VIRGINIA JOURNAL OF LAW & TECHNOLOGY

FALL 2021 UNIVERSITY OF VIRGINIA VOL. 25, NO. 3

Can Affirmative Consent Save "Revenge Porn" Laws? Lessons from the Italian Criminalization of Non-Consensual Pornography

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ABSTRACT

Current laws criminalizing non-consensual pornography (commonly referred to as "revenge porn") are insufficient, both in Italy and internationally. This essay delves into whether requiring affirmative consent for the disclosure of sexual images can strengthen non-consensual pornography laws internationally. Answering this question in the affirmative, this essay evaluates the Italian law on "revenge porn" and identifies the law's core principles, specifically the elements of the offense and the mental elements required to establish it.

The current legal framework governing non-consensual pornography ignores crucial elements of the crime that are unique to non-consensual pornography and require close analysis. This essay first reviews recent instances of non-consensual pornography in Italy that prompted the passage of legislation to address the issue. Next, it analyzes the Italian law that criminalizes non-consensual pornography and outlines its strengths and weaknesses. Finally, it compares the Italian law with international non-consensual pornography statutes to show that requiring affirmative consent to the sharing of intimate photos can save non-consensual pornography laws internationally.

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INTRODUCTION

In 2019, following several dramatic cases, Italy introduced a new law criminalizing so-called "revenge porn," that is, the disclosure of intimate images by an ex-partner.

Unfortunately, the Italian legislature has fallen victim to this narrow definition of the crime and its ambiguity, which is at the root of some glaring flaws in the wording of the new crime.

The first part of this article will present the Italian law and the lightning-fast legislative process that led to the introduction of the new crime and the interpretative challenges posed by the new offense.

The second part will reflect on the Italian experience in the hope that it may be useful in the international debate. Firstly, the paper will highlight some features of the law already stressed by Anglo-American scholars that have been confirmed by the specific criminalization in Italy. These features are mostly critical issues and pitfalls that the Italian lawmaker has not properly addressed. In particular, the requirement that the perpetrator intended to cause harm to the victim is highly perplexing. This, along with others, is the main hint that the legislature did not quite grasp that it was necessary to criminalize non-consensual pornography and not just "revenge porn" in the strict sense.

Subsequently, the focus will move to some noteworthy points of the Italian law that are innovative and may be of interest in a comparative perspective for other legal systems. Italy was one of the last countries to introduce the crime, but the law has some original features that have not yet permeated the debate.

In particular, it will be contended that the paradigm of affirmative consent can "save" the existing revenge porn laws, both from technical-applicative and symbolic-expressive points of view. The article will also argue that the model of liability for "second distributors" adopted by the Italian law is perhaps the best and most balanced solution so far proposed in the jurisdictions that have specifically criminalized revenge porn.

I. THE ITALIAN CRIMINALIZATION OF "REVENGE PORN"

A. Approval of the Law

1. Tiziana, Carolina and Giulia. Three (Non-) "Revenge Porn" Italian Stories

One evening in September 2016, the Italian public became aware of Tiziana Cantone's suicide.[1] The 31-year-old woman from the Neapolitan hinterland caught the public's attention due to the viral dissemination of videos of her performing sexual acts.[2]

The facts are still not clear. It seems that the woman was persuaded by her partner to be filmed having sexual intercourse with other men.[3] However, it is unclear how the videos were initially shared with others before they reached the devices of millions of people. According to one initial theory, Tiziana sent the videos - under pressure from her partner - to four of his friends as a part of a game: showing others the infidelity of his girlfriend. These four friends then spread the videos without her consent.[4] According to another more recent reconstruction of events, Tiziana's partner shared the videos without her knowledge and then accused his four friends of non-consensual distribution.[5]

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[1] For a complete report of the affair, *see* Filippo Facci, *Storia di Tiziana Cantone*, IL POST, (Sept. 15, 2016), https://www.ilpost.it/2016/09/15/storia-tiziana-cantone/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] The plot of the case continues to thicken with new developments. The woman's companion, Sergio Di Palo, has been accused of the crimes of simulation of a crime, slander and abusive access to a computer system. According to this new reconstruction of the case, the man convinced Tiziana Cantone to falsely accuse her four friends of the dissemination of the videos and, after her death, hired an expert to access the remote memory of her smartphone in order to delete some conversations. For more details, see Leandro Del Gaudio, *La morte di Tiziana, il pm chiede il processo per l'ex compagno*, IL MATTINO, (May 20, 2018, 2:04 AM),

The week after the videos were recorded, in April 2015, they could be found online on a porn website, and within a few days, they had become very popular - especially in Naples.[6] The woman was easily identifiable and her name and surname often appeared in the titles of the uploaded videos.[7] The main reason for the success - a so-called "Internet meme" - is the beginning of one of those videos, where the woman exclaims with a strong Neapolitan accent: "Are you making a video? Bravo!"[8]

From then on, the dissemination became widespread: at first, the amateur and private videos spread across all the most popular pornographic sites. They then circulated on the messaging application WhatsApp. "Are you making a video? Bravo!" became the icon of Facebook pages and the subject of cartoons and parodies by football players and radio commentators; it was even used as the closing clip of an Italian song that has more than 20 million views on YouTube.[9]

It was no longer (only) amateur pornography spread beyond expectations, but a real "pop culture" catchphrase.[10]

Tiziana's initial reaction was to move to live with relatives in Tuscany. In the meantime, she undertook a difficult legal battle to remove her images from the Internet, at least from the most popular platforms. In the final part of this legal "battle," Tiziana obtained the deletion of the videos from some sites but was denied compensation for damages. The disappointment stemming from this decision may have contributed to her suicide.[11]

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https://www.ilmattino.it/napoli/cronaca/la_morte_di_tiziana_il_pm_chiede_il_processo_per_l_ex_compagno-3744565.html.

[6] *See* Facci, *supra* note 1.

[7] *Id.*

[8] Gian Marco Caletti, *"Revenge porn" e tutela penale. Prime riflessioni sulla criminalizzazione specifica della pornografia non consensuale alla luce delle esperienze angloamericane*, DIRITTO PENALE CONTEMPORANEO. RIVISTA TRIMESTRALE, Mar. 2018, at 66 (which explains the importance of this meme in the diffusion of videos).

[9] *See* Facci, *supra* note 1.

[10] Caletti, *supra* note 8, at 66.

[11] Facci, *supra* note 1.

The proceedings for criminal defamation,[12] triggered by the woman's first complaint against the five men who received and (allegedly) distributed the videos, were dropped in April 2017 by Naples prosecutors.[13] A few months later, in the second investigation that started immediately after the woman's death, the charges for incitement to suicide against unknown persons were also dropped.

A trial has begun against the woman's ex-partner, but the charges do not include any accusation related to the dissemination of the intimate images.[14] Therefore, no one has been accused of the non-consensual disclosure of the aforementioned sexual videos. The sole focus has been on whether the videos amounted to criminal defamation or an offense relating to her suicide.

Tiziana was taunted for months by an entire country and only her death made it clear that it was not a joke to her – it was profoundly harmful and life destroying. Immediately after Tiziana Cantone's suicide, a bill was presented in Parliament with the aim of criminalizing so called "revenge porn," but this

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[12] In Italy, defamation is considered a crime as well as a civil tort, according to article 595 of the Penal Code, which punishes anyone who damages the reputation of someone else. Given the lack of specificity of this definition of the Penal Code, the case law has clarified the requirements for the existence of the crime, in particular with regard to journalists' activity. News that damages reputations must be plausible and truthful, of public interest, and reported in an appropriate form that does not degenerate into name-calling. *See generally* STEFANO CANESTRARI ET AL., MANUALE DI DIRITTO PENALE 594 (2d ed. 2017). The crime of defamation was applied to revenge porn cases prior to the introduction of the new specific offense, as is discussed in this paper.

[13] Titti Beneduce & Felice Naddeo, *Tiziana Cantone, nessun reato per aver diffuso i video hot*, CORRIERE DEL MEZZOGIORNO (Apr. 11, 2017, 11:45 AM),
https://corrieredelmezzogiorno.corriere.it/napoli/cronaca/17_aprile_11/suicida-video-hot-gip-chiede-procura-indagare-facebook-d0073b0a-1e9a-11e7-8744-a20bd6e13595.shtml.

[14] *See* Elisa Messina, *Tiziana Cantone, la ricostruzione del caso dall'inizio: revenge porn, il suicidio e il possibile omicidio*, CORRIERE DELLA SERA, (May 28, 2021, 7:12 PM), https://www.corriere.it/cronache/21_maggio_28/tiziana-cantone-ricostruzione-revenge-porn-suicidio-omicidio-08177b76-bf97-11eb-b7a1-7e76296b457a.shtml.

was stopped at a very early stage, and it was not even considered by the Law Commission.[15]

According to some newspapers, at the end of 2018, Tiziana's sexual images were still available on the Internet.[16] They probably are still today.

In November 2012, Carolina Picchio was fourteen years old.[17] After eating a pizza and drinking with other teenage friends, she locked herself in the bathroom as she felt sick. Having drunk too much, she lost consciousness. A group of boys surrounded her and simulated sexual acts.[18] They targeted her with insinuations and increasingly explicit acts. Those scenes were captured in footage made with the intention of disrespecting her.[19] She found herself at the center of viral attention: first through the boys exchanging the footage through a virtual chat, then through the publication of such videos on social networks with a proliferation of insults and disparaging comments.[20]

In January 2013, Carolina jumped out of a window. Before dying, she left a letter in which she wrote: "*words hurt more than blows.*"[21]

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[15] The bill, presented by Hon. Sandra Savino (Forza Italia) and registered as Act of the House No. 4055, contemplated, just as happened about three years later, the introduction of a new offense under Article. 612-*ter* of the Penal Code, entitled "Dissemination of sexually explicit images and videos."

[16] *Non c'è pace per Tiziana Cantone: a due anni dalla morte i video hard ancora in Rete*, SECOLO D'ITALIA (Sept. 14, 2018, 3:00 PM), https://www.secoloditalia.it/2018/09/non-ce-pace-per-tiziana-cantone-a-2-anni-dalla-morte-i-video-hard-ancora-in-rete/.

[17] *See* Elena Polidori, *Carolina Picchio, suicida a 14 anni. Cyberbulli in libertà*, QUOTIDIANO NAZIONALE (Dec. 20, 2018), https://www.quotidiano.net/cronaca/carolina-picchio-1.4354245.

[18] To read about Carolina Picchio's story, visit the site of the foundation created by her father to encourage digital education and combat cyberbullying, see FONDAZIONE CAROLINA, *https://www.fondazionecarolina.org/2021/carolina/carolina-picchio-da-vittima-a-icona/* (last visited Sept. 8, 2021).

[19] *Id.*

[20] *Id.*

[21] *Id.* (translated from Italian to English and emphasis added).

Carolina's bullies have been charged with multiple felonies, including possession of child pornography. They were all juveniles, so they were granted probation.[22] Carolina's father created a foundation to encourage digital education and combat cyberbullying.[23]

In 2017, Italy introduced a law against cyberbullying.[24] Nevertheless, Carolina's images are also probably still online.

Giulia Sarti is a young parliamentarian from the "Movimento Cinque Stelle" party, the political protest movement founded by comedian Beppe Grillo and, at the time of writing, one of the governing forces in Italy.

In February 2018, when she held the prestigious position of President of the Law Commission of the Chamber of Deputies, Giulia was involved in a political scandal.[25] She was accused by her party of not paying in the percentage of her salary[26] as required by the party's internal regulations.[27] While

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[22] *See* Polidori*, supra* note 17.; Following recent reforms, the Italian Penal Code (CODICE PENALE [C.P.] art. 168-*bis*) envisages a particular form of probation that precedes criminal conviction. For certain offenses, and with limits relative to the punishment provided for by the Code, the accused may apply to suspend the proceedings and perform socially useful services under the supervision of a special body. If probation is successful, the crime is declared extinct by the Court. This mechanism is particularly favored when the defendant is a minor. The legal system also provides for a different form of probation, following a criminal conviction, which is an alternative to prison sentences. *See* Legge 26 luglio 1975, n. 354, G.U. Aug. 1975, n. 212 (It).

[23] FONDAZIONE CAROLINA, *supra* note 18.

[24] *See* Legge 29 maggio 2017, n. 71, G.U. June 3, 2017, n. 127 (It.). *See also* by Marco Mantovani, *Profili penali del Cyberbullismo: la L. 71 del 2017*, 2018 INDICE PENALE 475.

[25] Caterina Giusberti, *Sarti e Bulgarelli, due emiliane coinvolte nella "rimborsopoli" a 5 Stelle*, LA REPUBBLICA (Feb. 14, 2018),

https://bologna.repubblica.it/cronaca/2018/02/14/news/sarti_e_bulgarelli_due_emiliane_coinvolte_nella_rimborsopoli_a_5_stelle-188798447/. *See also* Wikipedia, *Giulia Sarti*, WIKIPEDIA, (last visited Oct. 4, 2021) https://it.wikipedia.org/wiki/Giulia_Sarti.

[26] *Id.*

[27] The "Five Star Movement" arose in opposition to the normal political parties, making honesty its own flag. From the very beginning, its parliamentarians were granted little political autonomy. Among the

the media was talking about Giulia, very explicit videos and photographs depicting her naked or engaged in sexual intercourse began to circulate on the Internet.[28] The origin of the distribution of the pornographic materials, as often happens, is not at all clear. According to one version, they were images already disclosed in the past which returned to persecute her as she had acquired notoriety. There are, however, those who contend that Giulia's political movement exposed the images to discredit her due to the accusation that she had not paid the fees to them.[29]

Giulia accused her partner of appropriating money intended to be given to the party, but the Prosecutor's Office immediately dismissed the case claiming that Guilia had been patently aware of the man's conduct and therefore no crime of theft had been committed.[30]

Overwhelmed by both scandals, at the end of February 2019 Giulia Sarti resigned from her position as President of the Law Commission and later abandoned her party (but not her seat in the Parliament).[31]

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innovative measures that differentiate the Movement from the traditional parties, there is the obligation for all its parliamentarians to give a very substantial part of their salary to the Movement. These aspects are here specified because some passages of the text may not be clear without knowing this particular political background.

[28] Fiorenza Sarzanini, *Gulia Sarti, le foto e i video in rete*, CORRIERE DELLA SERA (Mar. 14, 2019),
https://www.corriere.it/politica/19_marzo_14/giulia-sarti-foto-video-rete-basta-non-vi-occupate-piu-me-1bdb80ea-46a3-11e9-b69d-e01a5b02f504.shtml.

[29] Manuel Spadazzi, *Foto hard rubate a Giulia Sarti, spunta la pista della vendetta grillina*, IL RESTO DEL CARLINO (Mar. 21, 2019), https://www.ilrestodelcarlino.it/rimini/cronaca/giulia-sarti-fotografie-1.4502515.

[30] Giuseppe Baldassaro & Rosario Di Raimondo, *M5s, la Rimborsopoli travolge Giulia Sarti. Le chat col fidanzato la incastrano: "Ilaria e Rocco mi dicono di denunciarti",* LA REPUBBLICA (Feb. 27, 2019),
https://www.repubblica.it/politica/2019/02/27/news/rimborsi_m5s_giulia_sarti_dimissioni_in_lacrime-220241582/.

[31] *See Caso rimborsi, Giulia Sarti si autosospende dal Movimento 5 Stelle*, LA REPUBBLICA (Feb. 26, 2019),

Although she had not behaved ethically on a political level, in particular with regard to the false accusation against her partner, nothing justifies such a gross violation of her sexual privacy. In contrast to what happened a few years earlier with Tiziana, this time the violation was clear to everyone, and in a few days the Parliament introduced a specific crime of "*Illegal dissemination of sexually explicit images or videos.*"[32]

2. The Necessity to Explicitly Criminalize Non-consensual Pornography in Italy through the Lens of Harm Principle and Principle of Minimum Criminalization

Thanks to the abovementioned stories, Italy has become aware of the dramatic consequences of so-called "revenge pornography."[33] Paradoxically, none of these episodes were so-called "revenge porn," at least in the strict sense of the term.

It is indeed well-known that "revenge porn" occurs when an ex-partner (usually a man) distributes private sexual images of his (or her) former partner in order to take revenge after the break-up of their relationship.[34]

Following the first reconstruction of facts, the initial sharing of Tiziana's videos to a limited number of people seems to have relied on the woman's consent.[35] Her partner had no revenge motive as they still had a relationship at the time and the sharing of the video was motivated, at least on the partner's side, by erotic-sexual purposes and not revenge.[36] In Carolina's case it is not revenge porn either, given that there is neither a

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https://bologna.repubblica.it/cronaca/2019/02/26/news/giulia_sarti-220166463/.

[32] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.).

[33] Caletti, *supra* note 8, at 67.

[34] The Cambridge Dictionary defines revenge porn as: "private sexual images or films showing a particular person that are put on the internet by a former partner of that person, as an attempt to punish or harm them." *Revenge Porn*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/it/dizionario/inglese/revenge-porn (last visited Sept. 8, 2021).

[35] *See* Facci, *supra* note 1.

[36] Caletti, *supra* note 8, at 71.

sentimental connection nor revenge motive, but only the recording of sexual violence and the sharing of such for cyberbullying purposes.[37] Similarly, Giulia's situation is not a prototype within the definition of "revenge porn" in a strict sense, as the images that became viral seem to be old and their origin unknown.[38]

The fact that all of the main cases in Italy associated with "revenge porn" are not actual cases of "revenge porn" unequivocally shows how this categorization is too narrow in comparison to the general phenomenon. Nevertheless, in Italy this controversial slang expression has prevailed as a catchall phrase to indicate all the different forms of non-consensual dissemination of images with sexual content[39] and has been used (without translation) by the media[40] and even in the political debate,[41] giving rise to some misunderstandings that will be discussed below.[42]

The expression "non-consensual pornography" proposed by Danielle Keats Citron and Mary Anne Franks will therefore be used.[43] It appears to be the most appropriate term to describe the new range of cases that require the protection of criminal law. It has the merit of emphasizing the true distinctive feature of the phenomenon - the absence of consent to disclosure by the

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[37] *See Fondazione Carolina*, note 17.

[38] *See* Spadazzi, *supra* note 29.

[39] Exactly as in the United States. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

[40] When the specific offense was introduced many newspapers and many information sites entitled articles "revenge porn becomes a crime," using the English expression without translation. *See, e.g.*, *Violenza sulle donne, approvato 'Codice Rosso': il revenge porn diventa reato*, ROLLING STONE (July 18, 2019, 8:45 AM), https://www.rollingstone.it/politica/violenza-sulle-donne-il-revenge-porn-diventa-reato/469317/.

[41] Even in parliamentary works, as the record shows, the expression in English was used without translation. *See Lavori Preparatori Dei Progetti Di Legge*, CAMERA DEI DEPUTATI, https://www.camera.it/leg18/126?leg=18&idDocumento=1455 (last visited Sept. 8, 2021).

[42] *See infra* Part II.B.3.

[43] *See* Citron & Franks, *supra* note 39, at 346.

person depicted in the images[44] - and of setting aside any reference to the perpetrator's motives.[45] While this term is more appropriate than "revenge porn," the presence of the term "pornography" negates any connotation of blame and does not indicate that the conduct is problematic.[46] This is because the association with words that indicate the non-consensuality of the publication makes it clear that the victim did not aim to create a "pornographic" contribution – i.e. directed to the sexual excitement of an audience – but a simple intimate image to be enjoyed privately. The non-consensual disclosure is what transformed those images into "pornography."

As argued in the first legal paper I wrote in Italian on "revenge porn," it was imperative for Italy to introduce a new crime to sanction the conduct of non-consensual pornography.[47] As the tragic events described above also demonstrate, the criminal justice system offered a highly fragmented framework of protection.[48] The former criminal remedies – articles 595 (defamation),[49] 612-*bis* (stalking),[50] 615-*bis* (voyeurism)[51] of the Italian Penal Code, art. 167 of Italian Legislative Decree n. 196/2003 (unlawful processing of personal data) - were applied in some cases to punish the conduct in question, but the response to the phenomenon cannot be considered adequate. Firstly, because many cases deserving of protection were left out; secondly, because none of these offenses captured the seriousness of non-consensual pornography.[52]

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[44] *See infra* Parts I.B.4., II.C.1.

[45] *See* Citron & Franks, *supra* note 39, at 346.

[46] Many scholars have warned about the shortcomings of the expression "revenge porn" because of the use of the word pornography because it may convey a message of victim blaming by insinuating that the images are pornographic (when in fact the images are often semi-nude or similar) and that the victim chose to produce the pornographic material. *See, e.g.*, Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXF. J. LEG. STUD. 535, 535–36 (2017).

[47] Caletti, *supra* note 8, at 92–93.

[48] *Id.*

[49] *See* Art. 595 CODICE PENALE [C.P.] (It.). On defamation, *see also supra* note 12.

[50] *See* Art. 612-*bis* CODICE PENALE [C.P.] (It.).

[51] *See* Art. 615-*bis* CODICE PENALE [C.P.] (It.).

[52] Caletti, *supra* note 8, at 82–83.

The most significant and worrying loophole affected precisely the cases involving minors under eighteen years.[53] Recently, the decisions of the Italian Court of Cassation have recorded several fluctuations on the interpretation of the crime of "*distribution, disclosure, dissemination, publicizing of child pornography*"[54] in the case of non-consensual dissemination of images self-produced by the child ("sexting"), thus leaving a significant percentage of cases without protection in the framework of the offenses related to child pornography.[55] In brief, the interpretative uncertainties related to "sexting" seem to be led by the concern of the Courts to protect the autonomy of the minor, not incriminating them for the storage on their phone of images sent to them by their underage partner.[56] Abstractly, this conduct amounts to the crime of possession of child pornography.[57] For this reason, the Court of Cassation has enhanced the definition of child pornography, which, under Italian law, is only created through the "use" of the minor

[53] *Id.* at 85–86.

[54] *See* Art. 600-*ter* CODICE PENALE [C.P.] (It.) (translated from Italian to English).

[55] On this topic, in Italian legal scholarship, see MALAIKA BIANCHI, I CONFINI DELLA REPRESSIONE PENALE DELLA PORNOGRAFIA MINORILE 138 (2019); Domenico Rosani, *Il trattamento penalistico del sexting in considerazione dei diritti fondamentali del minore d'età*, DIRITTO PENALE CONTEMPORANEO – RIVISTA TRIMESTRALE 1, 9 (2019); Annalisa Verza, *Sulla struttura speculare e opposta di due modelli di abuso pedopornografico*, DIRITTO PENALE CONTEMPORANEO (2015).

[56] As is well known, the same problem has arisen in Anglo-American legal systems. *See generally, e.g.*, in the United States, Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035 (2010); John A. Humbach, *Sexting and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010); John Kip Cornwell, *Sexting: 21st-Century Statutory Rape*, 66 S.M.U. L. REV. 111 (2013); AMY A. HASINOF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT (2015); in England, Alisdair A. Gillespie, *Adolescents, Sexting and Human Rights*, 13 HUM. RTS. L. REV. 623 (2013); in Australia, Michael Salter, Thomas Crofts & Murray Lee, *Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People*, 24 CURRENT ISSUES CRIM. JUST. 301 (2013); THOMAS CROFTS ET AL, SEXTING AND YOUNG PEOPLE (2015); in Canada, Alexa Dodge & Dale C. Spencer, *Online Sexual Violence, Child Pornography or Something Else Entirely? Police Responses to Non-Consensual Intimate Image Sharing among Youth*, 27 *SOC. & LEGAL STUDS.* 636 (2018).

[57] *See* Art. 600-*quater* CODICE PENALE [C.P.] (It.).

(implied: by the pedophile).[58] Clearly, the images self-taken by the teenager do not meet this requirement.[59]

On the level of adherence to fundamental principles of criminal law, there was no difficulty in deeming a criminal response to the phenomenon of non-consensual pornography appropriate.[60] Based on the ground of harm principle,[61] non-consensual pornography entails very serious damage for the victim as already highlighted by many Anglo-American academics and, with regard to Italy, by the three opening stories.[62]

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[58] *See supra* note 54.

[59] *See* Cass. pen., sez. III, 21 marzo 2016, n. 11675, with commentary by BIANCHI, *supra* note 54; *see also*, more recently, Cass. pen., sez. III, 21 novembre 2019, n. 5522, with commentary by Domenico Rosani, *Cessione di immagini pedopornografiche autoprodotte ("selfie"): la Cassazione rivede la propria lettura dell'art. 600-ter c.p.*, SISTEMA PENALE, (Dec. 4, 2020) https://www.sistemapenale.it/it/scheda/cassazione-5522-2020-selfie-pornografici-600-*ter*.

[60] Caletti, *supra* note 8, at 78–79.

[61] The harm principle is one of the fundamental principles of the Italian penal system. Based on the work of Franco Bricola (one of the main European criminal lawyers of the last century), the principle requires that criminal law offer its protection only to constitutional rights and entitlements. *See* Franco Bricola, *Teoria generale del reato*, XIX NOVISSIMO DIGESTO ITALIANO 7 (1973). For an analysis of the different functions of the harm principle in the Italian legal system, see VITTORIO MANES, IL PRINCIPIO DI OFFENSIVITÀ NEL DIRITTO PENALE (2005).

In the case of non-consensual pornography, the agent's conduct harms the victim's right to personality, his or her privacy, and perhaps even his or her sexual autonomy. *See also infra* Part I.B.1.

[62] In particular, I consider the list of sufferings formulated by the Australian Legal and Constitutional Affairs Committee to be exhaustive. Questioned by the Australian Parliament, the SASS ("Sexual Assault Support Service") has reconstructed, mediating between academic studies and cases followed directly, a very thorough picture of the effects of non-consensual pornography:

> feelings of shame, humiliation, personal violation, and powerlessness; fear and apprehension about personal safety; sense of being watched or constantly 'under surveillance'; fear of being filmed or photographed during sexual activities; being approached by strangers and propositioned for sexual activities; hypervigilance online (for example compulsively checking websites to see if more images have been uploaded); disruption

While criminalization responds to the crime of non-consensual pornography after it has been committed, from the point of view of the principle of minimum criminalization and given the irreversibility of the effects of the conduct of disclosure,[63] it seems necessary to recognize that criminal law, and in particular its penetrating deterrent capacity,[64] has a decisive role to play in trying to prevent the initial publication of the images.[65] Indeed, the aspect that seems to characterize non-consensual pornography is the current impossibility of interrupting the dissemination of images. Dissemination can take place through such a wide number of channels - messaging applications, social networks, hard portals, peer to peer, mailing lists - that it is impossible to contain its "virality."[66]

> to education or employment; damage to (or concern about) reputation, personal standing in the community, current or future intimate relationships, relationships with family and friends, and/or future employment prospects; social withdrawal; body shame; trust issues; trauma symptoms (including anxiety, sleeplessness, and nightmares); and suicidal ideation and/or attempts.

See LEGAL AND CONSTITUTIONAL REFERENCES AFFAIRS COMMITTEE, *Phenomenon colloquially referred to as 'revenge porn,'* 20 (2016). Another extremely accurate analysis of the consequences of non-consensual pornography is that of Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. 1189 (2019) (emphasizing that sexual privacy invasions undermine the development of future intimate relationships). *See also* Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22 (2017) (discussing the mental health effects of non-consensual pornography).

[63] As Paul J. Larkin, Jr pointed out: "the Internet never forgets." Paul J. Larkin, Jr, *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 60 (2014).

[64] From this perspective, civil law has proven to be poorly effective. An injunction may allow the removal of a content from a specific website, with timeframes that are irreconcilable with the prevention of "dissemination," but it cannot prevent it from being posted elsewhere or, sometime later, even on the same site by another user. About this problem, see McGlynn & Rackley, *supra* note 46.

[65] Caletti, *supra* note 8, at 80–81.

[66] On the subject of digital dissemination, see the considerations of Alexa Dodge, *Nudes are Forever: Judicial Interpretations of Digital Technology's Impact on "Revenge Porn,"* 34 C. J. L. & SOC'Y 121, 128–33 (2019).

This happened, for example, in the case of Tiziana Cantone.[67] Her exclamation "are you making a video? Bravo!" and the extremely explicit nature of the images made the videos so popular that they reached millions of people without any obstacle and without any possibility, despite Cantone's attempts, of stopping the dissemination.[68]

3. The Lightning-fast Introduction of Article 612-*ter* ("Illegal Dissemination of Sexually Explicit Images or Videos") in the Italian Penal Code

Parliament did not address the problem of non-consensual pornography until 2019. As mentioned, a bill had been submitted to Parliament in September 2016 immediately after Tiziana Cantone's suicide, but it never reached the preliminary examination of the Law Commission.[69]

The current Legislature did not begin its term suggesting that the regulation of "revenge porn" was imminent. Some associations active in the field of digital rights presented, in the fall of 2018, an online petition to urge Parliament to pass a specific law to combat the phenomenon.[70] In a few days, the initiative had collected over 100,000 signatures, and the call to regulate the matter had been accepted by the Hon. Laura Boldrini (LEU), who announced that a bill would be presented to Parliament as soon as possible.[71] During the following weeks, three bills were presented in the Senate by other political forces (M5S, FI and PD).[72]

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[67] *See supra* notes 1–14 and accompanying text.

[68] Caletti, *supra* note 8, at 65–66.

[69] *See supra* note 15. *See also* Caletti, *supra* note 8, at 68 (about the non-examination of the committee).

[70] Riccardo Saporiti, *Revenge porn, una petizione perché diventi reato*, WIRED (Nov. 28, 2018), https://www.wired.it/attualita/politica/2018/11/28/revenge-porn-petizione/.

[71] Luca Zorloni, *Revenge porn, arriva una proposta di legge anche in Italia*, WIRED (Jan. 28, 2019), https://www.wired.it/internet/regole/2019/01/28/revenge-porn-legge-italia/.

[72] These are, respectively, Introduzione reato diffusione video privati, S.R. 1076, 18a Par. (2019) (It.); Introduzione reato diffusione video privati,

Just as the Senate Law Commission was about to work on these legislative proposals, the introduction into the Penal Code of Article 612-*ter* was voted on by the Chamber of Deputies as part of the discussion of the so-called "Code Red," a broad legislative project of governmental origin on gender violence.[73]

The new offense was not contemplated in the version of the bill initially presented by the government. Article 10, entitled "introduction of art. 612-*ter*," was incorporated into the draft as a result of two amendment proposals submitted by the main opposition forces during the parliamentary debate over the bill,[74] whilst the pornographic scandal of Giulia Sarti was ongoing.[75] On March 28, 2019, after a first rejection of amendment n. 1.17 (LEU), which was harshly contested by the opposition female deputies who staged a protest on the Government benches, amendment n. 1.107 (FI and PD) was unanimously approved - with substantial changes - by the Assembly on April 2.[76]

Curiously, after the approval of the amendment in the first Chamber, the Senate Law Commission held several hearings on the bills presented before the crime of "*Illegal dissemination of sexually explicit images or videos*" became part of the "Code Red."[77] However, on the following July 17th, despite the doubts

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S.R. 1166, 18a Par. (2019) (It.); Introduzione reato diffusione video privati, S.R. 1134, 18a Par. (2019) (It.).

[73] "Code Red" is the political and journalistic name for Bill n. S. 1200 ("Amendments to the Penal Code, the Code of Penal Procedure, and other provisions relating to the protection of victims of domestic and gender-based violence"), which later became L. n. 69 of July 19, 2019. For a summary of its contents, see Gian Luigi Gatta, *Il testo del disegno di legge "Codice Rosso" (Revenge porn, costrizione o induzione al matrimonio, deformazione/sfregio del viso, e molto altro ancora)*, DIRITTO PENALE CONTEMPORANEO, (Apr. 15, 2019).

[74] *See* Gian Marco Caletti, *Libertà e riservatezza sessuale all'epoca di Internet*, RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 2045, 2059 (2019).

[75] *See supra* note 25–30 and accompanying text.

[76] *See* Gian Marco Caletti, *"Revenge Porn". Prime considerazioni in vista dell'introduzione dell'art. 612-ter c.p.: una fattispecie esemplare, ma davvero efficace?*, DIRITTO PENALE CONTEMPORANEO, (Apr. 29, 2019).

[77] I had the honor of being part of the panel of experts interviewed by the Senate. To read my comments on article 612-*ter*, see *Osservazioni in merito*

expressed by the experts interviewed,[78] the Senate definitively approved - without amendments - the entire bill (law n. 69/2019), including article 612-*ter* of Penal Code ("*Illegal dissemination of sexually explicit images or videos*") formulated as follows:

> 1. Unless the fact constitutes a more serious crime, a person who, after having made or stolen them, sends, delivers, transfers, publishes or disseminates images or videos containing sexually explicit materials, intended to remain private, without the consent of the persons depicted, is liable to be punished with imprisonment from one to six years and with a fine of between € 5,000 and € 15,000.
>
> 2. The same penalty is applied to anyone who, having received or otherwise acquired the images or videos referred to in the first paragraph, sends, delivers, transfers, publishes or disseminates them without the consent of the persons depicted with the intention to harm them.
>
> 3. The penalty is increased if the facts are committed by the spouse, even separated or divorced, or by a person who is or has been linked by an emotional relationship to the victim or if the facts are committed through IT or telematic tools.
>
> 4. The penalty is increased from one third to one half if the acts are committed against a person physically or mentally disabled or against a pregnant woman.
>
> 5. The crime is punished only in presence of a complaint by the victim. The deadline for filing a lawsuit is six months. The remission of the complaint can only be procedural. However, the prosecutor can proceed ex officio in the cases referred to in the

ai disegni di legge n. 1076, n. 1134, n. 1166 in tema di c.d. "Revenge Porn," Senato della Republica, Commissione Giutizia, Palazzo Carpegna (2019) (statements by Gian Marco Caletti & Kolis Summerer).

[78] *Id.*

fourth paragraph, as well as when the fact is connected with another crime for which one the prosecutor must proceed ex officio.[79]

B. And Its Review

1. The Structure of the Offense on Two Paragraphs ("First" and "Second" Distributors): Notes on the Systematic Collocation within the Penal Code

A first question of interest involves the systematic collocation of the new crime, given that it could occur in different topographical locations.[80]

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[79] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.). The translation of the text of the law is by the author of this article and is therefore not official. This is the original Italian version:

> (Diffusione illecita di immagini o video sessualmente espliciti) – Salvo che il fatto costituisca più grave reato, chiunque, dopo averli realizzati o sottratti, invia, consegna, cede, pubblica o diffonde immagini o video a contenuto sessualmente esplicito, destinati a rimanere privati, senza il consenso delle persone rappresentate, è punito con la reclusione da uno a sei anni e con la multa da euro 5.000 a euro 15.000.
>
> La stessa pena si applica a chi, avendo ricevuto o comunque acquisito le immagini o i video di cui al primo comma, li invia, consegna, cede, pubblica o diffonde senza il consenso delle persone rappresentate al fine di recare loro nocumento.
>
> La pena è aumentata se i fatti sono commessi dal coniuge, anche separato o divorziato, o da persona che è o è stata legata da relazione affettiva alla persona offesa ovvero se i fatti sono commessi attraverso strumenti informatici o telematici.
>
> La pena è aumentata da un terzo alla metà se i fatti sono commessi in danno di persona in condizione di inferiorità fisica o psichica o in danno di una donna in stato di gravidanza.
>
> Il delitto è punito a querela della persona offesa. Il termine per la proposizione della querela è di sei mesi. La remissione della querela può essere soltanto processuale. Si procede tuttavia d'ufficio nei casi di cui al quarto comma, nonché quando il fatto è connesso con altro delitto per il quale si deve procedere d'ufficio.

[80] In the Italian penal system, the collocation of an offense takes on a certain importance, certainly more than in common law systems. This is

The Italian legislature has opted to include the crime of "*Illegal dissemination of sexually explicit images or videos*" within the Penal Code in the title dedicated to crimes that harm "moral freedom" ("*delitti contro la libertà morale*") – those crimes that, in essence, force the victim to tolerate something unwanted.[81] The choice seems to be motivated mainly by the proximity, on the criminological level, of non-consensual pornography with "stalking,"[82] criminalized in the previous article (art. 612-*bis* of the Penal Code).[83] The solution adopted by lawmakers, however, appears to be preferable to what had been proposed in other bills, which foresaw the placement of the new offense, for example, within the (colloquially known) "Privacy Code."[84] It is true that privacy is the legal interest

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particularly the case when the offense is included in the Penal Code, which is structured in different sections, distinct from the object protected by the offenses included in the section (*e.g.* offenses defending property). The placement within one section rather than another therefore gives an initial indication of the purposes of protection of the crime, which, although not mandatory, can be used in an interpretative way to resolve questions regarding the application of the offense. On this topic, see. TULLIO PADOVANI & LUIGI STORTONI, DIRITTO PENALE E FATTISPECIE CRIMINOSE. INTRODUZIONE ALLA PARTE SPECIALE DEL DIRITTO PENALE (2006).

However, it should be pointed out that, since the Code dates back to 1930, some of the classifications appear to be completely outdated and obsolete. For example, the current Italian legislation on "sexual crimes" was introduced by the legislature in 1996 (with law no. 66 of February 15, 1996). Prior to this reform, the Criminal Code of 1930 provided for the crime of "rape" and that of "violent libidinal acts," regulated by (repealed) articles 519 and 521 of the Penal Code. They were included among the crimes against public morality and decency (specifically, in the repealed Chapter I "crimes against sexual freedom" of Title IX of the Code). *See* David Brunelli, *Bene giuridico e politica criminale nella riforma dei reati a sfondo sessuale*, I REATI SESSUALI. I REATI DI SFRUTTAMENTO DEI MINORI E DI RIDUZIONE IN SCHIAVITÙ PER FINI SESSUALI, 37 (Franco Coppi ed., 2nd ed., 2007).

[81] *See* Art. 610-613-*ter* CODICE PENALE [C.P.] (It.).

[82] That proximity has been already highlighted by Anglo-American scholars. *See* DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 35–55 (2014) (where several cases of non-consensual pornography are illustrated in the context of cyber harassment and cyberstalking).

[83] *See* CODICE PENALE [C.P.] art. 612-*bis* (It.).

[84] D.Lgs. n. 196/2003 (It.). This collects all the provisions of the Italian law on privacy. The "code" also contains some crimes related to privacy, including the already mentioned offense of unlawful processing of personal data, see Art. 167 CODICE PENALE [C.P.] (It.)., which, as mentioned above, was also used in some revenge porn cases prior to the introduction of the new

primarily affected by the conduct discussed here, but the reference to the "sexually explicit" nature of the images contained in art. 612-*ter* of the Penal Code leads one to think of an attack on other values as well, such as intimacy, confidentiality, sometimes the trust placed in the agent and, to some extent, sexual autonomy. [85]

Despite the legislature's attempts to solve the problem of non-consensual pornography through this statute, the idea of creating a special section in the code for crimes that violate sexual privacy deserved more detailed consideration. Sexual privacy is a legal interest that is becoming increasingly at stake in modern life,[86] given the multiplication of new forms of intrusion permitted by digital tools,[87] and it deserves a new compact for protection.[88] The introduction of this crime should have been the occasion for an overall reform of sexual crimes in Italian criminal law,[89] given the similarities in terms of consent,[90] but the "Red Code" has provided only procedural and not substantial changes.[91]

Regarding the issues more strictly connected to the formulation of the offense, the offense can be committed in two distinct ways, which provide the same punitive treatment for the conduct of sending, delivery, transfer, publication and dissemination of images or videos with sexually explicit

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specific crime. *See*, *e.g.*, Cass. pen., sez. III, 10 settembre 2015, n. 40356; Cass. pen., sez. III, 14 giugno 2017, n. 29549.

[85] For general and worthwhile considerations about privacy, identity, sexual autonomy and "revenge porn," see Alisdair A. Gillespie, *"Trust me, it's only for me": "Revenge Porn" and the Criminal Law*, 11 CRIM. L.R. 866, 873–75 (2015).

[86] *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019).

[87] *Id.*

[88] *See* Danielle Keats Citron, *A New Compact for Sexual Privacy*, WM & MARY L. REV. (forthcoming).

[89] Many Italian scholars are now signaling the need for sex crimes reform. *See*, *e.g.*, Giuliano Balbi, *I reati contro la libertà e l'autodeterminazione sessuale in una prospettiva di riforma*, SISTEMA PENALE (Mar. 3, 2020).

[90] *See infra* Part 1.B.4.

[91] The goal of the bill was primarily to accelerate sexual assault prosecutions. For an overall commentary on the law, see BARTOLOMEO ROMANO & ANTONELLA MARANDOLA, CODICE ROSSO (2020).

content.[92] The boundary is drawn according to the modalities with which the agent has come into possession of the images that they subsequently distributed: in the case of the first paragraph, it is required that the distributor contributed to the creation of the images or that they have "*stolen*" them, while the second paragraph regulates when the distributor has "*received or acquired them in another way.*"[93]

Depending on the method of acquisition of sexually explicit material, the lawmaker has differently regulated the *mens rea*.[94] In order for the crime to exist in the instance of reception, the agent must carry out the conduct with "*the intention to harm*" the person depicted in the images or footages. The rationale is to distinguish between the "original distributor" (i.e. the one who has created the images or has taken them away from the victim in order to publish the images first) and the so-called "second distributors" (who disseminate images received from others and contributes to making them viral), selecting within the second distributors those conducts that, because they are animated by a malicious intent, can be more harmful for the victim. [95]

2. The Actus Reus of Non-consensual Pornography: Punishable Conducts

The range of illegal conduct is extremely broad and should include most cases of non-consensual distribution of pornography.[96]

The first group of conduct (send, deliver, transfer) seems to refer, not without overlapping, to the transfer of the images between two people or, alternatively, to a determined and restricted number of receivers.[97] Not infrequently, revenge is realized by sending intimate material to one or a few specific

[92] Caletti, *supra* note 75.
[93] *Id.*
[94] *Id*.
[95] *Id*.
[96] *See* Caletti, *supra* note 73, at 2065–66 (examining more closely the interpretation of the conduct that constitutes the *actus reus* of the new crime).
[97] *Id.*

people, such as the employer of the person portrayed in the images, his or her colleagues, family members, or new partner, in the hope that the scandal will jeopardize his or her professional future or close relationships.[98] Sometimes, the process of dissemination can also begin with an initial confidential transfer to a single person who, instead of keeping the image secret, distributes it to others. Something like this could also have happened in the case of Tiziana Cantone. According to the first version of the facts, the partner of the woman sent the videos to a few friends as part of an erotic game.[99]

The second group of conduct includes cases in which photographs or videos are posted on pornographic sites, social networks or other online platforms.[100] Dissemination seems to envisage the distribution without intermediaries to a wide audience of recipients, a scenario that could occur with the forwarding of instant messaging chats (e.g. "WhatsApp"), mailing lists, and peer to peer sharing tools.[101] By contrast, the action of those who merely show images to another person, without the "physical" transfer of the same on a paper or digital support,[102] do not seem to fall under the legal framework.[103]

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[98] Such cases are reported by Cinthya Barmore, *see* Cinthya Barmore *Criminalization in Context: Involuntariness, Obscenity, and First Amendment*, 67 STAN. L. REV. 447, 448 (2015); and Kellianne Hickey, *Using Technology to impede Privacy and Consent: a Survey of Revenge Porn Laws*, 55 AM. CRIM. L. REV. ONLINE 19 (2018).

[99] *See supra* note 1-14 and accompanying text.

[100] Caletti, *supra* note 73, at 2065–66.

[101] *Id.*

[102] The problem has also arisen in Australia. Among the Australian scholars, in favor of the criminal relevance also of the conduct of the one who shows an image, see Nicola Henry & Anastasia Powell, *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*, 24 (4) SOC. & LEG. STUD. 397, 403 (2016).

[103] Compare with the second paragraph of art. 615-*bis* (voyeurism) of the Italian Penal Code, which provides for the conduct of "revelation" of images unduly obtained without the consent of the represented person. A difference in treatment would not seem so unreasonable: in that case, the non-consensual - and therefore illicit - origin of the images makes it possible to envisage enhanced protection.

The legality of these cases can be justified by the lesser seriousness of such conduct. In fact, although certainly unpleasant, showing an image without transmitting it does not imply the risk of making it viral. The agent, not renouncing control over the image, does not initiate the further dissemination of the intimate material, which is – as we saw – probably the most damaging feature of non-consensual pornography.[104]

More problematic is the final group of conduct, in which the images are shown to a large number of people. Consider, for example, the stunt - anything but unrealistic[105] - of a group of young people who, during a party or a self-managed assembly of their school, show a video depicting a classmate performing sexual acts with one of them to humiliate the classmate. Or consider, again, the exhibition at a photographic exposition of a nude image that had not been authorized by the person represented in the photograph. With respect to this case, also characterized by the absence of transmission of the images, but still reaches a large audience, it can be read as a "publication."

In any case, except for borderline situations such as those indicated, the equal amount of punishment for all conduct leads us to believe that the meaning to be attributed to the actions listed in the new article will not be the subject of rigorous study by courts and scholars. It does not seem simple to identify a criterion to guide the judge at the sentencing stage and determine which of the different typified behaviors is more serious. It is not at all obvious that a publication without the knowledge of the victim on numerous foreign pornographic sites, able to reach thousands of users, is more harmful than sharing the publication with all of the direct acquaintances of the offended person on a messaging chat or a social network. It should also be noted that, as a rule of thumb, for those who carry out the conduct, in most

[104] Nevertheless, it is not difficult to imagine such cases causing harm. Such harm could arise if an ex-partner decides to show sexual images to a new partner, or to the parents of the person depicted, or to a colleague or employer of the victim.

[105] A real similar case is reported by Citron, *supra* note 61, at. 1206 (describing the case of a young man who had shown secretly videotaped sex videos of his girlfriend to members of his fraternity).

cases, it is not possible to predict how widespread the dissemination of images will be, given that the "virality" often takes random paths and is difficult to foresee.

At most, therefore, the different types of conduct will be a guideline for the evaluation of the existence of the specific intention to cause harm embodied in the second paragraph.[106]

Besides these considerations, the legislature's decision not to provide for the use of the Internet or, in any case, digital and/or telematic tools as an express form of conduct appears to be wise.[107] Such restrictions, envisaged in some bills and approved by several foreign legal systems, would have excluded serious conduct from the range of punishment. Non-consensual pornography existed before the adoption of modern technologies, which have radicalized its prevalence and effects.[108] Still today, however, forms of diffusion that do not utilize such tools, specifically of the Internet, are conceivable.[109]

3. The Object of the Dissemination: "Images and Videos with Sexually Explicit Content and Intended to Remain Private"

The images and videos that are relevant to satisfying the conduct requirements described by both paragraphs of art. 612-*ter* must have "*sexually explicit content*" and be "*intended to*

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[106] *See infra*, Part I.B.5.

[107] Cases of non-consensual pornography already existed before the advent of the Internet. *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1254 (2017) (describing the case of the magazine Beaver Hunt which published reader-submitted sexually explicit photographs).

[108] An important case of "revenge porn" *ante litteram* is that of the American magazine "Beaver Hunt", which in the '80s published non-consensual nude images of dozens of American girls. *See* Franks, *supra* note 106 at 1254. An overview of pre-digital non-consensual pornography is given by Michael Salter & Thomas Crofts, *Responding to Revenge Porn: Challenges to Online Legal Impunity*, NEW VIEWS ON PORNOGRAPHY: SEXUALITY, POL. & L. 233 (Lynn Comella & Shira Tarrant eds., 2015); and Alexa Dodge, *supra* note 65, at 123–26.

[109] *Id*., at 126.

remain private."[110] Both requirements have a restrictive function on the scope of application of the new crime, requiring the judge to select only those images that have an explicit sexual connotation and for which a well-founded expectation of privacy can be determined. We can assume that, unlike what has been observed for the conduct requirements, these requisites will be a crucial interpretative point.

From the first point of view, the decision to limit the offense to the distribution of sexually explicit images follows the example of Anglo-American laws, rather than utilizing the criminalization framework adopted by the main continental legal systems (for example, Spain and Germany), which focuses on the protection of privacy and confidentiality as a whole.[111]

From the second point of view, the solution adopted by Italy appears to align with the harsh punishment framework provided, which is justified by the greater harmfulness of the circulation of an explicitly sexual image.[112]

Even though initially envisaged in the first version of the law, the legislature decided not to provide a definition of what

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[110] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.).

[111] The Spanish law, codified in paragraph 7 of Article 197 of the Penal Code, speaks of "imágenes o grabaciones audiovisuales obtenido con su anuencia en un domicilio o en cualquier otro lugar fuera del alcance de la mirada de terceros," not contemplating any reference to sexuality. Similarly, § 201a of the Strafgesetzbuch focuses on the "Verletzung des höchstpersönlichen Lebensbereichs" and the only references to sexuality are contained in paragraph 3, which punishes those who take photographs of nudity of minors under eighteen years of age.

In both cases it seems uncontroversial that an image with nudity amounts to the offense. Both laws also provide for other and different invasions of intimacy as crimes. Asunciòn Colas Turegano, *Nuevas Conductas Contra la Intimidad (arts. 197; 197 bis; 197 ter)*, COMENTARIOS A LA REFORMA DEL CODIGO PENAL DE 2015 (José Luis Gonzalez Cussac ed., 2015).

[112] In this perspective, it should be noted that the penalties provided for by Spanish and German laws are considerably lower than those provided for by Italian law. The limitation seems also consistent with the possibility of invoking, to protect intimacy in the broadest sense, other existing offenses such as art. 167 of the "Privacy Code"; *see supra* note 83. If the images have been captured using "voyeuristic" methods, art. 615-*bis* of the Penal Code applies.

is meant by "sexually explicit," leaving it up to the case law to evaluate the sexual nature of the images disseminated on a case-by-case basis. This solution is, in the end, acceptable, even though it is not flawless in relation to the principle of definiteness (or strict construction).[113] Where, as in England, an attempt has been made to articulate an explicit definition of "sexual," it has raised many questions such as, among others, whether the female breast should be considered a "genital organ."[114]

In general, there should be no particular doubts regarding the recognition of the explicit sexual nature of images depicting any form of sexual intercourse or autoeroticism, as well as images depicting nude bodies, either in full or limited to genital organs or other body areas generally associated with sexual excitement such as breasts or buttocks. For the other categories of images - kisses and other effusions, sensual or provocative poses, photos in bathing suits or lingerie - which do not appear to *per se* fall under the requisite definition, the evaluation of the overall context will be important, given that even a particularly allusive image, even without the aforementioned nudity, can have a sexual character.[115]

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[113] The same problem has arisen in Italy in relation to the concept of "sexual acts" relevant to integrate sexual violence; *see* Art. 609-*bis* CODICE PENALE [C.P.] (It.). In fact, the law does not provide a definition, leaving the interpretation of sexual acts to case law. There are two interpretations that, initially proposed by scholars, have been used by the Courts. On the one hand, the "anatomical" paradigm, according to which a sexual act is only that which touches an erogenous zone of the victim's body; *see* Alberto Cadoppi, *Commento art. 609-bis C.P.*, *in* COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E LA PEDOFILIA 439 (Alberto Cadoppi ed., 4th ed. 2006). On the other hand, the "contextual" paradigm exists, according to which it is necessary to analyze the context in which the conduct is realized; *see* Giovanni Fiandaca, *La rilevanza penale del bacio tra anatomia e cultura*, 507 FORO ITALIANO (1998). This second paradigm makes it possible to define as sexual even conduct, such as the kiss on the cheek, that is not strictly sexual. For the analysis in English of this debate, see Alberto Cadoppi & Michael Vitiello, *A Kiss Is Just a Kiss or Is It? A Comparative Look at Italian and American Sex Crimes*, 40 SETON HALL L. REV. 191 (2010).

[114] On this issue, see Gillespie, *supra* note 84, at 869.

[115] Thus, it can be assumed that the alternative between the anatomical and contextual paradigm related to rape will reappear to the courts in relation to the definition of "sexually explicit" as well. *See supra* note 112.

In addition to an explicitly sexual nature, it is necessary that the images and videos were created with an expectation of confidentiality in which they would have remained if one of the illicit behaviors had not taken place.[116] The provision of this additional character of the images excludes from the focus of the statute situations in which there has been a voluntary exposure to the public, as is the case for "streaking," or for those who have sexual intercourse in public.[117] These are cases in which consent to the disclosure of the images may be lacking, but the non-private nature of the context of the image's creation makes it impossible to expect the image to remain confidential.[118]

The exclusion of cases in which the absence of the requirement of an expectation of confidentiality and privacy does not derive from a free choice of the person represented in the image seems to be more problematic. It appears to be necessary to admit this element of art. 612-*ter* c.p. is not satisfied by cases, which are appearing more and more frequently, in which harassment or real sexual violence are filmed for "cyberbullying" purposes or in order to blackmail the victim.[119] Such images, very often realized in the presence of many people (e.g., parties of adolescents, group violence), are created with the sole purpose of subsequent publication that is incompatible with "remaining private."

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[116] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.).

[117] The examples are taken from McGlynn & Rackley *supra* note 46, at 540.

[118] Very problematic is the case where two people deliberately choose a place where they reasonably believe the risk of being filmed is minimal (*e.g.*, a forest, the bathroom of a public place).

[119] International literature offers numerous examples of young girls committing suicide as a result of cyberbullying consisting of the dissemination of images of harassment. *See* Franks, *supra* note 106, at 1263–4; and Alexa Dodge, *Digitizing rape culture: Online sexual violence and the power of the digital photograph*, 12 (1) CRIME, MEDIA, CULTURE 65 (2016). On the trend of filming rape, see Henry & Powell, *supra* note 101, at 405-07. In England, it has been proposed to criminalize images that depict rape under the extreme pornography law. *See* Clare McGlynn & Erika Rackley, *Criminalising extreme pornography: a lost opportunity*, CRIM. L. REV., 245, 249–50 (2009).

Returning to the cases initially described, it would be difficult for the courts to hold responsible for the crime of art. 612-*ter* of the penal code the young boys who filmed and spread the sexual harassment of Carolina Picchio.[120]

Moreover, the attribute of privacy creates some interpretative challenges with regard to "sexting." In this regard, it must be firmly determined that the sharing of a sexually explicit image within a couple or a small circle of people does not translate into a renouncement of the privacy of the image.[121] This line of reasoning does not reflect in any way the idea of privacy conveyed by new technologies: those who have grown up with an online presence (so-called "millennials" and "Generation Z") are aware that they can, through identical gestures (a few "clicks"), share content with one person, a few friends, larger groups, all their acquaintances or even thousands of strangers.[122] As many scholars have argued, therefore, images with sexual content should be presumed to be "private,"[123] unless there are clear indications that there is no expectation of privacy in the conduct of the person depicted (for example, sending images to a very large group, "posting" them on social networks or uploading them to a pornographic site).

[120] *See supra* note 17.

[121] *See* McGlynn & Rackley *supra* note 46, at 543.

[122] The prevailing English doctrine is particularly lucid on this matter. *See* Gillespie, *supra* note 84, at 870; McGlynn & Rackley *supra* note 46, at 545.

[123] *See*, *e.g.* McGlynn & Rackley *supra* note 46.

4. The Lack of Consent as a Prerequisite for the Actus Reus: Issues on the Mental Element and Possible Application of the Paradigm of "Affirmative Consent"

Both paragraphs of Article 612-*ter* of the Penal Code require, as a prerequisite for the conduct, that the actions to be carried out "*without the consent of the persons depicted.*"[124]

This is, in some sense, the epicenter of the new offense. Non-consensuality, the true and proper distinctive feature of "revenge porn" in its broader meaning, draws the perimeter of offensiveness and unlawfulness of the dissemination of the images. The criminal intervention is justified not on the basis of the publication of pornographic materials and their intrinsic amorality, but on the unauthorized exposure of a body in circumstances of extreme intimacy. Therefore, if the distribution of images is consensual, "*no harm arises.*"[125]

The element of non-consensual conduct, however, raises several interpretative questions, especially on the ground of culpability. Same as with traditional sexual crimes,[126] in fact, the problem is to ascertain the *mens rea* of the accused in relation to the element of the absence of consent in the disclosure of the images.[127]

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[124] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.) (translated from Italian to English and emphasis added).

[125] McGlynn & Rackley *supra* note 46, at 542 (emphasis added). To be more accurate, the harm may also be there in cases of consensual disclosure: the person may lose their job, for instance, if their employer becomes aware of the images that the person consented to be shared. Therefore, what is absent is a wrong.

[126] After all, it is undeniable that there are multiple common threads between non-consensual pornography and rape. Gradually, legal scholarship is highlighting these aspects. *See*, *e.g.*, ANASTASIA POWELL & NICOLA HENRY, SEXUAL VIOLENCE IN A DIGITAL AGE (2017); Clare McGlynn, Erika Rackley & Ruth Houghton, *Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse*, 25 FEM. LEG. STUD. (2017); Dodge, *supra* note 118.

[127] *See*, *e.g.*, Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016).

It is on this point, not by chance, that the main oppositions to the criminalization of "revenge porn" in the Anglo-American world have been fed by the misunderstanding that allowing an intimate photo to be taken is equivalent to endorsing the subsequent publication or that, even more, sharing an image with a person ("sexting") means to consent to its further diffusion, or at least to accept the risk.[128] The blame therefore tends to be placed on the victim, to whose naive self-exposure to danger is ascribed the dramatic consequences actually triggered by the author of the conduct ("victim blaming").[129]

Taking this view, not new due to its well-known declinations in the field of sexual violence,[130] the risk on a practical level is an unjustified presumption of consent to the diffusion of the images by those who have shared them with their partners or, more likely, a frequent assumption that the perpetrator did not have the requisite intent due to a mistake of fact that affects the element of non-consensuality.

At this stage, it is necessary to reaffirm the strict "contextuality" of any form of consent, i.e. the prohibition to extend its validity beyond the boundaries of the exact context in

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[128] The reasoning, widely shared within public opinion, is explained by Clay Calvert. *See* Clay Calvert *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, in 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 698–700 (2014). *See also* Barmore, *supra* note 97, at 467 (exemplifying the reluctance of the American police to receive the first complaints, reporting the case of an agent who, when faced with a complaint, would have replied, "why would you take a picture like this if you didn't want it on the internet?").

[129] *See*, *e.g.*, Nicolas Suzor, Bryony Seignior & Jennifer Singleton, *Non-Consensual Porn and the Responsibilities of Online Intermediaries*, 40 MELB. U. L. REV. 1057, 1067 (2017).

[130] Italy is, after all, the country where a judge made international headlines just over a decade ago when he announced a decision that a man could not possibly rape a woman wearing tight blue jeans. *See* Alessandra Stanley, *Ruling on Tight Jeans and Rape Sets Off Anger in Italy*, N.Y. TIMES, Feb. 16, 1999, at A6. For a comment on that well-known sentence in the Italian penal literature, see Marta Bertolino, *Libertà sessuale e blue jeans*, 692 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 692 (1999).

which it is given.[131] From this perspective, on the basis of what is now generally recognized with regard to other areas, such as sexuality itself[132] or medical practice, it should be rejected that the consensual creation of a sexually explicit image or its sending to a specific person constitutes an implicit acceptance of distribution.[133] Such distribution constitutes additional conduct that, in order to be lawfully realized, requires a specific authorization.[134]

That said, it seems inevitable that, from a practical point of view, the evidence of the agent's perception of the absence of consent will be one of the main problems.

It is no coincidence that an American scholar, Franks, has recommended to state legislators that, in the drafting of laws, the statute provide for recklessness as the maximum subjective element regarding the absence of consent.[135]

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[131] On closer inspection, this aspect is very clear to Anglo-American scholarship. *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT. TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007). More recently see Citron, *supra* note 61.

[132] The contextuality of consent has been brought into clearer focus in the context of the rape. One example is the prosecution of so-called "stealthing," the practice of removing a condom during sexual intercourse without the consent of the other person. What is lacking in this case is not consent to sexual intercourse, but consent to the particular unprotected mode of intercourse. *See generally*, *e.g.*, Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183 (2017).

[133] Gillespie, *supra* note 84, at 873.

[134] On this point, the main part of Anglo-American scholarship is in agreement. *See*, *e.g.*, Citron & Franks, *supra* note 39, at 354; Gillespie, *supra* note 84, at 873; McGlynn & Rackley *supra* note 46, at 543–44. The premise of this approach is the lay and non-paternalistic perspective, according to which, for a person, and in particular a woman, it is a declination of her sexual freedom to send her own image to her partner, in a context of confidentiality, intimacy and mutual trust. For a view of revenge porn primarily as a breach of trust, see Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709 (2017).

[135] Along these lines, see Franks, *supra* note 106, at 1284. Similarly in Australia: Tyrone Kirchengast & Thomas Crofts, *The legal and policy*

Following this approach, without prejudice to the intent to disclose, whoever (whether a first or a second distributor) has shared the images while being aware of the risk that disclosure is not consented to is to be considered responsible.[136] Additionally, there would be no responsibility for those who share images because they genuinely believe that the person depicted has authorized them or that they have already been published consensually, for example in the belief that the person depicted is a professional "porn star."[137]

The differentiated accountability of intent, recklessness and negligence according to the different constituent elements of the crime (so-called "element analysis") is not part of the Italian tradition or, more generally, of the criminal law of so-called "civil law" countries.[138] Just as recklessness itself does not belong to continental European legal systems,[139] in Italy the distinction between conditional intent ("dolo eventuale") and conscious negligence ("colpa cosciente") is difficult to make.[140]

Conditional intent – also known as *dolus eventualis* in common law countries – requires two elements.[141] First, the

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contexts of 'revenge porn' criminalisation: the need for multiple approaches, 19-1 OXFORD UNIV. COMMONWEALTH L. J., 1, 12 (2019).

[136] Franks, *supra* note 106, at 1285.

[137] *Id.*

[138] Among Italian scholars, on the so-called element analysis, see Alberto Cadoppi, *Mens rea*, DIGESTO DELLE DISICPLINE PENALISTICHE 618 (4th ed., 1993); MATTEO L. MATTHEUDAKIS, L'IMPUTAZIONE COLPEVOLE DIFFERENZIATA (2020).

[139] For an updated and very comprehensive overview of recklessness in all common law countries, see FINDLAY STARK, CULPABLE CARELESSNESS. RECKLESSNESS AND NEGLIGENCE IN THE CRIMINAL LAW (2016). There are also those who have proposed importing recklessness in Italy as a new culpability criterion to overcome interpretive difficulties. *See* FRANCESCA CURI, TERTIUM DATUR. DAL COMMON LAW AL CIVIL LAW PER UNA SCOMPOSIZIONE TRIPARTITA DELL'ELEMENTO SOGGETTIVO DEL REATO (2003).

[140] *See*, *e.g.* STEFANO CANESTRARI, DOLO EVENTUALE E COLPA COSCIENTE. AI CONFINI TRA DOLO E COLPA NELLA STRUTTURA DELLE TIPOLOGIE DELITTUOSE (1999).

[141] For this definition, relating to *dolus eventualis* in South Africa, but well reflecting *dolus eventualis* in civil law countries, see Stark, *supra* note 138, at 210.

actor must be aware that it was "a not entirely distant possibility" that a certain risk would materialize.[142] The distinctiveness of conditional intention arises from its second element: the defendant must have "accepted," "consented to," "not cared" about or been indifferent to the materialization of the relevant risk.[143] Otherwise, in conscious negligence the actor believes that, despite the conduct, the event will not occur[144]

Drawing a boundary between these two forms of the *mens rea* is a really critical issue.[145] In Italian criminal law, offenses are punishable for negligence only if this is expressly provided for by the Penal Code.[146] Otherwise, as in the case for Article 612-*ter* of the Italian Penal Code, the level of intent mentioned covers all the elements of the offense.[147]

However, it would be possible to reach an outcome similar to that suggested by Franks without returning to the long-standing and complex issue of the distinction between conditional intent and conscious negligence. The road, certainly less tortuous, would be a particular reading of the literal text of art. 612-*ter* c.p., which presents a peculiar structure compared to other cases based on non-consensuality such as, among others, the violation of domicile.[148] Within the definition of art. 614 of the Penal Code, it is intended that the agent carries out the conduct of intrusion in the domicile "*against* the express or tacit will of those who have the right to exclude it."[149] In general,

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[142] *Id.*

[143] *Id.*

[144] Among Italian textbooks, see GIOVANNI FIANDACA & ENZO MUSCO, DIRITTO PENALE. PARTE GENERALE 604–05 (8th ed., 2018).

[145] This is also because the definitions are based on the actor's internal beliefs, which are difficult to deduce with external and objective criteria. *See* CANESTRARI, *supra* note 139.

[146] *See* Art. 42 CODICE PENALE [C.P.] (It.). Differently, intent is the ordinary criterion required to establish the *mens rea*.

[147] On the contrary, it seems admissible to mix different forms of intent according to the different elements of the offense, so that the element of non-consensuality could be ascribed to *dolus eventualis* and therefore recognized as present when the subject has accepted the risk that the person depicted had not given consent to the disclosure of the images.

[148] *See* Art. 614 CODICE PENALE [C.P.] (It.).

[149] *See* Art. 614 CODICE PENALE [C.P.] (It.):

consequently, the establishment of dissent, whether expressed or tacit, involves finding in the historical fact an actual manifestation of will of the owner to be hostile to intrusion into the home.

The new crime of illicit diffusion of sexually explicit images, by establishing that the conduct must take place "*without consent,*" does not place the requirement in terms of divergence from an expressly (or tacitly) manifested dissent.[150] Therefore, it seems possible to read the requirement of the conduct as satisfied whenever the agent has delivered the action in the absence of an explicit consent to the disclosure by all the persons depicted in the images; that is, without having previously collected an express manifestation of will.[151]

From this angle, the formulation of Article 612-*ter* of the Italian Penal Code seems to reflect the paradigm of affirmative consent recently affirmed in the legislation on rape in many

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> Chiunque s'introduce nell'abitazione altrui, o in un altro luogo di privata dimora, o nelle appartenenze di essi, contro la volontà espressa o tacita di chi ha il diritto di escluderlo, ovvero vi s'introduce clandestinamente o con l'inganno, è punito con la reclusione da uno a quattro anni. Alla stessa pena soggiace chi si trattiene nei detti luoghi contro l'espressa volontà di chi ha il diritto di escluderlo, ovvero vi si trattiene clandestinamente o con inganno. Il delitto è punibile a querela della persona offesa. La pena è da due a sei anni, e si procede d'ufficio, se il fatto è commesso con violenza sulle cose, o alle persone, ovvero se il colpevole è palesemente armato.

[150] The only precedent using this pattern in the Italian legal system is the recent law on informed consent to health treatment (*see* L. n. 219/2017). The law, as translated, states that "no health treatment may be initiated or continued without the free and informed consent of the person concerned" (in the Italian original version: "nessun trattamento sanitario può essere iniziato o proseguito se privo del consenso libero e informato della persona interessata"). As far as the law reiterated, this principle was already well established in the case law. On this new reform, see Stefano Canestrari, *Una buona legge buona (DDL recante «norme in materia di consenso informato e di disposizioni anticipate di trattamento»)*, RIVISTA ITALIANA DI MEDICINA LEGALE, 975, 976 (2017).

[151] *See* Caletti, *supra* note 73, at 2077.

American states.[152] According to this new model, penetration is non-consensual for the purposes of criminal law not only when the person has expressed an explicit dissent ("no means no"), but also in cases where it occurred without the person having expressed a positive will in that sense ("yes means yes").[153]

For example, Wisconsin's law, which provides: "Third degree sexual assault. Whoever has sexual intercourse with a person *without the consent* of that person is guilty of a Class G felony." [154] This jurisdiction has a legal framework that relies on affirmative consent.[155]

In conclusion, if the original distributor has acted because he was persuaded that the mere fact of having received a "sext" authorized him to share it or has carried out the conduct

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[152] As is well-known, the process of broadening the definition of rape has been a long one in the United States, made up of several "waves" of reform. In general, there has been a shift from requiring forcible compulsion to mere absence of consent, now declined according to different models, *see infra* note 152. On the expansion of rape definition, STEPHEN J. SCHULHOFER, UNWANTED SEX (1999); Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L. J. 651, 652 (2008); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335 (2017).

Also in Italy, where the law still requires the element of force in rape's definition, *see infra* note 211, some scholars have proposed reforming the crime of sexual violence and focusing it on the absence of victim consent. *Compare*, with partially different positions, Tullio Padovani, *Violenza carnale e tutela della libertà*, 1301 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE (1989), *with* Marta Bertolino, LIBERTÀ SESSUALE E TUTELA PENALE (1993). For an exhaustive comparative study of sex crimes in Italy and the United States, see Cadoppi & Vitiello, *supra* note 112.

[153] *See* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665 (2016). Consequently, the new definition of "rape" is "sexual penetration without consent," from which we perceive the assonance with the structure of art. 612-*ter* of the Penal Code. As is well known, the American literature on "no means no" and "yes means yeas" is extremely broad. Without claiming to be exhaustive, see Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005); and, more recently, Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016). In Europe, see, for example, Tatjana Hörnle, *#MeToo - Implications for Criminal Law?*, 115 *BERGEN J. CRIM. LAW & CRIM. JUST.* (2018).

[154] *See* Wis. Stat. § 940.225(3) (emphasis added).

[155] *See* Wis. Stat. § 940.225(4) (definition of the term "consent").

believing he is authorized because there was no express indications to the contrary, it seems to be a mistake of law according to art. 5 of the Italian Penal Code ("*ignorantia legis non excusat*"); therefore, the mistake of law would be irrelevant to excluding the mental element.[156] It is not denied that even the case of non-consensual pornography presents its own gray area, not only in relation to the private destination of the images, but also in relation to the consent to the distribution, for example, when, in exceptional cases, the belief of permission to disclose the images is based on misleading indications that emerge from the case. In such cases it will be possible to exclude the *mens rea* element.

5. The Achilles' Heel of the Italian Statute. Practical Concerns on the Second Paragraph and the Requirement of the Specific Intent to Harm the Victim

Article 612-*ter* of the Penal Code, as already mentioned,[157] distinguishes the case of first disclosure from that of secondary dissemination. The line of distinction is drawn on the modality with which the agent comes into possession of the images. If the agent has "received" the images or has obtained them in any way other than by making or stealing them (cases covered by the first paragraph), the specific intent to cause damage to the person portrayed is required.[158]

At a cursory glance, this would seem to be an extremely balanced approach.[159] The person who first distributes the images (paragraph 1) is punishable no matter the motivation that

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[156] *See* Art. 5 CODICE PENALE [C.P.] (It.).

[157] *See supra* Part I.B.1.

[158] *See* Art. 612-*ter* CODICE PENALE [C.P.] (It.). I am well aware of the issues raised by the term "specific intent" in the Anglo-American criminal justice literature. I use it in only one of several meanings, to translate the Italian expression "*dolo specifico.*" With "*dolo specifico*" in Italy we mean that in addition to the intent to carry out the *actus reus*, the defendant must also have a further purpose, which does not necessarily have to be achieved. In the case of art. 612-ter section two, therefore, the perpetrator must have, in addition to the intention to disclose the images, also the purpose of causing damage to the person depicted.

[159] Caletti, *supra* note 73.

drives him to do so. The second distributor (paragraph 2) commits the crime only if motivated by the desire to cause harm to the person depicted in the images. That intention should thus make it possible to select instances of second distribution that are particularly serious and which, despite the fact that the image has already been disclosed, are likely to deepen the harm to the victim.

Consider, for example, a defendant who finds a video of one of their acquaintances on pornographic websites and decides, in order to humiliate their acquaintance, to share it on their social profiles, so that all their acquaintances can view it. Or consider, again, the conduct of the person who, years after the first diffusion of the images and after the victim has managed to "clean up" the web from their images re-spreads the images, triggering again the virality's "vortex," or sends them to the new colleagues and employer, perhaps in conjunction with an important evolution in the victim's personal or professional life,.[160] This occurred in the case of Giulia Sarti, which was illustrated at the beginning. The images that went viral had likely been published in the past and started circulating again in 2019.[161]

Furthermore, the requirement of this malicious motive seems to preclude the "second distributor" from accountability in terms of the *dolus eventualis* of the element of non-consensual disclosure. The purpose of causing harm seems incompatible with the principle underlying this form of intent: the mere acceptance of risk.

However, at a more careful glance,[162] the second paragraph of art. 612-*ter* represents the main weakness of the Italian criminalization of non-consensual pornography. An actual Achilles' heel. That paragraph states: "*The same penalty applies to anyone who, having received or otherwise acquired the images or videos, sends, delivers, sells, publishes or*

[160] Some cases of this type are reported by Citron. *See* CITRON, *supra* note 81.

[161] *See supra* note 25–30 and accompanying text.

[162] Caletti, *supra* note 73, at 2083–85.

disseminates them without the consent of the persons represented in order to harm them."[163]

Listing the prerequisites of the conduct, the legislature has not specified the sender of the image.[164] This is problematic because the sender could also be the person depicted in the image, not only the first or (another) second distributor of an image of someone else.

In compiling the rule, it has not been taken into account that about 80% of the cases of "revenge porn" registered in the United States occur in relation to images self-produced by the victim (so-called "self-taken") and then sent to the partner, otherwise known as "sexting."[165] Therefore, the crime of "illegal dissemination of sexually explicit images or videos" risks becoming, in the majority of cases, a crime that requires proving the existence of a malicious motive to cause harm.

While proving this specific intent to cause harm might be relatively straightforward in some cases, such as an ex-partner who uploads images on hundreds of pornographic sites together with the address of the person in the image listed and other sensitive data or an ex partner who sends photos by e-mail to all colleagues of the victim, it will be a remarkable obstacle to achieve successful "revenge porn" convictions in many instances.[166] As we have already underlined, especially regarding the Tiziana Cantone story,[167] it is not necessary to engage in sophisticated conduct to guarantee a very wide diffusion of pornographic images. It is sufficient to release them and wait for the network to take its course.

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[163] CODICE PENALE [C.P.] art. 612-*bis* (It.) (translated from Italian and emphasis added).

[164] *Id.*

[165] *Cf.* Barmore, *supra* note 97, at 467; MATTHEW HALL & JEFF HEARN, REVENGE PORNOGRAPHY 27 (2018).

[166] *See infra* Part II.B.2. For clarification on how I use the term "specific intent" see *supra* note 157.

[167] *See supra* note 1.

II. LESSONS FROM THE ITALIAN CRIMINALIZATION IN A COMPARATIVE PERSPECTIVE: CONSIDERATIONS ON THE GROUND OF CRIMINAL POLICY

A. Essay Summary and Outlook

The above analysis of the Italian law on non-consensual pornography provides a number of lessons that may be useful to those in other jurisdictions.

Firstly, I will highlight some aspects of this debate that have already been stressed by Anglo-American scholars and have found validation in the specific criminalization in Italy. These are mostly critical issues and pitfalls that, in my opinion, the Italian legislature has not properly addressed.

Subsequently, I will discuss some interesting points of the Italian law that are innovative and may be of interest from a comparative perspective. Italy was one of the last countries to introduce the crime, but there are some original features that have not yet permeated the debate.

As analyzed,[168] Italian law seems to adhere, in regard to the absence of the consent of the person depicted in the images, to the paradigm of affirmative consent applied in the United States to the crime of rape. Regarding this topic, I will contend that the paradigm of affirmative consent can "save" the existing revenge porn laws, both from a technical-applicative point of view and from a symbolic-expressive point of view.

I will also argue that the model of liability of "second distributors" adopted by art. 612-*ter* of the Penal Code is perhaps the best and most balanced solution so far proposed in the jurisdictions that have specifically criminalized revenge porn.

[168] *See supra* Part I.B.4.

B. Some Confirmations of what has Already Emerged in the International Debate on "Revenge Porn"

1. Non-consensual Pornography Requires an Interdisciplinary Approach

The first part of the paper has lingered over the details of the legislative process[169] as it allows us to discern the reasons for some not entirely rational choices made by the Italian legislature for the purpose of criminal policy.

The first misunderstanding on which the "anti-revenge porn" regulatory intervention is based is that criminalization may be the only legislative response to non-consensual pornography.[170] On the contrary, this problem requires the use of other contrasting strategies. The weakness of an approach based only on criminal law has already been highlighted by many foreign experiences.[171] Sadly, it is not entirely surprising, given that it is one of the constants of the current political-criminal climate, defined by many as "populist," to consider the introduction of a crime (or the broadening of an already existing punishment) as the panacea of complicated and multifaceted problems.[172]

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[169] *See supra* Part I.A.3.

[170] It must be kept in mind that Italian tort law does not provide for typified models of tort, but instead an open model, so that "revenge porn" could undoubtedly give rise to damages. Now the issue is not in any way in question because of art. 185 of the penal code states that every crime that has caused damage obliges civil compensation. Art. 185 CODICE PENALE [C.P.] (It.).

[171] *See*, *e.g.* Kirchengast & Crofts, *supra* note 134; McGlynn, Rackley & Houghton, *supra* note 125.

[172] Populism in criminal justice constitutes an important recent topic of analysis by Italian scholarship. *See*, *e.g.*, Domenico Pulitanò, *Populismi e penale*, 123 CRIMINALIA (2013); MASSIMO DONINI, POPULISMO E RAGIONE PUBBLICA. IL POST-ILLUMINISMO PENALE TRA LEX E IUS (2019); ENRICO AMATI, L'ENIGMA PENALE. L'AFFERMAZIONE POLITICA DEI POPULISMI NELLE DEMOCRAZIE LIBERALI (2020). Even if Italian prisons are overcrowded, it does not seem to be due to the populist phenomenon, as it is in the United States. *See* RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 1–16 (2019).

It is not by chance that the bills presented to the Senate before the introduction of art. 612-*ter* were not simply limited to the new crimes. Although unsuccessful, these efforts widened the angle from which to face the problem, as they dealt with other aspects of non-consensual pornography, such as the collaboration of Internet Service Providers in the removal of images or the creation of psychological support programs for victims.[173]

In particular, the "take-down" of the images from main platforms seems to be what victims are most concerned about,[174] and Italian law provides almost nothing in this regard. As we have also seen in the opening stories, Tiziana Cantone's attempts to remove her pornographic videos from the Web, or at least from some of the most popular sites, were completely in vain.[175]

To be sure, the criminal liability of the provider for failure to control the content uploaded by users was affirmed by some courts a few years ago, and it has also been advanced by the prosecution in a famous case against Google.[176] However, relying on the principle that controlling all content is impossible, the Court of Cassation has declared that providers do not have liability, at least in relation to controlling all content uploaded.[177]

Thus, while other European countries such as Germany have expressly regulated provider liability,[178] the Italian legal

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[173] *See* Caletti & Summerer, *supra* note 76.

[174] *See* CITRON, *supra* note 81.

[175] *See supra* notes 1–14 and accompanying text.

[176] The case is Google vs. Vividown. *See* Cass. pen., sez. III, 17 decembre 2013, n. 5107; *see also* Alex Ingrassia, *The Ruling of The Supreme Court in The Google Case*, DIRITTO PENALE CONTEMPORANEO (Feb. 6, 2014) (the case was related to the publication of a video in which a disabled boy was bullied by some schoolmates. In the video were also reported offensive expressions against the association "ViviDown." Defendants were three Google managers, accused of criminal defamation and unlawful processing of personal data).

[177] *Id*.

[178] *See* Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Network Enforcement Act *z – NetzDG*] Sept. 1, 2017, BGBl. I S. 3352, amended by Article 1 of the Act of June 3, 2021, BGBl. I S. 1436 (Ger.). On this law, see Elisa Hoven, *Die strafrechtliche Verantwortlichkeit*

framework is very similar to that of the United States, even in the absence of an express immunity such as the one in section §230(c)(1).[179] If the provider does not comply with requests to delete the images, the victim has no legal remedy to force the provider to take action. They can only appeal to the Public Prosecutor to obscure the web page, but the operation takes a long time and does not prevent the viral re-spreading of the images or a new upload through the same provider.[180]

The lack of consideration of these issues and, more generally, the unexpected acceleration in the criminalization of "revenge porn" have influenced the "moral panic" triggered by Giulia Sarti's story described at the beginning of this paper. In a few hours, the images had become "viral," and suddenly non-consensual pornography became perceived as an emergency even by public opinion and by all political movements, in search of consensus in view of the upcoming European elections.[181] This was followed by the very rapid approval of art. 612-*ter* of Penal Code as part of the bill "Code Red" and the abandonment of attempts to compile a more systematic legislative redress.[182]

Even if the existing criminal remedies had limits, as we saw, other crimes have been utilized by the courts to provide a basic criminal protection for the victims of the conduct in question.[183] Nevertheless, the erroneous messages conveyed to the public by politicians and the media have contributed to the creation of the above-mentioned emergency atmosphere.

It would have been appropriate to develop a more structured law, focusing also on other aspects such as the role of providers in the deletion of images from the network, the law's

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der Betreiber von Social-Media-Plattformen, 4 ZWH-Online, 4-2018, 97 (2018). The law has been called informally the "Facebook Act."

[179] *See* Communications Decency Act, 42 U.S.C. § 230 (2018).

The issue of provider liability is also crucial in the United States. On the need to regulate this aspect as well, see *e.g.*, Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 402, 404 (2017).

[180] *See* Caletti, *supra* note 75.

[181] *Id*.

[182] *See supra* Part I.A.3.

[183] *See supra* Part I.A.2.

enforcement, the criminalization of "deep-fake,"[184] the inclusion of psychological support for victims, and the provision of digital education programs in schools.

In the case of this statute, contrary to the "holy" principles of the subject, the criminal law has not played a role of "last resort," but – we can say – of "first and only resort."

> 2. "It Is Vital that we Understand this Phenomenon better in order to Develop Specially Tailored Forms of Legal Redress."[185]

In addition to an approach based only on criminalization, paradoxically, the Italian law also presents critical points in terms of the efficacy of the incriminations. The new offense is likely to be ineffective due to the possibly unintentional extension of specific intent to "sexting" cases and to most of the non-consensual pornography cases.[186]

Some awareness of these aspects seems to have arisen in the course of the legislative process: the aforementioned additional "preliminary investigation" carried out by the Law Commission with regard to bills formally unrelated to the one that was about to be approved signals that they were aware that the new offense had serious flaws.[187] The convergence of art. 612-*ter* c.p. in the "Red Code," however, has extinguished any desire to modify the text of the amendment by the Senate, which would have meant, according to the symmetries of "perfect bicameralism," a return of the entire bill to the Chamber of Deputies.[188]

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[184] On this topic, see Robert Chesney & Danielle Keats Citron, *21st Century-Style Truth Decay: Deep Fakes and the Challenge for Privacy, Free Expression, and National Security*, 78 MD. L. REV. 882 (2019); Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MIA. L. REV. 892 (2019).

[185] McGlynn & Rackley *supra* note 46, at 535.

[186] *See supra* Part 1.B.5. For clarification on how I use the term "specific intent" see *supra* note 157.

[187] *See supra* note 76.

[188] The "perfect bicameralism" is a form of bicameralism in which legislative power is exercised by two equal representative legislative

What seems to be lacking in the legislative process is a reliable investigation, especially at the criminological level, into the object of criminalization.

From the rapid public-political debate that led to the direct and specific incrimination of "revenge porn" emerged, in fact, a certain terminological approximation. The same parliamentary acts show how the debate in the courtroom was essentially polarized on the English neologism "revenge porn."[189]

This has led to the adoption of responses targeted at revenge porn in the strict sense and not, as would have been desirable, on non-consensual pornography.

There are several elements of the offense that suggest the legislature's target is "revenge porn" in the narrow sense, such as the characterization of the private destination of the images[190] or the requirement that the perpetrator intended to cause harm to the victim.[191]

Regarding the latter, this is the exact scenario that should have been avoided, according to one of the rare univocal indications of how to formulate the crime, which emerged from

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chambers (same tasks, the same powers resulting from the same constitutional relevance). It follows that each law text must be approved by both chambers in the same form, without any difference. If one chamber (the Chamber of Deputies or the Senate) intervenes to modify the text already approved by the other chamber, the latter will have to vote on whether to approve or reject the modification. This way of proceeding, of course, greatly lengthens the legislative process. This system is unique in the international landscape and is one of the causes of our parliamentary slowness. Furthermore, since there are different electoral systems for the Chamber and the Senate, parliamentary majorities often do not exactly coincide. A reform proposed by the former Prime Minister, Matteo Renzi, was rejected by a popular referendum unfortunately strongly influenced by some fake news. For an in-depth study of the functioning of the Italian parliament, see the book of the well-known constitutionalist AUGUSTO BARBERA, I PARLAMENTI (1999).

[189] *See supra* note 36.

[190] *See supra* Part I.B.3.

[191] *See supra* Part 1.B.5.

the international experience.[192] It has already been said that, if it is true that "revenge porn" in the strict sense implies a vindictive purpose to cause damage to the victim, Anglo-American studies show how many other hypotheses of non-consensual pornography, for which the media language improperly uses the neologism "revenge porn," occur on the basis of motives very different from revenge.[193]

Moreover, an evident and unreasonable disparity of treatment is created between the person capturing the image (paragraph 1 of art. 612-*ter*) and the person who received them (paragraph 2 of art. 612-*ter*), who might have insistently requested the images. The individual in the first scenario will be responsible whatever their purpose was, while the individual in the second scenario will be criminally liable only if the prosecution can demonstrate the intent of causing harm.

In the end, the analysis that will be applied is determined on the basis of who pressed the button to start the recording or take the photograph. Given the way in which the new crime was approved, it seems that this disparity is mainly due to the lack of reflection on the formulation of art. 612-*ter*. c.p.[194]

Therefore, even if the intentions declared by the legislator were to introduce an exemplary rule to combat revenge porn, and although there were already examples such as the Californian and English law, the Italian law enters fully into

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[192] Among those who advised against the provision of malicious intent, see Citron & Franks, *supra* note 39, at 386; Franks, *supra* note 106, at 1287; Gillespie, *supra* note 84, at 870; McGlynn & Rackley *supra* note 46, at 555; Henry & Powell, *supra* note 101, at 402.

[193] *See, e.g.* HALL & HEARN, *supra* note 165 (from whose investigation it emerges that only in 50% of the cases the videos of the portal "MyEx.com" - a popular site created for non-consensual pornography - had been uploaded by the ex-partner).

[194] However, the doubt remains on the fact that the differential treatment may be influenced by considerations of "victim blaming" usually attracted by the phenomenon of "sexting." *See* Anastasia Powell & Nicola Henry, *Blurred Lines? Responding to 'sexting' and gender-based violence among young people,* 39 CHILDREN AUSTRALIA 119 (2014).

the restricted group of the "*swiss cheese of revenge porn laws*."[195]

The superficial study of the phenomenon of non-consensual pornography furthermore emerges from the aggravated forms of the crime, not reviewed in the first part of the paper for the sake of brevity. For example, art. 612-*ter* c.p., paragraph 4, as translated, states that: "*The penalty is increased from one third to one half if the acts are committed against […] a pregnant woman.*" It seems to be uncritically copied, as well as other aggravations, from the previous art. 612-*bis* (stalking), without taking into consideration and enhancing the substantial differences between stalking and non-consensual pornography on a criminological level.[196]

One thing is certain even after Italy has criminalized non-consensual pornography: it is a complex and heterogeneous phenomenon that deserves intense criminological scrutiny and tailored legislative redress.

[195] For this definition see Barmore, *supra* note 97, at 451. In the Anglo-American legal doctrine, some laws have been sarcastically referred to in this way because of the parallel between their ineffectiveness and the holey shape for which Swiss cheese is known.

[196] While it is easy to understand what motivations have led the legislature to consider worthy of a more severe punishment of persecutory acts against a pregnant woman, the same cannot be said for non-consensual pornography. To say the least, it is not so clear if the pregnancy must exist at the moment of the creation of the intimate materials or, as it seems more plausible, on the occasion of the sharing of the same, so as to cause stress to the woman. Regarding this second case, we could imagine a paradoxical scenario in which, after the breakup of the relationship, the man decides to take revenge on his ex with the disclosure of her most intimate images just when she is about to give birth to the child conceived during their relationship. However, perplexities arise also in relation to the subjective imputation of the circumstance: when stalking the victim the agent can be, in most cases, aware of the pregnancy; however, the pornographic revenge can be consumed even after a long time, when it is plausible that the agent is not aware of the condition of the victim.

3. The Expression "Revenge Porn" Should Be Abandoned

From what has been said so far, it is clear that the necessary condition to set up truly tailored responses to "revenge porn" in a broader sense is a definitive abandonment of this captivating expression. As reviewed, all the shortcomings of the Italian law seem to stem from a lexical misunderstanding.

It is necessary to reiterate, as many researchers have been doing for a long time, that the phenomenon to be criminalized is not "revenge porn" but "non-consensual pornography." Every publication of sexual private images that occurs without the consent of the person depicted should be a crime, whatever the motive of the perpetrator.[197] This is the message that must be conveyed, in addition to the message that the affirmative consent paradigm in this area can certainly help to promote, in concert with the terminology "non-consensual pornography," which emphasizes that it is precisely the absence of consent that is at the heart of the offense.

4. "Criminalizing Revenge Porn is also Appropriate and Necessary to Convey the Proper Level of Social Condemnation for This Behavior."

Two influential American scholars have, from the beginning, expressed the idea that "criminalizing nonconsensual pornography is also appropriate and necessary to convey the proper level of social condemnation for this behavior."[198]

I very much agree with this thought, as I wrote in my first essay about the need to criminalize non-consensual pornography

[197] Except, of course, in those very exceptional cases where conduct is carried out for defensive purposes in a judicial proceeding, or for compelling reasons of public interest.

[198] Citron & Franks, *supra* note 39, at 349. Many other scholars agree with this opinion. *See*, *e.g.*, McGlynn & Rackley, *supra* note 46, at 553–57; Henry & Powell, *supra* note 101, at 404; Suzor, Seignior & Singleton, *supra* note 128, at 1064.

in Italy.[199] In Italy the prevailing view of scholars repudiates the idea of endowing criminal law with a promotional and educational function and is therefore distrustful even in relation to the expressive function of the law itself.[200]

Moreover, in the case of such new phenomena related to new technology, the expressive role of incrimination is undeniable.[201]

The Internet is a rather recent innovation, and, even more recent are some of its extensions, such as social networks, which have created a paradigm where their use is seen to be without consequence or any responsibility of the user. In Australia it has been suggested that often, not only are the authors of non-consensual pornography unaware of the criminal relevance of their conduct, but, in the past, before the introduction of the crime, even the police officers showed total disinterest in the victims when receiving the complaints.[202]

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[199] Caletti, *supra* note 8, at 87.

[200] In the case of the expressive function, it is not a question of conferring on criminal law a promotional or propulsive function and of inculcating in the citizens precepts that they have not yet internalized. Instead, it is a question of emphasizing, with the symbolic charge of the penalty, the extreme gravity of the consequences suffered by the victim, also re-dimensioning the attitude of social reproach of which she is made the object. *See generally* JOEL FEINBERG, *The Expressive Function of Punishment, in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 38 (1970); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); ANTHONY R. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY 27 (2001); RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2017).

For the coordinates of the debate on this issue in Italy, see Alberto Cadoppi, *Liberalismo, paternalismo e diritto penale, in* SULLA LEGITTIMAZIONE DEL DIRITTO PENALE. CULTURE EUROPEO-CONTINENTALE E ANGLO-AMERICANA A CONFRONTO 83–124 (Giovanni Fiandaca & Giovanni Francolini eds., 2008).

[201] *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

[202] *See* Salter & Crofts, *supra* note 107; Nicola Henry, Asher Flynn & Anastasia Powell, *Policing image-based sexual abuse: stakeholder perspectives*, 19 (6) POLICE PRAC. AND RSCH. 565 (2018). A recent survey of the English police should also be noted, which showed the difficulty of the

It should also be emphasized that criminalizing "revenge pornography" does not promote a completely revolutionary message. It seems clear, after all, how despicable and harmful it is to reveal the most intimate moments of a person, especially since, unsurprisingly, the disclosure is described in terms of "revenge," something that is, by its very nature, contrary to law.[203] The idea to be opposed, if anything, is that revealing the most intimate moments can be done freely on the Internet, aiming to transform "*online subcultures of discrimination into those of equality and dignity before they become too entrenched.*"[204]

It seems no coincidence that, following the wave of criminalization that has involved so many countries around the world, many large companies have taken into consideration the seriousness of the phenomenon and begun to change some points of their websites policies.[205]

Moreover, from a broader perspective, it could also be argued that, through direct criminalization, the citizen is enabled to better understand the criminal consequences of their conduct, given that the uncertain application of other crimes certainly does not favor the predictability of the legal implications for

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agents in realizing the disvalue of the conduct of dissemination of non-consensual pornography and their illegality. *See* Emma Bond & Katie Tyrrell, *Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales*, 36 J. OF INTERPERSONAL VIOLENCE 2166 (2018); Dodge & Spencer, *supra* note 55 (discussing the same problem in Canada).

[203] Caletti, *supra* note 8, at 87.

[204] *See* Citron, *supra* note 201, at 409 (italicized for emphasis). The many false myths about rape demonstrate how tenacious social attitudes are in the realm of sexuality. *See* SCHULHOFER, *supra* note 151, at 17.

[205] *See* Henry & Powell, *supra* note 101, at 404 (where examples of Reddit, Twitter, Google, Microsoft and Pornhub are cited). For an analysis of the process for reporting revenge porn abuses in selected content sharing platforms, see Antonella De Angeli, Mattia Falduti, Maria Menendez Blanco, and Sergio Tessaris, *Reporting Revenge Porn: a Preliminary Expert Analysis*, in *CHItaly 2021: 14th Biannual Conference of the Italian SIGCHI Chapter* (CHItaly '21), July 11–13, 2021, Bolzano, Italy. ACM, New York, NY, USA, 7 pages. (https://doi.org/10.1145/3464385.3464739).

those who non-consensually disclose intimate images.[206]At the very least, then, it is also a matter of fair labeling.[207]

The effects of criminalization could be observed in relation to a recent case of "revenge porn" in the strict sense, in which the boyfriend of a young kindergarten teacher in Turin had distributed the teacher's intimate images through the chat the boyfriend had with his soccer team. The man was convicted of criminal defamation, because the distribution had taken place in 2018, before the introduction of the new crime.[208] However, notably, when the news of the conviction of the man and the whole story came under spotlight (at the end of 2020 and therefore after the law was introduced), the public opinion openly sided with the woman, causing the resignation of the female kindergarten director who had fired the teacher following the scandal.[209]

This is a huge shift in social attitudes. The difference in treatment received by this young teacher compared to Tiziana Cantone is quite evident, as Tiziana was taunted for months until her suicide.[210] Perhaps this conviction is the first indication that Italian law clarified where the true guilt lies.

C. The Original Features of the Italian Law

1. Applying the "Affirmative Consent" Paradigm to a New Field.

In the first part of this paper, I proposed that the expression "without the consent of the person depicted" be

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[206] Article 7 of European Convention on Human Rights is relevant here. *See*, *e.g.* ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 62-65 (7th ed. 2013).

[207] *Id.* at 77–79.

[208] *See* Maurizio Ternavasio, *Il caso del video hard della maestra e il processo per revenge porn spiegato bene*, LA STAMPA (Jan. 14, 2021, 1:31 PM), https://www.lastampa.it/torino/2021/01/14/news/dalla-diffusione-del-video-al-processo-tutto-quello-che-c-e-da-sapere-sul-caso-di-revenge-porn-che-ha-coinvolto-la-maestra-1.39772123.

[209] *Id.*

[210] *See supra* notes 1–14 and accompanying text.

interpreted as a form of the affirmative consent standard, providing arguments on the level of the law's lexical choices.

As explained above, this conclusion is essentially motivated by the fact that in Italy we do not contemplate recklessness, and it is still very difficult to distinguish between conditional intent and conscious negligence, which are our corresponding terms for the mental state of those who act recklessly.[211]

However, it could be argued that this approach could solve many practical concerns in other legal systems as well, both *de jure condito* in those systems where the tone of the law allows this kind of interpretation and *de jure condendo* in those countries that want to regulate revenge porn or want to revise their existing discipline.

Without considering the merits of this new model in the context of the crime of rape, I emphasize that Italy should reform its offense of sexual violence, which is still based on the use of force.[212]

Indeed, the legal shift from the paradigms based on force and the expression of dissent ("no means no") to the paradigm of "only yes means yes," with the consequent reshaping of consent in a final act no longer referred to the feelings - nebulous and non-verbal - of the subject agent, appears highly problematic, especially in terms of evidence.[213] The same cannot be said in relation to non-consensual pornography.

In addition to the comparison of art. 612-*ter* with other crimes based on non-consensuality,[214] the interpretation

[211] *See supra* Part I.B.4.

[212] Paradoxically, Courts often consider satisfied the element of force with the absence of consent. *See* Alberto Cadoppi, *Commento art. 609-bis C.P.*, *in* COMMENTARIO DELLE NORME CONTRO LA VIOLENZA SESSUALE E CONTRO LA PEDOFILIA 439 (Alberto Cadoppi ed., 4th ed. 2006).

[213] *See* Schulhofer, *supra* note 152.

[214] *See* supra, Part I.B.4.

advanced here is also supported by a plurality of other arguments.

The requirement to obtain express consent seems undoubtedly more reasonable in the case of non-consensual pornography than in a physical sexual context. In the digital age, asking the person depicted in the images to confirm that the receiver can disclose them, thus dispelling any doubts, cannot be considered a tedious task. It does not give rise to the embarrassment that can be felt when formalizing consent in a moment of sexual intimacy. Moreover, evidence of permission is much easier to ascertain at a later stage. Unlike the consent to a sexual relationship, permission will take place mainly via computer and, therefore, it will be traceable.

Unlike rape and other traditional sex crimes in which the victim has the opportunity to object and express dissent, the conduct of non-consensual pornography is usually carried out "at a distance." As a result, there is no way for the person depicted in the images to express their disapproval of the sharing at the time it is about to occur, and they can only do so preemptively. Even authoritative scholars justify the imputation of negligence in the context of consent in sexual assault on the basis that the actor is able to ask the victim for their consent at any time during the sexual relationship;[215] therefore, the adoption of a model such as affirmative consent would be justified in non-consensual pornography.

Furthermore, there is considerable disproportionality between the destructive and irremediable consequences of the conduct of the person who accepts the risk of disseminating images without having asked for confirmation from the person depicted and the "social utility" of the disclosure of sexually explicit images, which appears to be very slight.[216] In a highly

[215] *See* ASHWORTH & HORDER, *supra* note 206, at 337–67.

[216] A not dissimilar consideration is also developed by Franks to justify the use of recklessness as a criterion for *mens rea* relating to absence of consent. This is because recklessness requires that the risk is unreasonable. *See* Franks, *supra* note 106, at 1284.

"pornographic" society,[217] those who want to consume pornography have the possibility to do so with great ease, and it is certainly not necessary to do so in relation to images that should have remained private.

On this point, it should be noted that in Italy objections have not yet been formulated to the criminalization of non-consensual pornography in terms of free speech.[218] In fact, it is a well-established idea within the defense of the right to free speech that speech that harms the honor, reputation and privacy of individuals can be justified only when there is a well-founded public interest in learning the contents of the speech.[219]

The application of affirmative consent to non-consensual pornography seems also fully in line with social attitudes and the current law, which impose express disclaimers for any form of data or image processing. It seems completely paradoxical to admit that the diffusion of the most intimate images of an adolescent can happen without the same precautions given to a professional actress, in the occasion of the creation of pornographic films, must sign written authorizations of every kind.

Not to mention the symbolic value that this paradigm can play in the context of non-consensual pornography. "Yes means yes" clears the field of all those misunderstandings that lead to victim blaming: a person can consent to produce sexual images,

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[217] *Cf.* FEONA ATTWOOD, MAINSTREAMING SEX: THE SEXUALIZATION OF WESTERN CULTURE (2009).

[218] As we have seen, in Italy the case law has established that the speech that damages the reputation of an individual does not constitute criminal defamation if it is true (and in the case of revenge porn, the images are true) and if there is a public interest to know that fact. *See* CANESTRARI ET AL., *supra* note 12. In the vast majority of non-consensual pornography cases, this public interest in disclosure is not discernible. Thanks to this cultural approach, we have never questioned the compatibility of the criminalization of revenge porn with free speech, which is protected by the Italian Constitution at art. 21. *See* Art. 2 COSTITUZIONE [COST.] (It.). Conversely, as it is known, in the United States the incrimination of revenge porn has raised many doubts about its compatibility with the First Amendment. *See*, *e.g.*, John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 217 (2014).

[219] *See* CANESTRARI ET AL., *supra* note 12, at 594.

and they can even share it with another person, but to disclose it further requires their explicit permission. No defenses of mistake of fact may occur here, except in extraordinary and residual cases.

A final indication of the validity of the proposed interpretation is that it would not have any "pan-penalistic" effects on the so-called "second distributors," those who, as mentioned, redistribute an image already divulged but was not consensual, spreading it wider. Without prejudice as to what is better specified in the following paragraph, these parties seem to be protected if they only conduct a mere forward of the images, per the provision in the second paragraph of art. 612-*ter* of the Penal Code, which is furthermore a new feature of the Italian law.

2. The "Second Distributors": The Italian Liability Model as a New Solution in a Comparative Perspective?

My first essay on the opportunity to criminalize non-consensual pornography in Italy pointed out the responsibility of the so-called "second distributors" as the most problematic issue to be addressed in the legislation.[220] These are those subjects who, following the first "disclosure" of the images that usually occurs at the hands of the ex-partner, contribute to making them "viral" by spreading them in various ways.[221] The category is extremely heterogeneous: those who limit themselves to forwarding an image can be part of it, as well as those who enrich their contribution with insults and threats, or those who, years later, after the victim has laboriously obtained the deletion of their images from the main platforms, start their distribution again[222] (as may have happened in the case of Giulia Sarti).[223] In some instances, such as the one analyzed regarding Tiziana

[220] Caletti, *supra* note 8, at 91.

[221] *See*, *e.g.*, CITRON *supra* note 81, at 15; and McGlynn & Rackley *supra* note 46, at 537–38.

[222] *See* McGlynn & Rackley *supra* note 46, at 549–51.

[223] *See supra* note 23–28 and accompanying text.

Cantone, the second distributors are those who cause virality, despite a restricted initial distribution.[224]

The problem is compelling: if one or more instances of dissemination of sexually explicit images without the consent of the person portrayed are made illegal, one must recognize that the action of the "second distributor" also falls within the statutory definition.

A comparative look at the solutions adopted by the jurisdictions that have specifically criminalized non-consensual pornography shows a substantial diversity of approaches.[225]

The most common legislative pattern is not to make any distinction in the wording of the criminal offense, leaving the distinction up to the appraisal of culpability.[226] In particular, in terms of knowledge of the lack of consent of the victim to the circulation of his/her images, this leaves the distinction up to the evaluation of the culpability to select the relevant cases. As a matter of fact, in most scenarios it will be possible to exclude the configurability of the crime on the basis of the ignorance, on the part of the author of the second dissemination, on the non-consensuality of the first diffusion of the video or, at least, on the basis of the difficulty to prove the awareness. Unlike the "original distributor," the person who receives a pornographic image from others, or finds it on an Internet website, can sincerely believe that they are professionals or that the persons depicted have intentionally decided to make amateur pornographic materials and disseminate them.

Nevertheless, it is not impossible to imagine cases in which the awareness of the non-consensuality of the disclosure of images emerges in a demonstrable way for tens or hundreds of people. Think, for example, of a closed "group" on a social platform (Facebook) or instant messaging (Telegram, WhatsApp), in which hundreds of male participants regularly exchange images and videos of their partners, who are unaware of the sharing or creation of the images. Everyone is aware that

[224] *See supra* note 1–14 and accompanying text.
[225] *See* Caletti, *supra* note 73, at 2080–83.
[226] *Id.*

the contents of the group are posted without the woman's permission, not only because this is the founding principle of the group, but also because the non-consensuality is reiterated in every post published, through insults and appreciation, and all members encourage others to upload new materials.[227] Consider a hypothetical in which some participants of the group share the images in another place, for instance, on a pornographic website dedicated to "revenge porn" or another group of the same kind, perhaps even specifying that these are images authentically "stolen" from the privacy of the woman depicted, which indicates that the distributor was aware of the absence of consent. This hypothetical appears more problematic.

In order to avoid a situation of uncertainty, which leaves open the possibility, however remote, of trials with hundreds of defendants, other jurisdictions have adopted more drastic solutions.

In regard to the subjective element, as we saw, several Anglo-American jurisdictions, such as California and England, have configured a crime which requires a specific intent, conditioning the responsibility on the purpose of the perpetrator to cause a severe distress to the victim.[228] However, as aforementioned, in these experiences the restriction has ended up limiting the range of application of the new rules, leaving many deserving situations unprotected.[229]

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[227] The proposed case is inspired by news events and a study by two Italian sociologists who managed to infiltrate a Telegram chat entitled "women all whores," in which materials were exchanged roughly in the manner described. Lucia Bainotti & Silvia Semenzin, *The Use of Telegram for the Non-Consensual Dissemination of Intimate Images: Gendered Affordances and the Construction of Masculinities*, 1-12 *SOCIAL MEDIA & SOC'Y* (2020).

[228] On Californian Law, see Austin Vining, *No Means No: An Argument for the Expansion of Rape Shield Laws to Cases of Nonconsensual Pornography*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 303 (2019). On the English law combating the so-called "revenge porn," see Gillespie, *supra* note 84, at 875. For clarification on how I use the term "specific intent." *See supra* note 157.

[229] *See supra* Part I.B.5.

Spanish law, in an original way, already precludes, on the ground of *actus reus*, the second distributors from being called to answer for the offense. According to the wording of paragraph 7 of Article 197 of the Spanish Criminal Code, in fact, the crime is committed when the person who spreads, reveals or gives, without the consent of the person depicted, images or audio or video recordings and has obtained them with their consent ("*obtenido con su anuencia*"), while the second distributor is not liable even though they have obtained the image following the first non-consensual spread, without the consent of the victim.[230]

This is undoubtedly an attempt to solve the problem at its root and has the merit of not restricting the area of responsibility for the original distributor that typically occurs when the specific intent is adopted. At the same time, it should be pointed out that the Spanish approach may end up excluding the criminal relevance of particularly damaging conduct on the part of second distributors. Some examples were given in the preceding paragraph.

In the face of these three scenarios already explored by other legislations, the Italian legislature initially turned to a fourth possibility, at the antipodes of the Spanish solution, namely, the express criminalization of the second distributor. In paragraph 2 of the text of the law initially proposed with amendment no. 1.107, the same punishment for the first perpetrator was extended to "*anyone who, in any way, comes into possession of the images or videos referred to in the first paragraph, contributes to their further dissemination or does not prevent it.*"[231]

This was a rule with a strong "symbolic" attitude that is capable of overreaching and producing clearly unreasonable results, such as, just to name a few, criminal proceedings with

[230] On the Spanish offense, see Colas Turegano, *supra* note 110.
[231] *See* Caletti, *supra* note 73 (translated from Italian).

thousands of defendants, or the equal punishment of extremely different situations.[232]

The solution implemented by the statute, already examined, cannot fall under any of the four paradigms previously outlined.

The first part of this paper pointed out that the second paragraph of article 612-*ter* is the most critical point of the new Italian regulation on "revenge porn" – an actual "Achilles' heel." This is only because, as observed, the second paragraph will be the rule to decide cases of first distribution.[233]

Regarding second distribution, the provision requiring particularly malicious intent on the part of the perpetrator who aims to cause damage to the victim seems to be an intermediate rule that achieves a perfect balance. On the one hand, it avoids a sanctioning bias of a merely symbolic nature; on the other hand, however, it allows for the selection of certain particularly damaging behaviors by other parties, such as those discussed earlier in the article. These are actions that, not infrequently, contribute to the harassment of the victim and can be decisive when considering suicide, especially in the case of particularly young victims, such as Carolina Picchio.[234]

At the same time, the criteria for selecting relevant conduct based on the accountability model seems much more certain than when the boundary of criminal liability is based on the mere presence of the mental element, and therefore on the knowledge of disseminating intimate images without the consent of the person represented. The so-called "Rubicon function" hence is better enforced by this accountability model.

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[232] However, there are Anglo-American scholars who have suggested that second distributors should also be criminalized. *See* McGlynn & Rackley *supra* note 46, at 555.

[233] *See supra* Part. I.B.5.

[234] *See supra* note 17.

I believe this to be a legislative option that may be considered by new lawmakers when criminalizing revenge porn or by jurisdictions that want to change their own law.

CONCLUSION

The Italian law on "revenge porn" has pros and cons. The most glaring flaw lies in the requirement of specific intent when the perpetrator has received the images then disclosed them without consent (paragraph 2 of article 612-*ter* of the Penal Code). This second paragraph of article 612-*ter* was clearly tailored to the second distributor; applying it to the first perpetrator creates significant protection loopholes.

As argued throughout the course of this paper, this weakness in the compilation of the law is due primarily to a superficial study of the phenomenon it was intended to regulate. The equivocal expression "revenge porn" seems to have picked up another victim: the Italian legislature.

Despite the shortcomings outlined in the review of the offense, the Italian experience of non-consensual pornography criminalization presents some noteworthy innovative features. For example, article 612-*ter* provides a solution to the problem of secondary distributors that other jurisdictions have never considered before. As seen through some examples, it seems to be a very balanced solution to the problem, preventing a merely symbolic use of the criminal law and allowing for the punishment of some very serious conduct.

Furthermore, as argued in this article, the wording of the Italian offense allows it to be read as a form of absence of consent subsumed under the affirmative consent paradigm. In addition to resolving several problems on the level of culpability, this interpretation finds no objection on the level of criminal policy. It conveys a clear and accepted message – challenged only by some fallacies typical of victim blaming – namely that it is unlawful to disseminate sexual images without the express and genuine consent of the person depicted.

Therefore, can this model save enforcement of the offenses of non-consensual disclosure of sexual images? Can it save "revenge porn" laws around the world? My answer is yes. But, unfortunately, not the ones requiring specific intent.