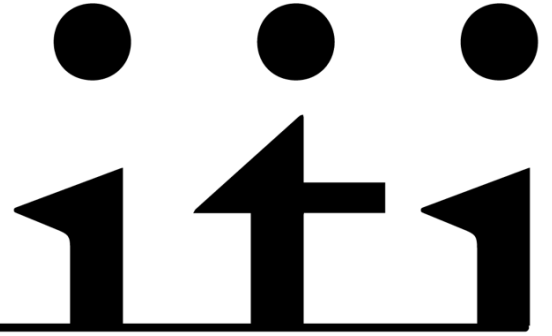


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Criminalising Deep Fake Pornography

A Gender-Specific Analysis of Image-Based Sexual Abuse

RÜYA TUNA TOPARLAK

Zitiervorschlag

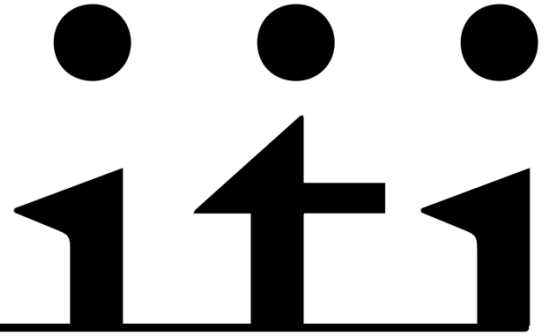
TOPARLAK, Criminalising Deep Fake Pornography,
in: cognitio 2023/1.

URL: cognitio-zeitschrift.ch/2023-1/Toparlak

DOI: [10.5281/zenodo.7791799](https://doi.org/10.5281/zenodo.7791799)

ISSN: 2624-8417





Criminalising Deep Fake Pornography

A Gender-Specific Analysis of Image-Based Sexual Abuse

RÜYA TUNA TOPARLAK*

Pornographic deep fakes account for the majority of deep fakes online. They overwhelmingly target women. Deep fake technology is getting easier to use and widely accessible. It is now possible for everyone to create non-consensual pornographic deep fakes of regular people. In this sense, they are exacerbating the broader problem of image-based sexual abuse. This paper inspects the applicable personality rights under Swiss Civil Law and makes the case for criminalising pornographic deep fakes under a broader context of image-based sexual abuse.

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I. Introduction

So will I turn her virtue into pitch

And out of her own goodness make the net

That shall enmesh them all.

- W. Shakespeare

(Iago in Othello Act II Scene iii)

When actress Kristen Bell found out there were pornographic deep fake videos of her circulating online, her first reaction was shock.¹ Her face was superimposed onto a pornographic actress's body, making it appear as though she was the one acting in the pornographic video. «This is my face, it belongs to me. I did not consent to this. That's why it's not okay even if it's labelled as fake.» she said.² Her story is one of many. Numerous celebrity women like Emma Watson, Gal Gadot, and Taylor Swift are being exploited by non-consensual pornographic deep fakes.³ Due to the large availability of photographs, videos, and voice recordings, celebrity women were the first victims of this technology.⁴ In recent years, this technology has become better, faster,

and easily accessible to everyone.⁵ With the wide-reach availability of deep fake software, it is now possible for everyone to use it with ease and create non-consensual pornographic depictions of regular people.⁶

Deep fakes are a new technology that is used to manipulate media. It swaps bodies and faces, manipulates expressions and creates highly realistic results.⁷ Deep fakes are partially regulated under civil and criminal law. This paper provides an overview of applicable personality rights under Swiss Civil Law. It reviews case law on the right to one's image, voice, and expression as well as violations of honour for disputes concerning non-consensual nude paintings and photo-montage and aims to draw parallels for future disputes concerning deep fake pornography. With this analysis, the paper aims to illustrate the specific legal challenges of addressing non-consensual pornographic deep fakes under civil law. Here, balancing freedom of art, satire, and expression as well as the victim not being immediately recognisable in videos, pose challenges. Furthermore, identifying perpetrators and getting the videos offline are harder to do with the traditional instruments of civil law. Moreover, the paper underlines the core issue with pornographic deep fakes as the non-consensual violation of a person's sexual autonomy and self-determination, not the damaging character of these videos. Thus, they should be addressed in a way that reflects this, which makes civil code inherently ill-suited.

To inspect and frame these challenges properly, this paper applies gender-based lens to deep fakes and inspects them within the interconnection of image-based sexual

¹ ABRAM CLEO, The Most Urgent Threat of Deepfakes Isn't Politics. It's Porn, in: *Vox* of June 8, 2020.

² CLEO (fn. 1).

³ CITRON KEATS DANIELLE, Sexual Privacy, in: *Yale Law Journal* 2019/128, p. 1870 et seqq., p. 1921 et seq.

⁴ AJDER Henry et al., The State of Deepfakes: Landscape, Threats, and Impact, in: *Deeptrace Labs* 2019, p. 3.

⁵ CHESNEY ROBERT/CITRON KEATS DANIELLE, Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security, in: *California Law Review* 2019/107, p. 1753 et seqq., p. 1762.

⁶ LANTWIN TOBIAS, Deep Fakes – Düstere Zeiten für den Persönlichkeitsschutz?, in: *MMR* 2019/9, p. 574 et seqq., p. 575.

⁷ CHESNEY/CITRON (fn. 5), p. 1758.

abuse with other types of violence. It provides a closer look at the harms and effects of pornographic deep fakes and societal attitudes towards deep fake pornography. Through the continuum framework of sexual violence, the paper illustrates the need to address deep fake pornography in a broad context of image-based sexual abuse. Following, the paper supports the need for a criminal response under a clause that would address all abusive behaviour involving non-consensual taking and sharing of a person's sexual images. Lastly, it reviews image-based sexual abuse under the reform of the Swiss Criminal Code on sexual offences. Thus, the paper advocates for effective prosecution and proper societal evaluation and condemnation of this behaviour.

II. Setting the Scene: A Closer Look on Deep Fake Pornography

There are many analogue and digital techniques that can be used to create videos and other content that misrepresent people and events. Deep fakes have been recently popularised due to the hyper realistic results they create; they are a sophisticated trend in digital impersonations.⁸ The technology is used for swapping faces and bodies in pictures and videos.⁹ It can also be used to manipulate existing video and audio content. It creates realistic impersonations, making individuals appear in places they've never been in, doing things they never were doing, saying things they never said.¹⁰ This promising new technology can be a great tool for self-expression, art, satire, entertainment, etc.¹¹ Yet non-consensual pornographic deep fakes of women constitute the vast majority

of the deep fakes circulating online.¹²

An analysis conducted in 2019 by the cybersecurity company Deeptrace found that 96 % of all deep fakes online are pornographic and disproportionately female.¹³ The top four websites dedicated to deep fake pornography received more than 134 Million views on videos targeting hundreds of women worldwide.¹⁴ This phenomenon emerged around 2018 when a Reddit user released «FakeApp» that enabled users to easily create deep fakes for free.¹⁵ Easy access to this technology, created a massive surge in the non-consensual pornographic deep fakes.¹⁶ A now banned subreddit was dedicated to creating deep fakes by inserting faces of female celebrities into pornographic videos.¹⁷ Within a few months of its release, FakeApp had been downloaded more than 100.000 times, enabling regular people to create realistic deep fakes.¹⁸

The FakeApp project no longer exists, however, the technology is thriving. Similar software has since then surfaced and amassed big user bases.¹⁹ One such software is called «Deepfacelab» and according to its developers, more than 95 % of deep fakes on the internet are created using this software.²⁰ Another popular software is called «Reface», which was launched in January

⁸ The technology uses artificial intelligence and machine learning techniques to create realistic results. For more explanations on the technique, see CHESNEY/CITRON (fn. 5), p. 1758.

⁹ CHESNEY/CITRON (fn. 5), p. 1758.

¹⁰ CHESNEY/CITRON (fn. 5), p. 1758.

¹¹ CHESNEY/CITRON (fn. 5), p. 1769.

¹² AJDER et al. (fn. 4), p. 1 et seq.

¹³ AJDER et al. (fn. 4), p. 1 et seq.

¹⁴ AJDER et al. (fn. 4), p. 1 et seq.

¹⁵ DELFINO REBECCA, Pornographic Deepfakes – Revenge Porn's Next Tragic Act – the Case for Federal Criminalization, in: *Fordham Law Review* 2019/88(3), p. 887 et seqq., p. 893.

¹⁶ CHESNEY/CITRON (fn. 5), p. 1762; MESKYS EDVINAS et al., Regulating Deep Fakes: Legal and Ethical Considerations, in: *Journal of Intellectual Property Law & Practice* 2020/15(1), p. 24 et seqq., p. 25.

¹⁷ CHESNEY/CITRON (fn. 5), p. 1772.

¹⁸ ROOSE KEVIN, Here come the fake videos, too, in: [The New York Times](#) of March 4, 2018.

¹⁹ KUMAR VARUN, 8 Best Deepfake Apps and Tools in 2022, in: [Rank Red](#) of 2022.

²⁰ PEROV IVAN, Deepfacelab Is the Leading Software for Creating Deepfakes, in: [GitHub](#) of 2022.

2020 and has been downloaded 70 Million times in one year and given a 5.5 Million USD seed round.²¹ These are all easy-to-use software and require no technical background. For a realistic result, one needs to identify the video to be used and feed as few as 500 images of the victim to be superimposed.²² A highly realistic result may take up to 40.000 source images.²³ While highly realistic deep fakes require a high amount of source images and computing power, there are alternatives for «undressing women» that operate on a much easier level. One such software called «deepnude» was released in 2019. It allowed users to «strip» clothed women in 30 seconds and generate naked body parts.²⁴ Although creators took the official website down, the software continues to be independently distributed.²⁵

A. The Terminology of Image-Based Sexual Abuse

Scholars have adopted different terms to comprehensively refer to the diverse range of abusive behaviour involving sexual images, like revenge porn, non-consensual pornography, digital sexual violence, and image-based sexual abuse.²⁶ Most colloquially used term revenge porn emerged to describe the non-consensual sharing of nude/sexually suggestive images of a person, mostly an ex-

partner.²⁷ The term is highly criticised by feminist and legal scholars alike.²⁸ The critique convenes around the term revenge porn focusing on the revenge intent behind and the content of the images, downplaying the act as something similar to consensual pornography, and the victim-blaming connotations.²⁹ Research shows that perpetrators share non-consensual sexual images with differing motivations, not just for revenge purposes.³⁰

Adopting a terminology that highlights the act of abuse and effects rather than the pornographic content of the medium also provides proper societal designation.³¹ Thus, this paper will use the most comprehensive term image-based sexual abuse while referring to all abusive behaviour that would involve the non-consensual taking and sharing of sexual images.³² Non-consensual pornographic deep fakes will be observed within image-based sexual abuse, as a new technology that is exacerbating this problem.³³ The term digital violence shall be used to encompass many forms of abuse happening online, including image-based sexual abuse,

²¹ LOMAS NATASHA, Reface Grabs \$5.5m Seed Led by a16z to Stoke Its Viral Face-Swap Video App, in: [Techcrunch](#) of December 8, 2020.

²² For a comparative analysis of the number of source images used, see HAUSER ANDREA, This Is How You Create the Perfect Deepfake, in: [Scip](#) of December 22, 2018.

²³ Arnold, How Many Iterations Does a Realistic Deepfake Image Need?, in: [Deepfake Now](#) of April 21, 2020.

²⁴ COLE SAMANTHA, Creator of DeepNude, App That Undresses Photos of Women, Takes It Offline, in: [Vice](#) of June 27, 2019.

²⁵ AJDER et al. (fn. 4), p. 8.

²⁶ For a comparative analysis of the terminology, see MADDOCKS Sophie, From Non-Consensual Pornography to Image-Based Sexual Abuse: Charting the Course of a Problem with Many Names, in: *Australian Feminist Studies* 2018/33(97), p. 345 et seqq.

²⁷ MADDOCKS (fn. 26), p. 347.

²⁸ MADDOCKS (fn. 26), p. 348; HENRY NICOLA et al., *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery*, London 2021, p. 3 et seqq.; MCGLYNN CLARE/RACKLEY ERIKA/HOUGHTON RUTH, Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse, in: *Feminist Legal Studies* 2017/25(1), p. 25 et seqq., p. 30.

²⁹ HENRY et al. (fn. 28), p. 3 et seqq.

³⁰ Some of these motivations are power, control, wanting to have fun, prove «masculinity», see HENRY et al. (fn. 28), p. 72 et seqq.

³¹ MADDOCKS (fn. 26), p. 350.

³² The term image-based sexual abuse has been developed by Clare McGlynn and Erika Rackley. It is adopted in the literature to address all abusive behaviour that would involve the non-consensual taking and sharing of sexual images, e.g., upskirting, downblousing. See MCGLYNN/RACKLEY/HOUGHTON (fn. 28), p. 26.

³³ MANIA KAROLINA, The Legal Implications and Remedies Concerning Revenge Porn and Fake Porn: A Common Law Perspective, in: *Sexuality & Culture* 2020/24(6), p. 2080 et seqq., p., 2089.

cyberstalking, harassment, doxxing, etc.

B. Psychological, Emotional, and Financial damage of Image-Based Sexual Abuse

When victims discover that they have been used in pornographic deep fakes, the damage may be profound.³⁴ A qualitative study conducted in 2017 with 18 image-based sexual abuse survivors revealed serious mental health effects for victims, including PTSD, suicidality, anxiety and depression.³⁵ The study highlighted the similarity of the effects on the victims with other types of sexual assault.³⁶ Other key themes in victims of image-based sexual abuse were identified as constrained liberty, isolation, and withdrawal from online life.³⁷ This was the case when Rana Ayyub, an investigative journalist from India, was victimised by pornographic deep fakes.³⁸ Her face was superimposed into a pornographic video and circulated widely. The stress sent her to the hospital with heart palpitations, high blood pressure, and anxiety. She withdrew from online life and started self-censoring.³⁹

The harmful culture of victim blaming that is pertinent in other forms of image-based sexual abuse is also present in non-consensual deep fake pornography.⁴⁰ In an

interview, one woman noted the victim blaming and harassment she experienced after her digitally altered images were made public. She stated that the harassment was also racially motivated.⁴¹ Another intersectionality happens with homophobia and transphobia.⁴² Deep fakes may be used to share information about someone's sexuality, identity and perpetrate discrimination.⁴³ One such example was from Malaysia. A political aid was arrested following a video depicting him having homosexual intercourse with the Malaysian minister of economic affairs.⁴⁴ The Malaysian prime minister alleged that the video was a deep fake, but the political aid lost his job, got arrested and both men suffered damages, nonetheless.

The harms of image-based sexual abuse certainly have an economic dimension. The stigma nude images carry, especially for women and girls, may cause consequences in the job market.⁴⁵ Job loss or problems of securing new employment were certainly observed as harms caused by other forms of image-based sexual abuse.⁴⁶ It is fair to predict that deep fakes will enhance this problem.⁴⁷ Another aspect of financial loss might occur when pornographic deep fakes are used for extortion.⁴⁸ A revenge porn website

³⁴ CITRON (fn. 3), p. 1926.

³⁵ BATES SAMANTHA, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health effects of Revenge Porn on Female Survivors*, in: *Feminist Criminology* 2017/12(1), p. 22 et seqq., p. 30.

³⁶ BATES (fn. 35), p. 39.

³⁷ HENRY et al. (fn. 28), p. 11.

³⁸ AYYUB RANA, *I Was the Victim of a Deepfake Porn Plot Intended to Silence Me*, in: *The Huffington Post* of November 21, 2018.

³⁹ AYYUB (fn. 38).

⁴⁰ CITRON KEATS DANIELLE/FRANKS MARY ANNE, *Criminalizing Revenge Porn*, in: *Wake Forest Law Review* 2014/49(2), p. 345 et seqq., p. 348, 367.; JURASZ OLGA/BARKER KIM, *Sexual Violence in the Digital Age: A Criminal Law Conundrum?*, in: *German Law Journal* 2021/22(5), p. 784 et seqq., p. 795; UHL CAROLYN et al., *An Examination of*

Nonconsensual Pornography Websites, in: *Feminism & Psychology* 2018/28(1), p. 50 et seqq., p. 61 et seq.

⁴¹ HENRY et al. (fn. 28), p. 56.

⁴² CITRON (fn. 3), p. 1898 and 1920 et seqq.; HENRY et al. (fn. 28), p. 34 et seq.

⁴³ HENRY et al. (fn. 28), p. 30.

⁴⁴ BLAKKARLY JARNY, *A Gay Sex Tape Is Threatening to End the Political Careers of Two Men in Malaysia*, in: *SBS News* of June 17, 2019; SIMONITE TOM, *The Web Is Drowning in Deepfakes and Almost All of Them Are Porn*, in: *Wired UK* of October 13, 2019.

⁴⁵ CHESNEY/CITRON (fn. 5), p. 1773

⁴⁶ CITRON/FRANKS (fn. 40), p. 352.; CITRON (fn. 3), p. 1891 and 1921.

⁴⁷ VAN HUIJSTEE MARIËTTE et al., *Panel for the Future of Science and Technology, Tackling Deepfakes in European Policy*, Strasbourg 2021, p. 30.

⁴⁸ CHESNEY/CITRON (fn. 5), p. 1772.

operator was convicted of six counts of extortion due to him charging 350\$ to victims to remove their pictures and information from his website.⁴⁹ Pornographic deep fakes make it easier for extortion to happen alongside image-based sexual abuse.⁵⁰

C. Gendered Element of Victimization in Deep Fake Pornography and Image-Based Sexual Abuse

Young adult women are more likely to be victimised by non-consensual deep fake pornography.⁵¹ Majority of pornographic deep fakes online are female.⁵² This parallels broader statistics on image-based sexual abuse.⁵³ A recent content analysis scanned seven so-called revenge porn websites and similarly found that 92 % of victims were women.⁵⁴

Women are not just more likely to be victimised by image-based sexual abuse, but they also experience the effects in a more profound way.⁵⁵ A study conducted with a similar number of male/female victims found that female victims were much more likely to report feelings of unsafety, harm to their health, relational impacts and reputational concerns.⁵⁶ Nude images carry a stigma, especially for women and girls and this stigma heightens the negative effects victims experience.⁵⁷ Non-consensual deep fake pornography provides new ways for perpetrators of image-based sexual abuse to victimise women. They no longer need «actual» nude imag-

es to threaten, humiliate, poke fun at, and control their victims.⁵⁸

D. Societal Attitudes Towards Deep Fake Pornography

Pornographic deep fakes are likely to exacerbate the image-based sexual abuse problem.⁵⁹ Yet, the majority of people are indifferent to this phenomenon.⁶⁰ The harms are downplayed, and digital sexual violence is regarded as less serious than offline crimes of violence.⁶¹ The cases of sexual violence that get reported are already low⁶² and reports of online sexual violence are often seen as more of a stretch of limited police sources.⁶³ In the cases of specifically non-consensual pornographic deep fakes, the reason for this downplaying has a couple of different dimensions.

Many perpetrators do not recognise the harms their creations are doing and regard their motivations as «more of a joke». ⁶⁴ Especially in such depictions where the video is clearly fake, perpetrators and viewers might falsely assume there is no real harm. Although pornographic deep fakes do not actually depict featured victim's actual private parts, they still exercise dominion over people's sexuality and exhibit it to others without consent.⁶⁵ Regardless of their level of realism, all pornographic deep fakes reduce

⁴⁹ MADAWI ARWA, Revenge Porn Website Operator Jailed, in: [The Guardian](#) of April 4, 2015.

⁵⁰ CHESNEY/CITRON (fn. 5), p. 1772.

⁵¹ CHESNEY/CITRON (fn. 5), p. 1773.

⁵² AJDER et al. (fn. 4), p. 1.

⁵³ CITRON (fn. 3), p. 1908.

⁵⁴ UHL et al. (fn. 40), p. 50.

⁵⁵ HENRY et al. (fn. 28), p. 48.

⁵⁶ This particular statistic only looks at the gender binary, however the researchers underline that harms are profound for people who identify outside of the gender binary. Deep fakes can be used to «out» someone's gender or sexual identity. HENRY et al. (fn. 28), p. 48.

⁵⁷ CHESNEY/CITRON (fn. 5), p. 1773.

⁵⁸ HENRY et al. (fn. 28), p. 72 et seqq.

⁵⁹ BAUER JENNY-KERSTIN/HARTMANN ANS, Formen digitaler geschlechtsspezifischer Gewalt, in: Prasad Nivedita (ed.), *Geschlechtsspezifische Gewalt in Zeiten der Digitalisierung*, Bielefeld 2019, p. 63 et seqq., p. 85.; MANIA (fn. 33), p. 2089.

⁶⁰ MESKYS et al. (fn. 16) p. 27.

⁶¹ CITRON/FRANKS (fn. 40), p. 350.

⁶² In Switzerland, only 8 % of female sexual violence victims reported the crime to the police. BORNATICI CHRISTINA, Eidgenössische Kommission für Frauenfragen EKF, [Junge Frauen in der Schweiz: Wo stehen sie heute?](#), Bern 2022.

⁶³ JURASZ/BARKER (fn. 40), p. 794.;

CITRON/FRANKS (fn. 40), p. 366.

⁶⁴ HENRY et al. (fn. 28), p. 72 et seqq.

⁶⁵ CITRON (fn. 3), p. 1921.

victims to sex objects and violate the depicted person's rights.⁶⁶ Victims feel the same level of humiliation, alienation, and fright. This is illustrated in journalist Rana Ayyub's experience of finding out pornographic deep fake videos of herself.⁶⁷ She said «You can call yourself a journalist, you can call yourself a feminist but, in that moment, I just couldn't see through the humiliation.»⁶⁸

In a gender-specific inspection, scholars suggested that ritualised acts of sexual humiliation against women are used for men's collective amusement in the service of proving one's position in male social hierarchy.⁶⁹ It is suggested that the emergence of this technology with targeting celebrities played a part in this initial indifference attitude.⁷⁰ The rise of deep fake celebrity pornography was categorised as disenfranchised men, whose efforts to exert power over women have failed, seeking out means through which to consolidate «male» identity and status.⁷¹ These were/are the women that most men will never be able to touch or possess.⁷²

Gendered messages minimising the impact of non-consensual pornographic deep fakes are powerful and often internalised by victims.⁷³ All these reasons mentioned here, contribute to most of the cases going unreported.⁷⁴

E. Interconnection of Image-Based Sexual Abuse With Other Types of Violence

It is not uncommon for image-based sexual

abuse to occur alongside other types of digital and offline violence. One such behaviour is «doxing», which heightens the effects of image-based sexual abuse.⁷⁵ A study conducted with 1244 image-based sexual abuse victims found that more than 50 % had their full names and links to social media profiles shared alongside their naked photos and 20 % had their E-Mail address and phone number posted alongside their photos.⁷⁶ A more recent study with 6109 respondents found that for 2/3 of victims, their images were shared alongside identifying personal information.⁷⁷ This makes the «online» crimes committed against victims feel much more real, like they could physically be harmed at any moment.⁷⁸ Digital violence perpetuates offline harassment and stalking.⁷⁹ Threats of sexual violence «literally, albeit not physically, penetrates the body» and non-consensual pornographic deep fakes can transform rape threats into a terrifying reality.⁸⁰

Digital sexual violence does not function separately from analogue violence, it is supplementary to violent relationship dynamics.⁸¹ In one qualitative study with 75 participants, around one-third of the victims experienced image-based sexual abuse alongside or in the context of other forms of domestic violence.⁸² Similarly, a quantitative study with 957 respondents found that 59.4 % of victims had experienced poly-victimisation from which, 8.3 % experienced it alongside physical abuse and 28.2 % ongoing harassment.⁸³ As follows, it is easy to see image-based sexual abuse as an extension of patriarchal power. These examples show the importance of contextualising the acts of im-

⁶⁶ CITRON (fn. 3), p. 1914.

⁶⁷ AYYUB (fn. 38).

⁶⁸ AYYUB (fn. 38).

⁶⁹ HENRY et al. (fn. 28), p. 96.

⁷⁰ MESKYS et al. (fn. 16) p. 27.

⁷¹ HENRY et al. (fn. 28), p. 98.

⁷² HENRY et al. (fn. 28), p. 98.

⁷³ CITRON/FRANKS (fn. 40), p. 353.

⁷⁴ PRASAD NIVEDITA, Digitalisierung geschlechtsspezifischer Gewalt, in: Prasad Nivedita (ed.), Geschlechtsspezifische Gewalt in Zeiten der Digitalisierung, Bielefeld 2019, p. 17 et seqq., p. 42.

⁷⁵ JURASZ/BARKER (fn. 40), p. 789.

⁷⁶ CITRON/FRANKS (fn. 40), p. 350 et seq.

⁷⁷ HENRY et al. (fn. 28), p. 25.

⁷⁸ CITRON/FRANKS (fn. 40), p. 353 et seq.

⁷⁹ CITRON/FRANKS (fn. 40), p. 353 et seq.

⁸⁰ CHESNEY/CITRON (fn. 5), p. 1773; CITRON (fn. 3), p. 1925.

⁸¹ PRASAD (fn. 74), p. 21.

⁸² HENRY et al. (fn. 28), p. 80.

⁸³ HENRY et al. (fn. 28), p. 21.

age-based sexual abuse, including non-consensual pornographic deep fakes alongside other forms of sexual abuse.

The statistics provided above illustrate the interconnected and continuous character of sexual violence. Non-consensual pornographic deep fakes pass into other forms of sexual violence and share the basic common characters.⁸⁴ This continuum framework rejects the hierarchy between physical and digital acts of sexual violence.⁸⁵ This framework is helpful to challenge societal outlooks and call for comprehensive regulation, however, it is not fully compatible with criminal law. «Fair labelling» of a crime belongs to the legal certainty and security principles of a democratic society. It is not only important whether an offender is convicted at all but also based on which elements of the crime they are convicted.⁸⁶ The designation of the crime and its systematic classification in the structure of the criminal code provides information about how the committed wrong is evaluated by society.⁸⁷ Therefore, a criminal provision that targets image-based sexual abuse apropos other sexual offences would be optimal.

III. Applicable Law and Challenges

Depending on the case facts, certain criminal provisions, data protection⁸⁸, and intellectual

property⁸⁹ rules may be applicable to non-consensual pornographic deep fakes. However, on the Pan-European level, non-consensual pornographic deep fakes are mostly discussed within the right to privacy and personality rights.⁹⁰

A. Personality Rights Under Swiss Civil Law

Under the Swiss Civil Code («CC») personality is protected in [art. 28 CC](#) as a whole. The clause refrains from listing individual personality rights and thus, remains applicable through changing times and technological advancements.⁹¹ Although [art. 28 CC](#) is applicable for any right that is inseparably linked to the person as a bearer, the doctrine and jurisprudence have formed categories of personality rights.⁹² As follows, the main distinction can be made between the physical, psychological, and social spheres of protection.⁹³ Although violations through non-consensual deep fakes might concern all spheres of personality herein, the social aspect of personality right hold particular significance. It encapsulates several rights and most centrally includes the right to protection of privacy.⁹⁴

⁸⁴ For more on the continuum of sexual violence, see MCGLYNN/RACKLEY/HOUGHTON (fn. 28), p. 25 et seqq.; JURASZ/BARKER (fn. 40), p. 784 et seqq.

⁸⁵ MCGLYNN/RACKLEY/HOUGHTON (Fn. 28), p. 35.

⁸⁶ SCHEIDEGGER NORA/LAVOYER AGO-TA/STALDER TAMARA, Reformbedarf im Schweizerischen Sexualstrafrecht, in: [sui generis 2020](#), p. 58 et seqq., p. 71.

⁸⁷ SCHEIDEGGER /LAVOYER /STALDER (fn. 86), p. 71.

⁸⁸ LANTWIN (fn. 6), p. 576.; HUIJSTEE et al. (fn. 47), p. 38.

⁸⁹ The owners of the original video might raise intellectual property claims. However, this is not fitting as the core of the violation is not on a property level. CITRON/FRANKS (fn. 40), p. 360. HUIJSTEE et al. (fn. 47), p. 40 and 64.

⁹⁰ AEBI-MÜLLER REGINA E., in: Breidschmidt Peter/Jungo Alexandra (eds.), *CHK-Handkommentar zum Schweizer Privatrecht*, 3. ed., Zürich 2016, N 2 to art. 28 CC.

⁹¹ BÜCHLER ANDREA, in: Kostkiewicz Jolanta Kren, et al. (eds.), *Orell Füssli Kommentar Schweizerisches Zivilgesetzbuch*, 4. ed., Zürich 2021, N 2 to art. 28 CC.; DÖRR BIANKA S., in: Böhler Andrea/Jakob Dominique (eds.), *Kurzkommentar Schweizerisches Zivilgesetzbuch*, 2. ed., Basel 2018, N 3 to art. 28 CC.

⁹² BÜCHLER (fn. 92), N 2 to art. 28 CC.

⁹³ BÜCHLER (fn. 92), N 2 to art. 28 CC.

1. The Right to One's Image, Voice, and Expression

The protection of social personality and protection of privacy under [art. 28 CC](#) is further concretised as the right to one's image, voice, and expression.⁹⁵ The right to one's image covers both the taking/making of the image and its publication.⁹⁶ In principle, no one may be depicted, i.e., photographed, drawn, or filmed, without their consent.⁹⁷ One could argue that pornographic deep fakes do not raise the same level of privacy concerns as other forms of image-based sexual abuse, because they do not «actually» depict a person who exists.⁹⁸ This would not be a convincing argument as the Federal Court of Switzerland has previously ruled in favour of a woman whose personality rights were violated through a non-consensual painting, depicting her partially nude.⁹⁹ It was stated that the depiction of a woman with a naked upper body represents a severe intrusion into her personality.¹⁰⁰

There are many types of deep fakes with varying levels of sophistication. It might be questionable if the right to one's image would be relevant for a low-quality manipulation like «shallowfakes» that do not rely on deep-learning and create mostly unrealistic results.¹⁰¹ In a case concerning violation of the right to one's image through photomontage, Federal Court of Switzerland has drawn attention to the identifiability of the complainant.¹⁰² In this case, the head was taken from a photograph of the complainant and

the naked body was taken from an unknown third party, yet the complainant was still recognisable. Here the question was raised whether the right to one's image also includes the added foreign body parts in the case of a photomontage.¹⁰³

As the depiction had the intention of criticising a political figure, the photomontage was obvious and not intended to be realistic. Here, the Federal Court of Switzerland decided that the face is crucial for the identification of a person and found that the entire appearance is ultimately attributed to the person in question.¹⁰⁴ The court also disregarded the fact that photomontage was obvious to notice and reiterated the identifiability of the face and focused if the depiction fell under satire, ultimately deciding positively.¹⁰⁵ In this respect, even the low-quality pornographic «shallowfakes» where it is obvious that the video is fake, or ones that are labelled as deep fakes would still constitute a personality right violation as long as the person's face is recognisable.

Therein another question would be whether the pornographic actress who consented to the original video could raise a claim under personality rights. In light of the discussion above, it could be disputed that her body is immediately recognisable. Here doctrine mentions that in cases of personality violations by the media, the injured party must be recognisable by third parties.¹⁰⁶ It is not enough if the injured party is the sole person that can recognise his/herself in the disputed content.¹⁰⁷ Nonetheless, depending on

⁹⁵ DÖRR (fn. 92), N 7 to art. 28 CC.

⁹⁶ BÜCHLER (fn. 92), N 9 to art. 28 CC.

⁹⁷ BÜCHLER (fn. 92), N 9 to art. 28 CC.

⁹⁸ DELFINO (fn. 15), p. 897.

⁹⁹ [Decision of the Swiss Supreme Court 5P.40/2003](#) of May 27, 2003.

¹⁰⁰ [Decision of the Swiss Supreme Court 5P.40/2003](#) of May 27, 2003, N. 2.

¹⁰¹ Arnold, What Is the Difference Between a Deepfake and a Shallowfake?, in: [Deepfake Now](#) of April 21, 2020.

¹⁰² [Decision of the Swiss Supreme Court 5A_553/2012](#) of April 14, 2014, N. 2.

¹⁰³ [Decision of the Swiss Supreme Court 5A_553/2012](#) of April 14, 2014, N. 3.1.

¹⁰⁴ [Decision of the Swiss Supreme Court 5A_553/2012](#) of April 14, 2014, N. 3.1.

¹⁰⁵ [Decision of the Swiss Supreme Court 5A_553/2012](#) of April 14, 2014, N. 3.1.

¹⁰⁶ KIRCHSCHLÄGER CAROLINE, in: Fischer Willi/Luterbacher Thierry (eds.), *Haftpflichtkommentar, Kommentar zu den schweizerischen Haftpflichtbestimmungen*, Zürich/St. Gallen 2016, N 20 to art. 28, 28a CC.

¹⁰⁷ KIRCHSCHLÄGER (fn. 106), N 27 to art. 28, 28a CC.

the concrete case facts redress could be sought in other areas of personality rights, e.g., violations of honour, which present controversially other foundational issues in applying «honour» clauses to cases of image-based sexual abuse.

2. Violations of Honour

as mentioned in Societal Attitudes Towards Deep Fake Pornography section of this paper, victims feel humiliation regardless of the video's level of realism. Hence, clauses on the protection of honour could be thought as relevant for pornographic deep fakes as well. [Art. 28 CC](#) concerns the human-moral validity of a person and the respect that a person may expect because they adhere to the prevailing moral standards.¹⁰⁸ [Art. 28 CC](#) also protects the social standing of a person regarding essential areas of life such as profession, politics, etc.¹⁰⁹ The Federal Court of Switzerland has previously considered the photomontage of a well-known male homosexual singer's face onto a female singer's body under violations of honour.¹¹⁰ This violation occurred after he lost the Eurovision song contest to said female singer. The court also referred to the effect the violation had on his standing regarding his professional singing life.¹¹¹

Pornographic deep fakes cause immense humiliation to victims.¹¹² Therefore, it might be assumed that pornographic deep fakes (and deep fakes in general) could also be considered under violations of honour. This might be attractive because untrue and honour-infringing statements are always considered to be a violation by the Federal Su-

preme Court.¹¹³ Nonetheless, through a gender-based lens it should be mentioned that applying honour-based clauses to pornographic deep fakes, labels pornographic content as «damaging» to a woman's reputation, further perpetuating gender inequality. Here, the main concern with pornographic deep fakes is the violation of a person's sexual autonomy and self-determination.¹¹⁴ Thus, they should be mainly addressed as such.

3. The Unlawfulness of Personality Rights Violations

Under the Swiss Civil Code, not every impairment of personality is considered a violation. For the protection of [art. 28 CC](#) to be relevant, the impairment of personality needs to be of noticeable disturbance and certain intensity and cause a serious threat to the personality right.¹¹⁵ In a survey conducted by Amnesty International, majority of the Swiss public found that sending intimate photos of oneself to other people without consent is not acceptable under any circumstances.¹¹⁶ Considering this strong attitude, a similar reaction may be assumed in cases of non-consensual pornographic deep fakes. Thus, almost all non-consensual pornographic deep fakes would surpass this threshold and be regarded as a violation of personality rights. Nonetheless, the injured person is to prove the violation of personality right and proving the intensity of their suffering puts the victims under continuous scrutiny.¹¹⁷

¹⁰⁸ AEBI-MÜLLER (fn. 91), N 18 to art. 28 CC.

¹⁰⁹ KIRCHSCHLÄGER (fn. 106), N 17 to art. 28, 28a CC.

¹¹⁰ [Decision of the Swiss Supreme Court 5A_376/2013](#) of October 29, 2013, N. 4.4.

¹¹¹ [Decision of the Swiss Supreme Court 5A_376/2013](#) of October 29, 2013, N. 4.4.

¹¹² See chapter II.B of this paper.

¹¹³ AEBI-MÜLLER (fn. 91), N 14 to art. 28 CC.

¹¹⁴ CITRON (fn. 3), p. 1898.

¹¹⁵ BÜCHLER (fn. 92), N 14 to art. 28 CC.

¹¹⁶ Amnesty International, [Repräsentative Studie: Mehrheit Für 'Nur-Ja-Heisst-Ja'](#), London/Bern 2022.

¹¹⁷ Burden of proof is regulated as per [art. 8 CC](#). The Federal Court has previously ruled that if, according to general life experience, the injury can cause intense harm, it is sufficient to prove this injury; the intensity of the harm then no longer needs to be proven. [Decision of the Swiss Supreme Court 5A_376/2013](#) of October 29, 2013, N. 8.1.

All violations are considered unlawful unless there are grounds for justification.¹¹⁸ In the case of non-consensual pornographic deep fakes, overriding public and private interests may be examined as possible grounds for justification.¹¹⁹ In overriding private interests, perpetrators may claim for example freedom of expression, freedom of arts, and satire.¹²⁰ In a case concerning a non-consensual partially nude painting, Federal Courts have dismissed the claim for overriding freedom of arts.¹²¹ Whereas satire necessarily contains judgement and its unlawfulness is only to be assumed if the depiction «exceeds the limits inherent in its nature to an intolerable extent».¹²² The Federal Court has previously negated the satire defence in a photomontage case depicting a well-known homosexual male singer in women's clothing.¹²³ Doctrine considers the publication of manipulated photographs a rather serious violation of personality because the image is perceived by the average viewer as a particularly credible information.¹²⁴ In this respect, satire is a limited justification for violations through photomontage.¹²⁵

In the case of pornographic deep fakes, their hyper-realism and sensitive material bring the violation to a new level of intensity. Regardless of if they depict private people or people in the public eye, hardly any constellations are conceivable in which their dissemination and consumption would outweigh the protection of personality rights on

the grounds of overriding public or private interest.¹²⁶

B. Legal Challenges

Pornographic deep fakes present unique challenges for the application of the existing law.¹²⁷ Firstly, the absence of consistent definitions for image-based sexual abuse and deep fakes as well as significant discrepancies in legislative content makes it harder to identify which rules are applicable to which deep fakes.¹²⁸ This creates uncertainty for victims, who in most cases wish foremost for the violating media in contention to be removed online.¹²⁹ This raises a big challenge as the information and communication environment of today means that once a video is online, it becomes almost impossible to deal with using methods of conventional civil law.¹³⁰ It is very hard to identify and locate the perpetrators, e.g. they may be using software that makes their IP address untraceable.¹³¹

Contrary to other jurisdictions that exempt internet service providers from liability for the content they host,¹³² Switzerland does not regulate specific provisions for internet service providers.¹³³ Content on the internet is to a large extent governed by the same

¹¹⁸ BÜCHLER (fn. 92), N 15 to art. 28 CC.

¹¹⁹ KIRCHSCHLÄGER (fn. 106), N 27 to art. 28, 28a CC.

¹²⁰ KIRCHSCHLÄGER (fn. 106), N 27 to art. 28, 28a CC.

¹²¹ [Decision of the Swiss Supreme Court 5P.40/2003](#) of May 27, 2003.

¹²² AEBI-MÜLLER (fn. 91), N 20 to art. 28 CC.

¹²³ [Decision of the Swiss Supreme Court 5A_376/2013](#) of October 29, 2013, N. 5.1.

¹²⁴ AEBI-MÜLLER (fn. 91), N 20 to art. 28 CC.

¹²⁵ AEBI-MÜLLER (fn. 91), N 25 to art. 28 CC; Case example where the Federal Court of Switzerland has accepted satire as a justification for a photomontage. [Decision of the Swiss Supreme Court 5A_553/2012](#) of April, 14, 2014.

¹²⁶ LANTWIN (fn. 6), p. 578.

¹²⁷ HUIJSTEE et al. (fn. 47), p. 39.

¹²⁸ MANIA (fn. 33), p. 2088.

¹²⁹ 18-year-old Noelle Martin spent years trying to get pornographic deep fakes about her taken down, see MELVILLE KRISTI, The insidious rise of deep fake porn and one woman who won't be silenced, in: [ABC News](#) of August 29, 2019.

¹³⁰ CHESNEY/CITRON (fn. 5), p. 1764; LANTWIN (fn. 6), p. 576.

¹³¹ DELFINO (fn. 15), p. 899.; HUIJSTEE et al. (fn. 47), p. 50.

¹³² For [Section 230](#) in the U.S. see Chesney/Citron (fn. 5), p. 1795 et seqq.; for the [e-Commerce Directive](#) in the EU see HUIJSTEE et al. (fn. 47), p. 41 et seqq.

¹³³ Platform liability is left out of the scope of this paper. For more information on Switzerland see Bundesamt für Kommunikation, [Zivilrechtliche Verantwortlichkeit Der Internet-Provider](#), Bern 2019.

rules that apply in offline situations.¹³⁴ This means that when a personality right is violated, civil action regarding [art. 28 CC](#) could be directed against anyone who participates in the violation.¹³⁵ In a new media context the Federal Court of Switzerland has previously ruled for the removal of a blog post from the website on which it was hosted.¹³⁶ The third party providing the hosting services was held equally liable for the removal of the violating post.¹³⁷

Victims of pornographic deep fakes could technically request the removal of the violating content as per [art. 28a \(1\) CC](#), provided it is possible to remove it and the provider is aware of the violation. However, for providers, liability for content they host may likely fail due to the subjective facts as they may have no knowledge of the violation and the specific deep fake. Moreover, this challenge is amplified because deep fakes are easily copied, shared, and stored in remote jurisdictions.¹³⁸ Said challenges of identifying the perpetrators, having jurisdiction, and enforcing the rules for service providers situated abroad are being discussed both in the European Union and Switzerland.¹³⁹ These issues illustrate the importance of carrying the legal protection to the online sphere via international and collaborative regulatory efforts¹⁴⁰, which are out of the

scope of this paper.

Scholars mention that the existing law puts the responsibility to hold the perpetrators liable on the victims.¹⁴¹ This approach is not appropriate in the case of pornographic deep fakes as the victims are hardly in a position to take appropriate measures after the material and psychological harms they suffered.¹⁴² Indeed both quantitative and qualitative studies confirm this assumption.¹⁴³ For this, we need civil society efforts combined with platform regulation, which need to be studied further. We also need to prevent further victimisation and agony of the affected individuals during the legal proceedings, which restriction of public access to criminal proceedings might be helpful for.¹⁴⁴

C. The Need for a Criminal Response

The protection of personality under private law is supplemented by protection under criminal law.¹⁴⁵ These existing clauses in the Swiss Criminal Code («SCC») might already be indirectly relevant for non-consensual deep fakes, depending on the specific case facts. The third section of SCC ([art. 173–179^{novies} SCC](#)) regulates the criminal acts against one's honour and private sphere. The

¹³⁴ MORSCHER LUKAS/STAUB LUKAS, *Lexology e-Commerce 2021*, London 2021, p. 100.

¹³⁵ BÜCHLER (fn. 92), N 13 to art. 28 CC.

¹³⁶ *Decision of the Swiss Supreme Court 5A_792/2011* of January 14, 2013.

¹³⁷ *Decision of the Swiss Supreme Court 5A_792/2011* of January 14, 2013.

¹³⁸ CHESNEY/CITRON (fn. 5), p. 1774.

¹³⁹ Eidgenössisches Justiz- und Polizei Department, *Kein Handlungsbedarf bei zivilrechtlicher Verantwortlichkeit von Providern: Essential Results of the Federal Council Report*, Bern 2015, p. 8; COLLINS AENGUS/EBRAHIMI TOURADJ, *International Risk Governance Center EPFL, Spotlight on Risk: Risk governance and the rise of deepfakes*, Lausanne 2021; HUIJSTEE et al. (fn. 47).

¹⁴⁰ In the European Union, *Draft AI Act* and the *Digital Services Act (DSA)* have special significance in this regard. AI Act proposes disclosure

obligations for the users of deep fakes and the DSA aims to ensure that online platforms are held accountable regarding illegal and harmful content their services may host, see European Commission, *Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment*, Strasbourg 2022.

¹⁴¹ HUIJSTEE et al. (fn. 47), p. 50.

¹⁴² HUIJSTEE et al. (fn. 47), p. 50.

¹⁴³ In an Austrian study, 79 % of female digital violence victims reported that they did not ask for support, see Weisser Ring, *Gewalt Im Netz Gegen Frauen Und Mädchen*, Vienna 2021, p. 74. In Switzerland, only 8 % of female sexual violence victims reported the crime to the police, see BORNATICI (fn. 62), p. 97.

¹⁴⁴ This argument has been made for criminalising revenge porn in common law systems, see MANIA (Fn. 33), p. 2091. Similar argument can also be carried to Switzerland as per [art. 70 CrimPC](#).

¹⁴⁵ AEBI-MÜLLER (Fn. 91), N 9 to art. 28 CC.

protection of honour under criminal law is limited to the moral sphere, namely to the reputation and the feeling of the person concerned to be an honourable person.¹⁴⁶ Under criminal acts against one's honour, defamation, and slander in [art. 173 SCC](#), and libel in [art. 174 SCC](#) might have relevance. Additionally, [art. 177 SCC](#) states that anyone who attacks someone's honour in another way including through an image shall be punished. These laws might apply to certain pornographic deep fakes, provided the concrete case fulfils the objective requirements.

Depending on the type of data gathered for the deep fake, [art. 179^{novies} SCC](#) might be relevant as the unauthorised acquisition of sensitive personal data that is not freely accessible. In addition to the crimes against honour and private sphere, laws on extortion and blackmail regulated in [art. 156 SCC](#) might be relevant in some cases of pornographic deep fakes.¹⁴⁷ The case facts might contain a version of cybercrimes in [art. 143 SCC](#), like hacking into the victim's computer or social media accounts. Additionally, criminal laws on pornography pursuant to [art. 197 \(4\) SCC](#) and [art. 197 \(5\) SCC](#) might be significant if the deep fake involves the content of an underage person, animals, and/or violence.

However, similar to violations of honour under civil law, applying crimes against honour to pornographic deep fakes has the problem of overlooking the core problem with these videos.¹⁴⁸ The core issue of pornographic deep fakes is the non-consensual violation of a person's sexual autonomy and self-determination, not the damaging or libellous character of these videos. This is further illustrated in the interconnection these videos have to other types of sexual

abuse and violence.¹⁴⁹ Hence, they should be defined and addressed under the offences against sexual integrity section of the Criminal Code.

Moreover, the laws overviewed in this chapter are applicable to only certain cases depending on the situation. This unclear application of law further muddles the challenges of pornographic deep fakes.¹⁵⁰

Criminal law provides victims with better legal remedies and minimises further victimisation.¹⁵¹ The deterrence function of criminal law would allow for the effective discouragement of potential creators of non-consensual pornographic deep fakes.¹⁵² By contrast, the deterrence and remedy civil law can offer stands relatively modest.

These videos perpetuate gender inequality and hostility towards women and minorities.¹⁵³ Thus, the demand to rely on milder alternatives to criminal law in these violations of the right to sexual self-determination seems unfitting. As follows, the European Parliament recognises extending the current criminal legal framework at member-state levels as a valid policy option.¹⁵⁴ Some member states have already introduced criminal provisions targeting image-based sexual abuse.¹⁵⁵ Similar efforts are being made in Switzerland as well.

¹⁴⁹ See chapter II.E.

¹⁵⁰ DELFINO (fn. 15), p. 901.

¹⁵¹ DELFINO (fn. 15), p. 902.

¹⁵² MANIA (fn. 33), p. 2090.

¹⁵³ HUIJSTEE et al. (fn. 47), p. 29; CHESNEY/CITRON (fn. 5), p. 1776.

¹⁵⁴ HUIJSTEE et al. (fn. 47), p. 61.

¹⁵⁵ In Germany, [art. 201a StGB](#) was regulated in 2014 to address the violation of the most personal sphere of life and personality rights through image recordings. This clause is sectioned under violation of personal life and privacy under the criminal code. In 2020, [art. 184k StGB](#) was regulated to address the violation of the intimate area through image recordings. This clause is sectioned under criminal offences against sexual self-determination, properly contextualising image-based sexual abuse within where it belongs, thus making pornographic deep fakes punishable.

¹⁴⁶ DONATSCH ANDREAS, in: Andreas Donatsch (ed.), *SCC: Kommentar Schweizerisches Strafgesetzbuch*, 21. ed., Zürich 2022, N 2 to Art. 173–179^{novies} SCC.

¹⁴⁷ MCGLYNN/RACKLEY/HOUGHTON (fn. 28), p. 34.

¹⁴⁸ See chapter III.A.2.

D. Image-Based Sexual Abuse Under the Reform of the Swiss Criminal Code on Sexual Offences

Discussions on a reform of the Swiss Criminal Code on Sexual Offences were instigated after Istanbul Convention's entry in the force in Switzerland in 2018.¹⁵⁶ On 01.02.2021, the Commission for Legal Affairs of the Council of States under the Swiss Parliament sent proposals for a revision of the Swiss Criminal Code on Sexual Offences to consultation of political parties, academic institutions, and civil society actors.¹⁵⁷ On 08.08.2021, the report on the outcome of this consultation procedure was published.¹⁵⁸

The revision aims to also address image-based sexual abuse under a few different clauses. The sexual harassment clause of [art. 198 SCC](#), which previously excluded all types of non-physical contact,¹⁵⁹ was amended to include «harassment by means of images». This was supported by almost all participants in the consultation process.¹⁶⁰ A considerable portion of participants welcomed the regulation on criminalising the «forwarding» of pornographic selfies under the rules on pornography in [art. 197 \(8\) SCC](#).¹⁶¹ Some participants specifically addressed «revenge porn» and advocated for its criminalisation.¹⁶² Discussions on this consultation report reflect modern rape reformers calling for the criminalisation of other

non-physical forms of coercion as well.¹⁶³

After above-mentioned consultation process, by 11 votes to 1 the Commission decided on proposing a new offence targeting «revenge porn» under art. 197a (draft) SCC.¹⁶⁴ The new offence is titled «unauthorized forwarding of non-public sexual content». Art. 197a (draft) SCC proposes to make the forwarding of non-public sexual content, namely writings, sound or image recordings, images, objects, or performances, to a third person without the consent of the person identifiable therein, punishable up to one year or to a monetary penalty. In case the content is publicly shared, the offence will be punishable up to three years or a monetary penalty.

On 17.02.2022, the finalised draft (draft 3) of the revision of the Criminal Code on Sexual Offences, and the report was submitted to the Federal Council and Council of States of the Swiss Parliament. The draft has started to be discussed in the summer session.¹⁶⁵ The Council of States has voted 37 to 6 in favour of including the «revenge porn» clause as stated in the above paragraph, under the criminal law on sexual offences.¹⁶⁶ During the discussions, one member of the Council of States from the liberal party (FDP), claimed that criminal law is the wrong place for addressing «revenge porn».¹⁶⁷ The Federal Council has also supported this minority opinion of the Council of States. The Federal Council was in favour of dispensing this proposed criminal offence and addressing the concern under punisha-

¹⁵⁶ SCHEIDEGGER NORA, Revision des Sexualstrafrechts, in: Juristinnen Schweiz (eds.), *Recht und Geschlecht*, Zürich 2021, p. 193 et seqq., p. 193 et seq.

¹⁵⁷ Die Bundesversammlung, *Kommission eröffnet Vernehmlassung zu einer Revision des Sexualstrafrechts*, Bern 2021.

¹⁵⁸ Die Bundesversammlung, *Bundesgesetz Zu Einer Revision des Sexualstrafrechts, Bericht über das Ergebnis des Vernehmlassungsverfahrens*, Bern 2021.

¹⁵⁹ SCHEIDEGGER (fn. 156), p. 207.

¹⁶⁰ Die Bundesversammlung (fn. 158), p. 35.

¹⁶¹ Die Bundesversammlung (fn. 158), p. 31.

¹⁶² Die Bundesversammlung (fn. 158), p. 40.

¹⁶³ SCHEIDEGGER/LAVOYER/STALDER (fn. 86), p. 773.

¹⁶⁴ Die Bundesversammlung, *'Nein Heisst Nein': Entwurf für ein modernes Sexualstrafrecht verabschiedet*, Bern 2021.

¹⁶⁵ Die Bundesversammlung, *Strafrahmenharmonisierung und Anpassung des Nebenstrafrechts an das neue Sanktionenrecht*, Draft 3 of February 17, 2022, Bern 2022.

¹⁶⁶ Die Bundesversammlung, *SDA Meldung – Debatte im Ständerat of June 13, 2022*, Bern 2022.

¹⁶⁷ Die Bundesversammlung (fn. 166).

ble acts against one's honour and under the ongoing work against «cyberbullying».¹⁶⁸ I have already emphasized the ill-suited nature of honour clauses in cases of image-based sexual abuse. As illustrated by the continuous character of sexual violence, criminal law is the right place them.¹⁶⁹ Fittingly, the proponents for the criminalisation of this proposed clause argued in the Parliament on the grounds of protection of sexual privacy.¹⁷⁰

Another critique against the proposed clause came from the justice minister within the Federal Council, who stated that «acts of revenge are not necessarily always about sexual content and there is a broader range of behaviour».¹⁷¹ In this paper, I displayed a more particular argument which is actually that image-based sexual abuse does not always happen with the intent of revenge. In this sense, the term «revenge porn» is certainly too narrow to address the issue. However, the fitting solution would be to criminalise image-based sexual abuse in a broader sense, rather than trying to fit its «revenge porn» connotations into cyberbullying or honour. These are different issues to address.

The Federal Council further argued against this proposed clause on the grounds of prosecution of internet offences regularly failing due to practical impossibilities of enforcing the law rather than the lack of criminal offences.¹⁷² The enforcement challenges are also recognised in this paper. However, this is certainly not an argument against criminalising image-based sexual abuse. Criminalisation of other sexual offences like child pornography prompted the platforms to act and inspired important innovations to

address the problem.¹⁷³ Considering these examples, the value criminalising image-based sexual abuse will bring online cannot be denied.

Debates are currently ongoing; the Commission has begun detailed consultations for the revision and these consultations will continue in the upcoming sessions. Regulatory efforts to recognise image-based sexual abuse are promising. The ultima ratio character of criminal law is certainly important and society's excessive punitiveness, its lust for punishment, and the use of criminal law as a cure-all are valid criticisms on some instances.¹⁷⁴ However, this criticism cannot be applied to the required reform of the Swiss Criminal Code on Sexual Offences. The reform merely aims to systematically orient criminal law on the right to sexual self-determination and is certainly needed for criminalisation and effective prosecution of all non-consensual sexual contact fully and appropriately.¹⁷⁵

IV. Conclusion

Pornographic deep fakes account for the overwhelming majority of deep fakes online. Although they started with the depiction of female celebrities, easy access to this technology means that anyone can be a victim. Perpetrators create these videos with different motivations, amongst which are taking revenge upon an ex-partner, shaming and silencing victims, or simply having fun. Victimization in deep fake pornography and image-based sexual abuse have a gendered element. Victims are overwhelmingly women and experience severe psychological, emotional, and financial damage. The severity of the effects also has a gendered dimension, as women feel the harm in a more pronounced way.

¹⁶⁸ Die Bundesversammlung (fn. 166).

¹⁶⁹ See chapter II.E.

¹⁷⁰ Die Bundesversammlung (fn. 166).

¹⁷¹ Die Bundesversammlung (fn. 166).

¹⁷² Bundesrat, [Bericht der Kommission für Rechtsfragen des Ständerates vom 17. Februar 2022](#), BBI 2022 1011, Bern 2022.

¹⁷³ CITRON/FRANKS (fn. 40), p. 390; DELFINO (fn. 15), p. 928.

¹⁷⁴ SCHEIDEGGER (fn. 156), p. 207.

¹⁷⁵ SCHEIDEGGER (fn. 156), p. 207.

There are many types of deep fakes, thus blanket regulations are not effective in dealing with them; different rules depending on the types of deep fakes are needed. Consistent legal definitions should be adopted on what would constitute a non-consensual pornographic deep fake as well as image-based sexual abuse.

Pornographic deep fakes frequently occur alongside or in the context of other types of abuse. Image-based sexual abuse is interconnected with other types of violence. Moreover, pornographic deep fakes are exacerbating image-based sexual abuse, as perpetrators no longer need actual nude images. Therefore, they should be contextualised and addressed within a broader sense of image-based sexual abuse as all abusive behaviour involving the non-consensual taking and sharing of sexual images under criminal law.

There are applicable laws under personality rights to pornographic deep fakes. However, they have significant deficits. Identifying the perpetrators, enforcing the rules in remote jurisdictions where the videos are hosted, and holding the platforms accountable are the main legal challenges. Once these videos are uploaded online, it is very hard to undo the damage. In recent years, societal attitude towards non-consensual pornographic deep fakes has started to shift and some surveys illustrated that majority of respondents condemn these videos, even though their popularity on pornographic websites keeps increasing.¹⁷⁶ Addressing image-based sexual abuse under the reform of the Swiss Criminal Code on Sexual Offences is certainly needed to help in subverting the normalisation of non-consensual pornographic deep

fakes.¹⁷⁷ Criminalising pornographic deep fakes would be helpful to provide justice to victims, deter potential perpetrators, mobilise a proper societal and platform response. Herein, further research is needed from criminal law scholars to examine how conventional standards of fault should be conceptualised to provide appropriate criminalisation and effective prosecution in cases of image-based sexual abuse.

¹⁷⁶ KUGLER MATTHEW/PACE CARLY, Deepfake Privacy: Attitudes and Regulation, in: *Northwestern University Law Review* 2021/116(3), p. 611 et seqq., p. 641; BURGESS MATT, Deepfake Porn Is Now Mainstream and Major Sites Are Cashing In, in: *Wired UK* of August 27, 2020.

¹⁷⁷ JURASZ/BARKER (fn. 40), p. 785; DELFINO (fn. 15), p. 902.