

Revenge pornography:

A conceptual analysis

Undressing a crime of disclosure

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Abstract

This paper seeks to clarify the concept of revenge pornography. Existing laws concerning revenge pornography are analysed and sorted into four separate categories, after which a definition of (consensual) pornography is set out against definitions of four types of non-consensual pornography, among which a definition of revenge pornography. This is followed by an analysis of the reasons for the lack of appropriate laws against revenge pornography and considers degrees of privacy. The discussion of the harms for victims will be followed by the identification of three kinds of wrongs and the identification of three kinds of perpetrators.

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1. Introduction

This paper aims to clarify the concept of revenge pornography. It is an analysis that will consist of breaking down the various elements and providing a sharp definition. This not only contributes to knowledge of a subject that up to now has been minimally researched, but will also ensure a proper understanding of the topic at hand, enabling an effective criminalisation of it where that is deemed appropriate. As it concerns an issue that limits the freedom of individuals who are confronted with it, it warrants this attention. In recent years, several cases of revenge pornography have gained widespread media attention, such as the case of Emma Holten, whose private, intimate and sexual images were disclosed without her consent and who regained control by disclosing other images *with* consent, thus removing the focus from her purported shame and refocusing on the lack of consent towards the disclosure of the images.¹ Other cases left victims more damaged and unable to regain control, like the case of Tiziana Cantone, who committed suicide in 2016 after being unable to escape the attention and slut-shaming she faced as a result of her becoming a victim of revenge pornography.² Another case that gained a lot of attention that same year was that of Chantal Rijken, who was unable to find the perpetrator and was left fighting legal battles with the likes of Facebook and a school to disclose user information, exposing the fact that a perpetrator's privacy is better safe-guarded than that of the victim.³ The term 'revenge pornography' is often misused in the media to indicate acts that are not necessarily cases of revenge pornography. This was the case with the iCloud-hacking scandal in 2014, when hundreds of celebrities saw their intimate, private and sexual images being disclosed by a hacker without their consent.⁴ By the standards of this paper this was a case of 'uninvolved revenge pornography', rather than of 'revenge pornography'.

¹ Emma Holten, "Someone stole naked pictures of me. This is what I did about it - Video," *The Guardian*, 21 januari 2015.

² "Tiziana Cantone: Suicide following years of humiliation online stuns Italy," *BBC News*, 16 September 2016.

³ Jorg Leijten, "ROC hoeft niet mee te werken aan onderzoek seksfilmpje," *NRC*, 21 September 2016.

⁴ Paul Farrel, "Nude photos of Jennifer Lawrence and others posted online by alleged hacker," *The Guardian*, 1 September 2014.

Revenge pornography has the potential to severely harm victims and society as a whole, yet no research has been done as to the content of the concept. A clarification of this concept is necessary to be able to understand the severity of the harms and wrongs imposed on victims and to develop appropriate laws governing revenge pornography. It seems strange that a matter that has such a severe impact on victims and society as revenge pornography has received so little attention from legislators and researchers. Although awareness about the issue and the number of countries taking legal action against the issue are growing, the laws that exist are not appropriate and do not acknowledge the various elements of different kinds of non-consensual pornography. The attitude often taken by the media and the response to cases of revenge pornography by society do not aid in creating a more supportive environment for victims of revenge pornography. As research on the topic of revenge pornography is very minimal, scholars provide little clarity. It is important to understand that the victims of revenge pornography often have done nothing different than any other person – they expressed themselves sexually in private, but these victims have had the misfortune to be faced with perpetrators that invaded their privacy and exposed them at their most intimate. Anyone who has ever been intimate and who would not like the world to witness this intimacy should be able to conceive the importance of proper regulations and understanding, and abstain from shaming victims. As it is apparently not entirely obvious to everybody that victims of revenge pornography did not bring their misfortune upon themselves, an analysis of the harms and wrongs imposed on them is warranted.

This thesis has the following setup. Chapter 2 will first draw a brief overview of the historic developments of revenge pornography, which will be followed in Chapter 3 by an analysis of different laws regarding revenge pornography currently in effect. This analysis will point out fallacies in the ways in which laws governing revenge pornography have been set up. These are an indication of the confusion surrounding the content of the concept of revenge pornography. In Chapter 4 the subject of objectification will be discussed. Objectification affects human dignity, and for the purpose of clarifying this matter this thesis will look at theories of Kant, Sartre, MacKinnon and Andrea Dworkin. The chapter will continue to set out a definition of consensual and non-consensual

pornography, followed by definitions of four kinds of non-consensual pornography: revenge pornography, uninvolved revenge pornography, non-voluntary pornography, and edited representations. The chapter will be concluded by a comparison of consensual and non-consensual pornography, which will clarify the substantial differences between the two concepts, the main focus being on objectification of individuals and the consent therefor. Different levels of consent will be recognised. Objectification without consent poses a serious threat to human dignity, and as a characteristic of revenge pornography it warrants wide attention. Chapter 5 will discuss the harms of revenge pornography for the victim by regarding the difference between ‘having a body’ and ‘being a body’, autonomy over the body and the impact of sexual violence. Chapter 6 is an analysis of the overlooked aspects of revenge pornography that may clarify why no appropriate actions have been taken to combat it. The chapter starts by discussing the ‘private’ and the ‘public’, and suggests a third category of the ‘private but accessible’, which entails all pornography. To create a better understanding of the public and the private spheres this chapter will briefly look at Hannah Arendt’s theory on this topic. The division between the public and the private is linked to the lack of legislation that protects victims. The chapter will discuss the focus of legislators, which seems to have been on the intention of the perpetrator and the protection of the public, rather than on the intention of the victim. Chapter 7 is an analysis of the three wrongs of revenge pornography committed against the victim, being a breach of trust, coercive control and the social impact and objectification. These wrongs are determined by analogy with domestic abuse. The three kinds of wrongs are closely intertwined with the identification of three degrees of possible perpetrators in Chapter 8. The first degree perpetrator commits all three wrongs, the second degree perpetrator commits the final two wrongs and the third degree perpetrator commits the third wrong only. The concluding remarks in Chapter 9 present issues with regard to the concept of revenge pornography that demand further research.

2. Analysing the rise and developments of revenge pornography

In the 1980’s Hustler magazine started placing sexually explicit photographs of ‘real’ women in its magazine, not always with the consent or knowledge of the depicted

individuals. Ex-partners of the depicted women would submit these images to the magazine. These cases are considered to be the first instances of revenge pornography (at least on a larger scale).⁵ Individuals were depicted in a private environment, where they had a reasonable expectation of privacy. It should be noted that there is a relevant difference between images or films of individuals who are depicted naked in public, and individuals who are depicted naked in private. The reasonable expectation of privacy individuals have when they are in private does not exist in public, meaning that the non-consensual disclosure of images or films made in private also constitutes a breach of the reasonable expectation of privacy, and therefore is more harming towards victims than the non-consensual disclosure of images or films taken in public.⁶

Revenge pornography has increased substantially since the internet has become a basic tool for most.⁷ In the 2010's websites were aired that hosted revenge pornography, such

⁵ See: Alexa Tsoulis-Reay, "A Brief History of Revenge Porn," *New York Magazine*, 21 July 2013.; Amanda Levendowski, "Our Best Weapon Against Revenge Porn: Copyright Law?," *The Atlantic*, 4 February 2014.

⁶ With regard to nudity in public, different levels of *respect* for privacy can still be distinguished: Individuals who are naked at a nudist beach may be naked in public, and yet have a reasonable expectation that they will not be photographed out of common decency and respect for the area in which an individual is free to be naked. However, if someone is naked in public out of protest for example, the naked protester is unlikely to have any expectation of respect for their privacy, as the nudity is meant to attract attention to a certain goal. An individual depicted naked in a situation like that would most likely not object to being depicted naked, although they may have objections to appearing on porn sites. (An image of a protester or of any other person who was consensually depicted naked, could be consensually disclosed. This does not mean that the depicted individual consented to their images or films being used for pornographic ends. If these images would be hosted on a porn site, this would wrong the depicted individual, although those cases do not fall within the scope of this paper, as this paper is concerned with the *non-consensual disclosure* of images used for pornography without consent.)

⁷ 'Realcore pornography' is amateur pornography distributed online, and was first described with this name in 2000 by Sergio Messina, see: Sergio Messina, "Realcore, the digital porno revolution," *Pankov, the underground research*, 20 November 2010. Realcore pornography is mentioned in the history of revenge pornography (see: Tsoulis-Reay.). However, it was the intention of the individuals participating in realcore pornography that they would be seen; the materials were meant to be public. Realcore pornography is therefore not a form of non-consensual pornography (or of revenge pornography). Realcore pornography is a form of amateur pornography, and the individuals appearing in it had the intention for the sexual images or films to become public. It could be considered a form of exhibitionism (which is not harmful when practised this way, as the content is meant to be public and regular pornography legislation prevents an unwanted confrontation with the materials). To consider realcore pornography a step towards the development of revenge pornography is to suggest that victims of revenge

as Hunter Moore's IsAnyoneUp.com. The site is no longer online, but when it was, the following was true: "those featured on the site are unwilling porn stars, their photos submitted by vengeful exes happy to share once-cherished tokens of intimacy with the world or hackers who broke into email or social networking accounts where the revealing photos were unwisely stored."⁸ This site was later followed by, among others, Kevin Bollaert's ugotposted.com.⁹ Bollaert got convicted for blackmailing the victims of revenge pornography whose images were hosted on his website: "Bollaert's site allowed and encouraged those with explicit images of other people to post them, along with identifying information such as names, addresses and links to Facebook profiles. He then emailed the victims through a second site offering to remove the images for up to \$350."¹⁰

The fact that there is a demand for this kind of pornography causes the production of consensual pornography that is made to look like revenge pornography, which also adds to the level of which revenge pornography is considered normal by the audience of pornography: "Revenge porn isn't just something spiteful exes upload to exact revenge. It's something that lots of people actually want to watch."¹¹ Pornographic videos claiming to depict ex-girlfriends performing sexual acts have been watched millions of times on

pornography somehow wanted to be involved in pornography. Revenge pornography images are not a form of exhibitionism, but of an expression within the course of someone's private life. As it is not the case that revenge pornography victims wanted to be watched by a broader audience or their images or films to become public and considered pornographic, the mere suggestion that victims of revenge pornography are in some way 'porn stars' is degrading them – because of the degradation that comes from being in pornography, which for that reason is compensated financially in consensual pornography. Realcore pornography has no links to revenge pornography, and failing to recognise this is harming victims of revenge pornography as it conveys some form of suggestion that the victims had a desire to be watched by others, by the mere fact that they had the images or films made. It is therefore bordering on victim-blaming which decreases the likelihood that victims are indeed be acknowledged to be victims.

⁸ Kashmir Hill, "Why We Find Hunter Moore And His 'Identity Porn' Site, IsAnyoneUp, So Fascinating," *Forbes.com*, 5 April 2012.

⁹ Tim Walker, "Man who got rich from 'revenge porn' website UGotPosted is finally exposed," *The Independent*, 12 December 2013.

¹⁰ Alex Hern, "How revenge porn sites rely on legal loopholes and anonymity," *The Guardian*, 9 May 2016.

¹¹ Kristen V. Brown, "Is this real? The problem with fake revenge porn on Pornhub," *Fusion.net*, 15 October 2015.

free pornography websites such as PornHub, with the audience actively looking for this kind of content and believing that the depicted individuals have not given their consent for disclosure of the materials. “By putting “ex” in the title, these fake “real amateur” videos intend to signal at least the illusion that they’ve been uploaded without the featured woman’s consent.”¹² As Brown puts it: “Most of the videos are essentially the same. They offer the viewer the illusion of intimate moments between couples, before, according to the narrative framing, these fake “real ex-girlfriends” are publicly humiliated. The titillation comes from not only the sex, but the invasion of privacy and the act of the woman being shamed by an angry ex-lover.”¹³ Rather than the lack of consent being a turn-off, it seems to be attracting people to watch these videos. Fake revenge pornography and consensual pornography depicting rape thus seem to have a similar attraction for the audience – the lack of consent on behalf of the depicted individual is considered arousing. It becomes more difficult for the public to distinguish consensual from non-consensual pornography when both are distributed on the same platform and can look very similar (especially when consensual pornography is made to look like revenge pornography). If the attraction is (at least partially) that the depicted individual did not consent to the disclosure of the images or films and their humiliation through that non-consensual disclosure, the public looking for these kinds of pornographic materials would most likely be disappointed to find out that they are in fact watching consensual pornography, rather than real revenge pornography.

The concept of revenge pornography has come into the spotlight worldwide in the summer of 2014, when a major iCloud hack caused the disclosure of hundreds of intimate, sexual, private photographs of celebrities against the will of the depicted individuals. Although by the classification of this paper this incident should be regarded as ‘uninvolved revenge pornography’, it was, and is, considered to be ‘revenge pornography’ by most, as no term for what this paper calls ‘uninvolved revenge

¹² Ibid.

¹³ Ibid.

pornography' yet exists.¹⁴ This adds to the confusion as to what revenge pornography is. This iCloud hack is more commonly known as 'the Fappening.'¹⁵ Remarkable about the Fappening, apart from the unprecedented scale, was the reaction the victims had. Previously, when a celebrity was faced with the unconsensual disclosure of their intimate, sexual and private photographs, the response from the victim was often one of shame and remorse for the picture existing in the first place, taking focus away from the serious fact that they had lost the ability to decide about the disclosure of these images themselves.¹⁶ Victim-shaming is still very common with non-consensual pornography and revenge pornography; however, the tone of famous victims is changing. In a later case of leaked intimate photographs the depicted individual did not apologize for the existence of the pictures and spoke about the matter quite light-heartedly. Her response was considered remarkable and the fact that she was not ashamed was explicitly mentioned in publications regarding the topic.¹⁷ With "the Fappening," for the first time victims called out the injustice they were facing, making the previously conceived shameful of the images itself a non-topic.¹⁸ Although these actions may have taken place in an

¹⁴ In order to be able to make a distinction between concepts, this paper uses the term 'uninvolved revenge pornography' for cases like this.

¹⁵ So dubbed by the Reddit-user who created the forum on which the hacked images were eventually posted. See: the Caitlin Dewey, "Meet the unashamed 33-year-old who brought the stolen celebrity nudes to the masses," *The Washington Post*, 5 september 2014.; A clarification of the name 'Fappening': "A portmanteau of "happening" and "fap," the latter of which in turn is an onomatopoeia for masturbation. Popularized by the 2014 celebrity pictures hacking scandal, or "Celebgate" ("Fappening," (2016) in *Urban Dictionary*, Online resource.).

¹⁶ Like Vanessa Hudgens in 2007: "I want to apologize to my fans, whose support and trust means the world to me. [...] I am embarrassed over this situation and regret having ever taken these photos. I am thankful for the support of my family and friends.", to which her employer (Disney Channel) responded with its own statement: "Vanessa has apologized for what was obviously a lapse in judgment. We hope she's learned a valuable lesson.", see: Lynn Smith, "Hudgens apologizes for nude photo," *Los Angeles Times*, 7 September 2007.

¹⁷ "Scarlett Johansson does not seem the least bit ashamed when discussing her recent nude-photo scandal with Vanity Fair contributing editor Peter Biskind. "I know my best angles," she says with her trademark insouciance. "They were sent to my husband," now ex Ryan Reynolds. "There's nothing wrong with that. It's not like I was shooting a porno." She adds saucily, "Although there's nothing wrong with that either.,"" Jessica Diehl, "Scarlett Johansson on those nude photos she sent to Ryan Reynolds: "I know my best angles"," *Vanity Fair*, 1 November 2011.

¹⁸ Jennifer Lawrence became the face of the Fappening when she was the first to publicly speak up against the actions and call them a sex crime: "She says her first thought was to write a public statement, "but every single thing that I tried to write made me cry or get angry. I started to write

environment that is not always taken seriously (and accused of being mere gossip), the reactions on the leaked intimate, sexual and private images of celebrities do reflect a norm regarding what is considered to be acceptable: either one can post nude photographs against the depicted individual's will and *they*, the depicted individuals, will take the blame, or the discloser will be blamed for acting inappropriately by disclosing the images or films without consent. Celebrities, who are known to the public before their intimate, private, sexual photographs are disclosed without their consent face different struggles than private individuals faced with the same situation that their private, intimate and sexual images or films are disclosed without their consent. Where the public image of a celebrity is *altered* by the disclosure of said images, the public image of a private person is *defined* by them. The impact of revenge pornography on private individuals is therefor much greater than the impact of revenge pornography on public individuals.

3. Legislation

The confusion surrounding the meaning of the term 'revenge pornography' is not only visible in the media, but also in legislation regarding revenge pornography. Worldwide, most states have not adopted any legislation aimed at the criminalisation of revenge pornography. Some states have not done so based on fallacies in their reasoning; others have never even considered criminalising the issue. However, a few states have made an attempt at criminalising revenge pornography. Although these laws are an attempt at the criminalisation of revenge pornography, lack of research into the concept at hand has caused the laws to have varying degrees of effectiveness in terms of reaching their goal, i.e. criminalising revenge pornography. The following is a brief overview of states that have adopted revenge pornography laws and the content of those laws. These differences in legislation can be viewed as an indication of the aforementioned confusion surrounding

an apology, but I don't have anything to say I'm sorry for. [...] "I didn't tell you that you could look at my naked body. [...] Just because I'm a public figure, just because I'm an actress, does not mean that I asked for this. It does not mean that it comes with the territory. It's my body, and it should be my choice, and the fact that it is not my choice is absolutely disgusting. It is not a scandal. It is a sex crime. It is a sexual violation. It's disgusting." Sam Kashner, "Both Huntress and Prey," *Vanity Fair*, 20 October 2014.

the concept of revenge pornography. Four approaches can be recognised in the legislation of those states that have criminalised (or states that are under the assumption that they have laws in place that criminalise) revenge pornography.

1. The criminalisation of non-consensual disclosure of private, sexual images or films that have been specifically made with consent.
2. The criminalisation of non-consensual disclosure of private, sexual images or films either made with or without consent.
3. The criminalisation of non-consensual disclosure of private, sexual images or films made without consent, with the presupposition that this criminalises revenge pornography.
4. No effective laws are in place, in spite of what states might believe to be the case.

The first category is probably the most appropriate for the specific criminalisation of revenge pornography.¹⁹ Under the second approach revenge pornography is criminalised, but the category is wider: different kinds of non-consensual pornography are criminalised, but not recognised as separate issues under these laws.²⁰ This is the result of a failure to recognise and/or acknowledge the differences between the different types of non-consensual pornography. The concepts for which ‘non-consensual pornography’ is an

¹⁹ The states in this category are Germany, The United Kingdom, the Australian state of Victoria, and California, Florida, Maryland, Michigan, New Hampshire and Tennessee of the United States of America. Although the laws in these states are not identical, they share the characteristic that they constitute a criminalisation of the non-consensual disclosure of intimate, private and sexual images or films made with consent. See Appendix A for a more thorough discussion of these laws.

²⁰ The states in this category are The Philippines, Israel, Canada, Japan, the Australian state South Australia and Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Washington D.C. of the United States of America. Despite the differences between the laws applicable to revenge pornography they share the characteristic that although they do criminalize revenge pornography, they also criminalise other kinds of non-voluntary pornography, thus obscuring the differences between the concepts and failing to appreciate the severity of the individual crimes. In these states, the non-consensual disclosure of intimate, private and sexual images or films is criminalised, regardless of whether or not the images or films were originally taken with consent of the depicted individual. For a more thorough discussion of the contents of the laws mentioned here, see Appendix B.

umbrella term will be addressed in the next chapter. However, it should be noted here that revenge pornography is a form of non-consensual pornography. Although the second category fails to distinguish the different variations of non-consensual pornography in cases that are prosecuted under laws in this category, the laws resulting from these overlooked differences do not exclude revenge pornography cases from criminalisation under that law. The third category is rooted in the same fallacy as the second category, but in this case the error has resulted in a lack of criminalisation of revenge pornography.²¹ The fourth category is built on a misunderstanding of the law and the concept of revenge pornography, leading to the false assumption that certain existing laws are appropriate or useful for the criminalisation of revenge pornography.²² A separate approach falls outside the scope of criminal law but offers specific civil remedies for victims of revenge pornography.²³

²¹ France: France is often named among those countries that may not have legislation explicitly prohibiting revenge pornography, but as nevertheless having laws in place that *cover* revenge pornography. However, the law that is referred to in that context states: “*En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé*” (Code pénal / Criminal Code, (France), Art 226-1.), criminalising the taking, recording or transmitting of images of a person in a private place, without that persons consent. In addition to that, it expressly states that consent is considered to be given if the person who was being recorded knew and did not object to the recording. This law does not criminalise the disclosure of images or films made with consent, but disclosed without consent. Revenge pornography as defined in the present paper therefore falls outside the scope of this law.

²² See the Netherlands: the Netherlands refrain from adopting revenge pornography legislation on erroneous grounds. the Netherlands announced in 2014 that they did not see a need for additional legislation to criminalise revenge pornography, and considered the conduct criminal under three different offences; namely defamation (*smaad*, *Wetboek van Strafrecht / Book of Criminal Law*, (The Netherlands), art. 261.), slander (*laster*, *ibid.*, art. 262.) and insult (*belediging*, *ibid.*, art. 266.). However, at least defamation and slander cannot be applicable to revenge pornography unless one is willing to blame the victim for what happened to them, as the offences are only committed when the victim has been blamed of something by the individual accused of defamation or slander. This ‘blaming’ is only possible if the defaming or slandering accusations are immoral or illegal, neither of which is the case with the images or films used in revenge pornography.

²³ See Brazil: Brazil passed a law in 2014 known as the ‘Marco Civil da Internet’. Although this law is not a criminal law and therefore does not constitute a criminalisation of revenge pornography or similar matters, it nevertheless deserves some attention in this paper (*Lei N° 12.965 Casa Civil / Civil Code*, (Brazil) 23 April 2014. The law states that the provider of internet applications that provides content generated by third parties will be liable for breach of privacy resulting from the disclosure of images, videos or other materials containing nudity or sexual acts of a private nature whenever they fail to promptly remove content after receiving a specific request in this sense.

The confusion surrounding the meaning of the term ‘revenge pornography’ is showcased by these differences in legislation, as they illustrate the lack of consent regarding the content and the wrongs of revenge pornography. Before going on to analyse the concept of revenge pornography, different concepts will be distinguished that are often used interchangeably. The differences between them justify the use of different terms, in spite of shared characteristics that may be present. Acknowledging the differences between the separate concepts allows for an easier classification of (potential) crimes committed against victims: no confusion will exist with regard to the harm done to the victim, even if the victim did consent to images or films being taken. To enable recognition of crimes they have to be formulated as precisely as possible.

4. Definitions of consensual and non-consensual pornography

Revenge pornography, as the term suggests, is considered to be a form of pornography. However, it is not a form of *consensual* pornography. Many differences between ‘consensual pornography’ and ‘non-consensual pornography’ exist. It is necessary to be aware of these differences in order to be able to develop suitable solutions for different problems and avoid mistakes, such as the ones described in Chapter 3 in the categories of legislation. Before defining the various concepts of pornography, this thesis will discuss

Canada: The Canadian ruling that covers the civil side of revenge pornography is not called revenge porn tort. Instead, it is referred to as the tort of “publication of embarrassing private facts.” Although the intention the Court had in its ruling may be to protect victims of revenge pornography, or at least to give these victims a way to seek damages, it is quite unfortunate that victims have to seek these damages for the publication of embarrassing private facts. Damages can be sought from “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” (*Doe 464533 v N.D.*, 2016 ONSC 541 (*CanLII*), Ontario Superior Court of Justice., § 41.). The images or films published in revenge pornography are not in themselves embarrassing – the disclosure of these images or films without consent is causing embarrassment. The fact that the Canadian Court has failed to acknowledge this is quite unfortunate and could be considered a step backwards from the criminalisation that is in place in Canada.

objectification. Objectification is present in all forms of pornography and can have a severe impact on human dignity.

4.1 Objectification

Objectification of persons has the potential to affect dignity, as the objectified individuals are not acknowledged as human. Kant's categorical imperative argues that to respect a person, and to treat them with respect, one should treat them as an end in themselves, not as means to an end.²⁴ Kant also argues that sexual relations without love are always purely objectifying. However, this thesis takes the position that when an intimate encounter is consensual this objectification does not pose a great threat to the human dignity of the individuals involved. Kant states that "In loving from sexual inclination, [one makes] the person into an object of their appetite. As soon as the person is possessed, and the appetite sated, they are thrown away, as one throws away a lemon after sucking the juice from it. [...] As soon as anyone becomes an object of another's appetite, all motives of moral relationship fall away; as object of the other's appetite, that person is in fact a thing, whereby the other's appetite is sated, and can be misused as such a thing by anybody."²⁵ This not only happens to pornography actors, who consented to this treatment, but also to victims of non-consensual pornography in general and revenge pornography in particular: the depicted individuals are not treated as persons, but used by other to satisfy an appetite.

Sartre argues that to see another person is to objectify him, which is similar to Kant's argument that loving from sexual inclination is objectifying: "The Other's body is radically different from my body-for-me; it is the tool to which I am not and which I

²⁴ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans., Allen W. Wood (New Haven and London: Yale University Press, 2002), 4:429, p. 46.

²⁵ Immanuel Kant, *Lectures on Ethics*, ed. Peter Heath; J.B. Schneewind, trans., Peter Heath (Cambridge: Cambridge University Press, 1784 (1997)), 27:385, p. 156.

utilize (or which resists me, which amounts to the same thing).”²⁶ In addition to that, being seen by an Other is objectifying for the individual that is being seen.²⁷

Anti-pornography feminist philosophers Catharine MacKinnon and Andrea Dworkin understand objectification in a similar way as Kant. MacKinnon argues that “[a] person, in one Kantian view, is a free and rational agent whose existence is an end in itself, as opposed to instrumental. In pornography women exist to the end of male pleasure,”²⁸ while Dworkin states “Objectification occurs when a human being, through social means, is made less than human, turned into a thing or commodity, bought and sold. When objectification occurs, a person is depersonalised, so that no individuality or integrity is available socially or in what is an extremely circumscribed privacy. Objectification is an injury right at the heart of discrimination: those who can be used as if they are not fully human are no longer fully human in social terms; their humanity is hurt by being diminished.”²⁹ Although this thesis does not take the opinion that pornography should be prohibited, the views of MacKinnon and Dworkin are useful in understanding the problem of objectification. However, unlike the position these philosophers take, the underlying idea of this thesis is that true consent to being in pornography is possible and that both men and women are capable of consenting freely to being objectified.

The use of pornographic materials that depict individuals does not treat people as an end in themselves, as the depicted individuals are used as means to an end, with no relation between the user and the used. It should be stressed that objectification does not only occur in pornography, and therefore it is not linked to the sexual nature of the materials that lead to objectification: an athlete arousing a passion for sports is also objectified by the audience, although in a different way, as this does not generally affect his dignity. Athletes and actors are commonly interviewed, for instance, allowing them to influence

²⁶ Jean-Paul Sartre, *Being and Nothingness (L'Être et le Néant*, trans., Hazel E. Barnes (London: Methuen&Co LTD, 1957 (originally 1943))., p. 340.

²⁷ Ibid., p. 346.

²⁸ Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge (Massachusetts) and London.: Harvard University Press, 1987)., p. 158.

²⁹ Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," *Harvard Women's Law Journal* 8, no. 1 (1985)., p. 15.

the way the public perceives them and the knowledge the public has about them. This way they are recognised as people, with a life outside sports or acting. It is not their person that is being objectified, but their character. The differences between 'person' and 'character' will be further explained in Chapter 5. The objectification is decreased when actors and sportsmen are discussed in ways that recognise their emotions (through commentaries in sports, or even gossip programmes), for which there is no equivalent in pornography.

When objectification has been consented to by the individual that is being objectified, as is the case in consensual pornography as well as in sports, this does not pose as great a threat to the human dignity of the depicted individual as it does when objectification occurs without consent. This is notwithstanding the fact that consensual pornography can affect human dignity of the depicted individual, especially if the actions performed in the material are humiliating. The decreased dignity in consensual pornography is consented to and (usually) compensated financially. This financial compensation may motivate the wish to be in pornography and lose dignity to some extent, but the depicted individual is at liberty to choose between the loss of dignity compensated financially and not being in pornography (an exception might be made for certain types of exhibitionism, in which individuals choose to disclose sexual images or films of themselves, from which they themselves achieve some sort of sexual gratification).³⁰ Actors appearing in consensual pornography were free to decide for or against the participation in pornographic material, accepting that objectification is a part of that. Individuals participating in sports or pornography sell their talents, knowing and accepting that objectification is part of it. Individuals depicted in revenge pornography and other kinds of non-consensual pornography are denied the choice between the loss of dignity and not being in pornography, which affects their human dignity more severely than appearing in consensual pornography would do. The difference should be sought in the voluntary

³⁰ Amateur pornography, sometimes referred to as realcore pornography is a pornographic genre in which the depicted individuals are not compensated financially, but rather take satisfaction from sharing their sexual images or films with an audience, see: Messina.; Feona Attwood, "No Money Shot? Commerce, Pornography and Sex Taste Cultures," *Sexualities* 10, no. 4 (2007), p. 448.

participation in objectification and humiliation (not in the lack of financial compensation – if victims of revenge pornography were compensated financially that would not diminish the harm done to them in terms of non-consensual objectification, loss of autonomy, and privacy).

4.2 Consensual pornography

The differences between consensual pornography and non-consensual pornography will be demarcated from a definition of pornography so as to create a thorough understanding of both concepts. Consensual pornography, although often faced with the criticism that it is degrading, nevertheless has consenting adults at its focus. The same cannot be said for non-consensual pornography. As non-consensual objectification affects the level to which non-consensual pornography is degrading, consensual pornography and non-consensual pornography should not be confused. The extent to which both concepts are degrading and individuals are objectified is discussed in the following.

The *Oxford Dictionaries* define pornography as “Printed or visual material containing the explicit description or display of sexual organs or activity, *intended to stimulate sexual excitement*” [emphasis added].³¹ Although this provides some clarification, the definition lacks specificity. From this definition it is clear that pornography is “material intended to stimulate sexual excitement” in the viewer. Sexual excitement in this context does not refer to the sexual excitement of the person(s) depicted in the pornographic material nor of the producer of the material, but rather to the sexual excitement of the person watching the pornographic material. Part of the definition of pornography is that it is *intended* to sexually arouse the viewer, indicating that pornography is *made* with an (unspecified) audience in mind, and therefore it is meant to be public: it is meant to be accessible to third parties not participating in the acts recorded. The intended audience would find the material arousing, although unintentional viewers would not necessarily feel that way. Materials produced for a particular niche market can still be pornography,

³¹ “Pornography,” (2016) in *Oxford Dictionaries*, Online resource.

even if the average viewer would not find it arousing. That the sexual arousal referred to in the definition of pornography regards the audience, and not the depicted individuals at the time of the production, is clear from the lack of reference towards individuals depicted: pornography is not limited to photographs or videos, but might as well be formed of text or drawings, eliminating the presence of depicted individuals without eliminating the intended sexual arousal. The possible use of pornography to stimulate sexual excitement must therefore be what is meant by the intent to stimulate sexual excitement; otherwise the fact that a viewer would fail to be sexually aroused by the material would question the original intent to arouse.

The use of pornography for sexual arousal in a third person is necessarily objectifying towards the individuals appearing in the pornographic material. As no personal relationship exists between the audience and the depicted individuals, the audience is unable, even if they were willing, to see and experience the depicted individuals in any other way than as objects that the audience can *use* – in the case of pornography for their sexual arousal. It should be noted that the intention of the distributor is key with regard to the applicability of the term ‘pornography’: it is the original distributor of non-consensual pornography who ensures, by the very act of disclosure, that the material is pornographic.³²

³² The original distributor might use an innocent agent to distribute the images or films (one that does not know that there was no consent of the depicted individual for the disclosure of the images or films) that may not even produce pornography. A bizarre but possible idea would be a perpetrator who distributes nude images for the production of a biology book. In that case, the book may not be pornographic in itself, but contain nude images for the sake of study. The original distributor would still have achieved his goal of disclosing the image without consent of the depicted individual and creating pornography (if he considers it to be that). The intent of the distributor of pornography is key with regard to the label of ‘pornography’: if someone would take an image from a biology book that was not meant to be pornographic, and uploads it to a pornography website, the images has *become* pornographic through that distribution to the website. In this case the individual who causes the image to be considered pornographic by uploading, or ensuring the uploading, to a pornography website would be considered the original distributor of the *pornographic* material, even if the material was available elsewhere before it was considered to be pornographic. The other way around might also occur, where an image that was produced for pornographic ends is used in a biology book, where it would no longer be considered to be pornography.

4.3 Non-consensual pornography

‘Non-consensual pornography’ is an umbrella term: Revenge pornography, uninvolved revenge pornography, non-voluntary pornography and edited portrayals fall under its scope. However, some scholars use the term as an equivalent of revenge pornography, even when they recognise that the term ‘non-consensual pornography’ is broader than ‘revenge pornography’.³³ Revenge pornography is sometimes taken to be the exact and full meaning of non-consensual pornography (the two terms are then used to indicate the same concepts). The same holds true for non-consensual pornography and non-voluntary pornography. When one replaces a specific term with a general term, the nuances of the specific terms are lost. Although there may be good arguments to use the same term for all concepts, it is nevertheless important to be able to distinguish the different concepts. If the nuances are invisible, confusion about the subject matter will increase, as was shown by the vast differences in legislation regarding ‘revenge pornography’ in Chapter 3. If no one knows the differences between revenge pornography and non-voluntary pornography, the latter may be criminalised while the former is not, even though it was the legislator’s intention to criminalise both. Therefore, this thesis argues that it is important to call the different concepts by different names, even if those names may not be ideal in reflecting the content of the concepts.

What makes *non-consensual* pornography pornographic, as opposed to *consensual* pornography (which is considered pornographic from the moment it is made even before distribution), is the act of publication. This is a defining characteristic of non-consensual pornography: before it has been published the materials used in non-consensual pornography do not in themselves constitute pornography, as pornography requires an

³³ See: Danielle Keats Citron and Mary Anne Franks, "Criminalizing Revenge Porn," *Wake Forest Law Review* 49, (2014)., p. 346.; Mary Anne Franks, "Drafting an effective revenge porn law: A guide for legislators, 2016," available at: <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf>, p. 2.; Mary Anne Franks, "Criminalising Revenge Porn: A Quick Guide," *Social Science Research Network*, 9 October <http://ssrn.com/abstract=2337998> or <http://dx.doi.org/10.2139/ssrn.2337998> 2013., p. 1.

audience.³⁴ If an image or film was not taken or made to arouse an audience, then it is not pornographic *in itself*. It can still become pornographic after it has been disclosed, but this disclosure is unlikely to have taken place with consent of the depicted individual.³⁵

4.3.1 *Revenge pornography*

Revenge pornography has become a ‘catch-all phrase’ for what is more accurately described as non-consensual pornography. This is especially true for use of the term by the media, which may influence the use of the term by other sources.³⁶

Revenge pornography has been defined as “sexually explicit images of a person posted online without that person’s consent especially as a form of revenge or harassment,”³⁷ “Revealing or sexually explicit images or videos of a person posted on the Internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment,”³⁸ “sexually suggestive images of someone, typically a former romantic partner, that are posted online or otherwise shared without the person's consent.”³⁹ As these definitions lack clarity with regard to the action that has been consented to, and focus on the aspect of ‘revenge’, they will not be used here.

Revenge pornography as used in this thesis describes the situation in which intimate

³⁴ Before publication the images or films can be used to blackmail potential victims of non-consensual pornography, which in most states is illegal. Although the images or films are in existence at such time, they are not published and therefore not considered to be pornography. The *threat* of non-consensual pornography, though a serious issue, is not non-consensual pornography in itself.

³⁵ Although it should still be possible for a depicted individual to change their mind with regard to the destination of the image or film. If the depicted individual did not intend an image or film to be public, but later changes their mind with regard to that, the disclosure of these images or films does not constitute non-consensual pornography.

³⁶ Media tend to use the term ‘revenge pornography’ for all instances of non-consensual pornography. See for instance: Peggy Drexler, "Who's at fault over J-Law's nude photo hack?," *CNN*, 2 September 2014.; Caroline Lowbridge, "Is revenge porn already illegal in England?," *BBC News*, 28 December 2014.; Philip Ellis, "The Shame Economy: Why Revenge Porn and the Ashley Madison Hack Should Matter to Everyone," *Huffington Post*, 21 August 2016.

³⁷ “Revenge pornography,” (2016) In *Merriam-Webster Dictionary*, Online resource.

³⁸ “Revenge pornography,” (2016) in *Oxford Dictionaries*.

³⁹ “Revenge pornography,” (2016) in *Dictionary.com*, Online resource.

images or films have been made with consent of the individual depicted in them, but which have been disclosed by the person to whom they were entrusted without the consent of the depicted individual. **Revenge pornography will therefore be defined as the non-consensual disclosure of private, intimate and sexual images or films, made with consent of the depicted individual, by the individual to whom they were entrusted.**

The images or films used in revenge pornography would have been taken or shared within the course of an intimate encounter or relationship. This is especially important, as these encounters or relationships are normally trusted to be completely private, in contrast to the encounters and relationships of consensual pornography. The mere possibility of a non-consensual disclosure of intimate, private and sexual images has an impact on relationships in general, even on those not involved in a case of revenge pornography. This impact on relationships not involved in a case or direct threat of revenge pornography is part of the social impact of revenge pornography: even if there is no direct threat from one of the (ex-)partners to disclose images, partners can still indirectly feel the threat because of the existence of revenge pornography, which may cause them to refrain from actions like making intimate, private and sexual images or films even if they might have wanted to make them. As taking intimate pictures or films of oneself or one's partner may be part of a healthy relationship, and even has become increasingly common,⁴⁰ it is not something that people should be feeling afraid about due to a lack of proper legislation on the abuse of the produced private materials. Before the materials used in revenge pornography are disclosed they would not count as pornography. The very act of publication is therefore to be recognised as a defining characteristic of revenge pornography.

⁴⁰ "Some 9% of cell phone owners have sent a suggestive picture or video, while 20% have received one. [...] Cell owners ages 18-24 are the most likely to say they receive sexts (44%), while those in their mid-twenties through mid-thirties are more likely than older adults to say they send sexts (22%).", from: Amanda Lenhart and Maeve Duggan, "Couples, the Internet, and Social Media: How American couples use digital technology to manage life, logistics, and emotional intimacy within their relationships," *Pew Research Center*, (2014).and illustrated by a popular magazine: Emma Barker, "9 out of 10 Millennial Women Take Naked Photos," *Cosmopolitan*, 3 September 2014.

Although ‘revenge pornography’ is not an ideal name for the concept, replacing the term ‘revenge pornography’ with an existing term like ‘non-consensual pornography’ (which includes concepts other than revenge pornography) will result in errors such as those described above in the categories of legislation in Chapter 3. Mary Anne Franks, recognising that non-consensual pornography entails more than the concept of revenge pornography, nevertheless advocates the use of just one term, i.e. non-consensual pornography. She does recognise the same concepts under this umbrella as this thesis does, but she does not feel these should be treated differently: “The term “revenge porn,” though frequently used, is somewhat misleading. Many perpetrators are not motivated by revenge or by any personal feelings toward the victim. A more accurate term is nonconsensual pornography, defined as the distribution of sexually graphic images of individuals without their consent. This includes both images originally obtained without consent (e.g. by using hidden cameras, hacking phones, or recording sexual assaults) as well as images consensually obtained within the context of an intimate relationship.”⁴¹

Several scholars have argued against the use of the term ‘revenge’, as revenge is not always the motive.⁴² Samantha Scheller defines “revenge porn as the online publication of sexually explicit photographs or videos posted without the consent or knowledge of the subject of the content.”⁴³ Although she does not discuss whether these images are *taken* with consent, she does point out that “[s]ome scholars have suggested rephrasing the term as “involuntary porn” or “non-consensual pornography” to emphasize that subjects of the pornographic photos and videos have not consented to the publication of their most intimate moments.” The use of ‘revenge’ in the description of the act is unfortunate, as it focuses solely on the intention of the perpetrator, and not on the harm done to the

⁴¹ Franks, "Criminalising Revenge Porn: A Quick Guide.", p. 1.

⁴² Mary Anne Franks, "How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge," *The Huffington Post*, 22 June 2016.; Clare McGlynn and Erika Rackley, "Not ‘revenge porn’, but abuse: let’s call it image-based sexual abuse," *Inherently Human*, 15 February 2016., which offers the suggestion to call ‘revenge pornography’ ‘image-based sexual abuse’.

⁴³ Samantha H. Scheller, "A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn," *North Carolina Law Review* 93, (2014)., p. 558.

victim.⁴⁴ The term ‘revenge pornography’ is somewhat misleading. The alternative terms suggested by those pointing this out stray from the definition of revenge pornography,⁴⁵ and cover more forms of non-consensual pornography.⁴⁶

The alternative suggested, i.e. ‘non-consensual pornography’ does not acknowledge that there are differences between different kinds of non-consensual pornography. The suggested use of the term ‘non-consensual pornography’ as a replacement of the term ‘revenge pornography’ would not only eliminate the word ‘revenge’, but also the classification of the concept ‘revenge pornography’ as something that is different from other kinds of non-consensual pornography. Eliminating the term ‘revenge pornography’ without replacing it by another term specifically meant for the concept of revenge pornography would eliminate a term that can be used to identify a concept that is different to adjacent concepts. This is not the aim of those suggesting other terms than revenge pornography. If and only if the concepts of non-consensual pornography can be distinguished from each other, it is possible to see the different ways in which victims are harmed: a victim of non-consensual pornography who was secretly photographed in a locker room way is confronted with a far greater breach of privacy than a victim of revenge pornography, who consented to the taking of intimate, private and sexual images or films. A revenge pornography victim on the other hand faces a far greater breach of trust by a (former) partner than the victim of non-voluntary pornography does, as the perpetrator would not have to have had a personal, intimate relationship with the victim (therefore there would have been no or a far more limited bond of trust). These differences between the separate concepts cause the victims to be harmed in different ways, which is why the concepts should be distinguishable from each other.

⁴⁴ This is a different matter than what constitutes pornography: the intention of the distributor of pornography is essential for the constitution of pornography. However, when looking at the ways in which non-consensual pornography and ‘revenge pornography’ harm victims, it is not enough to focus on the perpetrator’s intention: the harm done may exceed the intention or be vastly different from the perpetrators intention. Also, ‘revenge pornography’ may come about through other motives than revenge, which is why a different term will eventually have to be developed.

⁴⁵ Revenge pornography as defined by this thesis is the non-consensual disclosure of private, intimate and sexual images or films, made with consent of the depicted individual, by the individual to whom they were entrusted.

⁴⁶ Franks, "How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge."

Although the term ‘revenge pornography’ is not ideal in the sense that the meaning of the words do not reflect the content of the concept, for the purposes of this thesis the term ‘revenge pornography’ will be maintained.⁴⁷ It is the aim of this thesis to clarify the defining characteristics of the concept of ‘revenge pornography’ and to demarcate it from adjacent concepts. The harms and wrongs that are part of revenge pornography need to be acknowledged in order to do right by victims and to prosecute perpetrators for their actual actions. If no specific term for the concept of revenge pornography is used, the harms and wrongs specific to revenge pornography will go unnoticed and unpunished.

4.3.2 Uninvolved revenge pornography

The aforementioned definition of ‘revenge pornography’ excludes the situation in which intimate, private and sexual images or films were made with consent of the individual depicted in them, but disclosed not only without the consent of the depicted individual, but also by someone *other* than the person whom the images or films were entrusted to. As opposed to what is the case with revenge pornography, the images or films were not entrusted to the individual who disclosed them, but were obtained by the discloser by chance or through criminal actions such as computer hacking or theft. This type of action has not been previously classified as inherently different from revenge pornography, as described in Chapter 2. In this thesis this type of action will be referred to as ‘uninvolved revenge pornography’. It is justified to treat this type of action as inherently different from the actions by the involved intimate partner, which will become especially clear in §7.1, which discusses the breach of trust as part of the analysis of the wrongs of revenge pornography.

⁴⁷ It would be appropriate if a more suitable term would be developed in later research.

4.3.3 Non-voluntary pornography

A second concept that should not be used interchangeably with revenge pornography is non-voluntary pornography. This term refers to the situation in which intimate, private and sexually explicit images or films were taken or made without consent of the depicted individual *and* disclosed without consent of the depicted individual (the materials would have been secretly recorded or the victim coerced). In the case of non-voluntary pornography, no consent has been given for either the making of images or films, or the disclosure of these images or films. It would therefore be a mistake to treat this concept as being the same as revenge pornography, although the two concepts share some identifying characteristics. Victims of non-voluntary pornography tend to have more legal remedies available to them than victims of revenge pornography, and are less likely to being accused of having brought upon themselves what has been done to them.⁴⁸

4.3.4 Edited portrayals

A third form of non-consensual pornography that is different from revenge pornography is ‘edited portrayals’. These consist of edited images or films: images or films depicting someone’s body with the head of another person edited on it, made to look as if it is portraying the body of the individual whose head is depicted. In these cases the victim would not have to have had any contact with the perpetrator, it would be enough that the perpetrator is in possession of a picture of the victim that can be edited. The edited portrayals can make the depicted individual look as if they are portrayed in a sexual way when their original image would not have been sexual.

⁴⁸ See for example the Dutch laws criminalising ‘using a hidden camera in a non-public space’ (art. 139f Sr.), ‘publishing images or films that were secretly taken’ (art. 139g Sr.) or ‘publishing images that were taken by coercing the depicted individual’ (art. 284 Sr.). Similar laws exist in several states of the United States of America, the United Kingdom, France, Germany, etc.

4.3.5 Summarizing the concepts of non-consensual pornography

Revenge pornography, uninvolved revenge pornography, non-voluntary pornography, and edited portrayals are four forms of what is described here as non-consensual pornography. The ‘non-consensual’ part of that term refers to ‘pornography’, and not to the *images* used for pornographic means. Although these pictures may also be taken without volition of the depicted individual (as is the case with non-voluntary pornography), it is not the consent regarding the making of images or films that makes these images or films inherently pornographic. As has been pointed out, pornography is inherently public, whereas the images or films used in non-consensual pornography are not – they only *become* public through an act of publication that wrongs the individual(s) depicted in them, as the images or films, in so far as they were meant to exist at all, were meant to remain private. It is the very act of publication that makes them pornographic, not their contents in themselves. The internet, allowing for rapid spreading of anything published on it, causes the inability to contain the availability of online materials.⁴⁹ If certain pornographic materials were only meant for a certain audience, a broader audience may still be reached (something that producers of consensual pornography are aware of).⁵⁰ What is on the internet is no longer strictly private: it has become accessible like a public document.⁵¹

⁴⁹ Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007), p. 17.

⁵⁰ “While we never grant permission for our content to be added to Tube sites, it is regularly (by people who use stolen credit cards to join our site, download lots of content, then cancel their subscription). [...] All that's left is for porn producers like me to innovate, provide services that tube sites cannot steal (like...? No one really knows, and that's why I'm not hopeful for the future of the industry).” from: Garion Hall, “Why is there so much free porn on the internet?,” *Quora*, 9 January 2016.

⁵¹ Frederick Schauer, “Internet Privacy and the Public-Private Distinction,” *Jurimetrics* 38, no. 4 (1998), p. 557.; Gail Sullivan, “When will we learn: Nothing is secure on the Internet,” *The Washington Post*, 18 April 2014.; Royal Canadian Mounted Police B.C. Crime Prevention Services, “Nothing is Private Online” <http://www.rcmp-grc.gc.ca/cycp-cpcj/is-si/brochure/safety1316-secur1316-eng.htm> (accessed 25 January 2017); Arnoud Engelfriet, “Anonimiteit en privacy op het internet,” *Ius Mentis*, 16 December 2016.

It is widely accepted that making sexually explicit images or films *without* consent of the individual depicted in them is wronging this individual.⁵² The main characteristic of revenge pornography is the non-consensual disclosure of pictures taken *with* consent. It is the gist of the present paper that this is wronging the victim as well. To ensure a proper understanding of the harms and wrongs of the latter, it is important to recognise and distinguish all varieties/subtypes of non-consensual pornography and not to confine ourselves to a general understanding of ‘non-consensual pornography’. For that reason this thesis rejects the idea that various subtypes can in all circumstances be referred to by the umbrella term ‘non-consensual pornography’.

4.4 Comparing consensual pornography and non-consensual pornography

The concepts of consensual pornography and non-consensual pornography are distinguishable from each other through the actions that have or have not been consented to. Several levels of consent can be recognised within the concepts of pornography and non-consensual pornography that have been described above:

1. No consent given for taking or making of images or films of a private, intimate and sexual nature, no consent given for the disclosure of those images or films, as is the case with non-voluntary pornography.⁵³

⁵² A distinction could be made between situations in which the making of sexually explicit images or films without consent involves a breach of trust, and situations in which it does not. It is imaginable that it is accepted or acceptable between partners that these images or films are produced, even if the depicted individual was not aware of this at the time (such as while asleep) and a situation in which someone is photographed or filmed when they had a reasonable expectation of privacy, such as in a changing room. Photographing someone in a changing room constitutes a breach of their trust, even though strangers have fewer obligations towards each other than lovers do. In a changing room the trust could come from rules regulating the use of the room, see Rachel Premack, "Dani Mathers: What happened when a Playboy Playmate posted a photo of an unwitting naked woman on Snapchat," *The Independent*, 18 July 2016.

⁵³ This would also have to include the situation in which there was consent for images or films, and consent for their publication, but for strict purposes such as the consent of a patient to a photograph and the distribution thereof for the purposes of education of doctors. Such photographs being used for pornographic ends would fall under this, as it is important to note that there was not consent for the taking of *sexual* images or films, but the images being used for that purpose nevertheless.

2. Consent given for the taking or making of images or films of a private, intimate and sexual nature, no consent given for the disclosure of those images or films, as is the case with revenge pornography and uninvolved revenge pornography.
3. Consent given for the taking or making of sexual images or films, as well as consent for the disclosure of those images or films, as is the case with consensual pornography.

The main differences between consensual pornography and non-consensual pornography in general and revenge pornography in particular can be found in the level of intimacy, the expected level of privacy, the intention the individuals appearing in the materials were having while making the material, the actions that were consented to by the individuals appearing in the materials, and the relationship between the individuals appearing in the materials and the individuals producing them (see table 1).

	Consensual pornography	Revenge pornography	Uninvolved revenge pornography	Non-voluntary pornography	Edited portrayals
Intimate		*	*	*	
Private		*	*	*	*
Sexual	*	*	*	*	*
Meant for publication	*				*
Intimate relationship or encounter		*	*		
Consent for objectification	*				

Table 1: Differences between consensual pornography and non-consensual pornography

Pornography is not intimate. As opposed to forms of non-consensual pornography, the *act of publication* is not a defining characteristic of consensual pornography: consensual pornography was already meant for publication during its production (and the production of the material was most likely more public than the recording of sexual acts during a relationship or intimate encounter. Images and films used in revenge pornography are usually made by the partners themselves, not by a film crew). Pornography is not private

(although it can be depicting acts usually performed in a private environment), and it is not intimate (although it may bear the suggestion of intimacy). Consensual pornography and the material used in revenge pornography also differ from each other in the aspect of the sincerity of the displayed emotions and the intentions the producers and depicted individuals have with regards to the disclosure of the produced materials. The only interesting characteristic consensual pornography shares with the material used in revenge pornography is that it is sexual.

A major difference between consensual pornography and non-consensual pornography is the presence or absence of consent for objectification. It has been stated in §4.1 that the objectification through pornography, sports or otherwise, is necessarily degrading the person involved. However, if such degradation is consented to by the objectified individual by voluntarily entering into the actions that led to it, then this consent ensures that the suffered decrease of human dignity is not as severe as it would have been without consent. In those cases where objectification has not been consented to, it is the objectification *itself* that degrades the persons depicted and causes a decrease of respect for their human dignity (set aside the damage of dignity due to *what* is shown, the content of the materials).

Although objectification is degrading regardless of what is being shown, revenge pornography is degrading in a special way. The ‘pornification’ of individuals who did not choose to be in pornography shows them in a sexual way, at a time that they were expressing themselves on the most intimate level. The assault on dignity that comes from showing these individuals in the way that revenge pornography does is especially grave. The division between the private sphere and the public sphere normally ensures that individuals are (to some extent) in charge of their public image and their reputation. It is important to note that privacy is not (exclusively) used to hide information that is shameful from a public point of view – many reasons exist for keeping things private, especially things that are not shameful by their existence itself, but by being made visible to others. In the case of non-consensual pornography the division between the public and the private has been breached: what was intended to remain private becomes accessible to the public. The publication of images or films that have been made in the private sphere

with the intention that these images or films remain private violates the liberty of individuals to express themselves as they consider fit to do in private. This holds for private behaviours in general, but the more so for those of a sexual kind. The disclosure of such images or films shows the sexual expression of the depicted individuals to the public, when their intention was for this expression to remain private for the same reason that sexual acts are performed in private: they are only of the participants' concern, not of someone else's, and their privacy is a precondition for the sincerity and the depth of their expression.

The difference between those images or films used in revenge pornography and those used in consensual pornography is much like the difference between having an intimate sexual encounter or relationship, and a non-intimate or detached sexual *performance*. A sexual encounter or relationship is intimate, shared between intimate partners who trust each other enough to expose themselves to each other in a maximally intimate way (the fact that they are willing to sleep with each other reveals this).⁵⁴ This also holds true for the images used in revenge pornography, as these images are usually made within the course of one's sexual life. As opposed to that, pornography is public by its very nature and does not require intimacy or a bond of trust, neither between the actors themselves, nor between the actors and the audience. To the contrary, any depiction of intimacy is pretended and simulated, at least partially.

Pornography, although sexual and (having the pretence of depicting something) private, is not intimate. The production of sexual acts for publication and distribution is not intimate. In the documentary "Hot Girls Wanted," a documentary about young adult women being recruited for, and working in, pornography, a woman explains that she does not like to have sexual encounters and be intimate with someone, as it scares her – the only time she did so she was broken up with afterwards. It seems her trust was damaged badly. She does not, however, have any problems with performing sexual acts for the

⁵⁴ This thesis accepts that this kind of intimacy is present in all consensual sexual encounters, whether they take place in the course of a relationship or are a single sexual encounter without an expectation of further relations between the sexual partners.

purpose of producing pornography: “Having sex outside of porn scares me, and I do not want to commit myself to someone like that.”⁵⁵ This is an example of the difference between performing sexual acts for the sake of objectification, and performing sexual acts as part of being intimate with a romantic partner. The latter is an expression of the most intimate identity of a person, where partners expose themselves in a way that they would not normally, which is possible through the existing trust between partners, while the former is the portrayal of a character by an actor. The *Oxford Dictionary* definition of pornography discussed in §4.2 does not include ‘intimacy’. This thesis treats the depiction of intimate acts that are private and sexual as something inherently different from pornography.

In sum, the act of publication in the case of revenge pornography is a defining characteristic of that kind of pornography: the publication ensures that material that was previously private is publicly accessible, and although it still depicts a situation that was intimate for the depicted individuals, the very act of publication degrades the intimacy through exposure. Pornography can depict private and sexual actions, but by its very nature it cannot be purely private (although the law may limit the extent of its publicity). Revenge pornography could only *become* pornography after it has been disclosed, although it even then continues to have the element of being intended as remaining private. Accordingly, by publishing the private materials that had not been meant to be published, the depicted (real) intimacy is broken and the persons involved are degraded.

5. The harm of revenge pornography for the victim

Victims of revenge pornography that had the courage to speak out against what has been done to them describe a situation of hopelessness and feeling defeated. Annmarie Chiarini, who is a victim of revenge pornography, tried to commit suicide but did not succeed. Eventually Chiarini overcame the initial sense of hopelessness, and became an

⁵⁵ Two to Tangle Productions, Jill Bauer (Director), and Ronna Gradus (Director), "Hot Girls Wanted," (USA: 2015)., at 28:15.

advocate for the criminalisation of revenge pornography.⁵⁶ Another case is from September 2016, when a suicide case in Italy made worldwide headlines: Tiziana Cantone had taken her own life after an intimate video taken of her was disclosed online without her consent in 2015, which led to her being taunted online. “The images and videos began to appear on porn sites and spread virally on social media, along with jeering comments, edited screenshots and cruel video parodies, many using her full name.”⁵⁷ She won a court battle regarding the right to be forgotten, which ruled the images and videos to be removed from various websites and from coming up in search engines, but she was also ordered to pay €20.000 in legal costs, still implicating guilt on her part with regard to her being victimised.⁵⁸ Cantone had attempted to take her life twice before.⁵⁹ These cases are not isolated incidents; there are many more cases of revenge pornography victims committing suicide.⁶⁰

The lack of consent to publication, and with that consent to objectification, is part of what makes the public impact of revenge pornography different from the public impact of consensual pornography. Consent regarding intimate, private and sexual actions is viewed as an essential part of man’s liberty.

Intimate, private and sexual actions can only be allowed with the consent and volition of the participants. If no consent has been given and the acts are performed against the

⁵⁶ Annmarie Chiarini, "I was a victim of revenge porn. I don't want anyone else to face this," *The Guardian*, 19 November 2013.

⁵⁷ Katie Forster, "Tiziana Cantone: Woman's suicide after sex tape went viral prompts calls for stronger online privacy laws," *The Independent*, 16 September 2016.

⁵⁸ "Italy grapples with suicide of woman taunted over online sex video," *The Guardian*, 16 September 2016.

⁵⁹ While many reactions to the news of her death were sympathetic towards her, others still seemed to blame her for her own misfortune. A Turin city councillor “wrote on Facebook that Tiziana had in sending the video to acquaintances perhaps been “aiming for a certain notoriety” and was “certainly not a saint.” Mr Caputo later apologised for the remarks, which he said had been poorly considered.” see: "Tiziana Cantone: Suicide following years of humiliation online stuns Italy."

⁶⁰ See for instance Miriam Berger, "Brazilian 17-Year-Old Commits Suicide After Revenge Porn Posted Online," *BuzzFeed*, 20 November 2013.; Natalie Corner, "Family of revenge porn teen who committed suicide over online blackmail beg others not to suffer in silence," *Mirror*, 12 November 2015.; Kate Briquet and Katie Zavadski, "Nude Snapchat Leak Drove Teen Girl to Suicide," *The Daily Beast*, 6 October 2016.

other's volition, then they are considered harmful acts. These actions are a bodily expression, and performing them without the consent of the participants constitutes an attack, whether physical or not, on the body and accordingly on the person that embodies it. It seems strange to let this concept go when it comes to the depiction of that body. The portrayal of the body through images or films can be as much an attack on the person whose body it concerns as physical violence can. It could even be a more severe attack on the 'person' than physical violence.

5.1 Having a body or being a body

Merleau-Ponty describes the following: "I regard my body, which is my point of view upon the world, as one of the objects of that world."⁶¹ and "the relation of soul to body has nothing to do with the objective body, which exists only conceptually, but with the phenomenal body."⁶² As a person cannot exist outside of their body, an attack on that body through the intimacy and sexuality that the body has expressed constitutes an attack on the closest identity of a person (where the body and the feeling of what makes someone a person are involved) in a much more substantial way than the disclosure of other private documents such as bank statements would do.

Bank statements are private, but not intimate, and do not have the power to constitute an attack on the closest identity of a person the way intimate and sexual documents have when disclosed without consent. Lacey even makes the argument that a breach of autonomy in sexual matters is more significant than other breaches of autonomy. She too acknowledges that sexual assault is a more direct attack on personhood, and compares this to other types of physical assault, which leads her to state that "[t]he ultimate trespass on the liberal legal subject's sexual personhood is that his sexuality is appropriated

⁶¹ M. Merleau-Ponty, *Phenomenology of perception (Phénoménologie de la Perception)*, trans., Colin Smith (New York: The Humanities Press, 1965 (original 1945)), p. 81.

⁶² Ibid., p. 502.

without his consent.”⁶³ She goes on to argue that “rape violates its victims’ capacity to integrate psychic and bodily experiences.”⁶⁴ This can be linked to the idea that there are different degrees of severity with regard to a breach of privacy: if the breach of privacy is also an appropriation of the individual’s sexuality (in the case of revenge pornography by disclosing their intimate, private and sexual images or films), that breach of privacy can be considered more severe than if it concerns the disclosure of an individual’s bank statements. The celebrities that passed in review in Chapter 2 are an example of this. Being public figures, they would be used to being photographed (both with and without their consent) in all kinds of aspects of their lives. Yet it appears that the non-consensual disclosure of their private, intimate, sexual images was to them a more severe breach of privacy. Privacy with regard to sexuality is more important than it is for other aspects of the private life of individuals. This may be related to the nature of sexual intimacy, especially its dependency on a safe and private context as a precondition for a sincere and deep expression of personal feelings. Privacy in sexual matters is therefore more important than in other private activities of which the occurrence itself does not depend on privacy.

The difference between ‘having’ and ‘being’ is this: one can *have* bank statements, and when they are disclosed without permission it does violate someone’s privacy, but one *is* a body – regardless of the fact that one is able to refer to the body as ‘having a body’. Descriptions of that kind are a form of objectification of the body that is not uncommon, and can be useful, for instance during a doctor’s visit. Marcel described ‘being a body’ as “I am my body.”⁶⁵ He goes on to state that “it is obvious that my body [...] is myself; for I cannot distinguish myself from it unless I am willing to reduce it to an object.”⁶⁶ A person is a unity with their body.

⁶³ Nicola Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law," *The Canadian Journal of Law and Jurisprudence* 11, no. 01 (1998), p. 59.

⁶⁴ Ibid., p. 63.

⁶⁵ G.H. Marcel, *Being and having* (original title: *Être et avoir*), trans., Katherine Ferrer (Westminster: Dacre Press, 1949), p. 12.

⁶⁶ Ibid., p. 14.

This unity is what makes the non-consensual disclosure of intimate, private and sexual images or films more harming to the depicted individual than would other kinds of private documents: people are able to distance themselves from documents, but they are not able to distance themselves from their bodies. If individuals are distanced from their bodies they are objectified: they are no longer a unity of person and body, but the body has become an object. However, Marcel considers the following: "I cannot quite treat myself as a term distinct from my body, a term which would be in a definable connection with it. [T]he moment I treat my body as an object of scientific knowledge, I banish myself to infinity."⁶⁷ No matter how hard one tries, there is no way in which the person can exist without the body. To treat the body as *only* an object would eliminate the person. This can be further explained through the difference between 'person' and 'character'. The 'self' that Marcel refers to in that context should be considered to be the 'person' of the self. The body and the person cannot be treated as distinct terms, whilst it is still possible to take on the role of a character – in which case the self is *not* connected to what the body is portraying. In that case, it *is* possible to treat the body as an object that is not connected to the character.

Rowan Atkinson inadvertently explained the difference between 'person' and 'character' in response to being asked whether it is strange to see himself on screen. He said that whenever he watches himself in a film he does not see himself at all, but merely sees a character: "I get used to divorcing myself from my presence on screen. I just see a character, I don't see myself."⁶⁸ In spite of this, it would be strange if he did not still consider the body portraying the character to be his, Rowan Atkinson's, body. He does not see his own *person* as distinct from his body, but recognises that he is not showcasing his own person when he is acting: he is portraying a *character*. This ability to distance the character from the body comes from the intention the actor has had throughout the process of filming, of pretending to be someone else. This actor can therefore choose to only see the role he was playing. Being able to distance a character from the body is not

⁶⁷ Ibid., p. 12.

⁶⁸ Oliver Baroni, "Interview with Rowan Atkinson: «I'm happy to say goodbye to Mr. Bean»," (2011)., at 02:05.

the same as distancing the person from the body. The latter, according to Marcel, can never be truly separated.

Victims of revenge pornography do not have the option of seeing themselves as a character: they can only see themselves as the persons they are in the images or films that have been disclosed without their consent, as they were in a situation in which they were exposing themselves as much as they ever were capable of, displaying themselves in their innermost actuality. Being intimate with a partner is arguably the closest one can come to completely exposing oneself, without any kind of 'veil'. The difference between person and character is essential when comparing consensual and non-consensual pornography, as the latter does not allow the depicted individual to distance themselves from the portrayal, while the former can be compared to the actor cited above. When the objectification of the body was voluntary, it does not affect personhood, as it is not the person, but the character that is objectified. Actors, sportsmen and porn actors all take on characters for the materials in which they are objectified as something other than their person. Victims of revenge pornography do not have that option.

5.2 Autonomy over the body

The freedom to decide over one's own body, and thus the identity of the own person, is severely impaired by non-consensual pornography. Victims of non-consensual pornography are denied the choice on whether they consent to being objectified. An actor of pornographic images or films is given that choice: they choose to consent to being objectified through pornography, and this consent is essential. Victims of non-consensual pornography are denied that choice, and thus are objectified against their will: they are stripped of personhood by the audience that *uses* and consumes them; they are no longer treated as persons after they are objectified against their volition, and by that very treatment they do not receive any recognition for the harm that has been done to them. This happens in particular in the case of revenge pornography and uninvolved revenge pornography, where victims are often told afterwards that they brought these harms upon themselves by consenting to be photographed in the first place.

5.3 Intention of intimate, private and sexual images of victims and victim-blaming

Before the images or films used in revenge pornography are disclosed, they would not be referred to as pornographic. The right to privacy, and the right to experience one's sexuality are justified arguments to disregard the intention of the public when it wants to use material, that was not meant to be used thus, for pornographic ends. This is a reason to question the accuracy of the term 'revenge pornography' with regard to the extent to which the term reflects the harm done to victims and severity of the actions taken by those who make intimate, private and sexual images public. The depicted individuals never consented to being objectified or stripped from personhood by people who end up using them. This objectification is degrading if the depicted individual did not *intend* to be objectified, which is the case in revenge pornography. The intention the depicted individual had with regard to the taking or making of the images or films should be considered highly relevant to determine the appropriate audience (and with that, whether or not the materials are to be public and pornographic). As has been stated, pornography is defined by the intention of the distributor: someone other than the depicted individual can therefore decide to take the images or films of the depicted individuals and *make* them pornographic by disclosing them as *being* pornographic. If the intention of the depicted individual with regard to the privacy of the images or films is considered irrelevant by the legislator then the legislator would overlook victims by not taking them or their intentions seriously. It would be similar to stating that rape and sexual intercourse are the same, as the outcome in both cases is the same. If one only looks at the outcome to determine what something is, the intention of the victim with regard to having images or films published/to have sexual intercourse from the victim is irrelevant, which ignores the victim and the harm done to the victim.

Blaming victims for wrongs that have been inflicted upon them, is wronging in itself. In rape cases this is called the 'secondary victimisation', which refers to a situation in which a victim is re-victimised by the legal, medical and mental health system through insinuations that the victim may have had a role in the initial attack, through questions regarding the

victims clothing and/or possible intoxication. In revenge pornography cases the victim is often told that they should not have consented to the taking or making of private, intimate and sexual images or films, and that their consent to the making was the reason the images or films were disclosed – if the victim had not consented to the taking or making of intimate and sexual images or films, then there would not have been any images or films to be disclosed. This kind of victim-blaming is quite common with regard to revenge pornography. It not only occurs in cases of actual revenge pornography, but also *before* anyone has been hurt, with websites, books, etc. advising against the making of intimate, private and sexual images or films.⁶⁹ Victim-blaming shows up in the best-meaning texts, even when the victim is not addressed directly. Eric Goldman, who seems of the opinion that taking nude images will become the norm (if it is not already), and sees nothing wrong with that, still offers the following advice: “for individuals who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don’t take nude photos or videos.”⁷⁰ In offering this advice he reinforces the idea that it is the victim’s responsibility to prevent being victimised, as opposed to the perpetrator’s responsibility not to harm the victim through the non-consensual disclosure of intimate, private and sexual images or films. Individuals who allow the taking of intimate images or films are made to feel they are to be blamed even before anything has happened to them. Reclaiming their bodies

⁶⁹ Ashley Fern, "23 Reasons Why You Should Never, Ever Take A Nude Pic Again," *Elite Daily*, 3 September 2014.; "How to stop compromising pictures of you being published online.," *DMCA*; Emma Sadleir and Tamsyn de Beer, *Don't Film Yourself Having Sex* (South Africa: Penguin Random House, 2014)., which the authors say is not victim-blaming (see: "'Don't Film Yourself Having Sex' is not victim blaming - author," *News24Video*, 25 September 2014.), although the book gives a different impression.; "Olson: Some advice: Don't take nude photos," *Daily Chronicle*, 5 September 2014.; Lisa Scottoline, "Chick Wit: Don't want your nude selfies hacked? Don't take any!," *The Inquirer*, 7 September 2014. It is encouraging to see that as the topic of revenge pornography gains more and more attention, some advice sections have changed their tone and instead of discouraging the taking of intimate, private and sexual images or films, offer advice on how to protect these images from falling into the wrong hands. See: Whitney C. Harris, "How to Keep Your Sexy Photos as Safe as Possible - Because explaining them to your boss wouldn't be fun.," *Women's Health*, 14 July 2015.; Ashley Feinberg, "How to Keep Photos of Your Naked Body Off the Internet," *Gizmodo*, 2 September 2014.; Katie Calautti, "How To Prevent Your Own Leaked Photo Hack," *MTV.com*, 1 September 2014.; "Sexten doe je zonder hoofd," *Joop.nl*, 17 February 2016.

⁷⁰ Eric Goldman, "What Should We Do About Revenge Porn Sites Like Texxxan?," *Forbes*, 28 January 2013.

and accepting that they are indeed only the victim (without having a part in their own victimisation) is made very difficult, so that many victims of revenge pornography do not see a way out and commit suicide, as has been pointed in the introduction of this chapter. It is disturbing that victims are being blamed, as it is the perpetrator who is responsible for the disclosure and spreading of images that ought to have remained private, not the victim. Victims should not be blamed for being wronged, nor should they blame themselves. What is wrong is the non-consensual disclosure of the images or films, and not the fact that they were made. The wrongful action is not anything that the victim has consented to and not something they should be blamed for.

6. An analysis of the reasons for the lack of appropriate, well thought through laws against revenge pornography

If an individual is sexually objectified against their volition, they are objectified in doing something that portrays them in their innermost and deepest personal identity – this link was described by Marcel as “the union of the soul and body,”⁷¹ – the German law referring to the ‘damaging of the highly personal sphere’ reflects this.⁷² The sexual objectification of individuals appearing in pornographic materials is not necessarily problematic, although one might argue that this, too, is degrading to an extent that it should be prohibited. Although many arguments can be, and have been, made for outlawing (certain kinds of) pornographic materials, it is important to remember that these arguments seem to be aimed at the protection of the public only, and not the protection of the depicted individuals. It is remarkable that a matter as serious as revenge pornography has not been (properly) criminalised by any state. If one refutes the idea that states do not find the matter of revenge pornography serious enough to warrant any thought on their behalf, lack of criminalisation must be the consequence of a lack of understanding. Existing revenge pornography laws do not in the first place seek to protect the public or third parties, but rather the individuals depicted in the offending

⁷¹ Marcel., p. 11.

⁷² See Appendix A.

material. Good reasons exist for the criminalisation of revenge pornography, and the depicted individual should be at the focus of its protection, although these laws would benefit the public *as well as* the individual depicted in the materials. The public is protected through the preventive incentive that comes from criminalisation: revenge pornography is less likely to occur if it is criminalised, which leads to anyone being less likely to become a victim of revenge pornography. If revenge pornography is criminalised, victims of revenge pornography are able to show that the perpetrator wronged them, as the perpetrator faces criminal charges. This is opposed to the current situation where victims are being held responsible for their own misfortune, which is implied through the lack of (effective) criminalisation. If legislators cannot be bothered to criminalise revenge pornography, they either do not consider the matter worthy of criminalisation – effectively, although maybe not purposefully, reinforcing the position of the perpetrator, – or they do not understand the concept of revenge pornography and the ways in which it wrongs victims. It is up to states and legislators to take a standpoint with regard to revenge pornography:

1. States can choose to condemn the taking of intimate, private and sexual images or films and for that reason not make any legislation that criminalises it, out of the expectation that the risk of becoming a victim of revenge pornography would discourage people from making these kind of materials.; or
2. States can choose to be neutral with regard to the desirability of the taking intimate, private and sexual images or films and for that reason choose to protect the liberty of the people in general, for which they may consider putting revenge pornography laws in place.

For Western states the second option is the most likely standpoint, as it reflects the morals of Western societies: in general it is not frowned upon that individuals express themselves sexually in the course of an intimate relationship or encounter.⁷³ There is a

⁷³ A Pew Research found that premarital sex was met with less than 10% disapproval in Western European states. See: Pew Research Global Attitudes Project, "Global Views on Morality - Premarital Sex," 15 April 2014.; Sexual intercourse is engaged in from a young age: "between 75

question about whether the taking of private, sexual and intimate images or films is a good or permissible practice that should be enabled. If states choose to be neutral toward the making of private materials, or choose to encourage them, in order to provide a safe environment in which to do so, revenge pornography laws would be needed in both cases. One of the reasons for criminalising revenge pornography is that it breaches the victim's right to privacy: if states choose to encourage or be neutral with regard to the production of private materials, they must also protect the *privacy* of those private materials. Not doing so would be very similar, if not the same, as condemning making these materials. Considering the fact that taking intimate, private and sexual images or films has become quite common, laws protecting the right to do so would be justified.

Images or films used in revenge pornography were made with consent. These images or films were not meant for publication by the depicted individual, they were meant to remain private. However, the perpetrator's intention may have been different from the moment the materials were being made. The intention of the perpetrator might also have changed somewhere along the way: he could have been sincere in thinking that he would never disclose the images or films when they were being made. In that case, somewhere in the process the perpetrator changed his intention and disclosed the images. The question *whose* intention is referred to when speaking of the intention behind intimate, private and sexual images or films becomes relevant: if the legislator has the goal to protect victims of revenge pornography, it should also be *the victim's* intentions that are taken into account when determining who was the intended audience for the images or films. It should not be the intention of the perpetrator that is at the focus of determining the intended audience of the images or films. Focusing on the intention of the perpetrator with regard to the privacy of the images or films is a denial of the victim's right to privacy.

percent and 80 percent of males and females in the United States had experienced vaginal intercourse by the age of 19 (the average being 16-17)." See: Marshall Cavendish, "Premarital Sex," *Sex and Society* 3, (2010)., p. 664.

6.1 The public and the private

Legislators do not treat consensual pornography and revenge pornography differently with regard to the legality of the materials. Both are legal, although laws limit its publicity. Although pornography is in essence public, it is nevertheless not considered to be acceptable in public spaces, which displaces (both consensual and non-consensual) pornography to the private sphere. This displacement to the private sphere does not make pornography completely private however, and a useful distinction can be made here.

Something can be either:

- completely private (which is the case for an intimate encounter or relationship); or
- private but accessible (which is the case with pornography); or
- completely public.

This distinction is relevant to the differences of the kinds of materials used in consensual pornography and revenge pornography respectively. The materials used in the latter were meant to remain in the private sphere, but through their non-consensual disclosure were made accessible. Revenge pornography takes something from the strictly private sphere to the private-but-accessible sphere, yet legislators have not taken steps to prevent these materials from being accessible, treating them the same as the materials of consensual pornography, i.e. limiting their publicity to prevent the *public*.

Although pornography is only deemed appropriate in private, it is nevertheless of public concern. Whether or not something is, and should be, private should not solely depend on where it takes place, (whether it is a location normally deemed private or not) but on the impact it has on society. Something that has a severe impact on the public is not private. Jonathan Herring uses the example of domestic violence to clarify this: “Some may question the claim that domestic violence in a relationship has broader social significance. But we must remember that domestic violence plays a major role in the lives of so many women. The latest statistics (Home Office 2011) indicate that 29% of women have experienced domestic abuse since they were 16. 54% of serious sexual assaults were by a current or former partner. [...] The impact of this behaviour on such a large section

of the population must have a significant social impact, even for those who do not accept the broader feminist account.”⁷⁴ Actions that are performed ‘in private’ but nevertheless have such impact on society are not completely private – although they may remain private in individual cases, if it is considered normal to abuse a partner, this has an impact on the way society views domestic abuse, thus impacting society.

This is similar to the feminist argument that the personal is political,⁷⁵ although it is not the same: the feminist argument is used to challenge the existence of a difference between the personal and the political, so as to ensure better protection of the rights of women who are limited to a private environment (even though they are limited to the private sphere, “the “personal” should not be seen as an improper theme for concern and possible public interference.”),⁷⁶ whereas this paper refers solely to those actions in the private sphere that impact the public sphere, it does not seek to challenge the existence of a difference between the public and the private. Nevertheless, the present paper accepts that the private should not be used as an excuse to hide damaging behaviour from public scrutiny: even in the private sphere it can be acceptable to allow public interference. If something warrants public interference, it has become of the public’s concern, and therefore has become public. In the case of domestic abuse, child pornography, etc. this is especially obvious, as these acts have a social impact beyond the private sphere (which is similar to the social impact of revenge pornography). However, it does not seem to be useful to deny the existence of a difference between the private and the public, or the social and the intimate.

Gavison argues that anything that is controversial is in some way a matter of public concern.⁷⁷ This does not lead to the conclusion that there is no distinction possible between the private and the public, but according to Gavison it indicates that there is a

⁷⁴ Jonathan Herring, "The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3," *Journal of Social Welfare and Family Law* 33, no. 3 (2011), p. 303.

⁷⁵ Redstockings; Robin Morgan, *Sisterhood is Powerful: An Anthology of Writings From The Women's Liberation Movement* (New York: Random House, 1970).

⁷⁶ Ruth Gavison, "Feminism and the public/private distinction," *Stanford Law Review* 45, no. 1 (1992), p. 19-20.

⁷⁷ *Ibid.*, p. 15.

gliding scale of what is private and what is public, as opposed to the existence of a hard divide between the two. The fact that pornography is something that is apparently only appropriate in private does not make pornography itself private or excludes it from public scrutiny. The classification 'private but accessible' is therefore appropriate.

According to Hannah Arendt, the private realm and public realm have changed substantially. In ancient Greece, the private used to be concerned with providing in basic human needs, whereas the public was concerned with the communal, i.e. politics.⁷⁸ Over time, and caused by mistranslations of the concept 'zoön politikon' to 'animal socialis' ('homo est naturaliter politicus, id est, socialis': man is by nature political, i.e. social),⁷⁹ man's unique trait was considered his social capacities, not his political capacities as the ancient Greek had meant. Arendt attributes this mistranslation with the focus on the social in the public realm, which was originally contained to the private sphere. According to Arendt, the distinction "public and private" has been replaced by "social and intimate." The social realm, which has come to replace the public realm, is a mass-society that has the tendency to absorb everything in it.⁸⁰ As a result, less and less things truly belong to the intimate realm, which has come to replace the private realm: the intimate realm is not strong enough to withstand the pressure of the social realm.⁸¹ This may explain the extent to which it is considered acceptable to look at another's private, intimate and sexual images or films, even if the depicted individual has not consented to the disclosure of such images or films: if it is out there, it is out there, and then it is part of what Arendt calls the social realm. According to Arendt, if the law does not protect the intimate realm, it will be diminished by the social realm.⁸² With regard to pornography and revenge pornography, the legislator has so far seemed more concerned with protecting the public, rather than the private.

⁷⁸ Hannah Arendt, *The Human Condition, Second Edition* (Chicago: The University of Chicago Press, 1958; reprint, 1998), p. 24.

⁷⁹ Ibid., p. 23.

⁸⁰ Ibid., p. 45.

⁸¹ Ibid., p. 70.

⁸² Ibid., p. 50.

6.2 Unrecognised differences between consensual pornography and revenge pornography

So far, legislators have failed to recognise the main difference between consensual pornography and revenge pornography.⁸³ It is the different intentions of the depicted individuals that justifies the creation of specific laws, and yet specific laws are being made without awareness of the difference. For most legislators, it is irrelevant what the intention of the victim was with regard to the images or films used in revenge pornography, and the focus is instead on the intention of the perpetrator. The UK revenge pornography law is a sublime example, as it expressly focuses *solely* on the intention of the perpetrator: the intention of the perpetrator has to be to harm the victim. Disclosing a private, sexual and intimate image or film because the perpetrator thought it funny is *not* criminalised in the UK. In formulating the law this way, the UK legislator only partially criminalised revenge pornography: Revenge pornography with the intent to harm a victim is criminalised in the UK, but revenge pornography to laugh at someone is not. However, the outcome for victims of revenge pornography out of revenge and revenge pornography for other reasons is the same: private, intimate and sexual images or films of the victim are disclosed without their consent. This can be compared to criminalising murder, but failing to criminalise manslaughter: the outcome of both actions is the same, i.e. that the victim is dead, but the intention of the perpetrator is different. In the case of murder the perpetrator had planned to kill his victim beforehand, with manslaughter the perpetrator did not plan to kill his victim beforehand, but ends up doing so nevertheless. These crimes are recognised as different offences because of their

⁸³ Legislators worldwide have failed to adopt laws that take into account the nuances of revenge pornography. Although some countries have taken steps in order to criminalise revenge pornography, these laws are not as complete as they should be to ensure an effective criminalisation of the different forms of revenge pornography. Countries that have not made an effort to criminalise revenge pornography fail to acknowledge the wrongs committed against victims completely. The rise of the internet has caused a surge in instances of revenge pornography, causing the increase in attention for the concept and some states to criminalise it. Yet many blind spots still exist for legislators. Unless legislators intentionally neglect to criminalise revenge pornography out of the wish to discourage people to take private, sexual and intimate images or films of themselves, the legislator should criminalise revenge pornography in order to protect the privacy and liberty of citizens. It is remarkable that legislators do not attach enough value on the intention that victims of revenge pornography had when making the images or films that they would not criminalise the actions of the perpetrator leading to revenge pornography.

motives, which legislators may also wish to choose to do with regard to the criminalisation of revenge pornography. It is nevertheless important to recognise that the focus of the legislator with regard to murder and manslaughter is *firstly* on the harm done to the victim, and only *secondly* on the intentions of the perpetrator. The concept of revenge pornography warrants the creation of a similar situation, as it is usual for legislators to criminalise actions, rather than intention. Intentions are usually cause for heavier or lesser punishments, and there does not seem to be a reason why this should not apply to revenge pornography. Harm done to victims is usually of the main concern of the legislator in developing laws for the prosecution of perpetrators. The intentions of the perpetrator that led to his actions are not irrelevant, although it is a fallacy to criminalise the one, but not the other: the victim is harmed in the same way, regardless of the intention the perpetrator had. The intention of the perpetrator can be cause for lower sentences, as is the case with murder and manslaughter. It does not however excuse the perpetrator completely if they did not have the intention to harm the victim. The focus legislators put on the outcome of the actions leading to revenge pornography obscures the process of the establishment of revenge pornography – it does not acknowledge the wrongs a perpetrator commits against the victim, but merely forms an attempt at acknowledging that something might not be quite right with the perpetrator's actions. This begs the question *what* about the actions should be prohibited by focusing on the intention. The perpetrator points at the victim by disclosing their private, sexual and intimate photographs and makes them into an involuntary porn actor, leading to slut shaming of the victim. States that do not adopt revenge pornography laws, either because they deem them unnecessary to improve the right to privacy or because they wrongly feel that the acts of the perpetrator are already criminalised under different laws⁸⁴ fail to take into account the intention of the victim. If a state takes the right to privacy seriously, it cannot ignore the fact that the victim's privacy was breached in spite of the victim's intention to keep their sexual activities limited to the private sphere. Ignoring the victim's intention is another hurtful action towards the victim, as their intentions are not taken seriously or are considered to be irrelevant. The victim is not heard by the state if the state

⁸⁴ See category 4 of Chapter 3.

ignores them. Not acknowledging the harm done to the victim is an indirect form of victim blaming. If the victim's intentions are not taken seriously then the fact that they had private, sexual, intimate images or films taken can easily be misconstrued as a permission on behalf of the victim to be viewed naked. That the images or films were meant for one specific person is not mentioned in legal rules or regulations. If the victim's intentions are being overlooked by the law, then the wrongs inflicted upon the victims are considered to be caused by the victims themselves and to be their own fault. The legislator repeats the humiliation brought upon the victim by the perpetrator when the legislator does not take the harm done against the victim seriously. This is a recurring theme in sexual offences against women generally, e.g. cases of rape.

Legislators are often prepared to treat the group of non-consensual pornography as one matter, rather than recognising the different types of non-consensual pornography as concepts that need to be distinguished from each other. This again shows the focus on the outcome, rather than the process: a nude image is a nude image, regardless of how it came to be (and might as well be considered pornography, now that it is out in the open anyway). Especially compared to other criminal offences, it seems strange that no different actions are being recognised. When one compares rape to consensual sexual intercourse, one would be unable to identify a crime if only the intention of the perpetrator would be taken into account – it is the intention of the victim that constitutes rape: if the victim of rape would have consented to sex, then there would have been no rape. The rape can only exist in a situation in which the victim did not consent to sex, and the perpetrator performed sexual acts on the non-consenting victim nevertheless. The intention of the perpetrator is no grounds to excuse the perpetrator. If he did not mean to harm the victim with his actions he does not then excuse himself from being prosecuted for rape. Not intending to harm someone and doing so nevertheless is normally no grounds for exemption from criminal liability, however, in revenge pornography (again, see for example the UK) the intention of the perpetrator does seem to make a difference, and quite a big one at that: if the perpetrator did not *intend* any harm then his *actions* are not considered criminal.

6.3 (Confusion with) Public decency

Many states have adopted legislation that seeks to protect unintended viewers from an unwanted confrontation with pornography, as it is considered to have the possibility to *harm* unsuspecting viewers. The Netherlands criminalised the public display of material that is offensive to decency and/or sending such materials to people who have not requested this.⁸⁵ Similar laws exist in other countries.⁸⁶ The public is generally protected from unwanted exposure to material that is considered to be indecent. This does not make the material that is considered to be indecent or obscene itself illegal, but merely seeks to regulate its distribution. Pornography may not be illegal,⁸⁷ but legislators still seem to feel that it should not be publicly displayed in order to protect the public from an unwanted confrontation with indecent materials. This might reflect the way in which sexual behaviour is deemed only appropriate in private: Performing sexual acts in public is criminalised on the same grounds and often through the same laws. Pornography is sexually explicit material that intends to arouse the audience, meant for publication, and publicly accessible, although not displayed in public to protect against unwanted confrontation with indecency. It is publicly accessible material that is only deemed appropriate in private.

Laws regulating the spreading of pornography are not meant to protect the individuals appearing in it, but rather to protect the public, whilst keeping pornography available to those who wish to watch it. Similarly, obscenity laws seek to protect morality, but allow for people to view these ‘immoral’ materials in private if they wish. This protection is an

⁸⁵ “*Het openlijk tentoonstellen of aanbieden van een afbeelding of voorwerp aanstotelijk voor de eerbaarheid, of het anders dan op verzoek toezenden van een dergelijk voorwerp is bij wet verboden.*” Netherlands., Art 240.

⁸⁶ See for example: United Kingdom: Obscene Publications Act 1959; Germany: § 184 StGB a. F.; United States: 18 U.S. Code §1460-§1469 (Federal laws); Canada: Criminal Code (R.S.C., 1985, c. C-46 S 163); Brazil: Penal Code Title IV (Crimes against sexual dignity art. 233; art. 234).

⁸⁷ Extremely violent pornography, child pornography and pornography involving animals has been criminalised in many states that allow other kinds of pornography, for instance the Netherlands (criminalisation of child pornography: Art.240b Wetboek van Strafrecht, criminalisation of bestiality: Art. 254a Wetboek van Strafrecht) and the United Kingdom (criminalisation of extremely violent pornography and bestiality: Section 63-67 of the Criminal Justice and Immigration Act 2008)

indication of the extent to which pornography is in essence public: it is *so* public that laws exist regulating the publicity. In other words, laws delimit the degree of publicity of pornography, whilst they do not affect the legality of pornography itself.⁸⁸

7. Three wrongs of revenge pornography

Revenge pornography occurs in the course of or after a relationship or intimate encounter. The fact that there was a relationship between the victim and the perpetrator is highly relevant, as relationships create boundaries and expectations between the individuals involved. The disclosure of intimate, private and sexual images or films taken or entrusted within the course of the relationship is a breach of the boundaries of privacy and are therewith not only an assault on the victim's social respectability, but also on the victim's sense of self-respect.

The wrongs of revenge pornography will be analysed further here, so as to give more insight in the severity of the concept. 'Wrongs' refers to acts that are intrinsically wrong. It is not to be confused with 'harms', which are negative results of acts that did not necessarily have to be wrong. The wrongs recognised here are not only useful for the establishment of the severity of the harm done to victims, but might also serve definition of crimes and the determination of sentences for those crimes. Wrongfulness is used to determine the severity of acts, which is why the wrongs need to be analysed for the criminalisation of revenge pornography. It should be noted that these wrongs are applicable to revenge pornography specifically, and that they may not be present in other kinds of non-consensual pornography. The harms of revenge pornography discussed in Chapter 5 (objectification as an attack on the person, loss of autonomy, an invasion of privacy, and victim blaming) allow us to make a distinction of three different kinds of

⁸⁸ As consensual pornography and revenge pornography are very different concepts in terms of the way they come to be, the extent to which they harm the depicted individuals' privacy, human dignity and freedom, obscenity laws are not suitable for the criminalisation of revenge pornography. After all, to use such laws would not limit affect the legality of revenge pornography, but merely limit the places where it is appropriate to view these materials.

wrong committed against the victim. For the purpose of the identification of the wrongs that are inflicted upon the victim, Herring's analysis of essential wrongs of domestic abuse will be adopted.⁸⁹ Although revenge pornography and domestic abuse are two substantially different concepts in terms of their respective factual actions, they are quite similar in the way the victims are being wronged: both take place within or after a relationship and involve actions different from what can be expected from a partner.

Based on Michelle Madden Dempsey's description of three elements of domestic abuse, i.e. 'violence', 'domesticity', and 'patriarchy',⁹⁰ Herring identifies three essential wrongs of domestic abuse, namely 'coercive control', 'a breach of trust', and 'the social impact'. The essential wrongs of domestic abuse will be used as a framework for identifying the essential wrongs of revenge pornography.

7.1 Breach of trust

The first essential wrong that will be discussed here is the 'breach of trust'. Herring refers⁹¹ to the notion that an intimate relationship involves a "thick interpersonal trust."⁹² Domestic abuse, according to Herring, involves a breach of that trust. Within the course of an intimate relationship, individuals expose themselves to their partners in a way that is very different from what they would show publicly. Therefore, in an intimate relationship there is trust that the disclosed intimacy will stay between partners, that it is safely harboured within the other.⁹³ Trust creates obligations, among which "not to take advantage of the vulnerability created by intimacy."⁹⁴ In relationships "[a]spects of our

⁸⁹ Herring, "The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3."

⁹⁰ Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford: Oxford University Press, 2009), p. 105.

⁹¹ Herring, "The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.", p. 301.

⁹² Dmitry Khodyakov, "Trust as a Process: A Three-Dimensional Approach," *Sociology* 41, no. 1 (2007), p. 121.

⁹³ John Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2006), p. 4-47.

⁹⁴ Herring, "The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.", p. 302.

physical and personal selves are disclosed,”⁹⁵ which adds to the extent in which this trust is important to partners. Trust that is present in a relationship is the sincerest form of trust. In the identification of the wrongs of revenge pornography it becomes clear that this ‘breach of trust’ is necessarily present: the trust of the victim is breached by their (ex-)partner through the disclosure of intimate, private and sexual images or films depicting them; by the person they trusted enough to be intimate with. This breach of trust constitutes a wrong towards the victim. Breaching trust that was present in an intimate relationship “turns what should be a tool for self-affirmation and self-identification into a tool for alienation and self-betrayal.”⁹⁶ The victim “almost becomes used as a tool against [him or herself].”⁹⁷ Revenge pornography is defined by this paper as the non-consensual disclosure by a (former) partner of private, intimate and sexual images or films taken with consent, a breach of trust is necessarily part of revenge pornography.

7.2 Coercive control

Herring recognises coercive control as an essential wrong of domestic abuse, because of the aim of the abuser: “The whole aim of the behaviour of the abuser is to dominate the victim and diminish [their] sense of self-worth.”⁹⁸ The coercive control aspect of revenge pornography is established in a different way than is the case with domestic abuse. With regard to domestic abuse, Herring notes that coercive control takes place by restricting “the victim’s access to work; isolating her from friends; manipulating the victim emotionally; and using physical attacks.”⁹⁹ Although physical attacks fall outside the scope of revenge pornography, the first three elements are clearly present. In revenge pornography, as opposed to domestic violence, they are a result of the disclosure of private and sexual images, hence of *actions*, rather than *threats*, as would be the case in

⁹⁵ Ibid.

⁹⁶ Ibid., p. 302.

⁹⁷ Ibid., p. 302.

⁹⁸ Ibid., p. 301.

⁹⁹ Ibid., p. 301.

domestic abuse.¹⁰⁰ This is notwithstanding the fact that the *threat* of revenge pornography can be used to coercively control a victim. It is blackmail and might be between revenge pornography and domestic violence: a (former) partner threatening a potential victim does not constitute revenge pornography, but the practice should be taken seriously as victims will want to prevent their private, intimate and sexual images or films to become public. The coercive control aspect of revenge pornography can be found in the restriction of the autonomy of the depicted individual, as well as in the attack on their sense of self-worth.

Victims of revenge pornography describe getting fired and/or being unable to find a job due to their private and sexual images having become publicly available.¹⁰¹ They get isolated from friends and family out of shame or humiliation. Their sense self-worth is actively attacked by the exposure of their body against their will and by the exposure of their deepest personal emotions.

The harm of this coercive control is visible in the fact that victims often do not only isolate themselves from friends and family, but often from society as a whole, as they feel victimised by society, as well as by their (ex-)partners. On several occasions a victim of revenge pornography committed suicide. The objectification of the individuals that are victims of revenge pornography severely impedes them to reclaim the ownership over their own bodies again.

Revenge pornography impacts victims in ways that are very similar to those of sexual abuse, where victims often come to see themselves as inherently bad, and cannot see

¹⁰⁰ Threatening to disclose images or films of a private, intimate and sexual nature would constitute domestic abuse rather than revenge pornography, although the *threat* of revenge pornography is not to be dismissed when looking at revenge pornography. The (former) partner controls the liberty of the depicted individual by eliminating the authority the depicted individual had with regard to be able to decide over their own private, intimate and sexual images or films.

¹⁰¹ See for instance: M.C. Barnum, "IT HAPPENED TO ME: I Was The Victim Of Revenge Porn And Forced To Resign From My Job," *XOJane*, 7 October 2015.; Lou Chibbaro Jr., "Gay teacher's sex video stolen, posted to school site," *Washington Blade*, 10 February 2016.; Cyber Civil Rights Initiative, "Victims' Stories" <https://www.cybercivilrights.org/share-your-story/> (accessed 25 January 2017).

themselves as separate from the crime that has been committed against them – they become, quite literally, *part of the crime*, and as such blame themselves or hold themselves responsible.¹⁰² Society's responses to revenge pornography are not too helpful in this regard, with victims of it being told that *they* are to blame, for they did consent to pictures or videos of a private and sexual nature to being taken, and that this blame of the victim justifies the use of their intimate, private and sexual images or films for the sexual arousal of others. The victim of revenge pornography is objectified, their personhood is affected, and they are not acknowledged as a victim. The same holds true for victims of sexual abuse: only when they themselves find their voice, and are able to claim ownership over their bodies and actions again, society seems to be more inclined to understand the way in which they have been wronged.

Emma Holten, who was a victim of (uninvolved) revenge pornography, reclaimed her body by releasing other naked images of herself, stating that the difference between the two sets of photos was that the public has her permission to view the last set, but not the first. She managed to overcome the initial embarrassment, stating that she was not ashamed of showing her body, but was shamed and hurt because it had not been her choice to show the first set of photos: "It was important to me not to distance myself from my body, not to blame it for causing me this humiliation, and not to be cowed into denying my sexuality. I get that people think this is counterintuitive, but I disagree. Consent is key: I did this. Just as rape and sex have nothing to do with each other, pictures shared with and without this consent are *completely* different things."¹⁰³ Her actions were widely met with admiration and acknowledgement of the harm done to her – something that only happens when victims speak out against the injustice they face.¹⁰⁴ It would be too easy to suggest that victims should just speak up and all problems will be

¹⁰² Rebecca Campbell, "The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems," *American Psychologist*, (2008)., p. 703.

¹⁰³ Holten. at 2:15.

¹⁰⁴ See for instance: Lucia Peters, "Activist Emma Holten Fights Back Against Revenge Porn by Reclaiming Her Body In a Powerful Photo Series," *Bustle*, 29 December 2014.; Virginia Kirst, "Intime Bilder, für ein Millionenpublikum gedacht," *Welt.de*, 8 February 2015.; Ann Olivarius, "Emma Holten has spoken and now it's time for action against revenge porn," *mcolaw.com*, 23 January 2015.

solved. Speaking up is precisely what victims who view themselves (and are made to view themselves) as part of the problem, an object, and as something inherently bad, cannot do.

7.3 The social impact/objectification

Lastly, Herring identifies an element of wrong within the social impact of domestic abuse. Regarding domestic abuse he notes that “[domestic violence] reinforces and relies upon power exercised by men over women in society more general,”¹⁰⁵ and continues to state: “[d]omestic violence not only relies on existing inequalities within society, it reinforces them.”¹⁰⁶ With regard to revenge pornography, the social impact is most recognisable as the objectification of the depicted individuals against their volition. Whereas Herring points at the social impact of domestic abuse as reinforcing existing inequalities between men and women, the social impact of revenge pornography can be viewed as the reinforcement of the idea that the objectification of others against their will is acceptable: it slowly gets to be taken for granted that a person, whose private, intimate and sexual images or films are disclosed, loses their right to decide over their own body. The non-consensual objectification of revenge pornography, and the degree to which it is taken for granted, adds to the decreasing respect for people and their human dignity. One is only entitled to dignity, it seems, when there is no trace of images or films that portray a person in a sexual way. When a person has consented to being portrayed in a sexual way, society will not allow them to speak up against objectification.

The social impact of revenge pornography should also be sought in the ‘normalisation’ of (the threat of) revenge pornography, which affects the degree to which the general public will feel indifferent to the injustice that revenge pornography victims experience. Without the audience of society, and without the judgment made by society against the victim (slut-shaming) the impact of revenge pornography could not be what it is now. Part of the

¹⁰⁵ Herring, "The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.", p. 302.

¹⁰⁶ *Ibid.*, p. 303.

harm done to the victim by revenge pornography as it stands is that third parties can access the most intimate depictions of their bodies and their sincerest emotions, and have them at their disposal for purposes of their own preference.

A wider social effect of revenge pornography is the impact it can have on relationships or private encounters unrelated to individual cases of revenge pornography. The normalisation of revenge pornography creates awareness about the impact and severity, but also about the ease with which private, intimate and sexual images or films are disclosed without consent and the impossibility of reversing the publication of the images or films. This may undermine the trust in intimate relationships in general, as it also increases awareness about the ease with which trust can be severely betrayed. If partners abstain from taking intimate photographs of one another for fear of publication at a later time, an indication of lack of trust is unearthed at that very moment. This undermines the intimate relationship itself, and could even do so if the question of taking intimate photographs is not brought up – as long as there is an awareness that (one of the) partners would not consent to the taking of intimate photographs or films for fear of having them disclosed against their volition, the trust in that relationship has been undermined by the external factor of the existence of revenge pornography (as well as by the absence of appropriately protective legislation).

These wrongs are present in revenge pornography regardless of the intention of the perpetrator, making many revenge pornography laws insufficient in covering the instances of revenge pornography. If there is a legal requirement for the intent of the perpetrator to cause distress (among others in the UK and California) then many perpetrators will go unpunished if the intent cannot be proven or turns out to be different from the one criminalised under the law (as is the case in the UK with disclosing the images because the discloser thought it was funny). The victim is wronged regardless of the intention the perpetrator had. It is therefore not clear why so much value is attached to the intention of

the perpetrator, rather than to the effect the perpetrator's actions have.¹⁰⁷ Moreover, it is important to recognize and acknowledge the differences between the different types of non-consensual pornography, so as to be able to address *all* of them adequately. Only a few instances of non-consensual pornography are criminalised if the concepts of non-consensual pornography are used interchangeably.¹⁰⁸

8. Three degrees of perpetrators

The three essential wrongs of revenge pornography are inflicted on victims by a perpetrator. This thesis will here discuss three degrees in which an individual can inflict the aforementioned wrongs upon a victim. These degrees in which an individual can be a perpetrator will be linked to one or more wrongs inflicted upon the victim. See table 2 for an overview of the wrongs committed by each degree of perpetrator.

	First-degree perpetrator	Second-degree perpetrator	Third-degree perpetrator
Breach of trust	*		
Coercive control	*	*	
Social impact / objectification	*	*	*

Table 2: Overview of which wrongs are committed by each degree of perpetrator

8.1 The first-degree perpetrator

The first perpetrator that will be discussed here is the 'first-degree perpetrator'. This is the individual who originally disclosed private, intimate and sexual images or films that were entrusted to them, excluding here the original discloser of *uninvolved revenge pornography*, as

¹⁰⁷ Although this paper does recognise that different intentions may be criminalised under separate laws if the legislator sees fit to do so, see the previous discussion of murder and manslaughter.

¹⁰⁸ Excluding for instance the disclosure without consent of the depicted individual if the individual took the picture themselves, as is the case in, for example, California.

the images or films were not entrusted to that original discloser by the victim. The first-degree perpetrator of revenge pornography would have, or have had, an intimate relationship with the victim, in the course of which the private and sexual images were originally shared. The three essential wrongs of revenge pornography identified in the above are all committed by this perpetrator: The trust that was present in the partnership is breached by the non-consensual disclosure of private, intimate and sexual images or films by one of the (ex-)partners, the victim no longer gets to decide who they do and do not show private, intimate and sexual images of themselves (they lose effective control over their own body and their personhood) and is thus coercively controlled by the perpetrator. The impact revenge pornography has on society, such as influencing the behaviour of people, the extent to which people feel free, and the objectification of people who are perceived in a sexual way (even if the person perceived as such did not want to be perceived as such) is reinforced by the actions of the first-degree perpetrator who allows for the objectification of their (ex-)partner against the will of the victim.

8.2 The second-degree perpetrator

The second-degree perpetrator obtained the images or films second-hand, through the first-degree perpetrator, another second-degree perpetrator, or possibly through someone who cannot be labelled as a perpetrator because they acted in good faith.¹⁰⁹ Another second-degree perpetrator is an individual who hacks or steals private, intimate and sexual images or films and discloses them without permission; this is the discloser of uninvolved revenge pornography.¹¹⁰

¹⁰⁹ This ‘good faith actor’ might never exist, or would be quite rare. Questions arise on whether someone who thought to share the images for the public interest can truly act in good faith if the images end up not being in the public interest at all. It should also be noted that it is rarely necessary to *show* images or films: informing the public by telling them (rather than showing them) about events of which images or films exist might be sufficient to inform the public about knowledge that would be in the public interest.

¹¹⁰ This was the case in the large scale hacking of celebrities with ‘The Fappening’: Farrel.

The second-degree perpetrator either hacks, steals, or obtains the images or films second-hand knowing that they were disclosed without consent of the individual(s) depicted in them and in spite of that spreads them further, for instance by hosting them on his own website.¹¹¹

This perpetrator is recognised by the way in which they wrong the victim. As this perpetrator does not have a personal relationship with the victim, this perpetrator does not wrong the victim through a breach of trust: the thick interpersonal trust described by Khodyakov can only exist between people that know each other, and cannot be an anonymous obligation. The second-degree perpetrator does wrong the victim through coercive control however, by disclosing or spreading content of a private, intimate and sexual nature that the victim did not want to have disclosed. Again, the victim is robbed of their liberty to do with and show their body as they please. The second degree perpetrator also objectifies the depicted individual, and thus contributes to the social impact of revenge pornography. The second-degree perpetrator also plays a role in enabling the content to spread farther and wider than the first-degree perpetrator did or was able to do.

8.3 The third-degree perpetrator

The third-degree perpetrator, just like the second-degree perpetrator, obtained the images or films second-hand and knew that they were disclosed without consent of the individual(s) depicted in them. Therefore this perpetrator knows that the images or films were not meant to be public and not meant to be used for the sexual arousal of a public audience. The perpetrator is aware that there is a *victim* in the images or films that did not consent to being objectified for pornographic ends, but the third-degree perpetrator nevertheless chooses to watch or use the images or films for their own pleasure. The third-degree perpetrator therefore actively goes against the will of the victim by choosing

¹¹¹ With regard to the website operator as a second-degree perpetrator it may also be worth considering the question whether the profit the operator makes from the hosting and distribution of revenge pornography may be considered profit from slave labour.

to watch these images or films. This is the third wrong: the ‘normalisation’ of objectifying a person against their will (increasing the level to which it is considered acceptable in society to watch images or films of revenge pornography).¹¹² Although the third-degree perpetrator does not share the images further but only uses them for himself, the third-degree perpetrator contributes to the objectification of the depicted individual. The third-degree perpetrator does not wrong the victim through a breach of trust or coercive control but is aware of the content of the images, and has thus *used* the fact that they are publicly available. If the third degree perpetrator goes on to mention these images or films anywhere, the knowledge of their existence will increase, as will the harm done to the victim.

9. Concluding remarks

Revenge pornography is the non-consensual disclosure of private, intimate and sexual images or films that have been made with consent. Revenge pornography is increasingly common, but minimal research has led to a poor understanding of the topic by scholars, legislators and media.

Revenge pornography is inherently different from consensual pornography and other types of non-consensual pornography. Although some legislators have made an effort to criminalise revenge pornography, they fail to acknowledge the differences between similar concepts. This thesis clarified the harms and wrongs of revenge pornography, so as to create a better understanding of the issue. There is a difference between ‘having a body’ and ‘being a body’ which accounts for the impact an attack on the closest actuality of a person makes. As victims of revenge pornography are visible as the person they are, and not as a character, it is impossible for them to distance themselves from the images or films used in revenge pornography. Revenge pornography harms a victim’s freedom, autonomy and right to privacy.

¹¹² It should be noted that the accidental observer is somewhat excluded from this: especially in the case of images circulated by phone it is possible that the audience never intended to watch or wanted to watch these images, but were confronted with them when they were sent to them.

The lack of effective criminalisation of the topic is partially attributed to the focus being on the intention of the perpetrator, rather than the intention of the victim: it is often into account or acknowledged that the victim intended the materials to remain private.

Both consensual pornography and revenge pornography are located in a sphere that has been dubbed 'private but accessible'. This further clouds the fact that different measures are needed: to protect the public from an unwanted confrontation with pornographic materials, obscenity laws may be used. As they do not affect the legality of the materials that are being restricted in publicity these laws are not suited to protect victims of revenge pornography. Revenge pornography consists of materials that were intended to remain private, but were published and after this publication were located to the 'private but accessible' sphere. To achieve justice for victims and prevent revenge pornography, the focus should be on the protection of the victim, not on that of the public, as victims did not have the intention that their intimate, private and sexual images or films should become accessible to the public.

Three wrongs can be recognised in the actions of perpetrators of revenge pornography: a breach of trust, coercive control and the social impact/objectification. These wrongs are inflicted upon victims by three degrees of perpetrators. The first-degree perpetrator inflicts all three wrongs, the second degree perpetrator inflicts the wrongs of coercive control and contributes to the social impact and objectification, and the third degree perpetrator inflicts the last wrong only. This paper does not argue that all three degrees of perpetrators should be viewed as criminal by the law, criminalising the first two kinds of degrees would suffice to ensure effective criminalisation of revenge pornography. It would of course be helpful if the third degree perpetrator could be made to face certain consequences if it can be proven that the perpetrator actively looked for revenge pornography.

Much remains to be done by researchers and legislators alike. The term 'revenge' in the name of the concept is unfortunate, as revenge pornography may be caused by different motives.

More research is required to develop a term better suited to the contents. It would be irresponsible not to acknowledge that the harms and wrongs of the non-consensual disclosure of private, intimate and sexual images or films made with consent are no different for the victim in cases where ‘revenge’ was the intention of the perpetrator, and those cases where the perpetrator was motivated by other reasons. For legal ends at least, a more accurate terms should be developed in order to ensure effective criminalisation. ‘Image-based sexual abuse’ has been suggested as an alternative, but whether this term is truly applicable in every sense will have to be researched.

It would also be useful to analyse the wrongs of the other types of non-consensual pornography, so as to better be able to identify the differences between them in concrete cases. A more complete understanding of revenge pornography would be enabled through an analysis of the similar concepts of non-consensual pornography. It is especially important to develop a term for ‘uninvolved revenge pornography’, as it is now usually referred to as revenge pornography.

Hopefully this thesis will contribute to knowledge on the concept of revenge pornography and as well as to further research and elaboration of the issues presented here.

10. Bibliography

- "How to Stop Compromising Pictures of You Being Published Online." *DMCA* Retrieved from: <http://www.dmca.com/FAQ/How-to-stop-compromising-pictures-of-you-being-published-online>, Last accessed: 25 January 2017.
- "Don't Film Yourself Having Sex' Is Not Victim Blaming - Author." *News24Video*, 25 September 2014 Retrieved from: <http://www.news24.com/Video/SouthAfrica/News/Dont-Film-Yourself-Having-Sex-is-not-victim-blaming-author-20140925>, Last accessed: 25 January 2017.
- "Olson: Some Advice: Don't Take Nude Photos." *Daily Chronicle*, 5 September 2014 Retrieved from: <http://www.daily-chronicle.com/2014/09/05/olson-some-advice-dont-take-nude-photos/au2lacm/>, Last accessed: 25 January 2017.
- Oxford Dictionaries*. 2016, <https://en.oxforddictionaries.com> [accessed 25 January 2017].
- Merriam-Webster Dictionary*. 2016, <https://http://www.merriam-webster.com/dictionary/revenge-pornography> [accessed 25 January 2017].
- Dictionary.com*. 2016, <http://www.dictionary.com> [accessed 25 January 2017].
- Urban Dictionary*. 2016, <http://www.urbandictionary.com/fappening> [accessed 25 January 2017].
- "Italy Grapples with Suicide of Woman Taunted over Online Sex Video." *The Guardian*, 16 September 2016 Retrieved from: <https://http://www.theguardian.com/world/2016/sep/16/italy-grapples-with-suicide-of-woman-taunted-over-online-sex-video>, Last accessed: 25 January 2017.
- "Sexten Doe Je Zonder Hoofd." *Joop.nl*, 17 February 2016 Retrieved from: <http://www.joop.nl/nieuws/sexten-doe-je-zonder-hoofd>, Last accessed: 25 January 2017.
- "Tiziana Cantone: Suicide Following Years of Humiliation Online Stuns Italy." *BBC News*, 16 September 2016 Retrieved from: <http://www.bbc.com/news/world-europe-37380704>, Last accessed: 25 January 2017.
- (Australia), Crimes Amendment (Sexual Offences and Other Matters) Act 2014 Victoria.
- Arendt, Hannah. *The Human Condition, Second Edition*. Chicago: The University of Chicago Press, 1958. Reprint, 1998.
- Attwood, Feona. "No Money Shot? Commerce, Pornography and Sex Taste Cultures." *Sexualities* 10, no. 4 (2007): 15, 441.
- Australia, Offences Act 1953 South.

- Barker, Emma. "9 out of 10 Millennial Women Take Naked Photos." *Cosmopolitan*, 3 September 2014 Retrieved from: <http://www.cosmopolitan.com/sex-love/advice/a30675/ninety-percent-millennial-women-take-nude-photos-cosmo-survey/>, Last accessed: 25 January 2017.
- Barnum, M.C. "It Happened to Me: I Was the Victim of Revenge Porn and Forced to Resign from My Job." *XOJane*, 7 October 2015 Retrieved from: <http://www.xojane.com/it-happened-to-me/i-was-the-victim-of-revenge-porn>, Last accessed: 25 January 2017.
- Baroni, Oliver. "Interview with Rowan Atkinson: «I'm Happy to Say Goodbye to Mr. Bean»." 2011.
- Berger, Miriam. "Brazilian 17-Year-Old Commits Suicide after Revenge Porn Posted Online." *BuzzFeed*, 20 November 2013 Retrieved from: https://http://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-porn-pos?utm_term=.cp9RQ3OPW-.xapjgKV8Y, Last accessed: 25 Januari 2017.
- Brazil. *Lei N° 12.965 Casa Civil / Civil Code*, 23 April 2014.
- Briquelet, Kate and Katie Zavadski. "Nude Snapchat Leak Drove Teen Girl to Suicide." *The Daily Beast*, 6 October 2016 Retrieved from: <http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html>, Last accessed: 25 January 2017.
- Brown, Kristen V. "Is 'This Real?' the Problem with Fake Revenge Porn on Pornhub." *Fusion.net*, 15 October 2015 Retrieved from: <http://fusion.net/story/214811/fake-revenge-porn-on-pornhub/>, Last accessed: 25 Januari 2017.
- Calautti, Katie. "How to Prevent Your Own Leaked Photo Hack." *MTV.com*, 1 September 2014 Retrieved from: <http://www.mtv.com/news/1917333/how-to-prevent-a-photo-hack/>, Last accessed: 25 Januari 2017.
- Campbell, Rebecca. "The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems." *American Psychologist*, (2008): 16, 702.
- Canada: Ontario Superior Court of Justice, *Doe 464533 V N.D.*, 2016 *Onsc 541 (Canlii)*.
- Canada, Protecting Canadians from Online Crime Act.
- Cavendish, Marshall. "Premarital Sex." *Sex and Society* 3, (2010): 4, 663.
- Chiarini, Annmarie. "I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This." *The Guardian*, 19 November 2013 Retrieved from: <https://http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>, Last accessed: 25 January 2017.
- Citron, Danielle Keats and Mary Anne Franks. "Criminalizing Revenge Porn." *Wake Forest Law Review* 49, (2014): 46, 345.

- Corner, Natalie. "Family of Revenge Porn Teen Who Committed Suicide over Online Blackmail Beg Others Not to Suffer in Silence." *Mirror*, 12 November 2015 Retrieved from: <http://www.mirror.co.uk/tv/tv-news/family-revenge-porn-teen-who-6813481>, Last accessed: 25 January 2017.
- Cyber Civil Rights Initiative, "Victims' Stories" <https://http://www.cybercivilrights.org/share-your-story/> (accessed 25 January 2017).
- Dempsey, Michelle Madden. *Prosecuting Domestic Violence: A Philosophical Analysis*. Oxford: Oxford University Press, 2009.
- Dewey, Caitlin. "Meet the Unashamed 33-Year-Old Who Brought the Stolen Celebrity Nudes to the Masses." *The Washington Post*, 5 september 2014 Retrieved from: <https://http://www.washingtonpost.com/news/the-intersect/wp/2014/09/05/meet-the-unashamed-33-year-old-who-brought-the-stolen-celebrity-nudes-to-the-masses/>, Last accessed: 25 January 2017.
- Diehl, Jessica. "Scarlett Johansson on 'Those Nude Photos She Sent to Ryan Reynolds: 'I Know My Best Angles'." *Vanity Fair*, 1 November 2011 Retrieved from: <http://www.vanityfair.com/news/2011/11/scarlett-johansson-december-cover-nude-pictures-sean-penn>, Last accessed: 25 January 2017.
- Drexler, Peggy. "Who's at Fault over J-Law's Nude Photo Hack?" *CNN*, 2 September 2014 Retrieved from: <http://edition.cnn.com/2014/09/01/opinion/drexler-nude-photos-jennifer-lawrence/>, Last accessed: 25 January 2017.
- Dworkin, Andrea. "Against the Male Flood: Censorship, Pornography, and Equality." *Harvard Women's Law Journal* 8, no. 1 (1985): 30, 1.
- Eekelaar, John. *Family Law and Personal Life*. Oxford: Oxford University Press, 2006.
- Ellis, Philip. "The Shame Economy: Why Revenge Porn and the Ashley Madison Hack Should Matter to Everyone." *Huffington Post*, 21 August 2016 Retrieved from: http://www.huffingtonpost.co.uk/philip-ellis/ashley-madison-hack_b_8015804.html, Last accessed: 25 January 2017.
- Engelfriet, Arnoud. "Anonimiteit En Privacy Op Het Internet." *Ius Mentis*, 16 December 2016 Retrieved from: <http://www.iusmentis.com/maatschappij/privacy/internet/>, Last accessed: 25 January 2017.
- Farrel, Paul. "Nude Photos of Jennifer Lawrence and Others Posted Online by Alleged Hacker." *The Guardian*, 1 September 2014 Retrieved from: <https://http://www.theguardian.com/world/2014/sep/01/nude-photos-of-jennifer-lawrence-and-others-posted-online-by-alleged-hacker>, Last accessed: 25 Januari 2017.
- Feinberg, Ashley. "How to Keep Photos of Your Naked Body Off the Internet." *Gizmodo*, 2 September 2014 Retrieved from: <http://gizmodo.com/how-to-keep-photos-of-your-naked-body-off-the-internet-1629587058>, Last accessed: 25 Januari 2017.

- Fern, Ashley. "23 Reasons Why You Should Never, Ever Take a Nude Pic Again." *Elite Daily*, 3 September 2014. Retrieved from: <http://elitedaily.com/women/taking-a-selfie-pic-nudie/737323/>, Last accessed: 25 Januari 2017.
- Forster, Katie. "Tiziana Cantone: Woman's Suicide after Sex Tape Went Viral Prompts Calls for Stronger Online Privacy Laws." *The Independent*, 16 September 2016. Retrieved from: <http://www.independent.co.uk/news/world/europe/tiziana-cantone-sex-tape-revenge-porn-suicide-death-italy-online-privacy-laws-campaign-overhaul-a7310956.html>, Last accessed: 25 January 2017.
- France. *Code Pénal / Criminal Code*.
- Franks, Mary Anne. "Criminalising Revenge Porn: A Quick Guide." *Social Science Research Network*, 9 October 2013. <http://ssrn.com/abstract=2337998> or <http://dx.doi.org/10.2139/ssrn.2337998> 2013. Retrieved from: accessed.
- Franks, Mary Anne. Drafting an Effective Revenge Porn Law: A Guide for Legislators, available at: <https://http://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf>.
- Franks, Mary Anne. "How to Defeat 'Revenge Porn': First, Recognize It's About Privacy, Not Revenge." *The Huffington Post*, 22 June 2016. Retrieved from: accessed.
- Gavison, Ruth. "Feminism and the Public/Private Distinction." *Stanford Law Review* 45, no. 1 (1992): 45, 1-45.
- Germany. *Strafgesetzbuch / Criminal Code*.
- Germany: Bundesgerichtshof, *Urteil Des Vi. Zivilsenats Vom 13.10.2015, Vi Zr 271/14*.
- Germany: Landgericht Koblenz, *Urteil Vom 24.09.2013, Az.: 1 O 103/3*.
- Goldman, Eric. "What Should We Do About Revenge Porn Sites Like Texxxan?" *Forbes*, 28 January 2013. Retrieved from: <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/> - 4e7482234177, Last accessed: 25 January 2017.
- Hall, Garion. "Why Is There So Much Free Porn on the Internet?" *Quora*, 9 January 2016. Retrieved from: <https://http://www.quora.com/Why-is-there-so-much-free-porn-on-the-internet>, Last accessed: 25 January 2017.
- Harris, Whitney C. "How to Keep Your Sexy Photos as Safe as Possible - Because Explaining Them to Your Boss Wouldn't Be Fun." *Women's Health*, 14 July 2015. Retrieved from: <http://www.womenshealthmag.com/sex-and-love/keep-nude-photos-safe>, Last accessed: 25 January 2017.
- Hern, Alex. "How Revenge Porn Sites Rely on Legal Loopholes and Anonymity." *The Guardian*, 9 May 2016. Retrieved from: <https://http://www.theguardian.com/technology/2016/may/09/revenge-porn-websites-legal-loopholes-anonymity>, Last accessed: 25 January 2017.

- Herring, Jonathan. "The Meaning of Domestic Violence: *Yemshaw V London Borough of Hounslow* [2011] Uksc 3." *Journal of Social Welfare and Family Law* 33, no. 3 (2011): 7, 297.
- Hill, Kashmir. "Why We Find Hunter Moore and His 'Identity Porn' Site, Isanyoneup, So Fascinating." *Forbes.com*, 5 April 2012 Retrieved from: <http://www.forbes.com/sites/kashmirhill/2012/04/05/hunter-moore-of-isanyoneup-wouldnt-mind-making-some-money-off-of-a-suicide/> - 6c47595445f8, Last accessed: 25 January 2017.
- Holten, Emma. "Someone Stole Naked Pictures of Me. This Is What I Did About It - Video." *The Guardian*, 21 januari 2015 Retrieved from: <http://www.theguardian.com/profile/emma-holten>, Last accessed: 25 January 2017.
- Israel. *מינית הטורדה למניעת חוק* / *Sexual Harassment Law*, 1998.
- Japan. *Law No. 126 of 2014: Shiji Seitoki Gazon Kiroku No Teikyoto Niyoru Higai No Boushi Nikansuru HoRitsu* / *Act on Prevention of Victimization Resulting from Provision of Private Sexual Image*.
- Jr., Lou Chibbaro. "Gay Teacher's Sex Video Stolen, Posted to School Site." *Washington Blade*, 10 February 2016 Retrieved from: <http://www.washingtonblade.com/2016/02/10/gay-teachers-sex-video-stolen-posted-to-school-site/>, Last accessed: 25 January 2017.
- Kant, Immanuel. *Lectures on Ethics*. Translated by Peter Heath, Edited by Peter Heath; J.B. Schneewind. Cambridge: Cambridge University Press, 1784 (1997).
- Kant, Immanuel. *Groundwork for the Metaphysics of Morals*. Translated by Allen W. Wood. New Haven and London: Yale University Press, 2002.
- Kashner, Sam. "Both Huntress and Prey." *Vanity Fair*, 20 October 2014 Retrieved from: <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy>, Last accessed: 25 January 2017.
- Khodyakov, Dmitry. "Trust as a Process: A Three-Dimensional Approach." *Sociology* 41, no. 1 (2007): 17, 115.
- Kingdom, United. *Criminal Justice and Courts Act 2015*, Queen and Parliament of the United Kingdom.
- Kingdom, United: Criminal Law and Legal Policy Unit, *Criminal Justice and Courts Act 2015, Circular No. 2015/01*.
- Kirst, Virginia. "Intime Bilder, Für Ein Millionenpublikum Gedacht." *Welt.de*, 8 February 2015 Retrieved from: <https://http://www.welt.de/vermischtes/article137244750/Intime-Bilder-fuer-ein-Millionenpublikum-gedacht.html>, Last accessed: 25 January 2017.
- Lacey, Nicola. "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law." *The Canadian Journal of Law and Jurisprudence* 11, no. 01 (1998).
- Leijten, Jorg. "Roc Hoeft Niet Mee Te Werken Aan Onderzoek Seksfilmpje." *NRC*, 21 September 2016 Retrieved from: <http://www.nrc.nl/nieuws/2016/09/21/roc-hoef-inloggegevens-leerlingen-niet-te-delen-a1522533>, Last accessed: 25 January 2017.

- Lenhart, Amanda and Maeve Duggan. "Couples, the Internet, and Social Media: How American Couples Use Digital Technology to Manage Life, Logistics, and Emotional Intimacy within Their Relationships." *Pew Research Center*, (2014).
- Levendowski, Amanda. "Our Best Weapon against Revenge Porn: Copyright Law?" *The Atlantic*, 4 February 2014 Retrieved from: <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>, Last accessed: 25 January 2017.
- Lowbridge, Caroline. "Is Revenge Porn Already Illegal in England?" *BBC News*, 28 December 2014 Retrieved from: <http://www.bbc.com/news/uk-england-30308942>, Last accessed: 25 January 2017.
- MacKinnon, Catharine A. *Feminism Unmodified*. Cambridge (Massachusetts) and London.: Harvard University Press, 1987.
- Marcel, G.H. *Being and Having (Original Title: Être Et Avoir)*. Translated by Katherine Ferrer. Westminster: Dacre Press, 1949.
- Matsui, Shigenori. "The Criminalization of Revenge Porn in Japan." *Washington International Law Journal Association* 24, no. 2 (2015): 29, 289.
- McGlynn, Clare and Erika Rackley. "Not 'Revenge Porn', but Abuse: Let's Call It Image-Based Sexual Abuse." *Inherently Human*, 15 February 2016 Retrieved from: <https://inherentlyhuman.wordpress.com/2016/02/15/not-revenge-porn-but-abuse-lets-call-it-image-based-sexual-abuse/>, Last accessed: 25 January 2017.
- Merleau-Ponty, M. *Phenomenology of Perception (Phénoménologie De La Perception)*. Translated by Colin Smith. New York: The Humanities Press, 1965 (original 1945).
- Messina, Sergio. "Realcore, the Digital Porno Revolution." *Pankov, the underground research*, 20 November 2010 Retrieved from: <https://pankov.wordpress.com/2010/11/20/realcore-the-digital-porno-revolution/>, Last accessed: 25 January 2017.
- Morgan, Robin. *Sisterhood Is Powerful: An Anthology of Writings from the Women's Liberation Movement*. New York: Random House, 1970.
- Netherlands, The. *Wetboek Van Strafrecht / Book of Criminal Law*.
- Olivarius, Ann. "Emma Holten Has Spoken and Now It's Time for Action against Revenge Porn." *mcolaw.com*, 23 January 2015 Retrieved from: <http://www.mcolaw.com/blog/2015/1/23/emma-holten-has-spoken-and-now-its-time-for-action-against-revenge-porn-.WIdzjBFx9mA>, Last accessed: 25 January 2017.
- Peters, Lucia. "Activist Emma Holten Fights Back against Revenge Porn by Reclaiming Her Body in a Powerful Photo Series." *Bustle*, 29 December 2014 Retrieved from: <https://http://www.bustle.com/articles/55892-activist-emma-holten-fights-back-against-revenge-porn-by-reclaiming-her-body-in-a-powerful-photo>, Last accessed: 25 January 2017.

- Pew Research Global Attitudes Project. "Global Views on Morality - Premarital Sex." 15 April 2014 Retrieved from: <http://www.pewglobal.org/2014/04/15/global-morality/table/premarital-sex/>, Last accessed: 25 January 2017.
- Philippines. *Anti-Photo and Video Voyeurism Act of 2009 (Republic Act No. 9995)*.
- Premack, Rachel. "Dani Mathers: What Happened When a Playboy Playmate Posted a Photo of an Unwitting Naked Woman on Snapchat." *The Independent*, 18 July 2016 Retrieved from: accessed.
- Sadleir, Emma and Tamsyn de Beer. *Don't Film Yourself Having Sex*. South Africa: Penguin Random House, 2014.
- Sartre, Jean-Paul. *Being and Nothingness (L'être Et Le Néant*. Translated by Hazel E. Barnes. London: Methuen&Co LTD, 1957 (originally 1943).
- Schauer, Frederick. "Internet Privacy and the Public-Private Distinction." *Jurimetrics* 38, no. 4 (1998): 10, 555.
- Scheller, Samantha H. "A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn." *North Carolina Law Review* 93, (2014): 46, 551.
- Scottoline, Lisa. "Chick Wit: Don't Want Your Nude Selfies Hacked? Don't Take Any!" *The Inquirer*, 7 September 2014 Retrieved from: http://www.philly.com/philly/columnists/20140907_Chick_Wit__Don_t_want_your_nude_selfies_hacked__Don_t_take_any_.html, Last accessed: 25 January 2017.
- Services, Royal Canadian Mounted Police B.C. Crime Prevention, "Nothing Is Private Online" <http://www.rcmp-grc.gc.ca/cycp-cpcj/is-si/brochure/safety1316-secur1316-eng.htm> (accessed 25 January 2017).
- Smith, Lynn. "Hudgens Apologizes for Nude Photo." *Los Angeles Times*, 7 September 2007 Retrieved from: <http://www.latimes.com/entertainment/gossip/la-et-vanessa9sep09-story.html>, Last accessed: 25 January 2017.
- Solove, Daniel J. *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet*. New Haven: Yale University Press, 2007.
- Sullivan, Gail. "When Will We Learn: Nothing Is Secure on the Internet." *The Washington Post*, 18 April 2014 Retrieved from: https://http://www.washingtonpost.com/news/morning-mix/wp/2014/04/18/when-will-we-learn-nothing-is-secure-on-the-internet/?utm_term=.b73b7f530731, Last accessed: 25 January 2017.
- Tsoulis-Reay, Alexa. "A Brief History of Revenge Porn." *New York Magazine*, 21 July 2013 Retrieved from: <http://nymag.com/news/features/sex/revenge-porn-2013-7/>, Last accessed: 25 January 2017.
- Two to Tangle Productions, Jill Bauer (Director) and Ronna Gradus (Director). "Hot Girls Wanted." 84 min. USA, 2015.

Walker, Tim. "Man Who Got Rich from 'Revenge Porn' Website Ugotposted Is Finally Exposed." *The Independent*, 12 December 2013 Retrieved from: <http://www.independent.co.uk/news/world/americas/man-who-got-rich-from-revenge-porn-website-is-finally-exposed-9001709.html>, Last accessed: 25 January 2017.

Appendix A

States that criminalised non-consensual disclosure of private, sexual images or films that have been specifically made with consent, and a brief overview of the content of each law.

Germany: Germany amended the law called “*Verletzung des höchstpersönlichen Lebensbereichs durch Bildaufnahmen*” (§201a Abs 1 S 4, Strafgesetzbuch / Criminal Code (Germany)) in 2014 criminalising the disclosure of images made with consent, but disclosed without consent if these images violate the highly personal sphere of life (*höchstpersönlichen Lebensbereich*) of the individual depicted in them. Although this law did not seek to criminalize revenge pornography specifically, perpetrators of revenge pornography can be prosecuted under it. The court Landgericht Koblenz had previously ruled that images of a private and sexual nature, taken during the course of an intimate relationship should be deleted if one of the (ex-)partners so requests (see: *Urteil vom 24.09.2013, Az.: 1 O 103/3*, Landgericht Koblenz.). This was later confirmed by the Bundesgerichtshof (see: *Urteil des VI. Zivilsenats vom 13.10.2015, VI ZR 271/14*, Bundesgerichtshof.);

The United Kingdom: The United Kingdom Criminal Justice and Courts Act 2015 section 33 criminalises disclosing private sexual photographs and films without the consent of the individuals appearing in it, with the intent to cause distress. The disclosure of a photograph or film does not prove the intent to cause distress merely because that was a natural and probable effect of the disclosure: if intent to cause distress cannot be proved, disclosure is explicitly excluded from criminalisation under this act (*Criminal Justice and Courts Act 2015*, Queen and Parliament of the United Kingdom, S 33 (8).). The intent to cause distress is a necessary requirement for this Act to be applicable. Also excluded is transposing the head of a former partner onto a sexual photograph of another person (*Criminal Justice and Courts Act 2015, Circular No. 2015/01*, Criminal Law and Legal Policy Unit, Annex C2, Q7).;

Victoria (Australia): The Australian state Victoria criminalised ‘sexting’, although also covering the criminalisation of revenge pornography through that same law, in 2014. Not

only the intentional distribution of an intimate image of another person to a third person without the depicted individuals express or implied consent was criminalised (Crimes Amendment (Sexual Offences and Other Matters) Act 2014 Victoria (Australia), S 41 DA.), the *threat* of such distribution was criminalised as well (ibid., S 41 DB.);

United States of America: 34 States and Washington D.C. in the United States of America consider themselves to have laws criminalising revenge pornography. The classification varies per state and goes from a misdemeanour to a felony. The different laws can be dissected in two approaches in the criminalisation. Some states have criminalised the non-consensual disclosure of images or films made with consent (California (California Penal Code 647(j)(4)); Florida (Florida Statute 784.049); Maryland (§ 3-809, Maryland Code); Michigan (MCL 750.145e); New Hampshire (N.H. Rev. Stat. § 644:9-a); Tennessee (Tenn. Pub. Act ch. 872).

Appendix B

States that criminalised non-consensual disclosure of private, sexual images or films either made with or without consent, and a brief overview of the content of each law.

The Philippines: The Philippines Anti-Photo and Video Voyeurism Act of 2009 criminalises the copying, reproducing, selling, distributing, publishing and/or broadcasting of photos or videos of persons performing sexual acts or similar activities, as well as of images of private areas of the individual(s) depicted, if the individual(s) involved had a reasonable expectation of privacy (*Anti-Photo and Video Voyeurism Act of 2009 (Republic Act No. 9995)*, (Philippines), S 4.). It should be noted that the Act explicitly states not to differentiate between situations in which consent for images or videos was given, and the situation in which consent for images or videos was absent: both situations are equally criminalised under this Act. Nor is a differentiation being made between the individual who originally disclosed the offending images or films and individuals who obtained images second hand. The Act seeks to protect the honour, dignity and integrity of individuals depicted in such images.;

Israel: Israel amended its Prevention of Sexual Harassment Law in 2014 to include the publication of photographs, films or recordings that focus on the sexuality of the individual depicted in them, if made public in a way that facilitates the identification of the depicted individual and under circumstances that may degrade, humiliate or shame the depicted individual (*מינית הטורדה למניעת חוק*/ *Sexual Harassment Law*, (Israel) 1998., S 3 §5a.). This law includes the publication of photographs, films or recordings that have been edited so as to *appear* to be the individual whose face and/or identifying information are visible.;

Canada: Revenge pornography was criminalised in Canada in 2014. The Canadian Act criminalises the knowingly publishing, distributing, transmitting, selling, making available or advertising of an intimate image of a person, knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not

that person gave their consent to that conduct (Protecting Canadians from Online Crime Act (Canada), S 162.1 (1).);

Japan: Revenge pornography was criminalised in Japan in 2014. “The Act’s primary purpose is to criminalize publicizing “private sexual image[s]” that disturb the tranquillity of someone’s private life” ((Matsui 2015), p.300). Consent for the taking of the images or films is irrelevant for prosecution under this law (*Law No. 126 of 2014: Shiji Seiteki Gazou Kiroku No Teikyoto Niyoru Higai No Boushi Nikansuru Horitsu / Act on Prevention of Victimization Resulting from Provision of Private Sexual Image*, (Japan), Artt. 1 - 2 (1).);

South Australia (Australia): The state South Australia criminalised the distribution of an invasive image of another person, if the perpetrator knows or has “reason to believe that the other person does not consent to that particular distribution. This includes if the other person does not consent to distribution of the image generally in addition to that particular distribution. An invasive image is a moving or still image of a person: Engaged in a sexual act of a kind not ordinarily done in public; or using a toilet; or in a state of undress so their bare genital or anal region is visible” (Offences Act 1953 South Australia (Australia), S 26C.);

USA: Most states in the USA that criminalised revenge pornography do not specify the need for consent for the taking of the images or films and merely focus on the question of consent for the disclosure. These states have criminalised non-consensual pornography, but have not excluded revenge pornography from this criminalisation: different concepts are criminalised under these laws. These laws were more often than not made with the intent to criminalise revenge pornography, and it is unlikely that acts of voyeurism, that are criminal under it, will be prosecuted through it if more appropriate voyeurism laws are in place. It is nevertheless worth mentioning this wider reach of the law, as it is another example of the confusion surrounding revenge pornography. It should be noted that the present paper considers knowledge about the existence of the material as different from consent for the making of the material by the victim, as awareness of the existence might have started after the images were produced (Alaska (Alaska Stat. § 11.61.120.); Arizona (Arizona Revised Statutes, 13-1425); Arkansas

(Arkansas Code 5-26-314); Colorado (Colorado Revised Statutes 18-7-107 and 18-7-108); Connecticut (Conn. Gen. Stat. § 53a-189c. Sec. 8); Delaware (§ 1335, Title 11, Delaware Code); D.C. (D.C. Law 20-275); Georgia (Georgia Code Title 16 Chapter 11 Article 3 Part 1 16-11-90); Hawaii (Hawaii Revised Statutes, § 711-1110.9); Idaho (§ 18-6609, Idaho Code); Illinois (§ 11-23.5, Illinois Criminal Code); Kansas (Kan. Stat. § 21-6101(a)(8)); Louisiana (R.S. 14:283.2.); Maine (Sec. 1. 17-A MRSA 511-A); Minnesota (Minn. Stat. § 617.261); Nevada (NRS, Chapter 200, §2-6); New Jersey (§ 2C:14-9, New Jersey Code); New Mexico (New Mexico Criminal Code, Act Unauthorized Distribution of Sensitive Images, Sec. 1 A); North Carolina (General Statutes Section 14-190.5A); North Dakota (Section 12.1-17-07.2 of the North Dakota Century Code); Oklahoma (Oklahoma Statutes, Section 1040.13b of Title 21); Oregon (ORS § 163.472); Pennsylvania (Title 18 Pennsylvania Consolidated Statutes § 3131); Texas (Texas Penal Code 21.16); Utah (§ 76-5b-203, Utah Code); Vermont (Sec. 2. 13 V.S.A. § 2606); Virginia (§ 18.2-386.2, Code of Virginia); Washington (Title 9A RCW); Wisconsin (§ 942.09, Code of Wisconsin).).