

# RECONCEPTUALIZING REVENGE PORN

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*Revenge porn has become an epidemic in the United States in recent years. A debate among legislators has emerged, focused primarily on the question of whether to criminalize the phenomenon, with most states having already done so, based on the grave harm that revenge porn inflicts on victims and the ease of distributing it. However, the conceptual questions of how to categorize the offense, and why, have not received much attention. Contrary to the prevailing approaches in the United States, which sporadically define revenge porn as an infringement of privacy, as obscenity, or as some other offense, this Essay proposes, for the first time, theoretical grounds for categorizing it as a sex offense. This novel, though possibly controversial, reconceptualization more accurately reflects the social values that are violated by the phenomenon, more correctly labels the behavior of the offender, and more succinctly recognizes the nature of the harm inflicted on the victim. Categorizing revenge porn as a sex offense has not only theoretical but also practical implications, both for victims and released sex offenders.*

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### INTRODUCTION

Several years ago, a woman's ex-boyfriend posted videos on the Internet in which she can be seen having sexual intercourse with him. The videos were made public without her consent, in clear violation of the man's stated commitment not to do so, and with the intention of humiliating her sexually. The woman testified that following the publication of the videos, she required regular psychological and psychiatric treatments, and that the injury appears to have left her with significant mental scars. She described the experience as follows:

I had a boyfriend for six months. We lived together. We decided to document ourselves in an intimate scene on his cell phone. When we separated, he decided to disseminate it to his friends. It was circulated all over the country. His friends circulated it to their friends, and they circulated it to their friends. It ran on the web to an absurd extent. Everyone I know received it. Everyone I didn't know but I met later received it. A lot of people received it. It ruined my life. Since it happened, since everyone saw it, including my family, my closest friends—simply everybody—my brother, my parents, I haven't been able to come back to life, to routine life. I don't think this is an invasion of privacy. I think I was raped in front of the whole country. I feel this is viral rape, online rape.<sup>1</sup>

In recent years, distributing intimate pictures or videos without the consent of the person depicted has become an epidemic in many countries. This includes cases in which the person disseminating the material obtained it with the consent of the person depicted or without consent by hacking into the victim's computer or by taking the picture or video without the victim's knowledge. The main emphasis in this phenomenon is on the dissemination of the material without the victim's consent, rather than its actual creation.<sup>2</sup>

The nonconsensual distribution of an intimate image or video can be motivated by revenge following a failed relationship and is usually gender-related

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1. See Protocol no. 20, Status of Women and Gender Equality Committee, the 19th Israeli Parliament (June 18, 2013) (on file with author).

2. Rachel Budde Patton, Note, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 431 (2015).

since most of the victims are women.<sup>3</sup> Websites that encourage this phenomenon publish mostly images of women,<sup>4</sup> and in most of the court cases that have addressed the issue, it is women who have been the victims and men the perpetrators.<sup>5</sup> Thus the phenomenon has come to be known as “revenge porn,” even though the term does not cover the full range of cases in which intimate images are disseminated without consent.<sup>6</sup> For example, there are also cases in which there is no relationship between the man and the woman, and the motive is simply entertainment or financial gain.<sup>7</sup>

In the United States, revenge porn began to receive significant attention in the media and from judicial authorities in 2010, with the emergence of websites that encouraged people to upload pictures revealing intimate organs of women even without their consent. Such websites encouraged a culture of revenge against the subjects.<sup>8</sup> The sites also frequently provided the names and addresses of the women, which caused them significant physical, mental, and emotional anguish, in many cases leading to anxiety attacks, depression, anorexia, and even suicide.<sup>9</sup>

Although the dissemination of an image of a clearly sexual nature without consent constitutes a serious violation of privacy, until 2003 there was no law in the United States stating that it is a criminal act.<sup>10</sup> By 2013, only three states had criminalized revenge porn.<sup>11</sup> From that point onward, there was greater legislative

3. See *People v. Austin*, 2019 IL 123910, ¶ 68 (“[T]he nonconsensual dissemination of sexual images disproportionately affects women, who constitute 90% of the victims, while men are most commonly the perpetrators . . . .”); Danielle Keats Citron, *Sexual Privacy*, 128 *YALE L.J.* 1870, 1919–20 (2019) (“Nonconsensual porn affects women and girls far more frequently than it affects men and boys. According to recent studies, the majority of victims are female, and young women are particularly likely to experience threats to post their nude images.”); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 353 (2014); Ava Schein, Note, *When Sharing Is Not Caring: Creating an Effective Criminal Framework Free From Specific Intent Provisions to Better Achieve Justice for Victims of Revenge Pornography*, 40 *CARDOZO L. REV.* 1953, 1961–62 (2019); see also Emily Poole, Comment, *Fighting Back Against Non-Consensual Pornography*, 49 *U.S.F. L. REV.* 181, 191 (2015). To reflect the fact that this is a gendered phenomenon, we use gender-based language, according to which victims are women and disseminators are men, although both victims and disseminators may be of any gender.

4. See Mary Anne Franks, “*Revenge Porn*” Reform: A View from the Front Lines, 69 *FLA. L. REV.* 1251, 1262 (2017); Poole, *supra* note 3, at 191–92.

5. Franks, *supra* note 4, at 1259.

6. *Id.* at 1257–58; Jessica A. Magaldi, Jonathan S. Sales & John Paul, *Revenge Porn: The Name Doesn’t Do Nonconsensual Pornography Justice and the Remedies Don’t Offer the Victims Enough Justice*, 98 *OR. L. REV.* 197, 200 (2020).

7. *Austin*, 2019 IL 123910, ¶ 18; Franks, *supra* note 4, at 1257–58. In this Essay we use, for reasons of convenience, the term “revenge porn.”

8. Franks, *supra* note 4, at 1255; see also Budde Patton, *supra* note 2, at 409; Poole, *supra* note 3, at 187.

9. Citron & Franks, *supra* note 3, at 350–51; Schein, *supra* note 3, at 1964.

10. Franks, *supra* note 4, at 1255.

11. *Id.* at 1280. The first states to criminalize revenge porn were New Jersey, Alaska, and Texas. This is surprising due to the fact that both state and federal law have criminalized various forms of infringement of privacy. For example, federal law prohibits a

effort to deal with the phenomenon, and by 2020, 46 states and the District of Columbia had enacted specific laws against it.<sup>12</sup> Many other countries have done the same.<sup>13</sup> The criminalization of the phenomenon has spread in the wake of a growing understanding that the option of civil action to remedy infringement of privacy is not sufficient and that criminal law is needed in order to vigorously combat the behavior.<sup>14</sup>

In parallel to these developments, the criminalization of revenge porn sparked a controversy among scholars as to the need for criminal legislation. Some have argued that existing civil legislation is sufficient and that there is no need to make revenge porn a crime.<sup>15</sup> Others have suggested that even if revenge porn should be a crime, existing criminal legislation covers most of the cases that can be considered revenge porn.<sup>16</sup>

At present, revenge porn laws vary across states. A considerable number of states have categorized the offense as an infringement of privacy;<sup>17</sup> others as an obscenity offense;<sup>18</sup> and a few as harassment or miscellaneous offenses.<sup>19</sup> In each of these states, it seems that there has not been a thorough discussion of the rationale underlying these different categorizations, either in the courts or in the legislature. When there has been a discussion, courts have focused primarily on the question of the constitutionality of the offense given the potential violation of freedom of speech. In October 2019, for instance, the Supreme Court of Illinois validated the constitutionality of Illinois's revenge porn legislation.<sup>20</sup> Similarly, in December

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government agency from providing private information to anyone not authorized to receive it. *See* 5 U.S.C. § 552(a)(8)(A)(i). Similarly, it is prohibited to make available an individual's medical information without his consent. *See* 42 U.S.C. § 1320d-6. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (determining for the first time the substantive right to privacy).

12. *See infra* note 87.

13. *See* Franks, *supra* note 4, at 1279–80.

14. *See* *People v. Austin*, 2019 IL 123910, ¶¶ 22–23.

15. *See* Anupam Chander, *Youthful Indiscretion, an Internet Age*, in *THE OFFENSIVE INTERNET* 124, 129–33 (Saul Levmore & Martha C. Nussbaum eds., 2010); Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2031 (2014); Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 446 (2014); Jenna K. Stokes, Note, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 952 (2014). *But see* Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1034–44 (2009) (calling for the courts to apply § 230 of the Communications Decency Act in a way that would impose tort liability on website sponsors based on a negligence standard).

16. *See, e.g.*, Budde Patton, *supra* note 2, at 434–38.

17. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335 (2017); S.D. CODIFIED LAWS § 22-21-4 (2020); KAN. STAT. ANN. § 21-6101(a)(8) (2016); CONN. GEN. STAT. § 53a-189c (2015); *see also* discussion *infra* Part III.

18. *See, e.g.*, MINN. STAT. § 617.261 (2016); VA. CODE ANN. § 18.2-386.2 (2019); COLO. REV. STAT. §§ 18-7-107 to -108 (2019).

19. *See* ALASKA STAT. § 11.61.120 (2019); CAL. PENAL CODE § 647(j)(4)(A) (West, Westlaw through ch. 372 of the 2020 Reg. Sess.).

20. *People v. Austin*, 2019 IL 123910, ¶ 119.

2020, the Minnesota Supreme Court upheld a state law prohibiting revenge porn, finding that it satisfies strict scrutiny and comports with the First Amendment.<sup>21</sup>

Although the need to criminalize revenge porn has been widely discussed, the question of how to categorize the offense has not yet been thoroughly explored. This Essay seeks to fill the void by shifting the contemporary discussion to a conceptual question, namely the appropriate categorization of the offense and its significance. We demonstrate the lack of a coherent theoretical discussion of the appropriate categorization of the offense of revenge porn by analyzing the sporadic and scattered regulation that the various states have adopted. We propose a new conceptualization of revenge porn based on the protected values that it violates. We argue that these values are similar in nature to those underlying existing sex offenses, namely human dignity, sexual autonomy, and sexual privacy. Thus, we contend that the prohibition against revenge porn should not be criminalized as an infringement of privacy, harassment or obscenity, but rather as a sex offense. The conceptual distinction between our proposed approach and the prevailing ones will help clarify the nature of revenge porn and will encourage legislators to rethink the appropriate way to criminalize it.

Our approach is based on the argument that in criminal law the categorization of an offense is of no less importance than its punishment. First, criminal law has a declarative–expressive dimension, and therefore it is important to attach a label to the offense that accurately conveys the nature of the harm caused, irrespective of utilitarian considerations. Second, criminal law has a communicative function. In the course of criminal proceedings, offenders are expected to internalize the evil of their actions. At the same time, society is expected to provide a feasible way of returning offenders to its ranks, as full members of the community. An accurate categorization conveys to the defendant the condemning message inherent in this violation, thus helping him internalize the severity of his conduct and granting him the opportunity to rehabilitate. Third, categorization as a sex offense may help deter potential offenders because of the greater stigma involved. Finally, categorization as a sex offense has not only theoretical but also practical significance, in view of the envelope of protection granted to sex offense victims and the restrictions imposed on released sex offenders in various states of the United States.

Structurally, the Essay proceeds as follows. Part I describes the phenomenon of revenge porn, its scope, and its development. Part II discusses the reasons for criminalizing revenge porn and addresses the argument that civil law alone or the existing criminal offenses are insufficient to deal with it. Part III analyzes the heterogeneous approaches in the United States to revenge porn and the lack of discussion on how to categorize the offense. Part IV proposes a novel conceptualization that considers revenge porn to be a sex offense, which has practical implications for both the labeling of offenders and the scope of legal protections for victims.

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21. State v. Casillas, No. A19-0576, 2020 WL 7759952, at \*8, \*10, \*12 (Minn. Dec. 30, 2020).

## I. DEFINITION OF REVENGE PORN, ITS DEVELOPMENT, AND ITS SCOPE

The phenomenon of revenge porn involves the visual disclosure of a person's intimate organs by means of a photograph or video that is made public without the consent of the person depicted.<sup>22</sup> A study conducted by the Cyber Civil Rights Initiative ("CCRI") in 2017 shows that women have a 1.7 times greater chance of being victimized, and that the images and videos are overwhelmingly distributed by men.<sup>23</sup>

The phenomenon of revenge porn includes cases in which the image was obtained with the woman's consent and cases in which it was not, as occurs when, for example, the victim's computer is hacked or the picture is taken without the woman's knowledge. The main emphasis in the concept of revenge porn is on the publication of the nude image without consent rather than its creation.<sup>24</sup> In light of the prevalence of cases in which the perpetrator is a man wishing to take revenge on a former partner following a failed relationship,<sup>25</sup> it became known as "revenge porn." Because the motivation is sometimes to degrade women or obtain financial gain, some have proposed "nonconsensual pornography" as a more accurate term.<sup>26</sup>

The phenomenon of revenge porn is not new. In the 1980s, Hustler magazine started publishing nude pictures of women that had been obtained or conveyed without the consent of the women depicted.<sup>27</sup> Some of the pictures were stolen from the women by strangers, while others were given to the magazine by former partners in order to exact revenge.<sup>28</sup> Some of the women sued Hustler for violation of privacy, and the court ordered the magazine to compensate them for the emotional harm caused.<sup>29</sup> Starting in the early 1990s, the phenomenon dramatically increased in scope due to the widespread use of the Internet.<sup>30</sup> In the past, the publication of offensive information had limited distribution, was difficult to locate, and usually caused only localized damage for a limited period of time. With the creation of the Internet, the potential for distribution of an image became unlimited and irreversible (often it is not possible to delete the content from all sources).<sup>31</sup>

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22. Citron, *supra* note 3, at 1917; Citron & Franks, *supra* note 3, at 346.

23. Franks, *supra* note 4, at 1262; Schein, *supra* note 3, at 1961 ("[M]en are most commonly the perpetrators and consumers of revenge porn.").

24. Austin, 2019 IL 123910, ¶ 21; Citron, *supra* note 3, at 1918; Schein, *supra* note 3, at 1958.

25. Citron & Franks, *supra* note 3, at 346, 351.

26. Austin, 2019 IL 123910, ¶ 18; Magaldi et al., *supra* note 6, at 200; Diane Bustamante, Comment, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida's New Anti-Revenge Porn Law*, 12 FIU L. REV. 357, 364 (2017).

27. Poole, *supra* note 3, at 186; Franks, *supra* note 4, at 1254.

28. Franks, *supra* note 4, at 1254.

29. Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1085 (5th Cir. 1984); Gallon v. Hustler Magazine, Inc., 732 F. Supp. 322, 325–26 (N.D.N.Y. 1990).

30. Budde Patton, *supra* note 2, at 407–08; Poole, *supra* note 3, at 186.

31. Citron & Franks, *supra* note 3, at 350; Budde Patton, *supra* note 2, at 409–10. Larkin describes in picturesque language the uniqueness of the virtual space: "Like an

Today, the ease of using the Internet, social media, and messaging apps has created convenient and accessible platforms for distributing sexually offensive images. Furthermore, the dissemination of videos and images on the various virtual platforms has made it difficult to identify the offenders due to the anonymity of the process and the ease of subsequent redistribution by secondary disseminators. In parallel, the technological development of small and inexpensive cameras that can easily be concealed anywhere—in homes, dressing rooms, and bathrooms, for example—has increased the vulnerability of women because pictures can easily be obtained without their knowledge.<sup>32</sup> In many cases, entering the name of a victim in a search engine returns the pictures at the top of the search results, thus reinforcing the effect.<sup>33</sup> Nevertheless, in the absence of criminal regulation of the phenomenon during the early years of the Internet, no police investigations were conducted and the disseminators of the videos were not prosecuted for their actions.<sup>34</sup>

In 2010, the phenomenon of revenge porn began to receive increased attention after Hunter Moore created the website *isanyoneup.com*, which encouraged men to upload intimate pictures or videos of women, together with their personal details.<sup>35</sup> This site was eventually shut down, but prior to the shut down the site achieved traffic of 350,000 visits per day.<sup>36</sup> In 2015, Moore was convicted and sentenced to 30 months in prison after he pleaded guilty to a single count of federal hacking and a single count of federal aggravated identity theft. That is, his conviction was based on the way displayed pictures were obtained rather than for “revenge porn.”<sup>37</sup> The popularity of the site led to the creation of many similar sites, some of which also included an extortion mechanism. Women whose picture was displayed were required to pay large sums of money for their picture to be deleted from the site, a highly profitable activity for the site owners.<sup>38</sup> In 2017, there were

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elephant, the Internet never forgets. Information potentially lives in the cloud forever. That is good if you are looking for an obscure music video or film clip. That is bad if your high school posts your freshman-year class photo. That is horrible if someone posts a compromising picture of you.” Paul J. Larkin, Jr., *Revenge Porn, State Law and Free Speech*, 48 *LOY. L.A. L. REV.* 57, 60 (2014).

32. See Taylor Linkous, *It’s Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 *RICH. J.L. & TECH.* 14, ¶ 10 (2014).

33. *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019).

34. Franks, *supra* note 4, at 1255–56; see also Levendowski, *supra* note 15, at 425.

35. Franks, *supra* note 4, at 1255; Levendowski, *supra* note 15, at 424; Poole, *supra* note 3, at 187.

36. Poole, *supra* note 3, at 187; Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, *ROLLING STONE* (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

37. Franks, *supra* note 4, at 1278–79; see also Tracy Clark-Flory, *Revenge Porn King Going to Prison for Something Besides Revenge Porn*, *VOCATIV* (Dec. 3, 2015), <https://www.vocativ.com/257638/revenge-porn-king-going-to-prison-for-something-besides-revenge-porn/index.html>.

38. See, e.g., *Online Reputation Management*, *CHANGE MY REPUTATION* (Sept. 8, 2013), <http://web.archive.org/web/20130908082556/http://changemyreputation.com/services> (showing an older version of this website accessed by searching for *ChangeMyReputation.com* in the Internet Archive).

10,000 sites for uploading revenge porn,<sup>39</sup> as compared to only about 3,000 in 2014.<sup>40</sup>

The revenge porn phenomenon was not limited to distribution via designated websites. Videos have been posted on other virtual platforms, such as social networks, messaging programs, emails, and blogs, which has increased the scope of the phenomenon and the harm to the victims.<sup>41</sup> The scope and intensity of the phenomenon is evident from studies which show that 12.8% of the adult users of social networks have been victims of revenge porn or have been exposed to a threat of revenge porn,<sup>42</sup> and over 5% of adult social network users have been involved in distributing such content.<sup>43</sup> The demand for these images and videos is a different phenomenon from the regular consumption of pornography, as Professor Mary Anne Franks explains: “The ‘revenge porn’ consumer is not aroused by graphic sexual depictions as such, but by the fact that the people in them—usually women—did not consent to being looked at.”<sup>44</sup>

Due to the unique characteristics of the virtual domain, the phenomenon of revenge porn has far-reaching implications for the victims. The harm suffered by the victims affects all aspects of their lives: psychological, mental, emotional, physical, social, occupational, and economic.<sup>45</sup> It thus became necessary to rethink the phenomenon, both socially and legally. One of the main questions raised is whether there is a need for criminal legislation to prohibit the phenomenon or whether it is sufficient to provide relief through civil remedies, and assuming there is justification for criminalizing the phenomenon, the question then arises of whether existing criminal offenses already cover the phenomenon of revenge porn.

## II. THE CONTROVERSY OVER THE REGULATION OF REVENGE PORN

### A. *The Debate over the Need to Criminalize Revenge Porn*

According to some scholars, criminal legislation prohibiting revenge porn is unnecessary in view of the possibility of bringing an action based on civil law, such as a claim of infringement of privacy.<sup>46</sup> A claim on these grounds is possible

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39. Franks, *supra* note 4, at 1260–61.

40. See *Revenge Porn: Misery Merchants*, ECONOMIST (July 5, 2014), <http://www.economist.com/news/international/21606307-howshould-online-publication-explicit-images-without-their-subjects-consent-be>.

41. Franks, *supra* note 4, at 1260–61.

42. ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT (June 12, 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>. Other studies show that 4% of American Internet users—around 10 million people—had been a victim of or threatened with the disclosure of intimate images. See *People v. Austin*, 2019 IL 123910, ¶ 22; *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019); Schein, *supra* note 3, at 1960.

43. Franks, *supra* note 4, at 1261.

44. *Id.* at 1254.

45. *Austin*, 2019 IL 123910, ¶ 67; Schein, *supra* note 3, at 1962–64; Bustamante, *supra* note 26, at 365–66.

46. See Budde Patton, *supra* note 2, at 421; Citron & Franks, *supra* note 3, at 357.



by virtue of the Restatement (Second) of Torts, which defines an invasion of privacy as a situation in which an individual discloses information about another's personal life, if the disclosure meets the following cumulative criteria: the disclosure "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."<sup>47</sup> It appears that publicizing a nude picture without consent meets these two conditions because a reasonable person would be harmed in this case, and there is no public interest involved. Although the law in the United States is not uniform, in most states some version of a violation of privacy law has been enacted.<sup>48</sup> Some courts have also ruled in favor of women who have sued the disseminators of their nude photos based on a civil tort for violation of privacy. For example, in *Pohle v. Cheatham*, an Indiana court awarded compensation of \$200,000 to a woman who sued her ex-husband for violation of privacy which involved the distribution of nude pictures of her at several locations near her home.<sup>49</sup> In the appeal, the ex-husband argued that his ex-wife had agreed to be photographed.<sup>50</sup> The court, however, ruled that the consent of the woman to have the photograph taken does not amount to her consent to have it disseminated in the public domain.<sup>51</sup>

Nonetheless, and for reasons of both deterrence and retribution, it is doubtful that civil law is sufficient to deal with the phenomenon. From the perspective of deterrence, it is unlikely that the use of tort claims alone is sufficient to deter offenders. In many cases, the victim does not have sufficient resources or time to file a tort claim against the offender, and therefore deterrence is significantly impaired.<sup>52</sup> Moreover, a tort claim requires disclosure of the victim's name, whereas in many cases the victim prefers to remain anonymous so as not to exacerbate the harm she has already sustained.<sup>53</sup> Even in cases where a civil action is eventually filed, it is doubtful that the victim can obtain the compensation from the offender who may not have sufficient means, again impairing deterrence.<sup>54</sup> Moreover, and as already noted, it is now possible to easily and anonymously distribute nude pictures worldwide, without the consent of the person depicted. In such a situation it is extremely difficult to locate the disseminator and file a civil suit against him for infringement of privacy, especially when he is outside the United States.

Another suggested approach to battling the phenomenon is legal action against the owners of the site for copyright infringement. Section 230 of the Communications Decency Act ("CDA") grants almost complete immunity to

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47. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

48. Budde Patton, *supra* note 2, at 421–22.

49. \$100,000 in compensatory damages and \$100,000 in punitive damages. *See Cheatham v. Pohle*, 764 N.E.2d 272, 274 (Ind. App. Ct. 2002).

50. *Pohle v. Cheatham*, 724 N.E.2d 655, 658–59 (Ind. Ct. App. 2000).

51. *Id.* at 661.

52. Citron & Franks, *supra* note 3, at 358; Budde Patton, *supra* note 2, at 422 (arguing that shifting the burden of prosecution onto the victim results in their further punishment).

53. Citron & Franks, *supra* note 3, at 358.

54. Budde Patton, *supra* note 2, at 422–23; *cf.* Levendowski, *supra* note 15, at 425.

owners of sites against tort claims,<sup>55</sup> but not against copyright infringement.<sup>56</sup> However, this approach is also unlikely to provide adequate remedy because a claim of copyright infringement in order to remove the image is relevant only in situations in which the person depicted is the one who took the photograph.<sup>57</sup> Moreover, all of the previous arguments relating to the difficulty in filing a claim when the victim lacks the necessary resources are also relevant in this case. Even if the victim's action is successful and leads to the removal of the image from a specific site, this does not prevent others from continuing to disseminate the picture if they were able to download it from the site before the ruling to remove it.

Given that civil remedies are inadequate to address the phenomenon of revenge porn, the question arises as to the justification for resorting to criminal law, which is meant to be a last resort. Much has been written about the inflation in the use of criminal legislation in American law<sup>58</sup> and the possibility of protecting values using the "softer" tools of civil law. With regard to sex offenses, it has been argued that caution should be exercised in criminalizing and labeling prohibited acts as sex offenses, in view of the stigma attached to them.<sup>59</sup>

While we recognize the importance of the *ultima ratio* principle in criminal law—according to which it is necessary to first exhaust all noncriminal means, and only then to resort to criminal means<sup>60</sup>—and even though it may be overused in many cases,<sup>61</sup> criminal law is the correct remedy for revenge porn despite the

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55. According to this section, website owners enjoy immunity from criminal prosecution and from tort actions if harm is caused to a third party or if an offense has been committed as a result of materials uploaded to the site by someone who is not an owner of the site. *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("[W]e . . . find that Section 230 immunity should be broadly construed."); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294–95 (D.N.H. 2008).

56. See *Bambauer*, *supra* note 15, at 2030–31, 2055; *Levendowski*, *supra* note 15, at 426.

57. See *Ariel Ronneburger, Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 17 (2009); see also *Franks & Citron*, *supra* note 3, at 360; *Levendowski*, *supra* note 15, at 426.

58. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2007) (arguing that "the most pressing problem with the criminal law today is that we have too much of it").

59. For a critique of expanding punishment in the case of sex offenses against minors, see Chrysanthi Leon, David L. Burton & Dana Alvare, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 157–58 (2011). For a critique of the criminalization approach to child pornography, see Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1726–27 (2012).

60. See generally Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004).

61. There are many esoteric and superfluous offenses in American criminal law. See, e.g., 18 U.S.C. § 1865(c); 36 C.F.R. § 7.15(c)(2) (making it a federal crime to defecate in the Shenandoah backcountry and bury it under less than three inches of soil); 21 U.S.C. §§ 331, 333, 343(g); 21 C.F.R. § 133.165(a) (making it a federal crime to sell parmesan cheese that is not easy to grate); 36 C.F.R. § 2.15(a)(4) (making it a federal crime to let your pet make a noise that scares the wildlife in a national park).

potential for overuse. In what follows, we will present the justifications for this stance.

First, criminal legislation may be more effective in deterring revenge porn. In contrast to a private plaintiff, who often lacks the resources needed to file a tort claim, the state, which is the prosecutor in criminal cases, has the resources needed. Furthermore, the imposition of criminal liability may deter potential disseminators of revenge porn in view of the stigma and disgrace associated with a criminal conviction, in addition to the deterrent effect of the accompanying punishment. This will also be more effective in deterring potential offenders who do not have the resources to pay damages in the case of a tort claim, as well as those who have ample ability to pay and are not deterred by a tort claim but are likely to be deterred by criminal prosecution. A civil suit may get an image deleted from a website, but criminal liability can deter others, who have already downloaded it from the original site, from continuing to distribute it.

Second, criminal legislation may provide a better response from the retributive point of view, given the significant damage caused to victims and to society as a whole. The posting of sexually offensive images leads to severe physical and emotional harm. Indeed, studies have found that over 80% of victims experiencing such injury suffer from profound mental stress and anxiety.<sup>62</sup> Some of these victims describe the harm as irreversible and as having changed their lives beyond recognition. In cases where nude pictures are uploaded to the Web together with contact details, many of the women receive requests for sexual services from strangers.<sup>63</sup> The fear of anonymous callers seeking sexual services led to major disruption of their lives, causing them to miss work and to fear leaving the house unattended.<sup>64</sup> Nervousness, hysteria, depression, and anorexia are known to be common symptoms among victims who have been sexually harassed.<sup>65</sup> Some of the victims tried and even succeeded in ending their lives.<sup>66</sup>

The vulnerability to harmful publication of sexual material permeates all facets of the victims' lives, including their livelihood. Women who were the victims of revenge porn often lost their jobs<sup>67</sup> and had difficulty finding a new employer

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62. Citron & Franks, *supra* note 3, at 351.

63. *Id.*

64. *Id.* ("Jane, for example, did not go to work for days after she discovered the postings. Hollie Touns, a thirty-three-year-old teacher's aide, explained that she was afraid to leave her home after someone posted her nude photograph, home address, and Facebook profile on a porn site. 'I don't want to go out alone,' she explained, 'because I don't know what might happen.'").

65. See Citron & Franks, *supra* note 3, at 351; Matt R. Nobles, Bradford W. Reynolds, Kathleen A. Fox & Bonnie S. Fisher, *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, 31 JUST. Q. 986, 993–95 (2012).

66. See Franks, *supra* note 4, at 1265–67; Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 359 (2010).

67. Bustamante, *supra* note 26, at 365–66; see also Budde Patton, *supra* note 2, at 409. Public sector employers have dismissed women following the publication of intimate

willing to take the risk of employing them.<sup>68</sup> To avoid further attacks, many victims stopped using social networks and closed their email accounts or blogs.<sup>69</sup> Beyond social isolation, this suspension also led to further economic loss since it hindered their job search and diminished their ability to showcase their skills.<sup>70</sup>

The serious harm inflicted by revenge porn was clearly evident in *People v. Iniguez*, which involved the constitutionality of prohibiting revenge porn in California.<sup>71</sup> In this case, the victim and the defendant had intermittently been in a relationship with each other for four years.<sup>72</sup> After the relationship ended in 2011, the defendant began harassing the victim through emails and text messages sent to her mobile phone.<sup>73</sup> As part of her job description, the victim was responsible for maintaining the Facebook page of the company she was employed by. The defendant uploaded several messages to the Facebook page, in which he claimed that the victim had flirted with him, and uploaded a partially nude photograph of the victim he had taken at the beach, even though he had promised that the picture would remain private.<sup>74</sup> The victim stated in her testimony that she had been shamed by the publication of the picture and was afraid that she would be fired from her job.<sup>75</sup> She also stated that the posts and the picture had led to thoughts of suicide.<sup>76</sup> The court ruled that the harm caused to the victim clearly met the definition of significant mental harm and therefore convicted the defendant on the count of distributing a private image.<sup>77</sup>

Given the abovementioned retributive and consequentialist considerations, and the inadequate response provided by existing civil legislation, we believe that revenge porn should be criminalized. Criminal law has a unique expressive and communicative function, in view of its ability to convey a message to those who show disregard for protected social values and at the same time to broadcast to the rest of society that violating social values is intolerable.<sup>78</sup> The imposition of criminal

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photos of them without their consent. *See* Citron & Franks, *supra* note 3, at 352; Levendowski, *supra* note 15, at 424.

68. Ryan, *supra* note 66, at 363–65.

69. Franks, *supra* note 4, at 1264.

70. Citron & Franks, *supra* note 3, at 352–53; *see also* Franks, *supra* note 4, at 1264.

71. *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 241–43 (Cal. App. Dep’t Super. Ct. 2016).

72. *Id.* at 240.

73. *Id.*

74. *Id.* at 240–41.

75. *Id.* at 241.

76. *Id.*

77. *Id.* at 246 (“Fajardo was embarrassed, she worried about losing her job, believed she needed psychological help but lacked the money for treatment, and she felt so bad that she told her mother she wanted to ‘get in the car and go kill [herself].’ Whether a common or specialized definition was used, this was all that was required to satisfy the element in question.”).

78. *See* Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (“The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of

responsibility conveys a clear social message that revenge porn causes injury not only to the victims but to society as a whole.<sup>79</sup>

### *B. The Debate over the Need for a New Offense*

Even assuming that criminal liability should be imposed in the case of revenge porn, one could argue that existing offenses already cover these cases and that there is no need to create a new one. For example, the Computer Fraud and Abuse Act prohibits accessing another's computer without consent.<sup>80</sup> In many cases, nude images distributed without consent are obtained by illicit accessing of a computer, and therefore criminal liability can be imposed on the disseminator. In practice, in more than 50% of the revenge porn cases, the images were freely given to the offender by the victim, within the context of an intimate or friendly relationship.<sup>81</sup> In these cases, it is not possible to impose criminal liability for hacking into a computer because no such intrusion occurred.

Another relevant law is the Video Voyeurism Prevention Act,<sup>82</sup> which prohibits capturing a private area of an individual without his or her consent in a situation where it is reasonable to expect that privacy will be respected. This law is applicable in many cases involving revenge porn. However, in many other cases, the picture is taken by a partner with the consent of the woman, and therefore it is doubtful if the law should apply. Moreover, the statute's jurisdiction is very limited, relating specifically to territorial jurisdiction of the United States.

Even a criminal offense prohibiting harassment<sup>83</sup> does not always provide a remedy in cases of revenge porn. First of all, in some states it must be proven that the harm occurred through contact or connection with the victim.<sup>84</sup> Because the images are often distributed to the public and not specifically to the victim, it is not possible to impose criminal liability under this law. Furthermore, in many states it is necessary to prove that the offender consistently acted with the intent to harm or harass.<sup>85</sup> Thus, it is difficult to argue that a one-time uploading of an image amounts to acting consistently. Moreover, there are cases in which the intent to harm or harass is absent. Therefore, not all cases of revenge porn are covered by this law either.<sup>86</sup>

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antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment.”); Grant Lamond, *What is a Crime?*, 27 OXFORD J. LEGAL STUD. 609, 610 (2007) (“A successful prosecution does not simply result in a defendant being held liable for the breach of a legal prohibition - instead she is *convicted* of committing a crime - she is found *guilty* of the *charge* against her. These are socially expressive terms. The criminal law serves an important condemnatory function in social life - it marks out some behavior as especially reprehensible, so that the machinery of the state needs to be mobilized against it.”).

79. See JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 2-3 (6th ed. 2012).

80. 18 U.S.C. § 1030.

81. Franks, *supra* note 4, at 1263.

82. 18 U.S.C. § 1801.

83. See 18 U.S.C. § 2261A; Citron & Franks, *supra* note 3, at 365.

84. *People v. Barber*, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. 2014); Citron & Franks, *supra* note 3, at 365-66; Franks, *supra* note 4, at 1301.

85. Franks, *supra* note 4, at 1301.

86. See *id.*

Existing offenses therefore do not cover all cases of revenge porn, and a new criminal offense is called for. In Part III, we discuss the development of criminal legislation in the United States with respect to revenge porn and the lack of uniformity in the definition of the offense.

### III. DEVELOPMENT OF LEGISLATION PROHIBITING REVENGE PORN IN THE UNITED STATES

Until 2003, there was no criminal legislation in the United States prohibiting the distribution of intimate images without the consent of the victim. Between 2003 and 2013, three states—New Jersey, Alaska, and Texas—enacted laws that specifically addressed the phenomenon. In recent years, as the incidence of revenge porn grew and its harm came to be recognized, additional states also passed revenge porn laws. As of 2020, 46 states in the United States and the District of Columbia have enacted offenses prohibiting revenge porn. In some states, the offense is a felony, while in others it is a felony only under certain circumstances; in many others it is a misdemeanor.<sup>87</sup>

The actus reus and mens rea that define the offense are not uniform across states. Some states have classified the offense as a “result offense,” which requires certain harm as a condition for the offense to be established.<sup>88</sup> Other states classified it as a “conduct offense.”<sup>89</sup> In some states, an element of intent is required as part of the mens rea, while in others, awareness is sufficient.<sup>90</sup> The categorization of the offense also varies from state to state. Some states have categorized it as an infringement of privacy,<sup>91</sup> others as obscenity,<sup>92</sup> and still others as harassment or as a miscellaneous offense.<sup>93</sup> Although the specific location of the offense in the penal code does not constitute an absolute proof for the categorization of the offense, the location implies the protected values that underlie the offense.

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87. See *46 States + DC + One Territory Now Have Revenge Porn Laws*, CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Feb. 19, 2021).

88. See, e.g., CAL. PENAL CODE § 647(j)(4)(A) (West 2013).

89. See, e.g., 18 PA. STAT. ANN. § 3131 (West, Westlaw through 2020 Reg. Sess. Act 140).

90. In New Jersey, there is no requirement of intent. N.J. STAT. ANN. § 2C:14-9(c) (West 2016). In contrast, in Virginia, the law prohibits the distribution of content with intent to coerce, harass or intimidate. VA. CODE ANN. § 18.2-386.2(A) (“Any person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another person who is totally nude . . .”).

91. See, e.g., GA. CODE ANN. § 16-11-90 (West 2020); HAW. REV. STAT. ANN. § 711-1110.9 (West 2018); MONT. CODE ANN. § 45-8-213(1)(d) (West 2019); see also *supra* note 17 (citing the relevant laws of Delaware, South Dakota, Kansas, and Connecticut).

92. See *supra* note 18 (citing the relevant laws of Minnesota, Virginia, and Colorado).

93. See *supra* note 19 (citing the relevant laws of Alaska and California).

For example, in 2013 California enacted a designated law against revenge porn,<sup>94</sup> which classifies it as a miscellaneous offense.<sup>95</sup> According to the law, a person commits a misdemeanor if he or she distributes images showing intimate parts of another identifiable person, in circumstances where the parties have agreed that the images would remain private. To establish the offense, it is necessary to prove the intent of the offender to distribute the material and that he was at least potentially aware that the distribution would cause severe psychological and emotional distress to the victim.

In 2014, Colorado also enacted a law against revenge porn, which categorized it as obscenity.<sup>96</sup> The law prohibits the publication of intimate images of a person over the age of 18, whether or not the person is identifiable in them, on social media or a website, under the following conditions: the publication is intended to harass and cause serious mental stress to the victim; there is no consent or there are reasonable grounds to assume so; and the distribution caused serious mental stress to the victim.<sup>97</sup> In other words, in contrast to the California law which required intent only with respect to the publication of the material, the Colorado law requires intent with respect to the outcome, that is, intent to harass the victim and subject her to severe psychological stress.

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94. See CAL. PENAL CODE § 647(j)(4)(A) (West 2020) (“A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.”).

95. This offense follows other offenses of infringement of privacy, such as photographing a person’s nude body by an electronic device in a location where there is an expectation of privacy and without the consent of the person being photographed. See *id.* § 647(j)(3)(A).

96. See COLO. REV. STAT. ANN. § 18-7-107(1)(a) (West, Westlaw through 2020 Reg. Sess.).

An actor who is eighteen years of age or older commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any website any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older:

(I) With the intent to harass, intimidate, or coerce the depicted person;

(II)(A) Without the depicted person’s consent; or

(B) When the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private; and

(III) the conduct results in serious emotional distress of the depicted person.

*Id.*

97. The definition of the offense also includes, under the category “social media,” mobile phones, messaging apps, and emails. § 18-7-107(6)(e).

Pennsylvania enacted a law against revenge porn, which defined it as a conduct offense that requires intention as the minimum mens rea.<sup>98</sup> Accordingly, the offense is established only if a nude image was published with the intention of harassing the victim; however, it is not necessary to prove that the victim was indeed harassed. In contrast to the laws adopted in the states mentioned above, the scope of this statute is limited to cases in which the defendant and the victim have been or currently are in a sexual or intimate relationship.<sup>99</sup>

New Jersey was the first state to enact a prohibition against revenge porn as part of its penal code, which categorized the offense as an infringement of privacy.<sup>100</sup> To establish the offense, it is not necessary to prove intent to harass or to cause severe mental stress to the victim, rather it is sufficient to show that the material was distributed without consent. Delaware also categorized the offense as an infringement of privacy, and to establish the offense it is sufficient to prove that the perpetrator knowingly disseminated a visual depiction of the intimate body parts of the victim without her consent.<sup>101</sup> However, if the offense was committed for the purpose of profit or with the intent to harass, it is categorized as a felony rather than a misdemeanor.<sup>102</sup>

Kansas categorized the offense as an infringement of privacy. To establish the offense, it is necessary to prove that the perpetrator distributed a picture or a video created to harass or threaten the victim and in which the nude body of the victim appears, or in which the person is depicted having sexual intercourse and was distributed without the victim's consent.<sup>103</sup>

It seems that one of the reasons for the variation across states has to do with the question of whether the criminal prohibition against revenge porn violates the First Amendment, which enshrines the freedom of speech as a constitutional right. Emily Poole has argued that legislation that does not include intent as part of its

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98. See 18 PA. STAT. ANN. § 3131 (West, Westlaw through 2020 Reg. Sess. Act 140).

99. *Id.* (“[A] person commits the offense of unlawful dissemination of intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.”).

100. See N.J. STAT. ANN. § 2C:14-9(c) (West 2016) (“An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image . . . . For purposes of this subsection: (1) “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise, offer, share, or make available via the Internet or by any other means. . . . Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.”).

101. DEL. CODE ANN. tit. 11, § 1335(a)(9) (West 2017).

102. § 1335(c).

103. KAN. STAT. ANN. § 21-6101(a)(8) (West 2016) (“Breach of privacy is knowingly and without lawful authority . . . disseminating any videotape, photograph, film or image of another identifiable person 18 years of age or older who is nude or engaged in sexual activity and under circumstances in which such identifiable person had a reasonable expectation of privacy, with the intent to harass, threaten or intimidate such identifiable person, and such identifiable person did not consent to such dissemination.”).



mens rea violates the First Amendment.<sup>104</sup> In *United States v. Stevens*, the U.S. Supreme Court invalidated a federal law prohibiting the creation or publication of crush videos,<sup>105</sup> in which people appear to be deliberately killing animals.<sup>106</sup> The Supreme Court ruled that this activity is protected by freedom of speech, since the videos contained real rather than false information.<sup>107</sup> Accordingly, Poole argued that the publication of intimate videos without consent is similarly protected if the material was obtained by the offender with consent, because the information is real, not false.<sup>108</sup> Poole added that the core of the offense should be aimed at intent to harm rather than the content of the disseminated material. In legislation that subscribes to this reasoning, which would significantly limit the prohibition, there would be no conflict with the First Amendment.<sup>109</sup>

Franks argued that the protected value underlying the offense is the infringement of the victim's privacy, rather than the protection of the victim from harassment or harm. Therefore, contrary to Poole's position, there should be no requirement of intention to harm or harass, and it should be sufficient to prove that the offender was aware of the nature of the content he is publishing and the lack of consent. Although in many cases the publication of nude pictures without consent is intended to harass or to exact revenge, in other cases there is no such intention. In some cases, the offenders do not know the women depicted, and their sole purpose is to profit from the act. A requirement to show intent to harm or harass in establishing the mens rea of the offense would deny genuine protection of the victim's privacy.<sup>110</sup>

The tension between the criminal prohibition of revenge porn and freedom of speech was discussed in a ruling issued in June 2019 by the Supreme Court of Vermont, which examined the constitutionality of their enacted revenge porn law.<sup>111</sup> In this case, the victim sent a nude picture of herself to a man named Anthony Coon, who had been in a relationship with her in the past.<sup>112</sup> The picture was sent using Facebook Messenger so that only Coon could see it.<sup>113</sup> A woman named VanBuren, who had previously been in a relationship with Coon, accessed his private Facebook account, saw the picture, and uploaded it to Coon's Facebook page so that a large audience could see it.<sup>114</sup> The victim asked Coon to remove the picture from the page. In response, VanBuren called the victim from Coon's phone and told her that she would also inform her employers about the picture.<sup>115</sup> When the victim asked VanBuren to delete the picture, VanBuren told her that she would destroy her life

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104. Poole, *supra* note 3, at 208–09.  
105. *United States v. Stevens*, 559 U.S. 460, 482 (2010).  
106. *Id.* at 465.  
107. Poole, *supra* note 3, at 208.  
108. *Id.*  
109. *Id.* at 209.  
110. Franks, *supra* note 4, at 1289.  
111. *See State v. VanBuren*, 214 A.3d 791 (Vt. 2019).  
112. *Id.* at 797.  
113. *Id.* at 796–97.  
114. *Id.* at 797.  
115. *Id.*

and would take revenge on her.<sup>116</sup> Consequently, an indictment was filed against VanBuren for the offense of publishing a nude photograph of a person without consent with the intent to harm or harass, an act that would cause harm to a reasonable person.<sup>117</sup> The law in Vermont states explicitly that agreeing to have a nude picture taken does not constitute consent to make the picture public. The defendant argued that the Vermont law is unconstitutional on the grounds that it violates the freedom of speech protected by the First Amendment.

The prosecution argued that revenge porn is not protected under the First Amendment because it is obscenity.<sup>118</sup> It added that even if revenge porn were protected by the First Amendment, that protection is limited, in view of the important social values that the law is meant to protect and, in particular, the right to privacy.<sup>119</sup> The court rejected the prosecution's claim that revenge porn amounts to obscenity so profane it is not protected by the First Amendment. Nevertheless, the court, in a majority opinion, accepted the argument that even if revenge porn is protected by the First Amendment, it is still possible to subjugate freedom of speech when there is a major infringement of privacy and there is little value gained from the distribution of the material.<sup>120</sup>

In contrast, the minority opinion held that the law was unconstitutional based on two arguments. The first argument stated that there is no significant public interest in preventing the distribution of the material because the state has no obligation to protect its citizens from committing foolish and poorly thought-out acts.<sup>121</sup> The second argument stated that even if there is a significant public interest in preventing distribution of such material, an alternative remedy should be sought that is less harmful to freedom of speech. In this case, the minority opinion held that the less harmful alternative is to be found in the law itself, namely the option of filing a civil action for infringement of privacy.<sup>122</sup>

In the abovementioned *Iniguez* case,<sup>123</sup> the California court ruled that the law prohibiting revenge porn is constitutional since it protects significant social interests, without excessively infringing on freedom of speech, given the conditions of the offense that limit its application.<sup>124</sup> To impose criminal liability, it is necessary to prove intent to harm, not only awareness of harm. Moreover, not every case in which a nude picture is disseminated falls within the confines of the law, and the law only applies to an image that a reasonable person could assume would remain private.<sup>125</sup>

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116. *Id.*

117. *Id.* (discussing VT. STAT. ANN. tit. 13, § 2606).

118. *Id.* at 799.

119. *Id.*

120. *Id.* at 809–11.

121. *Id.* at 816–17.

122. *Id.* at 817.

123. *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 240 (Cal. App. Dep't Super. Ct. 2016).

124. *Id.* at 242–43.

125. *See id.* at 243.

In December 2019, the Minnesota Court of Appeals overturned a state law prohibiting revenge porn, arguing that it is overbroad and in violation of the First Amendment.<sup>126</sup> The court explained that it was not necessary to prove that the victim had been harmed or harassed and that there was no need to prove intention to harass. Furthermore, it was not necessary to prove that the perpetrator was actually aware that the victim had not given her consent.<sup>127</sup> However in December 2020, the Minnesota Supreme Court overturned this decision and validated the state law prohibiting revenge porn, finding that it satisfies strict scrutiny and comports with the First Amendment.<sup>128</sup>

Similarly, in October 2019 the Supreme Court of Illinois validated the constitutionality of Illinois's revenge porn law.<sup>129</sup> The court ruled that "in evaluating the competing social costs at stake, we have held that Illinois has a substantial governmental interest in protecting the privacy of persons who have not consented to the dissemination of their private sexual images."<sup>130</sup>

In the debate over freedom of speech versus the prohibition of revenge porn in the United States, four approaches have emerged: the first rejects criminal legislation on the grounds that civil legislation is sufficient and that criminal legislation may violate the freedom of speech protected by the First Amendment; the second supports the imposition of criminal liability for revenge porn, but holds that existing criminal legislation is sufficient; the third supports criminal legislation, but holds that it should be limited to cases in which the offender acted with intent to harm or harass the victim; and the fourth supports criminal legislation that prohibits revenge porn and only requires awareness of the lack of consent, not having to show intent to harm.<sup>131</sup> Despite the differences, the vast majority of states consider revenge porn to be a violation of privacy, an obscenity, or other offenses, but not a sex offense.<sup>132</sup>

In our opinion, the lack of uniformity in revenge porn laws across states and in court decisions regarding the violation of freedom of speech reveals that the conceptualization of revenge porn has not been coherent. Once it has been decided to criminalize the act, the discussion has focused only on tactical questions, such as the definition of mens rea and actus reus, while ignoring a major strategic question, namely the proper categorization of the offense and the identification of the protected values that underlie it.

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126. See *State v. Casillas*, 938 N.W.2d 74, 89 (Minn. Ct. App. 2019).

127. *Id.* at 82.

128. *State v. Casillas*, No. A19-0576, 2020 WL 7759952, at \*8, \*10, \*12 (Minn. Dec. 30, 2020).

129. *People v. Austin*, 2019 IL 123910, ¶¶ 39–77.

130. *Id.* ¶ 109.

131. *Id.*; Franks, *supra* note 4, at 1282–93.

132. A few states, such as Illinois, Pennsylvania, and Texas, did classify revenge porn as a sex offense. See 720 ILCS 5/11-23.5 (Illinois); TEX. PENAL CODE § 21.16 (Texas); *supra* note 89 (Pennsylvania). In this Essay, we offer for the first time a coherent theoretical basis for why this offense should be categorized as a sex offense.

#### IV. RECONCEPTUALIZING REVENGE PORN AS A SEX OFFENSE

Contrary to the prevailing approach in the United States, we suggest a new conceptual approach to criminalizing revenge porn. We argue that the proper categorization of the offense is crucial, and therefore revenge porn should be categorized as a sex offense and not simply as a violation of privacy, as obscenity, or as a miscellaneous offense.

##### A. *Prohibition of Revenge Porn Versus Violation of Privacy*

The right to privacy includes protection of the individual's autonomy, wellbeing, and right to self-realization.<sup>133</sup> One of the justifications that underlies this right considers privacy to be inherent within human dignity.<sup>134</sup> Privacy allows individuals to protect their autonomous space and grants them the ability to control their lives by controlling the dissemination of information about them. In this sense, the right to privacy includes an individual's decisions regarding his own body and establishes an individual's right to disengage from society and to be left alone.<sup>135</sup> The justification of the right to privacy in terms of human dignity is a classic liberal position that regards disengagement as a human need.<sup>136</sup> This is based on a Kantian conception according to which human beings are ends in themselves and should not be treated as a means to other ends.<sup>137</sup> Privacy is the core of one's personal autonomy, and its infringement, irrespective of the consequences, is prohibited.

Another type of justification regards privacy as a means of achieving other important ends. Thus, there are those who regard the right to privacy as a means of satisfying an individual's psychological needs.<sup>138</sup> Without the right to privacy, one cannot fulfill oneself in the best possible way. People need privacy in order to have experiences, to learn, to make mistakes, and to think. Without personal space, people cannot develop themselves and control their lives as they wish.<sup>139</sup> Furthermore, the right to privacy is essential in ensuring trust between people and creating conditions of mutual respect, love, and friendship.<sup>140</sup>

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133. See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 85 CAL. L. REV. 1805, 1808 (2010).

134. See Giovanni Buttarelli, *Privacy Matters: Updating Human Rights for the Digital Society*, 7 HEALTH & TECH. 325, 326 (2017).

135. See Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 23 (2009).

136. See Randy K. Lippert & Kevin Walby, *Governing Through Privacy: Authoritarian Liberalism, Law, and Privacy Knowledge*, 12 L. CULTURE & HUMAN. 329, 333 (2013).

137. See generally IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1887).

138. Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 L. & CONTEMP. PROBS. 307, 310 (1966) ("The experience of psychotherapists and of students of personality growth has shown that people maintain themselves in physical health and in psychological and spiritual well-being when they have a private place . . .").

139. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 435 (1980) (stating that "concern for the opportunity to have solitude and anonymity is related not only to the wish to conceal some kinds of information, but also to needs such as relaxation, concentration, and freedom from inhibition").

140. See Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968).

Privacy is also viewed as the basis for a democratic regime. This justification falls outside the realm of individual rights and emphasizes the general good. Being able to live without having one's activities monitored is a freedom granted to individuals in a democracy, which makes trust possible between a country and its citizens.<sup>141</sup> A private space that is not under observation by the state is essential in a pluralistic society that allows for a variety of voices. Privacy also enables criticism of the government and is vital in the development of views that eventually make their way into the political sphere.

We do not dispute the fact that revenge porn violates the privacy of its victims. However, in our opinion, the infringement of privacy does not reflect the full impact of the violation and its essence. Unlike a trivial violation of a person's privacy that harms the aforementioned interests, revenge porn amounts to sexual abuse for the following reasons. First, the mental, emotional, and physical harm inflicted on many revenge porn victims is similar in nature to that caused to victims of classic sexual assault. As noted earlier, studies indicate that depression, anorexia, anxiety, and sometimes even suicide<sup>142</sup> follow cases of sexual assault, consistent with a subset of harms experienced following rape.<sup>143</sup> This fact can provide support for categorizing the offense as sexual rather than as a violation of privacy. Second, and more importantly, the protected values in the context of revenge porn are similar in nature to those that underlie classic sexual offenses. U.S. courts have determined that the protected values underlying rape include sexual privacy, sexual autonomy, and human dignity.<sup>144</sup> Although the values of human dignity and human autonomy

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141. Paul Bernal, *Data Gathering, Surveillance and Human Rights: Recasting the Debate*, 1 J. CYBER POL'Y 243, 259 (2016) ("[F]ormer communist countries, such as East Germany and Romania, relied on the most extensive secret police systems possible at the time: the Stasi and Securitate. They gathered data on a massive scale, using whatever methods were available at the time.").

142. See EATON ET AL., *supra* note 42, at 23–24; Schein, *supra* note 3, at 1964; *People v. Austin*, 2019 IL 123910, ¶ 67 ("Victims additionally suffer profound psychological harm. Victims often experience feelings of low self-esteem or worthlessness, anger, paranoia, depression, isolation, and thoughts of suicide.").

143. See, e.g., Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 703 (2008) ("Rape is one of the most severe of all traumas, causing multiple, long-term negative outcomes, such as posttraumatic stress disorder (PTSD), depression, substance abuse, suicidality, repeated sexual victimization, and chronic physical health problems.").

144. The U.S. Supreme Court has recognized human dignity and sexual autonomy as the protected values of the criminal prohibition against rape. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[I]t is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.'"); see also *Johnson v. State*, 328 P.3d 77, 89 (Alaska 2014) ("Criminal prohibition on rape has as its goal preventing the loss of autonomy, dignity, free will, and bodily integrity."); *People v. Griffin*, 94 P.3d 1089, 1095 (Cal. 2004) ("Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent."); ARTHUR S. CHANCELLOR & GRANT D. GRAHAM, *CRIME SCENE STAGING: INVESTIGATING SUSPECT MISDIRECTION OF THE CRIME SCENE* 234–35 (2017) ("Rape, of course, is one the ultimate

are also infringed on in the case of a classic violation of privacy, the nature of a violation of human dignity and human autonomy in the case of revenge porn is completely different and justifies the categorization of revenge porn as a sexual offense and not just as a privacy offense.

### *1. Human Dignity*

Revenge porn violates the dignity of the victim, humiliates her sexually, and degrades her.<sup>145</sup> Some victims avoid leaving their homes, fearing that anyone they meet may have seen the disseminated image.<sup>146</sup> In this sense, the sexual humiliation caused by revenge porn might even be more severe than in the case of an indecent act, which is a one-time occurrence that takes place in isolation. As mentioned, victims of revenge porn report an experience similar to an actual rape.<sup>147</sup> In other words, the victim also experiences desecration of her body in the case of revenge porn.

Another aspect of revenge porn is that it reduces the victim's identity to only her intimate organs, which infringes on her moral status and dignity.<sup>148</sup> This is not to say that the only component of a person's identity is his or her sexuality. A person's intellectual and creative abilities, for instance, are also elements of their personality, and the privacy in those domains must also be protected in order to prevent intellectual uniformity. Nonetheless, the violation of privacy in, for example, the intellectual context does not reduce a person's identity to his or her intellectual abilities alone, and therefore the violation of a person's dignity in this case is negligible relative to the harm to dignity in the case of a violation of sexual privacy.

Furthermore, and more than other types of privacy, sexual privacy allows a person to feel autonomous as an individual rather than as a person belonging to the collective.<sup>149</sup> Samuel Warren and Louis Brandeis emphasized the psychological need for people to disengage themselves from society and to create an inviolate personality for themselves.<sup>150</sup> Every person is a separate entity; when one's sexual privacy, in particular, is violated, then so is one's dignity. Revenge porn humiliates and degrades a woman and turns her body into an object that is no longer completely hers.

The fact that human dignity is violated in the case of both nonsexual infringement of privacy and revenge porn does not mean that they should both be included under the rubric of infringement of privacy. We should acknowledge the distinction in human dignity violations between the nonconsensual publication of a nonintimate picture taken of a person and the nonconsensual publication of a nude

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crimes against persons. Not only is the victim's sense of privacy, security, and well-being violated, but their personal safety and control over their own body is lost.”).

145. Citron & Franks, *supra* note 3, at 353.

146. Poole, *supra* note 3, at 194.

147. See *supra* text accompanying note 1 (citing the testimony of an Israeli victim).

148. See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 9–10 (2000); MARTHA NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 363 (2013); Citron, *supra* note 3, at 1886.

149. Citron, *supra* note 3, at 1885.

150. Warren & Brandeis, *supra* note 11, at 205.

photo taken of a woman. The degradation and humiliation in the second case are concrete, evident, and violate the woman's dignity. Not only is the woman's privacy infringed on in the sense that her right to be left alone is violated, but the act also desecrates her body and compromises her sexual dignity. In contrast, the effect on human dignity in the capture of a nonintimate picture in a private domain is not likely to cause any serious humiliation and does not have consequences beyond that situation.

## 2. *Sexual Privacy as a Means of Fulfilling Sexual Autonomy*

Sexual privacy is necessary to realize a person's sexual autonomy.<sup>151</sup> This kind of privacy is achieved by creating a protected space around an individual's intimate relationships and around his or her body. This protected space is what prevents others from observing a person's body and his or her intimate relationships without his or her consent, including dissemination of a photograph displaying a person's intimate organs without consent.<sup>152</sup> Revenge porn is a major violation of the autonomy of the person depicted, as in the case of rape, because the victim's body is being used without her consent.

Furthermore, sexual autonomy, which is protected by the right to sexual privacy, is a necessary condition for a person to be defined as a free being.<sup>153</sup> Because one's body is the raw material that shapes a person's identity, sexual autonomy allows an individual to develop.<sup>154</sup> Sexual autonomy also allows a person to shape his or her sexual identity and to determine how his or her intimate life will develop.<sup>155</sup> Placing a protected space around one's body and one's intimate relationships with others makes it possible to experience and explore oneself, and to keep one's identity and one's sexuality beyond any outsider's gaze.<sup>156</sup> Sexual situations often involve the exposure of thoughts, fantasies, passions, and behaviors that an individual is unwilling to share with anyone other than a sexual partner. Such intimate thoughts and behaviors are at the core of an individual's private personal self and their exposure without consent means that he or she is exposed, both literally and figuratively, "in all his nakedness." For cultural reasons, sexual fantasies, passions, and practices can be controversial and even perceived as shameful or embarrassing, and therefore only the individual should decide whether to expose them and to whom. Revenge porn violates the victim's sexual autonomy, thus depriving her of sexual freedom. In such a situation, the woman's ability to realize her sexuality in accordance with her free will is impaired.<sup>157</sup>

Three arguments can be brought against our suggestion to categorize revenge porn as a sex offense. One could argue that what makes some behavior into

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151. Citron, *supra* note 3, at 1882.

152. *Id.*

153. *See id.* at 1884.

154. *See* MAURICE MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 67–74 (2013); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977).

155. Citron, *supra* note 3, at 1884–85.

156. *Id.*

157. Budde Patton, *supra* note 2, at 419 (stating that "[w]hen these pictures are distributed without her consent, it amounts to a violation of her sexual autonomy to which the law should respond").

a sex offense is the use of the victim as a means to satisfy the offender's sexual needs. However, in the case that the offender does not use the victim as a means to achieve sexual satisfaction but rather for the purpose of revenge, making a profit, entertainment or the like, then the act is not a sex offense. According to this argument, rape is a sex offense because in the typical case, the offender uses the victim as a means for his sexual satisfaction. In contrast, in the typical case of revenge porn the offender is not using the victim as a means to achieve sexual satisfaction, even though he is causing her harm. Despite this distinction, we argue that from a normative standpoint it is more appropriate to classify revenge porn as a sex offense. First, there are cases in which the motive for a rape is not in fact the sexual satisfaction of the offender but rather the achievement of control and power.<sup>158</sup> There is no disagreement as to whether rape in these cases is considered to be a sex offense. Second, and more importantly, the main emphasis in the case of sex offenses should be on the relationship of the harm to protected values rather than on the motives of the offender. As already mentioned, the values that are harmed in the case of revenge porn are identical in nature to those underlying sex offenses, and therefore it is appropriate to give it the same categorization. The fact that an offender used a victim as a means for sexual satisfaction is likely to be an indication of his dangerousness, but it is not a condition for defining behavior as a sex offense.

Furthermore, it can be claimed that in the case of revenge porn the core of the offense goes beyond just the protected values underlying sex offenses, such as sexual autonomy and human dignity, to also include harm to other values that are unrelated to sex offenses. Therefore, revenge porn should not be categorized as a sex offense. The dissemination of sexual images without consent, especially by a former or current partner in a relationship, undermines trust which is a basic value in any society.<sup>159</sup> Trust is a necessary condition to achieve cooperation and love between two partners in a relationship, regardless of its sexual component. The extent of trust between two partners in a relationship determines their ability to share and to plan, to experience and to dream together.<sup>160</sup>

Another aspect of revenge porn is that it harms not only the victim but also society as a whole. Left unpunished, a message is sent that revenge porn is a legitimate means of entertainment, profit-making, or exacting revenge on an ex-partner. It is not a coincidence that the victims are often successful and influential women and that the revenge porn is meant to "put them in their place."<sup>161</sup> Revenge porn harms women in general by reducing a woman's sense of security, based on

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158. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975) (arguing that rape is an instrument of social control, "a conscious process of intimidation by which all men keep all women in a state of fear").

159. See Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 719 (2017) ("Individuals share graphic or intimate images with others when the social context includes expectations of trust that recipients will behave with discretion and keep those images confidential. Transforming those images into pornography for strangers is an invasion of privacy precisely because it erodes both the trust that had developed between the victim and her harasser and, as we have seen, the broader social trust that keeps social interaction humming along.").

160. See *id.*

161. Franks, *supra* note 4, at 1259.



the realization that she may be the next target. This situation may have a chilling effect on women's freedom of speech and their ability to "be themselves" in the private domain.<sup>162</sup>

We agree that revenge porn indeed harms these other values, which are not related to the definition of a behavior as a sex offense. However, this does not alter the fact that, in the case of revenge porn, values that are at the core of a sex offense are also affected, and the seriousness of the outcome justifies the categorization of revenge porn as a sex offense. Moreover, the value of trust in other people is harmed in the case of rape as well, but nonetheless it is unequivocally considered to be a sex offense.

Another possible argument against the categorization of revenge porn as a sex offense rests on the assumption that a sex offense requires direct physical contact between the assailant and the victim. Revenge porn does not involve such physical contact. Rachel Budde Patton has noted a distinction made in case law related to the publication of child pornography between the sexual exploitation that appears in the distributed material and the act of distributing it. She argues that whereas the sexual exploitation in this kind of case constitutes sexual assault, the distribution of the images does not.<sup>163</sup> Patton concurs with this distinction and argues that the dissemination of the images does not constitute sexual assault because there is no contact between the disseminator and the minor depicted. She concludes, therefore, that revenge porn should not be regarded as sexual assault.<sup>164</sup>

We claim that this argument does not preclude categorizing revenge porn as a sex offense. Admittedly, in many states the actus reus of sexual assault or indecent assault includes a condition that there be direct contact between the offender and the victim, and therefore revenge porn does not technically qualify.<sup>165</sup> Nonetheless, there is theoretically no impediment to recognizing a behavior that does not involve direct contact between offender and victim as a sex crime. In our opinion, the criterion for categorizing an act as an offense should be the protected value that is harmed and the nature of that harm. As argued above, the protected values underlying the prohibition against revenge porn are identical in nature to those underlying rape and sexual assault. In the current era of virtual social

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162. *Id.* at 1293.

163. Budde Patton, *supra* note 2, at 427; *see also* New York v. Ferber, 458 U.S. 747, 756 (1982).

164. Budde Patton, *supra* note 2, at 427–28.

165. In Kansas, for example, sexual battery is defined as "the touching of a victim who is not the spouse of the offender, who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another." KAN. STAT. ANN. § 21-5505 (West 2014). In Pennsylvania, sexual assault is defined as:

A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and . . . the person does so without the complainant's consent . . .

18 PA. CONS. STAT. ANN. § 3126(a) (West 2020).

interaction, the condition of physical contact loses much of its relevance. The phenomenon of revenge porn is a prime example.

Israeli law, for example, does not require physical contact between assailant and victim in order to impose criminal liability for indecent assault. Case law has defined indecent assault as any act with an element of overt sexuality that is considered by a reasonable person to be immoral and immodest.<sup>166</sup> The Israeli Supreme Court has convicted an individual of indecent assault for photographing the private body parts of women and girls with his mobile phone, at times under their skirts or by peeking into toilets in public and private washrooms, without their knowledge and for sexual purposes. The Court rejected his claim that these were only acts of voyeurism and a violation of privacy. The Court ruled that an indecent act does not require any physical attack or physical contact with the victim. The protected value in this case is identical to that underlying the offense of indecent assault. The decision emphasized that, in defining an indecent act, technological developments have made the condition of physical contact irrelevant. In the modern era, courts and legislators need to take technological developments into account and redefine the behaviors that are to be included in the category of sex offense.<sup>167</sup>

Therefore, even though revenge porn infringes upon the right to privacy, classifying the offense only as a privacy offense misses the main and the more severe harm caused to the victim, which is the erasure of her sexual autonomy.

### ***B. Prohibition of Revenge Porn Versus Obscenity Offense***

In our view, the categorization of revenge porn as obscenity by Colorado and Virginia is not normatively coherent. Several courts in various states, as well as the U.S. Supreme Court, have ruled that the social value underlying the offense of publishing obscene content is the protection of the public's sensibilities rather than protection of the victim's privacy, autonomy, or dignity.<sup>168</sup> The definition of the term "obscenity" also suggests the same; in view of the fact that for obscene material not to be protected under the First Amendment, the following conditions must be met:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

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166. See CrimA 9603/09 John Doe v. State of Israel (2011) (Justice Jubran's verdict at 12) (on file with author); see also CrimA 6255/03 John Doe v. State of Israel, PD 58(3) 168 (2004) (on file with author).

167. CrimA 9603/09 John Doe v. State of Israel (2011) (Justice Rubinstein's verdict at 4) (on file with author).

168. See *State v. VanBuren*, 214 A.3d 791, 800 (Vt. 2019) ("The Court has consistently recognized that a state's interest in regulating obscenity relates to protecting the sensibilities of those exposed to obscene works, as opposed to, for example, protecting the privacy or integrity of the models or actors depicted in obscene images."); see also *Miller v. California*, 413 U.S. 15, 18–19 (1973); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Ginsberg v. New York*, 390 U.S. 629, 637–43 (1968); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1637, 1639 (2005).

applicable state law, and (c) wherever the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>169</sup>

In contrast, laws against revenge porn do not seek to protect the sensibilities of the public but rather seek to protect potential victims. In some instances, revenge porn does not fall under the definition of obscenity because it is not necessarily intended to sexually stimulate members of the public and does not in itself necessarily constitute a repulsive or harmful act. The antisocial nature of revenge porn stems from the absence of consent rather than its content alone.<sup>170</sup> Because an obscenity law seeks to protect the sensibilities of the public, rather than protecting the victim of revenge porn, categorizing revenge porn as an obscenity offense misses the mark by adopting the wrong rationale.

### *C. The Importance of Properly Categorizing Revenge Porn*

It could be argued that how the offense of revenge porn is categorized is of little importance as long as it is criminalized. We contend that in criminal law categorization is indeed important. Expressive theories emphasize the message conveyed by an action and by the legal process.<sup>171</sup> In the criminal context, defining a behavior as an offense serves to convey a negative message to potential offenders, and the sentence for the offense is meant to express condemnation of the wrongdoer.<sup>172</sup>

Defining an act as a specific offense also sends a message concerning the nature and importance of the relevant protected value. Therefore, the imposition of criminal liability for a given offense, apart from the severity of the punishment imposed, is not merely a matter of semantics in the sense of ascribing one name or another to the offense. The imposition of liability based on a particular offense rather than another reflects a normative assessment of the degree of culpability inherent in the actions of the defendant, and this moral condemnation should match the antisocial nature of the offense. An example of the expressive value of criminal legislation can be found in the debate over whether the consumption of prostitution should be a crime. The expressive function of criminal law also emphasizes the moral–social message conveyed by a prohibition. Thus, even if there are two offenses with the identical punishment, it is important to correctly classify an offense so as to reflect the type and nature of the harm done to the social value underlying it.

Another theory that emphasizes the importance of the message conveyed by criminal law is the communicative theory put forward by Antony Duff.<sup>173</sup> Duff claims that the purpose of criminal law is for offenders to internalize the severity of

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169. See *Miller*, 43 U.S. at 24. For a discussion of the definition proposed in the *Miller* case, see Brian L. Frye, *The Dialectic of Obscenity*, 33 *HAMLIN L. REV.* 229, 234–36 (2012).

170. *VanBuren*, 214 A.3d at 800.

171. For an explanation of the expressive function of law, see Cass R. Sunstein, *On the Expressive Function of Law*, 104 *U. PA. L. REV.* 2021, 2051 (1996).

172. See *id.* at 2022–24.

173. ANTONY DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 80–81 (Oxford University Press, 2003).

their actions by persuasion, rather than through worry or fear.<sup>174</sup> According to Duff, criminal law is a communicative mechanism that should treat citizens as moral human beings, based on the ethical language of the law. The law is meant to establish a communicative process between the community, represented by the State, and the defendant, who is also part of the community. In the course of criminal proceedings, it is expected that a defendant will understand the wrongness of the actions and the damage caused to the community and to the victims, and as a result will abandon such behavior in the future.<sup>175</sup> The core of criminal law is the process by which the defendants are to be persuaded to internalize and understand the severity of their actions, rather than just the punishment itself. According to this theory, the purpose of criminal law is not for the defendants to “pay their debt to society,” but rather to comprehend the severity of their acts. Refraining from committing an offense only because of deterrence does not fulfill the function of criminal law. Offenders need to be treated as community members with moral responsibility, and they should be persuaded to refrain from the relevant behavior based on their understanding of its inherent impropriety.<sup>176</sup>

We argue that according to the rationale behind the communicative function of criminal law, the question of whether to categorize the act of revenge porn as a sex offense or merely as a violation of privacy is an important one. The persuasive process that takes place in criminal law and the internalization of the severity of the offense by the defendant cannot be accomplished by punishment alone. For these complex messages to be properly conveyed, the defendant’s act must be accurately labeled. The internalization of the social harms of the act requires that a precise message be conveyed regarding the nature and importance of the relevant protected value, which in turn requires that the offense be accurately categorized. Categorizing revenge porn as only an infringement of privacy conveys the message that the defendant has violated the woman’s privacy but has not harmed her sexually. A categorization of infringement of privacy fails to fully characterize

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174. *Id.* (“A criminal trial is also a communicative enterprise in which a citizen is called to answer a charge of wrongdoing and to take part in the process by which that charge is tested []. If he is convicted, his conviction communicates to him (and to others) the censure that he has been proved to deserve for his crime. He is expected (but not compelled) to understand and accept the censure as justified: to understand and accept that he committed a wrong for which the community now properly censures him. His trial and conviction thus address him and seek a response from him as a member of the political community who is both bound and protected by its laws. . . . The aim is not simply that citizens refrain from crimes or that offenders refrain from repeating their crimes. It is, rather, that citizen recognize and accept the law’s requirements as being justified and refrain from crime for that reason, or that offenders recognize the wrongfulness of their past crimes and refrain from future crimes for that reason.”).

175. *Id.* at 145 (“[W]e must now ask, not just how different modes of punishment can serve the general aim of communication censures to offenders, but also how they can help to communicate a more substantive understanding of the wrongfulness and the implication of particular kinds of offense.”).

176. *Id.* at 81 (“If the law is to treat and address the citizens as responsible members of the political community (a community whose defining values include that of autonomy), its aim cannot be merely to bring about that they conform their conduct to the law’s requirements . . . . Its aim must instead be to persuade them to refrain from criminal wrongdoing because they realize that it is wrong.”).

the unique nature of revenge porn. In contrast, categorizing revenge porn as a sex offense conveys the message that the main harm to the victim is not the violation of her privacy, but rather the violation of her sexual autonomy and the desecration of human dignity.

From a utilitarian perspective, it would appear that categorizing revenge porn as a sex offense rather than a violation of privacy may achieve more substantial deterrence, in view of the greater stigma attached to a sex offense. Given that a significant proportion of revenge porn offenders are “normative” citizens in most other domains, being labeled as a sex offender, with its associated shame and stigma, may have a “chilling effect” on their willingness to engage in revenge porn.

Categorizing revenge porn as a sex offense will have additional implications for offenders and victims. For example, in all states in the United States there is an obligation to register sex offenders, with the length of the registration period varying with the severity of the offense.<sup>177</sup> In the case of revenge porn, there are arguments for and against this practice. On one hand, it is reasonable to argue that in the case of revenge porn the offender is typically not motivated by sexual desire, and as a consequence is unlikely to commit the offense again, whereas the rapist must register in order to warn the public of the danger that he will again commit a rape. On the other hand, it might be argued that even in the case of revenge porn, women should be warned about such offenders out of fear that they will again engage in revenge porn in similar circumstances.

Categorizing a behavior as a sex offense also provides some protection for the victims. For example, victims of sex offenses in Florida benefit from a variety of rights, including the right to testify before an empty court room (except for the court officials);<sup>178</sup> the right to legal representation when testifying at a trial;<sup>179</sup> extension of the period during which victims of certain sex offenses may seek compensation for mental health expenses;<sup>180</sup> and a financial grant from the state for relocation, subject to certain restrictions.<sup>181</sup> Considering the nature and intensity of the damage caused to victims of revenge porn, consideration should be given to recognizing the need for an increased package of rights for victims, as in the case of victims of sexual assault.

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177. In California, for example, the duty to register applies to every sex offender who lives, works, or studies in the state. *See* CAL. PENAL CODE § 290 (West, Westlaw through ch. 372 of 2020 Reg. Sess.). Certain sex offenders must register in Louisiana as well. *See* LA. STAT. ANN. § 15:542 (2017). The registration includes name, social security number, date of birth, a recent photograph, place of residence, and telephone number. The law in Louisiana prohibits some sex offenders from using social media, including Facebook, or any other website that includes the ability to communicate with people and deliver visual or textual messages. In the case of violation, the offender may face up to ten years imprisonment. *See* LA. STAT. ANN. § 14:91.5 (2017).

178. FLA. STAT. ANN. § 918.16 (West, Westlaw through 2020 2d Reg. Sess.).

179. § 960.001(1)(q).

180. § 960.07(4).

181. § 960.199.

### CONCLUSION

The phenomenon of revenge porn has become increasingly common in the United States in recent years, prompting states to enact legislation against it. The trend toward criminalization of revenge porn in the United States is based on the understanding that the Internet space makes it possible to inflict grave harm on innocent victims with great ease. Uploading an intimate photograph or video without consent can cause significant physical, emotional, and financial harm to a victim. However, the vast majority of states have not categorized revenge porn as a sex offense but rather as an infringement of privacy or as obscenity. We have proposed a new conceptualization according to which revenge porn would be categorized as a sex offense, as in the case of rape or sexual assault. We have emphasized that the harm caused to victims of revenge porn is extremely similar to that in the case of sexual assault. More importantly, the social values that underlie sex crimes, such as human dignity, sexual autonomy, and sexual privacy, are similar to those that would be protected by making revenge porn a sex offense. These values are fundamentally different from those protected by laws against infringement of privacy or obscenity.

The question of categorization creates a new thread in the debate over revenge porn. Until now, the debate has focused primarily on the need for criminal legislation and the need to balance between the prohibition of revenge porn and freedom of speech.<sup>182</sup> In our view, the significant question at this point—with the debate over whether or not to criminalize revenge porn decided—is which categorization should be applied to the offense of revenge porn. This Essay can serve as the basis for reexamining the phenomenon of revenge porn and its recategorization as a sex offense, rather than an infringement of privacy or obscenity. Such an approach more accurately reflects the social values that are violated by revenge porn, more precisely labels the behavior of the offender, and more appropriately recognizes the nature of the harm caused to the victims.

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182. See, e.g., *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); *State v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019); *State v. Casillas*, No. A19-0576, 2020 WL 7759952, at \*8, \*10, \*12 (Minn. Dec. 30, 2020); *People v. Austin*, 2019 IL 123910.