp-kann-personen-in-pornos-austauschen-welche-rechte-haben-geschaedigte-23489/>> accessed 29 September 2023.

⁵⁵ The German Women Lawyers Association, ‘Bekämpfung bildbasierter sexualisierter Gewalt’ (*The German Women Lawyers Association* 7 June 2023) <<https://www.djb.de/presse/stellungnahmen/detail/st23-17>> accessed 2 October 2023. See also Jessica Greif, *Strafbarkeit von bildbasierten sexualisierten Belästigungen* (1st edn Duncker & Humblot 2022) 228–241.

3. makes available to a third party, in the awareness of lacking the authorisation to do so, a photograph or other image of the type set out in no. 1 which was produced with authorisation

incurs a penalty of imprisonment not exceeding two years or a fine.⁵⁶

Art. 184(k) is located under the offenses against sexual self-determination chapter of the criminal code and possesses the non-exclusive term 'other image.' With reference to it, Toparlak asserts that Art. 184(k) can cover non-consensual sexual deepfake.⁵⁷ Conversely, Art. 184(k) solely tackles taking unauthorized photos (upskirting and downblousing), not non-consensual sexual deepfake in the eye of the German Women Lawyers Association.⁵⁸ Upskirting and downblousing, in principle, concern authentic photos, and it is highly exceptional that they are produced by deepfake.

In summary, it is questionable whether the German Criminal Code can sufficiently address all cases of the dissemination of non-consensual sexual deepfake. The call of the German Women Lawyers Association supports this view and asks for a reform that harmonizes and fills the gaps in the criminal code. The association also advocates for publicly funded empirical research on image-based sexual abuse, training of law enforcement on image-based sexual abuse, and the establishment of a specialized public prosecutor office on technology-facilitated gender-based violence.⁵⁹

3.7 Italy

Tiziana Cantone fell victim to image-based sexual abuse that was followed by cyberbullying. She had to fight an uphill legal battle to remove her images from the Internet, and the legal remedy was too little too late. The Italian court ordered Cantone to pay 20.000 euro in legal costs and granted her the right to be forgotten after she took her own life.⁶⁰ The story of Cantone sparked an intense debate on gender-based violence and resulted in a law reform.⁶¹ One of the outputs of this reform is the Italian Criminal Code Art. 612-ter, which criminalizes 'illegal dissemination of sexually explicit images or videos' and as follows:

⁵⁶ Germany Federal Ministry of Justice (n 53).

⁵⁷ Rüya Tuna Toparlak, 'Criminalising Pornographic Deep Fakes: A Gender-Specific Inspection of Image-Based Sexual Abuse' in *SciencesPo Law School The 10th Graduate Conference Law & Technology* (SciencesPo Law School 2022) 1.

⁵⁸ The German Women Lawyers Association (n 55).

⁵⁹ *Ibid.*

⁶⁰ BBC News, 'Four questioned in Italy after woman's suicide over sex video' (*BBC News* 15 September 2016) <<https://www.bbc.com/news/world-europe-37377286>> accessed 16 October 2023.

⁶¹ Elena Pavan and Anita Lavorgna, 'Promises and Pitfalls of Legal Responses to Image-Based Sexual Abuse: Critical Insights from the Italian Case' in Anastasia Powell and Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Palgrave Macmillan 2021) 545.

‘Unless the fact constitutes a more serious crime, a person who, after having made or stolen them, sends, delivers, transfers, publishes or disseminates images or videos containing sexually explicit materials, intended to remain private, without the consent of the persons depicted, is liable to be punished with imprisonment from one to six years and with a fine of between Euro 5,000 and Euro 15,000. The same penalty is applied to anyone who, having received or otherwise acquired the images or videos referred to in the first paragraph, sends, delivers, transfers, publishes or disseminates them without the consent of the persons depicted with the intention to harm them. The penalty is increased if the facts are committed by the spouse, even separated or divorced, or by a person who is or has been linked by an emotional relationship to the victim or if the facts are committed through IT or telematic tools.’⁶²

It is unclear whether Art. 612-ter can tackle non-consensual sexual deepfake. Panebianco claims that even the broadest interpretation of Art. 612-ter does not cover non-consensual sexual deepfake.⁶³ Ranghi highlights that the Italian Criminal Code possesses a specific article on virtual child pornography in addition to the child pornography provision.⁶⁴ This is not the case with virtual non-consensual pornography; thus, non-consensual sexual deepfake is not punishable pursuant to Art. 612-ter. Corridori agrees that Art. 612-ter does not cover deepfakes, questions whether the aggravating factor committed through IT or telematic tools can address non-consensual sexual deepfake, but also doubts if this interpretation violates the principle of legality and recommends an amendment to Art. 612-ter that specifically addresses non-consensual sexual deepfake.⁶⁵ A congresswoman put forward a bill⁶⁶ that amends Art. 612 and specifically addresses non-consensual sexual deepfake, supporting the view that Art. 612-ter does not cover DNP. Taken together, it seems plausible that non-consensual sexual deepfake remains unpunished under Art. 612-ter.

Another issue is the ineffective enforcement of the law. More than a thousand investigations started under Art. 612-ter in its first year, 121 were set for trial, and three resulted

⁶² Antonella De Angeli and others, ‘Reporting non-consensual pornography: clarity, efficiency and distress’ (2023) 82 *Multimedia Tools and Applications* 12829.

⁶³ Giuseppina Panebianco, ‘La diffusione illecita di immagini o video sessualmente espliciti: tra carenze della fattispecie’ (2022) 2022-1 *Rivista di studi giuridici sull’orientamento sessuale e l’identità di genere* 1.

⁶⁴ Giada Ranghi, ‘Violenza Digitale: La Diffusione Illecita Di Immagini O Video Sessualmente Espliciti’ (*Salvisjuribus* 20 January 2022) <<http://www.salvisjuribus.it/violenza-digitale-la-diffusione-illecita-di-immagini-o-video-sessualmente-espliciti/>> accessed 16 October 2023.

⁶⁵ Costanza Corridori, ‘Il fenomeno del deep-fake e il diritto penale tra tutela dell’immagine e autodeterminazione sessuale’ (*giudicedonna.it*) <http://www.giudicedonna.it/articoli/Il_fenomeno_del_deep-fake_e_il_diritto_penale.pdf/> accessed 16 October 2023.

⁶⁶ Camera dei deputati, Introduzione dell’articolo 612-quater del codice penale, in materia di manipolazione artificiale di immagini di persone reali allo scopo di ottenerne rappresentazioni nude A.C. 2986, July 21, 2021.

in conviction.⁶⁷ Data obtained from local NGOs tells a different story: approximately two million Italians have fallen victim to image-based sexual abuse. There are at least 231 image-based sexual abuse Telegram channels intended for Italians.⁶⁸ Vido and Sosa also underline the lack of procedural and extra-criminal support measures in this domain.⁶⁹

While this paper concentrates on criminal law measures, the Italian Data Protection Authority's effort in combatting non-consensual sexual deepfake is worth mentioning. The authority started an investigation into non-consensual sexual deepfake bots on Telegram⁷⁰ and (as of October 2023) issued 107 orders for Internet intermediaries to take measures against the dissemination of image-based sexual abuse images.⁷¹ Such a proactive approach could be considered best practice where the criminal law fails to tackle non-consensual sexual deepfake.

In summary, non-consensual sexual deepfake may escape from the reach of the Italian Criminal Code, and there seems to be room for improvement in effective enforcement of the law.

3.8 Malta

Under the influence of the Catholic Church, the manufacture, possession, or distribution of consensual adult pornography and obscenity material had been illegal in Malta for decades.⁷² It is difficult to assert that Maltese lawmakers have demonstrated an equivalent level of sensitivity towards addressing novel forms of technology-facilitated gender-

⁶⁷ Pavan and Lavorgna (n 63) 553. Between the introduction of the law and September 2022, 3,496 image-based sexual abuse cases have been reported, according to the latest police records. Ministero dell'Interno, 'Brochure Violenza Sulle Donne Il Punto La Violenza Contro Le Donne' (*Ministero dell'Interno*) <https://www.interno.gov.it/sites/default/files/2021-11/2021-_sac_brochure_violenza_sulle_donne.pdf> accessed 18 September 2023.

⁶⁸ Permesso Negato, *State of Revenge 2022* (Permesso Negato (2022) <https://www.permesso-negato.it/doc/PermessoNegato_StateofRevenge_2022.pdf> accessed 31 October 2023.

⁶⁹ Lorena Sosa and Sata De Vido, *Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence* (Directorate-General for Justice and Consumers 2021) 145.

⁷⁰ Garante Per La Protezione Dei Dati Personali, 'Deep fake: il Garante privacy apre un'istruttoria nei confronti di Telegram per il software che "spoglia" le donne' (Garante Per La Protezione Dei Dati Personali 23 October 2020) <<https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9470722>> accessed 17 October 2023.

⁷¹ Garante Per La Protezione Dei Dati Personali, <https://www.garanteprivacy.it/home/ricerca?p_l_id=148005&_g_gdpdp5_search_GGdpdp5SearchPortlet_mvcRenderCommandName=%2Frender-Search&_g_gdpdp5_search_GGdpdp5SearchPortlet_text=&_g_gdpdp5_search_GGdpdp5SearchPortlet_dataInizio=&_g_gdpdp5_search_GGdpdp5SearchPortlet> accessed 17 October 2023.

⁷² ELSA Malta, *Pornography and Vilification of Religion Law Advancement and Policy Consideration* (ELSA Malta 2016) <<https://cms.elsa.mt/api/v1/files/download/af78f79d-fa74-4113-9558-fd2176ae310e/preview>> accessed 1 November 2023.

based violence. The Maltese Criminal Code Art. 208(e) concerns image-based sexual abuse and declares:

‘Whosoever, with an intent to cause distress, emotional harm or harm of any nature, takes or discloses a private sexual photograph or film without the consent of the person or persons displayed or depicted in such photograph or film shall on conviction be liable to imprisonment for a term of up to five years or to a fine (*multa*) of not less than four thousand euro (€4,000) and not more than eight thousand euro (€8,000), or to both such imprisonment and fine.’⁷³

The article seems in a position to address non-consensual sexual deepfake due to the terms ‘displayed or depicted’ and the broad definition⁷⁴ of photograph or film. However, proving ‘an intent to cause distress, emotional harm or harm of any nature’ can be a formidable challenge and arguably makes the provision inapplicable. It also can provide impunity to different motivations behind non-consensual sexual deepfake, eg, financial gain, earning social status, sexual objectification, or humiliating the target person, which differ from causing harm or distress but can be equally harmful. A parallel can be drawn with the United Kingdom’s previous legislation addressing image-based sexual abuse, which faced similar criticisms about proving intent,⁷⁵ eventually led to its amendment. The Maltese law seemingly needs a reform to penalize non-consensual sexual deepfake effectively.

3.9 The Netherlands

The cases of female television presenters Dionne Stax, Bridget Maasland, and Welmoed Sijtsma⁷⁶ symbolized that non-consensual sexual deepfake is a growing problem in the Netherlands. Fortunately, the Dutch government has taken proactive measures against non-consensual sexual deepfake and seems more prepared for the age of generative AI.⁷⁷ The Dutch Criminal Code Art. 139(h) addresses image-based sexual abuse as follows:

‘1. The following shall be punished by a term of imprisonment not exceeding one year or a fine of the fourth category:

a. he who intentionally and unlawfully creates an image of a person of a sexual nature;

⁷³ Legiżlazzjoni Malta, ‘Criminal Code’ (*Legiżlazzjoni Malta*) <<https://legislation.mt/eli/cap/9/eng/pdf>> accessed 19 September 2023.

⁷⁴ Photograph or film ‘means a moving or still image or data, stored by any means, which is capable of conversion into a moving or still image.’ *Ibid.*

⁷⁵ Law Commission (n 5) 183-188.

⁷⁶ Finn Bonis, ‘Man opgepakt voor nep-seksvideo Welmoed Sijtsma’ (*Veronica Superguide* 10 November 2023) <<https://www.veronicasuperguide.nl/nieuws/man-opgepakt-voor-nep-seksvideo-welmoed-sijtsma>> accessed 15 November 2023.

⁷⁷ Tweede Kamer der Staten-Generaal, *Kamerstuk 26643 nr. 1041* (*Tweede Kamer der Staten-Generaal* 30 June 2023) <<https://zoek.officielebekendmakingen.nl/kst-26643-1041.html>> accessed 18 October 2023.

b. he who has access to an image as referred to under a, while he knows or should reasonably suspect that it was obtained through or as a result of an act made punishable under a.

2. The following shall be punished by a term of imprisonment not exceeding two years or a fine of the fourth category:

a. he who makes public an image as referred to in the first paragraph, under a, while he knows or should reasonably suspect that it was obtained through or as a result of an act made punishable in the first paragraph, under a;

b. he who discloses an image of a person of a sexual nature, knowing that such disclosure may be detrimental to that person.^{78'}

The term 'manufacture' (*vervaardigen*) in Art. 139(h)(1)(a) allows the criminalization of the manufacture and disclosure of synthetic images. The Dutch Minister of Justice and a parliamentary document confirmed that Art. 139(h) covers non-consensual sexual deepfake.⁷⁹ Besides, the Hague District Court convicted a man who non-consensually manufactured and possessed non-consensual sexual deepfake material pursuant to Art. 139(h).⁸⁰

Two aspects of the Dutch law deserve close attention. Art. 139(h)(1)(b) criminalizes reckless or intentional possession of or access to unlawful sexual images, which creates a dilemma. Possession is generally linked to the manufacture and dissemination of non-consensual sexual deepfake. Additionally, knowing the fact that non-consensual sexual deepfake is accessible can distress victims.⁸¹ On the other hand, the question arises as to whether the criminalization of mere possession or access to non-consensual sexual deepfake aligns with the principle of minimal criminalization.⁸² Moreover, how to effectively enforce this rule is anybody's guess considering the soaring number of non-consensual sexual deepfake and the increasing democratization and user-friendliness of deepfake

⁷⁸ Göran Sluiter, 'Aiding and abetting liability for social media platforms in relation to 'image-based sexual abuse' – a way around Art. 14 (1) of EU Directive 2000/31?' (*Rethinking SLIC* 17 December 2021) <<https://rethinkingslic.org/blog/criminal-law/102-goeran-sluiter>> accessed 18 October 2023.

⁷⁹ Tweede Kamer der Staten-Generaal (n 79); Tweede Kamer der Staten-Generaal, 'Aanhangsel van de Handelingen Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden 719' (*Tweede Kamer der Staten-Generaal*) <<https://zoek.officielebekendmakingen.nl/ah-tk-20222023-719.pdf>> accessed 19 September 2023.

⁸⁰ ECLI: NL: RBDHA: 1885, 09.842309-20 (2021) The Hague District Court.

⁸¹ 84.9% of respondents of a US-based study stated that the manufacture of unlabeled non-consensual sexual deepfake for personal use (without distribution) should be criminalized. The participants consider the material 'extremely blameworthy and harmful.' Matthew B. Kugler and Carly Pace, 'Deepfake Privacy: Attitudes and Regulation' (2020) 116 *Northwestern University Law Review* 611.

⁸² See footnote 20. It may be challenging to argue that not criminalizing mere possession of or access to non-consensual sexual deepfake would be counter productive.

technology.⁸³ There is a plausible concern that effective enforcement of this rule could lead to overcriminalization. The second issue regards the perpetrator's intent. Art. 139(h) came under criticism because it overfocuses on the perpetrator's intent, which can be difficult to prove.⁸⁴ The 'should have known' clause can lighten the burden of proof.

Ultimately, the Dutch law seems well equipped against non-consensual sexual deepfake but excessively far-reaching; thus, the impact and enforcement of criminalization of access to and possession of non-consensual sexual deepfake remain to be seen.

3.10 Portugal

The Penal Code of Portugal Art. 193 was introduced in May 2023 to strengthen the protection of image-based sexual abuse victims.⁸⁵ It criminalizes non-consensual dissemination of images, photographs, or recordings that violate private life—particularly intimate family or sexual life—or assistance to the act up to five years imprisonment. Non-consensual dissemination can take place on the Internet, social media, or other mediums of public dissemination.

Whether the law covers non-consensual sexual deepfake comes down to the interpretation of 'images, photographs (*imagens, fotografias*).' It can be argued that the terms 'images, photographs' do not include deepfake considering the rule of lenity and the ordinary-meaning rule of semantic interpretation.⁸⁶ Nonetheless, the statutory interpretation of the recently introduced law remains to be seen.

⁸³ See also Home Security Heroes (no 3); Matt Burgess, 'Deepfake Porn Is Out of Control' (*Wired* 16 October 2023) <<https://www.wired.com/story/deepfake-porn-is-out-of-control/>> accessed 19 October 2023; Cecilia D'Anastasio and Davey Alba, 'Google and Microsoft Are Supercharging AI Deepfake Porn' (*Bloomberg Law* 24 August 2023) <<https://news.bloomberglaw.com/artificial-intelligence/google-and-microsoft-are-supercharging-ai-deepfake-porn>> accessed 19 October 2023.

⁸⁴ Daphne Stevens, 'Criminalizing Revenge Pornography' (*SecJure* 21 January 2021) <<https://www.secjure.nl/2021/01/04/criminalizing-revenge-pornography/>> accessed 19 October 2023; Marthe Liljana Rebecca Goudsmit, 'Criminalising image-based sexual abuse: an analysis of the Dutch bill against 'revenge pornography' (2019) <https://www.researchgate.net/publication/354807798_Criminalising_image-based_sexual_abuse_an_analysis_of_the_Dutch_bill_against_'revenge_pornography'> accessed 21 September 2023.

⁸⁵ Procuradoria-Geral Distrital de Lisboa. 'Lei n.º 26/2023, de 30 de Maio' (*Procuradoria-Geral Distrital de Lisboa*) <https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=3649&tabela=leis&ficha=1&pagina=1&so_miolo=>> accessed 21 October 2023.

⁸⁶ In comparison, the United Kingdom Online Safety Act 2023 uses the term 'an image, whether made or altered by computer graphics or in any other way, which appears to be a photograph or film.' The European Parliament and of the Council on Combating Violence Against Women and Domestic Violence Art. 5 uses the term 'manipulated material.' The General Penal Code of Iceland Art. 199(a)'s wording includes 'fake images, text, or similar material.' Singapore Penal Code of 1871 Art. 377BE uses the term 'intimate image or recording. It defines non-consensual sexual deepfake as 'an image or recording ... includes an image or recording, in any form, that has been altered to appear to show any of the things mentioned in paragraph (a).'

3.11 Romania

Romania did not have a good track record on technology-facilitated gender-based violence, as exemplified by the European Court of Human Rights judgement *Buturugă v Romania*.⁸⁷ The Romanian lawmakers took their time for legal reform in this domain⁸⁸ and introduced the Romanian Criminal Code Art. 226(2¹) in June 2023.

Art. 226(2¹) punishes non-consensual disclosure, dissemination, presentation, or transmission—in any way—of intimate image that is likely to cause damage to the image of or mental harm to the depicted person by a fine or imprisonment from six months to three years. The depicted person shall be identified in the image or identifiable due to information provided with the image. Intimate image means any copy of an image of a person in a sexual relationship or sexual act, or an image of a naked person, which partially or fully portrays genitals, anus, pubic area, or woman's breasts. The article is indifferent to initial consent to sharing or producing images, and evidence of a crime is a justification.

The article is open to criticism from several aspects. Stoica and Balog questioned the 'identified in the image or identifiable due to information provided with the image' requirement and warned that it should not be interpreted narrowly. This requirement may cause issues in the case of low-quality non-consensual sexual deepfake material. They also voiced concerns about the narrow definition of the 'intimate image,' which refers to other articles of the criminal code.⁸⁹ Turning to the question of whether the article can address non-consensual sexual deepfake, the debate boils down to the interpretation of the term 'image (*imagini*).' As stated above, this term may not cover deepfake; the statutory interpretation will tell whether Art. 226(2¹) can outlaw non-consensual sexual deepfake.

3.12 Slovenia

The Slovenian Criminal Code Art. 143(5) and 143(6) deal with image-based sexual abuse under misuse of personal data. Art. 143(6) states that 'anyone who publicly announces recordings or messages of another person with sexual content without the consent of that

⁸⁷ The European Court of Human Rights' judgment expressed that the Romanian authorities did not properly investigate cyberbullying and domestic abuse allegations of a woman about her husband. The judgement was pivotal in recognizing violence against women and girls can take various forms, such as 'taking, sharing, manipulation of data or images, including intimate data.' *Buturugă v Romania*, ECHR 2020 56867/15.

⁸⁸ Rareș Stocia and Ioana Balog, 'Mult așteptată modificare adusă Codului penal: incriminarea fenomenului de „revenge porn”' (*juridice.ro* 16 June 2023) <<https://www.juridice.ro/689652/mult-asteptata-modificare-adusa-codului-penal-incriminarea-fenomenului-de-revenge-porn.html>> accessed 23 October 2023.

⁸⁹ *Ibid.*

person and thereby seriously affects his or her privacy shall be punished by imprisonment of three months up to three years.⁹⁰ Researchers suggest that the term 'recordings of another person with sexual content' gives the impression of being broad enough to cover synthetic images like deepfakes.⁹¹ The article is open to criticism even if this (debatable) opinion is accepted.

Šepec and Lango uphold that Art. 143(6) concentrates on the mental state of the perpetrator and requires direct or indirect intent to severely affect privacy, which can be burdensome to prove. Furthermore, they note that 'severely affects privacy' is a vague term,⁹² and Šepec points out that the requirement may deny liability for the perpetrator's motives beyond severely affecting privacy.⁹³ Additionally, the term 'sexual content' possibly does not include strip naked deepfake. Another concern is ineffective enforcement: over the past five years, law enforcement has received five to seven complaints based on Art. 143(6) each year,⁹⁴ signalling the potential dark figure of crime.

Despite the concerns, there may be no impunity for non-consensual sexual deepfake in Slovenia, at least in theory. The Slovenian lawmakers emphasize that image-based sexual abuse can be addressed under the Slovenian Criminal Code Art. 143(5), which criminalizes unlawful or non-consensual sharing of sensitive personal data (related to sexual life) by imprisonment for up to two years.⁹⁵ The downside is that this paragraph punishes the wrongdoing less severely compared to Art. 143(6) and ignores the sexual and gendered nature of non-consensual sexual deepfake by treating it as a mere data protection issue.

⁹⁰ Šepec and Lango (n 28) 123.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Miha Šepec, 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13 *International Journal of Cyber Criminology* 418.

⁹⁴ Barbara M. Smajila, 'Fantu je poslala svoje gole fotografije, zdaj jih on pošilja naprej' (*n1info.si* 1 October 2023) <<https://n1info.si/poglabljeno/mascevalna-pornografija-zloraba-ki-se-dogaja-vsem-na-oceh/>> accessed 25 October 2023.

⁹⁵ Generalni Sekretariat Vlade Republike Slovenije, 'Predlog Eva: 2016-2030-0001 Prva Obravnava Predlog Zakona O Spremembah In Dopolnitvah Kazenskega Zakonika' (Generalni Sekretariat Vlade Republike Slovenije) <<https://e-uprava.gov.si/.download/edemokracija/datotekaVsebinsa/287871?disposition=inline>> accessed 25 October 2023.

3.13 Spain

Despite non-consensual sexual deepfake targeting many Spanish female celebrities⁹⁶ and the outcry of Spanish singer Rosalía about the issue,⁹⁷ non-consensual sexual deepfake became an issue of public concern following the Almendralejo case. AI-generated realistic naked photos of underaged girls circulated at their school and were greeted with outrage.⁹⁸ The wrongdoing was prosecutable under child pornography because the victims were minors. The incident also demonstrated the legal vacuum about non-consensual sexual deepfake.⁹⁹ The primary provision on image-based sexual abuse in the Spanish Criminal Code, Art. 197(7), states that:

‘If an individual, without the authorization of the person concerned, disseminates, discloses or transfers to third parties images or audiovisual recordings of the person concerned that have been obtained with the consent of the person at the place of residence or any other place away from the sight of others, he shall be punished with imprisonment of three months to one year or a fine of six to twelve months, when the disclosure would seriously undermine the personal privacy of that person.’¹⁰⁰

Presumably, the article fails to punish non-consensual sexual deepfake for two reasons. Art. 197(7) only criminalizes non-consensual dissemination of images or audiovisual recordings obtained with consent. The Spanish Supreme Court’s progressive ruling stated that the term ‘obtained’ refers to images taken without consent and also images initially shared voluntarily.¹⁰¹ Even this interpretation falls short of addressing non-consensual sexual deepfake, because the manufacture of non-consensual sexual deepfake does not align with the conditions specified in these scenarios. In principle, non-consensual sexual

⁹⁶ Adrián del Pozo, ‘Arrimadas, Rosalía, Edurne... Al menos 32 celebrities españolas, víctimas de vídeos pornográficos falsos hechos con Inteligencia Artificial’ (*Cadena SER* 31 August 2023) <<https://cadenaser.com/nacional/2023/08/31/arrimadas-rosalia-edurne-al-menos-32-celebrities-espanolas-victimas-de-videos-pornograficos-falsos-hechos-con-inteligencia-artificial-cadena-ser/>> accessed 26 October 2023.

⁹⁷ Jon Blistein, ‘It’s Disgusting’: Rosalía Fires Back at Artist Who Shared Photoshopped Nude Photos of Her’ (*Rolling Stone* 23 May 2023) <<https://www.rollingstone.com/music/music-news/rosalia-jc-reyes-photoshopped-pictures-1234740631/>> accessed 26 October 2023.

⁹⁸ Manuel Viejo, ‘In Spain, dozens of girls are reporting AI-generated nude photos of them being circulated at school: ‘My heart skipped a beat’’ (*El País* 18 September 2023) <<https://english.elpais.com/international/2023-09-18/in-spain-dozens-of-girls-are-reporting-ai-generated-nude-photos-of-them-being-circulated-at-school-my-heart-skipped-a-beat.html>> accessed 18 September 2023.

⁹⁹ Olympe Abogados, ‘Deepfakes sexuales generados por IA: machismo pero... ¿Delito?’ (*Canal Red* 24 September 2023) <<https://diariored.canalred.tv/actualidad/deepfakes-sexuales-generados-por-ia-machismo-pero-delito/>> accessed 26 October 2023.

¹⁰⁰ Karolina Mania, ‘Legal Protection of Revenge and Deepfake Porn Victims in the European Union: Findings from a Comparative Legal Study’ (2024) 25 *Trauma, Violence, & Abuse* 117.

¹⁰¹ Sosa and Vido (n 69) 139.

deepfake is manufactured by the transformation of daily images obtained from social media or public websites.

Another issue is that Art. 197(7) addresses images or audiovisual recordings taken at the place of residence or any other place away from the sight of others, a condition that deepfake technology can readily circumvent. Taking these into account, Art. 197(7) does not seem like an effective instrument to combat non-consensual sexual deepfake.

Noticing the legal void, the Spanish lawmakers introduced a bill that penalizes non-consensual sexual deepfake, which was thrown out at the parliament.¹⁰² As mentioned above, the Spanish Supreme Court rectified the lawmaker's mistake about the obtained with the consent requirement of Art. 197(7), and perhaps the judiciary should take over responsibility once again. The recently amended Spanish Criminal Code Art. 173(1)—seriously damaging moral integrity provision—holds the potential to address non-consensual sexual deepfake.¹⁰³

3.14 Sweden

Sweden ranks at the top of the Gender Equality Index of the European Union,¹⁰⁴ albeit its laws seem to lag behind novel forms of technology-facilitated gender-based violence. The primary criminal law response to image-based sexual abuse can be found in the Swedish Penal Code Chapter 4 § 6, which tackles illegal privacy invasion and gross illegal privacy invasion and (its relevant parts) as follows:

'Chapter 4 § 6 c

A person who intrudes into the private life of another person by disseminating:

1. an image of or other information about a person's sexual life;

(...)

5. an image of a person's wholly or partially naked body,

if the dissemination is liable to result in serious damage to the person whom the image or information concerns, guilty of unlawful breach of privacy and is sentenced to a fine or imprisonment for at most two years. The person is not held responsible if the act was justifiable in view of its purpose and other circumstances.

Chapter 4 § 6 d

¹⁰² Congreso de los Diputados, *Proposición de Ley Orgánica de refuerzo de las medidas para restringir el acceso de los menores de dieciséis años a la pornografía* (353-1 122/000326).

¹⁰³ Abogados (n 99).

¹⁰⁴ European Institute for Gender Equality, 'Gender Equality Index 2023' (*European Institute for Gender Equality*) <<https://eige.europa.eu/gender-equality-index/2023/compare-countries>> accessed 27 October 2023.

If an offence referred to in Section 6c is gross, the person is guilty of gross unlawful breach of privacy and is sentenced to imprisonment for at least six months and at most four years. When assessing whether the offence is gross, particular consideration is given to whether the act was, in view of the content of the image or information or the means or scope of its dissemination, liable to result in very serious damage to the person whom the image or information concerns.¹⁰⁵

Chapter 4 § 6 is founded on the infringement of privacy and targets violations related to the disclosure of factual information rather than fictional content, such as synthetic audiovisual media. The bill commentary supports this view and cites ‘genuine and true (*sanna och korrekta*)’ information.¹⁰⁶

Another problematic part is the requirement for dissemination to large circles. The bill commentary articulates that dissemination to one or just a few people is not a pressing issue. Chapter 4 § 6 requires dissemination to ‘more than a few people’ for criminal liability.¹⁰⁷ This condition overlooks the harm caused by dissemination to a limited audience, eg, the victim, their partner, employer, or loved ones.

The third issue regards the onerous burden of proof on the victim. Chapter 4 § 6 requires that dissemination shall cause serious damage to the privacy and personal integrity of the depicted person, which can be burdensome and emotionally taxing to prove. The perpetrator’s intent is required for criminal liability,¹⁰⁸ which increases the burden of proof.

Because Chapter 4 § 6 does not afford an easy and effective remedy, Swedish law enforcement had to resort to the defamation provision (Chapter 5) of the Swedish Penal Code to prosecute non-consensual sexual deepfake, as reported by media.¹⁰⁹ It is akin to the Danish response. As stated above, the nature of defamation is not an optimal instrument to tackle non-consensual sexual deepfake. If Sweden intends to uphold its reputation for gender equality, it needs to devote more effort to tackle emerging forms of technology-facilitated gender-based violence.

¹⁰⁵ Government.se, ‘Swedish Penal Code’ (*Government.se*) <<https://www.government.se/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf>> accessed 27 October 2023.

¹⁰⁶ Riksdagen.se, ‘Betänkande 2017/18:KU13 Ett starkt straffrättsligt skydd för den personliga integriteten’ (*Konstitutionsutskottets betänkande*) <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/betankande/ett-starkt-straffrattsligt-skydd-for-den_h501ku13/html/#top> accessed 28 September 2023.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Peter Herkel, ‘Man från Vellinge spred fejkade nakenbilder av unga kvinnor på Instagram’ (*Sydsvenskan* 30 December 2022), <<https://www.sydsvenskan.se/2022-12-30/man-fran-vellinge-spred-fejkade-nakenbilder-av-unga-kvinnor-pa-instagram>> accessed 27 October 2023.

4 Comparative Legal Analysis

Chapter Three compares several aspects of fourteen European Union countries' criminal laws on the dissemination of non-consensual sexual deepfake. To begin with the criminalization, the criminal codes of Spain, France, Austria, and Croatia lack a specific provision on the dissemination of non-consensual sexual deepfake, and the articles related to non-consensual sexual deepfake do not effectively criminalize the dissemination of non-consensual sexual deepfake. In Italy, Portugal, and Romania, if the interpretation of criminal law extends to the dissemination of non-consensual sexual deepfake, it risks violating reasonable foreseeability of the judicial interpretation and/or fundamental principles of legal interpretation. The Maltese criminal law is impracticable and covers the dissemination of non-consensual sexual deepfake only on paper. Put differently, the criminal codes of eight out of fourteen countries scrutinized in this paper do not effectively criminalize the dissemination of non-consensual sexual deepfake.

Secondly, lawmakers lag behind the rapid development and misuse of technology. They could not foresee how emerging technologies can give rise to novel forms of technology-facilitated gender-based violence when introducing the first laws on image-based sexual abuse. The paper observed that lawmakers made three typical mistakes when criminalizing image-based sexual abuse as follows:

- 1) Not directly referring to synthetic images or the absence of technology-neutral wording of the laws.
- 2) Over-focusing on the perpetrator's intent—instead of the harmful act itself—which is difficult to prove.
- 3) Disregarding the sexual and gendered nature of image-based sexual abuse and treating it as an ordinary defamation, data protection, or privacy issue.

With regards to the criminal codes that criminalize the dissemination of non-consensual sexual deepfake, the Dutch Criminal Code directly addresses it; the interpretation of the criminal law of Belgium, Denmark, Germany, Slovenia, and Sweden—in line with fundamental principles of legal interpretation—criminalize the dissemination of non-consensual sexual deepfake without prejudice to reasonable foreseeability of the judicial interpretation. Therefore, where circumstances permit, there is a need for progressive judicial interpretation until the laws catch up with reality. It is remarkable that only Belgium expressly criminalizes sharing non-consensual sexual deepfake with the profit motive, considering it is turning into a profitable business.¹¹⁰ Another exception is the Neth-

¹¹⁰ Santiago Lakatos, *A Revealing Picture AI-Generated 'Undressing' Images Move from Niche Pornography Discussion Forums to a Scaled and Monetized Online Business* (Graphika 2023); Kolina Koltai, 'Behind a Secretive Global Network of Non-Consensual Deepfake Pornography' (*Bellingcat*, 23 February 2024) <<https://www.bellingcat.com/news/2024/02/23/behind-a-secretive-global-network-of-non-consensual-deepfake-pornography/>> accessed 10 March 2024.

erlands, which criminalizes reckless or intentional possession of or access to non-consensual sexual deepfake. It can violate the principle of minimal criminalization, seems difficult to enforce effectively, and can cause overcriminalization.

Several countries disregard the sexual nature and gender dimension of non-consensual sexual deepfake:

- Denmark and Sweden employ defamation.
- Germany refers to violation of intimate privacy and personality rights.
- Slovenia uses unlawful or non-consensual sharing of sensitive personal data criminal law provisions to criminalize dissemination of non-consensual sexual deepfake.

These overlook the sexual and gendered nature of the wrongdoing, making them unideal instruments for the purpose.

A striking finding regards the limits of punishment. The minimum sentence is a fine in many countries, but maximum penalty differs significantly: imprisonment up to six years in Italy, five years in Belgium, Malta, Portugal, and one year in the Netherlands. The Southern European countries regard image-based sexual abuse as a more serious crime, which may be related to cultural codes. The results obtained from the comparative legal analysis are summarized in Table 1.

Table 1 – Summary of Comparative Legal Analysis of Selected Countries’ Criminal Law Responses to the Dissemination of Non-consensual Sexual Deepfake

Country	Criminal code specifically criminalizes non-consensual sexual deepfake	Interpretation of criminal code criminalizes non-consensual sexual deepfake	Criminal code does not criminalize non-consensual sexual deepfake	Crime Category	Punishment
Austria			(x)	N/A	N/A
Belgium		(x)		Image-based sexual abuse	Fine and six months to five years imprisonment
Croatia			(x)	N/A	N/A
Denmark		(x)		Defamation	Fine or imprisonment up to two years
France			(x)	N/A	N/A
Germany		(x)		Violation of intimate privacy and personality rights	Fine or imprisonment up to two years

Italy			(x)	Image-based sexual abuse	Fine and imprisonment up to six years
Malta			(x)	Image-based sexual abuse	Fine and/or imprisonment up to five years
The Netherlands	(x)			Image-based sexual abuse	fine or imprisonment up to a year
Portugal			(x)	Image-based sexual abuse	Imprisonment up to five years
Romania			(x)	Image-based sexual abuse	Fine or imprisonment from six months to three years
Slovenia		(x)		Unlawful or non-consensual sharing of sensitive personal data	Imprisonment up to two years
Spain			(x)	N/A	N/A
Sweden		(x)		Defamation	Fine or imprisonment up to two years

Against the backdrop of the lack of criminalization in the majority of analysed countries, a notable effort is observed at the European Union level. The recently adopted Directive on Combating Violence Against Women and Domestic Violence expressly criminalizes the dissemination of non-consensual sexual deepfake. Art. 5 of the Directive states that:

‘Non-consensual sharing of intimate or manipulated material

‘1. Member States shall ensure that the following intentional conduct is punishable as a criminal offence:

(a) making accessible to the public, by means of information and communication technologies (‘ICT’), images, videos or similar material depicting sexually explicit activities or the intimate parts of a person, without that person’s consent, where such conduct is likely to cause serious harm to that person;

(b) producing, manipulating or altering and subsequently making accessible to the public, by means of ICT, images, videos or similar material making it appear as though a person is engaged in sexually explicit activities, without that person’s consent, where such conduct is likely to cause serious harm to that person;

(c) threatening to engage in the conduct referred to in point (a) or (b) in order to coerce a person to do, acquiesce to or refrain from a certain act.

2. Paragraph 1, points (a) and (b), of this Article does not affect the obligation to respect the rights, freedoms and principles referred to in Article 6 TEU and applies without prejudice to fundamental principles related to the freedom of expression and information and the freedom of the arts and sciences, as implemented in Union or national law.’

As referenced in the text, Art. 5/1(a) and (b) respectively address non-consensual dissemination of authentic sexual/intimate images and non-consensual sexual deepfake, and Art. 5/1(c) tackles coercive threats. The Directive sets minimum standards; Member States are free to adopt more strict criminal legislation and have three years (after entry into force) to transpose it into national legislation.¹¹¹ While the Directive should be welcomed, some caveats may hamper its effectiveness.

Art. 5/1(a) criminalizes non-consensual dissemination of sexual or intimate authentic images (‘depicting sexually explicit activities or the intimate parts of a person’). In contrast, Art. 5/1(b) solely focuses on the non-consensual dissemination of deepfake¹¹² that ‘making it appear as though a person is engaged in sexually explicit activities.’ The limitation excludes strip naked deepfake from the scope of the Directive.¹¹³ This poses a significant issue because strip naked non-consensual sexual deepfake can be as harmful as face swap and synthesis non-consensual sexual deepfake. Additionally, the increasing efficiency of the diffusion model (AI system) enables mass and automated production of strip naked non-consensual sexual deepfake, particularly on Telegram (via Telegram bots) and dedicated deepfake websites. The Directive fails to address this issue.

Another concern is the ‘making accessible to the public’ requirement, which ‘should be understood as referring to potentially reaching a number of persons.’ This possibly excludes sharing non-consensual sexual deepfake with fewer than three persons considering the definition of ‘a number of.’¹¹⁴ The issue is that in some instances, dissemination to a very limited audience—such as the partner, employer, and loved ones of the victim—can be significantly detrimental. However, the Directive underlines that ‘those terms [accessible to the public and potentially reaching a number of persons] should be interpreted and applied having regard to the relevant circumstances, including the technol-

¹¹¹ Council of the EU, ‘Council Adopts First-Ever EU Law Combating Violence against Women’ <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/07/council-adopts-first-ever-eu-law-combating-violence-against-women/>> accessed 1 June 2024.

¹¹² The Directive specifically refers to manipulated images and deepfakes in the preamble (paragraph 19).

¹¹³ Carlotta Rigotti and Clare McGlynn, ‘Towards an EU Criminal Law on Violence against Women: The Ambitions and Limitations of the Commission’s Proposal to Criminalise Image-Based Sexual Abuse’ (2022) 13 *New Journal of European Criminal Law* 473.

¹¹⁴ Dictionaries define ‘a number of’ as ‘several,’ ‘many,’ or ‘more than two but fewer than many.’ Collins English Dictionary, ‘A NUMBER OF Definition and Meaning’ (2 June 2024) <<https://www.collinsdictionary.com/dictionary/english/a-number-of>> accessed 2 June 2024. Merriam-Webster, ‘Definition of A NUMBER OF’ <<https://www.merriam-webster.com/dictionary/a+number+of>> accessed 2 June 2024.

ogy used to make that material accessible,’ which leaves the door open to different interpretations. Lastly, the statutory interpretation of ‘making non-consensual sexual deepfake accessible to the public is likely to cause serious harm’ requirement remains an open question.

5 Conclusion

In 2010, Hunter Moore lawfully established IsAnyoneUp.com—a website that encouraged doxing and sharing intimate/sexual images without consent—turned it into a profitable business and defended it as ‘possibly offensive but not illegal.’¹¹⁵ A decade later, non-consensual sexual deepfake evokes a sense of déjà vu. This paper has shown that the criminal codes of eight out of fourteen European Union countries do not criminalize the dissemination of non-consensual sexual deepfake.

Criminal law should be employed as the last resort; it cannot tackle a complex societal issue by itself, and this is particularly true for a gendered, technological, and societal issue like non-consensual sexual deepfake. However, recalling the serious harms of non-consensual sexual deepfake and the shortcomings of technical measures and other branches of law, the paper concludes that criminalizing non-consensual sexual deepfake is preferable and more legitimate than not doing so. Nonetheless, only eight out of fourteen countries in the European Union criminalize the dissemination of non-consensual sexual deepfake. The recently adopted European Union Directive on Combating Violence Against Women and Domestic Violence supports this view and criminalizes the dissemination of non-consensual sexual deepfake. Nonetheless, the Directive excludes strip naked deepfake and sharing non-consensual sexual deepfake with fewer than three persons. Lastly, this paper underlines that in addition to criminalization, a multifaceted response—including different branches of law, educational initiatives, policy interventions, and technical measures—is required to tackle non-consensual sexual deepfake.

References

- Abogados O, ‘Deepfakes sexuales generados por IA: machismo pero... ¿Delito?’ (Canal Red 24 September 2023) <<https://diariored.canalred.tv/actualidad/deepfakes-sexuales-generados-por-ia-machismo-pero-delito/>> accessed 26 October 2023
- Ajder H and others, ‘The State of Deepfakes: Landscape, Threats, and Impact’ (*Deeptrace* 2019)
- Andrade de NNG, ‘Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights’ in Simone Fischer-Hübner and others (eds) *Privacy and Identity Management for Life* (1st edn Springer 2010)

¹¹⁵ Ganaele Langlois and Andrea Slane, ‘Economies of Reputation: The Case of Revenge Porn’ (2017) 14 *Communication and Critical/Cultural Studies* 1.

Angeli de A and others, 'Reporting non-consensual pornography: clarity, efficiency and distress' (2023) 82 Multimedia Tools and Applications 12829

Ayyub R, 'I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me' (HuffPost 21 November 2018) <https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316> accessed 29 November 2023

Baker McKenzie's Resource Hub, 'Prosecutorial considerations' (Baker McKenzie's Resource Hub) <<https://resourcehub.bakermckenzie.com/en/resources/fighting-domestic-violence/europe/denmark/topics/5-prosecutorial-considerations>> accessed 30 October 2023

Bates S, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 Feminist Criminology 22

BBC News, 'Four questioned in Italy after woman's suicide over sex video' (BBC News 15 September 2016) <<https://www.bbc.com/news/world-europe-37377286>> accessed 16 October 2023

—, 'Mia Janin: Schoolboys made fun of girl before her death' (BBC News 23 January 2024) <<https://www.bbc.com/news/uk-england-london-68071440>> accessed 24 January 2024

—, 'Two arrested in Egypt after teenage girl's suicide sparks outrage' (BBC News 4 January 2022) <<https://www.bbc.com/news/world-middle-east-59868721>> accessed 30 November 2023

Blistein J, 'It's Disgusting': Rosalía Fires Back at Artist Who Shared Photoshopped Nude Photos of Her' (*Rolling Stone*, 23 May 2023) <<https://www.rollingstone.com/music/music-news/rosalia-jc-reyes-photoshopped-pictures-1234740631/>> accessed 26 October 2023

Bonis F, 'Man opgepakt voor nep-seksvideo Welmoed Sijtsma' (Veronica Superguide 10 November 2023) <<https://www.veronicasuperguide.nl/nieuws/man-opgepakt-voor-nep-seksvideo-welmoed-sijtsma>> accessed 15 November 2023

Burgess M, 'Deepfake Porn Is Out of Control' (*Wired*, 16 October 2023) <<https://www.wired.com/story/deepfake-porn-is-out-of-control/>> accessed 19 October 2023

Citron D, 'Sexual Privacy' (2019) 128 Yale Law Journal 1870

—, *The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age* (e-book 1st edn W. W. Norton & Company)

Collins English Dictionary, 'A NUMBER OF Definition and Meaning' (2 June 2024) <<https://www.collinsdictionary.com/dictionary/english/a-number-of>> accessed 2 June 2024

Cook J, 'Here's What It's Like to See Yourself in A Deepfake Porn Video' (HuffPost 23 June 2019) <https://www.huffpost.com/entry/deepfake-porn-heres-what-its-like-to-see-yourself_n_5d0d0faee4b0a3941861fced> accessed 29 November 2023

Corridori C, 'Il fenomeno del deep-fake e il diritto penale tra tutela dell'immagine e autodeterminazione sessuale' (giudicedonna.it) <http://www.giudicedonna.it/articoli/Il_fenomeno_del_deep-fake_e_il_diritto_penale.pdf/> accessed 16 October 2023

D'Anastasio C and Alba D, 'Google and Microsoft Are Supercharging AI Deepfake Porn' (Bloomberg Law 24 August 2023) <<https://news.bloomberglaw.com/artificial-intelligence/google-and-microsoft-are-supercharging-ai-deepfake-porn>> accessed 19 October 2023

del Pozo A, 'Arrimadas, Rosalía, Edurne... Al menos 32 celebrities españolas, víctimas de vídeos pornográficos falsos hechos con Inteligencia Artificial' (Cadena SER 31 August 2023) <<https://cadenaser.com/nacional/2023/08/31/arrimadas-rosalia-edurne-al-menos-32-celebrities-espanolas-victimas-de-videos-pornograficos-falsos-hechos-con-inteligencia-artificial-cadena-ser/>> accessed 26 October 2023

Delfino RA, 'Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act' (2019) 88 Fordham Law Review 887

Digitalt Ansvar, Digital vold - delrapport om digital afpresning 2023 (September 2023) <<https://digitaltansvar.dk/wp-content/uploads/2023/09/Digital-vold-i-Danmark.-Anden-del-Nye-former-for-afpresning.pdf>> accessed 11 December 2023

Elle, 'Qu'est-ce que le deepfake porn? Pratique illégale dont a été victime Léna Situations' (Elle, 10 August 2023) <<https://www.elle.fr/Societe/News/Qu-est-ce-que-le-deepfake-porn-Pratique-illegale-dont-a-ete-victime-une-streameuse-americaine-4097124>> accessed 16 October 2023

ELSA Malta, Pornography and Vilification of Religion Law Advancement and Policy Consideration (ELSA Malta 2016) <<https://cms.elsa.mt/api/v1/files/download/af78f79d-fa74-4113-9558-fd2176ae310e/preview>> accessed 1 November 2023

Erste D, 'Gefälschte Sexvideos: Immer mehr Frauen Opfer von Deepfakes' (*Das Erste*, 14 February 2023) <<https://www.daserste.de/information/politik-weltgeschehen/report-mainz/sendung/2023/230214-rep-deepfakes-100.html>> accessed 16 October 2023

Felicity J, 'Behind Every Image is a Person' (Now Then Magazine 26 January 2021) <<https://nowthenmagazine.com/articles/helen-mort-behind-every-image-is-a-person-violence-against-women-deepfakes>> accessed 11 September 2023

Flynn A and others, 'Deepfakes and Digitally Altered Imagery Abuse: A Cross-Country Exploration of an Emerging form of Image-Based Sexual Abuse' (2022) 62 The British Journal of Criminology 1341

Franks MA and Waldman AE, 'Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions' (2019) 78 Maryland Law Review 892

Gieseke PA, "'The New Weapon of Choice': Law's Current Inability to Properly Address Deepfake Pornography' (2020) 73 Vanderbilt Law Review 1479

Golla SJ, 'Fake-Strafrecht in Wahlkampfzeiten' (Verfassungsblog 9 September 2021) <<https://verfassungsblog.de/fake-strafrecht-in-wahlkampfzeiten/>> accessed 29 September 2023

Goudsmit MLR, 'Criminalising image-based sexual abuse: an analysis of the Dutch bill against "revenge pornography"' (2019) <https://www.researchgate.net/publication/354807798_Criminalising_image-based_sexual_abuse_an_analysis_of_the_Dutch_bill_against_'revenge_pornography'> accessed 21 September 2023

—, 'Revenge pornography: A conceptual analysis undressing a crime of disclosure' (Master's Thesis, Leiden University, 2017).

Greif J, *Strafbarkeit von bildbasierten sexualisierten Belästigungen* (1st edn Duncker & Humblot 2022)

Hall M and Hearn J and Lewis R, *Digital Gender-Sexual Violations Violence, Technologies, Motivations* (1st edn, Routledge 2022)

Hansen C and Dammark F, '23-årig tiltalt: 229 billeder af uskyldige kvinder omdannet til pornografisk indhold' (TV Midtvest 12 March 2019) <<https://www.tvmidtvest.dk/midt-og-vestjylland/23-arig-tiltalt-229-billeder-af-uskyldige-kvinder-omdannet-til-pornografisk>> accessed 13 October 2023

Harris D, 'Deepfakes: False Pornography Is Here and the Law Cannot Protect You' (2019) 17 Duke Law & Technology Review 99

Herkel P, 'Man från Vellinge spred fejkade nakenbilder av unga kvinnor på Instagram' (Sydsvenskan 30 December 2022), <<https://www.sydsvenskan.se/2022-12-30/man-fran-vellinge-spred-fejkade-nakenbilder-av-unga-kvinnor-pa-instagram>> accessed 27 October 2023

Hochberg J, 'Mon corps n'est pas un objet dont on peut se servir sans ma permission' (Marie Claire) <<https://www.marieclaire.fr/deepfake-pornographique-mon-corps-n-est-pas-un-objet-dont-on-peut-se-servir-sans-ma-permission,1425880.asp>> accessed 16 October 2023

Home Security Heroes, '2023 State of Deepfakes Realities, Threats, and Impact' (*Home Security Heroes*) <<https://www.homesecurityheroes.com/state-of-deepfakes/>> accessed 27 October 2023

Huijstee M van and others, Tackling Deepfakes in European Policy (European Parliamentary Research Service 2021)

itv, 'Sheffield woman's campaign after 'deepfake' image used in internet pornography' (itv 1 July 2021) <<https://www.itv.com/news/calendar/2021-07-01/sheffield-womans-campaign-after-deepfake-image-used-in-internet-pornography?s=08>> accessed 29 November 2023

Karasavva V and Noorbhai A, 'The Real Threat of Deepfake Pornography: A Review of Canadian Policy' (2021) 24 *Cyberpsychology, Behavior and Social Networking* 203

Koltai K, 'Behind a Secretive Global Network of Non-Consensual Deepfake Pornography' (Bellingcat, 23 February 2024) <<https://www.bellingcat.com/news/2024/02/23/behind-a-secretive-global-network-of-non-consensual-deepfake-pornography/>> accessed 10 March 2024

Kugler MB and Pace C, 'Deepfake Privacy: Attitudes and Regulation' (2020) 116 *Northwestern University Law Review* 611

L'Express, 'Alerte sur les deepfakes pornos: "Les réseaux pédocriminels s'emparent de cette pratique"' (L'Express 30 August 2023) <<https://www.lexpress.fr/societe/alerte-sur-les-montages-pornos-generes-par-ia-on-peut-creer-25-images-pour-10-euros-4X5BBGTL2ZA4FE3BMNUT2PXUKU/>> accessed 16 October 2023

Lakatos S, A Revealing Picture AI-Generated 'Undressing' Images Move from Niche Pornography Discussion Forums to a Scaled and Monetized Online Business (Graphika 2023)

Langlais-Fontaine C, 'Démêler le vrai du faux : étude de la capacité du droit actuel à lutter contre les deepfakes' (2020) 18 *Revue des droits de l'homme* <<https://journals.openedition.org/revdh/9747/>> accessed 11 December 2023

Langlois G and Slane A, 'Economies of Reputation: The Case of Revenge Porn' (2017) 14 *Communication and Critical/Cultural Studies* 120

Law Commission, Intimate Image Abuse: A Final Report (Law Com No 407 2022)

Mania K, 'Legal Protection of Revenge and Deepfake Porn Victims in the European Union: Findings from a Comparative Legal Study' (2024) 25 *Trauma, Violence, & Abuse* 117

Martin N, 'Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist's Perspective' in Anastasia Powell and Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Palgrave Macmillan 2021)

McGlynn C and others, Shattering Lives and Myths: A Report on Image-Based Sexual Abuse (Australian Research Council 2019)

McGlynn C and Rackley E, 'More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 14 Irish Probation Journal 38

McGlynn C, Anonymity for Complainants of Image-Based Sexual Abuse (Durham University 2016)

Merriam-Webster, 'Definition of A NUMBER OF' <<https://www.merriam-webster.com/dictionary/a+number+of>> accessed 2 June 2024

Ministero dell'Interno, 'Brochure Violenza Sulle Donne Il Punto La Violenza Contro Le Donne' (Ministero dell'Interno) <https://www.interno.gov.it/sites/default/files/2021-11/2021-_sac_brochure_violenza_sulle_donne.pdf> accessed 18 September 2023

Miroslava Edvina Habeka, 'Online nasilje nad ženama – za osvetničku pornografiju dosad samo tri pravomoćne presude' (Zagreb 15 December 2022) <<https://www.ze-neimediji.hr/online-nasilje-nad-zenama-za-osvetnicku-pornografiju-dosad-samo-tri-pravomocne-presude/>> accessed 11 December 2023

Neethling J, 'Personality Rights: A Comparative Overview' (2005) 38 The Comparative and International Law Journal of Southern Africa 210

Oxford Advanced Learner's Dictionaries, 'Picture' (Oxford Advanced Learner's Dictionaries) <https://www.oxfordlearnersdictionaries.com/definition/english/picture_1?q=picture> accessed 5 December 2023

Panebianco G, 'La diffusione illecita di immagini o video sessualmente espliciti: tra carenze della fattispecie' (2022) 2022-1 Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere'

Patella-Rey P, 'Beyond privacy: bodily integrity as an alternative framework for understanding non-consensual pornography' (2018) 21 Information, Communication & Society 786

Pavan E and Lavorgna A, 'Promises and Pitfalls of Legal Responses to Image-Based Sexual Abuse: Critical Insights from the Italian Case' in Anastasia Powell and Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Palgrave Macmillan 2021)

Permesso Negato, State of Revenge 2022 (Permesso Negato (2022) <https://www.permessonegato.it/doc/PermessoNegato_StateofRevenge_2022.pdf> accessed 31 October 2023

Ranghi G, 'Violenza Digitale: La Diffusione Illecita Di Immagini O Video Sessualmente Espliciti' (Salvisjuribus 20 January 2022) <<http://www.salvisjuribus.it/violenza-digitale-la-diffusione-illecita-di-immagini-o-video-sessualmente-espliciti/>> accessed 16 October 2023

Rigotti C and McGlynn C, 'Towards an EU Criminal Law on Violence against Women: The Ambitions and Limitations of the Commission's Proposal to Criminalise Image-Based Sexual Abuse' (2022) 13 *New Journal of European Criminal Law* 452

Scalia A and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (1st edn Thomson/West 2012)

Šepec M and Lango M, 'Virtual Revenge Pornography as a New Online Threat to Sexual Integrity' (2020) 15 *Balkan Social Science Review* 117

Šepec M, 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13 *International Journal of Cyber Criminology* 418

Sloot B van der and Wagenveld Y and Koops B-J, *Deepfakes: the legal challenges of a synthetic society* (Tilburg University 2022)

Sluiter G, 'Aiding and abetting liability for social media platforms in relation to 'image-based sexual abuse' – a way around Article 14 (1) of EU Directive 2000/31?' (*Rethinking SLIC* 17 December 2021) <<https://rethinkingslic.org/blog/criminal-law/102-goeran-sluiter>> accessed 18 October 2023

Smajila BM, 'Fantu je poslala svoje gole fotografije, zdaj jih on pošilja naprej' (n1info.si 1 October 2023) <<https://n1info.si/poglabljeno/mascevalna-pornografija-zloraba-ki-se-dogaja-vsem-na-oceh/>> accessed 25 October 2023

Solmecke C, '„Deepfakes“ und Face-Swap-Apps können Personen in Pornos austauschen – Welche Rechte haben Geschädigte?' (WBS Legal 1 December 2022) <<https://www.wbs.legal/it-und-internet-recht/datenschutzrecht/deepfake-fakeapp-kann-personen-in-pornos-austauschen-welche-rechte-haben-geschaedigte-23489/>> accessed 29 September 2023

Sosa L and Vido SD, *Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence* (Directorate-General for Justice and Consumers 2021)

Stanford Encyclopedia of Philosophy, 'The Harm Principle' (Stanford Encyclopedia of Philosophy 29 January 2022) <<https://plato.stanford.edu/entries/law-limits/#HarmPrin>> accessed 4 December 2023

Stevens D, 'Criminalizing Revenge Pornography' (SecJure 21 January 2021) <<https://www.secjure.nl/2021/01/04/criminalizing-revenge-pornography/>> accessed 19 October 2023

Stocia R and Balog I, 'Mult aşteptata modificare adusă Codului penal: incriminarea fenomenului de „revenge porn”' (juridice.ro 16 June 2023) <<https://www.juridice.ro/689652/mult-asteptata-modificare-adusa-codului-penal-incriminarea-fenomenului-de-revenge-porn.html>> accessed 23 October 2023

StopChikane, 'Hvad er digitale krænkelse?' (StopChikane) <<https://stopchikane.nu/om-digitale-krænkelser/hvad-er-digitale-krænkelser/>> accessed 13 October 2023

Sturino SF, 'Deepfake Technology and Individual Rights' (2023) 49 *Social Theory and Practice* 161

Suslavich B, 'Non-consensual Deepfakes: A 'Deep Problem' for Victims' (2023) 33 *Albany Law Journal of Science and Technology* 160

The German Women Lawyers Association, 'Bekämpfung bildbasierter sexualisierter Gewalt' (The German Women Lawyers Association 7 June 2023) <<https://www.djb.de/presse/stellungnahmen/detail/st23-17>> accessed 2 October 2023

Tiedeke AS and others, 'What can be said online in Germany and Austria? A legal and terms of service taxonomy' (SSRN 5 December 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735932> accessed 25 September 2023

Toparlak RT, 'Criminalising Pornographic Deep Fakes: A Gender-Specific Inspection of Image-Based Sexual Abuse' in *SciencesPo Law School The 10th Graduate Conference Law & Technology* (SciencesPo Law School 2022)

Trine Birk and others, 'Kunstig intelligens klæder danske kvinder af på nettet: 'Det er jo alt, der bliver blottet på én' (DR 11 April 2021) <<https://www.dr.dk/mitliv/kunstig-intelligens-klæder-danske-kvinder-af-paa-nettet-det-er-jo-alt-der-bliver-blottet-paa>> accessed 13 October 2023

Viejo M, 'In Spain, dozens of girls are reporting AI-generated nude photos of them being circulated at school: 'My heart skipped a beat'' (El País 18 September 2023) <<https://english.elpais.com/international/2023-09-18/in-spain-dozens-of-girls-are-reporting-ai-generated-nude-photos-of-them-being-circulated-at-school-my-heart-skipped-a-beat.html>> accessed 18 September 2023

VRT News, 'Ex-Miss Belgien Celine Van Ouytsel "am Boden zerstört" durch gefälschte KI-Nacktbilder, Dutzende andere ebenfalls Opfer' (VRT News 29 September 2023) <<https://www.vrt.be/vrtnws/de/2023/09/29/ex-miss-belgien-celine-van-ouytsel-am-boden-zerstoert-durch-ge/>> accessed 12 October 2023

Wang MY, 'Don't Believe Your Eyes: Fighting Deepfaked Non-consensual Pornography with Tort Law' (The University of Chicago Legal Forum) <<https://legal-forum.uchicago.edu/print-archive/dont-believe-your-eyes-fighting-deepfaked-non-consensual-pornography-tort-law>> accessed 4 December 2023

Warren SD and Brandeis LD, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 1

Yavuz C, 'Deepfake for Human Rights: Disregarded Prosocial Uses of Deepfake and Their Nexus to Human Rights' (forthcoming)

Živković I and Čubrilo V and Dujčić K, ‘‘Revenge Porn’’: An Exploration into Redefinition in the Interest of Changing Legislation’ (The European Judicial Network) <https://portal.ejtn.eu/PageFiles/20512/Team%20Croatia_Revenge%20Porn%20An%20Exploration%20into%20Redefinition%20in%20the%20Interest%20of%20Changing%20Legislation.pdf> accessed 12 October 2023

This special issue brings together nineteen topical and innovative papers, researching the boundaries of sexual integrity and affirmative sexual consent, gender violence, and image-based or online sexual abuse, including child sexual abuse material and non-consensual sexual deepfakes. It offers an original and nuanced approach to understanding the important legal elements, various agents and harms of topic-related deviant conduct as well as legislative processes aimed at tackling it. In light of recent societal developments, including changes in societal sensibilities, and recent or on-going legislative amendments at national and supranational levels, research on these topics is timely and much needed.

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