The Regulation Of ‘Revenge Porn’ in England And Wales: Are Existing Legal Solutions Effective?

by

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Statement of Originality

By signing below, I declare that:

This thesis and the work to which it refers are the results of my own efforts. Any ideas, data, images or text resulting from the work of others (whether published or unpublished) are fully identified as such within the work and attributed to their originator in the text, bibliography or in footnotes. This thesis has not been submitted in whole or in part for any other academic degree or professional qualification. I agree that the University has the right to submit my work to the plagiarism detection service TurnitinUK for originality checks. Whether or not drafts have been so-assessed, the University reserves the right to require an electronic version of the final document (as submitted) for assessment as above.

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Abstract

‘Revenge porn’ is a pervasive social problem which is constantly evolving to adapt to new technologies; consequently, it has an infinite number of potential incarnations. It causes a myriad of harms both to individuals, and to wider society. Understanding the scale of the problem and the extent of the harms it causes are crucial in understanding how the law should respond, so that victims are provided with the most robust legal solutions possible. This thesis aims to evaluate the effectiveness of relevant existing legal responses to revenge porn, in England and Wales, in the civil and criminal law regimes, identifying gaps in provision and making suggestions for reform. The study also provides the theoretical foundations to justify addressing the conduct in the civil and criminal law regimes and offers robust theoretical support for the reform proposals it offers. The central argument running through the thesis is that neither the civil or criminal law regimes, in isolation, in England and Wales, is capable of vindicating all victims’ interests. While the civil law can offer victims a useful mechanism to claim damages or injunctive relief, the seriousness of the conduct also requires the blaming voice of the criminal law and the greater deterrent effect and retributive response that criminal sanctions can bring. It is suggested that adopting a hybrid approach would offer a good solution, as such an approach would enable prosecutors and victims to efficiently access the benefits of both regimes. The thesis thus recommends the availability of a criminal law that prohibits the creation and distribution of all private sexual images, with a tailored statutory tort running alongside it. This solution would provide victims with the most effective means of obtaining both criminal and civil redress, using one single, comprehensive piece of legislation.
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This thesis is for my dad, Philip Ernest Setterfield, 17th November 1925 - 4th September 2018.
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Chapter 1: Introduction

‘An eye for an eye will only make the whole world blind.’

Mahatma Gandhi (1869-1948)

‘Revenge porn’ is ubiquitous. It is typically understood as being a contemporary phenomenon, an adjunct to the digital revolution. An archetypal definition of revenge porn refers to the unauthorised and malicious dissemination of intimate images on the Internet for ‘the purpose of humiliating and embarrassing former lovers.’ Revenge porn, or the non-consensual dissemination of private sexual images, is far from being an exclusively modern problem, however, the misconduct having existed in previous offline incarnations. Nor can it be assumed that the motivation for distributing images is always malicious, as images can be disseminated for other purposes, such as for financial gain. However, the advent of the Internet and the development of social media platforms have altered the character of this conduct and its results for victims. Prior to the digital revolution and the advent of social media, individuals disclosing intimate details about others’ personal lives would share information amongst chosen groups of people, the distribution and reach of personal data thus inherently being limited. Only people in the public eye, such as political figures, film stars or professional athletes were at risk of having their private activities photographed and broadcast to the world. Those days are gone for good. The omnipresence of portable, camera-equipped, battery-

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1 Anne Bartow ‘Copyright Law and Pornography,’ (2012) 91(1) Or L Rev 44.
3 Samantha H Scheller, ‘A Picture is Worth a Thousand Words: The Legal Implications of Revenge Porn,’ (2015) 93 NCL Rev 551, 557: Marilyn Monroe was an early victim of involuntary pornography, when, in 1949, she agreed to pose nude shots for a calendar. Three years later, the images re-surfaced and sold to Hugh Hefner who published them in Playboy magazine; the motivation for dissemination was financial gain. Monroe did not need to resort to legal remedies, as her fame enabled her to mitigate the harm caused by the exposure.
powered, Internet-connected devices, allowing for the instantaneous taking, uploading, storing and sharing of intimate media, has placed ordinary individuals perennially at risk of mass exposure. In order to tackle the growing problem of revenge porn, in England and Wales, Parliament created the targeted offence of ‘disclosing private sexual photographs and films with intent to cause distress,’ as enacted under section 33 of the Criminal Justice and Courts Act 2015 (CJCA). Prior to the enactment of the targeted law, legal redress could be sought using a suite of existing criminal laws, or actions were brought privately in the civil courts. These offences and causes of action can still be used as an alternative to the CJCA.

This thesis evaluates the effectiveness of existing legal responses to revenge porn, in England and Wales, in the civil and criminal law regimes, identifying gaps in provision and making suggestions for reform. The chapter begins by offering a working definition of ‘revenge porn.’ It then describes the growth of the revenge porn phenomenon and outlines the difficulties lawmakers, globally, have faced in tackling the problem. Next, it delineates the extent of the abuse and the scope of the harm caused by revenge porn dissemination and outlines how the problem has previously been addressed by law on both international and domestic levels. The chapter then sets out the overarching framework for the study and describes the central thesis, its original contribution to knowledge and explains the methodology. It concludes by delineating the thesis’ key research questions and explaining their importance.

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6 The possible offences that may be committed by revenge porn include: (i) Sending malicious communications by way of letter, electronic communications or articles of any description, which are grossly indecent or offensive, with the intention of causing distress or anxiety to the recipient (s 1 of the Malicious Communications Act 1988); (ii) Sending by means of a public electronic communications network a message, or other matter, which is indecent or grossly offensive, for the purpose of causing annoyance, inconvenience or needless anxiety to another (s 127 of the Communications Act 2003); (iii) Harassment, where the disclosure (or threatened disclosure) forms part of a course of conduct (s 2 of the Protection from Harassment Act 1997); (iv) Stalking (under s 2A of the Protection from Harassment Act 1997, as amended by the Protection of Freedoms Act 2012); (v) Stalking where a course of conduct causes serious alarm or distress which has a substantial adverse effect on the victim’s usual day-to-day activities (under s 4A(1)(b)(ii) of the Protection from Harassment Act 1997, as amended by the Protection of Freedoms Act 2012); (vi) Blackmail, where a threat to disclose images amounts to blackmail, if the perpetrator seeks to make a gain for himself or another in money or another property by an unwarranted demand or seeks to cause a loss to another (ss 21, 34 Theft Act 1968); (vii) Breach of data protection law where links to images are not erased and images not removed from source websites without delay, following notification (under General Data Protection Regulations (GDPR) as transposed into domestic law under s 47 of the Data Protection Act 2018); (viii) Accessing a computer or smart phone without authorisation to acquire images, regardless of whether or not they are subsequently shared (s 1 Computer Misuse Act 1990).

7 Private actions can be brought, for example, in breach of confidence, misuse of private information, harassment and breach of copyright.
1.1 Research Definition of Revenge Porn

The Ministry of Justice defines revenge porn in its official guidance as follows:

Revenge Porn is the sharing of private, sexual materials, either photos or videos, of another person, without their consent and with the purpose of causing embarrassment or distress.  

The guidance explains that the offence can be committed on and offline, so applies to images shared electronically or in a more traditional way. Private materials are deemed to be those showing anything not usually seen in public. Sexual material not only covers images that show the pubic region, but anything that a reasonable person would consider to be sexual, so this could be a picture of someone who is engaged in sexual behaviour or posing in a sexually provocative way.

This thesis will argue that the above definition reflects the widespread assumption that revenge porn is distributed by jilted ex-partners, in order to exact revenge on former partners by shaming and humiliating them, following the break-up of their relationship. In many cases, the images will previously have been consensually shared with their perpetrators. It is around this paradigmatic scenario of revenge porn dissemination that the offence under s 33 CJCA is framed. As such, it excludes from its ambit other manifestations of the abuse, such as the creation of images, threats to disclose images, digitally manipulated images, ‘upskirt’ or ‘downblouse’ photography, and dissemination which does not involve a specific intention by the perpetrator to cause victims embarrassment or distress, such as the sharing and trading of images for financial gain.

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9 Ibid.
10 See section 1.4 below for a more detailed discussion.
Therefore, for the purposes of this research, ‘revenge porn’ will be defined as:

The non-consensual creation, disclosure, or threatened disclosure, of private sexual images, on or offline, in still or moving formats, including altered or digitally manipulated images that become sexual as a result of the alteration or digital manipulation.

This definition has been chosen to avoid the limitations presented by the Ministry of Justice definition given above. The advantages of using this definition are that it requires no specific intention for disclosing images, and encompasses within its scope the creation and dissemination of all private sexual images, including altered and digitally adapted images.

1.1.1 A Note on Terminology

‘Revenge porn’ is a media moniker given to the phenomenon when the issue first came to global press attention, in 2010. The name has become synonymous with the non-consensual distribution of private sexual images online and has secured the attention of the media and policy-makers, globally. To that effect, the term has been adopted and used throughout this thesis, although the term itself has been criticised for failing to explicitly capture the range of manifestations of the abuse, or convey the nature and extent of the harms suffered by victims. As McGlynn and Rackley argue, the term ‘revenge porn’ focuses too much on the motivations of perpetrators at the expense of the harms to victims. They suggest that the term ‘image-based sexual abuse’ better captures the nature and harms of the non-consensual creation and distribution of private sexual images. This thesis supports this argument, but retains the label ‘revenge porn’ because it is a more familiar term and it is hoped that this will facilitate understanding and uptake by readers. However, in using the term ‘revenge porn,’ the research

12 Ibid.
acknowledges that this encompasses multiple incarnations of the abuse, as per the definition given above.

1.2 Background to the Revenge Porn Phenomenon

The revenge porn phenomenon has evolved from pornography’s natural affinity with technology. This relationship has enabled the widespread transmission of pornographic materials, as well as giving rise to an abundant production of amateur pornography. Some of this sexually explicit material, originally taken or shared consensually, subsequently surfaces as revenge porn. The first technological invention responsible for the widespread circulation of pornography was the printing press, invented in the mid-fifteenth century, which enabled the mass printing of erotic texts and images, and therefore their wide distribution and consumption. The development of photography during the Victorian era significantly increased pornographic consumption, by enabling the creation of new pornographic images at a minimal cost. This technology also placed, for the first time, the production, control, distribution and purchase of pornography, entirely in the hands of ordinary people.

During the late twentieth century, the availability and relative ease of home video recording technology, from the mid 1980s onwards, would give rise to an explosion of amateur pornography, including a category of self-recorded, sexually explicit audiovisual material, some of which featured known media personalities. One of the earliest known instances of revenge porn would emerge from home video recording technology, when in the US, in the 1970s, a consensually produced pornographic home video featuring the then-married ‘blaxploitation stars,’ Jayne Kennedy and Leon Isaac Kennedy, was circulated, both informally

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14 Early examples include Geoffrey Chaucer’s Canterbury Tales (1387) and Giovanni Boccaccio’s The Decamerone (1349-51). The latter, a series of ribald stories depicting sex and seduction had already become a huge success, and early impassioned readers and copyists had already spent hours transcribing the text, but it was only with the invention of print that it became a ‘best-seller’ and by the end of the fifteenth century, 300 different printed and manuscript editions existed. Today, it remains one of the most translated works by an Italian author.


16 The earliest high-profile example of this was in 1989, when young actor Rob Lowe, was identified as the man participating in sexual activity with two young women, one of whom was only 16.
and commercially, after Jayne divorced Leon. It was widely suggested that Leon had released the tape in order to punish Jayne for leaving him.\(^{17}\) Another instance of ‘sex videotape’ revenge porn that attracted media attention featured Mimi Macpherson, younger sister to model and Australian actor, Elle Macpherson. In 1997, a video was circulated throughout Australia showing Mimi having sex with her (then) boyfriend, Michael Hellwig, as well as stimulating herself. The circulation of the tape was widely interpreted as an act of revenge by Hellwig, after Macpherson had ended their relationship.\(^{18}\)

It would not be long before video technology would give way to the DVD, a new technology that would facilitate the production and dissemination of pornography and consequently, of revenge porn. In 2007, a Virginia man, David Feltmeyer, was alleged to have covertly filmed his girlfriend performing sex acts, then copied the resulting computer file onto numerous DVDs. He then allegedly distributed the copies on random car windscreens, along with his girlfriend’s name and contact information.\(^{19}\) The woman reportedly subsequently received visits and phone calls from men, who had misinterpreted the DVDs as sexual propositions.\(^{20}\) The dissemination was apparently motivated by Feltmeyer’s anger that his girlfriend had broken off the relationship.\(^{21}\)

Fascination with the creation of amateur porn would increase when developments in digital camera technology allowed for a greater degree of ‘privacy’ for performers, combined with low production and distribution costs.\(^{22}\) The sophistication of this technology, which enabled pictures to be viewed without the need for developing and printing them, coupled with the availability of free web spaces, in the form of Usenet newsgroups, such as *alt.sex.net*, resulted in a burgeoning of self-produced erotica by the mid-1990s. It was dubbed ‘realcore’ by artist and researcher, Sergio Messina, who recalls that the early uploading of erotica by individuals appearing in the material themselves displayed one common, remarkable feature - the lack of

\(^{17}\) See Salter and Crofts (n 2) 235.  
\(^{18}\) See Hayward and Rahn (n 5) 53.  
\(^{21}\) Ibid.  
any photographer or indeed, any real intermediary. The real attraction was that the images were of real people, not porn stars, and they were being posted online by people who wanted to be seen. The Internet had become the natural domain for pornography, including numerous sites hosting user-generated content. Tang observes that ‘homeless’ pornographic material, which was out of place in either of the dominant contemporary environments of the home or the workplace, had, for the first time, its own space, in the non-space of cyberspace. By the late 1990s, a number of porn sites featuring user-generated content had emerged online, these sites also allowing for viewer feedback and discussion. The twenty-first century would see a continued marked rise of amateur porn online, as pornographic ‘tubes’ such as You Porn, XTube and PornoTube (based on the successful YouTube platform for streaming and hosting material) proliferated. But as Patton observes, such sites ‘opened the door for people to post not only photos of themselves but also photos of others who had not consented to the online distribution of their images.’ By 2008, XTube was receiving complaints about some of the material it was hosting, and before long, amateur porn websites explicitly dedicated to displaying non-consensually submitted images had begun to emerge.

“You” media technologies have heralded the dawn of a new ‘participatory’ generation of media making, the ability to mass-produce self-made erotica marking a major shift in attitude towards the production and distribution of sexual materials generally. The advent of Wi-Fi-enabled, battery-powered smart phones, tablets, laptops and webcams have made the production of pornography mobile, and therefore commonplace in private spaces such as the bathroom and bedroom, as well as outside, mains power no longer being essential. The ‘e-sexualisation of culture’ - the seeming saturation of Western society by sexual representations and discourses - has consequently become a focus of major interest and concern over the last

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24 See Tang (n 15) 168.
25 For example, redclouds.com and voyeur.com.
27 Ibid, 66.
31 See Slayden (n 26) 73.
decade. Ringrose et al observe that porn stars have emerged as bestselling authors and celebrities and that a ‘porno chic’ aesthetic once associated with the sex industry can be seen in music videos and advertising: practices once associated with the sex industry, for example, lapdancing and pole dancing have become ‘newly “respectabilised” [and] promoted as mainstream corporate entertainment or fitness activity’. 

Attwood notes that a public shift to more permissive sexual attitudes has resulted in the emergence of new experiences. One such experience is the trend of taking sexually explicit images on personal mobile devices. This trend, which derives directly from the combined forces of technological advancements and relaxed attitudes towards sex, has propelled the contemporary online revenge porn phenomenon exponentially, as it ensures the existence of the material that is subsequently non-consensually disseminated in cyberspace. Sexually graphic images taken on individuals’ personal, portable devices are then stored on these devices, or housed online in the Cloud, or in private email accounts. If these devices are lost or stolen, or online accounts are hacked into, the images are at risk of being non-consensually distributed, if the images are retrieved. This was seen on a massive scale after the 2014 celebrity iCloud hack, when the Apple’s iCloud platform for backing up images from IOS devices such as iPhones was compromised, and thousands of naked and sexually explicit images of numerous celebrities were accessed and leaked online.

Images are also ‘sexed’ to sexual partners during the course of a relationship, creating the potential for them to be disseminated online, after the relationship breaks down. ‘Sexting,’ defined as ‘the exchange of self-generated sexually explicit images, through mobile picture messages or webcams over the internet,’ is commonplace amongst teens in particular. While the sender may perceive that the sending of images in this way is relatively secure, once the

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33 Ibid.
34 Feona Attwood, ‘Sexed up: Theorizing the Sexualization of Culture,’ (2010) 9(1) Sexualities 77, 77.
37 See Ringrose, Gill, Livingstone and Harvey (n 32) 6: Quantitative research on sexting has found rates as wide as 15% to 40% among young people, depending on age and the way what is understood as sexting is measured.
images are sent, it is no longer possible to control them, as recipients can easily circulate them. The continual production of material by individuals taking and sending sexually explicit images in this way has rendered the social practice of sexting inextricable from the modern revenge porn problem, as well as contributing significantly to it. Revenge porn can be understood as a postmodern problem, then, as it engages with an extension of notions of ‘self’ via media and technology, as people are increasingly freed from previous constraints arising from social norms and social bonds with others.

1.3 The Modern Revenge Porn Problem

Digital-age revenge porn first gained notoriety in 2010, when one of the first websites to exclusively host this kind of material, *Is Anyone Up?*, featured thousands of nude images of non-consenting men and women alongside links to their social media profiles and accompanying derogatory commentary. Dubbed ‘revenge porn’ by the media, this term has now become synonymous with the practice of non-consensually distributing individuals’ private, sexually graphic images online. Hunter Moore, the site’s American founder made various claims about his motivations, including a wish for his friends to see photos of the woman with whom he was sleeping at the time, and assertions that he wished to establish a means by which he and his friends could ‘get back’ at their ex-girlfriends. Moore was notoriously unresponsive to requests from victims to remove their images, earning him the reputation of being ‘the most hated man on the Internet.’

At the height of its popularity, Moore has asserted that the site was generating over $13,000 a month in advertising revenue. Legally, he was unimpeachable, as the material displayed on his site was submitted by third party users. Moore had drawn up a submission form for users,

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41 Ibid.
which essentially acted as a contract under which submitters assumed responsibility for the images and defamatory comments. This meant that the content was protected by Section 230 of the Communications Decency Act 1996 (CDA), a legal safe harbour that protects Internet publishers from prosecution for user-generated content. The site ceased operating in August 2012, after Moore became the focus of an FBI investigation, culminating in his arrest and indictment on charges of identity theft and computer hacking. However, a lucrative new category of online pornography had been born, with a template for a replicable business model for others to follow. As had already been apparent with earlier ‘realcore’ pornography, nude and sexual images of people other than professional performers, combined with the knowledge that the images had been distributed non-consensually and with malicious intent, only served to increase the appeal for some viewers.

Copycat sites soon emerged, following in Moore’s digital footsteps, ensuring the perpetuation of the revenge porn genre. Notably, another American, Craig Brittain, sought to cash in on Moore’s success; his website, IsAnyoneDown? exponentially increasing the harm level to victims, the majority of whom were women, by including extensive identifying information to accompany victims’ images, placing them in very real danger of being stalked and harassed. Additionally, to maximise profits, the site incorporated an innovative way of extorting money from the individuals it featured, re-directing them via a link to another site, TakeDownHammer. This purportedly belonged to an independent New York lawyer, who claimed to be able to assist victims in removing their images for a fee of between $200-$500 dollars. Both sites, however, were electronically traced back to Brittain, who was ordered to cease trading by the

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43 Section 230 of Title 47 of the United States Code (47 USC § 230) was passed as part of the Communications Decency Act of 1996 and gives broad immunity to website operators hosting user-generated material.
44 See Danielle Keats Citron Hate Crimes in Cyberspace (Harvard, US, 2014) 176: According to the indictment, Moore paid a computer hacker to access women’s password-protected computers and email accounts in order to steal their nude photos.
46 See Messina (n 23).
48 Salter and Crofts (n 2) 242
US Federal Trade Commission. He was banned from posting any further nude pictures and ordered to delete all the images and personal contact information he had collected to date.

A San Diego man, Kevin Bollaert, would later employ a similar business model, relying on a submission form for posting third party content that took advantage of the protection afforded by Section 230 of the CDA. To post content to Bollaert’s website, Ugotposted, however, far more identifying information about victims was required. The submission form requested their full names, ages, locations and links to their social media accounts. The website then displayed the nude and sexual images of its adult victims, posted anonymously and non-consensually, alongside all their personal details. As with Brittain’s website, victims were re-directed via a link to a separate site, Changemyreputation, where a service charging between $250 and $350 was made available to victims, to remove their images. More than 10,000 images, predominantly of women, were posted between December 2012 and September 2013; Bollaert reportedly earned around $900 a month in advertising revenue and collected an additional $30,000 from victims for removing images. Bollaert was convicted in February 2015 on 21 counts of identity theft and six counts of extortion, receiving an 18-year prison sentence. Under Californian penal law, it is illegal to wilfully obtain identifying information for unlawful purposes, and the majority of Bollaert’s charges actually relate to identity theft rather than to blackmail and extortion. His lawyer claimed at his trial that while his client’s business was gross and offensive, due to the fact that the content of the site was user-generated, this meant that in this regard, his client had not broken the law.

Other emergent sites, such as Pinkmeth, again allowed for user-submitted pictures to be displayed alongside links to victims’ social media sites, such as Facebook, LinkedIn and MySpace. Replicating Moore’s business model, Pinkmeth also included a section where users

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51 Ibid.
52 Californian Penal Code sections 530.5 and 653(b) state that obtaining identifying information ‘for any unlawful purpose, including with the intent to annoy or harass’ is a criminal offence.
could submit defamatory commentary about the person depicted.\textsuperscript{54} Another site, \textit{Texxaan}, ensured that victims were even more easily identifiable by posting user submitted pictures alongside victims’ partial or full names and towns of residence. Anonymous users could then access the comment threads to post the full names and social networking profiles of the individuals pictured,\textsuperscript{55} significantly increasing the risk of them being stalked and harassed. Stroud observes that although many of these sites have been shut down through legal pressure, many have simply opened up again on a different server at a new web address.\textsuperscript{56} \textit{Pinkmeth} is a case in point: soon after being shut down, it re-opened under a different domain name, operating out of Somalia.\textsuperscript{57} Other websites emulating Brittain and Bollaert’s extortion models incorporated removal policies, encouraging victims to pay a fee to have their images taken off the sites. The revenge porn website, \textit{My Ex.com} even offered its own Question and Answer section, providing answers to common queries, such as how to remove posts from the site. It would then re-direct victims via a link to another site, which requested a payment of $499 to delete their record from the website. This fee also included the removal of the \textit{MyEx.com} search result from the Google, Yahoo! and Bing search engines. The removal policy has since been updated to allow individuals to submit removal requests without requesting payment,\textsuperscript{58} and many sites exploiting victims in this way have now been successfully shut down for good.\textsuperscript{59}

Regardless of the profit model employed, revenge porn websites are designed to make individual contributors, rather than the site itself, responsible for the verification of age and consent status of those depicted.\textsuperscript{60} In the US, both webmasters and users who merely view the site are granted wide legal immunity by virtue of Section 230 CDA, which states that ‘no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information provider’. This immunity is not absolute, however, as copyrighted material is not protected. Section 230 provides better protection for website operators hosting user-generated content than in England and Wales, although the

Defamation Act 2013 has strengthened the safeguards for website operators, by adding additional defences in respect of statements posted by third parties.\textsuperscript{61} In Europe, Regulation 19 of the E-Commerce Regulations 2002 states only that website operators should act ‘expeditiously’ in removing unlawful third party material when a complaint has been made, meaning that as no specific time limit is established for doing so. In fact, there is sometimes a considerable timeframe in which images can be repeatedly re-posted and disseminated. The lack of legal rigour in targeting website operators hosting revenge porn has contributed significantly to the proliferation of revenge porn websites worldwide and facilitated the hosting of content on social media platforms.

By 2014, the UK Safer Internet Centre had identified between 20 and 30 websites displaying revenge pornography in the UK, some pay-per-view and some free to access, but all displaying sexually explicit images, mainly of women, that had been posted without their permission.\textsuperscript{62} Fletcher opines that the commercial viability of revenge porn websites elevates this category of pornography beyond the ‘Rule 34’ meme, which essentially contests that if something exists, there is pornography of it. He believes that defining a new category of pornography has simply utilised an old marketing trick and suggests that people are ‘enthusiastic consumers of apparently new products, even if the experience is largely determined by new labelling.’\textsuperscript{63} He observes that the constant innovation of new technologies which have driven pornography’s production, is matched in parallel by the development of new business opportunities for it. For example, operators of free revenge porn websites stand to make a good profit through advertising revenue and by directing users to subscription only porn sites, in addition to charging victims a fee for removing their images.\textsuperscript{64} It is in the website operators’ interests, therefore, to keep the compromising images up on their sites for as long as possible: the more traffic the website receives, the more they can charge for advertisements and removal fees.\textsuperscript{65} He makes the point that, while the obvious distress revenge porn causes has led to calls for specific legislation globally, existing revenge porn laws focus primarily on the distributers of

\begin{itemize}
\item \textsuperscript{61} Defamation Act 2013 Section 5.
\item \textsuperscript{62} HC Deb 19 June 2014, vol 582, col 1369.
\item \textsuperscript{63} Gordon Fletcher, ‘Revenge Porn has Become too Profitable to Go Away,’ The Conversation, (24 April 2014) <http://theconversation.com/revenge-porn-has-become-too-profitable-to-go-away-25837> accessed 15 January 2019.
\item \textsuperscript{64} Ganaele Langlois and Andrea Slane, ‘Economies of Reputation: The Case of Revenge Porn,’ (2017) 14(2) Communication and Critical Studies 120, 126-9.
\end{itemize}
the images, with none of the laws contemplating the prospect of also banning advertisers or subscribers from websites that include the revenge porn category. Fletcher believes that the formation of new categories is likely to continue as long as there are advertisers and subscribers willing to support new creations. If this view is apposite, it suggests that the revenge porn phenomenon is unlikely to quietly abate, but will instead steadily grow in line with technological innovation, in the absence of new legal measures that target websites operators. The revenge porn problem has, therefore, an alarming potential for escalation.

1.4 The Scope of the Abuse and the Extent of the Harm

The non-consensual dissemination of another person’s private sexual images can have devastating consequences: some victims have developed anxiety-related illnesses and depression, and others have committed suicide, due to the shame and humiliation caused by dissemination. Where identifying information accompanies revenge porn images, victims are put in danger of stalking and harassment. Derogatory commentary is actively encouraged to increase the level of shame and humiliation to victims: at least twelve websites have been identified in the UK alone, which promote themselves by encouraging men to post images of ex-partners for others to view, one advertising itself as a forum to share images of ‘cheating slut wives.’ Revenge porn can affect individuals of all ages, and although statistics show that the majority of victims are women, men are also affected. While revenge porn does disproportionately affect women, according to the Government Equalities Office, 25% of calls to the Revenge Porn Helpline in the UK relate to male victims, approximately 40% of

66 Fletcher (n 63).
67 Ibid.
68 Citron and Franks (n 20) 351.
69 See section 1.3 or a discussion of the scope of the abuse and the extent of harm caused by dissemination.
71 See ‘End Revenge Porn’ infographic for statistics, where a survey sample shows that 90% of victims of revenge porn are women:<http://www.endrevengeporn.org/revenge-porn-infographic/> accessed 11 January 2016
whom are gay.\textsuperscript{74} Data obtained under a Press Association freedom of information request also reveal that the youngest victim in the UK is aged just 11 and that the oldest victims are pensioners.\textsuperscript{75} While images are disseminated (or dissemination is threatened) by current or ex-partners (such threats involving the type of blackmail referred to as ‘sextortion’), culpable parties also reportedly include friends, ex-friends, acquaintances, dates, one-night stands, or even strangers (if images are obtained by hacking).\textsuperscript{76}

Another means by which offenders disseminate images is via the creation of fake social media accounts in victims’ names, which then invite friends and family to connect to them, allowing the inadvertent viewing of private, intimate material.\textsuperscript{77} Anonymous image boards are also increasingly facilitating revenge porn. A concept originating in Japan and brought to the West by flagship site 4Chan, image boards provide a forum for images in preference to text. Anonymous image boards allow posters to post images without any permanent identity, older posts being deleted as quickly as new ones are made.\textsuperscript{78} While 4Chan itself does not host revenge porn, a growing number of spin-off sites based in counties around the UK do, hosting sexually explicit images of local girls and women who many users know.\textsuperscript{79} In some cases, images are stolen from victims’ hacked Facebook profiles and are posted alongside requests for further images, from other users who may possess them.\textsuperscript{80} These spin-off sites are registered to an industrial site in Canada and it is almost impossible to discover who is behind the anonymous posts.\textsuperscript{81}

New varieties of revenge porn are perpetually emerging. First, ‘Photoshopped porn’ is the practice of digitally adapting images, so that one person’s face is transposed onto another


\textsuperscript{76} See Ricci et al (n 59).

\textsuperscript{77} Ibid.


\textsuperscript{79} Laville and Halliday (n 70).

\textsuperscript{80} Ibid.

\textsuperscript{81} Ibid.
person’s naked body, before being disseminated online. This practice has become prevalent in India, where victims are primarily women in the public eye. In 2015, two teenagers from Kerala were charged under cybercrime laws for uploading a fake video of a Malayalam actress on Whatsapp and Facebook, and a 19 year-old man was arrested for sharing this type of forged material of another prominent television actress. In the UK, images of victims including underage children are being acquired from their social media profiles, and similarly Photoshopped before being disseminated. Another emerging trend is where perpetrators take unaltered images of individuals, appearing fully clothed (again including underage victims) from victims’ social media profiles, and post them onto pornography websites, for the purpose of inciting derogatory commentary and sexual threats from other users. A further trend is ‘deepfakes,’ where fake porn films featuring victims are created using AI technology, which is freely available via user-friendly apps, such as FakeApp. The technology is so sophisticated, it is increasingly hard to differentiate these fake images from the real thing, causing significant distress to victims of this practice. An even more recent practice is ‘cyber-flashing,’ where unsolicited images, mainly featuring male genitalia, are sent anonymously to women on public transport, via the AirDrop feature on Apple iPhones, although in this case, rather than images being non-consensually disclosed, they are non-consensually received.

Another distinctive form of the abuse is ‘sextortion,’ which has taken hold in communities where honour plays an important role. Offenders pursue relationships with women from these

communities and acquire compromising pictures or films of them, to use in subsequent blackmail attempts. Vulnerable women from from the Sikh and Hindu communities are disproportionately targeted by men they genuinely believed to be proper boyfriends, resulting in their terror of being sent to their homeland to make an arranged marriage, or even becoming the victim of an honour killing, perpetrated by their own family members.88

Then there is the practice of ‘upskirting’ or ‘downblousing.’89 This involves the covert, voyeuristic photography or filming of victims’ private bodily regions in public places, such as on public transport, without their knowledge; the images are subsequently posted onto dedicated websites, for fellow fetishists to view. Also referred to as ‘creepshots’ the consumption of these images is increasing, as digital technology considerably facilitates the taking and uploading of them. Recent research by McGlynn and Grey reveals that upskirt videos are easily and freely available on mainstream pornography websites: over a period of just six months, close to 2,500 videos were found on the landing pages of the UK’s top three most accessed porn sites.90 Until recently, the issue has attracted surprisingly little attention in either the civil or criminal law, the legislation in the area focusing more on the regulation of surveillance by law enforcement.91 This position has been reviewed following a concerted campaign by a former victim of the abuse, Gina Martin, after police declined to prosecute a man accused of taking pictures up her skirt at a music festival in London, in 2017.92 Upskirt photography is now a criminal offence, in England and Wales: the Voyeurism (Offences) (No. 2) Bill 2017-19 amends s 67 of the Sexual Offences Act 2003, creating additional offences under s 67A, to make certain acts of voyeurism, including upskirting, a sexual offence.

90 Clare McGlynn and Fiona Vera-Grey, ‘No Woman in a Public Place is Free from the Risk of Upskirting – We Must do More to Tackle Image-based Sexual Abuse,’ The Blog, Huffington Post UK (23 November 2018) <https://www.huffingtonpost.co.uk/entry/upskirting-law-sexual-harassment_uk_5bf7c501e4b088e1a6888e47> accessed 15 January 2019.
Revenge porn can lead to ‘devastating consequences for victims causing insurmountable
damage to careers, family life and indeed, the individual’s health and welfare.’\textsuperscript{93} Victims
struggle with anxiety and panic attacks and can develop ailments such as anorexia nervosa and
depression.\textsuperscript{94} Some victims have lost jobs, been forced to change schools, move house or
change their name after being subjected to stalking and harassment,\textsuperscript{95}suffering sometimes
irreparable reputational damage and emotional harm. Consequently, some victims have
committed suicide as a direct result of having their images distributed in this way.\textsuperscript{96} Victims
can suffer ‘loss of personal dignity, a lost sense of security, lowered respect from family and
friends, and a greater difficulty in maintaining and securing future romantic relationships.’\textsuperscript{97}
Citron and Franks highlight the professional costs of revenge porn, explaining how victims are
in danger of losing jobs or not getting a job at all, when an Internet search by a prospective
employer prominently displays naked pictures or videos at the top of its results.\textsuperscript{98} Citron and
Franks also raise the issue of domestic abuse, observing how the threat of disclosing images is
used by abusers to keep their partners ‘under control, making good the threat once their partners
find the courage to leave.’\textsuperscript{99} They also remark that the existence of the images themselves, in
these cases, is very often ‘the result of an abuser’s coercion of a reluctant partner.’\textsuperscript{100}

The emergence of new liberal sexual attitudes towards the end of the last century, largely
precipitated by the convergence of new technologies with pornography, has effectively
devolved sexual responsibility from the state and society to the individual.\textsuperscript{101} This has enabled
individuals to self-govern their engagement with pornographic materials and production,

\textsuperscript{93} Justine Mitchell ‘Censorship in Cyberspace: Closing the Net on Revenge Porn,’ (2014) 25(8) Ent LR 283,
283.
\textsuperscript{94} Keats Citron and Franks (n 20), 351.
\textsuperscript{95} Mary Anne Franks ‘Adventures in Victim Blaming: Revenge Porn Edition,’ Concurring Opinions blog
(February 2013) <http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-
\textsuperscript{96} Victims who have committed suicide due to revenge porn exposure include: Tyler Clementi (Ed
Pilkington, ‘Tyler Clementi, Student Outed as Gay on Internet, Jumps to his Death,’ The Guardian (30 September 2010,
New York)<http://www.theguardian.com/world/2010/sep/30/tyler-clementi-gay-student-suicide>); Amanda
Todd, (‘Man Charged in Netherlands in Amanda Todd Suicide Case,’ BBC News (18 April 2014, Europe)
<http://www.bbc.co.uk/news/world-europe-27076991>)and Jesse Logan (Mike Celzic, ‘Her Teen Committed
Suicide over “Sexting,”’ Today (March 2009)<http://www.today.com/parents/her-teen-committed-suicide-over-
\textsuperscript{97} Zak Franklin, ‘Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by
\textsuperscript{98} See Citron and Franks (n 20) 352.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid, 351.
\textsuperscript{101} Salter and Crofts (n 2) 236.
encouraging sexual autonomy and agency. Regardless of sexual orientation or gender, individuals have welcomed the freedom new technologies and shifting attitudes have presented. Schulhofer defines sexual autonomy as permission for individuals to ‘act freely on their own unconstrained conception of what their bodies and their sexual capacities are for,’ while Patton notes that the sexual revolution and its emphasis on sexual freedom has brought many positive benefits to society at large, particularly to women. These benefits include increased roles for women in the workforce, the pursuit of careers and the development of healthy sexual relationships. She observes that ‘the control women exercise over their sexual expressions and behaviours often extends to their non-sexual lives too, encouraging confidence in decision-making that can lead to better life conditions overall.’

The revenge porn phenomenon has signalled, therefore, the re-emergence of a harmful double standard. In the case of the non-consensual dissemination of intimate images by former partners, Patton observes that when a woman willingly takes a nude or sexually explicit photograph of herself, or allows one to be taken by another person, she is ‘making a decision about her sexual life and behaviour, choosing to express her sexuality in a particular way.’ If she then decides to share the intimate media with a trusted partner, qualitative research suggests that there are proven benefits in doing so, as sharing such images can increase confidence as this can encourage partners to experiment with new behaviour, building anticipation for other sexual activity. Viewed in this way, sharing intimate media, in confidence with a sexual partner, highlights the increased mutual benefits of sexual autonomy. However, when the trusted relationship breaks down and the images the woman has shared are distributed non-consensually by the former trusted partner, the blame for this gross invasion of the woman’s sexual privacy is placed on her, and she is denounced for having taken the images in the first place, or having allowed them to be taken, perpetuating a culture of victim-blaming and ‘slut-shaming.’

104 Ibid.
105 Ibid.
107 See Citron and Franks (n 20) 353.
Clearly, such narratives do not take into account victims whose images have been disseminated after being photographed or filmed covertly, or who have been coerced into making intimate media by an abusive partner. Nor do they reflect the reality of vulnerable young teenagers who have previously been groomed and become victims of child exploitation. Images which have been taken during a period of childhood abuse, and then resurface years later, can cause victims not only to re-live the painful memories of the abuse, but also to endure, simultaneously, a different variant of it.  

Finally, some consideration should be given to the harm caused third parties by the dissemination of revenge porn. Partners, future spouses or victims’ families or children who do not feature in the images themselves can also be traumatised by the dissemination of revenge porn featuring their loved ones. Consideration should also be given to the extent of the harm to society as a whole, as opposed to individuals, as a result of this non-consensual abuse. Revenge porn raises important questions about societal values and the violation of these through the unauthorised dissemination of images, particularly with regard to the issue of consent.

1.5 Legislatively for the Problem of Revenge Porn

1.5.1 An International Overview

In attempting to address the revenge porn problem, legal scholars and lawmakers worldwide have grappled to identify the complex legal and moral issues surrounding the production and unauthorised dissemination of intimate photographs and videos. The issue has, unsurprisingly, given rise to varying academic opinion as to how it should be addressed. Many academics welcome criminalisation, believing it sends a positive message that the misconduct is harmful and deserving of criminal sanction. Pegg has argued, however, that although criminalising

108 See Ricci et al (n 59).
revenge porn is ‘laudable in its intent,’ prima facie, revenge porn is a civil matter: issues regarding private relations should not be dealt with in the criminal courts, as the ‘slow, steady creep of criminal law into private relations is not to be welcomed.’ Chander and Ronneburger suggest that privacy doctrine affords the best legal solution for those affected, as this focuses on the non-consensual nature of the dissemination, and the gross invasion of privacy aspect of the misconduct. There is also some support for finding a legal remedy for revenge porn in the law of equity, in breach of confidence, as inherently, the central issue is one of breach of trust. Bambauer and Levendowski consider that revenge porn is a matter of intellectual property, which can be addressed privately in copyright actions, due to the fact that in a large number of cases, victims have taken the images themselves, meaning that they own the copyright to them. Edwards holds the view, however, that legal remedies are largely ineffectual in addressing what victims need the most: a means of swiftly removing links to the material once it has been disseminated. For most individuals whose photos or videos have been shared without consent, the principal harm goes way beyond the original disclosure. Rather, the injury occurs from the ongoing and repeated dissemination of the intimate content.

Edwards has thus advocated the ‘right to be forgotten’ as the most effective remedy for revenge porn victims. Following the decision of the European Court of Human Rights in Google

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112 This has been advanced as a solution by the Supreme Court in Western Australia, see: Giller v Procopets [2008] VSCA 236. The case accepted that a person can recover damages for emotional distress under the tort of breach of confidence, as a result of the distribution of videos showing sexual intercourse. See Chapter 4.2(i) for a detailed discussion of this case.

113 Derek E Bambauer proposes the creation of a right for identifiable people captured in intimate media in the US Copyright Act, to block unauthorised distribution and display of those images or video in ‘Exposed,’ (2013) Arizona Legal Studies Discussion Paper No 13-39 1-58, 6. Amanda Levendowski argues that, given that 80% of photos hosted on revenge porn sites are selfies, meaning that the victims own the copyright to their photos, copyright infringement may be a better tool to battle revenge porn in ‘Using Copyright to Combat Revenge Porn,’ (2014) 3 NYU Journal of Intellectual Property & Entertainment Law 442-446.


115 Edwards (n 114).
Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzales116 (usually known as Google Spain), this gives data subjects the right to request that links to data that they consider to be harmful to their interests is removed from search engines. There is even more reason to believe that this might provide a good solution for victims as recently revised data protection law now provides further essential benefits to revenge porn victims vis-a-vis their right to be forgotten. In May 2018, the directly effective EU General Data Protection Regulation (GDPR) came into force, providing a clarified right to erasure to help people better manage data protection risks online. The provisions include a new right for data subjects who no longer want their data to be processed to request that it is permanently deleted, if there are no legitimate grounds for retaining it.117 This right to erasure applies across the board, not just to search engines, meaning that the new provisions under EU data protection law now provide revenge porn victims not only with a way of deleting links to disseminated images, but also with a means of removing images from source websites, at least within the EU jurisdiction. This position should not be influenced by Brexit, even in the event of a no-deal scenario.118 However, despite these improved provisions, once images are posted online, they can be cached and stored indefinitely, once downloaded, creating the potential for them to be re-uploaded at some future point.

With such widely varying academic opinion, it is unsurprising that lawmakers have found the task of legislating against revenge porn far from straightforward. This is due, in part, to the absence of any universal agreement about the definition, scope and manifestations of the problem, or consensus about how victims should be compensated for the harm caused. Lack of agreement also exists simply because the problem itself is not fully understood. What is certain, and a significant cause of the problem lawmakers face, is that national legal systems are struggling to keep pace with the relentless expansion of the Internet, due to the borderless nature of cyberspace, and the fact that individuals can broadcast information to large

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116 Case C-131/12.
117 Under Article 17 of the GDPR individuals have the right to have personal data erased. The right is not absolute and only applies in certain circumstances.
118 Department for Digital, Culture, Media and Sport, Guidance: Data Protection if there’s no Brexit Deal (13 September 2018) <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal> accessed 15 January 2019. The DCMS guidance states that before 29 March 2019, rules governing the collection and use of personal data will be set at an EU level by the General Data Protection Regulation (GDPR). If the UK leaves the EU in March 2019 with no agreement in place regarding future arrangements for data protection, there would be no immediate change in the UK’s own data protection standards. This is because the Data Protection Act 2018 would remain in place and the EU Withdrawal Act would incorporate the GDPR into UK law to sit alongside it.
international audiences. Governments across the globe are being forced to reconsider how, and to what extent, they wish to regulate speech in the online environment. Legislation to combat the effects of harmful, hateful or offensive content online inevitably comes into conflict with freedom of speech, an issue which is further complicated due to disparity amongst different national territories as to what kind of speech (political, artistic, sexual etc.) is deemed to be offensive. This incongruence is most notable between Western European nations and the US. The latter places a greater premium on individual freedom of expression than Western Europe, with the First Amendment to the US Constitution prohibiting lawmakers from encroaching upon individuals’ right to free speech, except in the narrowest of circumstances. This strict protection in the US is further safeguarded in cyberspace by virtue of the Communications Decency Act of 1996, which provides broad legal immunity to websites hosting third party user-generated content. As a result, images taken down from websites following legal action in Western European nations can subsequently be re-posted onto websites hosted in the US, where they are virtually impossible to remove.

Striking the right balance to protect speech when criminalising revenge porn has proved problematic in some US states. In California, in 2013, a revenge porn law that was tailored so as to pass First Amendment constitutional muster was so narrowly drafted that it did not cover incidences where victims had taken a sexual ‘selfie’, rendering the law ‘relatively toothless.’ The law was subsequently amended in 2014. In spite of the near absolute constitutional protection given to free speech, to date, 41 US states have now passed legislation

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120 See Majid Yar, Cybercrime and Society (2nd edn, Sage, London 2013) 104-108: although legal pluralism is evident within Europe itself, and significant divergence can be seen regarding acceptable forms of hate speech and obscenity for example between European countries.
121 These are where, for example, the speech contains a serious and imminent threat of violence against identifiable persons or directly incites others to commit specific criminal acts against those persons.
122 For example, see AMP v Persons Unknown [2011] EWHC 3454 (TCC). Following a successful action in the UK, an injunction granted the removal and prohibition of further dissemination of sexually explicit digital photographic images, which had been ‘seeded’ using Bit Torrent technology. However, First Amendment activists in the US promptly re-uploaded the images causing AMP’s legal team to pursue new action in the US on copyright grounds.
123 According to Cyber Civil Rights Initiative website, End Revenge Porn, these accounted for 80% of revenge porn cases: <http://www.endrevengeporn.org/welcome/> accessed 14 November 2015.
125 California Senate Bill 1255.
to criminalise revenge porn, in order to protect its citizens from the activity,\textsuperscript{126} and in July 2016, a bill that would make revenge porn a federal crime was introduced in Congress.\textsuperscript{127} Several other countries have already criminalised revenge porn, including France,\textsuperscript{128} Germany,\textsuperscript{129} Australia,\textsuperscript{130} New Zealand,\textsuperscript{131} Israel,\textsuperscript{132} Japan,\textsuperscript{133} Canada,\textsuperscript{134} the Philippines,\textsuperscript{135} England and Wales,\textsuperscript{136} Scotland,\textsuperscript{137} Northern Ireland,\textsuperscript{138} and Malta.\textsuperscript{139}

1.5.2 Legal Responses to Revenge Porn in England and Wales

1.5.2.1 The Civil Law

Revenge porn victims can bring private actions in the civil law for breach of copyright (if claimants have taken the images themselves), breach of confidence, harassment and misuse of private information. Claimants who pursue these actions will usually be seeking injunctions to prohibit further dissemination or removal of images, in addition to making applications for restraining orders and claiming damages.

The civil law might be the preferred route for some victims seeking legal redress for revenge porn disclosures for several reasons. First, in a civil case, victims can pursue claims

\textsuperscript{126} Data taken from Cyber Civil Rights Initiative website, End Revenge Porn: <https://www.cybercivilrights.org/revenge-porn-laws/> accessed 29 December 2018.
\textsuperscript{128} Digital Republic Act (2016).
\textsuperscript{129} Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation (GDPR); Art Copyright Law; In 2014, the Bundesgerichtshof (BGH) upheld an earlier ruling from a regional court in Koblenz that said a man did not have the right to keep intimate photos of his ex-lover on the ground that she had consented to them being taken in the first place.
\textsuperscript{130} New South Wales: Section 91Q Crimes Act 1900 No 40 (2018); South Australia: Summary Offences Act 1953 (2018); Western Australia: Section 10G/61 Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016; Victoria: Section 41C Summary Offences Act 1996.
\textsuperscript{131} Harmful Digital Communications Act 2015.
\textsuperscript{133} Act on Prevention of Damage by Provision of Private Sexual Image Records Act (2014).
\textsuperscript{134} Section 162.1. Criminal Code through Bill C-13 Protecting Canadians from Online Crime Act or Cyberbullying Act (2015).
\textsuperscript{135} Anti-Photo and Video Voyeurism Act of 2009.
\textsuperscript{136} Section 33 Criminal Justice and Courts Act 2015.
\textsuperscript{137} Part 1 Section 2 Abusive Behaviour and Sexual Harm Act 2016.
\textsuperscript{138} Part 3 Section 51 Justice Act (Northern Ireland) 2016
\textsuperscript{139} Article 208E Maltese Criminal Code 2016.
anonymously, by virtue of a non-disclosure order,\textsuperscript{140} meaning that, unlike criminal proceedings, their identities can be protected.\textsuperscript{141} Second, a civil action does not rely upon persuading others, namely the police or the Crown Prosecution Service of the strength of a case, or the seriousness of it.\textsuperscript{142} Where victims are unable to pursue a criminal prosecution,\textsuperscript{143} civil justice can offer a welcome alternative course of action, not least because a lower standard of proof is required in the civil law than the criminal law: claimants only have to prove the case on the balance of probabilities, rather than the prosecution having to prove that the defendant is guilty beyond reasonable doubt. A successful civil claim can be made after an unsuccessful criminal case, so even where a prosecution has been pursued but is unsuccessful, victims can still avail themselves of justice by pursuing a civil claim, benefiting from the lower standard of proof.

Third, in tort law, the most likely outcome for revenge porn claimants is that compensatory damages will be paid by the defendant, in order to make reparation for the claimant’s loss. As McGlynn and Rackley observe, where actions are successful, the remedies provided for by a civil claim, whether damages or injunctive relief, may well be more beneficial to claimants of image-based abuse, who seek to rebuild their lives, than having their perpetrators face a (relatively short) custodial or community sentence.\textsuperscript{144}

There are some limitations, however, for litigants seeking redress for revenge porn disclosures in the civil law. First, victims of non-consensual pornography are normally powerless to prevent publication at the outset, as civil actions and remedies are generally only available after the event. While the successful application for an interim injunction can result in the takedown of images, preventing publication in the first place requires awareness by the victim, or prior notification that the images will be published. This is something that the perpetrator is unlikely to provide, given that the pivotal purpose of non-consensual pornography is to publicly humiliate the subject.\textsuperscript{145} Even if a final injunction is granted after civil proceedings have taken

\textsuperscript{140} Under Civil Procedure Rules, r 39.2 (4).
\textsuperscript{141} Although in criminal trials, judges do have a discretionary power to withhold names.
\textsuperscript{143} Victims do have the option of pursuing a Norwich Pharmacal Order in the courts to ascertain their perpetrator’s identity, by requiring the website operator to disclose the registration and log-on details of the poster. These details can be faked, however, meaning that the costs of such an application (anything from £5000) may be incurred in vain and may require further applications: See Jennifer Agate and Jocelyn Ledward, ‘Social Media: How the Net is Closing in on Cyber Bullies,’ (2013) 24(8) Ent LR 24, 263, 267.
\textsuperscript{144} McGlynn and Rackley (n 142) 25.
place, digital images can be very difficult to locate, once shared, and securing permanent removal of them can be virtually impossible once they have entered cyberspace.

Next, there can be long delays in waiting for civil trials. This means for revenge porn victims that it could take a year, for example, from the initial dissemination of their images for the adjudication of their trial to be complete, which can have debilitating psychological and emotional effects. Also, victims are only able to claim damages for the harm they are able to demonstrate at the time that the case was originally brought, despite the fact that revenge porn may have further, unforeseen downstream consequences.

It is funding litigation and accessing civil justice, however, that can present the biggest obstacle for ordinary members of the general public, who neither have the financial means to instigate proceedings, nor want to take the risk of paying costs and damages should they lose. Claimants bringing an action in tort law will generally be expected to fund the cost of litigation from the outset. Although the Jackson Reforms have curtailed uplifted civil litigation costs,146 these do not extend to privacy and publication proceedings, such as breach of confidence and misuse of private information,147 meaning claimants funding litigation independently could still face significant legal costs. If civil litigation is not undertaken independently, claimants may alternatively choose to use a conditional fee agreement. The basic idea of such a ‘no-win-no-fee’ agreement is that claimants will not have to pay anything to the firm acting for him or her, in the event the case is lost, but if it is successful, solicitors will be entitled to charge clients at their usual rate, plus a success fee. The success fee will be a percentage, up to 100%, of the costs otherwise chargeable to the claimant. Litigant solicitors must be convinced, then, of the likelihood of winning and may be unlikely to take on a case where there is uncertainty as to the outcome.

If the claimant either funds litigation independently, or proceeds via a CFA and wins the case, then as a general rule, costs are recoverable from the unsuccessful party.148 If the defendant has no money, even if it is a legal requirement to pay, the claimant will not be able to recover

146 The Legal Aid Sentencing and Punishment of Offenders Act 2012 Section 44 (2).
148 Under Civil Procedure Rules, r 44.2 (2).
damages. The financial freedom of both parties will, therefore, impact hugely on whether a claimant can pursue a cause of action in the first place. Where finances are no object, however, and seeking damages is a secondary consideration to halting the further dissemination of images, a civil injunction can be a very effective remedy for victims of revenge porn. There are potentially very serious penalties for breaching a court order, including imprisonment of defendants for contempt of court, potentially making the upheaval of litigation well worth the cost and effort for victims.

1.5.2.2 The Criminal Law

In England and Wales, disclosing intimate pictures or videos of someone without their consent is a now a criminal offence. Section 33 of the Criminal Justice and Courts Act 2015 created the offence of ‘disclosing private sexual photographs and films with intent to cause distress,’ in England and Wales, which carries a maximum custodial sentence of two years. Contemporaneously, a government-funded revenge porn helpline was established to support victims and deter potential offenders. The offence is not retrospective, meaning it cannot be used to prosecute disclosures made before its enactment. The law extends to England and Wales, so the misconduct has to be committed within the jurisdiction. However, where a perpetrator and their intended victims are physically located in England, it is possible for an offence to be committed, even if a website hosted abroad has been used.

Criminal prosecutions for revenge porn can also be brought under the two communications offences provided by s 1 of the Malicious Communications Act 1988 and s 127 of the Communications Act 2003, both of which target ‘grossly offensive’ communications. The misconduct can also be prosecuted using offences under the Computer Misuse Act 1990 and

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149 Section 9 provides that the penalty on conviction is up to 2 years in the Crown Court and up to 12 months in the Magistrates Court.
152 Howlett Unreported 28 January 2015 Peterlee Magistrates’ Court. Kevin Howlett was found guilty of sending nude pictures of his ex-girlfriend to contacts on her mobile phone. The offence was concerned with the defendant’s unauthorised access of the victim’s mobile phone contacts.
the Protection from Harassment Act 1997, although when using the latter, the requirement for a ‘course of conduct’ might be difficult to establish in cases where images posted only once by the perpetrator have subsequently gone viral. If images are of victims under 18 years of age, prosecutors can consider offences under the Protection of Children Act 1978, and in the most serious cases, where intimate images have been used to coerce underage children into further sexual activity, other offences under the Sexual Offences Act 2003 can be used.

The gendered nature of revenge porn misconduct has also been recognised. In March 2013, the CPS acknowledged that domestic abuse, perpetrated by means of controlling, coercing and abusing a partner, increasingly occurs through Internet and communications technologies. The updated guidance for prosecuting domestic abuse cases now includes instances where the abuse involves controlling the use of a complainant's phone, for example by harassment through text, mobile, email, social networking sites, or the posting of inappropriate material such as sexually explicit or nude images or defamatory or insulting comments.

1.6 Central Thesis and Original Contribution to Knowledge

The central argument running through the thesis is that neither the civil or criminal law regimes, in England and Wales, is capable of vindicating all victims’ interests, in isolation. The civil law can empower victims to bring their abusers to court, thus providing them with a means of upholding their dignity and equal rights individually. It also gives claimants the opportunity to have trial proceedings conducted anonymously, and where actions are successful, the remedies victims are awarded may enable them to move on with their lives. However, the thesis will demonstrate that tort law responses inevitably leave some important harms unrederessed, rights which go unvindicated and victims who go uncompensated. Most crucially, this is because tort law cannot adequately acknowledge the blameworthiness and moral wrongfulness of revenge porn conduct. There is a clear need, then, for state intervention and for criminal sanctions to signal the moral condemnation for the conduct that civil penalties do

153 Aldous unreported 18 April 2013 Colchester Magistrates’ Court. James Aldous posted sexually graphic images of his ex-girlfriend to revenge porn sites and was found guilty of harassment.
This thesis will also demonstrate the need for the greater deterrent effect that criminal sanctions can provide. Ultimately, the thesis will propose a hybrid civil/criminal response to revenge porn, as only a dual response to the problem would enable victims to access the most effective legal redress possible from both regimes.

The thesis argues that, while the civil law can offer victims a useful mechanism to claim damages or injunctive relief, the seriousness of the conduct also requires the blaming voice of the criminal law and the greater deterrent effect and retributive response that criminal sanctions can bring. However, it also argues that in addition to utilising the criminal law to hold their perpetrators to account, revenge porn victims should be able to access a tailored civil solution, to sue defendants for an injunction or damages. The thesis acknowledges that the criminal law does offer this solution already, to some extent, but, arguably, this does not always provide a fully adequate response for victims seeking redress for revenge porn disclosures.

The study breaks down the analysis into two distinct parts, the civil and the criminal. The first part deals with the theoretical justifications for responding to revenge porn in the civil law regime, on the grounds of two contemporary tort theories, economic analysis theory and corrective justice theory. The discussion evaluates how well two applicable common law causes of action, the equitable remedy of breach of confidence and the tort of misuse of private information, respond to revenge porn dissemination by three paradigmatic categories of revenge porn defendants. This is followed by a normative analysis of these responses, this being underpinned by the theoretical analysis, which identifies areas where victims’ interests are not adequately vindicated, and thus where the law is in need of reform. The first part concludes by offering suggestions for reform, based on these findings.

The second part of the analysis mirrors the approach taken in the first part, justifying addressing revenge porn on the grounds of two contemporary criminal law theories, deterrence theory and retribution theory. These conveniently mirror the tort theories discussed in the first part. Two relevant current criminal law responses to revenge porn will then be analysed and normatively evaluated, these being offences under the Protection from Harassment Act 1997 and s 33 of the Criminal Justice and Courts Act 2015. The Protection from Harassment Act 1997 provides victims of harassing conduct with a criminal law response and a statutory tort, both of which
have been used in the context of revenge porn. Section 33 of the Criminal Justice and Courts Act 2015 was enacted specifically to tackle revenge porn abuse. The thesis will identify gaps in provision, in both regimes, and offer proposals for reform, which will be underpinned with robust theoretical justifications. The final chapter concludes with an examination of the central thesis.

The three paradigmatic categories of potential revenge porn defendants identified for discussion in the thesis are:

(i) Primary Disseminators

This category involves perpetrators who initiate the original disclosure, or threatened disclosure, of images. While, typically, revenge porn is understood to be disclosed by ex-partners (or disclosure is threatened by current partners), culpable primary disseminators can include friends, ex-friends, acquaintances, casual dates, one-night stands and strangers, where images are obtained by hacking. Primary disseminators include the category of perpetrators who facilitate the creation of pornographic images through Photoshopping, generating images by superimposing pictures of victims’ heads onto images of individuals engaged in sexual activity, and also those who generate fake porn films, or ‘deepfakes,’ using AI technology. Primary disseminators can also be sexual fetishists who capture images of victims’ private bodily areas before posting them online to dedicated sites, in the activities known as ‘upskirting’ and ‘downblousing.’

(ii) Secondary Disseminators

This category includes those individuals who amplify the original revenge porn post. Secondary dissemination can be instigated by friends or acquaintances of victims, for example, ‘friends’ of fake social media accounts set up in victims’ names, or acquaintances of victims whose images have been sent directly to them by primary disseminators. This category also includes an unspecified number of individuals unknown to victims, who have come across the
images via search engines, or by visiting dedicated websites, and have subsequently further disseminated them.

(iii) Internet Intermediaries

This category of wrongdoer includes individuals or entities who enable the mass dissemination of images in cyberspace. Revenge porn distribution is facilitated by Internet intermediaries in two distinct ways. First, revenge pornographers can post revenge porn, either real or digitally manipulated, onto victims’ social media accounts, or upload links to their images onto imageboard and discussion websites. Accounts can be genuine or fake, fake accounts usually created in victims’ names by primary disseminators.\textsuperscript{155} Although most of these Internet intermediaries provide reporting tools for revenge porn,\textsuperscript{156} and some have developed software or artificial intelligence to detect nude or overtly sexual images,\textsuperscript{157} inevitably, not all posts will be reported or detected and removed in time to prevent victims’ images from being broadcast to a mass audience.

The second way in which revenge porn is facilitated by Internet intermediaries is through the creation of websites dedicated to revenge porn disclosure and dissemination. Operators of free revenge porn sites stand to make a significant profit, through advertising revenue and by directing users to subscription-only porn sites.\textsuperscript{158} Victims’ shame and humiliation and the desire to remove their images can also be further monetised by website owners who charge a fee for removing images.\textsuperscript{159} It is in the website operators’ interests, therefore, to keep the


\textsuperscript{158} Langlois and Slane (n 64) 126-9.

compromising images up on their sites for as long as possible, as the more traffic the website receives, the more they can charge in advertisement and removal fees.160

Original Contribution to Knowledge

Revenge porn is still a relatively new phenomenon and presents some complex legal and moral challenges for lawmakers seeking to regulate it. The research for the thesis’ proposal initially commenced soon after the problem of revenge porn had migrated from America to the UK, in 2013, and the work on the actual thesis began in October 2014, just after the UK Government announced that the misconduct was to become a criminal offence, in England and Wales. The research has thus been conducted and concluded over a four-year period characterised by fast-moving developments in this area of law. As with any emerging area of law, new research around the subject has become increasingly available,161 most notably a recent evaluation of section 33 of the Criminal Justice and Courts Act by the Law Commission, in its Scoping Report, three years after the law’s enactment.162 The Government has also announced it will be asking the Law Commission to take forward a more detailed review of the law around the taking and sharing of non-consensual intimate images,163 although details of this review have not yet been confirmed.

This thesis makes a distinct and original contribution to the available literature by providing a theoretical foundation to justify addressing revenge porn conduct in both the civil and criminal law regimes and by offering theoretical support for the original reform proposals it offers. Unlike existing studies, this thesis evenhandedly evaluates legal responses in both regimes: most of the available research focuses principally on criminal law responses to revenge porn.164 The research also offers a unique comparative element, as it draws on ideas for reform to both

160 Justine Mitchell (n 65) 285.
161 Particularly active in the field of this research area are Clare McGlynn, Professor in Law at Durham University, Erika Rackley, Professor in Law at the University of Kent, Samantha Pegg, Senior Lecturer in Law at Nottingham Law School, and Alisdair Gillespie, Professor in Law at Lancaster University. This thesis cites much of their valuable research in support of its findings and conclusions.
civil and criminal remedies from other jurisdictions (Australia, New Zealand, Canada and Scotland), where lawmakers are also tackling the pervasive problem of revenge porn. As much existing literature on this subject has emerged contemporaneously with the development of this project, some of the conclusions and proposals in this thesis inevitably concur with those offered elsewhere, although others, are, of course, novel. In essence, the originality of the contribution of this thesis is not only the novelty of its conclusions, but also the unique development of the theoretical foundations that support them.

1.7 Methodology

The thesis employs three complementary methodologies. First, given its focus on the effectiveness of existing legal sanctions for revenge porn, the principal method of research is doctrinal legal analysis, which involves the interpretation and analysis of primary and secondary legal texts, in order to extract patterns and relevant rules to be applied in cases of revenge porn. The primary sources of law used in this study are legal doctrines, statutes and case law relevant to the research questions. The secondary sources of law used include books, journal articles, official publications, newspaper articles, websites and blogs. The primary and secondary sources pertain primarily to England and Wales but include those relating to other common law jurisdictions under discussion, where relevant.

Second, the thesis employs normative theoretical methods to generate a framework for the evaluation of existing laws as well as the development and evaluation of reform proposals. This involves synthesizing a broadly appealing account of the foundations of the civil and criminal law, identifying what these areas of law aim to achieve and what justifies their use. This same methodology is then used to examine the benefits and limitations of responding to revenge porn, in the civil and criminal law regimes, and to evaluate the effectiveness of existing

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laws. Ultimately, normative philosophical analysis establishes a holistic justificatory foundation for the thesis and the reforms it suggests.

Finally, comparative methodology is used to elucidate the law in the common law jurisdictions of the United States of America, Canada, Australia, New Zealand and Scotland, in order to identify how the issue of revenge porn has been dealt with in these jurisdictions and, where successful, to adopt strategies from these jurisdictions to inform proposals for reform in this jurisdiction.

1.8 Research Questions and their Importance

The primary research question and sub questions seek to establish whether existing laws in the civil and criminal law regimes, in England and Wales, provide effective solutions for victims of revenge porn. This is important, as the problem has, to date, been treated in relatively diffuse ways, in this jurisdiction. Three years after the enactment of the Criminal Justice and Courts Act 2015, data collated via a BBC freedom of information request showed that, in 2017-18, despite an increased number of cases being reported to the police, the proportion of cases resulting in charges dropped to just 7%. This suggests that the criminal law response to revenge porn has been inadequate. An assortment of other criminal laws can also be used to prosecute the misconduct, although some victims choose to avoid the criminal law regime altogether, preferring to bring private actions in the civil courts. The current suite of laws used to tackle the abuse do not currently provide victims with adequate solutions, however, but, rather, offer a piecemeal, ad hoc legal approach to the issue.

Revenge porn dissemination is a growing social problem which is constantly evolving to adapt to new technologies, so it has an infinite number of potential incarnations. It causes an endless narrative of harms both to individuals, and to wider society. Individual harms include damage to health, careers, reputation, dignity and self-respect, and a difficulty in maintaining and securing future romantic relationships. Revenge porn harms wider society by contravening

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socially accepted norms of conduct, by placing what should be private into public view. It is a gendered form of abuse, typically targeting, women, who can suffer long-term psychological effects following this intentional sexual violation. Additionally, women are denounced for expressing their sexual autonomy by taking sexually-explicit photographs of themselves and sharing them with romantic partners. When these are subsequently non-consensually disseminated, women are criticised for their sexual agency, perpetuating a culture of victim-blaming. Understanding the scale and manifestations of the problem and the extent of the harm it causes, both to individuals and to wider society, are crucial in understanding how the law should respond to the problem so that victims are provided with the most robust solutions possible, thus empowering them to take action and seek redress.

1.9 Research Questions and Chapter Structure

The primary research question asks: do existing laws in the civil and criminal law regimes in England and Wales provide effective solutions for the problem of revenge porn? In order to answer this research question, a series of sub questions will be addressed in the forthcoming chapters, as follows:

*What are the theoretical justifications for addressing revenge porn in the civil law regime?* Chapter 2 considers justifications for responding to revenge porn on the grounds of two contemporary tort theories, economic analysis (optimal deterrence) theory and corrective justice theory. It seeks to determine whether, theoretically, revenge porn can be sufficiently addressed in the civil law regime, or whether it also warrants the attention of the criminal law.

*How effective are existing civil law responses to revenge porn?* Chapter 3 explores two applicable common law causes of action that can be used to address revenge porn: the equitable remedy of breach of confidence and the tort of misuse of private information. It evaluates their effectiveness when applied specifically to revenge porn disclosures by three paradigmatic categories of defendants and provides a normative analysis of the benefits and limitations of using the causes of action to respond to revenge porn, identifying areas in need of reform.
How should the civil law regime be reformed to respond more effectively to revenge porn?
Chapter 4 explores how the civil law should be reformed, drawing on its limitations when responding to revenge porn identified by the normative analysis in Chapter 3. The chapter adopts a comparative approach by exploring how the issue has been dealt with other common law jurisdictions, focusing primarily on Australia, New Zealand and Canada, using any successful strategies identified as models for potential reform in this jurisdiction.

What are the theoretical justifications for addressing revenge porn in the criminal law regime?
Chapter 5 considers justifications for responding to revenge porn on the grounds of two criminal law theories, deterrence theory and retributive justice theory. These theories conveniently mirror the contemporary tort theories presented in Chapter 2. The chapter seeks to determine whether, theoretically, revenge porn can be sufficiently addressed in the criminal law regime, or whether victims should also be able to access a tailored civil remedy for maximum redress. It concludes by reflecting that a hybrid civil/criminal approach might provide victims with a more effective solution.

How effective are existing criminal law responses to revenge porn?
Chapter 6 explores two applicable criminal law offences that can be used to address revenge porn: ss 2 and 4 of the Protection from Harassment Act 1997 and s 33 of the Criminal Justice and Courts Act 2015. It evaluates their effectiveness when applied specifically to revenge porn disclosures by three paradigmatic categories of defendants and provides a normative analysis of the benefits and limitations of using the offences to respond to revenge porn, identifying areas in need of reform.

How should the criminal law regime be reformed to respond more effectively to revenge porn?
Chapter 7 explores how the criminal law should be reformed, drawing on its limitations when responding to revenge porn identified by the normative analysis in Chapter 6. The chapter adopts a comparative approach by exploring how the issue has been dealt with in other jurisdictions, focusing primarily on New Zealand and Scotland, using successful strategies identified as models for potential reform in this jurisdiction.
Chapter 8 summarises the thesis’ main findings, conclusions and recommendations and provides a final critical examination of the central thesis.
Chapter 2: Theoretical Justifications for Addressing Revenge Porn in the Civil Law Regime

‘Private law is a pervasive phenomenon of our social life, a silent and ubiquitous participant in our most common transactions…. It is the public repository of our most deeply embedded institutions about justice and personal responsibility.’

Ernest Weinrib

2.1 Introduction

Revenge porn disclosures unquestionably infringe of one of the fundamental rights and freedoms enshrined in the European Convention of Human Rights (ECHR), the right to respect for private and family life, home and correspondence, as protected by Article 8. The ECHR, established in Strasbourg in 1949, was drawn up within the Council of Europe as part of a post-war attempt to unify Europe, by institutionalising shared democratic values.2 The United Kingdom was one of the first states to ratify the treaty and played a pivotal role in its creation; the ECHR thus reflects the common law legal tradition of this jurisdiction.3 The UK has been bound by the ECHR since it came into force in 1953,4 but despite having international obligations under the Convention, prior to the enactment of the Human Rights Act 1998 (HRA), the courts were obliged to do no more than ‘have regard’ for the Convention when interpreting ambiguous statutes.5 This meant that judges and public authorities were not bound to observe human rights as a matter of law, so anyone claiming that the Government or a public authority had breached their fundamental human rights could not pursue a claim via the

3 Ibid, 20.
domestic courts, but, instead, had to go to the European Courts of Human Rights in Strasbourg, which could be a lengthy and sometimes expensive process.⁶

The enactment of the HRA, in October 2000, changed this position significantly by giving further effect in domestic law to the fundamental rights and freedoms in the Convention, essentially creating a domestic scheme of human rights protection in the UK. The three key provisions of the HRA which facilitate the protection of human rights are: section 6, which requires all public authorities to act compatibly with the ECHR unless primary legislation requires them to act otherwise; section 3, which requires UK law to be interpreted, so far as it is possible to do so, in a way that is compatible with Convention rights; and section 2, which stipulates that when interpreting questions about human rights, domestic courts should ‘take into account’ relevant judgments of the European Court of Human Rights.

As well as giving vertical effect to the way in which human rights law impacts on the relationship between individuals and the state, the inclusion of courts and tribunals in the definition of public authority also renders the Convention rights capable of indirect horizontal effect, as states are typically held directly and internationally responsible for the conduct of non-state actors who interfere with the enjoyment of others’ human rights.⁷ As such, Article 8 does more than merely impose a negative obligation on the state and public bodies not to interfere with citizens’ privacy, as it can also involve the adoption of positive measures which secure the respect for private life in the sphere of relations between individuals.⁸ The HRA has thus made a remedy available in the national courts both for individuals claiming a breach of human rights by the Government or a public authority, and indirectly, for private persons, without the need to go to Strasbourg.⁹

The enactment of the HRA has led to the development of the common law, in England and Wales, to accommodate for the provisions of the ECHR. Historically, there is no express right

⁶ Donald et al (n 2) 21.
⁹ Donald et al (n 2) 21.
to privacy in English law, but as the Article 8 Convention right guarantees citizens the right to respect for a private life, judges have had to define a new right which protects claimants’ private information, while at the same time balancing this with defendants’ Article 10 right to freedom of speech. Following a series of high-profile cases decided in the decade following the HRA’s enactment, the courts effectively created a new right to privacy in English law by extending the common law equitable remedy of breach of confidence. This has created a remedy in tort, which Giliker describes as a ‘curious amalgamation of tort law, equity and Arts 8 and 10 of the European Convention on Human Rights’. As a result, the key legal principles of the new privacy tort can be found in case law, and the courts’ decisions have also been influenced by European jurisprudence.

Rather than exploring how revenge porn can be addressed directly and independently using human rights law, this thesis will focus on the relief that tort law can offer revenge porn victims, in England and Wales, considering that existing common law torts have been developed, post-HRA, in a way that is compatible with Convention rights. This approach can also be justified on the ground that pursuing a claim in tort in the domestic courts would necessitate far less involved legislative and judicial action than would be required following a mere declaration, in a specific case, that the state had failed to protect human rights. Furthermore, any party wishing to rely directly and independently on human rights law would still need to go through the English courts before they were able to take their case to Strasbourg, as the ECHR requires that all domestic remedies are exhausted before a case can be heard at the European Court of Human Rights.

Individuals of revenge porn seeking vindication for this violation of their human rights can thus seek a private remedy in the domestic courts in tort law. Tort law exists to redress wrongs

10 In the case of Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406, the House of Lords held that there was no cause of action under English law for ‘invasion of privacy’.
11 Three landmark cases can be primarily be attributed to the emergence of a tort for invasion of privacy: the House of Lords’ decision in OBG Ltd v Allan [2007] UKHL 21; [2008] 1 AC 1 (HL); the decision of the European Court of Human Rights in Von Hannover v Germany [2004] EMLR 379 (ECtHR) and the House of Lords’ decision in Naomi Campbell v MGN Ltd [2004] UKHL 22.
13 For examples see the decisions in Von Hannover v Germany [2004] EMLR 379 (ECtHR) and Peck v United Kingdom (2003) 36 EHRR 41, which essentially found that a public location does not always preclude the protection of an individual’s Article 8 right, although this position has not been consistently followed by the UK courts.
14 Article 35(1) ECHR.
visited on one private party on another outside of any contractual arrangement. The use of tort law, rather than the criminal law, by some revenge porn victims, however, raises questions about the need for the intervention of the criminal law at all; if the misconduct can be dealt with adequately as tortious conduct, and adjudicated within the civil courts, why go further? This chapter will determine whether, theoretically, revenge porn conduct can be sufficiently addressed in the civil law regime, or whether it also warrants the attention of the criminal law. It will begin by outlining the aims of tort law and its overarching goals (Section 2.2). It will then introduce two contemporary tort theories, economic analysis (optimal deterrence theory and corrective justice theory), and present theoretical justifications for addressing revenge porn in tort law, on the ground of each (Sections 2.3 and 2.4). The chapter will then proceed to question whether the concept of ‘harm,’ as traditionally understood by tort law, can sufficiently address the negative effects of sexual violation suffered by women, and the implications of this analysis for the putative adequacy of tort law remedies (Section 2.5). It will conclude by suggesting, on the findings of the analysis, that revenge porn cannot be adequately addressed by the civil law regime alone (Section 2.6).

2.2 The Aims of Tort Law

Tort law governs the private responsibilities that people have towards each other. Its principal aim is to serve justice by redressing civil wrongs, imposing an obligation on a person who has committed a wrong, to pay money, by way of compensation, to a person who has thereby suffered harm. Subsidiary remedies can include mandatory orders or injunctions, which prohibit or regulate harmful conduct.\(^\text{15}\) Tort law is concerned with the secondary obligations generated by the infringement of individuals’ primary rights, including rights to property, bodily safety, freedom, and reputation,\(^\text{16}\) and it aims to protect these rights against the rest of the world. Primary rights are protected, in tort law, through an obligation that individuals have, in undertaking various activities, not to infringe them, either intentionally or unintentionally. Torts thus define and give content to people’s rights, providing them with a mechanism for protecting them and securing compensation if they are infringed.\(^\text{17}\) In addition to providing


\(^{17}\) Honoré (n 15) 75.
remedies retrospectively, a central aim of tort law is to establish norms about how people treat each other prospectively: ‘rules of proper behaviour that society imposes on each citizen for avoiding improper harm to others and for determining when compensation is due.’

A further aim of tort law is to obtain justice by distributing losses and burdens appropriately. Distributive justice in tort law is concerned with the allocation of assets and burdens amongst all, or many, of the members of a community, placing on each member the burden of bearing the risk that his conduct may turn out to be harmful to others. In this way, distributive justice in tort law distributes the risks of harm attributable to human conduct throughout society, thus creating economic efficiency, and benefiting society through its contingent purpose of promoting economic well-being.

When conduct is made tortious, either by statute or through the common law, the legislature or courts are seeking ‘forbid or discourage it, or, at a minimum, to warn those who indulge in it of the liability they may incur.’ Deterrence, then, is a key aim. Founded on the consequentialist theory that social well-being can be maximised by reducing harm and minimising social costs, deterrence is achieved by reducing tortious injuries to an efficient level, through fear of attracting tort liability. By creating incentives for potential tortfeasors to take cost-justified precautions, either to avoid accidents, or to refrain from pursuing intentionally harmful behaviour, social costs are reduced and well-being is maximised as people are encouraged to avoid tortious acts.

Compensation, or restoring the status quo ante, is a powerful means by which tort law achieves deterrence, as it aims to redress claimants for the harm caused by defendants’ tortious acts. It can also be awarded in excess of the harm caused, in the form of exemplary, or punitive damages. By making people fearful of committing torts, through the prospect of paying damages, this creates disincentives for actors to engage in the harmful conduct in the first place.

19 Honoré (n 15) 83.
20 Ibid.
21 Honoré (n 15) 84.
22 Honoré (n 15) 75.
Beyond compensation, tort actions send a message to actors that they must give due consideration to the well-being of others.\textsuperscript{23} Tort cases can thus foster public dialogue and debate about social problems. As Goldberg discerns, tort law can put pressure on entities and institutions (that exercise significant influence over ordinary citizens’ lives), to pay greater attention to the public welfare, acting, in a sense, as a public ombudsman.\textsuperscript{24} In addition to compensating individuals who have suffered setbacks, tort law thus indirectly engineers social progress.\textsuperscript{25}

2.2.1 Theoretical Justifications for the Aims of Tort Law

No single unified theory justifies all the aims of tort law. Broadly speaking, there are three distinct camps of tort theory: law and economics, which advocates the consequentialist belief that tort law should maximise social well-being by reducing harm; deontological views which conceive of tort law as a means of vindicating people’s moral rights in some way; and pluralism, according to which tort law should simultaneously accomplish multiple goals, both maximising well-being through deterrence and vindicating individual rights.\textsuperscript{26} The following discussion will focus on the first two of these theories, economic analysis theory and corrective justice theory, presenting an overview of each. The theories will then be explored further and critically evaluated, through specific application to the problem of revenge porn. This will establish to what extent, theoretically speaking, revenge porn can be sufficiently addressed in tort law, on the ground of each theory.

2.3 Economic Analysis (Optimal Deterrence) Theory

\textsuperscript{24} Ibid, and see generally, AM Linden, ‘Tort Law as Ombudsman,’ (1973) 51(1) Can Bar Rev 155-68.
\textsuperscript{25} Goldberg (n 23) 326.
Proponents of economic theories of law believe that tort law serves the broader, instrumental function of economic efficiency. On this account, the point of a liability rule is to provide people with incentives to take cost-justified precautions. A precaution is deemed ‘cost justified’ if the costs of taking it are less than the costs of not taking it, in the form of more accidents, or more intentionally harmful conduct. Therefore, damages exist to motivate parties to take these cost-justified precautions. Economic analysis recognises, however, the social costs imposed on individuals who refrain from activities that may result in negligent, or intentionally harmful conduct. The costs imposed on defendants by tort law go beyond damages themselves to include both primary costs, such as the costs of taking precautions, and secondary costs, for example court costs and lawyers’ fees, as well as general costs to the judicial system. Although tort suits are costly to all parties, the consequences of making conduct tortious is of significant social benefit, insofar as harmful conduct is deterred.

Tort law, unlike contract law, does not expect people to negotiate with one another, in order to allocate the costs of future accidents, as the obstacles to bargaining for agreements, compared to the probability of accidents occurring, are too high for parties to effectively cooperate together - for example, it could not be expected for every driver on the road to negotiate with every other driver, and agree amongst themselves how to allocate the costs of future accidents. Tort law, therefore, surmounts obstacles to bargaining, also referred to as ‘transaction costs.’ These secondary costs can include bargaining costs, emotional costs, lawyers’ fees, court costs, or costs to the judicial system. The nature of the relationship between people in tort law means the transaction costs are very high, unlike the lower costs of private agreements seen in contract law. The costs that exist outside of private agreements are described by economists as ‘negative externalities.’ Not every cost of an accident or harm will be a negative externality, however, as these are limited, broadly speaking, to the costs individuals impose on others through their conduct. The economic purpose of tort liability is to induce injurers to ‘internalise’ the costs of harms that occur outside of private agreements, and which result from

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27 Early scholarship on economic theories of tort law derive, notably, from Guido Calabresi (See The Costs of Accidents (1970)); Richard A Posner (See ‘A Theory of Negligence’ (1972); 1 J Legal Stud 29); William Landes and Richard Posner (See The Economic Structure of Tort Law (1987); and Steven Shavell (See Economic Analysis of Accident Law (1987)).
30 Ibid.
31 Ibid.
their negligent or intentional conduct thus reducing negative externalities.\textsuperscript{32} This in turn leads to efficiency - or optimal deterrence.

The deterrence perspective of law and economics has been criticised for its limitations. Economic analysis has traditionally relied heavily on ‘rational choice’ models, which assume that individuals (or entities) generally make self-interested decisions about how, or whether to, engage in certain activities, by weighing up the costs and benefits of these activities. The contemporary view of the theory still relies on elements of rational choice, but these are based on preference satisfaction, which holds that individuals make choices based on their preferences (these being objectively expressed or manifested in market choices), with a view to achieving subjective well-being. One of the normative foundations of law and economics is the idea that people exercise authorship over their lives, by making choices which enhance their well-being (although economists clearly do not view preference satisfaction as being a perfect proxy for happiness or human flourishing). As West observes, however, the general assumption of rationality that legal economists make rests on two basic, implicit claims about human competency and motivation: ‘[f]irst it assumes that people are capable of ascertaining what choices from the possible pool will maximise their own subjective well-being, and second, that people are motivated to do so.’\textsuperscript{33} She asserts that it is only if these assumptions are fair, can it be ‘safe to assume that the decisions and choices we make accurately maximise our own subjective well-being and minimize to whatever extent is possible our subjectively felt pains.’\textsuperscript{34}

In the field of tort law, Goldberg observes that the deterrence model presupposes that legal sanctions are capable of deterring.\textsuperscript{35} This assumption is predicated on the following syllogism, as advanced by Cardi \textit{et al}:

\begin{quote}
People generally are rational actors and choose their actions out of self-interest. Self-interest is economic and cost-benefit driven, and even interests not
\end{quote}

\textsuperscript{32} Ibid.
\textsuperscript{34} Ibid, 166.
obviously economic are nevertheless quantified (if often unconsciously). By forcing internalization of costs inefficiently imposed on others, the common law of torts not only reaches an efficient result in the specific case, but also leverages the public’s economic self-interest to deter future inefficient injuries.36

A study conducted by Cardi et al has seriously challenged the premise that the threat of common-law tort liability, in fact, deters tortious conduct.37 The authors took as their working hypothesis the assumption that the threat of tort liability would serve as a moderate deterrent to individuals’ day-to-day risky behaviour - weaker than criminal sanctions, but stronger than a system with no tort liability at all. This, they explain, is because extant social science literature would suggest that the relatively high likelihood of tort liability must render tort sanctions an effective deterrent, relative to lower probability outcomes such as criminal liability.38 The data from their study did not support their hypothesis, however. This, they explain, may be because of two cognitive phenomena that could have led the subjects of the study to believe the certainty of tort sanctions to be low. The first of these is ‘egocentric bias.’ This is when people over-estimate their own abilities, and underestimate their chances of becoming injured, or of injuring others.39 In the context of their study, egocentric bias might have led individuals to perceive the risk of injury in day-to-day conduct to be low, meaning the prospect of tort sanctions would be uncertain - and if uncertain, then the sanctions are only capable of serving as a weak deterrent, at best.40 The second phenomenon is ‘availability heuristic,’ a general cognitive bias by which people are more likely to see an event as foreseeable, if they are able to easily recall similar events, either from personal or common experience.41 Cardi et al elucidate that very few of their study’s respondents had ever been

37 Cardi et al (n 36) 567-603.
38 Ibid, 592. The authors cite a study by DW Shuman, ‘The Psychology of Deterrence in Tort Law’ (1993) 42 Kan L Rev 115, 121. Shuman recognises that deterrence is only achieved when the certainty of punishment reaches a sufficient level.
39 Ibid. The authors cite studies by J Ehringer, and D Dunning, ‘How Chronic Self-Views Influence (and Potentially Mislead) Estimates of Performance’ (2003) 84 (1)J Personality & Soc Psych 5-7, who explain egocentric bias, citing meta-studies of the phenomenon; they also cite DW Shuman (n 38) at 65 whose empirical research shows that people are generally overconfident about the likelihood of outcomes.
40 Cardi et al (n 37) 593.
involved in civil litigation. The availability heuristic thus implies that subjects would have underestimated the chance of being sued, and if sued, of having to pay damages.\textsuperscript{42}

Cardi \textit{et al} assert that their findings warrant further investigation, arguing that whilst the law and economics literature over the past forty years has relied heavily on the assumption that the threat of common law tort liability deters tortious conduct, as if it were analytic truth,\textsuperscript{43} the evidence shows that people are typically ignorant of the law, and even if aware of the law’s content, they commonly discount the chance of being held liable.\textsuperscript{44} Deterrence theory relies, therefore, on people’s knowledge and understanding about what tort law is, and what it requires them to do. Dewees \textit{et al} similarly submit that the deterrence perspective on tort law overestimates the amount of overly dangerous activity that would occur without tort liability, and thus the amount of accident reduction achieved by it.\textsuperscript{45} They assert that, actually, a combination of factors, including ignorance by prospective injurers of both law and facts, incompetence, discounting the threat of liability, the taste for risk, small unexpected penalties, and the pervasiveness of liability insurance, ‘all combine fatally to undermine any deterrence effects that the tort system might otherwise achieve.’\textsuperscript{46}

However, as Popper points out in response, scholarship that concludes that individuals are simply not deterred by the prospect of civil liability fails to acknowledge ‘that it is extremely difficult to find any evidence whatsoever that the tort system fails to deter.’\textsuperscript{47} Pogarsky asserts that legal-sanction threats \textit{can} actually be consequential for a portion of the population, and he outlines a theoretical framework, distinguishing three common response types along a hypothetical continuum, ranging from acutely conformist individuals to incorrigible ones.\textsuperscript{48} For the acute conformists, extra-legal influences, such as social disapproval and self-disapproval, ensure compliance with the law, as their strongly-held moral beliefs inhibit conduct to the

\begin{itemize}
  \item \textsuperscript{42} Cardi \textit{et al} (n 37) 593.
  \item \textsuperscript{43} Ibid, 599, 568.
  \item \textsuperscript{44} Ibid, 569.
  \item \textsuperscript{46} Ibid.
  \item \textsuperscript{47} Andrew F Popper, ‘In Defence of Deterrence’ (2011) 75 Alb L Rev 181, 194.
\end{itemize}
extent that ‘considerations of cost and benefit are not brought into play.’ At the other end of the continuum are those individuals who can be considered incorrigible: ‘legal-sanction threats being inconsequential for committed offenders who are impervious to dissuasion.’ He gives the example of sexual offenders who are driven by biological and physical urges rather than by consideration of the costs and benefits of offending. He also cites studies which demonstrate that individuals with low cognitive functioning and those acting impulsively, in a state of emotion, or sexual arousal, are less likely to be influenced by the threat of legal sanctions. Pogarsky positions deterrable individuals in the middle of this hypothetical continuum, as people who are neither acutely conformist, nor strongly committed to crime.

It is these individuals, then, who are potentially deterrable and who are more likely to respond to the threat of tort liability. They are individuals, acting, not in the heat of passion with roused emotions, but with clear-eyed vision, and an awareness of the law and its implications for sanctions, particularly with a view to compensatory liability. If tort liability can encourage some individuals to adopt behaviour that improves societal well-being, through deterring negligent or intentionally harmful conduct, economic analysis theory does provide, at least, a partial justification, for the deterrence aims of tort law.

According to deterrence theory, damages should be calculated to promote a cost-justified level of deterrence, which may require imposing damages in excess of the harms caused to victims. Such additional damages awards are referred to as exemplary, or punitive damages, and they are often available for intentional torts, which are thought to be particularly responsive to deterrence due to being consciously undertaken. Popper submits that, in spite of the lack of credible empirical evidence regarding the deterrent effect of compensatory damages, research has demonstrated the impact of punitive damages and the positive effect of uncertainty in those

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50 Ibid, 433.
51 Ibid.
52 Ibid.
54 Ibid, 432.
56 Goldberg (n 35) 544 - 547.
damages.\textsuperscript{57} He cites a study by Baker \textit{et al}, who suggest that a punitive damages award is likely to have a more immediate deterrent effect than a simple negligence case with modest compensatory damages.\textsuperscript{58} It is reasonable to presume, then, that punitive damages should play a role in any successful deterrence scheme. Further, public awareness campaigns about the danger of tort liability to potential wrongdoers, such as print advertisements in public places, or television and social media awareness-raising campaigns, could potentially expand the pool of deterrable tortfeasors considerably.

To summarise, the deterrence aims of tort law are partially justified on the ground of economic analysis, insofar as some individuals can be deterred from committing wrongful actions by the threat of tort liability. Economic analysis also justifies the imposition of liability in excess of compensation on intentional tortfeasors. The following discussion will apply this analytic framework to revenge porn torts in particular. This will determine both whether revenge porn tort liability is justified by economic analysis theory at all, and also, whether it is entirely sufficient from this perspective.

\textbf{2.3.1 Specific Application to Revenge Porn}

Revenge pornographers usually intend to harm their victims and succeed in doing so. If at least some of these potential tortfeasors can be deterred, by tort liability, as argued above, then it seems clearly justified, notwithstanding its likely limited direct impact on rates of offending. This provides a foundation for carving out the behaviour as deserving of tort liability, in the first place, as it suggests that revenge porn dissemination is a type of behaviour which ought to be heavily deterred. Weinrib observes that tort liability may also indirectly lower rates of offending in the long term. He delineates two distinct functions of tort law.\textsuperscript{59} First, the law establishes just rules for the allocation of costs of wrongdoing between the parties. Second, the very process of defining wrongs and penalising wrongdoers signals the wish of the legal system to deter wrongful conduct. While the second function in itself does not determine the norms of positive law, it is ‘an additional feature that comes into play once the norms have

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\textsuperscript{57} Popper (n 47) 195.
\end{flushleft}
been determined.’ 60 Hence, the legal system’s recognition of revenge porn as tortious conduct helps to establish a social norm about how people should treat each other: the conduct is deemed to be unacceptable by society, and falls below the baseline of tolerable conduct. 61 For those actors who are responsive to such normative messages, the process of defining wrongs and penalising wrongdoers can essentially add another layer of deterrence, creating further disincentives to act.

Economic analysis thus provides good justification for imposing compensatory liability on revenge pornographers, and, additionally it can explain the availability of punitive damages for revenge porn torts. Revenge porn causes both tangible and intangible harms to victims, and the losses generated by these harms can be estimated, in monetary terms, when calculating the compensation awarded to victims in damages. The scope and extent of revenge porn harms has been delineated, in detail, in Chapter 1, but to summarise, these can be measured in both pecuniary and non-pecuniary terms. Pecuniary losses can arise if victims lose or are forced to leave jobs, or if their future education or employment prospects are significantly compromised; some victims may be forced to close down existing Internet accounts, causing financial disruption. Others may feel compelled to relocate, and in some cases even change their identities, resulting in financial losses. In non-pecuniary terms, individuals subjected to this type of sexual victimisation are harmed by the vengeful nature of the act, and by having their confidence breached and their privacy invaded in this way. Moreover, revenge pornography often interferes with and sometimes destroys victims’ relationships with other people. 62 As Adjin-Tettey observes, sexual victimisation can have serious short and long-term consequences for victims, and hedonic damages should include the distress suffered by victims, and the loss of enjoyment for life. 63

Damages paid to tort victims in England and Wales, include general and aggravated damages, and a third category: non-compensatory exemplary damages. General damages are compensatory, and thus are calculated to put victims back in the material position, as far as

60 Ibid, 625.
possible, that they would have been in had the tort not been committed.\textsuperscript{64} Aggravated damages, which are primarily compensatory, may also be awarded where the defendant’s behaviour has been especially reprehensible, and where the court considers that shocking conduct has caused the claimant a special loss.\textsuperscript{65} As discussed above, however, empirical evidence suggests that individuals do not respond to the threat of tort liability unless the threat of sanctions is nearly certain, and actors do not underestimate the likelihood of paying damages. Mere compensatory liability is, therefore, likely to be an inadequate deterrent unless supplemented by exemplary damages. Exemplary (or punitive) damages are non-compensatory, and are awarded to punish the defendant, although until recently, they could not be awarded where the claimant had not also suffered compensable damage.\textsuperscript{66} Their use in tort settlements is controversial,\textsuperscript{67} as punitive damages are thought to blur an important functional distinction between the civil and criminal law, according to which punishment is properly a function only of the latter system. The availability of punitive damages for revenge porn victims, does, however, enhance the economic justification for addressing revenge porn in tort law.

Justifying addressing revenge porn in tort law on the ground of economic analysis theory becomes more challenging, however, when considering the theory’s reliance on rational choice models. As discussed earlier, these assume that, to a certain extent, whether consciously or unconsciously, individuals will make decisions about how, or whether to, engage in certain activities, by weighing up the costs and benefits of participation. Cardi \textit{et al} assert, however, that people are not always rational actors, but sometimes act from ‘reflex, habit, or snap judgment.’\textsuperscript{68} Goldberg similarly discerns that a good deal of tortious conduct comes in the form of ‘momentary lapses’ that may not be deterrable.\textsuperscript{69} Arguably, most initial disseminators of revenge porn, who are often spurned lovers motivated by a vengeful desire to harm former partners, are not acting rationally. As Posner observes, ‘economic analysis [relies]…on methodologies that are not well suited to analysing emotion,’\textsuperscript{70} positing that, while rational

\textsuperscript{64} Livingstone \textit{v} Raywards Coal Co (1880) 5 App Cas 25, 39.
\textsuperscript{66} Exemplary damages can now be awarded without demonstrating any pecuniary loss, as decided in Vidal-Hall \textit{v} Google Inc [2015] EWCA Civ 311 (CA (Civ Div)).
\textsuperscript{67} In Rookes \textit{v} Barnard [1964] AC 1129, the House of Lords held that exemplary damages should be awarded in only the narrowest of circumstances.
\textsuperscript{68} Cardi \textit{et al} (n 37) at 569 (fn 10), who cite William H Rodgers Jr, ‘Negligence Reconsidered: The Role of Rationality in Tort Theory’ (1980) 54(1) S Cal L Rev16-23.
\textsuperscript{69} Goldberg (n 35) 558.
actors might be deterred in a state of pre-emotion - or calm - once they enter the emotion state, they are not usually subject to deterrence, as ‘an angry person’s action is to harm the offender, even at cost to oneself.’

In his study on the role of emotions in decision making, Loewenstein similarly finds that a person in a ‘cool,’ unemotional state will have difficulty predicting his or her own behaviour, at a point in the future, when he or she is in a ‘hot, emotional state’. Loewenstein describes this failure for people to accurately predict their future behaviour as the ‘empathy gap’ between individuals’ cool and hot selves, which can lead to an underappreciation of the power of their future emotions. This implies that people will systematically fail to take sufficient precautions to avoid situations in which they are likely to become overwhelmed by their emotions. As Loewenstein et al observe, when applied to rational choice models of decision making, ‘the predictions people make about their response to a hypothetical scenario…while “cool” may not accurately reflect their actual response in a comparable, real situation while “hot.”’

The empathy gap theory suggests that visceral factors, such as pain, anger and jealousy, could well predominate the decision-making processes of potential revenge pornographers who are acting in the heat of passion. A visceral urge to harm a former lover is unlikely to be deterred by the threat of tort liability, even if that same actor could not imagine taking such a risk while in a cooler emotional state. While economists have not explicitly denied the existence and significance of visceral factors, they have traditionally left them out of their analyses because they are ‘too unpredictable and complex to be amenable to formal modelling.’ Loewenstein also suggests that although the transient nature of emotions may lead some economists to

75 Ibid.
76 Ibid.
77 See generally George Lowenstein, ‘Emotions in Economic Theory and Economic Behavior’ (2000) 90(2) The American Economic Review 426-432, who explains that visceral factors refer a wide range of negative emotions (e.g. anger, fear) drive states (e.g. hunger, thirst, sexual desire) and feeling states (e.g. pain).
78 Ibid, 431.
consider their influence unimportant,\textsuperscript{79} the feeling of injustice that people have when they believe they have been treated unfairly is of particular relevance to economics, as it often causes them to act contrary to their own economic interests.\textsuperscript{80} A revenge pornographer acting in the heat of passion, is not likely, then, to be acting with an eye on his economic interests, and be deterred by the threat of tort liability. This makes it more challenging to justify the deterrence aim of economic analysis, when considering those revenge pornographers who are acting under the influence of visceral factors, such as rage and jealousy.

However, it must be reiterated that there is more than just one category of revenge pornographers. As outlined in Chapter 1, in addition to those individuals who are acting in the heat of passion, there are also many individuals who are motivated to non-consensually disseminate other people’s sexually-graphic images, for reasons other than revenge.\textsuperscript{81} As McGlynn and Rackley elucidate, these motivations can include disclosure for financial gain, having a laugh, gaining notoriety amongst a friendship group, or to control, harass or blackmail other individuals.\textsuperscript{82} Images can also be acquired, opportunistically, if they are hacked, or obtained from stolen devices, before being widely circulated online. This was the case in the celebrity iCloud hack, in 2014, where images were hacked from the Apple iCloud platform, before being widely disseminated.\textsuperscript{83}

Moreover, revenge porn disclosures are amplified by secondary disseminators and Internet intermediaries through subsequent reposting, sharing, and hosting.\textsuperscript{84} Because secondary disseminators and Internet intermediaries have little or no prior connection with victims, they are unlikely to be disclosing images under the same hot visceral influences of a spurned lover, but, rather, would be acting in a cool, unemotional state. These categories of revenge pornographers could be far more deterrable on average. Individuals disseminating,

\begin{flushright}
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid, 429-30.
\textsuperscript{81} For more detail see Chapter 1.4.
\end{flushright}
transmitting or hosting images with clear-eyed vision, might make different decisions about acting, given an awareness of the law, or understand that in acting, or failing to act (for example, by refusing to take images down from host websites), then they could end up in court and forced to pay compensation.

A further challenge for justifying addressing revenge porn in tort law, on the ground of economic analysis theory, is its principal focus on defendants, while claimants play a more secondary role.\(^{85}\) Claimants’ incentives, such as the need to induce enforcement of the norm, receive far less attention. As Posner observes, ‘[t]hat damages are paid to the plaintiff is, from an economic standpoint, a detail.’\(^{86}\) According to economic analysis, damages are not a matter of compensating any particular revenge porn victim, but rather of providing that revenge pornographer, and other prospective revenge pornographers, incentives to take efficient levels of precaution going forward.\(^{87}\) Economic analysis thus fails to join the defendant and the claimant in any kind of relational nexus, and it therefore cannot attach appropriate importance either to the fact that the defendant caused the claimant’s injury or to the goal of correcting an injustice. As Coleman et al observe, economic analysis only accounts for the relationship between a particular injurer and victim insofar as ‘the nature of this relationship provides evidence of the ability of either person to reduce accident costs.’\(^{88}\) From this perspective, there is no intrinsic reason why a claimant should argue in court that they had been wronged by that particular defendant, rather than by a defendant who was in a better position to reduce overall costs.\(^{89}\)

To sum up, there is clearly some economic justification for addressing revenge porn in tort law due to its deterrent effects on potentially deterrable revenge pornographers. The threat of tort liability could have a powerful effect on the behaviour of certain classes of potential offenders. However, any deterrent effect can only be partial, because some potential offenders will be unaware of the law whilst others will fail to make rational choices due to their powerful

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\(^{85}\) Weinrib (n 59) 627.


\(^{89}\) Ibid.
emotional motivations. A further issue for economic analysis is that it does not enjoin the claimant and defendant in a correlative structure that appropriately reflects the injustice inflicted by one party on the other.

An account of tort law that focuses on the moral aspect of revenge porn conduct, and which takes into account the relationship between the injurer and the victim, is therefore a necessary component of any complete justification of tort liability. To this end, the following discussion will examine another of the contemporary tort theories, corrective justice theory, to establish whether this can provide better justification for addressing revenge porn in tort law than economic analysis theory.

2.4 Corrective Justice Theory

Corrective justice is a non-utilitarian tort theory, which, unlike instrumentalist law and economics theories, is directed at both of the litigating parties. The underpinning concept of corrective justice theory is that liability rectifies an injustice inflicted by one person on another.90 It is this bipolar relationship which marks out the procedural and doctrinal requirements of liability. Procedurally, litigation in tort law takes the form of a claim that a particular claimant presses against a particular defendant, and doctrinally, requirements such as the causation of harm attest to the dependence of the claimant’s claim of a wrong suffered at the defendant’s hand.91 Unlike economic analysis theory, which holds up the defendant as an example to influence others, leaving the claimant largely irrelevant to the inquiry, and offering little explanation as to why a particular claimant should be provided with compensation from a particular defendant, corrective justice unites the litigating parties in a correlative structure, and rectification, therefore, operates correlativelly on both parties.92

Corrective justice focuses on the rights of the individuals involved in any tort suit, and is underpinned by the notion that tort liability rectifies the injustice inflicted by one person on

92 Weinrib (n 90) 350.
Supporters of corrective justice theory argue that instrumentalist theories are blind to this integral feature of private wrongdoing, whilst corrective justice asks whether the particular claimant currently before the court is entitled to a remedy from a particular defendant on the basis of the latter’s wrongdoing. As Ripstein observes, the basic form of a civil complaint is: ‘the defendant is not allowed to do that to me’ rather than ‘the defendant is not allowed to do that.’ Within the corrective justice paradigm, ‘[t]he plaintiff does not come before the court to enforce a general norm or assist in the pursuit of a general public policy; the demand for a remedy is against the very person who is alleged to have wronged that very plaintiff.’

Traditional versions of corrective justice theory offer varying insights into the functions of tort liability. As Encarnacion observes, while formulations of corrective justice may vary, they roughly hold that one person who wrongfully injures another has a duty to repair the injury, or offset the losses resulting from that injury. Traditional theorists, such as Ernest Weinrib, believe that a corrective justice theory of tort law should explain why a particular plaintiff is entitled to receive compensation from a particular defendant. He believes that an injustice at the plaintiff’s expense that involves a violation of rights to person or property, creates inequality between the parties. Corrective justice, therefore, requires that the defendant pays the victim an amount of compensation to correct this injustice, so that equality can be restored. Jules Coleman, on the other hand, defends a view of corrective justice that focuses on its remedial quality, and the imposition of a duty to repair wrongful losses on those agents responsible for them. In this way, ‘[c]orrective justice mediates the relationship between agents and a subset of losses that individuals absorb,’ creating an agent-relative duty to repair

93 Ibid, 349.
94 Influential leading scholars include: George Fletcher (see generally ‘Fairness and Utility in Tort Theory’ (1972) 85 Harv L Rev 537); Richard Epstein (see generally ‘Defences and Subsequent Pleas in a System of Strict Liability’); Jules Coleman (see generally Risks and Wrongs); Izhak Englard (see generally The Philosophy of Tort Law (1993); and Ernest Weinrib (see generally The Idea of Private Law (2012)).
96 Ibid, 4.
97 Ibid.
99 Weinrib (n 91) 55-66.
100 Ibid, 63 (citing Aristotle’s Nichomachean Ethics, 1132a32-1132b5).
He stresses, however, that it is only wrongful losses which fall within the ambit of corrective justice, not all losses, such as injury to non-legitimate interests.  

Critics of traditional accounts suggest, however, that they do not adequately account for some important features of tort law. A principal objection is that corrective justice theory cannot explain the diversity of remedies available in tort law, over and above the payment of compensatory damages awards. As Encarnacion remarks, one Aristotelian metaphor often used to capture this compensatory duty to repair is that damages awards in tort aim to make victims ‘whole.’  

Encarnacion observes, however, that the problem is that there are many remedies besides compensatory relief available in tort suits, including punitive damages, nominal damages and injunctions, which serve to restore claimants, as far as possible, to their pre-injury position. Traditional corrective justice theory views these forms of relief as ‘aberrational’ despite being central features of tort practice. The fact that some corrective justice theories fail to account for them is problematic if these remedies seem to offer the most appropriate form of legal redress for many claimants.

Benjamin Zipursky and John Goldberg have developed an alternative version of the theory to better justify the availability of other remedies in tort law. Civil recourse theory, a distinct but related version of corrective justice, does not rely on notions of rectification, normative equilibrium, or a duty to repair, but instead presents a model of ‘rights, wrongs and recourse.’ Zipursky explains that the model does not fundamentally depart from traditional accounts of corrective justice theory in that it retains the notion of a wrong as a violation of a legal norm that enjoins certain conduct. He asserts that the civil recourse model also concurs with the traditional assertion that a plaintiff is permitted to recover, and a defendant is required to pay, only because the defendant has breached a legal norm. He explains, however, that civil recourse differs from corrective justice theory insofar as it does not view tort law as a system aimed at restoring equilibrium, but rather as ‘a system that permits those who have been

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102 Ibid.  
103 Ibid, 330.  
104 Encarnacion (n 98) 456.  
106 Ibid, 457.  
109 Ibid, 742.
wronged to have the state force certain remedies out of those who have wronged them. On this view, he argues that punitive damages need not be squeezed into a compensatory damages box, but should perhaps reflect the entitlement of a plaintiff who has been wilfully wronged, to be punitive in this manner, with the state’s permission, if he or she chooses to do so. The following discussion will examine the application of these prominent accounts of corrective justice to revenge porn torts, to determine how far it is theoretically justifiable to respond to revenge porn in tort law on the ground of corrective justice theory

2.4.1 Specific Application to Revenge Porn

In his brief but foundational account of corrective justice in *Nicomachean Ethics*, Aristotle observed that justice is effected by the direct transfer of resources - or holdings - from one party to the other, for the purpose of restoring equality, after the wrongful interference with the holdings of another. This traditional account of corrective justice unites the parties as the ‘doer’ and ‘sufferer’ of the injustice. This view is supported by Weinrib who further explains that justice is achieved by reversing the active and passive roles of the doer and sufferer of the injustice so that the doer becomes the sufferer of the law’s remedy. For revenge porn victims, corrective justice is achieved, then, by making the revenge pornographer suffer the law’s remedy, by forcing the transference of his resources to the revenge porn victim as compensation.

As well as linking the plaintiff’s right to compensation with the defendant’s duty to compensate, the Aristotelian account of corrective justice can also justify injunctions that prospectively restrain a wrong. Weinrib contends that Aristotle is particularly interested in the structure of the relationship for which the award of damages (or equivalent relief) is a rational response to the commission of the wrong. If what matters is the conceptual structure of the relationship between actor and victim, the analysis does not require that a wrong has

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110 Ibid, 750.
111 Ibid, 751.
113 Weinrib (n 91) 56.
114 Weinrib (n 90) 350.
115 Ibid.
116 Weinrib (n 91)56 at fn 3.
already taken place. This correlative relationship between wrongs and remedies can explain why a particular revenge porn claimant is entitled to apply for an injunction against a particular actual or prospective revenge pornographer. The ability to apply for an injunction, either to restrain threatened revenge porn disclosure or to prevent further disclosure once it has occurred, strongly motivates many revenge porn victims to bring civil actions and thus bolsters the theoretical justification for addressing revenge porn in tort law on the ground of corrective justice theory.

Coleman similarly emphasises the significance of the relationship between the parties, although his conception of this relationship in corrective justice differs in an important regard to Weinrib’s. Coleman constructs a view, which he terms ‘the relational conception of corrective justice.’ In this construction, all individuals have responsibilities towards one another, and from these responsibilities, duties are formed, which are owed by persons to other persons, as a direct result of the actions they undertake and the relationships they form. Many of these duties result from the unjustified advantages people take of one another, or the harms their conduct occasions. The requirement of corrective justice thus imposes a ‘duty to repair’ when someone has failed to abide by the relevant norms of conduct, and in so doing, their action forms a wrongdoing. On this view, a person who has non-consensually disseminated another’s intimate media has a duty to repair by paying the victim compensation. Coleman’s relational conception of corrective justice implies that no one else has a responsibility to make good the losses from revenge porn torts except the revenge pornographer who caused them, as this person has created a duty to repair the loss.

It is prerequisites for the imposition of responsibility that separate Coleman’s conception of corrective justice from Weinrib’s. Coleman denies that the relational view is fundamentally concerned with losses: ‘[t]he existence of a loss is not necessary to trigger claims based on corrective justice, nor is the point of corrective justice to annul or eliminate a loss.’ Rather, he claims that its function is to specify a framework of rights and responsibilities between

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117 Ibid.
118 Coleman (n 101) 311-2.
119 Ibid.
120 Ibid, 312.
121 Coleman (n 101) 334.
122 Ibid, 314 (original emphasis).
individuals, and he stresses that it is the wrong, and not the loss, that must be annulled and therefore specifies the content of the relevant duty. Coleman’s account of corrective justice theory, with its imposition of responsibility in the context of a framework of rights seems to provide good justification, as well, for responding to revenge porn in tort law, on the ground of corrective justice theory.

Coleman’s version does present a potential challenge when considering intentional torts, such as revenge porn, however. As Genn observes, while the chief remedy offered by the courts is financial compensation, research shows that litigants frequently state that their primary motivation for taking legal action is something else, such as achieving an apology, or some acknowledgement they have been wronged, or to prevent what has happened to them from happening to someone else. For a revenge porn claimant, these goals often drive the decision to go to court. Coleman stresses, however, that while there may be other agent-relative reasons for acting that arise as a result of wrongfully injuring another, such as the duty to apologise, or to forbear from future harming, these are not derived from corrective justice. This creates a challenge then, for Coleman’s account of corrective justice theory, if revenge porn victims are indeed motivated to go to court for reasons other than to seek financial compensation.

Responding to revenge porn in tort law on the ground of corrective justice theory presents a particular challenge when considering the availability of non-compensatory remedies in tort. Some tort theorists question whether the availability of punitive damages in tort can be reconciled with traditional accounts of corrective justice. The general principle of tort damages, restitution in integrum, traditionally holds that damages should only restore claimants to the position they would have occupied, as far as possible, had the tort not occurred. Chapman, for example, argues that damages awards under corrective justice theory can have no utility for the correction of non-pecuniary tort remedies and is decisive against the award of such damages. Weinrib suggests that punitive damages are inconsistent with corrective justice, as the place of such considerations should not be in private law, but in

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123 Ibid.
126 Ibid, 412.
criminal law. According to such traditional views, compensation for non-pecuniary welfare or hedonic losses caused by revenge porn torts may not be compensable, and punitive damages may be unjustifiable. Such criticism has given rise to a distinct, but related version of corrective justice theory, civil recourse theory.

Zipursky argues that under the civil recourse model the availability of non-compensatory tort remedies is not aberrational. Punitive damages, he contends, need not be seen as essentially deterrent or retributive in nature, and thus as a ‘graft of the criminal law onto tort law.’ He suggests that critics of punitive damages misidentify the term ‘punitive’ with the idea of ‘state-inflicted punishment in the form of a damages award.’ Punitive damages, on this account, he explains, may alternatively be understood as ‘vindictive damages,’ so permit claimants to inflict hardship on defendants out of resentment, spite, or the desire for revenge. Zipursky submits that this cannot be right as the principles embedded in tort law should instead constitute a fundamental aspect of individual liberalism. The correct view, he argues, is that individuals who have been legally wronged should be entitled to civil recourse against the one who has wronged them, thus empowering them to act against their wrongdoer, rather than merely restoring a normative equilibrium between passive participants.

Advocates of civil recourse theory believe that it offers a clear picture of tort law as an integrated structure of rights, wrongs, and their associated remedies. Ripstein and Zipursky argue that tort law does not seek to morally sanction individuals, but instead functions as ‘a holding of liability to fit the rights invasion the plaintiff has incurred.’ On this view, revenge porn victims would go to court in order to seek the best-fit remedy for the rights invasion they have suffered from the person who has incurred it, and the law would not acknowledge any personal intention of punishing that person. If this remedy takes the form of punitive damages, then the revenge porn victim is merely exercising her civil right to this form of recourse, via the state’s obligation to empower her to do so, for being legally wronged. Where revenge

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128 Zipursky (n 108), 751.
129 Ibid.
130 Ibid.
131 Ibid.
pornographers are forced to pay punitive damages, this is justifiable, on the ground of civil recourse theory, if this is the best-fit remedy available to victims.

Zipursky’s model of civil recourse does not rely on notions of rectification, normative equilibrium, or a duty to repair, but instead presents a model of ‘rights, wrongs and recourse.’ He suggests that civil recourse is essentially responsive: it is because someone has been wronged by someone that they are entitled to recover against this person. It is easy to envisage how the civil recourse model can be applied to revenge porn disclosures. Civil recourse places the victim in a privileged position, empowering her to respond to her perpetrator by seeking the most appropriate relief, including punitive damages. Zipursky warns, however, that the privilege afforded by civil recourse should not be misused in order to wrong defendants. Such wrongs, he contests, are forbidden by civil recourse theory, even responsively. Ripstein and Zipursky warn against viewing tort law as a system of punishment, in part because the state itself must treat all persons alike, as it does in the criminal law, implying that decisions about who should bear costs ought to be public-minded. This would contravene a central premise of tort law: that it is concerned with fundamentally private matters between parties. The role of the state in tort actions, should not be to appear as a party in cases of punishment or regulation, with a duty to uphold precedents from previous decisions, but to uphold rights of citizens with respect to each other.

This presents a potential challenge for civil recourse theory where revenge porn victims are seeking redress by means of forcing defendants to pay punitive damages, in order to harm them, so that they might feel more adequately vindicated. While Zipursky allows room in civil recourse theory for non-compensatory punitive damages, he warns that these awards should not be as a result of ‘vindiciveness,’ if plaintiffs are seeking damages, not only as a means to restore themselves, but also to vindicate their rights, by the infliction of a punitive sanction on defendants. Given the nature of revenge porn disclosures and the extent of the humiliation and indignity caused to victims by such a painful invasion of their interests in bodily privacy.

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133 Zipursky (n 108) 698.
134 Ibid, 746.
135 Ibid.
136 Ripstein and Zipursky (n 132) 223.
137 Ibid.
and sexual autonomy, it is reasonable to presume that many victims might vindictively seek to inflict punitive sanctions on defendants. Despite this challenge, civil recourse theory does provide good justification for addressing revenge porn in tort law that reflects the diversity of remedies available. The model, importantly, explains why revenge porn victims should receive punitive damages, in excess of strict monetary compensation, in recognition of the fact that the harm caused by dissemination may require more than compensatory relief.

In spite of the challenges presented by the different versions of corrective justice theory above, two broad, normative justifications for addressing revenge porn in tort law, on the ground of corrective theory, can be extracted. First, it provides an incontrovertible connection between the wrong and the remedy, which explains the revenge pornographer’s duty to compensate the victim. As Gordley observes, without this link, it would be difficult to see why tort law allows a particular claimant to recover from a particular defendant.\textsuperscript{139} The correlativity of right and duty in the case of the revenge porn claimant and defendant is evident: the claimant has personal rights which are good against the rest of the world, including those to property, bodily safety and reputation, as well as a legal right to privacy. The defendant has a duty not to infringe any of these rights by non-consensually disseminating the claimant’s intimate media. Liability therefore reflects the injustice of revenge porn disclosure that is incompatible with the claimant’s rights.

Second, unlike economic analysis theory, which assumes the courts exclusively seek to deter future tortious behaviour, corrective justice assumes that the courts employ an \textit{ex post} approach, which acknowledges that the tortious act has occurred and cannot be undone.\textsuperscript{140} Corrective justice minimally requires that victims are restored, as far as possible, to the position they would have been in, had the tortious conduct not occurred. For revenge porn victims, the \textit{ex post} position has distinct advantages where dissemination has caused demonstrable pecuniary and non-pecuniary loss. By ensuring that the particular defendant responsible pays compensation to her, rather than payment being made by a third party, tort law appropriately


\textsuperscript{140} Christopher Bruce, ‘Applying Economic Analysis to Tort Law’ (1998) 3(2) Expert Witness newsletter, 1, 2.
responds to the defendant’s actions in disclosing the claimant’s intimate media, and any gainful satisfaction he may have experienced as a result of this disclosure.

However, corrective justice theory’s justifications for addressing revenge porn in tort law can, as with deterrence theory, only be partial. The most significant objection to responding to revenge porn on the ground of corrective justice, is that it fails to address the intrinsic badness of revenge porn conduct. Charmallas and Wriggens observe that, despite corrective justice’s ‘morally laden language of wrongs and wrongful conduct’ and its focus on the connection between the defendant’s conduct and the harm this has caused victims to suffer, the sort of wrongdoing required by corrective justice does not necessarily involve moral culpability; it requires only that the conduct in question has failed to comply with norms of conduct.141 Many victims bringing a civil claim for revenge porn disclosure, however, will be doing so because they have been harmed by someone who is morally culpable, and many would want this to be recognised. Revenge porn dissemination unquestionably falls short of appropriate norms of conduct, but the moral blameworthiness of the conduct is not necessarily relevant. Although tort liability essentially forces defendants to ‘apologise’ for their actions, victims may not feel justice has been fully served, therefore, if the moral blameworthiness of the conduct has not been acknowledged. This implies that the imposition of liability in tort suits might not be enough to satisfy some revenge porn victims, suggesting that the intrinsic moral reprehensibility of revenge porn conduct must be addressed by some other means, that tort law cannot provide.

Compensation is the closest response that tort law can give to correct wrongs that have been committed in the first place, but, as Stevens observes, although it is generally accepted that compensation can make good, or eradicate, a monetary loss, it is also accepted that it cannot truly eradicate other losses, for example the pain and loss caused by the loss of a limb.143 Likewise, the pain and loss caused by emotional and psychological trauma are also, often, incommensurable. Even large monetary awards in excess of compensatory relief may not eradicate all losses caused by revenge porn dissemination, which have, in some cases, driven

142 Coleman (n 101) 334.
victims to suicide. In particular, tort law does not traditionally address the specific harms that women suffer in virtue of their gender, which has inspired feminist tort scholars to question the adequacy of tort law’s response to cases involving the sexual victimisation of women. These concerns, and their implications for victims of revenge porn, are addressed below.

2.5 Tort Law, Revenge Porn and ‘Harm’

Many feminist tort law scholars argue that its rights-based paradigm is blind to the distinctive harms that women suffer in contexts such as sexual harassment or the effects of pornography. Revenge porn typically targets women, so a legal scheme that is blind to women’s distinctive concerns will inevitably fail to adequately respond to them. West contends that the subordinate position of women in society renders them vulnerable to ‘physical, emotional and psychic trauma,’ of a type not usually recognised by tort law. Godden asserts that the gender bias of tort doctrine is well-known. Conaghan observes that because harm is a socially constructed concept, unless a particular harm is recognised as such by society and by law, it is not necessarily experienced as harm even by victims themselves. Her theory can explain why many women endure sexual harassment for years without complaint: the social and legal failure to recognise the injury entailed has led women simply to repress their feelings of violation and the sense that a wrong has been perpetrated. Only certain kinds of tangible injuries, which are relatively easy to prove, can be actionable in tort. These may include bodily injury, physical or psychological illness and sometimes emotional pain and suffering, but the

144 See Chapter 1.4.
147 Chamallas and Wriggens (n 141).
150 Conaghan (n 145) 429.
151 West (n 148) 98.
legally recognised versions of such harms can be quite divorced from survivors’ subjective experience.¹⁵²

Adjin-Tettey traces such discriminatory tort doctrines back to historical gender stereotypes according to which men are associated with reason and rationality, which are highly valued, whereas women are associated with emotion and irrationality, which are devalued.¹⁵³ She argues that damages in tort law are based on rationality rather than emotions and thus privilege tangible over intangible harms. It follows that pecuniary losses are deemed more appropriately compensable than non-pecuniary damages.¹⁵⁴ Adjin-Tettey submits that long-term harms resulting from sexual victimisation may often be psychological, ‘affecting self-esteem, feelings of safety, ability to focus and obtain education [and] difficulties maintaining employment and interpersonal relationships.’¹⁵⁵ Many women who have been violated through revenge porn dissemination are likely to suffer such long-term, largely incommensurable losses. Because these losses are almost impossible to quantify, they may be sidelined when calculating compensation.¹⁵⁶ Adjin-Tettey observes that traditional tort scholars have sometimes questioned whether intangible losses should be compensable on the basis of an empirically unsupported assumption that the ephemeral harms associated with intangible losses may diminish over time, unlike the enduring nature of pecuniary losses.¹⁵⁷ For revenge porn victims suffering the sustained threat of repeated humiliation and victimisation following each new disclosure of their images, however, the resulting harms may never diminish.

Although tort theorists remain divided regarding the availability of punitive damages in tort, as the discussion in the previous section has highlighted, Adjut-Tettey submits that the difficulty in calculating damages for non-tangible harms has been partly offset by the increasing availability of punitive damages in cases where there is demonstrable evidence of intentional violation of personal autonomy, or bodily integrity and security.¹⁵⁸ This, she argues,

¹⁵² Elizabeth Adjin-Tettey, ‘Sexual Wrongdoing: Do the Remedies Reflect the Wrong’ in Janice Richardson and Erika Rackley (eds) Feminist Perspectives on Tort Law (Routledge, Oxon, 2012) 190.
¹⁵³ Ibid, 190-91.
¹⁵⁴ Ibid.
¹⁵⁵ Ibid, 181.
¹⁵⁶ Ibid, 184.
¹⁵⁷ Ibid, 184.
¹⁵⁸ Ibid, 193.
has done much to better redress sexual victimisation, demonstrating the value of punitive damage availability from a feminist perspective.

A further challenge for tort law, as Birks discerns, is that tort law does not require evidence of harm in the moral sense of damage or injury, but rather evidence that a protected interest of the victim has been infringed.\(^{159}\) Tort law, therefore, does not track harm \textit{per se}, or the intrinsic badness of intentional wrongs. It affirms, instead, that a legal wrong is the breach of a legal duty and the infringement of a legal right, and not a response to the moral quality of the conduct. This would suggest, then, that tort law cannot, in principle, provide full vindication for the rights’ infringement of these victims who might still require that the moral wrongfulness and intrinsic badness of revenge porn conduct to be acknowledged. An additional legal response to revenge porn, which addresses the moral reprehensibility of the conduct, its social harmfulness, and the culpability of defendants who disseminate it, is therefore required.

\section*{2.6 Conclusion}

This chapter has explored the theoretical justifications for responding to revenge porn in tort law on the grounds of economic analysis and varying strands of corrective justice theories. The analysis has revealed that, while there is some theoretical justification for addressing revenge porn in tort law, civil liability is only a partial solution. Responding to revenge porn in tort law is justifiable on the ground of economic analysis theory if tort liability deters some prospective revenge pornographers from acting. The deterrence effects of tort liability are enhanced by the availability of punitive damages, in some circumstances, which also send the normative message that revenge porn will not be tolerated by society. Deterrence can only be partially effective, however, because economic analysis’s reliance on rational choice models, which assume that most individuals will be incentivised to behave efficiently and be deterred from acting, fail to account for much human behaviour. Some individuals are prepared to disseminate revenge porn whatever the cost, and therefore cannot be deterred by the threat of tort liability. Economic analysis also fails to track the moral properties of civil wrongdoing by

\footnote{\textsuperscript{159} Peter Birks, ‘The Concept of a Civil Wrong,’ in David G Owen (ed) \textit{The Philosophical Foundations of Tort Law} (Oxford University Press, Oxford, 1995) 40.}
linking the litigating parties in the kind of correlative structure that would explain why a
claimant would wish to seek a remedy from a particular wrongdoer, to make up for a particular
wrong inflicted on them.

There is, arguably, stronger theoretical justification for addressing revenge porn in tort law on
the ground of corrective justice theory. Unlike economic analysis theory, it conceives of
liability as the rectification of an injustice inflicted by one person on another by requiring a
particular defendant to compensate a particular claimant. Corrective justice imposes a duty on
revenge pornographers to repair the wrongful losses their actions caused their victim to suffer
by failing to abide by the relevant norms of conduct. Justification for addressing tort law on
the ground of conventional corrective justice theory can, again, only be partial, however, as
these traditional theories cannot account for the ambit of remedies available in tort law,
particularly punitive damages. It is the availability of punitive damages that more adequately
reflects the intangible harms caused by sexual violations, such as revenge porn dissemination,
over and above pecuniary losses. Civil recourse theory, a distinct but related version of
corrective justice theory, better explains why punitive damages might be the best-fit remedy
for the rights invasion victims have suffered, but there is a danger that this remedy might be
used vindictively by claimants who simply wish to harm the defendants who have so
egregiously wronged them.

The manner in which tort law responds to the particular types of harm that women suffer as a
result of sexual violations raises additional concerns. The intangible, subjective harms revenge
porn causes can be difficult to account for, in monetary terms, when calculating for non-
pecuniary losses, as the types of harm seen in revenge porn torts are not the types of harm that
tort law traditionally recognises. Despite the increasing availability of punitive damages for
revenge porn torts, the harms that many women suffer as a result of revenge porn disclosures
may remain incommensurable and thus not fully compensated.

Arguably, the biggest challenge faced by any of the prominent contemporary theories of tort is
that civil justice is less concerned with the moral culpability of a person’s actions than with
whether the conduct in question has complied with community standards. For this reason, tort
law cannot sufficiently address the blameworthiness of revenge porn conduct, nor can it satisfy victims who need the moral wrongfulness of the conduct to be acknowledged. If tort law, in isolation, cannot provide a satisfactory response for revenge porn victims, then an additional criminal law response may be justified.

The availability of criminal penalties would not eliminate the need for a civil law response, however. The civil law empowers victims to bring their abusers to court, and thus provides a means for them to uphold their dignity and equal rights individually. While a criminal prosecution can offer victims public recognition of their victimisation and is important in responding to offences where the victim has been sexually violated, pursuing a criminal route can often leave victims feeling re-victimised. Some victims may choose, therefore, not to pursue a criminal prosecution if they can afford the financial costs of maintaining a civil suit. This gives claimants the opportunity to have trial proceedings conducted anonymously and the advantage of proving their case to a lower standard of proof than required by the criminal law.

The civil law can work effectively in conjunction with the criminal law. Indeed, most crimes are also torts, meaning that most criminals are also vulnerable to civil suits under present law. The civil law can be mobilised either in preference to criminal prosecution or as a supplementary route for victims, when seeking legal redress for revenge porn. Because revenge porn is both morally wrongful and intrinsically bad conduct, only the availability of appropriate criminal sanctions can signal the moral condemnation that civil penalties do not. In addition, economic analysis theory indicates that the greater deterrent effect that criminal sanctions can bring would also be salutary. A full development of theoretical justifications for addressing revenge porn in the criminal law regime will be explored in Chapter 5.

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160 Adjin-Tettey (n 152) 180.
Chapter 3: Civil Law Responses to Revenge Porn

‘It is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury its proper redress.’

William Blackstone

3.1 Introduction

Chapter 2 has established that, theoretically, there is at least partial justification for responding to revenge porn in the civil law regime, on the grounds of both economic analysis theory and corrective justice theory. While many victims of revenge porn will seek redress in the criminal law, case law reveals that some individuals, including some quite high-profile cases, have chosen to mobilise the civil justice system, in preference to pursuing a criminal prosecution. This gives claimants the opportunity to have trial proceedings conducted anonymously and the advantage of proving their case to a lower standard of proof than required by the criminal law. This chapter will argue, however, that while tort law goes some way towards addressing the problem, it does not completely solve it, meaning that there is still a need for a criminal law response, at least in some of the more extreme cases. By evaluating the benefits and limits of responding to revenge porn with identified causes of action in the civil law, the chapter aims to prove this thesis by identifying areas where victims’ interests remain unprotected.

This chapter will focus on traditional tort law responses to revenge porn, in particular on the equitable remedy of breach of confidence and the tort of misuse of private information. Arguably, it is these causes of action that best address infringements of the particular kinds of interests suffered by revenge porn claimants. The chapter does not cover all the relevant civil law responses, therefore, and it should be noted that there are other statutory regimes within

the civil law which might be applicable to revenge porn, such as copyright and data protection law. While the focus of the chapter is on the common law and tort principles, rather than statutory torts, the tort of misuse of private information does actually derive from a statutory scheme, following the codification of the Human Rights Act 1998 and analogous parts of European human rights law. However, this statutory scheme, arguably, only codifies traditional tort law principles, mirroring in substance the kind of concerns traditionally addressed in tort law. The tort of misuse of private information will be a cause of action familiar to English lawyers, therefore, having its roots in the common law and codifying traditional tort law principles. Moreover, it will be argued that the tort of misuse of private information better protects the privacy interests of revenge porn victims than does the equitable remedy of breach of confidence.

For each cause of action, the discussion will be divided into four parts. The first part will explore the doctrinal development and historical context of each cause of action, before stating the rules and elements and outlining the remedies available (Sections 3.2 and 3.3). The second part will discuss the application of each cause of action to revenge porn, a discussion which will be framed around three paradigmatic categories of potential revenge porn defendants (Sections 3.2.2 and 3.3.2) before moving onto a normative analysis, in the third part (Sections 3.2.3 and 3.3.3). The analysis will evaluate how effectively the causes of action respond to revenge porn, drawing on findings from the three scenarios, identifying the benefits and limitations of responding to the problem using each cause of action. The final part will draw conclusions from the normative analysis and identify areas for potential reform (Sections 3.2.4 and 3.3.4).

By employing this methodology, the chapter aims to establish the effectiveness of the civil law remedies under discussion, identifying any gaps where victims’ interests are not adequately vindicated. The chapter additionally provides a springboard for the discussion in Chapter 4, which proposes reforms to these civil law remedies, so that victims of revenge porn can be provided with better redress in this regime. The analysis ultimately builds towards the chapter’s thesis that there are problems and limitations with a civil law response to revenge porn: important harms that go unredressed, rights that go unvindicated, and victims who go
uncompensated. A criminal law response is thus also required, to provide a more adequate solution to the problem.

The three paradigmatic categories of potential revenge porn defendants identified for discussion are primary disseminators, secondary disseminator and Internet intermediaries, as outlined in Chapter 1.²

³.2 The Equitable Remedy of Breach of Confidence

The common law equitable remedy of breach of confidence is founded upon the unauthorised use of confidential information when a defendant is considered to be under a duty of confidence. This section will sketch the historical background of the equitable remedy of breach of confidence, and outline the purpose, elements and rules of the doctrine, and the remedies available using the cause of action. Delineating the scope of the equitable remedy of breach of confidence will facilitate an exploration of how the cause of action responds to the dissemination of revenge porn by the three paradigmatic categories of revenge porn defendants.

3.2.1 Doctrinal Background and Remedies

The fundamental purpose of the equitable remedy of breach of confidence is to protect individuals’ interests in confidential communications. Breach of confidence actions traditionally focused on commercial relationships giving rise to a duty of confidentiality,³ although an early case, The Duchess of Argyll v The Duke of Argyll,⁴ concerned personal information of a sexual nature, disclosed between husband and wife. The action has also been used widely,⁵ to protect information as diverse as family etchings,⁶ ideas for television

² See Chapter 1.6.
³ Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203.
⁵ Linda Clarke, ‘Remedial Responses to Breach of Confidence: The Question of Damages,’ (2005) 24(3) CJQ 316, 316.
⁶ Prince Albert v Strange (1849) 1 H&T 1.
programmes and government practices, and it has evolved to ‘reflect changes in society, technology and business practice.’ The enactment of the Human Rights Act 1998 (HRA), which enshrined the fundamental freedoms agreed under the European Convention on Human Rights 1950 (ECHR) into UK common law, has resulted in a further reshaping of the action for breach of confidence, as a means of securing the rights guaranteed by Article 8 of the ECHR, which deals with the right to privacy.

The leading case on breach of confidence, Coco v AN Clark (Engineers) Ltd, sets out the key elements of the cause of action: (i) that the information in question is confidential in nature; (ii) that it must have been communicated in circumstances importing an obligation of confidence, and (iii) that there must have been subsequent unauthorised use or disclosure of that information. The enactment of the HRA has effectively diluted the second Coco requirement, as, while the information in question must have been communicated in circumstances giving rise to an obligation of confidence, there is now no longer a need to establish the existence of a prior confidential relationship between the litigating parties. The effect of the enactment has widened the scope of the cause of action, as a claim to confidence can now be made solely in contexts where it is evident that the defendant has acquired information in such a manner that it should have been obvious that it should not be used freely. Additionally, an obligation of confidence can be implied.

So, as the current law on breach of confidence stands, in order to establish a claim in relation to the disclosure of information, it must be shown that the information has been obtained in a manner which gives rise to a duty of confidence (for example, financial information given to an accountant to complete a tax return, or information disclosed to a doctor); that the information has the necessary quality of confidence about it (for example, disclosing someone’s medical records or details of their salary); and that it was obtained in a manner that gives rise to a duty of confidence (for example, during the course of a contractual relationship).

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7 Fraser v Thames TV [1984] 1 QB.
8 Attorney General v Guardian Newspapers (No. 1) [1987] 3 All ER 316.
9 Douglas v Hello! Ltd [2001] QB 967, per Keene LJ.
10 Campbell v MGN Ltd [2004] AC 457
11 Coco v AN Clark (Engineers) Ltd [1968] FSR 415.
12 Ibid at [419-21] per Megarry J.
14 Argyll v Argyll [1967] Ch 302; [1965] 2 WLR 790 at [322] per Ungoed-Thomas J.
such as that of employer/employee, or as a matter of conscience, for instance, disclosing information following the discovery of someone’s diary in the street). It must also be shown that information must have been used in an unauthorised way, which has caused the claimant to suffer a detriment from its unauthorised use.\(^\text{15}\)

The right to confidentiality can be overridden, or is extinguished, in some circumstances, however. This might be because the information in question is deemed not to be confidential in nature or is considered to be general public knowledge, so, therefore, is not sufficiently identifiable and original.\(^\text{16}\) Further, the information must not be merely gossip, as equity cannot be invoked to protect trivial ‘tittle-tattle,’ however confidential.\(^\text{17}\) Additionally, it must not already exist in the public domain,\(^\text{18}\) although confidentiality may survive depending on the facts (for example if the information is technically accessible, as in the case of revenge porn, or known to only a small group of people). The question is whether the further publication of the information could still be damaging.\(^\text{19}\)

Claimants might expect to recover nominal, general or aggravated damages to compensate them for the harm caused, where the unauthorised use of their images disclosed in confidence has caused a detriment. Exemplary damages are not available, however.\(^\text{20}\) Injunctions and non-disclosure orders can be granted in addition to, or instead of, damages, in order to prevent further, or future, publication, of confidential images, or to protect the identity of claimants.\(^\text{21}\) Legal costs are usually recoverable from the losing party. There is no statutory basis for awarding damages for mental distress caused by breach of confidence,\(^\text{22}\) and until relatively recently, there was no authority in case law, either. Following the enactment of the Human Rights Act 1998, the courts reviewed this position, and found that compensatory damages can

\(^{15}\) Coco v AN Clark (Engineers) Ltd [1968] FSR 415; Saltman Engineering Co Ltd (1948) 65 RPC 203.


\(^{17}\) Coco v AN Clark (Engineers) Ltd [1969] RPC 41 [48]; Faccenda Chicken Ltd v Fowler [1987] Ch 117 at [140]; Stephens v Avery [1988] Ch 449 at [453].

\(^{18}\) Coco v AN Clark (Engineers) Ltd [1969] RPC 41 at [47].

\(^{19}\) OBG Ltd v Allan [2007] UKHL 21; [2008] 1 AC 1 (HL).

\(^{20}\) In Rookes v Barnard [1964] AC 1129, the House of Lords severely restricted their use.

\(^{21}\) See ICF Spry, The Principles of Equitable Remedies (8th edn, Lawbooks, Sydney, 2010) 323: ‘The power of courts with equitable jurisdiction to grant injunctions are, subject to any relevant restrictions, unlimited.’

\(^{22}\) England and Wales Law Commission, Breach of Confidence (Law Com No 110, 1981) 4.82.
sometimes be awarded for hurt feelings, mental distress, loss of dignity, and the vindication of a right. The latter is not meant to compensate for any injury to the claimant’s reputation caused by the disclosure, but rather to provide an adequate remedy for undermining another’s Convention right. A claimant has six years from the date of the breach within which to bring court proceedings.

3.2.2 Analysis of Three Paradigmatic Categories of Potential Revenge Porn Defendants

This section will examine how the current law on breach of confidence responds specifically to three paradigmatic categories of potential revenge porn defendants. This will give analytical clarity as to the effectiveness of the cause of action, when responding to revenge porn, and will provide a foundation for the normative analysis in the next section.

(i) **Primary Disseminators**

The equitable remedy of breach of confidence focuses on relationships, holding liable those who have non-consensually divulged information, disclosed to them in contexts where it is apparent that the claimant had an expectation of confidentiality, and where breaching this expectation would harm the victim. Where perpetrators are known to victims, such as ex-partners, or friends, or any individuals with whom victims have previously consensually shared their images, breach of confidence is an appropriate cause of action for victims to use in order to seek redress for the actual or threatened disclosure of these images. This is because, regardless of motive, the key concept of the cause of action is the protection of confidential information. So, where private, sexual images have shared voluntarily by victims with primary disseminators, during the course of a relationship or friendship, before subsequently being

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23 *Archer v Williams* [2003] EWHC 1670 (QB) at [76] per Jackson J.
26 Ibid, *Mosley* at [216].
disseminated, then due to the sexual nature of the images, not only would they be deemed to have the necessary quality of confidence about them, but impliedly, would also have been obtained in circumstances importing an obligation of confidence. An action for breach of confidence could similarly be established where claimants’ images have been digitally manipulated by primary disseminators, either known, or unknown to victims, to make it appear as if they are engaged in sexual activity, before being subsequently disseminated.\(^{28}\) Despite the fact that the images had been digitally manipulated, this does not alter the fact that claimants would have suffered a detriment from the unauthorised disclosure of these images. Even if an image has been Photoshopped, and is comprised of images taken of different people, this does not diminish the potential harm resulting from its dissemination.\(^{29}\) Where perpetrators are unknown to victims, however, in the circumstances outlined above, claimants would look to sue the Internet intermediaries responsible for the transmission and broadcast of these images, as will be discussed further below.

Following the enactment of the HRA, a prior confidential relationship between the parties is no longer required. Claimants can bring an action in breach of confidence, where images have been obtained and disclosed by primary disseminators less well-known to them, such as casual dates, acquaintances, or one night stands.\(^{30}\) Regardless of the nature of the relationship, a duty of confidence can arise in respect of any information, if the discloser knows, or ought to know, that ‘it is fairly and reasonably to be regarded as confidential.’\(^{31}\) As Mitchell observes, it would not be difficult to establish that the subject of such images would have a reasonable expectation that their sexually explicit images would remain confidential.\(^{32}\) Additionally, the images would not be readily available in the public domain, and as Mitchell remarks, the level of intimacy and intrusion imbued by disseminating sexually explicit images would render any defence of public interest unlikely.\(^{33}\)

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31 Attorney-General v Guardian Newspapers Ltd (No 2) 1 AC 109 at [281] per Lord Goff.
33 Ibid.
Primary dissemination of revenge porn can also be facilitated by perfect strangers. For instance, images can be obtained by hacking claimants’ mobile phones, social media accounts or Cloud storage platforms, or by means of covert photography, for example, the activity of ‘upskirting.’ As it is no longer necessary to prove the existence of a prior confidential relationship, it would be possible to establish a claim on the ground that the hacked images were obtained in a manner giving rise to a duty of confidence, as a duty of confidence arises as a matter of conscience, in relation to the images. It would be more difficult to establish a claim in breach of confidence for upskirting, due to the public locations in which these images are usually obtained. Another problem for claimants, however, is identifying the anonymous defendants who have posted their images online. It might be necessary, therefore, for victims to obtain a *Norwich Pharmacal Order,*\(^{34}\) in order to establish who has uploaded them.

In summary, breach of confidence can be a useful cause of action to bring a claim for damages or an injunction for revenge porn disclosure by primary disseminators, particularly by those defendants with whom claimants have established a prior relationship of confidence, such as ex-partners and friends. It can also be used to bring a claim, however, where the prior relationship is transient, or even where no prior relationship exists at all, if it can be established that their images had been obtained in a manner giving rise to a duty of confidence, prior to their unauthorised disclosure, providing that these primary disseminators can be identified.

**(ii) Secondary Disseminators**

Prior to the enactment of the HRA, claims brought against third parties would only succeed if claimants established that these individuals knew that the disclosed information was impressed with a prior obligation of confidence.\(^{35}\) Under current law, a duty of confidence arises in respect

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\(^{34}\) This requires a third party, e.g. a website operator, who is involved, albeit innocently, in wrongdoing (such as defamation or harassment online), to disclose the identity of an anonymous wrongdoer, without putting him in breach of the Data Protection Act 1998. The term originates from the name of the case, *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133, which established the principle that a court could make such an order.

of any information the discloser knows, or ought to know, should be regarded as confidential.\textsuperscript{36} So, where revenge porn images are received and subsequently re-distributed by secondary disseminators already known to victims, these recipients are also liable, regardless of whether or not they were aware that consent had not been given by the subjects of the images to disclose them in the first place. These individuals ought to have known, as a matter of conscience, that victims would have had a reasonable expectation that their sexually explicit images would remain confidential.

Where secondary disseminators are entirely unknown to victims, however, a breach of confidence action could be hard to found, although not impossible, if defendants can be identified using a \textit{Norwich Pharmacal Order}. Where secondary dissemination has significantly amplified their images, victims may opt to hold identifiable parties liable for breach of confidence as joint tortfeasors, to increase the likelihood of recovering costs and damages.\textsuperscript{37} However, it might be difficult to establish that identified secondary disseminators knew that the images in question had been used in an unauthorised way before re-distributing them. This is because distinguishing revenge porn images from legitimate pornography is not always possible. For example, some secondary disseminators may feasibly have stumbled across images while browsing pornographic websites and would have been unaware, before disseminating them, that the images had previously been disclosed without the consent of the subjects.

In summary, breach of confidence lends itself well to claims for revenge porn disclosure by secondary disseminators acquainted or unacquainted with claimants, as a duty of confidence arises in respect of any information which the disclosers knew, or ought to have known, should be regarded as confidential, irrespective of whether or not they had prior knowledge that the images had been impressed with a prior obligation of confidence. Where defendants can be identified, but they were unaware that the images had previously been non-consensually disclosed, this is not a bar to founding an action, but it might be difficult to prove that the defendants knew the images had been used in an unauthorised way, which caused the claimant to suffer a detriment from their use.

\textsuperscript{36} \textit{Campbell v Mirror Group Newspapers} [2004] UKHL 22.

\textsuperscript{37} \textit{Contostavlos v Michael Mendahun} [2013] EWHC 4026 (QB).
Internet Intermediaries:

The current revenge porn epidemic has evolved due to technological advancements, that have enabled the mass dissemination of images online. This category of wrongdoer includes social media platforms, image board forums or discussion websites, all of which can inadvertently facilitate the transmission of revenge porn images. Most of the major social media platforms, for example, Facebook, Twitter, and Instagram, have adopted hard-line policies against publishing overt sexual images and have developed reporting tools for users. Some have also developed software or artificial intelligence to detect legally suspect images, even before they are reported by real people. Community standards can vary from platform to platform, however, and not all revenge porn posts will be considered to violate these standards, meaning that, in some cases, it can be difficult to get images taken down without legal intervention. Additionally, moderation is subjective and time-constrained moderators flooded with reports of revenge porn are likely to make mistakes, given that many find policies on sexual content difficult to follow. While image board forums, such as 4Chan, do not purposely host revenge porn, there are a number of spin-off sites that do emerging in the UK. These forums, relying on user-generated content, are registered to an address based outside of the UK, and seemingly

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have few rules and face few consequences for their conduct.\textsuperscript{44} The discussion website, Reddit,\textsuperscript{45} also does not directly host revenge porn, but it does host links to images or videos. Although the site has taken steps to curb revenge porn, even when images are successfully unlinked, they still exist in cyberspace.\textsuperscript{46} It is unlikely, however, unless they have been given legal notice to do so, that Internet intermediaries who have no control over external content can be held liable, unless the claimant has submitted a request for image removal, which is ignored.\textsuperscript{47} This is because, while the intermediaries may be facilitators of information, they are not secondary publishers.\textsuperscript{48} In the event that images are not removed on notice, however, internet intermediaries may be treated as defendants, if they would have known, or ought to have known, that they were using these images in an unauthorised way.

The second way in which revenge porn is facilitated by Internet intermediaries is through the creation of websites dedicated to revenge porn disclosure and dissemination. Operators of websites hosting revenge porn seek to provide ‘a dedicated platform which encourages publishers to upload sexually explicit images of their ex-partners specifically to wreak revenge and public humiliation.’\textsuperscript{49} As Mitchell notes, without such platforms there would be nowhere to upload these images, other than to social media platforms, where, unless accounts are fake, the victim has a degree of control over what can be posted on her personal page, by altering her privacy settings.\textsuperscript{50} Moreover, images can also be removed by social media platforms, on request or discovery.\textsuperscript{51} In addition to enabling users to post compromising images of their victims, dedicated revenge porn websites also encourage users to submit accompanying derogatory commentary and identifying information about them.\textsuperscript{52} By providing a public forum through which users meet to view and comment on images, these website owners effectively

\begin{itemize}
\item \textsuperscript{44} Ibid.
\item \textsuperscript{46} Van der Nagel and Meese (n 38).
\item \textsuperscript{47} Tamiz v Google Inc [2013] EWCA Civ 68; [2013] 1 WLR 2151.
\item \textsuperscript{48} Mitchell (n 32) 285.
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} Ibid.
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} Examples of revenge porn websites include My Ex-Girlfriend. Com <http://www.myexgf.com> and Get Revenge on Your Ex<http://www.getrevengeonyourex.com/revenge-website.php> both accessed 18 March 2018.
\end{itemize}
‘participate in the economy of online shame,’ with very little investment on their part, due to the sites’ use of user-generated images. Operators of free revenge porn sites stand to make a significant profit from hosting revenge porn, through advertising revenue and by directing users to subscription-only porn sites. Victims’ shame and humiliation and the desire to remove their images can also be further monetised by website owners, who charge a fee for removing them, although many sites operating in this way have either been closed down or driven underground, to the Dark Web.

Unlike social media platforms, as Mitchell observes, it may be possible to hold dedicated revenge porn website operators to account for breach of confidence, under the principles in Tamiz v Google, as they are not passive and are, therefore, potentially publishers. A duty of confidence arises, as the current law stands, in respect of any information that the publisher knows, or ought to know, should be regarded as confidential. Website operators who do not remove images on notice can, therefore, be treated as defendants and found liable in breach of confidence, for damages and an injunction, under the E-Commerce Directive 2002 (Regs 18-19). The requirement here is that Internet intermediaries should remove material ‘expeditiously,’ and no time-frame is given for this to be facilitated. As Wilson remarks, however, it should not be taken for granted that all website operators will comply with an injunction, particularly those outside the issuing jurisdiction, and those operating on the fringes of society. Some websites set up in far-flung territories specifically to host revenge porn will only remove photographs on payment of a fee. Wilson also points out that some website operators outside of the jurisdiction may seek to rely on immunity provided by local laws. Section 230 of the Communications Decency Act 1996, in the US, for example, protects intermediaries and website operators from liability arising from content posted by third parties,

55 Langlois and Slane (n 53) 126-9.
56 In Tamiz v Google Inc (n 47) it was held that there was an arguable case that Google was a publisher of anonymous, defamatory comments appearing on a blog it operated, entitled “The London Muslim.”
57 Mitchell (n 32) 285.
although this may not be a shield where a criminal offence is committed under local laws, or where there has been a copyright violation.\textsuperscript{59}

Given these challenges, the UK Department for Digital, Culture, Media and Sport (DCMS), has recently announced the development of its new Digital Charter, a Government initiative aimed at combatting the challenges arising from new technologies. The Digital Charter policy paper asserts that the charter is ‘a rolling programme of work to agree norms and rules for the online world and put them into practice.’\textsuperscript{60} Although the details are scant, the most notable aspect of the new standards involves the Government’s intention to address online platforms’ legal liability for third party content shared on their sites, raising questions about the current exemption under the E-Commerce Directive 2002 for online platforms from liability for illegal content they unknowingly host.\textsuperscript{61} The Government has also recently announced that it is considering creating an online safety commissioner with powers to fine and investigate social media giants. This would be along the lines of an Australian initiative, where an eSafety Commissioner has powers to fine social media companies for everyday cyberbullying posts that are not taken down.\textsuperscript{62} It should also be noted that revised data protection law now provides further essential benefits to revenge porn victims. In May 2018, the General Data Protection Regulation (GDPR) came into force. The Regulation is the EU’s response to the rapid technological developments, which have brought such difficult challenges for the protection of personal data. The GDPR provides a clarified right to erasure, also referred to as the ‘right to be forgotten,’ to help people better manage data protection risks online.\textsuperscript{63} The provisions include a new right for data subjects who no longer want their data to be processed to request that it is permanently deleted, provided that there are no legitimate grounds for retaining it.\textsuperscript{64}

\textsuperscript{59} Ibid.
\textsuperscript{64} Under Article 17 of the GDPR individuals have the right to have personal data erased. The right is not absolute and only applies in certain circumstances.
This right to erasure applies across the board, not just to search engines, meaning that for victims of revenge porn, the new provisions under EU data protection law now provide victims with a means of not only deleting links to disseminated images, but with a means of removing their images from source websites, at least within the EU jurisdiction. This position should also not be influenced by Brexit, even in the event of a no-deal scenario. However, the nature of revenge porn means that despite these improved provisions, once images are posted online, they can be cached and stored indefinitely, once downloaded, meaning that these new data protections provisions cannot prevent images from being uploaded again at some future point.

In summary, where revenge porn is disseminated on social media platforms, image board forums and discussion websites, victims should first use the platform’s reporting tools to get images taken down, although not all posts will be deemed to violate a platform’s community standards. In general, these Internet intermediaries are regarded as facilitators of information, rather than secondary publishers, so where they have no control over external content, it is unlikely they can be held liable, unless the claimant submits a request for image removal that is ignored, if they had known, or ought to have known that they were using the images in an unauthorised way. Internet intermediaries hosting dedicated revenge porn websites are not considered to be passive and are potentially publishers. They can, therefore, be treated as defendants and may be found liable for breach of confidence.

3.2.3 Normative Analysis

This section will present a normative analysis of the benefits and limitations of using breach of confidence to respond to revenge porn, with reference to the three paradigmatic categories of potential revenge porn defendants outlined above. It will identify respects in which using the cause of action succeeds, but also fails, in some circumstances, to fully vindicate victims.

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65 Department for Digital, Culture, Media and Sport, ‘Guidance: Data Protection if there’s no Brexit Deal’ (13 September 2018) <https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal> accessed 9 October, provides that: before 29 March 2019, rules governing the collection and use of personal data will be set at an EU-level by the General Data Protection Regulation (GDPR). If the UK leaves the EU in March 2019 with no agreement in place regarding future arrangements for data protection, there would be no immediate change in the UK’s own data protection standards. This is because the Data Protection Act 2018 would remain in place and the EU Withdrawal Act would incorporate the GDPR into UK law to sit alongside it.
for the harm caused by the dissemination of their images. The analysis aims to shed a normative light on how the doctrine should respond to revenge porn, in order to better vindicate victims, thus highlighting how existing provisions could be improved. The analysis will aim to show, where appropriate, how using breach of confidence to respond to revenge porn might be congruent with some of the tort theories discussed in Chapter 2.

As the examination of the three paradigmatic categories of potential revenge porn defendants has shown, the ambit of breach of confidence can extend to cover revenge porn disclosure, or the transmission and hosting of images by some Internet intermediaries, in all three categories. The duty to maintain confidentiality is not ‘chained,’ therefore, to a select few formal relationships,66 as a duty of confidence arises in respect of information published by individuals who would have known, or ought to have known, was confidential. A duty can also be implied, and when analysing implied obligations of confidence, the courts often find a discloser’s reliance on custom and context reasonable.67 Of significant benefit to revenge porn victims, then, particularly in the case of primary dissemination by known defendants, is that even where an expectation of confidentiality has not been explicitly established, it may nonetheless be inferred by the courts, when considering the private, sexual nature of the images in question and the context within which they were originally shared. As Nissenbaum contends, ‘contextual integrity,’ or the context in which information is disclosed, should determine the appropriateness of sharing it.68 Citron and Franks similarly concur that context and social norms should determine the question of confidentiality.69 Waldman explains that, even where the expectation of confidentiality is not explicitly conveyed, if disclosure happens in a context where the facts, taken together, impliedly suggest an obligation of confidentiality, this would suggest that the information disclosed is of a confidential nature, and that the nature of the information should be taken into account to determine a confidential context.70 So where defendants claim to have not understood that the images were to remain confidential, this could

70 Waldman (n 66) 724.
be rebuffed by the courts, because of an extant, normative understanding that private sexual images, consensually shared by one individual with another, are implicitly confidential.

One of the central aims of tort law is to establish norms about how people treat each other. A secondary social benefit of bringing an action in breach of confidence against individuals who have egregiously betrayed the trust previously vested in them is that it sends the message that such conduct is unacceptable to society. As Hartzog observes, breach of confidence embodies the salient norms of confidentiality, thereby not only providing legal remedies for those whose trust has been betrayed, but also strengthening our social relationships.71 Waldman submits that entrusting third parties with our information - from our shopping habits to our most intimate secrets - is both necessary and socially beneficial.72 He asserts that trust is a resource of social capital between or among two or more persons concerning the expectations that other members of their community will behave according to accepted social norms.73 Following on from this, arguably, the taking and sharing of explicit sexual imagery has become so commonplace in society that individuals should, then, be able to make choices about participating in this activity consensually, without the threat of the recipient of their images further sharing them, without their consent. Imposing tort liability for such egregious breaches of confidence as revenge porn dissemination, then, as well as creating disincentives for prospective revenge pornographers to act, sends the strong message that the conduct will not be tolerated by society. As Waldman observes, while the latter might have little impact on a practitioner searching for additional weapons to attack revenge porn cases, the tort of breach of confidence can have powerful expressive effects.74

While there are clearly distinct benefits to responding to revenge porn, using breach of confidence, there are also some important limitations. For example, exemplary, or punitive, damages are not available, or at least not in contexts where the Article 8 right to privacy is in play. As Butler and Miller observe, there has been some extra-judicial support for the availability of exemplary damages in equity, in England and Wales, but the case law on this

71 Hartzog (n 67)
72 Waldman (n 66) 716.
73 Ibid
74 Ibid, 730.
issue appears to be virtually non-existent. There is no statutory basis in England and Wales for awarding damages in respect of mental distress caused by breach of confidence, and until relatively recently, there was no authority in case law, either. Following the enactment of the Human Rights Act 1998, however, the courts have reviewed this position and found that compensatory damages for breach of confidence can be awarded for mental distress. Generally, in assessing quantum of damages for distress, only relatively modest awards of a few thousand pounds are made by adjudicating judges, however. Therefore, revenge porn victims wanting to be more adequately compensated for the mental distress caused by the violations to their privacy, dignity, self-esteem and bodily autonomy, for example, may not feel adequately vindicated, if they do not feel that the amount of compensation awarded for the mental distress they have suffered is enough, if indeed, compensation can ever really be enough to achieve vindication.

If exemplary damages are unavailable, and awards for the mental distress caused by revenge porn disclosure are modest, this reduces the attractiveness for victims to respond to revenge porn by pursuing a claim for breach of confidence, on the grounds of some of the tort theories discussed in Chapter 2. For example, underpinning the concept of civil recourse theory is the idea that liability for tort law should be on a best-fit basis for the rights invasion claimants have suffered. As Zipursky has argued, under a civil recourse theory model, the availability of punitive damages in tort should not be aberrational, if this is the most appropriate remedy that the civil law can offer. Arguably, forcing revenge pornographers to pay punitive damages, would, for many revenge porn victims, be the best remedy the courts could provide, in order to vindicate them for the particularly egregious rights invasions they have suffered. The lack of adequate monetary damages, in conjunction with the fact that awards for mental distress suffered are generally modest is incongruent with economic analysis theory, specifically with regard to the theory’s deterrence aims. The previous chapter concluded that there is at least

76 England and Wales Law Commission, Breach of Confidence (Law Com No 110, 1981) 4.82.
78 For example, in Campbell v MGN [2004] UKHL 22, the House of Lords only awarded a very modest award of equitable compensation to the claimant for her mental distress.
80 See the discussion in Chapter 2 on economic analysis (optimal deterrence) theory, and its specific application to revenge porn torts.
partial justification for addressing revenge porn in tort law, on the ground of economic analysis, due to the fact that the theory provides justification for imposing compensatory liability on those revenge porn tortfeasors who are likely to respond to the threat of tort liability, by creating disincentives for actors to engage in the harmful conduct in the first place. This would suggest that economic analysis theory would support both punitive damages awards for breaches of confidence, and larger compensatory damages awards for the emotional distress suffered as a result of the breach. In addition to providing more adequate vindication for victims, this would also have a greater deterrent effect on prospective defendants, than the prospect of paying modest compensation, at least for those revenge pornographers who can be deterred.

3.2.4 Conclusion

It is possible to draw some normative conclusions from the above analysis and identify some areas for potential reform. While using breach of confidence to respond to revenge porn has many benefits, due to its fundamental purpose of protecting individuals’ interests in their confidential communications, there are also some important limitations. First, although the action aims to redress certain rights and values, namely trust and confidence, it does not redress violations of many other important interests of victims, such as violations of their sexual privacy, bodily autonomy, dignity and self-esteem. Second, the discussion has highlighted the inadequacy of the remedies available, when using breach of confidence. With regard to compensatory damages, there is a strong argument that victims should be awarded more than the current modest amounts awarded by judges, to reflect the extent of the mental distress caused by revenge porn dissemination. One area of reform, therefore, could be to increase the quantum of damages available for breaches of confidences that result in severe mental distress, as this might go some way in acknowledging the magnitude of the harm caused. This might also be a valuable reform from a deterrence perspective because larger judgments for victims could incentivise them to pursue a remedy in court, rather than letting the offence slide. This, then, would lead to a greater chance of making offenders pay, which, in turn, would be more likely to deter prospective offenders. Finally, however, it is the non-availability of punitive damages, for breach of confidence actions, which really emphasises the gap between the severity of the harm suffered in some of the more extreme cases of revenge porn dissemination, and the remedies available. Arguably, punitive damages should be made available in these
cases. A further area of reform, therefore, could be to make these available for breaches of confidence, where the harm caused by the disclosure is particularly severe. These areas for potential reform will be discussed further in Chapter 4.

3.3 The Tort of Misuse of Private Information

The unauthorised and unjustified disclosure of private and or confidential information, or even merely accessing this information, can give rise to a claim for misuse of private information. This section will sketch the historical background of the tort of misuse of private information, and outline its purpose, elements and rules, and the remedies available using the cause of action. Delineating the scope of the tort of misuse of private information will facilitate an exploration of how the cause of action responds to the dissemination of revenge porn by the three paradigmatic categories of revenge porn defendants.

3.3.1 Doctrinal Background

Historically, there is no express right to privacy in English law but following the enactment of the Human Rights Act 1998 (HRA), the equitable common law remedy of breach of confidence was extended by the courts, effectively creating a new right to protect the misuse of private information. This was to secure the rights guaranteed by claimants’ Article 8 Convention right, which guarantees the right to respect for private and family life, while at the same time balancing this with defendants’ Article 10 right to freedom of speech. Following a series of high-profile cases decided over the next decade, the new right to privacy in English law can be described as a ‘curious amalgamation of tort law, equity and Arts 8 and 10 of the European Convention on Human Rights.’ As a result, the key legal principles of the tort are

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81 In the case of Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406, the House of Lords held that there was no cause of action under English law for ‘invasion of privacy.’

82 Article 8 (1) HRA 1998.

83 Three landmark cases can primarily be attributed to the emergence of a tort for invasion of privacy: the House of Lords’ decision in OBG Ltd v Allan [2007] UKHL 21; [2008] 1 AC 1 (HL); the decision of the European Court of Human Rights in Von Hannover v Germany [2004] EMLR 379 (ECHR) and the House of Lords’ decision in Campbell v MGN Ltd [2004] UKHL 22.

to be found in case law, and the courts’ decisions have, unsurprisingly, been influenced by European jurisprudence.\(^{85}\)

The House of Lords established a two-stage test for misuse of private information in the leading case of *Campbell v Mirror Group Newspapers*.\(^ {86}\) Stage one stipulates that the court must identify whether the information in question is subject to a reasonable expectation of privacy, so that Article 8 is engaged. At stage two, the defendant’s Article 10 right is considered, along with any other relevant circumstances of the case, for example, whether there might be any public interest in publication, which would outweigh the strength of the privacy claim. In *Re S (A Child)*,\(^ {87}\) the Lords clarified that neither the Article 8 or 10 right has presumptive priority, and that where the two rights are in conflict, the courts must conduct an intense focus on the comparative importance of the specific rights being claimed in each individual case, carefully considering the justifications for interfering with, or restricting, each right. Finally, the proportionality test, or the ‘ultimate balancing test’ should be applied to each right,\(^ {88}\) which involves the courts’ consideration of whether the intrusion, or the degree of the intrusion, into a claimant’s privacy is proportionate to the public interest supposedly being served by it.

Following the leading case of *Max Mosley v News Group Newspapers*,\(^ {89}\) most information relating to private sexual activity now gives rise to a reasonable expectation of privacy, under the first part of the *Campbell* test the courts will find very little public interest justification for publication. The public interest defence has been effectively diluted, and individuals can now reasonably expect information relating to their sexual activities to be a private matter. Despite the fact that the two-part test formulated in *Campbell* has long provided the basis for privacy cases, however, the tort of misuse of private information was only confirmed recently as a standalone remedy, independent of the equitable remedy of breach of confidence, when this was finally established in the Court of Appeal case of *Google v Vidal-Hall*,\(^ {90}\) in 2015.

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\(^{85}\) For examples see the decisions in *Von Hannover v Germany* [2004] EMLR 379 (ECtHR) and *Peck v United Kingdom* [2003] 36 EHRR 41, which essentially found that a public location does not always preclude the protection of an individual’s Article 8 right, although this position has not been consistently followed by the UK courts.

\(^{86}\) [2004] UKHL 22.

\(^{87}\) [2004] UKHL 47.

\(^{88}\) Ibid at [17] per Lord Steyn.

\(^{89}\) [2008] EWHC 1777 (QB).

\(^{90}\) [2015] EWCA Civ 311.
As the current law stands, in order to establish a claim for the misuse of private information, the courts must apply this two-stage process. First, the court must determine whether there is a reasonable expectation of privacy, such that Article 8 is engaged at all, which is a question that must be considered objectively from the standpoint of a reasonable person in the claimant’s position. To assist in applying the threshold test, the Supreme Court later held in Murray v Big Pictures (UK) Ltd. that the question of whether there is a reasonable expectation of privacy ‘is a broad one, which takes account of all the circumstances of the case.’ These include the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent (and whether it was known or could be inferred); the effect on the claimant; and the circumstances in which, and the purposes for which, the information came into the hands of the publisher. If a privacy interest is found, the courts must applying the balancing test, to ascertain whether there might be a countervailing public interest, such as the right to freedom of expression, which displaces the right to a reasonable expectation of privacy completely, or tips the balance in favour of disclosure. Available defences might be that the information is in the public interest; that it is gossip or mere tittle-tattle; that it is already in the public domain, or accessible to the public, so that it is not deemed private; that the disclosure of the information is in the interests of national security, public safety, the economic wellbeing of the country, the prevention of disorder or crime; or that the disclosure of private information was justified in order to protect the health and moral rights and freedoms of others. Actions based on a claim under the HRA must be brought to court within one year.

The same remedies for the tort of misuse of private information are available as for breach of confidence, namely an injunction, and compensation. Claimants might expect to recover nominal, general or aggravated damages to compensate them for the distress caused by the misuse of their private information, but these awards are relatively modest. Because the cause of action has recently been classified as a tort, however, exemplary damages may also be

92 [2008] EWCA Civ 446.
93 Ibid at [36] per Sir Anthony Clarke MR.
94 Ibid.
95 Campbell v MGN ([2004] UKHL 22 at [134] – [139].
96 Article 8 (2) HRA 1998.
97 Google v Vidal Hall (n 90).
available, which potentially improves this position. However, the most important remedy, and the one that claimants are most interested in, is an injunction to restrain the misuse of their private information. Interim injunctions can be granted over several parties, including those unknown. Non-disclosure orders can also be granted, in order to protect the identity of claimants. Legal costs are usually recoverable from the losing party.

3.3.2 Analysis of Three Paradigmatic Categories of Potential Revenge Porn Defendants

This section will explore how the current law on misuse of private information responds specifically to three paradigmatic categories of potential revenge porn defendants. This will give analytical clarity as to the effectiveness of the cause of action, when responding to revenge porn, and will provide a foundation for the normative analysis in the next section.

(iv) Primary Disseminators

The original, unauthorised dissemination (or threatened dissemination) of revenge porn, by primary disseminators, will, in most cases, be a misuse of private information. To establish this, the courts must apply the threshold test, to identity whether victims have a reasonable expectation of privacy, in relation to the images, in order to engage Article 8. Following the decision in Mosely, which affirmed that sexual disclosures could warrant protection in privacy, providing that the first part of the Campbell test was satisfied, the claimant would usually have a reasonable expectation of privacy in respect of her images, due to the sexual nature of them. When applying the balancing test, it would be unlikely that the claimant’s Article 8 right would be trumped by the defendant’s Article 10 right to freedom of expression. So, where primary dissemination is facilitated by individuals known to victims, such as ex-partners, ex-friends, casual acquaintances and one-night stands, all these parties would be liable, as the focus is on the unwarranted exposure of information concerning the private lives of claimants, rather than on the breach of trust that led to the disclosure. Where disclosure is threatened, or to prevent

100 Under Civil Procedure Rules, r 39.2 (4).
further disclosure, claimants can apply for an interim injunction, to restrain publication of images, and this can be on a ‘without notice’ basis if the threat of dissemination is immediate. Where primary dissemination is facilitated by parties unknown to victims, for example, if images have been obtained and disseminated following the hacking of stolen mobile devices or Cloud storage accounts, a court can grant an interim injunction over any party who has possession or control of the images, including unknown parties,\textsuperscript{101} so the matter could potentially resolve swiftly out of court, without having to go to trial. Claims can be brought anonymously, by virtue of a non-disclosure order,\textsuperscript{102} which is advantageous to victims, as this can reduce the impact of bringing this sort of action to court.

The tort of misuse of private information was used by YouTube star, Chrissy Chambers, to sue her ex-boyfriend for revenge porn, under the law in the High Court. He had recorded videos of them having sex, while she was asleep, then posted these onto free porn websites after the relationship had ended, where they were viewed hundreds of thousands of times.\textsuperscript{103} The Crown Prosecution Service was unable to bring charges against him, however, as the videos were posted before the misconduct was criminalised, in April 2015. In the first civil case of its kind, in England and Wales, and with the aid of crowdfunding, Chambers sued her perpetrator for harassment, breach of confidence and misuse of private information, winning substantial damages.\textsuperscript{104} While the terms of the settlement mean the man cannot be named, nor the amount of damages paid to Chambers disclosed, Chambers’ victory now paves the way for her to sue the sites that hosted the material. The verdict serves as a stark warning, Reid observes, not only for primary disseminators, but also for Internet intermediaries who host this kind of content.\textsuperscript{105}

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\textsuperscript{101} Contostavlos (n 99).
\textsuperscript{102} Under Civil Procedure Rules, r 39.2 (4).
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A possible defence for primary disseminators is that information considered to be trivial and of no consequence will not be sufficient to engage Article 8, so, in a scenario where primary disseminators have disclosed images that might be relatively anodyne, such as those showing the victim semi-clothed, or engaged in the act of merely kissing and cuddling, the claimant’s right for reasonable expectation of privacy might be displaced with the defendant’s countervailing right of freedom of expression. While the subject of the images may be mortified at their disclosure, the quality of the material in question may not be objectively sufficient to engage the subject’s Article 8 rights. In these cases, claimants might be better off relying on a claim of breach of confidence. Additionally, where information is already in the public domain, or accessible to the public, it will not always be deemed as private, which could be problematic for individuals seeking an injunction, if their images have been particularly widely disseminated, although the extent of the public nature of the images will be considered by the courts on a case-by-case basis.

An important exception to the expectation of privacy that individuals can have, with regard to the misuse of their private sexual images by primary disseminators, however, is that there is no general right to privacy, for adults, which protects images taken in public places. This means that privacy law does not protect victims of ‘downblousing’ or ‘upskirting,’ where images are obtained in public spaces, and then disseminated onto dedicated fetishists’ websites. This is because in common law jurisdictions there can be no reasonable expectation of privacy in public places.

In summary, the focus of the tort of misuse of private information is on the unwarranted exposure of information concerning the private lives of claimants. It is unquestionably relevant, in the case of revenge porn disclosure by primary disseminators, known or unknown to victims, where victims have a reasonable expectation of privacy in regard to their private, sexual images. It is particularly useful for restraining further dissemination of images, following the application for an interim injunction. Additionally, because the cause of action has recently been classified as a tort, exemplary damages may also be available. Misuse of

\[106\] However, ‘upskirting’ will soon be a criminal offence, in England and Wales, punishable by two years’ imprisonment: the Voyeurism (Offences) (No. 2) Bill 2017-19 currently passing through Parliament amends s 67 of the Sexual Offences Act 2003, creating additional offences under s 67A, to make certain acts of voyeurism, including upskirting, a sexual offence.
private information cannot be used, however, by victims of ‘upskirting,’ as images that have been obtained in public spaces are not protected by privacy law.

(i) Secondary Disseminators

Where revenge porn dissemination is amplified by secondary disseminators, known or unknown to victims, these individuals would be liable under misuse of private information. Unlike breach of confidence, an action for misuse of private information can be brought irrespective of whether defendants were aware that the images they were re-distributing were revenge porn, as the principal focus of the tort is on the expectation of privacy victims can have in respect of their private images. As with primary dissemination, the courts will apply the threshold test to identify whether victims have a reasonable expectation of privacy, in order to engage Article 8, followed by the balancing test, to ascertain if there is a countervailing public interest, such as the right to freedom of expression, which displaces the right of reasonable expectation of privacy. As the courts are likely to be sympathetic to claimants, it is unlikely that a public interest defence would be upheld. In addition, proceedings can be brought anonymously. However, as with primary dissemination, possible defences for secondary disseminators could be if the images in question are relatively anodyne, so could be considered trivial, or they may already exist extensively in the public domain.

The action can be a particularly useful one to effectively restrain further dissemination of images by secondary disseminators unknown to victims, as courts can grant an interim injunction over several parties, including those unknown, which can include anyone who has possession or control of the images. An example of an interim injunction being used to effectively restrain publication by secondary disseminators can be seen in the revenge porn case, JPH v XYZ and Persons Unknown. Here, the court also included amongst the defendants, “persons unknown,” to enable any resulting order to be served on a number of friends holding copies of the images. After an interim order was made to restrain publication, the judge recognised that because of the circumstances, swift action was necessary to prevent

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the spread of the material going viral once it was in the public domain. Therefore, information about the third parties holding copies of the material was exchanged between the parties’ solicitors within one hour of the order, as well as relevant steps being taken to remove any material already posted, prior to the service of the order. Additionally, in the event that the material was made public, the judge ensured that committal proceedings would be an available sanction for non-compliance. The action was so effective, that to date, the identities of the parties have not been revealed, and the harmful images have been kept out of the public domain.

In summary, providing victims have a reasonable expectation of privacy, in respect of images disseminated by secondary disseminators, so that Article 8 is engaged, and this is not displaced by a countervailing public interest, victims can bring an action for misuse of their private information. It is particularly useful where it is crucial for victims to be able to effectively restrain further publication of their images, as an interim injunction can be granted over several parties, including those unknown, thus effectively prohibiting the further publication of images, by anyone who has them in their possession or control.

(v) Internet Intermediaries

Most contemporary revenge porn disclosure is facilitated by Internet intermediaries, via social media platforms, image board forums or discussion websites, or via dedicated revenge porn websites. Victims’ priority will be to attempt to secure the prompt removal of any images in the public domain, and in the first instance they should use any reporting tools provided to report revenge porn dissemination, to request takedown of their images. If pursuing this first action is unsuccessful, victims should notify all relevant Internet intermediaries who are publishing their images of a complaint, as early as possible. Once an intermediary is on notice that the publication is unlawful, there can be no defence to its publication, as it will lose its

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110 Ibid. These would be brought under CPR 81 for contempt of court.
defence under the Electronic Commerce (EC Directive) Regulations 2002 (Regs 17-19)\textsuperscript{111} to a
claim for damages.\textsuperscript{112} If co-operation is not forthcoming, however, then victims can seek an
interim injunction to restrain further publication of their images. There can be numerous
Internet intermediaries involved, but as is the case with the primary and secondary
disseminators, providing victims have a reasonable expectation of privacy, in respect of their
private images, so that Article 8 is engaged, and this is not displaced by a countervailing public
interest, such as freedom of expression, the courts can grant an interim injunction over several
parties, including those unknown, which can include anyone who has possession or control of
the images.\textsuperscript{113} Therefore an interim injunction restraining publication can be served over any
Internet intermediaries who are publishing the images.\textsuperscript{114} As Wilson points out, it cannot be
taken for granted, though, that Internet intermediaries, particularly those operating outside the
jurisdiction, will comply with an order, and some sites dedicated to hosting revenge porn will
only remove photographs on payment of a fee, while others may seek to rely on immunity
provided by local laws.\textsuperscript{115}

Uncertainty exists, as noted previously, however, as to whether companies such as Facebook
and Twitter can be considered to be publishers of information or merely platforms for third-
party content. This distinction is crucial for revenge porn victims suing these companies for
damages when their use of the dedicated reporting systems has not resulted in the removal of
their images. In a recent development, an out-of-court settlement was made by Facebook to a
14-year-old girl, after she sued them following her lack of success in removing a photo of her,
which was posted on a ‘shame page’ on the site.\textsuperscript{116} She had tried repeatedly to remove the
image, using Facebook’s reporting tools, but it re-appeared several times between November
2014 and January 2016. Lawyers acting for the teenager made the claim on the grounds of

\textsuperscript{111} These protect ISPs from civil or criminal liability arising if they are a mere conduit of information (Reg 17);
where the onward transmission of cached information has not been modified (Reg 18); or where they are
hosting information without actual knowledge of unlawful activity (Reg 19).
\textsuperscript{112} Kate Wilson, ‘Privacy and Misuse of Private Information - Overview,’ Lexis®PSL <https://www.lexisnexis.com/uk/lexispsl/ip/document/393989/5DS5-S4G1-F18C-X077-0000-00/Privacy+and+misuse+of+private+information—overview> accessed 15 January 2019.
\textsuperscript{113} Contostavlos v Mendahun [2012] EWHC 850 (QB).
\textsuperscript{114} Ibid.
misuse of private information, as well as negligence and breaching the Data Protection Act 1998. While Facebook did not admit liability, arguably, the case sees a move towards social media companies accepting that they are publishers of information, as well as a platform, meaning the case has potentially opened up the possibility of using current laws more widely to obtain damages from the social media giants.

Classifying misuse of private information as a tort has also opened the door to exemplary damages for some victims of revenge porn, as per the second condition laid down by the House of Lords in *Rookes v Barnard*: 

\[\text{117} \] in cases where individuals are extorting money out of victims using the threat of disclosing their images, or where Internet intermediaries have calculated to make a profit at the expense of victims, these parties may now be forced to pay exemplary damages. While this considerably extends the effectiveness and the reach of the cause of action, the biggest problem for victims remains securing the prompt removal of their images from the public domain. In the event that they have already been disseminated, the speed at which this process can be achieved can be slow, as under the E-Commerce Directive 2002 (Regs 18-19) the requirement is that Internet intermediaries should remove material ‘expeditiously,’ and no time-frame is given for this to be facilitated. As images can go viral very rapidly, it may already be too late for many victims taking the action outlined above to realistically restrain the further publication of their images, with an interim injunction. 

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In summary, providing that revenge porn victims have a reasonable expectation of privacy, that is not outweighed by a countervailing public interest, the courts can grant an interim injunction over known and unknown parties, including Internet intermediaries and anyone else who has possession or control of the images. Victims have some protection under the Electronic Commerce (EC Directive) Regulations 2002, as once notified that a publication is unlawful, there can be no defence for Internet intermediaries who continue to publish their images, although the speed at which they must comply can be problematic. It may also be possible to

\[\text{117} \] [1964] AC 1129 at [1226]: the categories where exemplary damages are available are: (1) cases involving oppressive, arbitrary or unconstitutional action by servants of the government; (2) cases in which the defendant’s conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the claimant and (3) cases where the award is authorized by statute.

\[\text{118} \] See earlier note, however, in 3.2.2(iii) regarding the development of a new Digital Charter and the Government’s intention to address online platforms’ legal liability for third party content shared on their sites.
sue social media companies for damages, if they have failed to remove images once they have been reported, as long as these companies are treated as publishers, not merely platforms. Additionally, the classification of misuse of private information as a tort means that exemplary damages can now be made available to victims, in some circumstances.

3.3.3 Normative Analysis

This section will present a normative analysis of the benefits and limitations of using the tort of misuse of private information to respond to revenge porn, with reference to the three paradigmatic categories of potential revenge porn defendants outlined above. It will show where using the cause of action succeeds, but also fails, in some circumstances, to fully vindicate victims for the harm the dissemination of their images has caused. The analysis aims to shed a normative light on how the doctrine should respond to revenge porn, in order to better vindicate victims, thus highlighting how existing provisions could be improved. The analysis will be underpinned with theory, where appropriate, showing how using misuse of private information to respond to revenge porn might support some of the tort theories discussed in Chapter 2.

As a signatory to the European Convention on Human Rights (ECHR), the United Kingdom has, in addition to its negative obligation to avoid breaching Article 8, a duty to protect its citizens against Article 8 interferences by private actors. Member States must, as a bare minimum, provide some kind of civil recourse for such interferences.119 Thus, Article 8 has horizontal, as well as vertical effect. The horizontal effect does not create new causes of action between private persons, but rather obliges courts to develop any applicable causes of action consistently with Convention principles.120 The enactment of the HRA, therefore, ‘has provided new parameters within which the court will decide…whether a person is entitled to have his privacy protected by the court,’121 which, following Campbell, has effectively shaken off the constraint of finding a confidential relationship, in cases involving private information. This benefits victims of revenge porn, whose privacy interests have been violated by having their

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intimate images non-consensually disseminated, transmitted, or hosted, by parties in all three paradigmatic categories of defendants because the tort’s principal focus is not on the breach of confidence which has led to the disclosure, but rather on victims’ reasonable expectation of privacy. Therefore, as the law currently stands, the tort of misuse of private information has provided individuals with the opportunity to bring private actions for revenge porn disclosure by revenge pornographers in all three scenarios, with the guarantee of accessing the protections afforded to them by Article 8 of the Convention rights. As Mitchell remarks, even where the defendant’s Article 10 right might prevail in certain circumstances, this is likely to be confined to a textual description because ‘images provide a more lurid and memorable expression.‘ The tort of misuse of private information thus arguably better protects the privacy interests of revenge porn victims than the equitable remedy of breach of confidence.

The publication of private, sexual images can intrude into private life ‘in a peculiarly humiliating and damaging way.’ A revenge pornographer who deliberately misuses a person’s private sexual images, by broadcasting them to a wider audience, without the consent of that person, has set out to undermine their dignity and autonomy in such a way. As Moreham observes, it is the underlying values of autonomy and dignity that lie at the heart of the misuse of private information, rather than any ‘duty of good faith applicable to personal confidential information.’ The previous section concluded that the equitable remedy of breach of confidence does not provide adequate redress for victims, as it does not rectify violations of all the interests, rights and values that they have suffered. While using the tort of misuse of private information to respond to revenge porn does not redress the rights and values that breach of confidence aims to vindicate, namely those of trust and confidence, it does redress victims’

122 Uncertainty exists, however, as to how much the existing protections will be affected by Brexit. While the EU referendum result gave no mandate for the repeal of the HRA1998, the 2015 Conservative election manifesto did include a commitment to repeal the Act and replace it with a British Bill of Rights. Such a repeal could have a profound effect on evolving privacy law, depending on how the European Convention rights are replicated in a British Bill of Rights, particularly if Article 8 of the Convention is given less weight in the Bill than Article 10. The then Secretary of State for Justice implied that this might be the prospective UK position to the House of Lords Select Committee for the EU, in February 2016 (see European Union Committee, The UK, the EU and a British Bill of Rights, 9 May 2013, HL 139 2015-16, para 41). This weighting has the potential, then, to undermine evolving privacy law as the tort of misuse of private information has not yet been fully subsumed into English common law.


124 Theaskston v MGN Ltd [2002] EWHC 137 (QB) at [78].

125 Moreham (n 120) 374.

126 Campbell v MGN Ltd [2004] UKHL 22 at [51] per Lord Hoffman.
interests in respect of their rights to privacy, dignity and bodily and sexual autonomy. Unlike breach of confidence, which focuses on the breach which led to the disclosure of confidential information rather than the quality of the information itself, the tort responds to the intention of revenge pornographers to shame and humiliate victims by violating their privacy. This means that extent of the harm that victims have suffered, as a result of this particular kind of disclosure, is acknowledged, which can provide victims with more of a sense of vindication for the egregious invasion of their dignitarian rights, and the violation of their interests in their autonomy and self-esteem. Victims may feel, therefore, more adequately redressed for the range of harms revenge porn has caused them when using the tort misuse of private information, due to the extended range of interests it vindicates.

Of further benefit to victims, is the fact that the cause of action has been classified as a tort. As Mo observes, since exemplary damages are traditionally limited to the law of torts, the nature of the cause of action has direct relevance to the availability of exemplary damages. Now, as per one of the three conditions under which exemplary damages can be made available, following the decision in *Rookes v Barnard*, revenge porn victims can force any person who has calculated to make a profit for himself, at their expense, to pay exemplary damages, in excess of any compensation awarded to them. This would include primary disseminators who have calculated to make a profit by ‘sex torting’ money, in return for not disclosing images, and any Internet intermediaries who have calculated to make a profit from hosting the images. The recognition of misuse of private information as a tort in its own right has clearly had positive repercussions and this may go some way towards addressing the specific harms revenge porn victims suffer, regardless of the fact that these types of harms are not the kind that tort law traditionally recognises. As Adjin-Tettey observes, while the courts have historically found it challenging to calculate damages for the many kinds of non-tangible harms suffered by victims of sexual violation, this position has increasingly been offset by the availability of punitive damages, although, arguably, these can never correspond to the extent of the harms suffered in some of the more extreme cases of revenge porn.

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127 *Google v Vidal Hall* [2015] EWCA Civ 311.
128 Mo (n 98) 95.
129 [1964] AC 1129 at [1226].
There are some limitations to using misuse of private information to respond to revenge porn, however, despite the increased range of interests it protects. While recognising the cause of action as a tort distinct from breach of confidence means that, in some circumstances, victims can be awarded exemplary damages, conversely, the classification of the action as a tort could actually limit the amount of damages that can be awarded for the mental distress caused by revenge porn. As Mo observes, when bringing actions for misuse of private information, claimants generally may have difficulties in pursuing damages for hurt feelings, which is often the main cause for a complaint in the first place.\(^\text{131}\) The general principle of tort damages, *restitution in integrum*, holds that damages should only restore claimants to the position they would have been in, had the tort not occurred. So, for misuse of private information claims, unless mental distress is part of an overall award, claimants may find difficulty in justifying a claim for damages based on injury to feelings alone. This is because compensatory damages for non-pecuniary welfare losses, such as emotional distress, can only be awarded in tort law, if the mental distress suffered has caused a recognised psychiatric illness.\(^\text{132}\) Historically, as McGregor notes, from the courts’ perspective, ‘mental distress is not by itself sufficient to ground an action,’\(^\text{133}\) and that ‘at common law emotional distress, falling short of diagnosable psychiatric harm, is not normally within the ambit of the law of torts.’\(^\text{134}\) So, where such an illness is not established, presumably revenge porn victims would not be able to sue for damages for their mental distress alone, in cases where they have suffered no pecuniary loss. Therefore, if victims are suing for damages, purely on the basis of their mental distress, Mo suggests that claimants might be better off relying on an action of breach of confidence instead, where the judge would be able to award compensation on a discretionary basis.\(^\text{135}\) If pursuing damages in excess of pecuniary loss is the main cause for revenge porn victims to bring a private action, then in the event that pecuniary losses are small, and the mental distress suffered is not severe enough to be recognised as a psychiatric injury, the quantum of damages awarded is likely to be modest.

\(^\text{131}\) Mo (n 128) 94.

\(^\text{132}\) The tort action for the willful infliction of nervous shock, as established in *Wilkinson v Downton* (1897) 2 QB 57, requires proof of actual damage, such as a recognised psychiatric illness. See also *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907.


\(^\text{134}\) Ibid, para 1-22.

\(^\text{135}\) Ibid, 95.
The approach to awarding damages in privacy cases, including those for mental distress, was reviewed by the High Court, in 2015, in *Gulati v MGN Ltd*,\(^{136}\) where the awards were significantly higher than in previous privacy cases. The case concerned individuals in the public eye, whose private and confidential information had been obtained both through phone hacking and by private investigators, which, apart from one claimant, had led to the publication of articles in its newspapers.\(^ {137}\) Some of the awards were global awards, but others were divided into separate heads, depending on the severity of the intrusion suffered in each individual case.\(^ {138}\) The Court stated that damages in privacy cases should compensate not merely for distress but also, if appropriate, for the loss of privacy or autonomy arising out of the infringement by hacking or other mechanisms - which in this case was significant. This might, in the Court's view, include a sum to compensate for meaningful damage to dignity or standing, so far as that was not already within the distress element.\(^ {139}\) Although the Court did make additional mental distress available as a separate head of damages, where these awards were divided up, it did not attempt to determine what might constitute adequate vindication for victims for suffering mental distress, arriving at quantum of between £15,000 - £20,000 to compensate claimants for the additional distress they had suffered. The Court acknowledged that case law showed an increasing tendency to appreciate and give effect to the seriousness of invasions of privacy, although no previous cases had involved the award of sums approaching those claimed by the claimants.\(^ {140}\) It was the scale of the invasion suffered in these particular cases that justified the size of the awards by the Court, because of the level and persistence of the press tactics, as well as the level of privacy intrusion in these cases, as opposed to previous cases where smaller awards had been given.\(^ {141}\)

If *Gulati* cannot be viewed as setting a precedent for giving larger awards more generally, the tendency to award modest damages for mental distress, is, of course, problematic for revenge porn victims who might be seeking bigger awards, in order to feel subjectively adequately vindicated for the mental distress caused by the dissemination of their images. While the enactment of the HRA 1998 has brought about some significant doctrinal shifts, including

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\(^{136}\) [2015] EWHC 1482 (Ch).
\(^{138}\) *Gulati* (n 136) [154].
\(^{139}\) Ibid at [111].
\(^{140}\) Ibid at [184].
\(^{141}\) Foster (n 137) 89.
making awards of compensatory damages available for mental distress, these, notably, have been small awards and incorporated into aggravated damages awards,\textsuperscript{142} demonstrating that there is still reluctance by the courts to award substantial damages for ‘mere’ distress in the law of torts. The reasons for this, as Giliker comments, are threefold: first, there is the fear of people making exaggerated, fraudulent claims - how is it possible to prove that someone’s feelings have been hurt and to what extent? Second, quantification is cited as an obvious problem, although, as Giliker remarks, there do not appear to be any apparent difficulties when quantifying awards of damages for pain and suffering as part of the personal injury award. Third, is the floodgates argument, which represents the fear of an uncontrolled proliferation of claims which would ultimately place ‘an undue compensatory burden on the defendant and his or her insurers and clog the system with a multitude of claims.’\textsuperscript{143} There is no systematic or recognised way, currently, in which the courts can determine what might constitute adequate vindication for victims for suffering mental distress, which might suggest that it would be sensible, in some situations, to employ an objective, reasonableness standard, in order to determine quantum of damages for mental distress. Giliker argues that much could be gained from appreciating the true nature of damages for mental distress in the English law of torts, suggesting that, rather than subsuming these awards in aggravated damages, they should be available as a separate head of damages, in their own right, as part of the claimant’s general compensatory claim. In doing so, she submits, an open recognition of this head would be of benefit to individual claimants and the system as a whole, as it would help to clarify this area of damages.\textsuperscript{144}

The position of modest damages awards for mental distress also offers little justification for responding to revenge porn in tort law, on the grounds of the tort theories discussed in Chapter 2. Underpinning corrective justice theory is the concept that liability rectifies an injustice inflicted by one person on another and joins in the same event what the defendant has done with what the claimant has suffered. Corrective justice asserts an immutable connection between the wrong and the remedy, thereby connecting the revenge pornographer’s wrongful

\textsuperscript{142} In \textit{Campbell v MGN Ltd} [2004] 2 AC 457, Naomi Campbell received £2,500 plus £1,000 aggravated damages for the publication of details of her drug therapy sessions and photographs of her leaving these sessions; and in \textit{Weller v Associated Newspapers} [2014] EWHC 1163, £5,000 was awarded to a 16-year-old girl for publication of unauthorised photographs, with £2,500 being awarded to her younger siblings. 


\textsuperscript{144} Ibid, 19.
action in misusing the claimant’s private sexual images, with the correction of this injustice through the payment of damages. Forcing defendants to pay adequate compensation to victims for any non-pecuniary welfare losses suffered due to revenge porn abuse, means that justice is effected and the wrong is corrected. Arguably, the wrong is not corrected if victims cannot be adequately compensated in tort for the emotional distress the dissemination of their images has caused them.

The inadequacy of damages for victims’ mental distress also provides little justification for addressing revenge porn in tort law, on the ground of economic analysis theory. This theory would arguably support increasing available awards, as it suggests that that individuals make decisions about whether to engage in certain activities, by weighing up the costs and benefits of participation. The prospect of paying only small damages awards for victims’ non-pecuniary losses may not, therefore, be a strong enough motivation to deter individuals performing a cost-benefit analysis. If tort liability is to be understood, from an economic standpoint, as being instrumental in encouraging at least some individuals to deter from harmful activities, this should at least be reflected in the quantum of damages available to victims for the non-pecuniary losses caused by revenge porn, in order to encourage those deterrable individuals away from acting. For revenge pornographers who are neither acutely conformist or strongly committed to crime,145 these actors could potentially be encouraged away from disseminating revenge porn, if the threat of tort liability is powerful enough.

By far the most significant limitation of using misuse of information to address revenge porn is the fact that there is no general right to privacy, for adults, which protects images taken covertly in public spaces, as in common law jurisdictions, there can no reasonable expectation of privacy in public places.146 This means that privacy law in England and Wales does not currently protect victims of ‘downblousing’ or ‘upskirting.’ This practice involves the covert photography or filming of a person’s private bodily areas (normally a female) in public

145 See Greg Pogarsky, ‘Identifying “Deterrable” Offenders: Implications for Research on Deterrence,’ (2002) 19(3) Justice Quarterly 431, 432, who outlines a theoretical framework for the responsiveness that individuals have towards legal-sanction threats, placing them on a hypothetical continuum ranging from acutely conformist to incorrigible, with deterrable individuals being positioned in the middle.

146 This was underlined by Lord Hoffman in Campbell v MGN Ltd [2004] UKHL 22 at [73], who stated that in this, as in other common law jurisdictions, there is traditionally an expectation that if you are out and about in public, and someone takes your photograph, whoever you are, there can be no cause for complaint.
places, for example, on the street, on public transport, in the supermarket or in the office, using surreptitiously placed recording devices, in bags or shoes, or increasingly, just the camera feature of a mobile phone. The images may, or may not, then be distributed online, without the subject’s knowledge or consent. It is the non-consensual acquisition and distribution of these sexual images, which makes them so highly prized, when so much consensual pornography is available online. While it is recognised that ‘creepshots’ are a real problem because they violates victims’ interests in their physical privacy and bodily autonomy, in England and Wales, as in other common law jurisdictions, privacy rights do not generally extend to images taken in public, unless there is a reasonable expectation of privacy, as Article 8 does not extend to cover such intrusions into a person’s physical space in public.

The European Court of Human Rights has found that, in some circumstances, Article 8 can protect images of individuals taken in public places, particularly where those individuals are vulnerable, or have found themselves in humiliating situations, but the Court’s stance has not been closely adhered to in the domestic courts, meaning the position remains unclear. Moreham submits that there are actually two distinct but overlapping categories of privacy interference. The first is misuse of private information (informational privacy), which is actually the exclusive focus of English common law. The fundamental objection in informational privacy cases, as Moreham observes, is that someone has found out something about someone else, against their wishes. This can be because they have discovered something about them, for example by reading their diary or accessing their emails; or it can be because

149 The general rule where images are obtained in public spaces is that there is no right of privacy when a person is photographed on a public street, except in exceptional circumstances, these being (i) to prevent additional publicity being given due to the fact that they were present on the street due to particular circumstances (Campbell v MGN Ltd [2004] UKHL 22); or (ii) to protect the privacy rights of a child (Murray v Big Pictures (UK) Ltd. [2008] EWCA Civ 446).
150 Von Hannover v Germany (Application no. 59320/00) (2005) 40 EHRR 1.
152 Sciacca v Italy (2006) (Application no. 50774/99) 43 EHRR 400.
153 Although a precedent had been set in Von Hannover and Peck that a public location does not preclude the protection of an individual’s Article 8 right, and this was re-visited in Jagger v Darling (2003) [2005] EWHC 683 (Ch), where Bell J accepted that although the incident in question took place in a public place, the claimant did have a legitimate expectation of privacy, the issue is still the matter of some debate, and the law in the area remains vague.
someone has retained information about them, such as their private records or information, either to use for future reference, or with a view to sharing the information with someone else; or it can also be, as is the case with revenge porn, because someone has disclosed, or has threatened to disclose, information about them, including photos and other materials, by uploading it online.\textsuperscript{155}

The second category of privacy interference, Moreham contends, is not currently the focus of the common law, and this concerns the unwanted access to a person’s physical self. As Moreham explains, in this category, which she terms ‘physical privacy,’ the interference can be said to be sensory. A person can be subjected to sensorial interference through watching and listening, or otherwise being sensed by another person against their wishes.\textsuperscript{156} Moreham suggests that physical privacy can be interfered with in three main ways: first, through observing someone, including with technological aids, against their wishes, for example, by spying on someone as they get changed, or filming them in the bathroom; second, when a person photographs or otherwise records another person’s private activities; and finally, when that person enables others to see or hear another person’s private activities by disseminating photographs or recordings of those activities to others. In all these situations, Moreham contends, ‘the concern is primarily physical: the observer is, through the use of the senses, physically experiencing something of you against your wishes and/or allowing others to do the same.’\textsuperscript{157}

‘Upskirting’ and ‘downblousing’ concerns the interference of a person’s physical privacy, by an unwanted intrusion into their physical space, using a technological aid. As Moreham submits, the conception of privacy as understood by the current English common law, focuses exclusively on the acquisition or dissemination of private information; it fails, then, to accommodate for interferences to physical privacy interests effectively. All breaches of privacy, she contends, whether informational or physical, can lead to ‘feelings of affront, violation and indignity,’\textsuperscript{158} yet privacy law in this jurisdiction does not provide recourse for victims of the latter type of breach. This means that individuals who have been subjected to

\textsuperscript{155} Ibid.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid, 352.
these types of creepshots currently have no access to recourse in the civil law, to enable them to seek vindication for this violation of their interests. This should not be the case. Reform of privacy law in England and Wales to accommodate for unwanted physical privacy interferences, such as ‘upskirting’ should be a matter of urgent priority.

3.3.4 Conclusion

It is possible to draw some normative conclusions from the above analysis and identify some areas for potential reform. It is evident that using the tort of misuse of private information to respond to revenge porn has many benefits, as it focuses on the reasonable expectation of privacy a person can expect to have in respect of their private information. The move away from any focus on confidential relationships also means that the emphasis is on the quality of the information disclosed and how this disclosure might affect victims’ autonomy and dignity, rather than redressing the violations of trust and confidence which led to the disclosure. It is also clear that there are some important limitations, however. First, although the action has been recognised as a tort in its own right, meaning that exemplary damages are available in some circumstances, where defendants have calculated to make a profit from victims’ images, the cause of action’s status as a tort could mean that compensatory damages are unavailable to victims who have not also suffered pecuniary loss. This means that non-pecuniary welfare losses, such as emotional distress, may not be recoverable, unless emotional distress is part of an overall award. Revenge porn victims should be able to obtain damages for severe emotional distress caused by the dissemination of their private, sexual images. One suggestion for reform, then, to get around this issue, would be to broaden the circumstances under which exemplary damages are made available, so that they can be awarded for flagrant breaches of privacy, where the mental distress suffered is particularly severe.

The second normative conclusion that can be drawn from the analysis is that victims should be able to pursue a claim for damages or an injunction, following the intrusion of their private, physical space in public places, where photographic images are obtained, regardless of whether or not they are subsequently disseminated. The discussion has highlighted a particularly worrying gap in provision for victims of ‘upskirting,’ or ‘downblousing,’ due to the fact that in common law jurisdictions there is no general right to privacy for adults for this kind of
physical intrusion, in public spaces. It is submitted, therefore, that this is an area of privacy law requiring urgent reform in England and Wales. One possible solution could be to extend the tort of misuse of private information to incorporate a category of privacy interference that concerns the unwanted access to a person’s physical self. Such an extended tort would then protect individuals subjected to the covert photography of their private bodily regions, in public places. These areas for potential reform will be discussed further in Chapter 4.
Chapter 4: Proposals for Civil Law Reform

‘Reform, to be useful and durable, must be gradual and cautious.’

Horace Smith

4.1 Introduction

The normative analysis in Chapter 3 has identified the benefits and limitations of addressing revenge porn, in the civil law regime, using two traditional common law causes of action, the equitable remedy of breach of confidence and the tort of misuse of private information. The benefits for revenge porn victims in bringing actions for breach of confidence are that a duty of confidence can arise in respect of any information that disclosers knew, or ought to have known, should be kept confidential. This means that it can redress violations of victims’ interests in trust and confidence, by all three paradigmatic categories of revenge porn defendants. The analysis has identified two distinct limitations for victims using this cause of action, however. The first is that the modest amounts of compensatory damages awarded often do not reflect the extent of the mental distress caused by the wrong. This chapter proposes, then, that the equitable remedy of breach of confidence should be reformed to increase quantum of damages for breaches of confidences that result in severe mental distress (Section 4.2(i)). The second limitation identified is that punitive damages are unavailable as a remedy for breach of confidence actions. The chapter will propose, then, that exemplary damages should be available to revenge porn victims, where this is the best remedy that the law can offer (Section 4.2(ii)).

When responding to revenge porn using the tort of misuse of private information, the analysis in Chapter 3 has revealed that this has several benefits, as it redresses violations of revenge porn victims’ interests in their sexual autonomy, dignity and self-esteem. It can also be used to bring actions against all three paradigmatic categories of revenge porn defendants. The

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1 The Tin Trumpet, Or Heads and Tales, for the Wise and Waggish: To which are Added, Poetical Selections, Volume 2 (Whittaker & Co., London, 1836).
discussion has highlighted two important limitations, however, for victims using this cause of action to respond to revenge porn. First, its status as a tort means that compensatory damages are unavailable to victims who have not also suffered pecuniary loss. This means that non-pecuniary welfare losses, such as emotional distress, may not be recoverable unless emotional distress is part of an overall award. It will be suggested, then, that one potential reform to circumvent this problem, would be to broaden the circumstances under which exemplary damages can be awarded in tort law, so that a category for serious breaches of privacy is incorporated. This would mean that punitive damages could be made available to victims, irrespective of pecuniary or non-pecuniary loss, where the harm caused by revenge porn is particularly severe. It would also allow all three paradigmatic categories of defendants to be held accountable by being forced to pay punitive damages, not just those defendants who may have calculated to make a profit from victims’ images (Section 4.3(i)). The second limitation identified by Chapter 3 is that victims are unable to pursue a claim for misuse of private information, following the unwanted and unauthorised invasion of their physical privacy, in public. This highlights a worrying gap in provision for victims of creepshots. The chapter proposes, then, that the tort of misuse of private information should be reformed, by extending its scope to incorporate a category of privacy interference that concerns the unwanted access to a person’s physical self (Section 4.3(ii)). The chapter will also identify, where relevant, how the proposed reforms can be justified by the tort theories explored in Chapter 2.

The chapter will explore the proposed reforms to each cause of action, in turn. While the jurisdictional scope for the suggested reforms is limited to England and Wales, the chapter will adopt a comparative approach, by examining how revenge porn is dealt with, both as a breach of confidence and an invasion of privacy, in other common law jurisdictions. By exploring how other common law systems have adapted to respond to revenge porn, through extension of the common law, this will shed light on how extending the common law, in this jurisdiction, might provide victims of revenge porn with better remedies. However, as this thesis ultimately argues, even if implementing the suggested reforms might provide better solutions for victims, a civil law response to revenge porn has its limitations, because there will always be victims who go unvindicated, if the moral reprehensibility of revenge porn is not addressed. The chapter will conclude, then, that in order to address the intrinsic badness of the conduct and to hold defendants morally accountable, a criminal law response is also required, to provide
victims of revenge porn with vindication for the reprehensibility of the conduct, that civil sanctions cannot (Section 4.4).

4.2 Proposals for Reform to The Equitable Remedy of Breach of Confidence

(i) Increase Quantum of Damages for Severe Mental Distress

The analysis in Chapter 3 has identified that quantum of damages awarded for the infliction of mental distress caused by revenge porn can be quite modest. It is now possible to award compensatory damages for mental distress, in equity, in England and Wales, following the Human Rights Act 1998, even if this is not recognised as a psychiatric illness.\(^2\) However, quantum of damages for mental distress is generally quite modest.\(^3\) The reasons for this are threefold: first, there is the fear of people making exaggerated, fraudulent claims; second, there are problems associated with quantifying damages for subjectively experienced emotional distress; and third, is the floodgates argument, which represents the fear of a proliferation of claims for mental distress, should larger awards be made available. Low compensation awards clearly cannot reflect the extent of mental distress caused by revenge porn, where this might fall short of a recognised psychiatric illness, however, meaning that many victims will not feel subjectively adequately vindicated for the distress they have suffered. It is submitted, then, that quantum of damages for mental distress should be increased, to improve this situation.

The constraints in equity, surrounding awards of damages for mental distress, are not confined to England and Wales. It has also proved historically challenging to obtain damages, merely for embarrassment and emotional distress, in the common law jurisdiction of Australia.\(^4\) This jurisdiction has recently seen a development in its equity law, however, as a result of two revenge porn cases, when assessing awards of damages for mental distress falling short of a

\(^2\) *Wilkinson v Downton* (1897) 2 QB 57.

\(^3\) The issue of damages awards for mental distress caused by the dissemination of private information was recently revisited by the High Court in *Gulati and Others v MGN Ltd* [2015] EWHC 1482 (Ch). The awards given in this case were considerably higher than in previous cases, as these were meant to reflect the extent of the privacy invasion and the severity of the intrusion suffered, in each individual case.

\(^4\) Unlike the US, neither Australia or England and Wales recognise a cause of action for the wilful infliction of emotional distress. The tort action for wilful infliction of nervous shock, in both jurisdictions, known as the rule in *Wilkinson v Downton* requires proof of actual damage, such as recognised psychiatric illness.
recognised psychiatric injury. In the first case, *Wilson v Ferguson*,\(^5\) which was heard in the Supreme Court of Western Australia, two co-workers in a romantic relationship had ‘sexed’ intimate images and videos to one another, during the course of their relationship. After the relationship had broken down, the defendant, Mr Ferguson, proceeded to post a number of the explicit images and videos onto his Facebook page. He then made these available to approximately 300 of his Facebook friends, many of whom were also the plaintiff’s work colleagues and social group. The bulk of the plaintiff’s claim for damages was for non-economic loss (apart from her claim for compensation to re-coup for lost wages, as she had been too humiliated to attend work), this being for the embarrassment and emotional distress she had suffered, following the dissemination of her images. While obtaining damages merely for embarrassment and emotional distress had heretofore been challenging, the Court relied on an earlier decision in *Giller v Procopets*,\(^6\) from the Victorian Court of Appeal, to remedy this situation.

*Giller v Procopets* concerned the defendant, Mr Procopets, videotaping himself having sexual relations with the plaintiff, Ms Giller, on a number of occasions, either with, or without, her consent. After Ms Giller had ended the relationship, the defendant began harassing her and threatened to show the videos he had made to her family, friends and work colleagues, in order to humiliate and shame her. The Court found that he had attempted to carry out his threat and had actually succeeded on a number of occasions. The Court held that the plaintiff could recover damages for emotional distress, in her equitable claim, establishing that the claim was clearly one of breach of confidence, as the videotape had been created by the claimant and defendant, while in a de facto relationship, and this had subsequently been non-consensually disclosed by the defendant. The court unanimously agreed that the claimant could recover compensation for her consequent emotional distress as equitable compensation. Using this case as precedent, the Supreme Court in *Wilson* agreed with the Victorian Court of Appeal in *Giller* that:

...[T]he equitable doctrine of breach of confidence should be developed by extending the relief available for the unlawful disclosure of confidential

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\(^5\) [2015] WASC 15.
\(^6\) [2008] VSCA 236.
information to include monetary compensation for the embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.\(^7\)

In assessing quantum, the Court considered it appropriate to award the plaintiff equitable compensation for embarrassment, anxiety and distress, particularly in view of the fact that the images had been disseminated amongst her workplace colleagues and social group. The judge, Mitchell J, considered the relevant factors to be:

1) that the impact of the disclosure on the plaintiff was aggravated by the fact that the release of the images was an act of retribution by the defendant, and intended to cause harm to the plaintiff; and

2) the fact that the plaintiff had not sustained a psychiatric injury, and the amount awarded should not be disproportionate to amounts commonly awarded for pain, suffering and loss of amenity in tortious personal injury cases.\(^8\)

The judge made particular reference to developments in technology and private communications, suggesting that the relief given in response to such breaches of confidence should ‘accommodate contemporary circumstances and technological advances, and take account of the immediacy with which any person can broadcast images and text to a broad, yet potentially targeted, audience.’\(^9\) The plaintiff was awarded general damages of $35,000, as well as those for her economic loss due to taking unpaid leave, amounting to $13,404. The judge clearly wished to ensure that the award for mental distress was commensurate with amounts commonly awarded for pain, suffering and loss of amenity in personal injury cases.

It is proposed, then, and following the example of the Australian Courts, that the equitable remedy of breach of confidence should be extended, in this jurisdiction, to signal the availability of more substantial equitable compensation for mental distress falling short of

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\(^7\) Wilson (n 5) at [83].

\(^8\) Ibid at [85].

\(^9\) Ibid at [81]
psychiatric injury. As Clarke observes, such a development may be seen as giving effect to ‘the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.’\(^\text{10}\) The Supreme Court in *Wilson* made a point of noting that the extension of the remedy of breach of confidence was actually consistent with the development of the law, in England and Wales, under the influence of the Human Rights Act 1998. Making more substantial equitable compensation available to claimants bringing actions for the mental distress suffered by a breach of the duty of confidence, in this jurisdiction, then, could be viewed as a natural progression of the law, under its influence. There is no established mechanism, however, to assess quantum of damages when victims are claiming for purely non-economic equitable compensation. One suggestion to improve this position would be for the courts to employ an objective, reasonableness standard for non-economic losses, not dissimilar to the test used to assess damages for the pain and suffering in personal injury cases. The test would objectively determine, then, what might constitute an acceptable level of damages for the mental distress suffered by revenge porn victims. This would allow revenge porn victims whose distress falls short of recognised psychiatric illness, but who have suffered pain, suffering and loss of amenity, following the dissemination of their images, to have their damages awards quantified in a similar way to individuals in personal injury cases, and thus be awarded similar levels of compensation.

Increasing quantum of damages for mental distress would provide good justification for addressing revenge porn in tort law on the ground of some of the tort theories, discussed in Chapter 2. The underlying principle of economic analysis theory is that the prospect of tort liability deters individuals from engaging in intentionally harmful conduct. It follows, then, if intentionally imposing serious harms on individuals attracts tort liability, and this can be estimated in monetary terms through the payment of compensation to victims, then awarding larger judgments for mental distress could have a greater deterrent effect on prospective offenders, who might be put off at the prospect of paying more than modest amounts of compensation. Increasing quantum of damages for mental distress also provides good justification for responding to revenge porn in tort law on the ground of corrective justice theory. Revenge pornographers who have caused the losses the victims have suffered have a

duty to make good that loss. The motivation for revenge porn claimants, in seeking a remedy, is that the wrong that has been visited on them is rectified. Corrective justice unifies the litigating parties in a correlative structure, meaning that rectification works correlative on both parties. If defendants who have caused severe mental distress to victims do not pay them adequate compensation, this does not adequately correlate the extent of the wrong with the loss, so the wrong is not rectified.

The Australian revenge porn cases have demonstrated the development of the common law, to make adequate equitable compensation available to revenge porn plaintiffs, to compensate them for mental distress they have suffered. It is submitted, then, that the courts, in this jurisdiction, should be similarly less constrained when awarding damages for the mental distress caused by revenge porn. Increasing quantum of damages for mental distress, in equitable claims, by employing an objective, reasonableness standard, similar to the test used to assess damages for the pain and suffering in personal injury cases, would result in all three paradigmatic categories of revenge porn defendants facing the prospect of making larger pay outs to victims. This would hold them properly accountable for the mental distress they have caused, allowing victims to feel subjectively more adequately vindicated than is currently the case. It would also encourage victims to bring claims to court in the first place, rather than letting the offence slide. Crucially, the reform would also address the urgent need that the courts have for the law to respond to revenge porn perpetrated as a result of advancements in technology, by acknowledging the extent of mental distress caused by the widespread disclosure of images, due to the ease and speed at which they can be distributed and the potentially targeted audience they can reach.

(ii) Make Punitive Damages Available for Breaches of Confidence

The second area for potential reform, identified by the analysis in Chapter 3, is the non-availability of punitive damages for equitable wrongs. Equitable remedies have historically functioned on the basis of *restitution in integrum* and focus on restitution for the breach of both equitable and some common law principles. This is different to the role of punitive damages, which is to deter the defendant and vindicate the claimant. While there is no English authority for awarding exemplary damages for an equitable wrong, the scope for awards of these
damages was examined, in 1997, by the Law Commission in its report on aggravated, exemplary and restitutionary damages. One of the key recommendations was that awards of exemplary damages should be extended for any tort or equitable wrong.\textsuperscript{11} The Commission observed that, while no English case had awarded exemplary damages for an equitable wrong, in contrast, authorities in major Commonwealth jurisdictions had done so.\textsuperscript{12} The Commission, therefore, could see ‘no reason of principle or practicality for excluding equitable wrongs from any rational statutory expansion of the law of exemplary damages,’ considering it unsatisfactory to perpetuate the historical divide between common law and equity, without a very good reason for doing so.\textsuperscript{13}

Ultimately, the Law Commission’s recommendations were rejected, due to fundamental problems concerning the relation between civil and criminal procedure and the rationale for punishment and civil remedies.\textsuperscript{14} The matter of making exemplary damages awards available for claimants bringing breach of confidence actions, did, however, come under judicial consideration in \textit{Max Mosley v New Group Newspapers Ltd}.\textsuperscript{15} In this case, the claimant sought exemplary, as well as compensatory damages, in an action for breach of confidence (or, the extended version of the action based on rights of privacy, as protected by Article 8 of the European Convention of Human Rights (ECHR)). Eady, J held, however, that exemplary damages should not be made available for breach of confidence, at least not in cases concerning the Article 8 right to privacy. The reason for this, the judge averred, is that an award of exemplary damages, in this context, would be tantamount to a ‘fine’ on the media. This, he considered, should not be a justified limitation on the countervailing right to freedom of expression, as protected by Article 10 of the ECHR, due to the ‘chilling effect’ this would have on freedom of press speech.\textsuperscript{16} As Tomlinson observes, however, it would be surprising if these damages were, in all circumstances, in violation of the right to freedom of expression,

\textsuperscript{11} Law Commission \textit{Aggravated, Exemplary and Restitutionary Damages} [1997] EWLC 247(5) para 5.44 (19(b)).
\textsuperscript{12} Ibid, para 5.54. These include Australia (in limited cases), Canada and New Zealand.
\textsuperscript{13} Ibid, para 5.55.
\textsuperscript{15} [2008] EWHC 1777 (QB). See chapter 4 for a detailed analysis of this case.
\textsuperscript{16} Mosley (n 15) at [173] – [181] per Eady, J.
considering that they are available in the United States and Canada, countries which have strong constitutional protections for freedom of speech.\textsuperscript{17}

The question of whether exemplary damages can be awarded in equity has also come under consideration in the common law jurisdiction of New Zealand. Here, the Court of Appeal confirmed, in\textit{Aquaculture Corporation v New Zealand Green Mussel Co Ltd},\textsuperscript{18} that punitive damages \textit{can} be awarded for equitable wrongs. In reaching his decision, Somers J posited that equitable remedies could not be intentionally punitive in nature as ‘equity and penalty are strangers,’\textsuperscript{19}. He considered, therefore, in context of remedies for breach of the equitable duty of confidence, that a full range of remedies should be made available, including punitive damages, regardless of whether they originated in the common law, equity or statute.\textsuperscript{20} Somers J’s opinion was echoed by Gault J, in the Court of Appeal case of\textit{TV3 Network v Eveready New Zealand}.\textsuperscript{21} In this case, the judge was also of the view that courts should have available the full range of remedies, where appropriate, even if this involved a ‘process of fusion of [common] law and equity,’ where this best served the interests of justice.\textsuperscript{22} Interestingly, the impact on the right to freedom of expression surrounding the issue of availability of exemplary damages for breach of confidence has never been considered in New Zealand case law.\textsuperscript{23}

The idea of making punitive damages available for breaches of the equitable duty of confidence has been opposed, in this jurisdiction, however, due to continuing concerns about the impact of these on freedom of expression. In his report, following the media hacking enquiry of 2012,\textsuperscript{24} Lord Justice Leveson recommended that punitive damages should be made available for equitable wrongs, advising that exemplary damages ‘should be available in actions for breach of privacy, breach of confidence and similar media torts.’\textsuperscript{25} He even suggested that the extended availability of exemplary damages should cover breaches of privacy and confidence

\textsuperscript{18} [1990] 3 NZLR 299.
\textsuperscript{19} Ibid at [302].
\textsuperscript{20} Ibid at [301].
\textsuperscript{21} [1993] 3 NZLR 435.
\textsuperscript{22} Ibid at [447].
\textsuperscript{24} Leveson Report (No 0780 2012–13) (29 November 2012).
\textsuperscript{25} Leveson Report Vol IV, 1512, para 5.12.
by anyone, not just the media. Lord Justice Leveson’s recommendations have been the subject of much criticism, however, many commentators suggesting that these are contrary to Article 10, and a means of routinely imposing punishment and fines on publishers who make mistakes. They have, therefore, never been implemented, due to press pressure. However, as Butler and Miller observe, in jurisdictions which have rights instruments that protect the right to freedom of expression, the effect of an award of exemplary damages on that freedom should be considered on a case-by-case basis, and as ‘another ingredient to throw into the discretionary mix.’ The impact on freedom of expression should not be the only consideration, the authors submit, when the circumstances of the case warrant an award of exemplary damages, over and above pure compensatory relief.

As mentioned earlier, one of the key recommendations of the Law Commission, in its report on aggravated, exemplary and restitutionary damages, was that exemplary damages should be made available for any tort or equitable wrong. In the report, the Law Commission also advanced the idea of having a single, general test that would isolate especially culpable and punishment-worthy examples of wrongful conduct. Taking inspiration from other common law jurisdictions, the Commission suggested that the phrase ‘[having] deliberate and outrageous disregard’ of the plaintiffs’ rights, which is used in Australia, Canada and the United States, should be used to describe when exemplary or punitive damages are available. The test for ‘outrageous conduct’ actually derives from the Commonwealth and US case law, which the Commission acknowledges in its report. The American Law Institute’s *American Restatement (Second) of Torts [1979]*, section 908, reads as follows:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

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26 Ibid.
27 Tomlinson (n 17).
28 Butler and Miller (n 23) 245.
29 Ibid.
30 Law Commission Report (n 11) para 5.44 (19 (b)).
31 Ibid, para 5.46.
32 Ibid.
33 Ibid para 5.46 fn 32.
(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Had a similar test been implemented, following the Law Commission’s suggestion, then concerns about Leveson’s recommendation that awarding punitive damages in equity could have a chilling effect on freedom of press speech, would have been unfounded. As Tomlinson remarks, based on a test for ‘outrageous conduct,’ no particular category of defendant would have been singled out.34 Had the Law Commission’s proposal for such a test been implemented and Leveson’s recommendation been followed up, then, contrary to fears, the media in the hacking enquiry would not have been unfairly penalised. Anyone who misused private information, or who breached a confidence, would have been tried on the facts and judged objectively on the basis of the ‘outrageous conduct’ test, to establish if they had shown ‘deliberate and outrageous disregard’ of claimants’ rights. If so, then, and only then, could defendants have been potentially found liable to pay exemplary damages to affected individuals, circumventing fears that these were being arbitrarily used to impose punishment and fines unfairly on publishers.

It is proposed, then, and taking inspiration from the decisions of the New Zealand Court of Appeal, in *Aquaculture* and *TV3 Network*, that the courts, in this jurisdiction, should similarly be able to find defendants liable to pay exemplary damages, in equity, if the circumstances warrant it and this is the best remedy the law can offer. While the impact of this on defendants’ right to freedom of expression ought to be considered, this should only be one of many factors under consideration, where claimants have suffered a particularly egregious rights invasion. One suggestion for deciding whether the extent of the harm caused by particular conduct warrants an award of exemplary damages, would be to implement the Law Commission’s idea of a single, general test, which would isolate especially culpable and punishment-worthy examples of wrongful conduct. If such a test were implemented, this would provide revenge

34 Tomlinson (n 17).
porn claimants with the possibility of claiming punitive damages, if, when judged objectively on the facts, the Court decides that defendants have shown such a deliberate and outrageous disregard for claimants’ rights, that these should be made available to them.

From a theoretical perspective, making exemplary damages available in equity provides good justification for addressing revenge porn in tort law, on the grounds of economic analysis and civil recourse theory, as discussed in Chapter 2, but provides less justification for addressing revenge porn, on the ground of corrective justice theory. Economic analysis theory explains the availability of punitive damages for intentional torts, as these give greater material incentives for prospective actors to avoid such sanctions. Incorporating punitive damages into revenge porn settlements could have a greater deterrent effect if the prospect of mere compensatory liability is not enough to deter potential offenders from acting. It also provides good justification for addressing revenge porn in tort law, on the ground of civil recourse theory, a distinct but related form of corrective justice theory. Underpinning civil recourse theory is the idea that liability for tort law should be on a best-fit basis for the rights invasion claimants have suffered. It follows that if revenge porn victims have exemplary damages made available to them, in equitable settlements, this would provide them with the best remedy that the law can offer. As the New Zealand Court of Appeal has demonstrated, in *Aquaculture* and *TV3 Network*, and congruent with civil recourse theory, mingling law with equity to make punitive damages available, in some cases, is the best solution. Making exemplary damages available for breaches of confidence does not provide good justification for addressing revenge porn in tort law, on the ground of traditional versions of corrective justice theory, however. This is because corrective justice theory cannot explain the diversity of remedies in tort law, despite the fact that tort law has many remedies available besides compensatory relief. The theory cannot explain, then, if compensation cannot make good, or eradicate certain types of pain and loss, such as the pain and loss caused by emotional trauma and psychological suffering, why punitive damages should be available, even if this remedy better serves to eradicate the pain and loss caused by certain kinds of harm.

It is submitted, then, that making exemplary damages available for breaches of confidence, in this jurisdiction, would offer a more satisfactory remedy for revenge porn victims, than is currently available. Holding defendants in all three paradigmatic categories of revenge porn
defendants to account, by forcing them to pay exemplary damages, would allow victims to feel subjectively more adequately vindicated than receiving mere compensatory damages. Additionally, the prospect of larger judgments would act as a deterrent for would-be offenders, creating disincentives for prospective revenge pornographers to act, by sending a strong, normative message that breaching a confidence in this way is inherently wrong and deemed unacceptable by society.

4.3 Proposals for Reform to The Tort of Misuse of Private Information

(i) Broaden the Categories Within Which Exemplary Damages Can be Awarded in Tort Law

The first limitation identified in Chapter 3, for revenge porn victims seeking redress, in the civil law, using the tort of misuse of private information, is that, as with breach of confidence, damages awarded for non-pecuniary losses, such as mental distress, are generally quite modest. Although this situation is somewhat mitigated by the fact that exemplary damages are available, following the recent classification of misuse of private information as a tort distinct from breach of confidence, defendants cannot be found liable to pay them, if their conduct falls outside of one of the three restrictive categories laid down by the House of Lords, in Rookes v Barnard. It is suggested, then, that in order to get around this issue, the categories under which exemplary damages can be awarded in tort law, should be broadened, to incorporate a category for serious breaches of privacy. Despite the fact that the categories were decided by the Lords in Rookes v Barnard, over fifty years ago, they remain unchanged today. This means that exemplary damages can only be awarded to revenge porn victims where

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35 In Campbell v MGN Ltd [2004] 2 AC 457, Naomi Campbell received £2,500 plus £1,000 aggravated damages to compensate her for injuries to her dignity and pride caused by the publication of details of her drug therapy sessions and photographs of her leaving these sessions; and in Weller v Associated Newspapers [2014] EWHC 1163, £5,000 was awarded to a 16-year-old girl for publication of unauthorised photographs, with £2,500 being awarded to her younger siblings.
37 [1964] AC 1129 at [1126] – [1127]. These are: (i) where there was oppressive, arbitrary or unconstitutional actions by servants of the government; (ii) where the defendant's conduct was 'calculated' to make a profit for himself which exceeded the compensation payable to the plaintiff.; and (iii) where a statute expressly authorised their award.
defendants’ conduct meets the second *Rookes v Barnard* requirement. This is relevant, as where defendants have calculated to make a profit from victims’ images, which exceeds the amount of compensation payable to them, defendants can be found liable for exemplary damages. This category would include, for example, primary disseminators who have made a profit through ‘sextortion’ (where victims are faced with the threat that their images will be disseminated unless they pay their blackmailers) or Internet intermediaries, who have hosted victims’ images on dedicated websites, in order to make a profit from advertising revenue or subscription fees.

Where defendants have not calculated to make a profit from the images, however, and their motivation is not financial gain, but, rather, is borne out of a desire to shame and humiliate their victims, these defendants cannot be forced to pay punitive damages, even if this is the most appropriate remedy the law can offer. This means that for victims who have not suffered a recognisable psychiatric injury and whose images, also, have not been disseminated by defendants who have calculated to make a profit from them, quantum of damages can be quite modest. Understandably, some victims may not feel this adequately vindicates them for the extent of the rights invasion they have suffered. Therefore, extending the common law to broaden the current restrictive categories by including a category for serious breaches of privacy, could resolve this problem as it would mean that exemplary damages could be awarded to more revenge porn victims. Evolving the common law to increase the availability of exemplary damages, in this way, would not only help a greater number of victims receive an acceptable level of damages, but would also address the urgent need for the law to respond to the developments in technology and communications, which have significantly facilitated the ease and speed at which this type of serious privacy invasion is perpetrated.

The argument for extending the availability of punitive damages, in England and Wales, for serious invasions of privacy, by defendants whose conduct falls outside the *Rookes and Barnard* categories, is not new. Before the landmark decision in *Google v Vidall-Hall*,\(^\text{38}\) which confirmed the classification of misuse of private information as a standalone tort,\(^\text{39}\) the

\(^{38}\) [2015] EWCA Civ 31.

\(^{39}\) The case also confirmed that damages for distress-alone claims could be made under Section 13(2) of the Data Protection Act 1998.
availability of exemplary damages in the privacy context was explored in *Mosely v NGM Ltd.*[^40] Here, Eady J held that they could not be awarded, on the basis that breach of confidence was not a tort. A recent Supreme Court decision in *PJS v News Group Newspapers Ltd.*,[^41] re-examined this position, however. Although the legal position was not clarified, the Court did note that awards of exemplary damages for misuse of private information claims remained ‘open to argument at higher levels.’[^42] The Court did not rule out the possibility of awarding exemplary damages for misuse of private information, in all circumstances, where this would be ‘necessary and proportionate in order to deter flagrant breaches of privacy and provide adequate protection for the person concerned.’[^43] *PJS v News Group Newspapers Ltd.* primarily concerned the award of an injunction against media publication of a celebrity ‘kiss-and-tell’ type story, but the possibility of obtaining an award of exemplary damages against a publisher who was not an approved regulator, was also raised. This would be possible, the judges considered, under a statutory provision to award exemplary damages under sections 34-46 of the Crime and Courts Act 2013, if the adjudicating court was satisfied that a publisher’s conduct had shown such ‘a deliberate or reckless disregard of an outrageous nature for the claimant’s rights…that…the conduct [was] such that the court should punish the defendant for it…and that…other remedies would not be adequate to punish that offender.’[^44] While no approved regulator was in existence at the time,[^45] meaning that the section had no application in the instant case, the Court was clearly willing to re-visit the position on exemplary damages, for serious invasions of privacy. In his dissenting judgement, Toulson J even stated that he did not consider *Mosley* to be ‘the final word on the subject,’ disagreeing with Eady J, in *Mosley*, that exemplary damages could not be awarded in an appropriate case.[^46] It is only recently that *Google v Vidall-Hall* confirmed the classification of misuse of private information as a standalone tort, meaning that exemplary damages are even available at all, so perhaps it is not inconceivable that in the future, the courts might be willing to extend the tort once again, by incorporating a category for serious breaches of privacy. In doing so, this might better reflect

[^42]: Ibid at [42] per Lord Mance.
[^43]: Ibid at [92] per Lord Toulson.
[^44]: Ibid at [42] per Lord Mance.
[^45]: The only press regulator to have acquired approved status at the time was Impress, which was officially recognised as an approved regulator, under a royal charter in October 2016. However, many major newspapers had signed up to a rival body, the Independent Press Standards Organisation (IPSO), which had not applied for official approval. Amendments to the Data Protection Bill, which brought the EU’s General Data Protection Regulation into UK law on 26th May 2018, now means a newspaper has to agree to abide by an editorial code adopted by an approved regulator.
[^46]: *PJS v MGN* (n 41) at [92].

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the kind of privacy invasions perpetrated online. As the Supreme Court rightly acknowledged in *PJS*, ‘the internet and other electronic developments are likely to change our perceptions of privacy as well as other matters - and may already be doing so.’

One common law jurisdiction that has recently demonstrated a willingness to expand the scope of its common law to accommodate for the types of privacy invasions facilitated by the Internet, is Ontario, Canada. One of the central aims in doing so has been to deter ‘a new culture of humiliation online.’ In 2015, the Ontario Privacy Commission chose ‘Reputation and Privacy’ as one of the Office's privacy priorities for the next five years, focusing its attention on both the reputational risks stemming from the vast amount of personal information posted online, and on existing and potential mechanisms for managing these risks. No doubt as a result of this, in 2016, the Ontario Superior Court of Justice took the unprecedented opportunity to extend privacy law in its jurisdiction, in the revenge porn case, *Doe v N.D.* The facts of the case concerned the defendant, a former boyfriend of the plaintiff, who had received an intimate video of her that she had made for him (after he had repeatedly begged her to do so), which he subsequently disseminated online, amongst members of their social circle. At Court, despite the fact that the plaintiff was already entitled to two existing remedies, the tort of breach of confidence and the tort of intentional infliction of emotional distress, Justice Stinson took the opportunity to extend the scope of existing privacy law, to accommodate for this flagrant breach of the plaintiff’s sexual privacy. For inspiration, the judge turned to one of the American torts, ‘public disclosure of embarrassing private facts about the plaintiff,’ finding this to be a good match for the facts in hand. The American tort reinforces the idea of a sexual relationship being an entirely private matter, and there is an actionable invasion of privacy, should it become publicised. The Ontario Superior Court duly adopted the elements of the cause of action with only a slight modification. As adapted, the test for the new tort requires that: (i) the defendant gave publicity to a matter concerning the private life of the plaintiff; (ii)

47 Ibid at [70] per Lord Neuberger.
50 *Jane Doe 464533 v N.D.*, 2016 ONSC 541.
51 Ibid at [42].
the matter publicised, or the act of publication itself, would (a) be highly offensive to a reasonable person and (b) is not of legitimate concern to the public. 52

Despite the fact that the case was brought under Canadian Simplified Procedure, which limits the maximum damages award to $100,000, the judge saw fit to award the plaintiff the maximum amount available and the full indemnity of costs. 53 The plaintiff was duly awarded: (i) $50,000 in general damages, based on evidence of severe emotional and psychological harm; 54 (ii) $25,000 in aggravated damages, because the trust reposed by the plaintiff in the defendant that he would not reveal the video was breached, this affront to their relationship making the impact of his actions more hurtful and painful for the plaintiff; 55 and (iii) $25,000 in punitive damages, on the basis that such an award may be appropriate ‘where the defendant has acted in a high-handed or arrogant fashion or has recklessly disregarded the plaintiff’s rights or the potential impact of the defendant’s intentional conduct.’ This, in Justice Stinson’s opinion, seemed an apt summation of the defendant’s conduct, in the instant case, particularly in view of his blameworthiness and because he had acted with malice and shown no remorse; he had also appeared insolent and offered no apology. 56 The judge additionally highlighted the need for deterrence, remarking that while the case was novel, it should serve as a precedent to dissuade others from engaging in similar harmful conduct, thus justifying an award of punitive damages. 57 Importantly, the case created a precedent for other individuals in Ontario to be able hold their perpetrators accountable, by forcing them to pay punitive damages for the harm caused by the dissemination of their private, sexual images.

In justifying these awards, Justice Stinson observed that the plaintiff’s counsel had likened the nature of revenge porn to cases involving claims arising from physical sexual battery, ‘with its attendant psychological impact and consequences.’ 58 Revenge porn, he claimed, in many ways, was even worse, as not only was the plaintiff’s personal and sexual integrity violated through the posting of the video, but the violation was possibly still ongoing, because the video may

52 Ibid at [46] (modification emphasised).
53 Ibid, 5.
54 Doe v N.D. (n 50) at [58].
55 Ibid at [59].
56 Ibid at [60] – [61].
57 Ibid at [62].
58 Ibid at [51].
well have been copied and stored and could therefore still be being viewed. In recognising the need to respond to this pressing modern issue, particularly because of the significant non-pecuniary harms caused to women, Judge Stinson took a valuable opportunity to extend the common law, to provide a tailored remedy in his jurisdiction, which could attract significant damages, including punitive damages, for victims of revenge porn. In creating the new tort of public disclosure of embarrassing private facts, MacKenzie observes that Justice Stinson’s decision in Doe runs counter to the tradition of judicial constraint, given that the plaintiff was already entitled to a remedy using two alternative torts. However, as a Superior Court justice, free from the burden of establishing a binding precedent governing future cases, Justice Stinson seized an opportunity to push the law and provide a remedy for a serious modern problem. MacKenzie submits that Justice Stinson’s decision to recognise a new tort, on the case before him, was laudable, and an exemplary model of disciplined law making. Operating entirely within the constraints the common law places on judges, Justice Stinson was able to capitalise on the role of judges within the judicial hierarchy, in order to expand the law in response to developments in the real world.

It is proposed then, and taking inspiration from Ontario Superior Court of Justice, that the common law should also be developed, in England and Wales, when an appropriate case arises, to reflect the technological developments that have exponentially increased the means by which personal, private information can be misused online. It is suggested that this could be achieved by extending the scope of privacy law, by broadening the existing range of categories within which defendants can be forced to pay punitive damages. This could be done by incorporating a category for serious breaches of privacy, which would allow exemplary damages to be made available to a greater number of claimants. It is proposed that a sensible way of implementing this reform would be to establish an objective general test, similar to the one used to decide whether exemplary damages should be available for breach of confidence, which would isolate especially culpable and punishment-worthy privacy invasions. This would enable the courts to consider exemplary damages, on a case-by-case basis, for all revenge porn claimants,

59 Ibid.
61 Ibid.
62 See section 4.2(ii).
particularly where the mental distress caused by the dissemination of their images is severe but is not recognised as a psychiatric injury, so modest compensation would not provide an adequate response. This reform would also be consistent with the suggestion mooted by the Supreme Court in *PGS v NGN*,\(^6\) that exemplary damages should be made available in circumstances where other remedies would not be adequate, because defendants had shown such a deliberate or reckless disregard for claimants’ rights.

Viewed from the perspective of some of the tort theories discussed in Chapter 2, holding defendants in all paradigmatic revenge porn categories to account for seriously breaching a person’s privacy, by forcing them to pay exemplary damages, would provide better justification for addressing revenge porn in tort law, on the ground of economic analysis theory, than only making some defendants pay them. This is because, if the prospect of mere compensatory liability is not enough to deter prospective offenders from disseminating revenge porn, then incorporating punitive damages into more revenge porn settlements might create a greater deterrent effect. The reform would also provide good justification for addressing revenge porn in tort law on the ground of civil recourse theory. This theory holds that liability for tort law should be on a best-fit basis for the rights invasion that the claimant has suffered. Therefore, if forcing defendants in all categories to pay exemplary damages to their victims is the best remedy the law can offer, then according to this theory, these should be made available in all circumstances, regardless of whether or not defendants had calculated to make a profit from victims’ images.

It is submitted, then, that increasing the availability of punitive damages for revenge porn dissemination, by forcing all paradigmatic categories of revenge porn defendants to pay them, regardless of any financial motive, would not only provide a greater number of victims with more satisfactory settlements, allowing them to feel subjectively more adequately vindicated, but would also create a greater deterrent effect, where the prospect of mere compensatory liability would not deter prospective offenders. The reform would also, importantly, demonstrate that the common law is willing to adapt to respond to the kind of wrongdoing perpetrated online, in the modern technological age, sending the strong normative message that

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misusing a person’s private information online is inherently wrong and deemed unacceptable by society. This reform would provide a more adequate response, than is currently available, for revenge porn victims wishing to use the tort of misuse of private information, to seek redress in the civil law regime.

(ii) Incorporate a Category of Privacy Interference for Unwanted Physical Privacy Invasions

The second limitation identified by the discussion in Chapter 3, is that for victims of a variation of revenge porn abuse, referred to as ‘upskirting’ or ‘downblousing,’ the tort of misuse of private information cannot be used to bring an action against individuals who have photographed or filmed their private bodily regions, in public places. Currently, there is no actionable breach of privacy for the taking of these creepshots in the civil law regime. Moreham outlines the limitations of using existing privacy law for this kind of conduct, explaining there are actually two distinct categories of privacy interference: one which concerns the misuse of private information (informational privacy), and another, which concerns the unwanted invasion to a person’s physical self. The current common law focuses exclusively on the former, meaning that it fails to accommodate for interferences to physical privacy interests effectively. This state of affairs is not fully in accordance with the decisions coming from the European Court of Human Rights, as the European Court has found that, in some circumstances, Article 8 can actually protect some images of individuals taken in public places. However, this position has not been closely adhered to in the domestic courts, meaning that victims of ‘upskirting’ cannot currently use their Article 8 right to bring an actionable claim using privacy law, for this kind of intrusion into their physical space.

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64 The general rule, where images are obtained in public spaces, is that there is no right of privacy when a person is photographed on a public street, except in exceptional circumstances, these being (i) to prevent additional publicity being given due to the fact that they were present on the street due to particular circumstances (Campbell v MGN Ltd [2004] UKHL 22); or (ii) to protect the privacy rights of a child (Murray v Big Pictures (UK) Ltd. [2008] EWCA Civ 446).


Wacks has raised some concerns about limiting the Article 8 right to the misuse of private information only, as this means privacy law in England and Wales can only accommodate for violations of certain kinds of privacy interests. He questions, if ‘privacy’ is protected by Article 8, then why is ‘intrusion excluded, when normally criminal acts such as bugging, tapping and hacking are no less worthy of protection than the publication of private facts? He argues that this is not consistent with decisions coming out of the European Court of Human Rights, which has not hesitated to incorporate intrusion under the wing of Article 8, and moreover, it has even counselled that ‘private life’ should not be construed restrictively. As Wacks observes, the European Court actually held, in Khan v United Kingdom, that the use of covert audio and video recording equipment may amount to an interference with an individual’s right to a private life. This aspect of the decision, he notes, was not cited in Campbell v MGN Ltd, the leading case which led to a recognition of the right to privacy, in England and Wales, and the development of the tort of misuse of private information. While the European Court has not found that the monitoring of an individual in a public place by the use of photographic equipment, without recording the data, gives rise to an actionable breach of privacy, it has found, however, that ‘the recording of such data and the systematic or permanent nature of the record’ may give rise to an interference with an individual’s private life. Unfortunately, as Wacks observes, this view does not appear to have ‘cut ice’ with the English courts, a position which means that for victims of creepshots (whose images may be captured and permanently recorded, for example, on public transport or in the supermarket), there is currently no access to recourse for this egregious infringement of their privacy.

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67 Moreham (n 65) 351 describes these as sensory physical invasions, a list to which she also adds covert voyeuristic photography.
68 Raymond Wacks, Privacy and Media Freedom (Oxford University Press, London, 2013) 246
69 Ibid: the ECtHR has found on several occasions that the recording of data and the permanent nature of the record may amount to an interference with an individual’s private life: e.g. Allan v United Kingdom (Application no. 48539/99) (2003) 36 EHRR (bugging); Doerga v Netherlands (Application no. 50210) (2005) 41 EHRR (telephone-tapping); Peck v United Kingdom (Application 44647/98) (2003) 36 EHRR 41 (unauthorised or unwarranted videoing).
70 (Application no. 35394/97) (2001) 31 EHRR 45.
72 Wacks (n 68)) 246.
73 Ibid. For example, see Peck v United Kingdom (Application 44647/98) (2003) 36 EHRR 41, concerning unauthorised or unwarranted videoing.
74 Wacks (n 68) 246.
While the activity of ‘upskirting’ is not new, it is the increasing unobtrusiveness of recording devices, as a result of technological developments, which is compounding the problem, as victims are often completely oblivious that they are even being photographed or filmed and that their physical privacy is being invaded in this way. Once they become aware of this intrusion, however, they have no access to recourse in privacy law. It is submitted, then, that the courts should extend the tort of misuse of private information, when a suitable case arises, to recognise that a person’s reasonable expectation of privacy can be breached by the unwanted recording of their private bodily regions in public, even where this information is not subsequently disseminated. Moreham supports this view, suggesting that in both physical and informational privacy cases, the fundamental objection is the same: the defendant is obtaining unwanted access to a person by interfering with his or her reasonable expectation of privacy. She suggests that there is no reason why the courts should not extend the reasonable expectation of privacy test ‘to include situations where the claimant has simply been looked at, listened to, or recorded without leave,’ thus recognising that a reasonable expectation of privacy can be breached, by unwanted looking, listening or recording, without subsequent dissemination of the material. She submits that, following Campbell, while the courts are right to suggest that people in humiliating or traumatic situations should be given special treatment, it is important to distinguish between humiliating and embarrassing situations, which victims have created themselves, and those which have been forced upon them, against their wishes. She argues that the English courts should recognise this distinction, and even take it one step further, by presuming that a person has a reasonable expectation of privacy in any situation where he or she had no choice but to experience an intimate, humiliating or traumatic event in public. Undoubtedly, victims of creepshots who have experienced the humiliation and trauma of having their intimate physical space invaded in public, without their consent, should be able to presume that they have an actionable breach of privacy against this unwanted intrusion.

75 It predates even photography itself, the 1767 Rococo painting, ‘The Swing’ by Jean-Honore Fragonard depicting a playboy baron, perfectly positioned to look up a maiden’s skirt, while she is on her swing.
76 Moreham (n 65) 373-4.
77 Campbell v MGN Ltd [2004] UKHL 22.
78 Supermodel, Naomi Campbell, was photographed after leaving a support group meeting for Narcotics Anonymous, having previously denied publicly that she was addicted to drugs. The tabloid newspaper, The Daily Mirror, published the photographs, after which Campbell sued the newspaper for damages. The case reached the House of Lords, which held that while the public undoubtedly had the right to be made aware that they had been misled regarding the claimant’s drug abuse, this was not enough reason to deprive her of her right not to have certain private facts relating to her physical or mental health or condition disclosed freely by the press.
80 Ibid, 625.
Moreham suggests that the horizontal effect of Article 8 might provide the impetus for reforming the tort of misuse of private information, so that the common law can be extended to protect against breaches to an individual’s physical privacy. She submits that the Article 8 right to respect for a private life extends well beyond the protection of private information, and that the United Kingdom also has positive obligations to protect other privacy interests, such as visual and audio surveillance, bodily searches and unwanted photography.\textsuperscript{81} She suggests that when an appropriate case arises, the courts should take the opportunity to extend the tort of misuse of private information to recognise a person’s reasonable expectation of privacy against unwanted watching, listening and recording, irrespective of whether the information obtained is further disseminated.\textsuperscript{82} The focus of the extended tort, she suggests, should be on the intrusiveness of these unwanted activities and predicated on the need to protect the human values of autonomy and dignity.\textsuperscript{83} The unwanted intrusion into individuals’ physical space by watching, listening and recording has been increasingly facilitated by advancements in technology. This is due to the increasing unobtrusiveness of recording and listening devices, creating an exponential problem, which all common law jurisdictions have had to adapt and respond to, to better protect their citizens.

Two common law jurisdictions have recently expanded the scope of their privacy law to accommodate for unwanted privacy intrusions, as a result of technological advancements. In recognition of the constitutional protection afforded to privacy interests by the Supreme Court of Canada, the Ontario Court of Appeal created a new tort for invasion of privacy, ‘intrusion upon seclusion,’ in Jones \textit{v} Tsige,\textsuperscript{84} a case which concerned the repeated, unauthorised access of the claimant’s bank records. In creating the new tort, the Court specifically wished to respond to privacy invasions perpetrated online.\textsuperscript{85} The central rationale for the new cause of action was the recognition of the unprecedented power to capture and store vast amounts of

\begin{itemize}
  \item \textsuperscript{81} Moreham (n 65) 374.
  \item \textsuperscript{82} Ibid, 375.
  \item \textsuperscript{83} Ibid.
  \item \textsuperscript{84} 2012 ONCA 32 at [67]; [2012] OJ No 148.
\end{itemize}
personal information using modern technology. For guidance, the Court turned to North America and the four privacy torts set out in the *American Restatement (Second) of Torts* [2010], finding the tort of intrusion upon seclusion to be the most relevant to the facts in the case in hand. The new form of civil claim created by the Ontario Court of Appeal thus protects a person from an intentional, unjustifiable intrusion by another into their private affairs, even where there is no resulting financial harm. In creating the tort, the Court recognised the need for the common law to evolve, in line with technological advancements, to protect against growing threats in the digital age to an individual’s privacy in sensitive, personal information.

Another common law jurisdiction, New Zealand, has also not shown reluctance in expanding its privacy law to accommodate for technological advancements. This jurisdiction has recently recognised a tort of intrusion, in its common law, due to concerns about the increasingly covert means by which individuals can make surreptitious recordings of others. In *C v Holland*, the judge, Whata J, took the opportunity to extend the established common law tort of invasion of privacy, a tort previously recognised by the Court of Appeal in *Hosking v Runting*, to create tortious liability for the unwanted intrusion into a person’s private space. The facts of the case concerned the plaintiff, C, who was an occupant in a house owned by her boyfriend and the defendant, Mr Holland. The defendant had surreptitiously installed a covert recording device in the roof cavity above the shower and toilet, in order to make video recordings of the plaintiff, while she was showering. When she discovered the videos, she was deeply distressed. The critical issue to be determined by the court was whether an invasion of privacy of this type, without publicity, or the prospect of publicity, was an actionable tort in New Zealand. While the established tort in *Hosking* depended on publicity being given to private facts, Whata J did not hesitate in recognising a separate intrusion tort, as a logical adjunct to the *Hosking* tort, which did not depend on any requirement for publicity to be given to private facts. As Wacks

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87 This in turn relies on the seminal legal article by William L Prosser (Privacy, 48 Cali L Rev 383, 388–89 (1960)) which identifies four distinct privacy torts: Intrusion upon seclusion or solitude, or into private affairs; public disclosure of embarrassing private facts; publicity which places a person in a false light in the public eye; and appropriation of name or likeness.
88 Ibid at [75].
observes, Whata J explicitly eschewed English jurisprudence, even commenting that the courts in the United Kingdom had remained steadfast in their refusal to acknowledge a tort of intrusion into privacy. The judge turned instead, as had the Ontario Court of Appeal in *Jones v Tsige*, to North America, and the tort of ‘intrusion upon seclusion,’ in support of his decision.

Accordingly, a new tort of intrusion upon seclusion has become part of New Zealand law. The elements of the new tort are:

(a) An intentional and unauthorised intrusion;

(b) Into seclusion (namely intimate personal activity, space or affairs);

(c) Involving infringement of a reasonable expectation of privacy;

(d) That is highly offensive to a reasonable person.

Intentional connotes an affirmative act, not an unwitting or simply careless intrusion. ‘Unauthorised’ excludes consensual and/or lawfully authorised intrusions. Further, not every intrusion into a private matter is actionable. The reference to intimate personal activity acknowledges the need to establish intrusion into matters that most directly impinge on personal autonomy. A right of action only arises in respect of an intrusion that is objectively

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93 Wacks n (68) 247.
96 *Restatement (Second) of Torts (1977)* at § 652B.
97 [2012] NZHC 2155 at [9a].
98 Ibid at [94].
99 Ibid at [95].
determined due to its extent and nature, to be offensive by causing real hurt or harm. A legitimate public concern in the information may provide a defence to the privacy claim.  

Interestingly, in his judgement, Whata J held that a one-step reasonable expectation of privacy test, comparable to the Article 8 test applied in the United Kingdom, was not sufficiently prescriptive, in the instant case, considering that ‘the capacity for conflict between the right to seclusion and other rights and freedoms [was] very significant.”  He believed that this conflict demanded a ‘clear boundary for judicial intervention.’ In establishing the new tort, Whata J differentiated between informational privacy invasions caused by the unwanted disclosure of private information, and privacy invasions caused by unwanted access to a person’s physical self. The tort’s application to the taking of creepshots is immediately apparent: it would not be challenging for any New Zealand court to objectively determine that covertly taking photographs or filming up a person’s skirt or down their blouse, in a public space, was an intrusion upon their seclusion and a direct impingement on their personal autonomy, both of which are offensive and capable of causing real hurt or harm. The creation of this new tort means that victims of creepshot photography in New Zealand can now seek redress for this kind of physical privacy invasion.

It is proposed, then, and taking inspiration from the New Zealand Court of Appeal, that the common law in England and Wales should also be extended, to provide for unwanted physical privacy invasions when a suitable opportunity arises. It is suggested that a practical way of doing this would be to extend the tort of misuse of private information, to create a new arm, which would protect invasions of physical privacy. The new arm would co-exist alongside the existing arm, which protects the publication of private information. Both elements of the tort would require the courts to ask the same two questions: whether the claimant has a reasonable expectation of privacy in respect of the private information in question; and whether the defendant’s countervailing right to freedom of expression trumps the claimant’s right to privacy? By incorporating a category of privacy interference into the existing tort which concerns the unwanted access to a person’s physical self, this would create an actionable breach

100 Ibid at [96].
101 Ibid at [97].
102 Ibid.
of privacy for the unauthorised intrusion of people’s intimate personal space, in public places. The extended tort would thus provide victims of creepshot photography with an actionable breach of privacy against this unwanted intrusion into their private, physical space. Reforming the tort of misuse of private information in this way would also alter the conception that breaches of privacy, as understood by English common law, solely concern the acquisition or dissemination of private information. The proposed reform would also bring the law into line with European jurisprudence, many decisions of the European Court having previously confirmed that the Article 8 right not only protects private information which has been published, but also protects information that has been collected or stored (even if that information is not subsequently used or disseminated).  

From a theoretical perspective, the suggested reform is supported by some of the tort theories discussed in Chapter 2. The addition of a new arm to the tort of misuse of private information, to protect individuals against unwanted intrusions into their intimate, personal space, can, first, be justified by economic analysis theory. The underpinning principle of economic analysis is that the point of liability is to provide people with incentives to take cost-justified precautions. Economic analysis assumes, then, that by making people pay for the damage or harm they intentionally cause, this will deter harmful conduct, by encouraging people away from it. In making the taking of creepshots tortious conduct, this would result in those individuals who are likely to respond to the threat of tort liability being disincentivized from pursuing the harmful conduct in the first place. Making this tortious conduct can also be justified by corrective justice theory. Corrective justice focuses on the rights of the parties involved, the central view being that tort liability rectifies the wrong inflicted by one person on another. The intentional and unauthorised act of taking creepshots is a civil wrong. It is not an actionable civil wrong, however, meaning the law cannot provide affected individuals with corrective rectification for this interference to their interests. In making the conduct tortious, claimants would then be able to seek legal rectification for this wrong, by requiring the offender to pay compensation to them, thus correcting the wrong.

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It is submitted, then, that the tort of misuse of private information should be extended to incorporate a second arm which protects against invasions of physical privacy. Extending the tort to protect against unwanted watching, listening and recording, by incorporating a category of privacy interference, would create an actionable breach of privacy for the unauthorised intrusion of people’s intimate personal space, in public places. As a result, victims of ‘upskirting’ and ‘downblousing’ would be provided with a much-needed remedy for this breach of their physical privacy, for which there is currently no means of seeking legal redress, in this jurisdiction. The reformed tort would also demonstrate the willingness of the common law to adapt and respond to the technological advancements that have spawned the increasingly unobtrusive devices leading to these types of privacy invasions. As technology continues to evolve, so must the common law, to protect against the increasing ways in which an individual’s privacy can now be breached by covert watching, listening or recording.

4.4 Conclusion

This chapter has made proposals for reform to two traditional common law causes of action, the equitable remedy of breach of confidence and the tort of misuse of private information, based on the limitations for revenge porn victims, using these causes of action to seek redress in the civil law, identified in Chapter 3. The reforms proposed to the equitable remedy of breach of confidence are first, that quantum of damages for breaches of confidences that result in severe mental distress should be increased and, and second, that punitive damages should be made available where this is the best remedy the law can offer. The reforms proposed to the tort of misuse of private information are, first, that the tort should be extended by broadening the categories under which exemplary damages can be made available, and second, that a category which protects against unwanted physical privacy interferences should be incorporated into the ambit of the tort. All of these reforms involve the extension of the common law. The chapter has looked at other common law jurisdictions, to identify how the common law has adapted and evolved to respond to revenge porn, in these jurisdictions, both as a breach of confidence and an invasion of privacy. This examination has provided valuable insight into how the common law could be extended, in this jurisdiction, so that revenge porn victims can be provided with better remedies.
The chapter has identified the urgent need for the common law to evolve, in all jurisdictions, to accommodate for advancements in technology and private communications. Technological developments have engendered a new type of harm, due to the instantaneous ability for any person to broadcast text and images online, to a targeted audience. The law must adapt and respond, therefore, to this new type of harm. Reforming the equitable remedy of breach of confidence and the tort of misuse of private information, as this chapter suggests, would reflect the harm caused by these technological changes. The reforms would additionally send the important message that causing such harm will not be tolerated by society, signalling the need for deterrence and ultimately dissuading others from engaging in similar harmful conduct.

The harm caused by revenge porn can be significant, as it undermines victims’ interests in their dignity, autonomy and self-respect, and can lead to feelings of distress, mistrust and violation. This chapter proposes that the reforms outlined above are implemented to improve the current tort law response to revenge porn, with the intention that doing so might provide a more adequate response to the problem than is currently available. Should these reforms be implemented, however, there would still, arguably, be victims of revenge porn who do not feel adequately redressed. This view is central to the thesis’ argument that there are problems and limitations with a tort law response to revenge porn, because there will always be important harms which go unredressed, rights which go unvindicated and victims who go uncompensated. This is because, even if the proposed reforms were to be implemented, tort law cannot sufficiently address the blameworthiness of revenge porn conduct, and cannot, therefore, satisfy victims who wish for the moral wrongfulness of the conduct to be acknowledged. Revenge porn can cause intangible, subjective harms that can be difficult to quantify and some of these harms may well be incommensurable. A civil law response to revenge porn will, ultimately, always have its limitations because the types of harm caused by revenge porn are not types of harm that tort law traditionally recognises. While implementing the reforms suggested in this chapter may well go some way towards improving a tort law response to revenge porn, if the intrinsic badness of the conduct and the moral reprehensibility of defendants is also to be addressed, a criminal law response is required, as criminal sanctions can signal the moral condemnation for the conduct, which civil sanctions cannot.
Chapter 5: Theoretical Justifications for Addressing Revenge Porn in the Criminal Law Regime

‘The only purpose of which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’

John Stuart Mill

5.1 Introduction

The analysis in Chapter 2, which outlines the theoretical justifications for addressing revenge porn in the civil law regime, has identified that, while there are some good justifications for addressing the conduct in tort law on the grounds of economic analysis and corrective justice theories, the civil law presents some problems and limitations when responding to revenge porn. The most significant of these is that tort law not address the moral reprehensibility of revenge porn. As the analysis has established, the intangible, subjective harms caused by the conduct can be difficult to account for, in tort law, as these are not harms that tort law traditionally recognises. Overall, the findings from Chapter 2 suggest that tort law cannot sufficiently redress victims of revenge porn disclosures, indicating the need for an additional criminal law response. This chapter will examine theoretical justifications for addressing the conduct in the criminal law and evaluate the case for criminalising it, in England and Wales.

The chapter will begin by sketching the main aims of the criminal law (Section 5.2), before delineating accounts of two contemporary criminal law theories - deterrence theory and retribution theory - presenting theoretical justifications for addressing revenge porn in the criminal law on the ground of each (Sections 5.3 and 5.4). While there are several justifications for criminalising conduct, deterrence and retribution theories are the most common rationales for criminal punishment. These theories also conveniently mirror the contemporary tort

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2 These include: deterrence, rehabilitation, incapacitation, desert, social theories and reparation or restoration. See Andrew Ashworth, Sentencing and Criminal Justice, (Cambridge University Press, Cambridge, 2010) 78.
theories presented in Chapter 2. Economic analysis in tort law and deterrence theory in the
criminal law both advocate deterrence as a justification for addressing harm and wrongdoing.
Corrective justice can be seen as the civil law analogue to retributivism, albeit with an inverted
goal: the aim of corrective justice is to make sure victims get the compensation they deserve
and restoring their rights, while retributivism can be understood as making sure criminals get
the punishment they deserve and rescinding their rights. The chapter also examines JS Mill’s
‘harm principle,’ a standard used to determine what conduct should be dealt with in the criminal
law. It will establish the extent to which criminalising revenge porn is justifiable, according to
this principle, when many of the harms caused by revenge porn originate from the breakdown
of private, domestic relationships. It argues that revenge porn might be considered to be
conduct concerning the private sphere, and thus concern an area in which the criminal law
should not intervene, according to the harm principle, but seeks to justify its intervention
nonetheless (Section 5.3.2). The chapter concludes that criminal penalties for revenge
pornographers are amply justified, but questions whether a criminal law response alone can
sufficiently vindicate victims. To that end, it suggests that a civil law response might also be
required, opening up the possibility of a hybrid criminal/civil response to a problem that cannot
be adequately addressed in either regime (Section 5.6).

5.2 The Aims of the Criminal Law

The main function of the criminal law can be understood as the protection of individual rights,
to which collective, or welfare interests are added. Economic analysis in tort law and deterrence theory in the
criminal law both advocate deterrence as a justification for addressing harm and wrongdoing. Corrective justice can be seen as the civil law analogue to retributivism, albeit with an inverted
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5.2 The Aims of the Criminal Law

The main function of the criminal law can be understood as the protection of individual rights,
to which collective, or welfare interests are added.3 Its scope can be determined by the
infringement of rights, its central aim being not only to protect individual rights, but also
collectively, those of the public.4 Whilst private wrongs which concern only those individuals
directly involved can be resolved in private actions, public wrongs concern all members of the
community, and the community is, therefore, collectively responsible for punishing them
appropriately.5 Lamond suggests that crimes are public wrongs in the sense that they are wrongs
to the public, because they ‘generate fear or social volatility, or because they violate values

3 Lindsay Farmer, Making the Modern Criminal Law: Criminalization and Civil Order (Oxford University
4 Ibid.
which the community shares.' 6 It is the public nature of a given instance of wrongdoing, then, that identifies it as criminal.

The criminal law aims to frame and reinforce civic values by identifying prohibited actions and enforcing appropriate and proportionate sanctions. Civic values effectively provide a justification for the regulation of activities, as conduct considered to be criminally culpable in a civil society is fundamentally perceived to constitute elements that are harmful to society. 7 The public interest in the decision to make conduct into a crime ultimately implies the importance of collective social responsibility, in determining what conduct society might consider to be criminal, or non-criminal conduct. 8

Criminal law is well-suited to further the dual aims of protecting individual rights and public mores due to the distinctive feature of criminal punishment. Unlike civil law proceedings, where a successful trial results in defendants being held liable for the breach of a legal regulation, a criminal prosecution results in offenders being convicted of committing a crime - and being found guilty of the charges against them. 9 Victims are vindicated by means of the sentencing and punishment of offenders, which can include the loss of liberty through imprisonment. The decision to make conduct into a crime turns on whether there is a public interest in ensuring that conduct does not happen, and when it does, then there is the possibility of state punishment. 10 While both the civil and criminal law regimes may stamp conduct as ‘wrong’ or ‘harmful,’ through the creation of torts and criminal laws, merely describing conduct as ‘tortious’ does not carry the same social stigma and condemnation as the language of the criminal law, which talks about ‘crimes’, ‘offences’ and ‘convictions.’ 11 As Lamond observes, the socially expressive terms employed by the criminal law communicate to society that certain conduct is marked out to be especially reprehensible, so that ‘the machinery of the state needs to be mobilized against it.’ 12 Such expressive communication transmits a dimension

6 Ibid.
8 Ibid.
9 Lamond (n 5) 610.
10 Ibid.
12 Lamond (n 5) 610.
of censure and social unacceptability about the conduct, which helps to explain both the social significance of liability, and the coercive use of criminal liability by the state, to deter the conduct.\(^{13}\) When a person is convicted of a criminal offence, he is condemned for what he has done.

Because the criminal law is concerned with condemnation and punishment, however, the institution must necessarily provide constraints so that criminal convictions are only warranted if a high standard of proof has been met, and a range of other procedural protections are followed. Where criminal charges are brought against defendants, the conduct in question would need to satisfy the Crown Prosecutor’s evidential and public interest stage.\(^{14}\) These measures are distinctive to the criminal law as they ensure that, ideally, people are protected from wrongful convictions and that defendants’ rights of participation in criminal trials is safeguarded.\(^{15}\)

5.2.1 Theoretical Justifications for the Aims of the Criminal Law

There is no single, unified theory which provides justification for the aims of the criminal law. In general terms, a taxonomy of common theoretical justifications can be put forward as grounds for state intervention and for the existence of criminal punishment.\(^ {16}\) Theoretical justifications for punishment are typically classified as consequentialist or non-consequentialist, or a mixture of the two. Consequentialist theories focus on the concept of harm, and harm reduction or prevention, and hold that the rightness or wrongness of any action or practice depends solely on its overall consequences. A common feature of consequentialist accounts, therefore, is that punishment is justified if it is instrumental in achieving some independently identifiable good, such as crime prevention, the promotion of social welfare, or, in classical utilitarian terms, the happiness of the greatest number of people.\(^ {17}\) Notably,

\(^{13}\) Ibid.
\(^{15}\) Ibid.
\(^{16}\) See Ashworth (n 2) 78.
consequentialist theories are capable of vindicating intuitively objectionable punishments, if making an example of innocent people, or ‘scapegoating,’ can justify their instrumental aims.\textsuperscript{18}

Non-consequentialist theories, in contrast, subscribe to the idea of legal moralism, holding that the law should track our individual moral obligations. Non-consequentialist accounts hold that punishment can be justified as an intrinsically appropriate response to crime.\textsuperscript{19} This can be because crimes are wrongdoings which deserve censure, or because crime involves taking an unfair advantage over the law-abiding, an advantage that punishment removes.\textsuperscript{20}

Consequentialist theories can be thought of as forward-looking, as they justify punishment as a means of achieving certain beneficial ends. Non-consequentialist theories, by contrast, are backward-looking, justifying punishment in terms of its relation to a past offence.\textsuperscript{21} There are also mixed theories that treat crime reduction and retributivist concerns as irreducibly important and so worthy of inclusion in a single justificatory framework.\textsuperscript{22} The most prominent pluralistic theories are those of John Rawls, HLA Hart and Andrew von Hirsch. Rawls believes that punishment should be concerned with reducing the frequency of certain kinds of acts, so is instrumental and forward-looking in its approach, but that when determining the guilt of those accused of crimes, he asserts that this should be backward-looking, as punishment should be justified in relation to the past offence.\textsuperscript{23} HLA Hart’s mixed theory combines elements of consequentialism, in that the general justifying aim of punishment should be understood in terms of crime prevention, but is also non-consequentialist, in that the governing principle, when deciding on punishment should be desert, to ensure that only the guilty are punished, and then, only proportionately.\textsuperscript{24} Andrew von Hirsch’s mixed theory posits that punishment can justified primarily in retributivist terms, as a means of conveying appropriate censure, but that hard treatment should be used to convey that censure for consequentialist reasons, ‘to add a deterrent force to what would otherwise be a moral appeal, and thus to increase the crime-preventive efficacy of the law.’\textsuperscript{25}

\textsuperscript{18} Ibid, 7.
\textsuperscript{19} Ibid, 4.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid, 8.
For simplicity, however, this chapter will primarily focus on monistic theories of punishment, which provide one overarching justification for punishment. It will bear in mind, however, that these theories could, in principle, be combined. Criminal law theory is dominated by two theories which subscribe to these two opposing justifications for the aims of the criminal law, deterrence theory and retribution theory. Deterrence theory is underpinned by the rationale that preventing or reducing future crime is instrumental in improving overall societal welfare.\(^{26}\) It is consequentialist in the sense that it permits the punishment of offenders because of the positive benefits this brings to society. Retribution theory is framed around the belief that people are autonomous individuals, capable of choice, and if they make bad choices that society perceives are morally wrong, then they should be punished - or get their ‘just deserts.’\(^{27}\) Retributivism is non-consequentialist, as improving societal welfare is not its aim; however, from a legally moralistic standpoint, punishment of offenders does deliver a powerful message about the preservation of society’s standards. The following discussion will focus on deterrence theory and retributive justice as theoretical justifications for the aims of the criminal law. An overview of each theory will be presented, before being explored further and critically evaluated, through specific application to revenge porn. This will establish to what extent revenge porn can be sufficiently responded to in the criminal law, on the ground of each theory.

### 5.3 Deterrence Theory

Deterrence theory is a utilitarian theory of punishment, as the justification for deterring crimes and offenders lies in the premise of the social welfare it will enhance.\(^{28}\) There are two strands of deterrence theory: special and general. Both strands have at their core the belief that the ultimate justification for inflicting the harm of punishment is that it is outweighed by the good to be achieved by preventing future crimes, either by that offender or by others.\(^{29}\) Special deterrence is the act of preventing particular offenders from re-offending. Unlike incapacitation theory, where the good punishment is thought to achieve stems from rendering offenders unable to commit further crimes (at least for a time), special deterrence is achieved


\(^{28}\) Walker (n 26) 26.

\(^{29}\) Ashworth (n 2) 78-79.
insofar as offenders are deterred from committing future crimes upon their release. Special deterrence is rarely the primary rationale of a sentencing system, however. As Ashworth notes, a system which regards individual deterrence as its main goal would presumably result in escalated sentences for persistent offenders, where non-custodial penalties had failed to deter offending conduct in the first instance. This could lead to the propensity to re-offend being the main determinant of sentencing, rather than the gravity of the crime.

General deterrence, by contrast, is achieved when public awareness of criminal penalties deters the general population from offending. Two early proponents of deterrence theory, Cesare Beccaria and Jeremy Bentham, believed that the infliction of pain on individuals through punishment could only be justified if it resulted in discouraging criminal conduct. Both were troubled, however, at the imposition of punishment by the state, in excess of what was deemed necessary to deter people from breaking the law. Contemporary strains of deterrence theory accept, however, that it is permissible for innocent people to be punished, if this reduces criminal conduct, thus benefiting society. Deterrence theory presupposes that individuals make conscious, rational choices when contemplating criminal behaviour, weighing up the costs and benefits before acting, only proceeding where the potential benefits to them might outweigh the expected costs. Deterrence theorists who work in the context of economic theory additionally posit that the severity of sentences has a deterrent effect. If criminals view punishment as a kind of pricing system, then the rational actor will adjust their conduct according to the disincentives provided by sentencing law. This, then, leads to marginal deterrence, as increasing penalty levels by a certain amount will result in a decline in offending. The theory assumes that potential offenders will consider the maximization of their own welfare interests and act rationally, when deciding to whether to break the law, by weighing up the costs and benefits of their activity.

30 Ibid, 79.
31 Ibid.
32 Ibid.
35 Ibid.
37 Ibid.
General deterrence theory has broad appeal, but also raises some moral challenges. General deterrence focuses on the idea of collective coercion, and the belief that threatening people with unpleasant consequences will have some influence on their behaviour. Hegel and Duff argue that coercing citizens not to break the law by using threats of suffering, rather than putting forward the moral reasons for obeying the law, amounts to treating people ‘like a dog,’ instead of with ‘the freedom and respect’ due to human beings.\textsuperscript{38} As mentioned earlier, further moral challenge arises because general deterrence accepts that it is permissible for innocent people to be punished or given disproportionately harsh sentences, if this has deterrent effects and reduces criminal conduct. The theory cannot accommodate, then, the notion of persons having rights.\textsuperscript{39} As Murphy observes, even if the punishment of a person would have good consequences, what gives us (i.e. society) the moral right to inflict it? He cites Marx, who asks, ‘what right have you to punish me for the amelioration or intimidation of others?’ \textsuperscript{40} The failure of deterrence-based theories to reject the punishment of the innocent or the handing out of excessive sentences runs counter to the liberal prescription that punishment should be limited to those who are morally responsible for their actions, and then, only to the extent of this moral responsibility.\textsuperscript{41} Consequentialist theories are capable of seemingly justifying manifestly undeserved punishments, if making an example of innocent people, or ‘scapegoating,’ can justify their instrumental aims.

Detractors of deterrence theory find it challenging to justify punishment on the premise that individuals make rational choices when deciding whether or not to commit crimes, arguing that rationality is not a dominant human trait and that many other factors influence how people behave.\textsuperscript{42} They assert that many crimes are committed impulsively, or from motives that do not take account of the deterrent effects of the law.\textsuperscript{43} In relying on the assumption that potential

\textsuperscript{39} JG Murphy, ‘Marxism and Retribution,’ in Duff and Garland (eds), A Reader on Punishment (Oxford University Press, Oxford, 1994) 49.
\textsuperscript{40} Karl Marx, ‘Capital Punishment,’ New York Daily Tribune (18 February 1853).
\textsuperscript{43} Ibid.
offenders act rationally when deciding to break the law, detractors suggest that the this does not adequately reflect the reality of the human condition, as individuals are governed by irrational impulses which do not always have regard for the maximisation of their own welfare. Detractors of deterrence theory also contest the claim of economic deterrence theorists that sentence severity will encourage rational actors to adjust their conduct according to the disincentives provided by sentencing law. They argue that this hypothesis lacks empirical support, as reliable factual data about the marginal deterrence effect of various types and levels of penalty for various crimes are difficult to find. A study by Von Hirsch et al, of extant research into the link between criminal deterrence and sentence severity, showed, at best, that a weak link exists between increases in sentence severity and the reduction of crime. A Home Office study into the deterrent effect of penalties also supports these findings, concluding that the evidence, although limited in the area, ‘provides no basis for making a causal connection between variations in sentence severity and differences in deterrent effects.’ Doob and Webster’s extensive international review of the literature into the effects of sentence severity and crime similarly found ‘no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence.’

Despite these challenges, there is some support for justifying the aims of the criminal law, on the ground of deterrence theory. Von Hirsch et al’s study, mentioned above, concludes that ‘deterrence does work, for some people, at some times, for some offences.’ Ashworth similarly identifies extant research, which suggests that some types of offences that involve a degree of forward planning might be susceptible to deterrent sentencing strategies. He cites Richard Harding’s study on rational choice gun use in armed robbery, which found that robbers tend to resist arming themselves with guns if there was a significant extra penalty for carrying a firearm. This might indicate, then, that general deterrence is more likely to be effective for

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45 Ashworth (n 31) 79.
49 Von Hirsch et al (n 46) 604.
50 Ashworth (n 31) 80.
51 Harding (n 42).
planned or ‘professional,’ rather than impulsive crimes.\(^{52}\) On this point, Whelan notes that detractors of deterrence theory’s concern with rationality might actually be overstated, in some circumstances.\(^{53}\) Economic deterrence theory has some potency, he argues, when applied to economic offences that are committed after long periods of deliberation, such as in the antitrust context, where educated, intelligent and otherwise morally functional persons might be more likely to undertake a cost-benefit analysis of their (market) behaviour, particularly if this concerns the economic impact on the firm they work for.\(^{54}\) However, as Ashworth observes, in order for deterrence to operate (if at all), it is essential that potential offenders know about the severity of probable sentences and take this into account when deciding whether to offend.\(^{55}\) They must also believe that there is a more than negligible risk that they will be caught and believe that the penalty will be applied to them if they are caught and sentenced, in order to refrain from acting for these reasons.\(^{56}\) This observation is supported by empirical evidence, which has shown a statistical link between the increased likelihood of detection and conviction and a decrease in rates of crime.\(^{57}\) Harding notes that deterrent sentences need to be combined with publicity and appropriate ‘social learning’ opportunities for them to have any significant preventive effects.\(^{58}\) Presumably, these preventive effects could be further increased by raising awareness of how wrongful conduct can attract criminal sanctions, for example, through advertising or by raising social awareness via campaigns in the press or on social media, meaning the pool of deterrable would-be offenders could potentially be expanded.

To summarise, this discussion has identified some moral challenges for justifying the aims of the criminal law, on the ground of deterrence theory, as the consequentialist aims of the theory permit the punishment of the innocent, and the handing out of disproportionately harsh sentences. This means that deterrence theory supports manifestly undeserved punishments in order to achieve its instrumentalist aims. There is, however, partial justification for the criminal law on the ground of deterrence theory, if the threat of criminal sanctions positively influences how people behave. While deterrence theory’s reliance on rational choice limits the scope of its application, some individuals and corporate organisations do act with clear-eyed vision and

\(^{52}\) Ashworth (n 31) 80.


\(^{54}\) Ibid, 17.

\(^{55}\) Ashworth (n 31) 79.

\(^{56}\) Ibid.

\(^{57}\) Halliday (n 47) 129.

\(^{58}\) Harding (n 42).
an awareness of the law, and thus, may be fearful of committing crimes due to the threat of criminal sanctions. The findings from this analysis will be used, below, to determine if there is sufficient evidence for addressing revenge porn in the criminal law, on the ground of deterrence theory.

5.3.1 Specific Application to Revenge Porn

Revenge pornographers who non-consensually disseminate other people’s intimate images do so with the intention of humiliating and shaming those individuals, thus causing them harm. The analysis in the previous section has found that deterrence theory does provide at least partial justification for criminalising conduct on the ground of deterrence theory, if at least some potential offenders are deterred, but it has also identified some challenges for doing so. This section will explore these challenges further, with specific relation to revenge porn dissemination.

The first challenge concerns the fact that the theory does not attach moral value to the consequences of perpetrators’ actions, nor does it consider the moral quality of revenge porn. Deterrence theory is consequentialist, meaning that punishment is inflicted on offenders in order to achieve some independently identifiable good, such as the promotion of social welfare; to this end, revenge pornographers are punished, then in order to prevent further similar crimes from being committed, rather than because the conduct is morally reprehensible. This would indicate the need for a theory of the criminal law which justifies the criminalisation of conduct on the grounds of its moral content, and the blameworthiness of those who commit it, rather than one whose forward-looking concerns focus on how punishing offenders affects the rest of society.

Another moral challenge for deterrence theory arises because most contemporary revenge porn offences are committed online, meaning that it can be difficult to prove the identity of perpetrators with absolute certainty. The inherent facelessness of cybercrime and the ease with which identities can be obfuscated online can create evidential difficulties, meaning that it is
possible for innocent people to be wrongly convicted of committing revenge porn. However, as Moore observes, even in cases where it is impossible to identify with absolute certainty that a particular offender has committed a crime, defenders of utilitarian theories believe that it is acceptable to punish people who are, in fact, innocent, in order to convince others that a particular crime does not pay. Justifying responding to revenge porn in the criminal law on the ground of deterrence theory presents a moral challenge, then, if inflicting undeserved punishments, or making an example of innocent people can be justified by its instrumental aims.

This challenge is evident when deterrence theory is applied to the specific revenge porn offence, ‘disclosing private sexual photographs and films with intent to cause distress,’ as set out in sections 33-35 of, and Schedule 8, to the Criminal Justice and Courts Act 2015. Gillespie notes that there are flaws in the drafting of this offence, which can lead to some ambiguity in its interpretation. Pegg similarly observes a lack of clarity, arguing that this puts significant pressure on police and prosecutors to use their discretion when interpreting it. This opens up the possibility, then, of people who have not committed the crime, as constructed, being prosecuted for the offence, for example, the art student who submitted a heavily cropped image of the torso of her ex-boyfriend, as part of a project for her art degree. Tadros notes, however, that for consequentialists, there is no especial difficulty in the idea that the state should promote outcomes which are intrinsically good, meaning for them, there are no special restrictions on the pursuit of good consequences.

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61 This offence will be discussed in more detail in Chapter 6.
The laws used to protect the transfer of images of children by adults can provide another example of how deterrence theory supports the criminalising of non-culpable individuals for offences they have unknowingly committed. While these laws are intended to promote outcomes which are clearly intrinsically good, the contemporary, normalised use of digital technology by teenagers choosing to ‘sext’ self-generated sexual images to each other, means that young people are being criminalised for committing offences they are unaware of. This does not create a problem for deterrence theory, however, which places no restrictions on the pursuit of good consequences, but it is manifestly undeserved, as a child’s record could potentially be marked for life. As Moore observes, ‘[F]or a consistent utilitarian, there is a net social gain that would be achieved by punishing such an innocent person, and there is no a priori reason that the net social gain in such a case might not outweigh the harm that is achieved by punishing an innocent person.’

There are also some practical challenges for deterrence theory, when justifying responding to revenge porn in the criminal law, which concern the theory’s reliance on rational choice models of human behaviour. Deterrence theory assumes that potential offenders will consider the maximization of their own welfare interests and act rationally when deciding whether to break the law, by weighing up the costs and benefits of their activity. It presumes, therefore, that rational actors can be deterred from engaging in a particular conduct if the prospect of criminal sanctions outweighs the benefits of committing the crime. It is immediately clear to see why this assumption creates a challenge in the context of revenge porn. Many revenge porn disclosures are perpetrated by scorned ex-partners, wishing to exact revenge on their former lovers. Driven by visceral influences, such as anger and jealousy, these individuals are unlikely to be acting rationally, but rather, impulsively and emotively, and in the heat of the moment;

66 The transfer of indecent images of children under the age of 18 is a crime under s 1 of the Protection of Children Act 1978 and s 160 the Criminal Justice Act 1988.
68 McManus and Almond (n 67).
69 Moore (n 60) 95.
such influences do not take account of the deterrent effects of the law.\textsuperscript{70} If deterrence theory relies strongly on the assumption that actors will act rationally and weigh up the costs and benefits of their actions before acting, this does not account, then, for conduct committed by individuals acting in a state of heightened emotion.

It is commonly understood that agitated individuals can commit terrible crimes of passion, for example, when a husband kills his wife in a jealous rage.\textsuperscript{71} Rationality is not, therefore, always a prevailing human trait. Revenge porn disclosure by scorned lovers will often be perpetrated in the heat of the moment, by individuals who will not be thinking rationally about the threat of criminal sanctions. This is assuming that they are even aware of the law, and if they are, that they acknowledge, in that moment, the possibility that they could be caught and punished. This presents a challenge, then, for deterrence theory, with its putative reliance on the premise that common sense will ultimately prevail. As Atiyah observes, some people are ‘so blinded with emotion or passion that no threats will deter them…[or]…are so simple minded or lacking in normal intelligence that they do not perceive the threats of the law in ways which others would perceive.’\textsuperscript{72} It is fair to say that deterrence theory’s reliance on rational choice does not take into account the fact that people typically do not act rationally when committing crimes of passion.

The study conducted by von Hirsch \textit{et al}, discussed above,\textsuperscript{73} does show a link, however, between the certainty of punishment and the reduction of crime, drawing the conclusion that ‘deterrence does work, for some people, at some times, for some offences.’\textsuperscript{74} Paternoster similarly notes a modest relationship between the perceived certainty of punishment and crime.\textsuperscript{75} He observes that offenders do rationally readjust their perceptions of the risk of sanctions and reduce their offending, for example as a reaction to the policing of hot spots and police crackdowns, tending to ‘move around the corner’ and commit crimes elsewhere until

\textsuperscript{70} See generally Paternoster and Harding (n 42).
\textsuperscript{72} Patrick S Atiyah, \textit{Pragmatism and Theory in English Law}’ The Hamlyn Lectures, Series 39 (Stevens & Sons Ltd, London, 1987) 79.
\textsuperscript{73} Von Hirsch \textit{et al} (n 46).
\textsuperscript{74} Ibid, 604.
\textsuperscript{75} Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100 Crim L & Criminology 765, 818.
‘the heat is off.’ Doob and Webster acquiesce that it is often very difficult to isolate a particular deterrent effect, because this can obscured by other factors and that just because one cannot find something (a deterrent effect or a missing sock), this does not mean it does not exist.

As has previously been noted elsewhere in the thesis, there is more than one paradigmatic category of potential revenge pornographers, and some might be more likely to conduct a cost-benefit analysis than others. While those primary disseminators, who are scorned lovers seeking revenge, might typically initiate the original revenge porn post in an agitated state, primary disseminators who are acting for opportunistic reasons, for example, disseminating images retrieved from hacked or stolen devices, are likely to be acting in a far calmer frame of mind. Most secondary disseminators will also not be amplifying the original revenge porn under the influence of visceral factors, as these are typically individuals who are acting for non-vengeful reasons, such as, for financial gain, for laughs or pranks, or maybe to gain notoriety amongst a friendship group. The third category of revenge pornographers, the Internet intermediaries who facilitate the transmission and hosting of revenge porn, are also unlikely to be acting under the influence of visceral factors. These individuals would be more likely to be thinking about the profit they stand to make at their victims’ expense, rather than the desire for vengeance. Such corporate disseminators are more likely to be acting with clear-eyed vision and an awareness of the law and might, therefore, be deterrable. Individuals either loosely associated, or unassociated with, revenge porn victims are less likely to be acting under the influence of visceral factors, such as rage and jealousy, and might, therefore, make different decisions about acting, given the threat of criminal sanctions.

In order for deterrence to operate, however, it is essential that potential offenders know about the severity of probable sentences and take this into account when deciding whether or not to offend. They must also believe that there is a more than negligible risk that they will be

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76 Ibid, 819.
77 Doob and Webster (n 48) 145.
caught, believe that the penalty will be applied to them if they are caught and sentenced, and refrain from acting for these reasons. Ashworth cites two studies which illustrate how this risk might be perceived, however, creating difficulties for this aspect of deterrence theory. First, a study by David Riley about drink drivers shows that the problems of a general deterrence strategy lie in drivers’ optimism about not being caught, ignorance of the penalty if they are, and ignorance of the amount of alcohol consumption needed to commit an offence. Second, Bennett and Wright’s research on burglars, in which the authors conducted interviews with offenders, revealed that most burglars ‘are not rational calculators, but rather, short-term hedonists or eternal optimists.’ Arguably, revenge pornographers could be said to share some relevant characteristics with these other offender groups, which creates a problem for deterrence theory when applied specifically to prospective revenge pornographers. Like the drink drivers, many might be ignorant of the penalty, should they get caught, or may simply be optimistic about not getting caught at all. These individuals may also not realise that just one posting of revenge porn is enough to commit the offence. Like the burglars, some revenge pornographers, particularly primary disseminators seeking revenge, may be short-term hedonists or eternal optimists, and act because of the instant gratification this provides them, even if they do have some awareness of the law and its consequences.

An additional practical challenge for deterrence theory is that revenge porn is predominantly committed online. This can lead to feelings of disassociation for perpetrators acting from behind the protective shield of a computer screen, leading them to further underestimate the risk of being caught. Paternoster observes that for deterrence to work well, ‘the would-be offender must be able to quickly conjure up in her mind the anticipated pain of punishment.’ For many revenge pornographers acting from behind a screen, however, the criminal law will be no more than a ‘long-distance danger.’ Arguably, this significantly mitigates the effects of deterrence, particularly for scorned lovers, the prospect of immediate vengeance relegating the threat of criminal sanctions into the background of their mind. As Von Hentig remarks, a criminal is ‘a human specimen, whose appetites and desires are irresistibly attracted by a near

81 Ibid.
82 Ashworth (n 80) 80.
84 Trevor Bennett and Richard Wright, Burglars on Burglary (Gower, London, 1984).
85 Ashworth (n 80) 80.
86 Paternoster (n 75) 821
87 Ibid.
For revenge pornographers seeking the instant gratification of revenge, arguably, the distant prospect of punishment cannot effectively serve as a real deterrent. As Paternoster observes, ‘[C]riminal deterrence may have its limits precisely because the legal costs are far removed in time and people find it difficult to feel the pain of the longer-term consequences of their actions.’

In summary, there are some moral challenges for justifying addressing revenge porn, in the criminal law, on the ground of deterrence theory. First, while deterrence theory permits the consequences of offending to result in punishment and has the potential to yield positive social effects, the purpose of this is to act as a deterrent for future offending. Deterrence theory does not attach moral value to the consequences of perpetrators’ actions, nor does it consider the intrinsic moral quality of conduct. As revenge porn is morally reprehensible conduct, this would indicate the need for a theory of the criminal law that contemplates the intrinsic moral value of the conduct by addressing its moral quality and the blameworthiness of those who commit it. Second, the consequentialist aims of the theory can, in principle, permit the punishment of the innocent and the handing out of disproportionately harsh sentences. This means that deterrence theory can support some manifestly undeserved punishments, if inflicting these achieves its instrumentalist aims. The analysis has also identified some practical challenges for deterrence theory as a basis for criminalizing revenge porn, due to the theory’s reliance on rational choice and the importance it attaches to timely punishment. However, the analysis has also established that some revenge pornographers, particularly corporate disseminators, who are acting with clear-eyed vision and an awareness of the law, might be deterred from committing revenge porn, when faced with the prospect of criminal sanctions. This provides, then, at least partial justification for addressing revenge porn in the criminal law, on the ground of deterrence theory.

5.3.2 Revenge Porn and the ‘Harm Principle’

In a liberal society, it is generally considered that the criminal law should not be concerned with all morally wrong behaviour, but should attempt to identify and regulate only the wrongful

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89 Ibid.
behaviour which causes risks, or risks causing significant social harm.  

Eminent rule-utilitarian deterrence theorist, John Stuart Mill, argued as far back as the 1850s that criminal sanctions could only be warranted in cases where conduct causes harm (or possibly offence) to others. Joel Feinberg, who shared Mill’s liberal leanings, later provided clarification as to the sorts of conduct the state might rightly make criminal. He argued that the consequences of an act, or the ‘wrongful setbacks’ to the welfare interests of individuals and general society, make an act wrong, rather than the act itself being a violation of a moral standard. Western liberal democracies have long since relied on this principle to justify limiting the state's use of criminal punishment, on consequentialist grounds.

The harm principle often functions as a method of bringing community values into the criminal law while maintaining the requisite objectivity and neutrality expected from the justice system. The principle can be said, then, to distinguish what marks out criminal conduct from civil wrongs and makes clear the state’s role in delineating this. The discussion in the previous section has shown that criminalising revenge porn on the ground of deterrence theory is partially justifiable, if at least some potential offenders can be deterred. Criminalising the conduct on the ground of the harm principle, is, arguably, wholly justifiable, given the wrongful setbacks it creates to individual and welfare interests. The harm principle provides validation for preventing and reducing the harm caused by certain conduct in a ‘public’ way that the law considers relevant and that concerns society as a whole, rather than merely concerning the ‘private’ harm to individual citizens within a community. Revenge porn can be considered to be a public wrong as it is the identification with victims as fellow citizens who adhere to society’s shared values, such as dignity and trust, which makes it a public wrong.

91 Mill believed that the moral correctness of people’s actions depends on the correctness of the rules that allow them to achieve the greatest good. See generally, John Stuart Mill, On Liberty (Penguin, Harmondsworth, Middlesex, 1979; 1859).
Using the harm principle to justify the criminalisation of revenge porn can be problematic, from a feminist perspective, however, where revenge porn originates from a pattern of private behaviour concerning domestic abuse. As Stimpson observes, this is because of the criminal law’s historical reluctance to enter the home, or indeed, the bedroom.\footnote{Stimpson (n 94) 104.} In 1957, The Wolfenden Committee on Homosexual Offences and Prostitution took the view, advanced by Mill, that the criminal law should have no place intervening in private conduct, other than to prevent harm. The Committee maintained, then, that there was a realm of private morality, or indeed, immorality, which was not the business of the law.\footnote{Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report) (Cmnd 247) (London, HMSO, 1957).} In other words, what adults did in private was not considered to be the law’s business (as long as the harm was not inflicted non-consensually), but what they did in the public domain would only attract the intervention of the law, if it was likely to harm the feelings of ordinary members of the public.\footnote{Andrew Ashworth and Jeremy Horder, Principles of Criminal Law (7th edn, Oxford University Press, Oxford, 2013) 37.} The Committee thus drew a distinction between public and private domains, when justifying the intervention of the criminal law, balancing the need to keep the law out of the private, consensual affairs of adults, with the need to protect citizens from collective injury or offence, through harmful ‘public’ wrongs.

Where crimes concern private, domestic relationships, however, it has not always been clear where the line should be drawn between conduct that is considered publicly wrong, and thus concerns society collectively, or privately wrong, concerning only those individuals directly involved. Serious domestic sexual wrongs, do, unquestionably, constitute a serious violation of a civic society’s core values, but there are some domestic sexual wrongs, such as adultery, which are not perceived as being a serious wrong in any ‘public’ sense that might justify the intervention of the criminal law. This distinction could, arguably, be seen to extend to revenge porn disclosures originating from the breakdown of private, domestic relationships, these not being perceived, therefore, as being publicly harmful enough to require the intervention of the criminal law. In this sense, revenge porn might fairly be considered by some, like adultery, to concern private consensual relations, and thus be a matter for private law.
Revenge porn dissemination is clearly offensive to public sensibilities, but, arguably, it does not evoke the same identification as with victims of serious domestic sexual abuse. This is because in a significant number of cases, revenge porn victims will have willingly taken and shared the offending images in the first place. This creates a challenge for the harm principle, when justifying the intervention of the criminal law, because of the active, consensual participation of the victim herself, in producing and sharing the images. The original consensual distribution of the images, might, therefore, have the potential to undermine any shared understanding of the ‘public’ character of revenge porn, the inference being that revenge porn may not be an issue that can be considered to properly concern the public generally, as consensual, private, sexual relations are an area in which the criminal law is not normally prepared to intervene.

Stimpson observes, however, that this inherently privileges harms that are of concern to the public sphere, at the cost of the private.99 This can be seen, historically, she argues, where many crimes concerning domestic abuse have been considered to be beyond the purview of the criminal law, the result being that crimes occurring in private are silenced.100 The danger here, she asserts, is that the harm principle appears to reinforce the male values of the legal system, which consider that matters originating from the bedroom and concerning private affairs are external to the criminal law. This view might, arguably, be borne out by the continuing reluctance of women to report crimes resulting from domestic abuse in relationships.101 It might also be a contributing factor in the significant under-reporting of revenge porn disclosures, particularly where these form part of a pattern of domestic abuse,102 the subliminal message, being, as Stimpson observes, that such issues belong in the private sphere.103 When viewed from this perspective, the harm principle might be construed as protecting the private sphere from the supposedly greater harm that is interference by the state, rather than recognising the significant harms that can arise within, and even because, of the private sphere.104 Using the

99 Stimpson (n 94) 105.
100 Ibid, 105.
103 Stimpson (n 94) 105.
harm principle to justify the criminalisation of revenge porn is clearly problematic, then, if there are areas of life that are subconsciously, or even subliminally, deemed by women to be outside the purview of the criminal law, and this results in a failure by them to report the types of crimes that can arise from the breakdown of domestic relationships.

However, the criminalisation of revenge porn using the standard of the harm principle can be justified, regardless of any active participation of victims in creating the images, as is it the harm caused by their non-consensual dissemination that makes revenge porn a public wrong. Even where revenge porn disclosures arise from the breakdown of private domestic relationships, the non-consensual disclosure of images previously shared in confidence violates many publicly shared values, such as those of dignity, sexual autonomy and trust. Victims should not be left to pursue their own grievances, therefore, as their perpetrators should be answerable not merely to them, but also to their fellow citizens for the ‘violation of the core values’ by which communities define themselves.\(^\text{105}\) The criminalisation of revenge porn that originates from the private domain is clearly justifiable from the standard of the harm principle, as this interference by the state advances both individual and societal interests far more than it sets them back.

5.4 Retribution Theory

The second of the prominent theories of the criminal law explored in this chapter is retribution theory. Unlike deterrence theory, the instrumental concerns of which are forward-looking, and focus on how punishment affects the rest of society, retributive justice employs a backwards-looking approach, and focuses on the function of punishment as retribution for transgressing the moral code.\(^\text{106}\) Retributivism is framed around the belief that people are autonomous individuals, capable of choice, and if they make choices that society perceives are morally wrong, then they must get what they deserve. Retributivism is non-consequentialist as improving societal welfare is not its aim. For a retributivist, it is the moral responsibility of an


offender which gives society a duty to punish, and which also obliges society to set up institutions to ensure that retribution is achieved. 107

The origins of classical retributivism are attributed to Immanuel Kant’s account of just punishment, found in The Metaphysics of Morals, 108 although there is some debate amongst Kant specialists about whether Kant is a pure retributivist, or actually offers, at most, a mixed or modified version of retributivism. 109 The central tenets of classical retributivism are considered to be: (1) that the only justification for state-sponsored punishment is that the person suffering it has committed a crime, and; (2) that the only state punishment which is justifiable is one proportional to the crime committed in manner and degree. 110 Strong retributivists would also add to this the controversial principle ius talionis, ‘an eye for an eye or a tooth for a tooth’ - or the law of retribution - a tenet which holds that, within the limits dictated by what is possible and humane, just punishment should impose the same treatment on the convicted criminal that he or she has inflicted on the victim. 111 While disagreements regarding the ultimate classical interpretation of Kant’s retributivism exist, Kant’s theory does offer an account of punishment that is justified and properly shaped by the demands of civic respect on citizens themselves and on the state as their representative. 112 This account is adopted by most contemporary retributivists, albeit with differing justifications.

Intuitively, it would seem that retribution theory provides better justification for addressing conduct in the criminal law than deterrence theory, due to its focus on the moral dimension of wrongful conduct. Retributivism’s non-consequentialist aims are distinct from instrumental approaches to punishment, as they justify punishing mentally competent people for their crimes, as ‘opposed to “treating” offenders or ignoring them in search of a cheaper means of

107 Moore (n 34) 91.
111 Ibid
112 Ibid 126.
harm reduction.” As von Hirsch observes, unlike blame in everyday contexts, the criminal sanction announces in advance that specified categories of conduct are punishable. Therefore, rather than coercing individuals to obey the law with morally neutral sanctions through fear of attracting criminal liability, ‘like tigers might be treated in a circus,’ the censure embodied in the prescribed sanction serves to appeal to people’s morality, and the sense of the conduct’s wrongfulness, as a reason to desist from it. A condemnatory sanction, therefore, treats an actor as a person who is capable of understanding, thus acknowledging his dignity as a human being.

A central problem for retributivism, however, is explaining why the specific punishments authorised by law are intrinsically appropriate responses to crime, or how the notion of ‘desert’ supposedly makes punishment an appropriate response. Contemporary retributivist theorists have attempted to meet this criticism by moving beyond the intuitive assertion that ‘those who have done wrong should be punished,’ offering differing versions of retributivism which incorporate various social justifications for punishment into their retribution models. Two modern theories, which attempt to justify the aims of the criminal law, are of particular note. One is the unfair-advantage (or benefits-and-burdens) theory, which focuses on the criminal law as a jointly beneficial enterprise. This theory asserts that the law requires every person to desist from certain kinds of predatory conduct; by doing so, the person benefits others, but he also benefits himself from their reciprocal self-restraint. A person who victimizes another person while benefiting from their self-restraint thus obtains an unjust advantage over them, and punishment’s function then, is to offset that disadvantage. A leading proponent of this theory, John Finnis, asserts that offenders gain an unfair advantage over those who restrain themselves, by exercising their freedom of choice and acting against a common interest.

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115 Ibid.
116 Ibid.
118 Galligan (n 106) 153-54.
119 Von Hirsch (n 114) 7.
Punishment thus restores the social balance by neutralising the unfair advantage gained by non-compliant citizens, in their breach of the law.\footnote{120}{John Finnis, *Natural Law and Natural Rights* (Clarenden Press, Oxford, 1980) 262-64.}

The other notable variation of retribution theory, censure-based retributive justice, incorporates into its model a social justification for punishment based on its communicative feature. This version of retributivism focuses on the criminal law’s condemnatory aim, namely its role in conveying censure or blame.\footnote{121}{Von Hirsch (n 114) 9.} Punishing someone expresses disapprobation on account of a person having committed a wrong and conveys to society the intrinsic wrongness of an act and the appositeness of the resulting criminal sanction. Treating the offender as a wrongdoer, on this account, is central to the aims of the criminal law,\footnote{122}{Richard A Wasserstrom, ‘Punishment,’ in Richard A Wasserstrom (ed) *Philosophy and Social Issues: Five Studies* (University of Notre Dame Press, Indiana, 1980) 112-51.} and sentences serve the function of communicating official censure or blame, both to the offender and to society at large.\footnote{123}{Andrew Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press, Cambridge, 2010) 88.}

Censure-based retributive justice theories provide good justification for criminal penalties because of the condemnatory communication they deliver to offenders, victims and to wider society. Retributive punishment thus communicates a liberal democracy’s commitment to the principle of equal liberty under the law.\footnote{124}{Markel (n 113) 53-4.} By his act, an offender has cut himself off from the social order and elevated himself above his fellow citizens. The state must, therefore, make its best reasonable efforts to reduce the plausibility of an individual’s false claims of superiority over his victim.\footnote{125}{Ibid, 54.} However, it justifies punishing offenders for legal wrongdoing, in part, because in treating the offender as a responsible moral agent, this communicates to him a respect for his autonomy.\footnote{126}{Ibid, 51.} The process of adjudication and punishment conveys dignity to the offender by holding him responsible as a moral agent, capable of choosing to act unlawfully and in a blameworthy manner.\footnote{127}{Ibid.} If retributive punishment can be understood as a communicative practice, it follows, then, that its value must lie in the ability of offenders to understand their crimes, as retribution must be internally intelligible to offenders if they are to
understand the meaning of the state’s condemnatory action against them, regardless of whether or not they are persuaded by it.128

Censure-based retributivism achieves a further communicative function by conveying to victims that they have not only been injured, but wronged through someone’s culpable act.129 By directing disapprobation at the person responsible, censure communicates that the hurt the victim has suffered has occurred because of another’s wrongful act.130 Censure-based accounts of punishment also communicate to citizens the importance of abiding by the shared values on which their civic enterprise is constituted. For retributivists, to simply ignore a fellow citizen’s wrongdoing would fail to do justice both to the victims and perpetrators, as this would imply that neither the sufferer of the wrong, nor the perpetrator’s actions, matter.131 The state’s coercive measures against such an offender communicate society’s fidelity to the norm that all should enjoy the same package of liberties under the law.132 Censure-based punishment thus frames and reinforces civic values by identifying prohibited actions and enforcing appropriate and proportionate sanctions.

Proportionality of sanctions is central to retributivism, as this principle not only provides justification for punishment, but also provides a basis for the severity of the sentence imposed and respects the values of the rule of law, by limiting the state’s power over offenders.133 While censure conveys blame, proportionality determines how severely the conduct should be punished, establishing the degree of blame expressed.134 As Galligan explains, ‘the proportion must be between the seriousness of the offence on one side, which includes not just the harm caused but also the culpability of the offender, and on the other side, the severity of the punishment.’135

128 Ibid, 52.
129 Von Hirsch (n 114) 10.
130 Ibid.
133 Ashworth (n 123) 89.
134 Galligan (n 106) 164
135 Ibid, 164.
Two senses of proportionality can be understood. First, ordinal proportionality relates to comparative punishments; its requirements are that persons convicted of crimes of like gravity should receive punishments of like severity. Second, cardinal proportionality addresses the relationship between the gravity of the offence and the severity of the punishment. Cardinal proportionality also relates the ordinal ranking to a scale of punishments, which require that the penalty is not out of proportion to the gravity of the crime involved. Proportionality, importantly, addresses offenders as moral agents who have the capacity to evaluate and respond to an official evaluation of the blameworthiness of their conduct, an evaluation which is communicated by the imposition of a proportionate sentence. Von Hirsch believes that a censure-based account of the criminal sanction is easier to link to proportionality, as if censure conveys blame, it is logical that the quantum of punishment for a crime should bear a reasonable relation to the degree of blameworthiness for it. The censure-based account of retributive justice would seem to be more compatible with the proportionality principle than the unfair-advantage theory and fits more comfortably with it, given, as Von Hirsch observes, that blaming is something people not only understand, but engage in themselves, in everyday life. Retribution theory, in particular the positive, censure-based variant, would appear to provide good justification, then, for the aims of the criminal law.

Justifying the intervention of the criminal law on the ground of retribution theory raises some challenges, however. A central moral concern for retributivists is the question of why offenders deserve to suffer penal punishment in the first place, if less harsh sanctions exist that might suffice as punishment? The desert claim is constructed around the premise that wrongdoers deserve to suffer, as this provides a fitting response to the offender’s wrongdoing, but the question remains, if they deserve to suffer, then why do they need to suffer the penal sanctions inflicted on them by the state? Retributivists must show, then, that punishment aims at doing some good. Tadros refers to the ‘the moral valence’ of harm, which some retributivists believe alters the way in which harm is usually understood: whilst harming people is normally bad, it

136 Von Hirsch (n 119) 18-19.
137 Ashworth (n 123) 89.
138 Ibid.
139 Ibid.
140 Von Hirsch (n 119) 7.
141 Ibid, 9.
142 Duff and Garland (n 117) 14.
is good that someone is harmed, it might be claimed, if that person deserved it. Michael Moore, in particular, defends this view, arguing that the state has the right and the duty to punish offenders because it has the right and the duty to bring about the good of deserved suffering.

Duff and Garland acknowledge that retributivism actually faces two problems regarding the interrelationship between desert and punishment. First, even if a crime deserves censure, then why should it be the state’s job to administer that censure; why not leave this task to the victim or to other individual citizens to deal with? Second, if a crime deserves censure, then why should that censure be expressed by means of penal sanctions, which inflict hard treatment and suffering on the offender? Could censure not be conveyed merely by a conviction, or by some other purely symbolic means of conveying condemnation, such as ordering offenders to wear a badge? One retributivist response as to why punishment involving hard treatment should be imposed is, as Duff suggests, because doing this is all part of a communicative enterprise that forces the offender’s attention to the disapproval it conveys, while at the same time, providing him with a means of expressing penitence. It remains unclear, however, why hard treatment is actually a necessary aspect of this enterprise, if this is just one way in which censure can be conveyed. As Tadros observes, retributivists have no real argument as to why the deserved outcome of punishment is suffering, other than for intuitive reasons. The lack of moral justification for conveying moral reprobation by punishing wrongful behaviour, rather than by using less harsh means, has become so troubling for some retributivist theorists that it has compelled them to acknowledge that it might be necessary to employ some forward-looking concerns in their theories, in order to offer more complete justification for them.

A second challenge for justifying the intervention of the criminal law, on the ground of retribution theory, is a practical one. While the proportionality principle in retribution theories is not disputed, there is nothing inherent in retributivism which entails a particular approach to

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146 Duff and Garland (n 142) 14.
148 Tadros (n 144) 74.
149 See, in particular, von Hirsch (n 119) 13; Duff (n 147) 52; and Finnis (n 120) 262-4.
deciding what proportional punishments should be. This is, perhaps, because of the practical difficulties for retributivists in relying on the objective concept of ‘moral anchoring’ to determine a precise penalty for a given offence. Retributivists use the concepts of ordinal proportionality as a scale to compare the gravity of like offences, and cardinal proportionality as an anchor to determine the severity of punishments for these crimes. This presents a practical challenge when comparing unlike crimes to make assessments about their moral blameworthiness, as making assessments will inevitably be open to a degree of subjectivity.

This challenge for proportionality is compounded by the fact that not all crimes are morally blameworthy, for example, strict liability offences. Punishment for such offences clearly cannot be set proportionately according to the moral blameworthiness of them, in the absence of moral blameworthiness. As Diamond observes, it is difficult to justify the criminal law in moral terms because there are too many important exceptions where subjective moral culpability is not a prerequisite to criminality. Arguably, comparing the immorality of crimes objectively, using the concepts of ordinal and cardinal proportionality means that theories of retribution are not capable of allowing for fair assessments of blameworthiness. As Walker remarks, if we were to take moral blameworthiness seriously, all assessments should be subjective.

To say a penalty should be proportional, however, is immediately appealing, as it seems instinctively right that a penalty should be no more or less than merited by the offence, but a further challenge for retribution theory lies in the practical reality of whether the gravity of an offence can really be readily matched with a number of years of imprisonment, ‘still less with the myriad forms and conditions of probation.’ Zedner notes that a deserts scale of punishment can be susceptible to external political, moral and economic pressures, suggesting

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152 Tonry (n 150).
that this scale of punishment is very much at the mercy of the prevailing political climate.\textsuperscript{156} The challenges surrounding the practical implementation of ordinal and cardinal proportionality have, unsurprisingly, led to some conceptual disagreements amongst retributivist theorists. Von Hirsch, for example, regards it as the central, defining concept in determining the severity of punishment,\textsuperscript{157} while for Morris, it provides a limiting principle to ensure that punishments are neither too lenient nor too severe.\textsuperscript{158}

Despite these challenges, however, there are some compelling reasons for justifying the intervention of the criminal law on the ground of retribution theory. Both the unfair-advantage variant of the theory, which posits that punishment restores the social balance by neutralising an unfair advantage, and the censure-based variant, which concerns the morality of conduct, are backward-looking, so focus on past crimes, and look to the criminal law to provide retribution for those who have been wronged. The principle of proportionality ideally aims to ensure that wrongdoers are only punished to the extent that they are responsible for their behaviour, meaning that innocent people are not punished to create an example to others, nor are they given disproportionality harsh or lenient sentences for their crimes. Retributive justice signals to victims and wider society that certain conduct is wrong and that any resulting criminal sanctions are justly deserved. It holds offenders responsible as moral agents, the process of adjudication and punishment conveying respect to them as autonomous moral beings, who have chosen to act unlawfully and in a blameworthy manner. As censure-based retributive justice focuses on the morality of a given conduct, this perhaps, intuitively, makes it a more attractive proposition for justifying the aims of the criminal law, than the unfair-advantage theory. By appealing to people’s morality, this may also encourage them to desist from wrongful conduct, on the ground that it is morally wrong, rather than coercing them to obey the law through fear of attracting criminal liability. The following section will discuss the specific application of retribution theory to revenge porn, using the findings from this analysis, to determine if there is sufficient evidence for addressing revenge porn in the criminal law, on the ground of retribution theory.

\textsuperscript{156} Ibid, 231.
\textsuperscript{157} Von Hirsch (n 119) 15.
5.4.1 Specific Application to Revenge Porn

When applied specifically to revenge porn disclosures, the earlier analysis of deterrence theory found that the theory permits the consequences of revenge porn to result in punishment, if this is instrumental in deterring future offending. The discussion also identified that deterrence theory fails to attach moral value to the blameworthiness of revenge pornographers’ actions, nor does it consider the moral quality of revenge porn, meaning that it does not address the intrinsic badness of the conduct. Retribution theory, by contrast, focuses on the morality of a given conduct and the extent to which criminalisation can be justified for transgressing the moral code, so that people are punished to the extent of this transgression. This might make it a potentially more compelling theory for justifying a response to revenge porn in the criminal law, if the moral reprehensibility of conduct is both acknowledged and addressed.

In order to determine the moral quality of revenge porn dissemination, and thus the extent to which responding to the conduct in the criminal law on the ground of retribution theory can be supported, this section will analyse the moral quality of revenge porn disclosures. To achieve this, the analysis will employ a framework devised by American legal theorist, Stuart Green, which assists in determining the moral content of criminal conduct.\textsuperscript{159} The framework evaluates criminal conduct in terms of three interrelated concepts: culpability, social harmfulness and moral wrongfulness. It is capable of capturing the two main principles of retribution theory, responsibility and proportionality, and can assist, therefore, in providing a solid foundation for justifying the criminalisation of revenge porn on the ground of retribution theory.

(i) Culpability

Green defines ‘culpability’ as being the moral value attributed to a defendant’s state of mind during the commission of a crime, which reflects the degree to which he is blameworthy, or

can be held accountable for the conduct.\textsuperscript{160} Culpability thus forms the basis for guilt or badness that punishments ideally seek to track. It can be challenging, however, to convey culpability with the criminal law’s offence definitions, as these can often fail to track culpability perfectly. In the case of revenge pornography, for example, this misconduct was criminalised under Section 33 of the Criminal Courts and Justice Act 2015,\textsuperscript{161} which created the offence of ‘disclosing private sexual photographs and films with the intention of causing distress.’ The wrongful act, or \textit{actus reus}, of revenge porn is the actual disclosure of the images, but this must be accompanied by a culpable mental state, or \textit{mens rea}, which, in the case of revenge porn, is that the perpetrator intended to cause his victim distress. Revenge porn is commonly understood to be a vengeful act, perpetrated by primary disseminators who are spurned ex-partners (usually a man) distributing private sexual images of their former partner (usually a woman) online, in order to exact revenge following the break-up of their relationship.\textsuperscript{162} It is this culpable behaviour that the specific revenge porn offence seeks to track. Spurned lovers who disseminate revenge porn clearly intend to cause victims distress, thus satisfying the \textit{mens rea} element of the section 33 offence and reflecting the responsibility principle of retribution theory, thus justifying the infliction of criminal sanctions.

As has been identified elsewhere in the thesis, however, revenge porn can be distributed by primary disseminators who are not spurned ex-lovers, secondary disseminators and Internet intermediaries, for reasons other than to cause victims distress. Reasons for disclosing images can include for financial gain, to control or harass individuals, to gain notoriety amongst a friendship group, or even just to have a for laugh or play a prank.\textsuperscript{163} This raises a challenge, then, for retributivists, as this means that perpetrators acting without the intention to cause victims distress do not have the requisite culpability to be found guilty of the offence as constructed, even though they are actively contributing to the distribution of the images. This is difficult to justify, theoretically, on retributivist grounds, if some categories of revenge pornographers do not display sufficient culpability for criminal liability, even when the justificatory theory of retribution is active. While the moral value attributed to the defendant’s state of mind during the commission of revenge porn should make it possible for retributivists

\textsuperscript{160} Green (n 159) 1547.
\textsuperscript{161} As set out in ss 33-35 of, and Sch. 8 to, the Act.
\textsuperscript{163} Ibid, 538.
to normatively establish how far revenge pornographers should be held criminally responsible for their culpable acts, if defendants’ culpability varies, according to whether or not they are caught by the offence as constructed, some revenge pornographers will evade punishment. This is hard to justify on retributivist grounds, if revenge pornographers disseminating revenge porn for non-vengeful reasons are equally morally as culpable as those revenge pornographers who have acted vengefully.

(ii) Social Harmfulness

The second of Green’s elements for assessing the moral content of criminal conduct is social harmfulness. Green defines social harmfulness as reflecting the degree to which a criminal act causes, or risks causing harm.\textsuperscript{164} He defines ‘harm’ as an intrusion into a person’s interest, an ‘interest’ being something in which a person has a stake. Unlike culpability, harmfulness refers to the act and its consequences, rather than the actor.\textsuperscript{165} Disclosing revenge porn egregiously intrudes into victims’ interests in their privacy, dignity, bodily autonomy and self-respect. The act of disclosing images to an online audience, however, considerably magnifies the extent of the intrusion. As Langlois and Slane observe, whereas twenty years ago, one could hope that the shame of being publicly humiliated would soon be forgotten, ‘the information-mining model that is increasingly structuring our daily lives and our reputations simply makes forgetting impossible.’\textsuperscript{166} The resulting harm from being publicly shamed online through revenge porn disclosures is not just about the effects of an action at a specific time and place, but also about the reverberations of an action through information networks, and through time.\textsuperscript{167}

The intrusion into victims’ interests is even more pervasive when revenge pornographers choose to intensify the degree of public shaming by inviting derogatory commentary about the images.\textsuperscript{168} In making both the images and commentary (which can also include identifying

\begin{itemize}
\item \textsuperscript{164}Green (n 159) 1549.
\item \textsuperscript{165}Ibid.
\item \textsuperscript{166}Ganaele Langlois and Andrea Slane, ‘Economies of Reputation: The Case of Revenge Porn,’ (2017) 14(2) Communication and Critical Studies 120, 121.
\item \textsuperscript{167}Ibid.
\item \textsuperscript{168}Ibid 123.
\end{itemize}
information about victims) available to a mass online audience, revenge porn disclosures have the increased potential to create significant harm to a person’s well-being, dignity, reputation, productivity and also their physical safety. The extent of the harm the abuse causes is wide-ranging: revenge porn victims can experience anxiety, depression and suicidal ideation.\textsuperscript{169} Some develop panic attacks and develop eating disorders, and many withdraw from both face-to-face and online social activities.\textsuperscript{170} Keats Citron and Franks note that some victims find they cannot be productive, lose their jobs and cannot find new ones.\textsuperscript{171} Revenge porn also raises the risk of stalking and physical attack.\textsuperscript{172} Some victims have even had to move house to escape physical harm or change their names to escape the otherwise permanent stain of online harassment.\textsuperscript{173} Almost all victims report experiencing feelings of hopelessness and despair.\textsuperscript{174} McGlynn and Johnson describe victims experiencing a form of ‘social rupture’ after becoming aware that their private, sexual images have been non-consensually disclosed online, the change this causes to their lives being so radical that they distinguish between their life experiences and sense of self as being ‘Before and After the abuse.’\textsuperscript{175} The variety of individual harms to interests in which victims have a stake is seemingly endless, and undoubtedly satisfies Green’s conception of harm on which an assessment of the moral content of revenge porn can be based. As a society, we value our interests in privacy, agency, dignity and sexual autonomy but these are interests that revenge porn dissemination seeks to erode.

Postmodernist criminologists, Henry and Malovanovic, posit that society is currently characterised by a fragmentation of social structure which previously formed people’s identities and gave them social roles and values.\textsuperscript{176} This has been replaced, they argue, by uncertainty as individuals increasingly focus on themselves with little regard for others, which

\textsuperscript{170} Ibid.
\textsuperscript{171} Danielle Keats Citron and Mary Anne Franks, ‘Criminalising Revenge Porn’ (2014) 49 Wake Forest L Rev 345, 353.
\textsuperscript{172} Ibid, 350.
\textsuperscript{173} Waldman (n 170) 716.
\textsuperscript{175} Clare McGlynn and Kelly Johnson, ‘It’s Time the Government Recognised the Harm of Upskirting and Image-Based Sexual Abuse,’ The Blog, Huffington Post UK (10 December 2018) <https://www.huffingtonpost.co.uk/entry/upskirting-image-based-abuse_uk_5c0e1fe7e4b0239a97100d80?ncid=other_twitter_cooo9wqtham&utm_campaign=share_twitter> accessed 15 January 2019.
causes harm in the modern world as people use power to show disrespect for others by causing
them harm of some sort.  

Revenge porn dissemination fits the concept of a postmodernist crime; the intersection between freedom from social constraints, the obsession with self, and disrespect for others manifests in conduct where the non-consensually disclosing images forms an expression of whatever identity the perpetrator chooses, motivated by an infinite number of causes, including emotional reasons, and free from the constraints of social norms and values. Viewed as a postmodernist offence, revenge porn dissemination is capable of creating significant social harm. This presents a compelling argument for a censure-based retributive response to the conduct, justifying as it does the punishment of offenders who have caused this harm by choosing to act in a blameworthy manner when disclosing victims’ images.

Revenge porn disclosures can create social harms on an even wider scale. Victims of revenge porn are predominantly women. The gendered element of the abuse, McGlynn and Rackley observe, can be said to reflect and sustain the persistence and prevalence of sexual double standards in society. As Patton observes, when women choose to exercise their sexual freedom by the taking and sending of ‘selfies,’ or allow sexually graphic images of themselves to be taken by another, they are expressing positive sexual autonomy. In creating this sexual imagery, a woman is making a conscious decision about her sexual life and behaviour. Any subsequent non-consensual distribution of these images can perpetuate social harm as, while this violation of her sexual autonomy might be recognised as a serious invasion of her interests, society is also ready to blame her for allowing the images to be taken in the first place. This attitude, known as victim blaming, or ‘slut-shaming,’ Patten argues, is harmful to society in two main ways. First, it belies a double standard for men and women, thus perpetuating gender inequality. Where women might be criticised and shamed for sexual activity, men are praised, and even encouraged, for it. This double standard, Patton asserts, preserves the idea that women do not (or should not) have sexual impulses, reinforcing the existing gendered power structure that perceives women’s needs and desires to be subordinate to those of men’s. The second social harm is that the victim-blaming mentality can discourage women and girls from

177 Ibid.
178 McGlynn and Rackley (n 162) 544.
180 Ibid.
sexual exploration, thus depriving them of the many benefits of sexual autonomy. As McGlynn and Rackley observe, without doubt, it is societal gender disparities, particularly the persistence of sexual double standards, which enable humiliation, stigma and shame to be visited on women, observing that these disparities and double standards actually facilitate the production and prevalence of image-based sexual abuse.

This analysis shows that Green’s conception of harm, on which an assessment of the moral content of revenge porn can be based, is satisfied. As Green observes, ‘[t]here is near unanimous support for the proposition that the state should have the power to impose criminal sanctions for intentionally wrongful conduct that causes serious harm or injury to others.’ The moral quality of revenge porn has the potential to cause serious individual and social harms as it impacts on so many socially valuable interests. Therefore, criminalising this conduct delivers a powerful message about the preservation of society’s standards.

(iii) Moral Wrongfulness

The third of Green’s elements for assessing the moral content of criminal conduct is moral wrongfulness. Green explains that moral wrongfulness involves ‘conduct that violates a moral norm or standard.’ Like social harmfulness, he asserts, it refers to the moral content of a defendant’s criminal act, rather than to the moral status of the actor. For example, there are some acts, which are clearly morally wrong, such as strangling one’s spouse, but in some cases, defendants are not culpable or blameworthy, for example, if they are insane. In separating culpability from moral wrongfulness, Green argues, they can be treated as being analytically distinct.

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181 Ibid.
182 McGlynn and Rackley (n 162) 544.
183 Green (n 159) 1550.
184 Ibid 1551.
185 Ibid.
186 Ibid, 1552.
Moral wrongfulness captures the underlying concern of retribution theory, which is that offences against the moral code, as constructed by society, should be punished. Moral wrongfulness is a norm-based concept, as opposed to a rights-based one. This gives it the advantage of comprehensibility; as Green asserts, ‘[e]ven people who have never had occasion to read a single page of moral philosophy are able to make finely grained distinctions about, say, what properly constitutes stealing or cheating.’ Most citizens would agree that revenge porn is wrongful conduct that contravenes the moral code, as in any civic society, individuals understand there are generally accepted norm-based forms of behaviour. As Pegg and Davies observe, we do not accept that people should be able to display their genitalia to strangers on a public street - but this is both legally and socially acceptable if it is done discreetly, in public, by a consenting partner. Equally, sexual intercourse only becomes unacceptable outdoors when others can view it. Revenge porn disclosures intentionally flout these socially accepted norms by deliberately exposing people, contravening the moral code by placing what should be private into public view. Because moral wrongfulness and culpability are analytically distinct, the moral wrongfulness of revenge porn can be separated from the moral culpability of offenders. As the moral wrongfulness of revenge porn does not depend on offenders’ culpability in disseminating it, this means that all paradigmatic categories of revenge pornographers can be considered to be committing morally wrongful conduct when they choose to do so. This includes individuals who might not be considered as being as morally culpable as others, for example, secondary disseminators who are unaware that the original posting was non-consensual, before re-distributing it. It is the act of placing what should be private into public view, which means all revenge porn disclosures flout socially accepted moral norms by deliberately exposing people which encapsulates the moral wrongfulness of the conduct, regardless of the extent of individual offenders’ culpability. This captures the underlying concern then, of retribution theory, that offences against the moral code should be punished.

Despite the challenge for retribution theory presented by the fact that the specific revenge porn offence, as drafted, means that some morally culpable individuals avoid liability for disclosing victims’ images, it is still a very attractive theory for justifying the intervention of the criminal

187 Galligan (n 106) 164.
189 Samantha Pegg and Anne Davies, Sexual Offences: Law and Content (Routledge, Oxon, 2016) 12.
law, in response to the problem. This is because it focuses on the morality of given conduct, its potential for causing social harm, and the degree to which criminalisation can be justified for conduct which transgresses the moral code. As the analysis above has demonstrated, revenge porn violates accepted moral norms and standards, causing significant individual and social harms, which captures the underlying concern of retribution theory, that offences against the moral code should be punished. Retribution theory is potentially more compelling than deterrence theory when justifying addressing revenge porn in the criminal law, then, due to the fact that both the moral quality of the conduct and the moral culpability of those who choose to disseminate it, are acknowledged and addressed.

5.6 Conclusion

This chapter has identified that many individual and social harms can result from revenge porn disclosures, which support the intervention of the criminal law in response, and has explored justifications for criminalising the conduct, on the grounds of two contemporary criminal law theories, deterrence theory and retribution theory and from the standard of the harm principle. It has found that criminalisation can be supported using the harm principle, as revenge porn causes significant individual and social harms, thus setting back the welfare interests of individuals and general society. The discussion has also identified some challenges for justifying criminalising the conduct using the principle from a feminist perspective, however, if the public/private distinction it creates means that revenge porn dissemination originating from the breakdown of private, sexual relations is subliminally considered by women to be outside of the purview of the criminal law.

The analysis in this chapter has found that there is at least partial justification for addressing revenge porn on the ground of deterrence theory, due to its instrumental consequences of deterring at least some potential offenders. However, it has also concluded that deterrence theory lacks the moral condemnation and blaming voice of the criminal law. The discussion has also identified that there might be better justification for criminalising revenge porn on the ground of retribution theory, due to its traditional links with immoral behaviour and its non-consequentialist concerns with the moral content of revenge porn dissemination. It is an attractive theory for justifying the intervention of the criminal law, when responding to revenge
porn, because of its focus on the morality of a given conduct, its potential for causing social harm and the degree to which criminalisation can be justified for conduct which transgresses the moral code.

While the discussion has focused on monistic theories of punishment, the analysis has also identified that justifying addressing revenge porn on the ground of each one of the theories, in isolation, might be problematic. Justifying punishment for revenge pornographers purely on the ground of deterrence theory, for example, can present serious problems if this punishment results in the punishment of the innocent. A mixed approach which mitigates consequentialist punishments with the constraints of desert may, all-things-considered, be justifiable. Conversely, even if punishment can be justified primarily in retributivist terms as a means of conveying appropriate censure, arguably, penal treatment should be used to convey that censure for consequentialist reasons, so taking a mixed approach might also be justifiable here.

The analysis in this chapter has found that there are, indeed, some compelling theoretical justifications for addressing revenge porn in the criminal law. These findings do not preclude, however, the use of the civil law in addition, or alternatively to, bringing a criminal prosecution. For some victims, a civil law response might actually be preferable, or even essential, in some cases, if criminal charges cannot be brought because the conduct in question does not satisfy the Crown Prosecutor’s evidential and public interest stage. Bringing a civil action does not rely on persuading others of the strength of a case, or the seriousness of it, so where victims are unable to meet the high evidential threshold needed to pursue a criminal prosecution, civil justice can offer a welcome alternative, not least because a lower standard of proof is required in the civil law than the criminal law. Successful civil claims can even be made after an unsuccessful criminal case, so even where a prosecution has been pursued but is unsuccessful, victims can still avail themselves of justice by pursuing a civil claim.

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Civil justice may also be attractive to some revenge porn victims as a means by which they are able to uphold their substantive civil rights against those who have wronged them. 192 To be able to bring an action in the civil courts affirms the belief of victims that they have the right to a remedy. It also underlines the social function of the court, in its preparedness to hear and decide the claim on their behalf.193 Unlike criminal proceedings, in a civil trial, victims’ identities can be protected.194 This is a distinct advantage, as the sexual nature of revenge porn means that the publication of complainants’ names during a criminal trial can only serve to amplify the painful invasion of privacy that has already been suffered. The prospect of a criminal trial and the publicity this can bring might, then, reasonably put many victims off pursuing a criminal prosecution in the first place, or even reporting the offence. The anonymity assured in civil proceedings, conversely, might encourage those who do not wish to pursue criminal proceedings to seek justice.

In tort law, the most likely outcome for revenge porn victims is that compensatory damages will be paid by the defendant, in order to make reparation for the claimant’s loss. While in many cases no amount of compensation will ever compensate victims for their loss, there are some advantages to pursuing a claim for damages. As McGlynn and Rackley observe, where actions are successful, the remedies victims are awarded may enable them to move on with their lives.195 Whether damages or injunctive relief, these remedies could be significantly more beneficial to claimants of image-based abuse, seeking to rebuild their lives, than having their perpetrators face a (relatively short) custodial or community sentence. Pursuing a civil claim for revenge porn, therefore, can empower victims by putting them back in control of the situation and their lives.196

This chapter has established, nonetheless, that revenge porn is an offence that, theoretically, justifies the intervention of the criminal law. There is, therefore, a clear need for state intervention and criminal sanctions to signal the moral condemnation for the conduct that civil penalties do not. While the civil law can be a useful mechanism for victims of revenge porn

193 Ibid, 9.
194 Although in criminal trials, judges do have a discretionary power to withhold names.
195 McGlynn and Rackley (n 162) 558.
196 Ibid, 557.
to claim damages or injunctive relief, the seriousness of the conduct also requires the blaming voice of the criminal law and the greater deterrent effect and retributive response that criminal sanctions can bring. It is suggested, then, that as well as being able to utilise the criminal law, victims should also be able to access a tailored civil remedy. This would suggest that an alternative solution for victims of revenge porn might lie in a hybrid criminal/civil response to the problem, to enable victims to access the maximum legal redress possible. A possible hybrid solution to the problem of revenge porn will be explored, in more detail, in the following chapters.
Chapter 6: Criminal Law Responses to Revenge Porn

‘The law condemns and punishes only actions within certain definite and narrow limits; it thereby justifies, in a way, all similar actions that lie outside those limits.’

Leo Tolstoy

6.1 Introduction

Prior to the enactment of the Criminal Justice and Courts Act 2015, which creates the specific offence of ‘disclosing private sexual photographs and films with intent to cause distress,’ in England and Wales, a number of criminal sanctions were already being successfully deployed to tackle the problem of revenge porn, raising doubts as to whether there was really a lacuna in the law. However, some uncertainty existed about applying existing laws to prosecute online misconduct, many of which pre-dated the Internet, prompting an enquiry by the House of Lords Select Committee for Communications into the suitability of using extant legislation to prosecute offences committed online and on social media. The enquiry concluded, in July 2014, that existing laws were generally appropriate for the prosecution of online offences, making no recommendation to introduce specific legislation to target online misconduct. The Committee noted that civil remedies were also available when private information was disclosed online, including breach of confidence and misuse of private information, although it recognised that civil actions could be long, costly and presented difficulties when enforcing court orders for the removal of images hosted on websites overseas. The Committee did recommend, however, that the Crown Prosecution Service guidance for prosecuting revenge porn using existing laws should be clarified. Soon after the publication of the updated

1 What I Believe (Constantine Popoff tr, Elliot Stock, London, 1885).
2 As set out Chapter 2, ss 33-35 of, and Sch 8 to, the Act.
4 See Chapter 1(fn 6) for the possible offences that may have been committed by revenge porn.
5 Select Committee on Communications, Social Media and Criminal Offences (Sessions 2014-15) HL Paper No 37.
6 Ibid, para 94 (d).
7 Ibid, paras 41-44.
8 Ibid, para 94(e).
a successful prosecution for revenge porn was brought under the Protection from Harassment Act 1997. This resulted in the perpetrator receiving a prison sentence for the first time, in England and Wales, suggesting both that the updated guidance, and the existing law had been effective. In October 2014, however, the Ministry of Justice announced that the sharing of private, sexual images of individuals, without their consent, was to become a specific criminal offence, following months of debate and calls for legislative change to tackle the growing problem.

Revenge porn is a serious crime, which, as the previous chapter has shown, theoretically justifies the intervention of the criminal law. The wide-ranging harms caused by revenge porn indicate a clear need for state intervention and criminal sanctions, both to deter the conduct and to signal moral condemnation for it. Chapter 2 has also identified, however, that it is theoretically justifiable for victims to pursue a claim in the civil law, to seek redress for the harm caused by revenge porn. The grounds for this justification can similarly be founded on the desire to deter the conduct, but also on the idea of rectifying an injustice that revenge pornographers have inflicted on their victims, by making them pay compensation. Chapters 3 and 4 have provided insight into how the civil law can be a useful mechanism for victims of revenge porn to claim damages or injunctive relief, as, where actions are successful, this can potentially offer victims crucial support in helping them rebuild their lives. Chapters 3 and 4 have also highlighted the preference of many victims to seek legal redress for revenge porn in the civil law for a variety of reasons, most notably, because they can pursue proceedings anonymously. While the seriousness of revenge porn conduct undoubtedly requires the blaming voice of the criminal law and the greater deterrent effect and retributive response that criminal sanctions can bring, it is submitted that the criminal law cannot provide an adequate solution for all revenge porn victims, in all cases, and some might wish to respond to the conduct in civil law, either alternatively, or as an adjunct to bringing a criminal prosecution.

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This chapter will propose that the most appropriate solution might, therefore, lie in a hybrid criminal/civil response, thus enabling victims to access the maximum legal redress possible, consistent with other weighty interests, concerns and rights. The use of hybrid legislation, in England and Wales, has gained traction over the past few decades. The precedent for this approach was the Protection from Harassment Act 1997 (PHA), which, in addition to providing victims with a choice of civil and criminal provisions, also empowers a court to impose criminal liability for the breach of a civil restraining order. As the court’s power only arises when it is sentencing a person convicted of harassment under section 2 or section 4 of the Act, the PHA can be described as a criminal preventive order. This is because its purpose is to protect victims of harassment, by preventing perpetrators from subjecting any person named in the order from harassment or acts that will cause a fear of violence, using the threat of criminal sanctions.

The concept of the criminal preventive order, as created by the PHA, precipitated the rapid development of another legal form - the civil preventive order, in the mid-1990s. Civil preventive orders are essentially two-step orders - a civil order backed up by a criminal penalty. The first step is the making of a preventive order according to civil procedure, prohibiting a person from performing certain acts or behaviour; the second step is that a person who breaches any of the conditions of such order, without a reasonable excuse, commits a serious criminal offence, which is usually punishable by up to five years’ imprisonment. The threat of criminal sanctions for the breach of an order is, therefore, coercive, and designed to prevent individuals from re-offending. This two-stage hybrid approach was seen as an ‘innovative but controversial form of social control,’ as it gave the courts a broader range of punishments to choose from as well as the ability to punish offenders more severely. The first civil preventive order - the Anti-Social Behaviour Order (ASBO) - was introduced by the Labour Government under s 1 of the Crime and Disorder Act 1998. Since then, over a dozen types of civil preventive orders have been created in England and Wales, all of which potentially involve

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11 PHA s 5(5).
13 Ibid, 3.
14 Ibid.
15 Ibid, 6.
17 The Anti-Social Behaviour Crime and Policing Act 2014 replaces the ASBO with Criminal Behaviour Orders (CBOs), Community Protection Notices (CPNs) or civil injunctions.
loss of liberty. These include: Serious Crime Prevention Orders, Non-Molestation Orders, Football Spectator Banning Orders, Drinking Banning Orders, Exclusion from Licensed Premises Orders, Foreign Travel Restriction Orders, Risk of Sexual Harm Orders and Travel Restriction Orders.

This chapter seeks to explore the possibility of responding to revenge porn, using this kind of dual civil/criminal approach, by examining two existing offences in the criminal law which, with some amendments, could provide victims with two robust hybrid solutions. First, as already touched on above, is the Protection from Harassment Act 1997 (PHA), which is unique in that, as well as creating criminal offences, it also creates a statutory tort, offering victims of harassment a tailored civil remedy, as well as the ability to seek a prosecution. The chapter will demonstrate that the Act, as it currently stands, does provide revenge porn victims with an adequate response to revenge porn, but will also identify how, with some minor reforms, the PHA could offer a more robust solution than is currently available. The second offence under discussion is the specific revenge porn offence, as set out in ss 33-35 of, and Sch. 8 to, the Criminal Justice and Courts Act 2015 (CJCA). Despite being enacted specifically to tackle the problem of revenge porn, the Act is beset with problems and limitations, which means it is not currently providing an adequate response for many revenge porn victims. This chapter will explore these limitations, identifying areas for potential reform. It will suggest that one reform to the CJCA might involve the incorporation of civil remedies, mirroring those provided by the PHA, so that victims using the specific revenge porn offence can also access a tailored civil remedy.

18 Ashworth and Zedner (n 12) 75.
19 Serious Crime Act 2007 s 1.
20 Family Law Act 1996 s 42A.
21 Football Spectators Act 1989 s 14A.
24 Sexual Offences Act 2003 s 114.
25 Ibid s 123.
26 Criminal Justice and Police Act 2001 s 33.
To examine each offence, the discussion will be divided into four parts. The first part will explore the background and scope of the offences and outline the penalties for each (Sections 6.2.1 and 6.3.1). The second part will explore the application of each offence to revenge porn, framing the discussion around three paradigmatic categories of potential revenge porn defendants (Sections 6.2.2 and 6.3.2). The third part presents a normative analysis, which evaluates how effectively the offences respond to revenge porn, as perpetrated by the three paradigmatic categories of defendants (Sections 6.2.3 and 6.3.3). Areas for reform will be identified in the concluding remarks, which will be explored further in Chapter 7 (Sections 6.2.4 and 6.3.4). The three paradigmatic categories of potential revenge porn defendants referred to are:

(iv) **Primary Disseminators**
(v) **Secondary Disseminators**; and
(vi) **Internet Intermediaries.**

### 6.2 The Protection from Harassment Act 1997

The Protection from Harassment Act 1997 (PHA) addresses behaviour which is repeated and unwanted by victims and which causes them alarm or distress. The Act’s particularly wide ambit means that it has considerable practical effect and can be used to prosecute many types of persistent, unwelcome behaviour, both offline and online. This section will sketch the background and scope of the Act, outlining the offences it creates and the penalties they incur, as well as the civil remedy it creates. Delineating the scope of the PHA will facilitate an exploration of how the offence responds to the dissemination of revenge porn by the three paradigmatic categories of revenge porn defendants.

#### 6.2.1 Background and Scope

(i) **Background**

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28 See Chapter 1.6 for an outline of the paradigmatic categories of revenge porn defendants.
The Protection from Harassment Act 1997 (PHA) was enacted following public concern and consultation about how to tackle the serious problem of ‘stalking,’ an activity which amounts to the persistent infringement of a person’s privacy. The Act itself did not originally refer to stalking, nor did it offer a definition of the misconduct it targeted, except providing in section 7(4) that it could also include speech. Parliamentary debates prior to enactment make it clear, however, that the intention of the legislation was to fill a legal lacuna that rendered victims of stalking vulnerable to continued harassment, following the struggle of the English judiciary to find a suitable remedy in cases involving stalking. The PHA was amended by the Serious Organised Crime and Police Act 2005, and again in 2012, by the Protection of Freedoms Act 2012. The latter amendment followed a campaign by the national charity, Protection Against Stalking, to create specific anti-stalking offences, under ss 2A and 4A, to ensure victims of stalking received sufficient protection from the criminal justice system. In April 2017, the maximum prison sentence for the more serious section 4 offences was doubled to ten years by the Police and Crime Act 2017, and in July 2017, a Private Members’ Bill, the Stalking Protection Bill 2017-19, sponsored by Dr. Sarah Wollaston, was published. The Bill would allow the police to apply to a magistrates’ court for a new civil Stalking Protection Order in England and Wales, imposing both prohibitions and requirements on the perpetrator. A breach of the new order would be a criminal offence.

(ii) Scope

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33 This was to ensure that corporate bodies who might be subject to campaigns from pressure groups, such as animal rights protesters, could enjoy the same protections under the PHA as individuals.
34 Pat Strickland, Stalking: Developments in the Law (HC Briefing Paper 06261, 9 July 2018).
35 This followed a campaign by the National Stalking Advocacy Service, Paladin, and a Ten Minute Rule Bill introduced in October 2016, by Alex Chalk. See: The Stalking (Sentencing) Bill 2016-17 (HC Deb 12 October 2016 cc310-312).
36 Stalking Protection Bill (HC Bill 247).
37 The Bill’s third reading was approved by MPs without division on 23rd November 2018 and will advance to the House of Lords.
The PHA effectively creates four substantive criminal offences and a statutory tort, but also creates a secondary basis for criminal liability through the imposition of restrictive orders, by both the criminal and civil courts, a breach of which constitutes a criminal offence. The offences and tort created by the PHA are as follows:

- Harassment (s 2): a summary only offence, carrying a maximum of six months' imprisonment and/or a level 5 fine;
- Stalking (s 2A): a summary only offence, carrying a maximum of six months' imprisonment and/or a level 5 fine;
- Putting people in fear of violence (s 4): an either way offence, carrying a maximum of ten years' imprisonment and/or a fine on indictment;
- Stalking involving fear of violence or serious alarm or distress (s 4A): an either way offence, carrying a maximum of ten years' imprisonment and/or an unlimited fine on indictment;
- Breach of a civil injunction (s 3(6)): an either way offence, carrying a maximum of five years' imprisonment.
- Breach of a restraining order (s 5(5)): an either way offence, carrying a maximum of five years' imprisonment.
- A civil tort of harassment, created by s 3.

There are three defences for the section 2 and 4 offences, which exclude from the ambit of each any course of conduct that:

a) is aimed at preventing or detecting crime;

b) is taken pursuant to any enactment or rule of law;

c) is ‘reasonable’ in the particular circumstances of the case.

At the heart of both the crimes and the statutory tort is the notion that the misconduct is dependent on a course of conduct, although how temporally proximate or similar the conduct should be is a matter that has been considered and developed through case law.\(^{38}\) An important

\(^{38}\) For example, in *Lau v DPP* [2000] Crim LR 1 FLR 799, two incidents that occurred four months apart were held to be a course of conduct; in *Pratt v DPP* [2001] EWHC 483 (Admin) D threw water over his estranged
feature of the PHA is that where harassment is the prohibited conduct, this is not defined. This gives it an important flexibility in its potential to cover all forms of conduct which constitute harassment, but would be difficult to encapsulate within one definition, although the term ‘harassment’ is considered to be one with a meaning which is generally understood. The PHA does, however, provide specific guidance by explaining that references to harassing a person include alarming the person or causing a person distress, although these are again undefined, giving the Act the necessary flexibility to cover all forms of conduct which result in these effects. The practical effect of not defining harassment is that the scope of the legislation is wide enough to cover harassment ranging from neighbour disputes and workplace conduct to campaigns of harassment based on beliefs such as animal rights. Where the offence of harassment is associated with stalking, however, the Act does provide a non-exhaustive list of examples of such conduct. Despite the fact that the PHA precedes the Internet revolution, its wide ambit also ensures transference between offline and online worlds, providing effectively for online harassment. The Act has been applied successfully to remarks on an Internet forum, and also to an Internet-based campaign. It has also been effectively used, to date, where images have been disseminated online, including revenge porn. The updated CPS Guidelines on Prosecuting Cases Involving Communications Sent via Social Media actively encourages the use of the PHA where an individual is being targeted on social media.

### 6.2.2 Analysis of Three Paradigmatic Categories of Potential Revenge Porn Defendants

wife and then three months later, chased her though the house, swearing at her constantly, actions which were found to amount to a course of conduct.

40 *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1223 at [29] per Lord Phillips MR.
41 PHA 1997 s 7(2).
42 Greatorex and Falkowski (n39) at 7.12.
43 PHA 1997 s 2A(3): these include, for example, following a person, contacting or attempting to contact a person, watching or spying on a person, or publishing any material relating to, or purporting to relate to a person.
44 *Cray v Hancock* [2006] EWCA Civ 302.
46 *S v Director of Public Prosecutions* [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.
48 CPS Guidelines (n 9) at 7.
This section will examine how the Protection from Harassment Act 1997 responds specifically to three paradigmatic categories of potential revenge porn defendants. This will give analytical clarity as to the effectiveness of the offence, when responding specifically to revenge porn, and will provide a foundation for the normative analysis in the next section.

(vi) **Primary Disseminators**

The initial primary disclosure (or threatened disclosure) of revenge porn can be perpetrated by individuals known to the victim, a category which can include friends, ex-friends, acquaintances, casual dates and one-night stands, for example, but it can also be perpetrated by strangers, where images are obtained through the hacking of illicitly acquired devices or online platforms. The original, unauthorised primary disclosure (or threatened disclosure) of revenge porn, will, in many cases, be initiated by a former romantic partner, however. As McGlynn and Rackley observe, this typically involves an ex-partner (usually a man) distributing private sexual pictures of their former partner (usually a woman) online, following the break-up of their relationship.\(^{49}\) Images can be disclosed via social media, or they might be included as email attachments as part of a more targeted attack, for example, to better ensure they are seen by victims’ friends, family or work colleagues. Images can also be disseminated on both regular pornography websites or those dedicated to hosting revenge porn.\(^{50}\) A feature of many dedicated revenge porn websites is that they invite derogatory commentary about the images,\(^{51}\) arming primary disseminators with an additional means of shaming and humiliating their victims. Some websites also include identifying information about victims’ images, placing them at risk of stalking or physical attack.\(^{52}\) The Protection from Harassment Act’s wide ambit means that revenge porn disclosed by primary disseminators, either known or unknown to victims, which is found to form part of a course of conduct,\(^{53}\) can potentially amount to an

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50 Ibid.
52 Danielle Keats Citron and Mary Anne Franks, ‘Criminalising Revenge Porn’ (2014) 49 Wake Forest L Rev 345, 353.
53 PHA 1997 s 1(1).
offence of harassment\textsuperscript{54} or stalking,\textsuperscript{55} under the PHA, and can also give rise to a civil claim, under section 3.

A ‘course of conduct’ by primary disseminators can be established in many multiple ways. For example, the posting of individual photographs, each posting constituting a separate act can amount to a course of conduct. Where images have been obtained non-consensually by primary disseminators, either having been taken covertly, or hacked from stolen devices, prior to dissemination, the act of obtaining the image and the subsequent disclosure could amount to a course of conduct. If an image is sent to multiple recipients, this also creates a course of conduct. There is no requirement, of course, that the acts are of the same nature, so in the context of a relationship breakdown, there might have been some other act, such as an argument or an abusive text message, which, when combined with the disclosure of the image online, would create a course of conduct. Given the willingness of the courts to take any two incidents involving the same two people as a course of conduct, they would be receptive to most formulations of conduct.

Once a course of conduct has been established, the substantive offences provided by sections 2 and 4 of the PHA require that the offender subjectively knew, or objectively would have known, that the course of conduct in question would cause harm. This requires primary disseminators to have either subjectively known that in disclosing their victims’ images, this would cause them to fear violence, alarm or distress, or that objectively, they ought to have known that this would be the case, as a reasonable person in possession of the same information would think so.\textsuperscript{56} Presumably, it would not be difficult to establish subjective or objective knowledge, in the case of revenge-seeking primary disseminators, that they would have known, or ought to have known, on disclosing their victims’ private sexual image(s), this would cause them alarm and distress. Providing that a course of conduct is established, prosecutors would need to determine, then, in these cases, whether the disclosure amounts to the s 2 offence of harassment, or the s 2A offence of stalking. Section 2A(3) of the PHA provides a list of examples about acts which, in particular circumstances, are ones associated with stalking.

\textsuperscript{54} Ibid s 2.
\textsuperscript{55} Ibid s 2A.
\textsuperscript{56} PHA 1997 s 1(2).
Section 2A(3)(c) states that a course of conduct amounting to stalking can include publishing a statement or other material either (i) relating or purporting to relate to a person, or; (ii) purporting to originate from a person. This provision covers the publication of both offline and online material, thus would capture revenge porn disclosures. Section 2A(3)(c)(ii) would also encompass the publication of digitally manipulated revenge porn, including ‘deepfake’ porn, where this purports to originate from a person. So, providing a course of conduct is established by the disclosure, primary disseminators could potentially be prosecuted under the PHA for either of the section 2 offences. The offences are summary only and carry a maximum sentence of six months’ imprisonment and/or a fine of up to £5000.

It may be possible, however, for primary disseminators to be charged with a more serious section 4 offence. These offences are triable either way, but conviction on indictment now carries a maximum sentence of ten years’ imprisonment or an unlimited fine, or both. Section 4A(1)(b)(ii) might apply, for example, where a course of conduct has been established, and this has caused serious alarm or distress, which has had a ‘substantial adverse effect’ on victims’ ‘usual day-to-day activities.’ This might be, for example, where primary disseminators have disclosed victims’ images to dedicated revenge porn websites and also invited derogatory commentary about them and/or provided identifying information and this has come to victims’ attention on more than one occasion. Revenge porn also raises the risk of stalking and physical attack.

The speciality of the PHA is that, in addition to criminal offences, it also creates a civil tort of harassment. Section 3(1) of the PHA provides that the actual or apprehended breach of the prohibitions in s 1(1) and s 1(1A) may be the subject of a claim in civil proceedings. Where

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57 As doubled from 5 years from 3 April 2017 by the Policing and Crime Act 2017.
58 Keats Citron and Franks (n 52) 350.
59 This provides that: ‘[A] person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions’.
60 The harassment of an individual.
61 The harassment of two or more persons.
A revenge porn disclosure is established as being a course of conduct amounting to harassment or stalking, the civil tort enables revenge porn victims to bring a claim against primary disseminators, both known and unknown to victims for:

(i) Damages: these can be awarded (among other things) for any anxiety caused by any the disclosure, or threatened disclosure, as well as any financial loss resulting from the disclosure, and;

(ii) Injunctive relief: an injunction can be sought and awarded restraining revenge pornographers from pursuing any further conduct which amounts to harassment.

A key weapon in combatting harassment is the jurisdiction of the civil courts to grant injunctions restraining conduct in respect of an actual or apprehended breach of ss 1(1) or 1(1A). For victims of an actual or apprehended revenge porn attack, this provision means that injunctive relief can be available swiftly, preventing defendants from making any further disclosures, or from disseminating images in the first place, if defendants have made threats to do so. Section 3(6) of the PHA renders injunctive relief an even more powerful tool, as a breach of the civil injunction without reasonable excuse is a criminal offence, and punishable by the criminal courts.

The PHA provides another crucial weapon in managing the risk of further disclosures as the courts can impose a restraining order on defendants at the time of sentence, which is drafted to meet the particular risks presented in each case. Section 5 of the PHA empowers the sentencing court dealing with a person convicted of the s 2 or s 4 offences to make such an order, which prohibits the defendant from doing anything described in the order. This could include, for example, imposing an order on the defendant, which prohibits him from using the

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62 Where individuals are unknown, they can potentially be identified using an order under CPR 31.17 (orders for disclosure against a person not a party), or by virtue of a Norwich Pharmacal Order. The latter compels individuals or companies who are not guilty of any wrongdoing, but who are somehow involved in the wrongdoing of another, to reveal their identity to enable a claimant to sue them. They are commonly sought against Internet service providers to compel disclosure of information held by them about their users.

63 PHA 1997 s 3(2).
64 PHA 1997 s 3(3).
65 Greatorex and Falkowski (n 39) at 7.69.
66 Strickland (n 34).
Internet. The purpose of the order, however, is to protect the victim (or any other named person) from any future harassment or fear of violence,\(^67\) rather than punish the defendant. The order can be expressed to have effect for a specified period, which can be for a specified or indeterminate period of time.\(^68\) S 5(A) of the PHA additionally empowers a court to make a restraining order against a defendant even where the defendant is acquitted of any offence. This power arises where the court considers it necessary to protect a person from harassment by the defendant.\(^69\)

The PHA additionally provides for police power of entry in relation to the offence of stalking. This means, under s 2B(1) that a justice of the peace may, on application by a constable, issue a warrant authorising a constable to enter and search a suspect’s premises if the justice of the peace is satisfied that there are reasonable grounds for believing that:

\[
\text{a) an offence under section 2A has been, or is being, committed; and} \\
\text{b) there is material on the premises which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence.}
\]

Section 2B(2) allows the police to seize and retain anything for which a search has been authorized under subsection (1). Where primary disseminators are known to victims and disclosure of images has been threatened, or is taking place, this provision could be a useful tool for victims to use to limit or prevent the threatened dissemination, if the devices containing the offending images are seized by the police. However, this power would again be contingent on a course of conduct having been established in relation to the material actually published, or that the threat of disclosure was considered to be part of a course of conduct amounting to stalking.

\(^67\) PHA s 5(2).
\(^69\) PHA s 5(1).
In summary, providing a course of conduct can be established with regard to the disclosure (or threatened disclosure) by primary disseminators, the PHA provides revenge porn victims with four potential statutory offences with which to prosecute offenders, depending on the individual circumstances of the case. It also creates a statutory tort, which enables victims to claim damages for the anxiety and distress caused by actual or threatened disclosures, as well as enabling them to apply for injunctive relief to prevent disclosure or curtail further disclosures. The Act also creates a secondary basis for criminal liability through the imposition of restrictive orders by both the criminal and civil courts, a breach of which constitutes a criminal offence. The PHA, therefore, creates police powers of arrest for defendants in breach of an injunction, as well as police powers of entry to seize any material from a defendant’s premises where there are reasonable grounds to believe that material constitutes evidence which might be of value in establishing an offence of stalking.

(vii) Secondary Disseminators

This category of revenge pornographers includes individuals who amplify the original revenge porn post. Secondary disseminators can be acquaintances of either victims or primary disseminators, and some may have acquired the images directly from primary disseminators, following the breakdown of a relationship. The category includes, however, an unspecified number of individuals unknown to the victim, who have come across the images via search engines, or by visiting dedicated websites, and have subsequently further disseminated them. The wide ambit of the PHA means that a conviction for harassment has a very low evidential threshold, so providing secondary disseminators can be identified and a course of conduct relating to the amplification of the original image can be established, they can be prosecuted using the PHA, in the same way as primary disseminators.

Where an unspecified number of individuals unknown to the victim have come across the images via search engines, or by visiting dedicated websites and subsequently further disseminated them, it would be impractical for victims to apply for separate court orders to

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70 This could be achieved in some cases via a Norwich Pharmacal Order, or by applying for an order under CPR 31.17.
reveal the identities of these unknown individuals. However, the PHA has proved to be useful in a case involving the amplification of revenge porn by large numbers of unknown secondary disseminators seeding Bit Torre‌nts. In a unique application of the PHA, in *AMP v Persons Unknown*, Ramsey J found that images uploaded using torrents, which are subsequently made available to secondary disseminators via torrent indexers, can constitute an act of harassment. In holding that the sharing of images by BitTorrent seeders constituted an act of harassment, this allowed the victim’s legal team to serve a notice on any person making them available, requiring them to desist and to destroy their copies of the files containing the images.

In summary, where secondary disseminators can be identified and a course of conduct which amounts to harassment or stalking is established, the PHA provides revenge porn victims with four statutory offences with which to potentially prosecute offenders, depending on the individual circumstances of the case. The PHA’s use is limited where large numbers of secondary disseminators unknown to the victim have come across the images via search engines, or by visiting dedicated websites, and have subsequently further disseminated them. However, following a unique application of the PHA to BitTorrent seeding, further dissemination of images via BitTorrents can be averted.

(viii) Internet Intermediaries

Online revenge porn disclosures are facilitated by Internet intermediaries in two distinct ways. First, images can be uploaded onto social media websites, or onto imageboard and discussion fora. Most of these platforms now provide reporting tools for revenge porn, however, and

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72 These are file types used by the BitTorrent file-sharing protocol, which authorises and points to a remote server that contains the location of different remote hosts with an instance or part of the file to be shared or downloaded.
73 *AMP* (n 71) at [45].
some have developed software or artificial intelligence to detect nude or overtly sexual images, although inevitably, not all posts will be reported or detected and removed in time to prevent victims’ images from being broadcast to a mass audience. Second is where images are posted to dedicated revenge porn websites. Operators of free revenge porn sites stand to make a good profit through advertising revenue, and by directing users to subscription-only porn sites. Money can also be made by charging victims a fee for removing their images. It is in the website operators’ interests, therefore, to keep the compromising images up on their sites for as long as possible, as the more traffic the website receives, the more they can charge in advertisement and removal fees.

The law in England and Wales generally absolves all Internet intermediaries of responsibility for content posted by users of their platforms. This is in the interests of protecting freedom of expression, considered crucial in a democratic society. If revenge porn is posted online and the content remains unmoderated, Internet intermediaries hosting sites based in Europe can rely on Regulation 19 of the E-Commerce (EC Directive) Regulations 2002, which protects website operators hosting third-party content from liability. This means that publishers hosting user-generated revenge porn on their platforms are not liable, even if users break the law in doing so, providing that the publisher operates an effective notice and takedown procedure and removes offensive content ‘expeditiously,’ once a complaint is received.

Where defamatory remarks are made or invited about victims’ images, the Defamation Act 2013 further strengthens the safeguards for website operators, by adding additional defences in respect of statements posted by third parties. Criminal liability is determined, then, by the way in which notification about offensive images and commentary is dealt with.

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77 Langlois and Slane (n 51) 126-9.
79 While user-generated content is currently protected by the EU Electronic Commerce Directive, following Brexit, the position is unclear. EU laws will not apply in the UK after the transition period unless they are reintroduced by new Acts of Parliament, including a new act to provide for a ‘report and remove’ system for unmoderated Internet content. If the UK joins the European Economic Area, some EU laws will be reintroduced into domestic law.
80 Regulation 19 (a)(ii).
81 See s 5 of the Defamation Act 2013.
Under current EU law, Internet intermediaries are immune, therefore, from liability for hosting revenge porn if they react quickly to complaints, once alerted, using the ‘notice and takedown’ mechanism. Providing material is removed expeditiously, Internet intermediaries can currently absolve themselves of blame by relying on the legal distinction between websites that publish data and platforms that host it.\(^{82}\) A problem for revenge porn victims who are seeking the swift removal of their images from any websites hosting them is that Regulation 19 does not give a specific timeframe within which offending material is removed, which creates the obvious potential for images to go viral, before the posts are taken down. A further problem is that many revenge porn websites are hosted outside of the EU, and Internet intermediaries in other jurisdictions can be subject to far less stringent regulations when hosting user-generated content, making it difficult for victims to get images removed, or hold website operators to account if they refuse to remove them.\(^{83}\) If Internet intermediaries hosting sites based in the EU fail to respond to takedown requests, this can attract criminal liability under s 3(6) of the PHA, as failure to comply with a notice can allow for a European Arrest Warrant to be issued. S 7(3A) of the PHA also usefully extends ‘conduct’ to aiding, abetting, counselling or procuring another’s conduct. Presumably, provided jurisdiction is not an issue, Internet intermediaries hosting revenge porn who do not remove revenge porn posted by third parties, within a reasonable timeframe following notification, could be seen as aiding and abetting a course of conduct amounting to harassment under s 7(3A) of the PHA, giving rise to both criminal and civil liability.

The PHA’s usefulness in enabling a civil claim to be brought against an Internet intermediary can be demonstrated, after a claim was brought against Facebook under the Protection from Harassment (Northern Ireland) Order 1997.\(^{84}\) While Northern Ireland is outside of the jurisdiction of England and Wales being examined in this thesis, the case demonstrates the Northern Ireland Act’s potential to claim for damages against an Internet intermediary, where offensive material is not removed expeditiously. In *J20 v Facebook Ireland Ltd* [2016] NIQB 98 (QBD) (NI), the claimant brought claims for harassment and misuse of private information.

\(^{82}\) Although see below about the aims of the new DCMS Digital Charter.

\(^{83}\) For example, in the US, Internet intermediaries hosting user-generated content are granted wide legal immunity by virtue of Section 230 of the Communications Decency Act of 1996. This immunity is not absolute, however, as copyrighted material is not protected.

\(^{84}\) SI 1997/11800.
against the defendant social network service, in relation to a series of postings on its site. These consisted of photographic images and accompanying commentary. The Northern Ireland Act does not have a similar provision to that of s 7(3A) of the PHA, however, which extends conduct to aiding, abetting, counselling or procuring another’s conduct, so any course of conduct in the instant case had to arise from the defendant’s decision not to remove the postings when they were drawn to its attention. The claimant, was awarded £3000 in damages after Facebook was found liable for misuse of private information, after failing to remove the offensive posts. While the postings did not meet the test for a course of conduct amounting to harassment, the case does demonstrate the potential for both civil and criminal liability to arise under s 7(3A) of the PHA 1997 when Internet intermediaries fail to remove revenge porn posts expeditiously, following notification.

Internet intermediaries can currently absolve themselves of blame by relying on the legal distinction between websites that publish data and platforms that host it. As noted earlier in Chapter 3, however, given the current challenges facing the regulation of online platforms, the UK Department for Digital, Culture, Media and Sport (DCMS), has recently announced the development of its new Digital Charter, a Government initiative aimed at combatting the challenges arising from new technologies. The policy paper asserts that the charter is ‘a rolling programme of work to agree norms and rules for the online world and put them into practice.’ Although the details are scant, the most notable aspect of the new standards involves the Government’s intention to address online platforms’ legal liability for third party content shared on their sites, raising questions about the current exemption, under the E-Commerce Directive 2002, for online platforms from liability for illegal content they unknowingly host. The Government has also recently announced that it is considering creating an online safety commissioner with powers to fine and investigate social media giants. This would be along the lines of Australia, which has had an eSafety Commissioner since 2015, who has powers to

85 Julian Fulbrook, ‘Case Comment: J20 v Facebook Ireland Ltd,’ (2017) JPI Law 2 C82-C87, C82.
86 Ibid, C83.
87 Although see note below about the aims of the new DCMS Digital Charter.
88 See Chapter 3.2.2.
fine social media companies for everyday cyberbullying posts that are not taken down. It should also be noted that revised data protection law now provides further essential benefits to revenge porn victims, following the enactment of the General Data Protection Regulation (GDPR) in May 2018.

In summary, Internet intermediaries based in the EU are currently absolved of responsibility for content posted by users of their platforms providing the content is unmoderated, as Regulation 19 of the E-Commerce (EC Directive Regulations) 2002 protects website operators hosting third party content. This means that publishers hosting user-generated revenge porn on their platforms are not held liable, even if the user breaks the law in posting the content, providing that the content remains unmoderated and the publisher operates an effective notice and takedown procedure and removes offensive content ‘expeditiously,’ once a complaint is received. Criminal liability is determined, then, by the way in which notification about offensive images and commentary is dealt with. Regulation 19 does not give a specific timeframe within which offending material is removed, meaning that revenge porn posts can go viral, before they are taken down. Where postings are not removed expeditiously following notification, civil and criminal liability could potentially arise, then, under s 7(3A) of the PHA. Many revenge porn websites are hosted outside of the EU, however, and other jurisdictions can have far less stringent regulations than this jurisdiction, when hosting user-generated content, making it difficult for victims to remove images or hold website operators to account if they refuse to remove their images.

6.2.3 Normative Analysis

This section will present a normative analysis of the benefits and limitations of using the PHA to respond to revenge porn, with reference, where applicable, to the three paradigmatic categories of potential revenge porn defendants outlined above. It will identify respects in which using the cause of action succeeds, but also fails, in some circumstances, to fully

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92 See Chapter 1.5.1.
vindicate victims for the harm caused by the disclosure of their images. The analysis aims to shed a normative light on how the PHA should respond to revenge porn conduct, in order to provide victims with more adequate vindication, thus highlighting how existing provisions could be improved. The analysis will aim to show, where appropriate, how using the PHA to respond to revenge porn might be congruent with some of the civil and criminal law theories discussed in Chapters 2 and 5.

The above analysis has identified that a significant benefit of using the PHA to seek redress for revenge porn disclosures is that it creates a statutory civil remedy. While revenge porn is, without doubt, an offence that justifies the intervention of the criminal law, the thesis has also previously identified that some victims might prefer to mobilise the civil justice system in order to seek recourse for revenge porn disclosures. Civil justice can offer an additional or alternative means of obtaining redress and can be an attractive option for victims, not least because a lower standard of proof is required in the civil law than the criminal law. Also, the anonymity assured in civil proceedings might encourage those who do not wish to pursue criminal proceedings to seek justice. Where actions are successful, the remedies victims are awarded might enable them to move on with their lives, damages or injunctive relief being significantly more beneficial to claimants than having their perpetrators face a relatively short custodial or community sentence.93 Pursuing a civil claim for revenge porn can also empower victims by putting them back in control of the situation and their lives.94

A key weapon in staving off an actual or potential revenge porn attack is the jurisdiction of the civil courts to grant injunctions to restrain conduct. This can be effected under s 3(3) of the PHA, in respect of an actual or threatened breach of s 1(1). Once awarded, an injunction can effectively restrain revenge pornographers in all paradigmatic categories from pursuing any threatened or further conduct. S 3(2) also enables victims to bring a claim for damages for any anxiety caused by revenge porn, and/or any financial loss resulting from it. These provisions make the PHA a particularly useful piece of legislation, as it gives revenge porn victims the choice of bringing a civil claim for damages or an injunction, in addition to, or alternatively, to pursuing a criminal prosecution. This may encourage victims who are reluctant to bring

93 McGlynn and Rackley (n 49) 25.
criminal proceedings to seek justice in the civil law, if their identities can be protected.\textsuperscript{95} The prospect of a criminal trial and the publicity this can bring might reasonably put many victims off pursuing a criminal prosecution in the first place, or even reporting the offence. The anonymity assured in civil proceedings, conversely, might encourage those who do not wish to pursue criminal proceedings to seek justice.

Revenge porn disclosures can cause victims to suffer significant mental distress, although, as Chapter 3 revealed, this can often fall short of being a recognised psychiatric injury, as required by tort law. The analysis in Chapter 3 shows that when some of the relevant common law torts are applied to revenge porn, obtaining more than modest damages for the mental distress caused by dissemination can be difficult, as tort law does not traditionally recognise the types of harm caused by this kind of conduct. The analysis reveals that, generally speaking, only relatively modest damages are awarded for the mental distress caused by a breach of confidence (although this position has improved following the enactment of the Human Rights Act 1998); when using the tort of misuse of private information, the recent classification of this cause of action as a tort means that compensatory damages for non-pecuniary welfare losses - such as emotional distress - can only be awarded if the mental distress suffered by claimants has caused a recognised psychiatric injury.\textsuperscript{96} It could be more beneficial, then, for victims to use s 3(2) of the PHA to claim damages instead of the common law torts, as damages awards under the PHA could potentially be more generous. As du Bois points out, the Protection from Harassment Bill\textsuperscript{97} was drafted specifically to overcome the common law’s ‘centuries-long insistence on personal injury,’ thereby allowing damages to be available for ‘any anxiety’ caused by harassment.\textsuperscript{98} The broad inclusion of ‘any anxiety’ under s 3(2) would encompass the particular kind of mental distress suffered by revenge porn victims, this harm not being traditionally recognised by tort law. Using the civil remedy provided by s 3(2) of the PHA could increase the potential, therefore, for victims to obtain higher damages awards for their mental distress by circumventing the constraints of some of the common law torts.

\textsuperscript{95} Although in criminal trials, judges do have a discretionary power to withhold names.
\textsuperscript{96} See discussions in 3.2.3 and 3.3.3.
\textsuperscript{97} Stalking Bill [Bill 78 of 1995-96].
\textsuperscript{98} François Du Bois, ‘Harassment: A Wrong without a Right?’ in Eric Descheemaeker and Helen Scott (eds) \textit{Iniuria and the Common Law} (Hart, Oxford and Portland, Oregon, 2013) 221.
One of the key advantages of using the PHA to seek redress in the civil law for revenge porn, then, is that it can bypass the strict requirements of torts, as harassment can be committed regardless of whether or not a right has been infringed. This is because it creates a free-floating wrong which can be adapted to fit the circumstances of each case and is open to judicial interpretation by the courts. It does not focus, therefore, on the intention of perpetrators, but rather on the reaction of victims, who have had interests in their physical integrity, dignity, bodily autonomy or reputation infringed by someone pursuing a course of conduct which he knows, or ought to know, amounts to harassment of another. Harassment stands out from the usual rights-based approach of the common law torts because it focuses on the moral quality of the misconduct and the manner in which the defendant chose to exercise his general liberty of action, rather than on the basis of the nature and seriousness of the harm caused.99

There is actually a historical precedent for the general wrong of harassment, as created by the PHA, as some academics believe this wrong can be regarded as a contemporary version of the ancient delict in Roman Law, the *actio iniuriarum*.100 *Iniuria* is variously translated in English as ‘insult’, ‘contempt’, ‘affront’, ‘outrage’ or ‘contumely’.101 As Descheemaeker and Scott explain, although the original focus of the delict was assault, it quickly grew to include sexual harassment and defamation and later evolved further to incorporate a range of new wrongs, which included all attacks on dignity.102 These protected a person’s interests in their *corpus, fama* and *dignitas* (physical integrity, reputation and esteem), so served to protect the non-patrimonial aspects of a person’s existence, in other words, ‘who they were,’ rather than ‘what they had’ - or their ‘being’ rather than ‘having.’103 Birks considers that harassment can be considered to be ‘the best generic description of the act involved in *iniuria,*’ as it comprises all the protected interests identified in first century accounts of the delict.104 The *actio iniuriarum* thus granted citizens a private remedy, or *damnum iniuria*, to assuage wounded feelings, where their dignity, reputation or bodily integrity had been violated in a contemptuous manner.105

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99 Ibid, 239.
100 Du Bois (n 98) 221.
103 Descheemaeker and Scott (n 101) 1.
104 Birks (n 100) 7-8.
105 Ibid
Descheemaeker and Scott observe, the Romans would have had no difficulty redressing stalking, at least in terms of society’s sensitivity to its wrongfulness. What is remarkable, they assert, is not so much the precocity of Roman law in responding to such a wrong, but rather, that modern systems of civil liability have felt stretched to their limits by the need to respond to it, evidencing ‘the common law’s implicit quest for an inuiria-like tort.’ The PHA can be considered, then, to be a, homegrown version of the actio iniuriarum, providing victims of revenge porn with a means of accessing a tailored civil remedy to vindicate their wounded feelings, following the violation of their dignity, reputation and bodily integrity.

The discussion above, in the previous section, has examined how the PHA responds to revenge porn disclosure by three paradigmatic categories of revenge porn defendants, identifying that a significant benefit of using the PHA to respond to revenge porn disclosures is the Act’s incredibly wide ambit. This enables the PHA to potentially cover disclosures by perpetrators in all three paradigmatic categories of defendants. The practical effect of not specifically defining the conduct of stalking when the legislation was originally drafted is that the scope of harassing conduct has largely been left open to judicial interpretation. This means that rather than merely restraining and protecting against stalking only, the legislation can cover a wide range of harassment, from neighbour disputes and workplace conduct, to campaigns of harassment based on beliefs such as animal rights. Its particularly wide ambit also ensures transference between offline and online worlds, providing effectively for online harassment.

The wide ambit of the PHA can be attributed to the fact that s 1 of the Act refers to harassment, which is subjectively assessed, meaning that the result of the harassing conduct requires the victim to suffer at least some alarm or distress, or some other low-level negative emotion. In DPP v Ramsdale, the Divisional Court held that the definition of harassment in s 7 of the Act was inclusive, not exhaustive, and that this could also include ‘negative emotion …for

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106 Descheemaeker and Scott (n 101) 19.
107 Ibid.
108 Du Bois (n 98)
110 Majrowski v Guy’s and St Thomas’s NHS Trust [2006] UKHL 34, [2007] 1 AC 224.
111 Masters and Scholars of the University of Oxford v Broughton [2006] EWHC 1233 (QB), [2006] All ER (D) 387.
example, annoyance or worry.\textsuperscript{113} The appeal of the section 2 offences, when applied specifically to revenge porn disclosures, is immediately apparent, as criminal liability rests, in part, on the subjective reaction of the victim. Due to the sexual nature of revenge porn, it can reasonably be assumed that individuals who have had their private images non-consensually disclosed would experience at least some alarm or distress, in addition to other negative emotions, such as humiliation, fear, anxiety or worry. While the reaction of victims does not solely determine criminal liability, the fault element of the section 2 offences provides a further benefit for revenge porn victims, as it consists not only of a subjective element but also an objective element, in the alternative. Under s 1(1) of the Act, providing that defendants know, or ought to know, that the disclosures would cause victims alarm or distress, then their intention in disclosing their images is irrelevant. Providing it is established that the disclosures amount to a ‘course of conduct,’ the section 2 offences of the PHA can potentially catch revenge porn disclosures by all three paradigmatic categories of defendants. The Act also has the potential to cover a wide range of image-based abuse, as it can provide effectively for the harm caused to victims by the disclosure of digitally manipulated images or ‘deepfake’ pornography;\textsuperscript{114} it could also encompass upskirting, where images taken covertly of victims are posted onto dedicated fetishists’ sites,\textsuperscript{115} and these come to the attention of the victim.\textsuperscript{116}

The PHA can usefully provide recourse in the criminal law, then, for revenge porn victims wishing to bring a criminal prosecution against perpetrators who have not acted with the requisite \textit{mens rea} for other offences that may have been committed by revenge porn disclosures.\textsuperscript{117} This is congruent with retribution theory, as retributivists believe that the moral value attributed to the defendant’s state of mind during the commission of crimes should make

\textsuperscript{113} Ibid at [16].
\textsuperscript{114} This new phenomenon involves the incorporation of thousands of photographs of an individual’s face, using user-friendly technology to make a pornographic film. The technology has become so sophisticated, it can be impossible to tell that the end result is fake.
\textsuperscript{116} The Voyeurism (Offences) (No. 2) Bill (HL Bill 130) amends s 67 of the Sexual Offences Act by inserting an additional offence to outlaw upskirting at s 67A.
\textsuperscript{117} For example, the specific revenge porn offence, as set out in ss. 33-35 of, and Sch. 8 to, the Criminal Justice and Courts Act 2015, is actually entitled ‘disclosing private sexual photographs and films with the intent to cause distress.’ The offence requires not only the non-consensual disclosure of images of an individual but also the intention of causing that individual distress; sending a message or other matter by means of a public communications network is an offence under s.127 of the Communications Act 2003, if this is deemed to be indecent or grossly offensive, but the perpetrator must have intended to cause the recipient annoyance, inconvenience, or needless anxiety.
it possible to normatively establish how far they should be held criminally responsible for their culpable act. Most perpetrators will understand that in disseminating revenge porn, this would potentially cause victims harm. However, where the mens rea for an offence is narrowly drawn, such as the requirement for perpetrators to intend to cause victims distress by disclosing their images under s 33 of the Criminal Justice and Courts Act 2015, this means that many revenge pornographers within the paradigmatic categories of defendants who do not intend to cause victims distress will not have sufficient culpability for liability, meaning they avoid punishment. This is unfair, on a retributivist view of the criminal law, as retributivism posits that all mentally competent, culpable actors should be punished to the extent of their desert. Using the PHA to pursue a conviction for revenge porn ensures that the moral blameworthiness of revenge porn disclosures extends to all paradigmatic categories of defendants, regardless of their intention in disclosing the images. It can, therefore, hold offenders in all paradigmatic categories culpable as moral agents who have chosen to act unlawfully and in a blameworthy manner by disclosing images.

While there are obvious benefits for using the section 2 offences for revenge porn offences, the PHA’s wide ambit can, conversely, present a limitation for police and prosecutors. As the low threshold is easily met, the section 2 offences are summary only and punishable by a maximum of six months’ imprisonment, or a fine not exceeding level 5. The harm caused by revenge porn disclosures can be devastating, however, and, in many cases, life-altering, so pursuing a conviction under section 2 might not provide many victims with an adequate solution, if their perpetrators are not sufficiently punished. The problem with the wide ambit of the PHA is that the conduct of many defendants will, in some cases, be too serious to merit a section 2 offence, but will also fall short of meeting the much higher threshold for a section 4 offence. These offences are triable either way, and punishable on conviction up to a maximum sentence of ten years, or an unlimited fine, or both. Given the higher threshold for liability, this could mean that police and prosecutors might opt instead to use the section 2 offences, where conduct falls in seriousness between the offences, in order to obtain a conviction and secure a restraining order, as quickly as possible. As Gowland observes, victims of a course of conduct amounting to harassment may have little choice but to proceed with their complaint via section

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118 Criminal Justice Act 1982 s 37 (2). This currently equates to £5000 on the standard scale of fines for summary offences.
119 As doubled from 5 years from 3 April 2017 by the Policing and Crime Act 2017.
120 Keats Citron and Franks (n 58).
2, simply to ensure that they can secure a restraining order as quickly as possible, albeit at the cost of a much shorter period of imprisonment for their tormentor.\textsuperscript{121}

The PHA can also be criticised for creating uncertainty in the law. As Finch observes, whether an individual’s behaviour crosses the harassment threshold ‘is contingent upon that which is inherently unknowable - how another person will react in any given situation.’\textsuperscript{122} She explains that victims of harassment might experience a ‘potentially infinite variability in individual reactions,’\textsuperscript{123} so ‘conduct that causes manifest alarm or distress to one person might leave another totally unperturbed.’\textsuperscript{124} Given this level of variability, Finch questions how liability can be said to rest on what the defendant ‘ought to have known’ was occurring in the mind of another?\textsuperscript{125} Gowland concurs, observing that not only does criminal liability rest on the reaction of the victim, which is an unknown quantity, but offenders are also judged by means of an objective, arbitrary standard, in that they ought to have known how the victim would react.\textsuperscript{126} This element of ‘contingent criminality,’ as Finch points out, means that the law lacks clarity, as a person will not be able to predict with certainty whether a particular type of behaviour will bring him into conflict with the law, given that this is totally dependent on the reaction of the recipient of the conduct.\textsuperscript{127} The very wide ambit of the section 2 offences has the potential, then, to inflict unfair prosecutions\textsuperscript{128} and undeserved punishments, if the objective standard takes no account of the defendant’s inability to appreciate the impact of his conduct on another, and makes insufficient allowance for the potential for misunderstandings to arise.\textsuperscript{129}

That criminality hinges on the individual reactions of the victims to the course of harassing conduct is problematic when justifying responding to revenge porn in the criminal law, on the

\begin{footnotesize}
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\item \textsuperscript{121} Judith Gowland, ‘Protection from Harassment Act 1997: The ‘New’ Stalking Offences’ (2013) 77(5) JCL 387, 392.
\item \textsuperscript{122} Finch (n 31) 261.
\item \textsuperscript{123} Ibid.
\item \textsuperscript{124} Ibid, 230.
\item \textsuperscript{125} Ibid, 261.
\item \textsuperscript{126} Gowland (n 121).
\item \textsuperscript{127} Finch (n 31) 230.
\item \textsuperscript{128} For example, in 2008, Michael Hurst was tried under s 2 of the PHA for pursuing a course of conduct amounting to harassment by sending his ex-girlfriend a ‘friend request’ on Facebook and sending a book to her place of work: see ‘Facebook Harassment Trial Ends in Farce as Case is Thrown out of Court,’ Daily Mail (27 March 2008) <https://www.dailymail.co.uk/news/article-547068/Facebook-harassment-trial-ends-farce-case-thrown-court.html> accessed 15 January 2019.
\item \textsuperscript{129} Finch (n 31) 261.
\end{itemize}
\end{footnotesize}
ground of deterrence theory, one of the criminal law theories examined in Chapter 5. In order for deterrence to operate effectively, the theory posits that potential perpetrators need to be aware of the law and understand when their actions will bring them into conflict with it. Without this awareness, potentially deterrable revenge pornographers cannot be encouraged to act rationally and take the law into account when deciding to act. The lack of certainty created by the PHA runs counter, then, to the first principle of the rule of law, as advanced by Lord Bingham, that the law must be ‘accessible, clear and predictable.’ 130 It also runs contrary to the principle, advanced by Joseph Raz, that ‘[t]he law must be open and adequately publicised,’ as if it is to guide people, they must easily be able to find out what it is. 131

The PHA creates further uncertainty in the law, due to the fact that the Act creates a novel kind of criminal offence, namely the breach of a civil order, as an alternative to the more usual contempt of court proceedings. 132 This means that, without reasonable excuse, criminal liability can be imposed on defendants using the civil standard of proof, which some critics of hybrid orders argue, manifestly criminalises defiance of the law, rather than the originating conduct. 133 This raises questions, not only about whether non-criminal proceedings should be used to circumvent a criminal trial, if the outcome might entail loss of liberty, but also whether the penalties for breaching the order can be proportionate to the breach alone. 134 As with hybrid orders, the dual provisions of the PHA treat the two sets of conditions - imposition and breach - as entirely separate, so sentences can be disproportionate to the nature of what has been done, arguably placing too much emphasis on breaching the order. 135 As the maximum sentence for breaching an injunction using the PHA is five years’ imprisonment, this is a substantial sentence. Ashworth and Zedner argue that where conduct is ‘sub-criminal,’ it is difficult to

132 Although, that said, the outcome is not much different from contempt of court proceedings for breach of injunction, except that with the PHA the victim should inform the police of the breach. This removes the onus from the victims of bringing the matter to the attention of the court and establishing the breach, enabling the police to act promptly.
135 Ibid.
justify the use of prison sentences for a breach of prohibitions, not least to justify maximum sentences for breach as high as five years.\textsuperscript{136}

When applied specifically to revenge porn conduct, the problem with disproportionality can be seen in the following scenario: the victim has apprehended on more than one occasion that a mentally unstable defendant will disclose her images, following threats to do so; an injunction is duly granted, prohibiting the defendant from disclosing the images. The defendant then breaches the injunction by threatening, without reasonable excuse, on another occasion to disclose the images, although he does not actually do so, which could possibly result in a custodial sentence under s 3(6) of the PHA. As well as creating legal uncertainty, this creates a challenge for responding to revenge porn in the criminal law, on the ground of retribution theory, as, in the above scenario, no crime has yet been committed, so a custodial sentence would be disproportionate. Proportionality of sanctions is central to retributivism as this principle provides both justification for punishment and a basis for the severity of the sentence imposed for the conduct, by respecting the rule of law and limiting the state’s power over offenders. By imposing a prison sentence of possibly up to five years on individuals who have not yet committed a criminal act, this creates the potential for an illogical quantum of punishment to be imposed, which does not bear a reasonable degree of blameworthiness for the original conduct for which the injunction was awarded. This challenge becomes an additional concern when considering that criminalising individuals for non-criminal conduct contributes to the larger problem of overcriminalization, due to the pressure this places on an already overstretched criminal justice system. This is a particular concern of Douglas Husak, who writes about ‘the extraordinary rise in the use of punishment’ in contemporary society, and also worries that some of this is as a result of unjust punishments which are ‘inflicted for conduct that should not actually have been criminalised at all.’\textsuperscript{137}

In order to attempt to address some of the issues identified above, the thesis proposes that more certainty could be created in the law by narrowing the gap between section 2 and section 4 offences by increasing the threshold for liability for section 2 offences, and to make these


offences triable either way. This would justify, then, increasing sentencing powers on a section 2 conviction from six months to two years. It is suggested that a sensible way to implement these reforms would be to drop the objective element of the fault test, so that defendants could only be prosecuted if they subjectively knew their behaviour would amount to harassment. This would benefit revenge porn victims using the PHA to seek redress in the criminal law, as it would mean defendants could be more adequately punished for the harm caused by the disclosure of their images. The reforms would also create more certainty in the law, as in removing the objective, arbitrary standard by which defendants are currently judged, this would reduce the PHA’s current potential to lead to unfair convictions and unjust punishments as well as the possibility of defendants being punished for unknown crimes. These suggestions for reform will be explored further in Chapter 7.

Despite the many benefits of using the PHA to redress revenge porn disclosures, the Act does have one particularly significant limitation when applied specifically to the misconduct. This is that the prohibited misconduct at the heart of both the crimes and the statutory tort requires a ‘course of conduct,’ which means that where an image has been posted online only once but is not accompanied by any other conduct which taken together would amount to a course of conduct, then PHA cannot be triggered. As discussed earlier in the chapter, a ‘course of conduct’ might be established in multiple ways. For example, the posting of individual photographs, each constituting a separate act can amount to a course of conduct. Also, where images have been non-consensually obtained covertly, or hacked from stolen devices before being disseminated, the act of obtaining the image and the subsequent disclosure might amount to a course of conduct. If an image is sent to multiple recipients, this can also amount to a course of conduct. There is no requirement, of course, that the acts are of the same nature, so in the context of a relationship breakdown, there could have been some other act, such as an argument or an abusive message, which, when combined with the disclosure of the image online, could create a course of conduct.

However, in cases where an image has been disclosed only once and has subsequently been distributed widely, but there is no other act by perpetrators that can be connected to the original disclosure, this can make the requirement for a course of conduct difficult to establish. This has not precluded the use of the PHA in these circumstances, in all cases, however: in Law
for example, the publication of an individual’s name on a website, posted in the knowledge that this publication would come to his attention on more than one occasion and on each occasion would cause him alarm or distress, was shown to amount to a course of conduct constituting harassment. However, in reality, as Tomlinson and Vassall-Adams note, online harassment might be hard to establish in the case of a single posting, as it usually requires a substantial volume of online material.

It is suggested then, that the PHA should be amended to reflect the fact that a course of conduct can be established in the case of a single posting, where the resulting harm is not simply about the effects of this one act, but also about the reverberation of this act online. It is proposed that a sensible way of doing this would be to amend s 7(3) of the PHA to include a subsection that makes it clear that harassment can include instances where the result of one act by offenders posting material online can have a continuing and protracted effect on victims. This amendment would update the provisions of the PHA, bringing it into the modern age, by providing that a course of conduct can originate from a single online event, offering victims with the means of obtaining criminal and civil justice under the PHA for all revenge porn attacks, including those that begin with a single posting. This proposal will be explored in more detail, in Chapter 7.

6.2.4 Conclusion

Using the PHA to respond to revenge porn has many benefits, as it can potentially catch revenge porn dissemination by individuals in all paradigmatic categories of revenge porn defendants, due to its particularly wide ambit. It has the potential to cover a wide range of image-based abuse, as it can provide effectively for the harm caused to victims by the disclosure of digitally manipulated images, including ‘deepfake’ pornography, and upskirting, where images taken covertly of victims are posted onto dedicated fetishists’ sites and these

138[2014] EMLR 2 at [61] and [75].
140 Tomlinson and Vassell-Adams (n 139) at 9.26.
come to the repeated attention of the victim. It also provides a tailored civil law solution that victims can use to seek damages and injunctive relief.

The normative analysis has identified some limitations when using the PHA to respond to revenge porn, however. The PHA’s low threshold for criminal liability can additionally act as a limitation for victims, who may opt to secure a conviction using the lower threshold of the section 2 offences, rather than pursue a prosecution under the more serious section 4 offences, even if these might be more appropriate. This might result in defendants receiving a far shorter prison sentence than they deserve, leaving victims feeling inadequately vindicated. The PHA can also be criticised for creating uncertainty in the law, as criminal liability rests not only on the reaction of the victim to the harassing conduct, which is an unknown quantity, but also on an objective, arbitrary standard which requires that defendants ‘ought to have known’ how victims would react to this conduct. A further limitation identified by the normative analysis is that the requirement of the PHA for a ‘course of conduct’ potentially narrows the scope of the Act for revenge porn victims in the case of a single online disclosure. The limitations identified by the normative analysis, and suggestions for potential reform, will be explored further in Chapter 7.

6.3 The Criminal Justice and Courts Act 2015

6.3.1 Background and Scope

(i) Background

Disclosing private sexual photographs and films with intent to cause distress is an offence under s 33 of the Criminal Justice and Courts Act 2015 (CJCA).\textsuperscript{141} Prior to the enactment of targeted legislation, public concern about the prevalence of revenge porn had been growing for some time, following the significant media coverage, in 2011, about the emergence of the phenomenon in the US. This focused on one of the first revenge porn websites, IsAnyoneUp,
hosted by American, Hunter Moore. Further national attention was brought to the issue following the disclosure of private, sexual images featuring the singer, Rihanna, in 2009. This disclosure was followed by the celebrity iCloud account hack, in 2014, when over 200 sexual images of women, many of whom were well-known celebrities, were hacked or stolen from Apple’s iCloud platform and after which they were widely disseminated. The images which featured, amongst others, actors Jennifer Lawrence, Scarlett Johansson and Vanessa Hudgens, went viral.

A burgeoning revenge porn problem, in England and Wales, was highlighted by data gathered across eight police forces across the jurisdiction, between January 2012 and July 2013. This revealed 149 allegations of incidents involving the disclosure of private sexual images, of which only six had resulted in a police caution or charge. Despite the fact that the conduct was already being successfully prosecuted using existing legislation, it was felt that a more robust criminal law response to revenge porn was warranted. Former Culture Secretary, Maria Miller MP, spearheaded the campaign for criminalisation in England and Wales, after becoming aware of the abuse through a former victim. While revenge porn does not exclusively, but primarily, affects women, Miller’s campaign was reinforced by various women’s support groups, many of which had seen an increase in calls to helplines from women who had experienced, or been threatened with, revenge porn. Section 33 was expeditiously


145 Ibid.


147 Data obtained a year after the enactment of the CJCA reveal that seventy-nine per cent of the victims were women, and that 13% of cases involved the type of blackmail sometimes referred to as “sextortion”. See Sandra Laville, ‘Twitter to Train Prosecutors in Fight Against Online Abuse’, The Guardian (4 March 2016) <https://www.theguardian.com/technology/2016/mar/03/twitter-to-train-prosecutors-in-fight-against-online-abuse> accessed 15 January 2019.

148 These include: End Revenge Porn< http://www.endrevengeporn.org >; Women’s Aid < http://www.womensaid.org.uk >; End Violence AgainstWomen<http://www.endviolenceagainstwomen.org.uk >; Victim Support
incorporated into the Criminal Justice and Courts Bill 2015, following an Early Day motion, urging the Government to introduce specific legislation to combat the growing problem. Even though the Bill had made no mention of this provision by the time it completed its passage through the Commons, following an amendment by the House of Lords to criminalise the activity, the Government worked with the Lords to introduce a targeted response to revenge porn and s 33 was created. A recent Scoping Report published in 2018, by the Law Commission, has evaluated the privacy and imagery-based offences that might be committed in an online context, in England and Wales, including the s 33 offence enacted under the CJCA. The Law Commission’s findings can, therefore, be helpfully incorporated into the discussion. The Government has also announced it will be asking the Law Commission to take forward a more detailed review of the law around the taking and sharing of non-consensual intimate images, although details of this review have not yet been confirmed.

(ii) Scope

The prohibited conduct which constitutes the offence ‘disclosing private sexual photographs with the intent to cause distress’ is set out in sections 33-35 of the CJCA. As Pegg observes, a clear criminalisation rationale for s 33 was never fully articulated, but the constituent elements of the offence suggest the protection of sexual privacy was central to the creation of the offence. However, as one of the constituent elements is the intent to cause distress, this would suggest that the offence is also designed to protect against the intention to cause harm or abuse. The offence broadly has three elements which need to be proven, as set out in s 33(1) of the Act. These are: (i) the disclosure of a private sexual photograph or film; (ii) without the consent of the person depicted; and (iii) with the intention of causing that individual distress.

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149 Early Day Motion 192 of Session 2014-15, sponsored by Julian Huppert MP, Tim Farron MP, Peter Bottomley MP, Alan Meale MP, Greg Mulholland MP and Julian Lewis MP.


152 HC Deb 5 September, vol 646, col 282.


154 Law Commission report (n 151) para 10.55.
The offence encompasses the disclosure of images both on and offline, but, as mentioned above, it was enacted largely as a response to revenge porn committed online. A disclosure only needs to be made once for the offence to be triggered. A key element of the offence lies in the perpetrator’s intention to cause victims distress meaning the focus of Act is on the intention of perpetrators rather than the reaction of victims to the disclosure. A person charged with an offence under s 33(1) is not taken to have disclosed a photograph or film with the intention of causing distress ‘merely because that was a natural and probable consequence of the disclosure.’ The Act makes it clear that it is insufficient for any embarrassment and humiliation arising from the disclosure to trigger the offence.

Three affirmative defences to disclosure are available:

(i) Where there is reasonable belief that the disclosure is for the purpose of preventing or detecting crime;  

(ii) Where the disclosure is made in the course of, or with a view to, the publication of journalistic material in the public interest, or he or she believed that, in the particular circumstances, the publication of the journalistic material would be in the public interest; and;  

(iii) Where the image is disclosed with the reasonable belief that it had previously been disclosed for reward and there was no reason to believe that the previous disclosure for reward was made without consent.

The offence is triable either way, with a maximum sentence of two years’ imprisonment. Definitive sentencing guidelines on s 33 were published for the first time, on 5 July 2018, becoming effective on 1 October 2018. The guidelines list factors that would indicate higher

156 CICA 2015 s 33(8).
157 CICA 2015 s 33(3).
158 CICA 2015 s 33(4)(a) and (b).
159 CICA 2015 s 33(5)(a) and (b).
culpability, for example, where there is evidence of conduct intended to maximise distress or humiliation, or ‘significant planning,’ such as where defendants set up fake social media accounts.\textsuperscript{161} The guidelines also make it clear that perpetrators should be dealt with more severely in cases where they make ‘repeated efforts to keep images available for viewing.’\textsuperscript{162}

\textbf{6.3.2 Analysis of Three Paradigmatic Categories of Potential Revenge Porn Defendants}

This section will explore how the offence as set out in sections 33-35 of, and schedule 8 to, the Criminal Justice and Courts Act 2015 (CJCA) responds specifically to revenge porn disclosures by three paradigmatic categories of revenge porn defendants. This will give analytical clarity as to the effectiveness of the offence and will provide a foundation for the normative analysis in the next section.

\textit{(i) Primary Disseminators}

Revenge porn is most commonly understood to be a vengeful act, perpetrated by primary disseminators who are spurned ex-partners (usually a man) distributing private sexual images of their former partner (usually a woman) online, in order to exact revenge following the break-up of their relationship.\textsuperscript{163} It is this broad understanding of the paradigmatic revenge porn case that the offence created by the CJCA seeks to track. While the offence, as constructed, does not specifically mention the term ‘revenge pornography,’ as Gillespie notes, the original Explanatory Notes to the s 33 offence makes it clear that this was the reasoning behind its introduction.\textsuperscript{164}

\textsuperscript{162} Sentencing Council Guidelines (n 160) p 22.
\textsuperscript{164} Alisdair A Gillespie, ‘“Trust Me, It’s Only for Me”: “Revenge Porn” and the Criminal Law.’ (2015) 11 Crim LR 866, 866.
Section 33(1) of the CJCA sets out the offence of ‘disclosing private sexual photographs and films with intent to cause distress’ as follows:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

The criminal offence comprises broadly three elements which need to be proven: ‘disclosure of a private sexual photograph or film,’ ‘consent’ and ‘the intention to cause distress.’ ‘Disclosure’ by primary disseminators can be established in a number of contexts, as this is given a wide interpretation and can accommodate disclosures made both on and offline. Section 34(2) states that ‘a person discloses something, if by any means, he or she gives it or shows it to the person or makes it available to the person.’ Whether the disclosure is given, made or shown for reward is irrelevant,\(^\text{165}\) as is whether what is disclosed has previously been given, shown, or made available to the person.\(^\text{166}\) As has been established many times already in the thesis, primary disseminators wishing to exact revenge on former lovers might disclose images via social media, include them as email attachments or send them via SMS messaging. Images might also be placed in shared folders where they can be viewed by whoever opens them. Revenge-seeking primary disseminators might also post images to regular pornography websites or to sites dedicated to hosting revenge porn.\(^\text{167}\) As Gillespie observes, the expression ‘makes available’ can be applied in a number of contexts, and has been held to include where images are placed in shared folders, where they can be accessed by others.\(^\text{168}\) S 34(2), arguably, covers, all existing, conceivable types of non-consensual disclosures by primary disseminators. There is no requirement that the images are actually viewed, meaning that primary disseminators who send images which are not viewed do not avoid liability.\(^\text{169}\) A disclosure

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\(^{165}\) CJCA 2015 s 34(3)(a).

\(^{166}\) CJCA 2015 s 34(3)(b).

\(^{167}\) Ibid.


\(^{169}\) Pegg (n 153) 517.
must actually be made in order for the offence to be triggered, however, meaning that threats made by primary disseminators to disclose images are outside the ambit of the Act.

For the purposes of the offence, photographs and films are given their ordinary meaning. Section 34(4) defines these as being a ‘still or moving image in any form’ that (a) ‘appears to consist of or include one or more photographed or filmed images and (b) in fact consists of or includes one or more photographs or filmed images.’ Altered images are expressly included in this definition, so the offence captures images that were originally created as private and sexual, then subsequently altered before distribution by primary disseminators. Excluded from the ambit of the offence, however, are films and photographs which are not in themselves private and sexual, but are ‘only private and sexual by virtue of the alteration or combination.’ This means that primary disseminators who have digitally manipulated images, making them sexual by means of superimposing an image of the victim’s face onto a sexual image, or by using ‘deepfake’ technology to incorporate several of the victim’s images to create a pornographic film, are not liable for the offence, as constructed.

The prohibited conduct under s 33(1) of the CJCA also excludes from its ambit liability for primary disseminators who distribute images acquired covertly by means of ‘upskirt’ or ‘downblouse’ photography. Section 35(3) defines a photograph or film as being sexual if:

(a) it shows all or part of an individual's exposed genitals or pubic area,

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

170 CJCA 2015 s 34(5).
171 CJCA 2015 s 35(5)(a).
172 CJCA 2015 s 35(5)(b).
While the definition is broad and could encompass most body parts that might be considered sexual, it notably excludes from its ambit a woman’s breast area, whether covered or exposed, and buttocks. The exclusion of the breast area eliminates from the scope of the offence the activity of ‘downblousing,’ where images are acquired by the covert filming of a woman’s breast area, in public places, by filming down the front of her top. Primary disseminators who subsequently disclose these images online would not be caught, then, by the offence. Section 35(3)(a) also requires that a person’s genital or pubic area must be exposed. This means that primary disseminators who have obtained images covertly by means of ‘upskirt’ photography and subsequently disseminated them online, then where these show the victim’s genital and pubic area covered by underwear, or their buttocks, either covered or uncovered, perpetrators can presumably evade liability.

‘Consent’ under the CJCA is given a broad meaning. According to s 33(7)(a) of the CJCA, this refers to ‘general consent covering the disclosure as well as consent to the particular disclosure.’ As far as the typically understood scenario of primary dissemination by revenge-seeking jilted ex-lovers is concerned, this definition captures the wider distribution of images that were formerly consensually shared in a private context. However, the meaning of ‘consent’ is undefined in the Act, which is silent as to how this should be approached, for example, where consent is given under duress, or if a person gives consent while intoxicated.\textsuperscript{175}

Finally, the \textit{mens rea} of the s 33 offence requires that the perpetrator disclosed the private sexual photograph or film with the intention of causing distress to an individual appearing in it. This additional evidential hurdle can be problematic when prosecuting primary disseminators who have acted for non-vengeful reasons, for example, for financial gain, for laughs or for pranks, or for purely sexual gratification. The \textit{mens rea} requirement means, then, that many morally culpable offenders might avoid liability under s 33, due to its narrow ambit.

In summary, providing that the prosecution can establish that the photograph or film was disclosed by primary disseminators with the intention of causing victims distress, and the

\textsuperscript{175} Pegg (n 153) 522-3.
disclosure falls within the definition of the offence, section 33 of the CJCA provides victims of non-consensual revenge porn disclosures with a targeted offence with which to seek redress in the criminal law. However, the offence notably excludes from liability primary disseminators who are acting with no thought as to whether the disclosure would cause distress. It also excludes from liability primary disseminators who may have obtained images covertly, via ‘upskirt’ or ‘downblouse’ photography, if the images are of victims’ genital or pubic area which are covered by underwear, or if they show buttocks or female breasts. Also excluded from the ambit of the offence are digitally manipulated images which are only private and sexual by virtue of the digital manipulation, so the offence does not cover Photoshopped or ‘deepfake’ images. A disclosure must actually be made in order for the offence to be triggered, meaning that threats made by primary disseminators to disclose images are not caught by the offence.

(i) Secondary Disseminators

The offence created by section 33 of the CJCA requires that perpetrators distributing the prohibited images must do so with the intention of causing victims distress. Disclosure alone of the private sexual image is not sufficient to infer intent. Secondary dissemination of revenge porn is the amplification of the original revenge porn post by primary disseminators. Culpable parties can include individuals known or unknown to the primary disseminator or victim, who further disclose the images. The subsequent redistribution of images, where users re-tweet them, for example, or might otherwise forward them, contributes, in many cases, to the images going ‘viral.’ While some secondary dissemination may in some cases be perpetrated with the intention of causing victims distress, secondary dissemination can also be perpetrated for a variety of reasons where malicious intent is absent. Reasons can include for financial gain, to have a ‘laugh,’ to gain notoriety amongst a friendship group or to control, harass or blackmail. Some secondary disseminators might share for purely sexual reasons. As McGlynn and Rackley note, many secondary disseminators will not even know the identity of the person in the image, or have any intention of finding out. The offence created by the

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176 CJCA 2015 s 33(8).
177 McGlynn and Rackley (n 163) 5.
178 Pegg (n 153) 524.
179 McGlynn and Rackley (n 163) 22.
CJCA, as drafted, thus limits culpability to the primary distribution of the image, as it does not allow for reckless intent, which would significantly expand the mens rea.\textsuperscript{180} It thus excludes from its ambit the secondary dissemination of images by perpetrators who act for reasons other than to intentionally cause victims distress.

(i) Internet Intermediaries

The distribution of revenge porn online is facilitated by Internet intermediaries in two distinct ways. First, images can be disclosed via social media platforms: according to information revealed to the BBC, in 2016, following a freedom of information request, the platforms used most frequently by perpetrators to disseminate revenge porn were Facebook, which featured in 68% of the cases, followed by Instagram, in 12% of cases, and Snapchat in 5% of them. WhatsApp and Twitter both featured in 4% of cases.\textsuperscript{181} Schedule 8 to the CJCA exempts providers of information society services from liability, however, if they have ‘no actual knowledge’ of hosting private, sexual images, as prohibited under s 33.\textsuperscript{182} This means that publishers who unknowingly host user-generated revenge porn on their platforms are not liable, even if their users break the law in doing so, providing images are removed ‘expeditiously’ following notification. Schedule 8 mirrors the provisions of Regulation 19 of the E-Commerce (EC Directive) Regulations 2002, which protects website operators hosting third-party content from liability.\textsuperscript{183} In spite of this exemption from liability, most social media platforms now provide reporting tools for revenge porn,\textsuperscript{184} as operators can see the reputational benefits of being seen to be proactive in helping victims.\textsuperscript{185} Many have set up specific forms for users to report revenge porn and some have developed software or artificial intelligence to detect nude

\textsuperscript{180} Ibid.
\textsuperscript{182} Sch 8 s 5(2).
\textsuperscript{183} See above at 6.2.2. While user-generated content is currently protected by the EU Electronic Commerce Directive, following Brexit, the position is unclear. EU laws will not apply in the UK after the transition period unless they are reintroduced by new Acts of Parliament, including a new act to provide for a ‘report and remove’ system for unmoderated Internet content. If the UK joins the European Economic Area, some EU laws will be reintroduced into domestic law.
\textsuperscript{184} See earlier discussion at (n 75).
\textsuperscript{185} Jocelyn Ledward and Jennifer Agate, ‘“Revenge Porn” and S 33: The Story so Far,’ (2017) 28(2) Ent LR 40, 42.
or overtly sexual images. Inevitably, not all posts will be reported or detected and removed in time to prevent victims’ images from being broadcast to a mass audience, however.

The second way in which Internet intermediaries facilitate the dissemination of revenge porn is by creating websites designed specifically to host revenge porn. Images can also be posted to amateur or professional adult porn sites. When the issue of revenge porn was first debated in the House of Commons, in 2014, the UK Safer Internet Centre had identified between 20 and 30 websites displaying revenge pornography, which were available for people to view in the United Kingdom. As has been mentioned earlier in the thesis, operators of free revenge porn sites stand to make a good profit through advertising revenue and by directing users to these subscription-only porn sites. Money can also be made by charging victims a fee for removing their images, so it is in the website operators’ interests to keep the images up on their sites for as long as possible, as the more traffic the website receives, the more they can charge in advertising, subscription and removal fees.

The CJCA provides no mechanism for the removal of victims’ images. Nor does it create a statutory tort, which would enable victims to seek an injunction to enforce removal of images from non-compliant hosting websites. As was the case prior to the enactment of the legislation, in order to avoid further exposure, victims still need to pro-actively approach Internet intermediaries themselves to request that their images are removed. Under Regulation 19 of the E-Commerce (EC Directive) Regulations 2002, website operators who do not remove images on notice, however, can be treated as defendants and sued in private actions for breach of confidence, misuse of private information, harassment or copyright. Internet intermediaries could also be held criminally liable under data protection law for failing to erase revenge porn, without delay, on receipt of an erasure request. The Data Protection Act 2018 (DPA) repealed and replaced existing data protection laws in England and Wales, in accordance with the General Data Protection Regulation (GDPR). This directly effective EU regulation came into

187 HC Deb 19 June 2014, vol 582, Col 1369.
188 Langlois and Slane (n 51) 126-9.
force on 25 May 2018, setting new standards for protecting personal data. The Act empowers Crown prosecutors to proceed against both individuals and corporates bodies, attracting potentially significant penalties.\textsuperscript{190} The right to erasure provided by s 47 of the DPA applies across the board, not just to search engines, as was previously the case, meaning that revenge porn victims are now provided with an effective means of removing images from source websites, at least within the jurisdiction of the EU. Many revenge porn websites are hosted outside of the EU, however, and these jurisdictions can have far less stringent regulations than this jurisdiction, when hosting user-generated content, making it difficult for victims to remove images or hold website operators to account for refusing to remove their images.\textsuperscript{191} This is compounded by the fact that some Internet intermediaries outside of the jurisdiction may also be able to rely on immunity provided by local laws, meaning that images can reappear in other jurisdictions as soon as they have been repressed in this one.\textsuperscript{192} In AMP v Person’s Unknown,\textsuperscript{193} the claimant successfully sought an injunction preventing further dissemination of her images, in this jurisdiction, but these reappeared on websites hosted in the US, after free speech activists re-uploaded the images, claiming that preventing access to them had a ‘chilling effect’ on free expression.\textsuperscript{194}

Although the CJCA does not provide a mechanism for the takedown of images, when legislation under the CJCA was enacted, the Revenge Porn Helpline was also launched.\textsuperscript{195} The Helpline, which is funded by the UK Government Equalities Office, provides clients with pro-bono legal advice, emotional support and practical guidance for the removal of images. As Pegg observes, unsurprisingly, it has proved popular, as the take-down of images is, in many cases, the redress victims seek. She also notes that the relationships it has built with Internet intermediaries has contributed towards the Helpline’s success with image removal.\textsuperscript{196} Figures taken from the website show that by September 2018, the service had been contacted by nearly

\textsuperscript{190} Data Protection Act 2018 ss 157-159.
\textsuperscript{192} For example, in the US, s 230 of the Communications Decency Act 1996 protects Internet intermediaries from liability arising from content posted by third parties, providing the images do not breach copyright laws.
\textsuperscript{193} [2011] EXHC 3454 (TCC).
\textsuperscript{194} Andrew Murray, Information Technology Law: The Law and Society (2\textsuperscript{nd} edn Oxford University Press, Oxford, 2013) 397.
\textsuperscript{196} Pegg (n 153) 526.
4,000 people, and that it had successfully removed over 80% of the content reported on behalf of its clients.\footnote{197 Revenge Porn Helpline (n 195).}

In summary, Schedule 8 to the CJCA exempts providers of information society services from liability if they have ‘no actual knowledge’ of hosting private, sexual images, as prohibited by s 33. This means that publishers who unknowingly host user-generated revenge porn on their platforms are not liable, even if users break the law in doing so, providing images are removed ‘expeditiously’ following notification. The CJCA provides no mechanism for the removal of victims’ images, so victims still need to pro-actively approach these Internet intermediaries themselves to request that they are removed and, unlike the PHA, it does not create a statutory tort to enable victims to seek a court order to enforce the takedown of images from hosting websites who are ignoring requests to remove images. Although victims can always use the statutory tort provided by the PHA, this would not be possible if, evidentially, there are difficulties establishing a ‘course of conduct,’ as required by s 1(1) of the PHA. The Revenge Porn Helpline launched contemporaneously with s 33 of the CJCA can provide clients with practical guidance for the removal of images as well as offering emotional support and legal advice. The service has a good success rate for taking down content it has reported on behalf of its clients. The GDPR, as transposed into domestic law via the Data Protection Act 2018, provides revenge porn victims with more robust rights of data erasure than the legislation it replaces and empowers Crown prosecutors to proceed against both individuals and corporate bodies, attracting potentially significant penalties. Where revenge porn websites are hosted outside of the EU, however, these jurisdictions can have far less stringent regulations than this jurisdiction for Internet intermediaries hosting third-party content, making it difficult for victims to remove images or hold website operators to account for refusing to remove their images.

6.3.3 Normative Analysis

The analysis above has identified that, while there are some benefits to addressing revenge porn in the criminal law using the CJCA, particularly if the misconduct in question fits the
broad understanding of the paradigmatic revenge porn case, where disclosure is perpetrated by a revenge-seeking former partner. The discussion has also identified some significant limitations for using the Act when responding to other manifestations of revenge porn, however. By shedding a normative light on the CJCA’s response to revenge porn disclosures by the three paradigmatic categories of revenge porn defendants outlined above, the analysis will identify areas where the law is in need of reform. It will also show how using the CJCA to respond to revenge porn might be congruent with some of the criminal law theories discussed in Chapter 5.

Using the offence under s 33 of the CJCA to respond to the paradigmatic case of revenge porn disclosed by aggrieved ex-partners has some notable benefits. Unlike the existing communications offences, both of which can be used to respond to revenge porn, there is no requirement for the images in question to be ‘grossly offensive.’ In a House of Commons debate, the use of these laws to respond to the problem was mooted, but, as Maria Miller MP observed, the offences would not be appropriate because revenge porn images could not necessarily be considered to be grossly offensive. This means that s 33 can be triggered in cases where the images in question can be relatively anodyne but their non-consensual disclosure is still very traumatic for victims. Pursuing the conduct via harassment law requires a repeated course of conduct, so a benefit of using the offence under the CJCA to respond to revenge porn is that the conduct does not have to be repetitious. As Ledward and Agate observe, most of the cases reported in the media do appear to involve isolated incidents, so the legislation would seem to be most effective in cases involving a ‘single but extremely damaging malicious disclosure.’

The first sentencing guideline for the s 33 offence has only recently been published, but media reported cases would indicate that, overall, the sentences ordered are not excessively punitive. Pegg notes, however, that the courts have generally found that the custody threshold has been crossed. Rather than giving community orders or lesser

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198 S 1 of the Malicious Communications Act 1988 and s 127 of the Communications Act 2003.
199 HC Deb 1 December 2014, vol 589, col 120.
The analysis in the previous section has identified several limitations with the offence when responding to revenge porn, however. First, a significant drawback for victims is that s 33 of the CJCA is not classed as a sexual offence. Crucially, this means that, unlike sexual offences, there is no statutory provision allowing for the automatic anonymity of complainants. Despite being framed around the disclosure of private, sexual material, it is not an offence under the Sexual Offences Act 2003 and those convicted are not subject to the notification requirements at Part 2 of the Act. The problem this creates is that police and prosecutors are not able to guarantee anonymity for revenge porn victims, which has resulted in a reluctance to report the abuse, as victims have a very real fear that their images will be shared even more widely and that the harassment and abuse might intensify. An anonymous survey carried out by the North Yorkshire Police, Fire and Crime Commissioner, Julia Mulligan, in 2015, analysed 3,000 responses from members of the public about government, police and criminal justice responses to revenge porn. The survey identified that the lack of anonymity was a very real cause for concern for affected individuals, victims indicating that ‘they were afraid of going to the police and speaking out for fear of being subsequently named and shamed in the media.’


204 See Pegg (n 202) 529: Heroy Bygraves received a 14-month custodial sentence in February 2017. The lengthy sentence reflected the number of images disclosed; the harm caused by disclosing these to family members; the blame he directed at his victim; his lack of remorse and his not guilty plea.

205 Ledward and Agate (n 200) fn 2.

206 As provided by the Sexual Offences (Amendment) Act 1992.


209 Ibid.
it itself, causes ongoing distress and results in many victims not coming forward to report offences.\textsuperscript{210} As Rackley and McGlynn observe, this has caused far more revenge porn cases to drop out of the criminal justice system than any other sexual violence cases (which, the authors note, also have well-known problems in terms of prosecutions and convictions).\textsuperscript{211} Data collated by the BBC support this claim: despite the fact that there has been an increase in the number of revenge porn cases reported to the police since records began, from 1,861 offences in 2015-16 to 3,307 offences in 2017-18, the proportion of cases resulting in charges has fallen from 14\% in 2015-16 to just 7\% in 2017-18.\textsuperscript{212} The data also reveal that one in three allegations of revenge porn are withdrawn by complainants. One of the reasons cited for this is that victims are reluctant to participate in prosecutions because they are not granted anonymity as they would be for a sexual offence.\textsuperscript{213}

The Law Commission has recently evaluated the effectiveness of s 33 of the CJCA in its scoping report on abusive and offensive online communications.\textsuperscript{214} The report identifies that the lack of anonymity is problematic for revenge porn victims, citing research undertaken by a doctoral candidate at Liverpool John Moores University, which finds that individuals working with, and supporting victims, following the disclosure of their images, claim that a lack of anonymity is a common reason for a lack of reporting.\textsuperscript{215} One individual working with victims claimed that a significant impact of revenge porn disclosures on victims stemmed from the public’s perception of them, and an increased fear of being recognised in the community, of being talked about, and people viewing the images, contesting that it was negligent to assume that anonymity was not vital.\textsuperscript{216}

It is submitted, then, that in not making s 33 a sexual offence, this creates inconsistency in the law. Labelling revenge porn as a sexual offence can be supported theoretically, on the ground of deterrence theory. Deterrence theory posits that people need to be aware of the law to

\begin{footnotes}
\item[210] Ibid.
\item[211] Rackley and McGlynn (n 207).
\item[213] Ibid.
\item[214] Law Commission, \textit{Abusive and Offensive Online Communications: A Scoping Report} (Law Com No 381, 2018) paras 10.42 -10.113.
\item[215] Ibid, par 10.51.
\item[216] Ibid.
\end{footnotes}
understand when their conduct might bring them into conflict with it. In making revenge porn an offence under the Sexual Offences Act 2003, perpetrators would know that in breaking the law, they are making a deliberate decision to commit a sexual offence. The threat of being labelled a sexual offender, with the unpleasant consequences of being placed on the sex offender register, might, then, deter some actors in all paradigmatic categories of defendants from acting. Crucially, this reform would encourage more victims to seek justice without fear of courting further public shame and humiliation. This proposal for reform will be explored in more detail, in Chapter 7.

The second significant limitation identified in the analysis in the previous section is that s 33 1(b) of the CJCA requires that the disclosure of private sexual photographs and films must be perpetrated with the intention of causing distress to the individuals appearing in them. Gillespie notes that, when drafting the offence, Parliament was perhaps concerned that there would be some legitimate disclosures which would inevitably cause distress (and thus caught by oblique intent) for which they did not believe criminal liability would be appropriate. Pegg concurs, noting that the injection of subjectivity into the s 33 offence ensures that only those who are actively seeking to humiliate or embarrass victims - those who are ‘ultimately seeking revenge’ - are criminalised. As the discussion above has identified, the offence under s 33 of the CJCA was created to track the broad understanding by the UK Government that revenge porn disclosures are typically perpetrated by spurned ex-lovers, with the intention of shaming and humiliating former partners, in order to avenge an unwanted relationship break-up. As such, it criminalises dissemination by primary disseminators only when the motivation for disclosing images is malicious and excludes from its ambit non-vengeful disclosures by primary disseminators and publication by secondary disseminators and Internet intermediaries, where there is no direct intention to cause distress. So, where individuals are motivated by reasons such as purely sexual gratification or financial gain and have given no thought as to whether a disclosure might cause embarrassment or humiliation, the offence is not triggered. Section 33(8) further underlines this, stating that a person charged with an offence under s 33(1) is not taken to have disclosed a photograph or film with the intention of causing distress ‘merely because that was a natural and probable consequence of the disclosure.’ It is not

218 Pegg (n 202) 524.
sufficient, therefore, for any embarrassment and humiliation arising from the disclosure to trigger the offence. Non-malicious disclosures of private sexual images can cause victims to suffer exactly the same harms as malicious disclosures. Regardless of perpetrators’ motivations, all disclosures violate victims’ interests in their dignity, self-esteem and bodily and sexual autonomy. This is difficult to justify on retributivist grounds, as culpable offenders avoid liability under the offence, as constructed, despite the justificatory theory of retribution being active.

The mens rea requirement of intentionally causing victims distress under s 33 (1)(b) of the CJCA not only creates an additional evidential hurdle for prosecutors, but also acts as a distraction, then, from the core wrong of revenge porn, which is the intentional non-consensual distribution of private sexual images. The evidential challenge of having to meet the distress threshold has recently been identified by the Law Commission in its evaluation of the s 33 offence. The Commission’s report states that meeting this threshold has contributed towards the ‘significant level of attrition of section 33 cases from reporting to prosecution.’\(^\text{219}\) It is submitted, then, that the mens rea requirement under s 33 1(b) of the offence should be lowered from intention to cause distress to recklessness as to causing harm or distress. As Parker observes, while revenge porn litigation continues to focus on an intention to cause distress to victims, the offence will miss the point and will continue to fail victims, proving itself to be ‘an ineffective legislative bandage to a genuine social problem.’\(^\text{220}\) Further arguments to justify lowering the mens rea of s 33 of the CJCA will be presented in Chapter 7.

The prohibited conduct under s 33 CJCA requires that three broad elements need to be proven: (i) the disclosure of a private sexual photograph or film; (ii) consent; and; (iii) the intention to cause distress. The mens rea requirement to intentionally cause distress has been dealt with in detail above, so the following discussion will explore the meanings of ‘disclosure,’ ‘consent’ and ‘private sexual photograph or film,’ as provided by the Act, in order to identify the benefits and limitations of using it to respond to revenge porn disclosures by the three paradigmatic categories of revenge porn defendants. First, s 34 of the CJCA gives the meaning of

\(^{219}\) Law Commission Scoping Report (n 214) para 10.106.
\(^{220}\) Kate Parker, ‘“Revenge Porn” Law: A Year’s Reflection,’ 5PB Blog (17 June 2016) <http://www.5pb.co.uk/blog/2016/06/17/revenge_porn_law_a_years_reflection/> accessed 15 January 2019.
‘disclosure’ a wide interpretation. This means it is capable of catching disclosures by all three paradigmatic categories of defendants, despite the legislation having been drafted primarily to target disclosures by primary disseminators. This provides a benefit for prosecutors when responding to revenge porn as ‘disclosures’ can be established in a number of contexts and can accommodate disclosures made both on and offline. Section 34(2) states that ‘a person discloses something, if by any means, he or she gives it or shows it to the person or makes it available to the person.’ Whether the disclosure is given, made or shown for reward is irrelevant,\(^{221}\) as is whether what is disclosed has previously been given, shown, or made available to the person.\(^{222}\) Images can be disclosed or made available via social media, included as email attachments or sent via SMS messaging. Images might also be disclosed or made available by placing them in shared folders where they can be viewed by whoever opens them. They can also be disclosed, or made available, to regular pornography websites or to sites dedicated to hosting revenge porn. As Gillespie observes, the expression ‘makes available’ can be applied in a number of contexts and has been held to include where images are placed in shared folders, where they can be accessed by others.\(^{223}\) Section 34(2), arguably, covers, all existing, conceivable modes of disclosure by primary disseminators. There is also no requirement that the images are actually viewed, meaning that perpetrators who send images that are not seen by anyone do not avoid liability.\(^{224}\) However, an important caveat exists within the meaning of ‘disclosure’ given in s 34, this being that a disclosure must actually be made in order for the offence to be triggered. This means that a significant limitation of the offence is that threats to disclose images are not caught by it.\(^{225}\)

‘Consent’ under the CJCA is not given a clear definition, however, and is open, therefore, to ambiguous interpretation. According to s 33(7)(a) of the CJCA, consent refers to ‘general consent covering the disclosure as well as consent to the particular disclosure.’ This is clearly targeted at the paradigmatic case of revenge porn being disclosed by primary disseminators seeking revenge for a broken relationship, the definition capturing the wider distribution of

\(^{221}\) CJCA 2015 s 34(3)(a).
\(^{222}\) CJCA 2015 s 34(3)(b).
\(^{224}\) Pegg (n 202) 517.
\(^{225}\) Although, depending on the circumstances, threats to disclose revenge porn can be prosecuted under s 127 of the Communications Act 2003; s 1 of the Malicious Communications Act 1988; ss 21, 34 of the Theft Act 1968, as blackmail if there is a financial element; or using the statutory tort of harassment under s 3 of the Protection from Harassment Act 1997, amongst other offences.
images that were formerly consensually shared in a private context. The Law Commission has identified, however, that ‘while there has been some form of ambiguous “general” consent to the disclosure, difficulties may arise in determining the limits of this consent.’ The Commission highlights the Italian revenge porn case of Tiziana Cantone, who sent videos of herself performing sex acts on a number of men to her boyfriend and to trusted friends on a WhatsApp group, which were then subsequently widely distributed by these secondary disseminators. Cantone committed suicide as a result of the images going viral. It is unclear how s 33(7)(a) would respond to this type of subsequent disclosure facilitated by secondary disseminators and Internet intermediaries considering that the original disclosure to all the parties was made consensually, given how ‘consent’ applies on the face of the law as it currently stands.

The report also highlights the fact that the Act is silent as to who should give consent, noting a case in Ireland where an intoxicated 17-year old was photographed and filmed by spectators, while performing fellatio on a man at a concert. These images subsequently went viral on social media and the girl was hospitalized due to the trauma. The Law Commission observes that the offence under s 33 would actually be formally committed if any images of the members of the crowd, who watched as things unfolded and could be clearly identified in the photographs and films, were subsequently shared with the intention of causing them distress, due to the fact they were associated with the footage. However, the meaning of ‘consent’ is undefined in the Act and it is silent as to how this should be approached where there are multiple people in the images. It is also silent where consent is given under duress, or if a person gives consent while intoxicated. As identified above, a disclosure must actually be made in order for the offence to be triggered, so this excludes from liability primary disseminators who attempt to control or coerce their partners by threatening to disclose their images. By failing to clarify how consent should be approached, this is problematic when

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231 Pegg (n 202) 522-3
considering that any threats to disclose could conceivably have been carried out after consent was obtained under duress, meaning that perpetrators could avoid liability if consent had, in fact, been given. The failure to provide a specific definition of consent may cause difficulties for courts in directing juries, particularly where consent is given in the context of an emotionally abusive and controlling relationship, or while victims are intoxicated.\textsuperscript{232}

Further issues with the drafting of the offence can be identified when analysing the meaning of ‘private sexual photographs and films.’ The meaning of ‘private’ for the purposes of the offence is clarified in s 35. ‘Private’ is defined in s 35(2) as being simply ‘something that is not of a kind ordinarily seen in public.’ This, Pegg notes, is ‘sufficiently flexible to allow for changes in social mores to be taken into account,’ although, she observes it provides little clarity for more fetishistic practices, such as toe sucking.\textsuperscript{233} The section does not require that the photographed or filmed activity must be done in private, so unlike voyeurism,\textsuperscript{234} it could apply to public spaces. As Gillespie observes, however, s 35 states that ‘private’ means an activity that is not ordinarily done in public, noting that it is hard to conceive of a sexual activity that would ordinarily be done in public, arguing that this renders the section rather superfluous, as realistically, the only relevant test is whether the activity recorded is sexual.\textsuperscript{235}

S 35(3) defines a photograph or film as being sexual if:

(a) it shows all or part of an individual's exposed genitals or pubic area,
(b) it shows something that a reasonable person would consider to be sexual because of its nature, or
(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

\textsuperscript{232} Law Commission Scoping Report (n 214) para 10.99.
\textsuperscript{233} Ibid, 518.
\textsuperscript{234} Sexual Offences Act 2003 ss 67(1) and 68(1).
\textsuperscript{235} Gillespie (n 168) 869.
While the definition is broad and encompasses many body parts that might be considered sexual, it notably excludes from its ambit images of a woman’s breast area, whether covered or exposed. This means that the activity of ‘downblouse’ photography, where images are obtained by photographing or filming down the front of a woman’s top are subsequently disseminated, is excluded from the offence. The exclusion of the breast area is presumably to limit overcriminalising conduct where images have been obtained in the context of activities of a kind which can ordinarily be seen in public, such as topless sunbathing. It is a curious omission, as the disclosure of images displaying a victim’s naked breasts would doubtless make up a lot of revenge porn imagery, meaning it would be down to the magistrate or jury to decide whether the disclosure of images of naked breasts would fall within the scope of the offence, depending on the facts of the case. The offence also requires that a person’s genital or pubic area must be exposed, meaning that, where these body parts are covered by underwear, images obtained by ‘upskirt’ photography which are subsequently disseminated, also fall outside of the ambit of the offence. This is another curious omission, given that the acquisition of these images is soon to become a criminal offence in England and Wales, yet the subsequent dissemination of them is not.

For the purposes of the offence, ‘photographs and films’ are given their ordinary meaning. Section 34(4) defines these as being a ‘still or moving image in any form’ that (a) ‘appears to consist of or include one or more photographed or filmed images and (b) in fact consists of or includes one or more photographs or filmed images.’ Altered images are expressly included in this definition, so the offence captures images that were originally created as private and sexual, but subsequently altered before distribution. Excluded from the ambit of the offence, however, are films and photographs which are not in themselves private and sexual, but are ‘only private and sexual by virtue of the alteration or combination.’ This means that where primary disseminators have Photoshopped images, making them sexual by digitally manipulating them, superimposing an image of the victim’s face onto a sexual image, or have

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237 As was the case when Paul Marquis admitted the offence after sending a photograph of a woman’s breasts to another man: Marquis Unreported 9 June 2015 Teeside Magistrates’ Court.
238 The Voyeurism (Offences) (No. 2) Bill 2017-19, currently passing through Parliament, amends s 67 of the Sexual Offences Act 2003 (SOA) to create additional voyeurism offences, including ‘upskirting’ under s 67A.
239 CJCA 2015 s 34(5).
240 CJCA 2015 s 35(5)(a).
241 CJCA 2015 s 35(5)(b).
used ‘deepfake’ technology to incorporate several of the victim’s images to create a pornographic film, these primary disseminators, or subsequently, secondary disseminators, are not liable for the offence, as constructed. As Gillespie remarks, limiting the offence in this way has attracted criticism, as technology is now so advanced that it can be difficult to distinguish digitally manipulated images from the real thing.\textsuperscript{242} As Lord Marks observed in the House of Lords, the publication of adapted images can be equally as humiliating as people who view them think they are real, as they are unaware of this doctoring.\textsuperscript{243} Further, as Pegg observes, ‘for those who have not - and would not - pose for a sexual image, a depiction that suggests they may have done so may prove more distressing than it would for those who have posed, but did not expect it to be disclosed.’\textsuperscript{244}

The opinions outlined above accept that digitally adapted images have the potential to cause the same - and in some cases - even more harm than real images, but these directly contrast with the Government’s view, as expressed in a letter by Karen Bradley MP, then Minister for Preventing Abuse, to Alistair Carmichael MP, in 2016, who stated that a Photoshopped image ‘does not have the potential to cause the same degree of harm as the disclosure of images that record real private, sexual events.’ Including these images, she believed, would ‘unjustifiably extend the scope of the offence.’\textsuperscript{245} It is submitted that this view is not justified, particularly given that advancements in technology have made it impossible to tell whether or not a manipulated image is real or fake, and that s 34 of the CJCA should be extended to incorporate digitally manipulated images within its definition of ‘photograph and film.’ As technology continues to facilitate and ease the construction of digital versions of the abuse, this is a serious omission, as the images will only become more life-like and credible.\textsuperscript{246}

The analysis of the meanings of ‘disclosure,’ ‘consent’ and ‘private sexual photograph or film,’ as given in s 33 of the CJCA, has identified several limitations when responding to revenge porn attacks which falls outside of the broadly understood paradigmatic case of disclosure by

\textsuperscript{242} Gillespie (n 217) 871.
\textsuperscript{243} HL Deb 16 November 2016, vol 776, col 1445.
\textsuperscript{244} Pegg (n 202) 521.
\textsuperscript{246} Law Commission Scoping Report (n 214) para 10.72.
aggrieved ex-partners, meaning it does not respond adequately to all manifestations of the abuse. As well as excluding from its scope the creation and distribution of digitally adapted images, it also excludes from its ambit threats to disclose images and the creation and distribution of ‘upskirt’ and ‘downblouse’ images. In addition, it provides a limited definition of consent, which may cause difficulties for courts in directing juries. It is submitted, then, that the offence under s 33 of the CJCA should be re-drafted to incorporate the creation and distribution of all private sexual images, including threats to disclose images, and to provide a specific definition of consent in order to avoid confusion and ambiguity. Proposals for reforming the drafting of the offence will be presented in Chapter 7.

The final limitation of the offence identified by the analysis in the previous section is that the offence does not create a statutory civil action. As the earlier analysis of the PHA identified, the speciality of the Act when responding to revenge porn attacks by the three paradigmatic categories of defendants is that it makes available the jurisdiction of the civil courts. This means that injunctions can be issued to restrain defendants from making further disclosures and prohibit Internet intermediaries from hosting the content. One of the key aims of the PHA, when it was enacted, was not solely to punish harassment when it had already occurred, but to prevent any further incidents from taking place, thus justifying the inclusion of a statutory tort under s 3(3) of the PHA. It would be logical to assume that the same reasoning might have been applied when creating the revenge porn offence under s 33 of the CJCA, as the inclusion of a statutory tort would have been justifiable to similarly prevent further incidents. This is a surprising omission, considering that the principal concerns for victims, following a revenge porn attack, would be to prevent any further disclosure and to access a means of removing images from hosting sites. It is an even more surprising omission, given that the offence under s 33 provides no mechanism for the removal of images from hosting websites. The inclusion of a statutory tort along the same lines as s 3(3) of the PHA would have provided victims with a useful means of limiting the harm caused by disclosures, following an actual or threatened revenge porn attack, at the outset. A breach of a civil injunction without reasonable excuse is a criminal offence and punishable by the criminal courts, meaning that the provision of this statutory tort provides victims with a powerful tool with which to manage the risks of disclosures. The tort also provides victims with a means of claiming damages for the anxiety and financial loss arising from disclosures. Crucially, it also enables them to pursue proceedings anonymously, thus empowering them to seek justice. It is proposed, then, that s
33 of the CJCA should, likewise, incorporate a statutory civil remedy. This proposal for reform will be discussed further, in Chapter 7.

6.3.4 Conclusion

The normative analysis above has identified that using the specific offence created under s 33 of the CJCA to respond to revenge porn has some benefits, where the offence is perpetrated with the malicious intent to cause victims distress. The offence is constructed to respond to dissemination of revenge porn by former ex-partners who intend to shame and humiliate victims in order to pay them back for breaking up the relationship. Due to its narrow construction, however, it does not respond to other manifestations of the abuse and notably excludes from its ambit disclosures committed without the intention of causing victims distress; the creation and dissemination of digitally manipulated images which may be indistinguishable from the real thing; and the creation and dissemination of ‘upskirt’ and ‘downblouse’ images (although the creation of upskirt images will soon be a criminal offence under amendments to voyeurism legislation). The failure to label revenge porn a sexual offence has also resulted in significant attrition rates from reporting to prosecution, as victims are not entitled to automatic anonymity. Additionally, the Act has been criticised for failing to define the meaning of ‘consent’ which, as the Law Commission has identified in its Scoping Report, creates difficulties for courts in directing juries, for example when limited consent to disclosures has been given, or if consent has been given under duress or while victims are intoxicated. This piecemeal and patchwork approach to legislating for revenge porn disclosures is clearly inadequate and has led to calls for the introduction for a new law on image-based sexual abuse which criminalises all non-consensual creation and distribution of intimate sexual images.248

The Law Commission has recommended however, that existing criminal offences could be improved so they are clearer and more effectively target serious harm and criminality.249 To this end, Chapter 7 will identify how the offence created under s 33 of the CJCA could be

reformed in order to respond to the problem of revenge porn far more effectively than current provisions allow.
Chapter 7: Proposals for Criminal Law Reform

‘Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions.’

Michel Foucault (1926-84)

7.1 Introduction

The normative analysis in Chapter 6 has identified the benefits and limitations of addressing revenge porn in the criminal law regime, using the offences provided by the Protection from Harassment Act 1997 (PHA), and the Criminal Justice and Courts Act 2015 (CJCA). A benefit of the PHA’s wide scope and versatility is that it is capable of catching revenge pornographers in all three paradigmatic categories of defendants, if a course of conduct can be established. It also creates a statutory tort, enabling victims to access a tailored civil remedy, providing victims with a mechanism to prevent or prohibit further disclosures, as well as to remove their images from uncooperative hosting websites. The analysis has identified two distinct limitations when using the PHA to seek redress in the criminal law for revenge porn disclosures, however. First, the low threshold for criminal liability for the section 2 offences, which are summary only, means that sanctions imposed on conviction are not particularly severe, meaning that defendants convicted for revenge porn disclosures are not adequately punished. Second, where an image has been disclosed only once online, but has subsequently been redistributed widely by other users, then in the event that no other act by the perpetrator responsible for the original disclosure can be linked to the disclosure, this might make the requirement for a course of conduct under the PHA difficult to satisfy.²

² Although see discussion in Chapter 6.2.3: in Law Society v Kordowski [2014] EMLR 2, the publication of an individual’s name on a website, posted in the knowledge that this publication would come to his attention on more than one occasion, and on each occasion would cause him alarm or distress, was shown to amount to a course of conduct constituting harassment. However, as Tomlinson and Vassall-Adams note, it might not always be possible to establish online harassment in the case of a single posting. See Hugh Tomlinson and Guy Vassell-Adams, Online Publication Claims: A Practical Guide (Matrix Chambers Ltd, London, 2017) at 5.88.
The normative analysis in the previous chapter acknowledges that responding to revenge porn disclosures using the offence under s 33 of the CJCA has some benefits, particularly where these are perpetrated with the malicious intent to cause victims distress. It has also identified several limitations with the offence, however, due to its narrow ambit, as it does not respond adequately to all manifestations of the abuse. Furthermore, the chapter has identified that in not labelling the offence as a sexual offence, this makes it difficult for victims to seek criminal justice as they are not entitled to automatic anonymity. Additionally, the definition of consent provided by the Act has the potential to create confusion and ambiguity as well as a fair and accurate labelling concern.

This chapter will explore the proposed reforms to the offences, in turn, in two parts. Each part will deal with the suggested reforms using individual subheadings. The first part will deal with proposed reforms to the PHA, suggesting in Section 7.2(i) that the threshold for liability for the section 2 offences under the PHA should be raised in order to narrow the gap between sections 2 and section 4, and that the section 2 offences should be made triable either way. This would justify, then, increasing the sentencing powers on a section 2 conviction, from six months to two years. This would result in conduct currently falling between the section 2 and section 4 offences attracting a more substantial term of imprisonment, if sentencing judges had more latitude to impose appropriate sentences. It will then propose in Section 7.2(ii) that the PHA should be amended to make it clear that harassment can involve instances where a single online act by offenders can have a continuing and protracted effect on victims, and that this can amount to a course of conduct.

The second part will identify how the offence under s 33 of the CJCA could be improved by making four significant reforms, so that the Act responds to revenge porn misconduct more effectively than current provisions allow. These include, in Section 7.3(i), that s 33 of the CJCA should be made a sexual offence, thus granting victims automatic anonymity. Section 7.3(ii) then proposes that the ‘intention to cause’ distress element of the mens rea ought to be lowered to include recklessness, thus inculpating a wider range of actors. Section 7.3(iii) suggests that the non-consensual creation and distribution of all types of private sexual images should be criminalised, including Photoshopped and ‘deepfake’ images, and images obtained by means of ‘upskirting’ and ‘downblousing,’ thus creating more certainty in the law. Section 7.3(iv)
proposes that a statutory civil remedy should be incorporated within the offence, enabling victims to straightforwardly access both criminal and civil justice, using just one comprehensive piece of legislation. The chapter concludes by reflecting that the reforms it proposes would increase the effectiveness of criminal law responses to revenge porn in the criminal law regime, but that, ultimately, a tailored civil/criminal response would ultimately provide victims with the best solution as this would enable them to straightforwardly access the benefits of both the civil and criminal law regimes (Section 7.4).

While the jurisdictional scope is limited to England and Wales, the chapter will adopt a comparative approach, where relevant, to explore how the issues under discussion have been addressed in the jurisdictions of New Zealand and Scotland, where these could helpfully offer inspiration and support for the proposed reforms. The chapter will also identify how the suggested reforms can be justified on the grounds of the criminal law theories discussed in Chapter 5 and, where relevant, the tort theories discussed in Chapter 2.

7.2 Proposals for Reform to The Protection from Harassment Act 1997

(i) Make Section 2 Offences Triable Either Way and Increase Sentencing Powers on Conviction.

The analysis in Chapter 6 has identified that the PHA can usefully provide for a wide range of revenge porn disclosures. The Act’s wide ambit means that it has the potential to extend to actors in all paradigmatic categories of revenge porn defendants, as it is how the disclosure is subjectively experienced by the victim, rather than the intention of the perpetrator in making the disclosure, that is the focus of the PHA. This renders the actus reus of the offence open to a very wide interpretation. The mens rea requirement for the section 2 offences extends the scope of the Act even further, as defendants need only to have known, or ought to have known, that the disclosure would cause victims alarm or distress, on at least two occasions. The threshold for liability for the section 2 offences can be easily met, then, providing revenge porn victims with a relatively straightforward means of obtaining criminal and/or civil justice.
Chapter 6 has argued, however, that the very low standard for criminal liability can actually be a limitation for revenge porn victims. This is because the conduct of defendants can, in many cases, be too serious to merit a section 2 offence, but not serious enough to warrant liability under the section 4 offences. The problem this creates is that the section 2 offences are summary only, and punishable by a maximum of six months’ imprisonment and/or a fine not exceeding level 5. This reflects neither the gravity of revenge porn conduct, nor does it adequately punish revenge pornographers for the harm they have caused their victims. A conviction under ss 2 or 2A can, therefore, leave many victims feeling inadequately vindicated. However, the threshold for the section 4 offences is far higher, conviction on indictment now carrying a maximum sentence of ten years’ imprisonment, this threshold being difficult for prosecutors to reach.

The PHA has been criticised in the past for precisely this issue. Lord Steyn flagged up this difficulty in *R v Ireland and Burstow*, 3 in 1996, when considering how the new law could be applied to this particular case, which fell between the then two offences provided by the PHA. 4 Concerns about the gap between the s 2 and s 4 offences were also raised by an independent parliamentary inquiry, launched in 2011, to ascertain whether the PHA was providing adequately for the problem of stalking. 5 The inquiry concluded that s 2’s low threshold for liability was, in fact, its weakness, rather than its strength. 6 It also noted that s 4 of the PHA was rarely used. 7 Lawyers, police and victims taking part in the inquiry all took the view, therefore, that s 2 of the PHA should be amended to make it triable either way. These findings led the inquiry to recommend that the offence of harassment under s 2 of the PHA should be heard in both the crown and magistrates’ court, depending on the seriousness of the case, and to signal the serious nature of the offending behaviour. 8 Although this recommendation was never implemented, the inquiry’s findings resulted in a specific offence of stalking being incorporated into the PHA, as well as a brand new offence under s 4A(1)(b)(ii) - stalking causing serious alarm or distress ‘which has a substantial adverse effect on [the victim’s] usual

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3 [1997] 4 All ER 225.  
4 Ibid at [228].  
6 Ibid, 21.  
7 Ibid.  
8 Ibid, recommendation 25.
day-to-day activities.’ The new offence was presumably designed to catch conduct falling in seriousness between the section 2 and section 4 offences. As Chapter 6 has identified, this offence can be usefully applied to more egregious cases of revenge porn.  

The gulf between the section 2 and section 4 offences, including s 4A(1)(b)(ii), has recently been widened however, following an amendment by the Policing and Crime Act 2017. This has resulted in the section 4 offences now carrying a maximum of ten years’ imprisonment, doubling the maximum sentence from five years. While it is commendable that the amendment has increased the PHA’s sentencing powers for more serious stalking behaviour, it has effectively widened the gap again for conduct that falls in between the section 2 and section 4 offences. This puts revenge porn victims back into the position, once more, of defendants potentially failing to meet the threshold for section 4 liability, thus creating uncertainty for the prosecution as to whether a conviction will be secured. The inevitable result of this is that the prosecution might decide to pursue the conduct via a section 2 offence instead, simply to secure a conviction and obtain a restraining order as quickly as possible.

It is suggested, then, that a sensible way to narrow the gulf between the section 2 and 4 offences would be to raise the liability threshold for the section 2 offences, by removing the objective element of the fault test. This would justify both making the offence triable either way and increasing sentencing powers on a section 2 conviction, from a maximum of six months to two years. In reducing the scope of the offence and narrowing the mens rea by removing objective fault, this would also provide better safeguards against unfair convictions and create more certainty in the law. It would also mean that defendants receive harsher punishments, leaving victims feeling more adequately vindicated.

The argument for removing objectivity from the fault test can be outlined as follows. Chapter 6 has identified that the actus reus for section 2 offences is open to incredibly wide interpretation, requiring only that victims must actually be alarmed or distressed or suffer some other low-level negative emotion, as a result of the harassing conduct, meaning that the scope

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9 See previous discussion in 6.2.3.
10 As from 3 April 2017.
for liability is excessively wide. It is rendered even wider by the mens rea, which contains subjective and objective elements in the alternative, meaning that, where defendants do not subjectively know that the conduct amounts to harassment, they are still criminally liable if they objectively ought to know that it amounts to such. Liability depends, then, not only on the subjective reaction of the victim to a course of unwanted conduct, which is an unknown quantity, but also on an objective standard, which requires that defendants ought to know how victims would subjectively react to this unwanted conduct. Further, if convicted, then in addition to any sentence defendants receive, they could face a restraining order, which, if breached, could attract a further spell in custody. This, Gowland remarks, is rather a harsh outcome for what, in some circumstances, can amount to an ‘unknown crime,’ in cases where defendants are unable to subjectively appreciate that their behaviour amount to harassment. As Conaghan notes, the fact that defendants must comply with an objective rather than subjective test for the purpose of criminal liability can be criticised from a civil liberties perspective, as eroding the rights of the defendant.

Concerns about the PHA’s broad mens rea have previously been brought to the attention of the Court of Appeal. In R v Colohan, the defendant appealed his conviction under s 2 for writing several letters to his local MP, which contained threats of violence, on the ground that he suffered from schizophrenia. The Court made it clear, however, that they would not interfere with the objective standard of reasonableness, arguing that to do so would dilute the protection provided to victims of harassment by all offenders, thus ‘significantly thwarting the purpose of the Act.’ The objective test remains, then, and endows all defendants, regardless of their mental health, with the same characteristics as the hypothetical reasonable person, leaving the threshold for liability under the Act extremely wide. This is reflected in the low sentences for section 2 offences, which are summary only.

Gowland remarks that the first part of the PHA’s mens rea actually poses little concern, as those who knowingly intend to cause harassment are the most culpable, and therefore deserving

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14 Ibid, at [19] per Hughes J.
of liability. However, it is the inclusion of those who should have known the effect of their behaviour which she believes is problematic.\textsuperscript{15} Dropping the objective element of the test would act to narrow the gap between the \textit{actus reus} and the \textit{mens rea}, and thus safeguard against the possibility of unfair convictions being imposed, where defendants do not subjectively know that their conduct amounts to harassment. This would address the problem of the PHA’s very low threshold for liability and reduce the possibility of disproportionately harsh sentences being imposed for potentially unknown crimes. As Geach and Haralambous observe, where the \textit{actus reus} of an offence is very broad, the \textit{mens rea} should be narrow, in order to limit liability.\textsuperscript{16}

Arguably, there could now be judicial support for removing the objective element from the \textit{mens rea} for the section 2 offences, despite the Court of Appeal’s decision in \textit{Colohan}.\textsuperscript{17} As Geach and Haralambous point out, \textit{Colohan} was decided before the House of Lords decision in \textit{R v G}\textsuperscript{18} which removed objectivity from recklessness in criminal damage, thus shifting liability in the criminal law towards subjective fault. It is suggested that when a suitable case arises, the courts should review the appropriateness of maintaining the objective test for liability for the section 2 offences provided by the PHA. In doing so, this would bring the law into line with the current trend for defendants to comply with a subjective, rather than an objective test, for criminal liability.

From a theoretical perspective, the suggested reforms can be supported by retribution theory. This theory posits that the only justification for state punishment is that the person suffering it has committed a crime, and should be punished proportionately to the extent of this crime. Retribution theory does not support the punishment of the innocent or the infliction of disproportionately harsh sentences. By eliminating the objective element of the fault test so that liability for the section 2 offences is contingent on what defendants subjectively knew amounted to harassment, this would mean that defendants who are not morally culpable for their actions, because they were unaware their conduct amounted to harassment, are not

\textsuperscript{15} Gowland (n 11) 391.
\textsuperscript{17} Colohan (n 13).
\textsuperscript{18} [2003] UKHL 50, [2004] 1 AC 1034.
punished. The reforms would also ensure that no defendant could break an injunction for what amounts to an ‘unknown crime,’ thus reducing the possibility of defendants being punished disproportionately for conduct they are subjectively unaware is harassing, for example, such as the repeated sending of flowers.\textsuperscript{19} As Husak remarks, injustice is at its most glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all.\textsuperscript{20} By dropping the objective element of the fault test for the section 2 offences and raising sentencing powers on conviction, this would mean that the sentences imposed were proportionate to conduct which competent defendants knew amounted to harassment. Defendants would understand, then, the meaning of the state’s action against them and that their punishment conveyed the extent of culpability for their actions.

The suggested reforms are also congruent with deterrence theory. Unlike retribution theory, deterrence theory accepts that it is permissible for innocent people to be punished or given disproportionately harsh sentences, if this has a deterrent effect and reduces criminal conduct so it already supports the wide threshold for liability under the section 2 offences of the PHA. However, deterrence theory can also justify reducing the scope for liability as it posits that prospective offenders need to be aware of the law in order to weigh up the costs and benefits of breaking it, and to understand the severity of probable sentences. By creating more certainty in the law by removing the objective test, prospective offenders acting with clear-eyed vision and an awareness of the law might be deterred if they were aware that their conduct might attract more severe criminal sanctions. This might, therefore, encourage rational actors to adjust their conduct and desist from breaking the law.

\textbf{(ii) Amend Section 7(3) To Establish a ‘Course of Conduct’ in the Case of a Single Online Posting}

The discussion in Chapter 6 has identified another limitation for responding to revenge porn using the PHA, which is the requirement that the prohibited conduct in s 1(1) of the Act is dependent on a ‘course of conduct.’ The prohibited misconduct at the heart of both the crimes

\textsuperscript{19} Gowland (n 15) 390.
and the statutory tort requires a course of conduct, which, in the case of revenge porn disclosures, might be established in multiple ways. It might, for example, involve the posting of individual photographs, each separate act amounting to a course of conduct. Where images have been non-consensually obtained covertly, or hacked from stolen devices before being disseminated, the act of obtaining the image and the subsequent disclosure might create a course of conduct. If an image is sent to multiple recipients, a course of conduct might also be established. There is no requirement, of course, that the acts are of the same nature, so in the context of a relationship breakdown, there might have been some other act, such as an argument or an abusive message, which, when combined with the disclosure of the image online, could create a course of conduct.

However, in cases where an image has been disclosed only once, but has subsequently been redistributed widely, then, in the event that there is no other act by perpetrators that can be connected to the original disclosure, the PHA cannot be triggered, as the requirement for a course of conduct is not satisfied. For example, if an image has previously been ‘sexted’ consensually to a former partner, during the course of a relationship, and following the relationship breakdown, the former partner posts it online, only once, then even if the image is subsequently viewed and downloaded many times by secondary disseminators, it might be difficult to establish a ‘course of conduct’ in the case of the original disseminator. Arguably, it might be possible for prosecutors to argue that a course of conduct could involve perpetrators posting the image once and then omitting to take it down, despite being able to, in order to clarify that a course of conduct can be established in the case of a single posting. This section proposes, then, that s 7 (3) of the PHA should be amended to include new subsections that expand the guidance to make it clear that this can involve a single act by offenders posting offensive material online, where this has a continued and protracted effect on victims. As Langlois and Slane observe ‘[W]hen somebody is publicly shamed online, that shaming becomes a live archive, stored on servers and circulating through information networks via search, instant messaging, sharing, liking, copying, and pasting. The resulting harm is not, therefore, simply about the effects of an action at a specific time and place, but also about ‘the reverberations of an action’ throughout information networks.’

The PHA was originally drafted to deal with conduct which takes place in the physical world, but the Internet has changed the ways in which harassment can occur. As such, the percussive effect of one single online posting has the potential to cause continuing alarm and distress to victims, over an extended period, even though the one act does not amount to a course of conduct in itself. That harassment can be perpetrated differently online, than in the physical world, has been recognised in New Zealand, a jurisdiction which has recently updated its harassment legislation to reflect this. In addition to creating brand new civil and criminal remedies to tackle cyberbullying and digital harassment, the Harmful Digital Communications Act 2015 (HDCA)\(^\text{22}\) amends extant legislation concerning the use of digital communications, to ensure that this can unequivocally provide for conduct perpetrated online. The Harassment Act 1997\(^\text{23}\) has thus been amended to acknowledge that a single online posting can amount to a pattern of harassing behaviour directed against another person.

Subpart 2, ss 31-34 of the HDCA amend New Zealand’s Harassment Act 1997 (HA) as follows: S 32 (4) of the HDCA amends the meaning of harassment in s 3 of the HA with a new provision which states that the prohibited conduct in s 3(1)\(^\text{24}\) can now include doing a specified act to another person that is one continuing act carried out over any period.\(^\text{25}\) S 32(4) then stipulates that a continuing act can result from ‘one specified act perpetrated online,’ that continues to have effect on a person over an extended period, for example, where offensive material about a person is placed in any electronic media and remains there for a protracted period. Finally, s 33 amends the meaning of a ‘specified act’ given in s 4 of the HA, so that it can include, ‘giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person.’\(^\text{26}\) This would encompass instances where a single revenge porn disclosure has reverberated through the information


\(^{24}\) This being that a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

\(^{25}\) Harassment Act 1997 Section 3 (3)(b).

\(^{26}\) Harassment Act 1997 Section 33 (2)(ea).
networks and had an effect on victims over an extended period, thus triggering redress using the HA.

Taking inspiration from this reform, it is proposed that the PHA should be amended along similar lines, to establish that a course of conduct can involve a single online posting, where this one act has a continuing and protracted effect on victims. It is suggested that to achieve this, s 7(3) of the PHA might be extended by adding new subsections (c) and (d), to establish that a course of conduct can involve a single act perpetrated online, where this has a continuing effect on victims. An amended s 7 (3) might look like this:

7 Interpretation of this group of sections.

(3) A ‘course of conduct’ must involve -

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or

(b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.

(c) in the case of conduct committed online in relation to a single person (see section 1(1)), conduct on at least one occasion where offensive material in relation to that person is placed in any electronic media, where it is likely to be seen by, or brought to the repeated or continuing attention of that person.

(d) in the case of conduct committed online in relation to two or more persons (see section 1(1A)), conduct on at least one occasion where offensive material in relation to each of those persons is placed in any electronic media, where it is likely to be seen by, or brought to the repeated or continuing attention of those persons.

The new subsections (c) and (d) would thus address the Act’s current limitation where a course of conduct cannot be established in the case of a single posting by a perpetrator, which cannot be linked to any other event. This amendment would solve the problem, then, for police and
prosecutors who might not otherwise be able to establish a course of conduct in the case of a single online posting.

From a theoretical perspective, this amendment can be supported by the two criminal law theories discussed in Chapter 5. First, it can be supported by deterrence theory, if the threat of criminal sanctions for perpetrating a single online act positively influences how prospective revenge pornographers behave. For deterrence theory to operate, potential offenders must understand the severity of probable sentences and take this into account when deciding whether to offend. If prospective offenders are aware that a single posting can amount to a course of conduct and know that this might bring them into conflict with the law, then the threat of criminal sanctions might positively influence how these individuals behave. Second, from a retributivist perspective, the reform can also be justified. As the law currently stands, a single online posting can result in a serious amount of harm, but as it might not amount to a course of conduct, this means that offenders can avoid liability even though they are morally responsible for inflicting harm through committing this one culpable act. The amendment would ensure, then, that these offenders can be found liable under the PHA and punished for their wrongdoing.

7.3 Proposals for Reform to The Criminal Justice and Courts Act 2015

(i) Label Section 33 of the CJCA a Sexual Offence Thus Granting Victims Automatic Anonymity

Revenge porn is regarded as a communications offence, rather than a sexual one,\(^{27}\) so despite being framed around the disclosure of private, sexual material, it is not an offence under the Sexual Offences Act 2003. Crucially, this means that, unlike sexual offences, there is no statutory provision allowing for the automatic anonymity of complainants.\(^ {28}\) As Chapter 6 has shown, this lack of protection for victims directly affects the number of cases being prosecuted,


\(^{28}\) As provided by the Sexual Offences (Amendment) Act 1992.
a study showing that one in three allegations concerning revenge porn are withdrawn by complainants.\textsuperscript{29}

The Government has long argued, however, that revenge porn is not a sexual offence because it does not require any element of sexual contact. In 2016, Karen Bradley, then Minister for Preventing Abuse, said, in a letter to Alistair Carmichael MP, who was supporting calls for automatic anonymity for revenge porn victims, that ‘[W]hilst victims in some circumstances feel violated by the malicious disclosure of such images, the offence is not a sexual one. It does not require any element of sexual contact or sexual gratification.’\textsuperscript{30} During the House of Commons debate about the ‘Upskirting Bill,’\textsuperscript{31} in July 2018, Maria Miller, MP, Chair of Parliament’s Women and Equalities Select Committee, brought the issue up again, arguing that ‘[W]here a sexual privacy is violated, it is difficult to see why it is not categorised as a sex offence.’\textsuperscript{32} The Government has once again rejected that revenge porn is a sexual offence, however. In the same debate, Lucy Frazer MP, Parliamentary Under-Secretary of State for Justice, pointed to the unintended risks of making revenge porn a sexual offence as this would place people on the sex offender register, with all the consequences this brings, when their intent was not sexual gratification.\textsuperscript{33} In giving anonymity to victims, she argued, this would create an inconsistency in the law by placing people on the sex offender register for offences that are not sexual.\textsuperscript{34}

However, it is submitted that not making revenge porn a sexual offence creates inconsistency in the law. Therefore, it is suggested that s 33 of the CJCA should be amended so that non-consensual distribution of private sexual images becomes a sexual offence prohibited by the Sexual Offences Act 2003 (SOA), so that victims are entitled to an automatic right to anonymity. Such a reform can be justified on several grounds. First, the activity of ‘upskirting’ is soon to become a sexual offence, in England and Wales, following a concerted campaign by

\begin{itemize}
\item \textsuperscript{31} The Voyeurism (Offences) (No. 2) Bill 2017-19.
\item \textsuperscript{32} HC Deb 2 July 2018, vol 644, cols 10-12.
\item \textsuperscript{33} Ibid, col 19
\item \textsuperscript{34} Ibid.
\end{itemize}
a former victim of ‘upskirt’ photography, Gina Martin. The criminalisation of taking upskirt images is to be welcomed, but a gap in the law is immediately apparent: while the creation of these images for the purpose of sexual gratification is a sexual offence under s 67A of the SOA, the subsequent non-consensual distribution of the same images, for purely sexual gratification, under s 33 of CJCA, is not. Therefore, women reporting incidents of upskirting to the police would be entitled to automatic anonymity, but women reporting the subsequent dissemination of upskirt images would not be.

Second, as has previously been identified in Chapter 1, it is the private and sexual nature of the images which makes them potentially so harmful; the fact that they are distributed without the consent of the individuals featured in them and with malicious intent, only serves to increase their appeal. Also noted was the fact that in spite of the infinite availability of consensual pornography available online, it is non-consensually disclosed sexual imagery of real-life adults that consumers of revenge porn want to view. As McGlynn observes, this only adds to their ‘potency’ to cause harm and abuse. Second, as noted by McGlynn and also identified in Chapter 1, is the harmful double standard that revenge porn perpetuates, which leads to the castigation of women for choosing to express their sexuality in a particular way. When a woman makes a decision about her sexual life and behaviour by allowing sexual images to be taken, or taking them herself, to share consensually with a romantic partner, she is denounced for demonstrating sexual agency and blamed for creating the images in the first place. This perpetuates a culture of victim-blaming.

Third, revenge porn disclosures are a serious violation of victims’ bodily and sexual autonomy. This is incongruent with the fact that revenge porn is not recognised as a sexual offence. As Parker observes, at its heart, the behaviour identified under s 33 of the CJCA ‘shares its DNA

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35 The Voyeurism (Offences) (No. 2) Bill 2017-19, currently passing through Parliament, amends s 67 of the SOA to create additional voyeurism offences, under s 67A.
36 See Chapter 1.2.
37 Ibid.
39 See Chapter 1.4.
40 McGlynn (n 38).
The Government has argued that revenge porn is not a sexual offence because it does not require any element of sexual contact.\textsuperscript{43} Sexual assault does not always require contact, however. McGlynn \textit{et al} argue that the approach of the UK Government ‘entirely misunderstands the existing law, which includes a number of offences, already labelled as sexual, that do not require contact.’\textsuperscript{44} The authors give preparatory offences such as grooming, causing individuals to perform sexual acts without contact with the perpetrator, coercing individuals to watch sexual acts, and indecent exposure, as examples of non-contact acts currently criminalised under the Sexual Offences Act 2003. They also point out that the focus of the Government on physical contact ‘fails to recognise the blurring between online and offline worlds both for experiencing and perpetrating abuse.’\textsuperscript{45} They cite empirical research in support of this, where a victim of sexual extortion states in an interview that this made her feel as if she had been ‘raped through a phone.’\textsuperscript{46} Similar feelings of sexual violation have also been expressed by some high-profile women who have had their private sexual images distributed online, without their consent, describing this as a form of sexual abuse.\textsuperscript{47}

\begin{footnotes}
\item[41] Kate Parker, ‘“Revenge Porn” Law: A Year’s Reflection,’ 5PB Blog (17 June 2016) <http://www.5pb.co.uk/blog/2016/06/17/revenge_porn_law_a_years_reflection/> accessed 15 January 2019.
\item[42] Ibid.
\item[43] Karen Bradley letter (n 30).
\item[47] For example, Jennifer Lawrence, star of \textit{Hunger Games} and victim of the celebrity iCloud hack in 2014, refers to the extensive distribution of her images as a ‘sex crime’; Vanity Fair ‘Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a “Sex Crime”’ Vanity Fair (October 7 2014) <https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover> and You Tube star Chrissie Chambers, who had images of a sexual assault distributed without her consent, has said that her perpetrator
\end{footnotes}
McGlynn, who is particularly active in this area of research, has identified several studies which find that sexual offending does not have to be motivated by sexual gratification. These include a study finding that the most common type of rapist is one who is motivated by power and control, and another which identifies many motivations for sexual offending, which include revenge and punishment, the sexual access of unwilling/unavailable women, and recreation and adventure. McGlynn submits, therefore, that to say that image-based sexual abuse is not a sexual offence because it ‘does not require any element of sexual contact and/or sexual gratification is to misunderstand sexual offending. Sexual offences are sexual, she asserts, because of the mode of perpetration (sexual acts) rather than motive; they are sexual because they are about power and control, punishment, sexual entitlement, anger, entertainment, as well as sexual gratification. As revenge porn can be disclosed for all of these reasons, either in isolation or in combination, not recognising the misconduct as a sexual offence is, therefore, rather missing the point.

Labelling revenge porn as a sexual offence, thus entitled complainants to automatic anonymity, can be supported from the perspective of both of the criminal law theories discussed in Chapter 5. Making s 33 of the CJCA a sexual offence would be congruent with retribution theory, as the paradigmatic wrong for which punishment is imposed would be the intentional violation of the bodily and sexual autonomy of another, rather than an intention to cause distress. In addressing what lies at the heart of revenge porn disclosures, this would more adequately address the moral content of the defendant’s act, so that punishment could be determined properly and proportionately to the gravity of this violation. It would also address the social harmfulness of revenge porn disclosures as these contravene the moral code by placing in public what should be private. By making revenge porn a sexual offence, this


48 McGlynn (n 38).
50 Diana Scully and Joseph Marolla, ‘‘Riding the Bull at Gilley’s”: Convicted Rapists Describe the Rewards of Rape,’ (1985) 32(3) Social Problems 251-263.
51 McGlynn (n 38).
52 Ibid.
recognises that in making disclosures, revenge pornographers deliberately flout accepted codes and norms, thus capturing the underlying concern of retribution theory that offences against the moral code should be punished.

Labelling revenge porn a sexual offence can also be supported by deterrence theory, as this would help to create more cohesion and certainty in the law. In creating general public awareness that the perpetration of sexual harm through any crime where the mode of perpetration involves a sexual act, offenders would understand when their conduct might bring them into conflict with the criminal law. Deterrence theory posits that people need to be aware of the law in order to weigh up the costs and benefits of breaking it and to understand the severity of probable sentences if they do. By creating a one-size-fits all approach so that all sexual offences are considered sexual because they involve a sexual act, rather than focusing on motives of perpetrators when committing these acts, this would assist perpetrators when they are undertaking a cost-benefit analysis. Further, if the offence under s 33 of the CJCA was classed as a sexual offence, this might further deter some actors in all three paradigmatic categories of revenge porn defendants from acting, as the threat of being labelled as a sex offender with its unpleasant consequences of being placed on the sex offender register, might have a positive influence on their behaviour. As mentally competent perpetrators would be able to understand that the disclosure of private sexual images is a sexual act, this should mitigate concerns about the unintended consequences and risks of placing offenders on the sex offender register. If perpetrators understand that committing a sexual act is always a sexual offence, then there would be no misunderstandings and no unintended consequences. Those deciding to commit revenge porn, when armed with this knowledge, would be making a deliberate decision to commit a sexual offence. Therefore, they would have to bear the consequences of making this decision.

(ii) Lower the Mens Rea Requirement to Broaden the Scope of the Offence.

The second significant limitation identified in the normative analysis, in Chapter 6, when responding to revenge porn disclosures using s 33 of the CJCA is that s 33 1(b) requires that the disclosure of private sexual photographs and films must be perpetrated with the intention of causing distress to the individuals appearing in them. The offence’s narrow mens rea means
that it criminalises dissemination by primary and secondary disseminators, only when the motivation for disclosing images is malicious. This requirement excludes from the ambit of the offence non-malicious disclosures by primary and secondary disseminators, and publication by Internet intermediaries, if there is no direct intention to cause victims distress. So, in cases where perpetrators are motivated by reasons such as sexual gratification or financial gain, giving no thought as to whether making a disclosure might cause victims distress, the offence is not triggered. While the Government’s original intention in drafting the offence with such a narrow mens rea was to prevent perpetrators acting without the relevant motivation from being placed on the sex offender register, by not classing revenge porn as a sexual offence, unfortunately, the result of limiting the offence to a malicious intention to cause victims distress is that it has created a legal loophole, which defence barristers can exploit to argue that their clients’ actions fall outside the scope of the law. As Bambauer points out, however, the principal harm of revenge porn disclosures does not necessarily arise from the malicious disclosures by former partners, as these relationships have ended, but from the ‘ongoing repeated dissemination of the sensitive content’ mainly by persons unknown to the victim.54 This secondary dissemination is not caught by the offence, as constructed, however.

As the normative analysis in Chapter 6 has identified, the requirement of an intention by perpetrators to cause victims distress, under s 33 1(b) of the CJCA, has been criticised for limiting the scope of the offence. It has also been identified by the Law Commission as a significant contributing factor in the level of attrition of s 33 cases, from reporting to prosecution.55 In spite of this, the new ‘Upskirting Bill,’ currently making its way through Parliament, also requires this additional evidential hurdle,56 subsection 3 of the Bill including qualifying requirements, one of which requires an intention for perpetrators to cause victims distress.57 As with revenge porn dissemination, this begs the question as to how much the Government have really understood about the upskirting issue, including why it is perpetrated, given the huge demand for images and their profitability58 as the Bill excludes the creation of images for purely financial gain. The requirement for an intention to cause distress is also

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55 See above discussion in 6.3.3.
56 This criminalises the activity of upskirt photography by amending s 67 of the Sexual Offences Act 2003, creating additional voyeurism offences under s 67A.
57 SOA s 67A (3)(b).
58 One website known to host and exchange ‘upskirt’ images is reportedly worth £30 million. See HC Deb (n 62) col 261.
surprising, given that the offence is based on existing Scottish legislation which outlawed upskirting eight years ago and which has been criticised for its very low prosecution and conviction rates. This is attributed to the fact that upskirting is currently only illegal if the motive of the perpetrator is either to gain sexual gratification or to cause distress to victims. As *The Scotsman* reports, this has created a considerable loophole in the law, ‘as the only person who can truly know the motivation for obtaining the images is the offender and proving either intention beyond reasonable doubt may be too difficult for police and prosecutors alike.’

Maria Miller, MP, Chair of Parliament’s Women and Equalities Select Committee, has questioned why the issues with the Scottish legislation are not reflected in the current Bill. A recent debate in the House of Lords highlighted concerns about the inclusion of the qualifying motivations in subsection 3 of the Bill, given that images can be obtained for other reasons, such as for entertainment, amusement or financial gain. Ignoring these concerns, arguably, only creates confusion and uncertainty in the law: as Maria Miller has remarked, the Bill ‘does not outlaw upskirting per se; it outlaws it in certain circumstances,’ suggesting that the Government needs ‘a cohesive strategy in this area’ rather than taking a ‘piecemeal approach.’

One way in which s 33 of the CJCA could be reformed would be to widen the scope of the offence, by broadening the *mens rea* to catch revenge pornographers in all three paradigmatic categories of defendants. This could be achieved by mirroring the *mens rea* requirements for the Protection from Harassment Act 1997 (PHA), that defendants should have subjectively or objectively known that their conduct amounted to harassment. The analysis of the PHA, in Chapter 6, found that a significant benefit of responding to revenge porn using the section 2 offences is that they can potentially catch disclosures by perpetrators in all three paradigmatic categories of defendants, due to their incredibly wide ambit, meaning that similarly lowering the *mens rea* requirement for the CJCA would inculpate a broader range of defendants. As the

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59 Sexual Offences (Scotland) Act 2009 s 9(4A).
64 HC Deb (n 62) col 261.
normative analysis in Chapter 6 also identified, however, the inclusion of an objective element in the *mens rea* of the PHA has been criticised for creating uncertainty in the law. Given that the PHA can catch conduct as innocuous as the repeated sending of flowers or the sending of ‘friend’ requests on social media, this element of ‘contingent criminality,’ means that the law lacks clarity: a person will not be able to predict with certainty whether a particular type of behaviour will bring him into conflict with the law, as this is completely dependent on the reaction of the recipient of the conduct. The inclusion of this standard has the potential to inflict unfair prosecutions and undeserved punishments, if it takes no account of the defendant’s inability to appreciate the impact of his conduct on another, and makes insufficient allowance for the potential for misunderstandings to arise.

It is submitted, however, that mirroring the language of the *mens rea* requirement for the section 2 offences under the PHA is justifiable, given that the conduct that the CJCA seeks to criminalise is the non-consensual disclosure of private sexual photographs and films. Unlike the potential for the PHA to criminalise individuals for conduct that they do not understand amounts to harassment, arguably, most revenge pornographers would both subjectively know that in non-consensually disclosing private sexual images, this would cause victims to suffer alarm and distress, or objectively, that they ought to have known this would be the case, as a reasonable person in possession of the same information would think so. It is submitted, then, that having both a subjective and objective *mens rea* element for the s 33 offence would not lead to unfair convictions and undeserved punishments being imposed, as mentally competent perpetrators would know, or ought to know, that in choosing to disclose revenge porn, this contravenes accepted social norms and has the potential to cause serious harms.

Chapter 6 identified that the *mens rea* requirement of intentionally causing victims distress, under s 33 (1)(b) of the CJCA, presents an additional evidential hurdle for prosecutors. The evidential challenge of having to meet the distress threshold has recently been identified by the

65 Michael Hurst was tried under s 2 of the PHA for pursuing a course of conduct amounting to harassment by sending his ex-girlfriend a ‘friend request’ on Facebook and sending a book to her place of work: see ‘Facebook Harassment Trial Ends in Farce as Case is Thrown out of Court,’ Daily Mail (27 March 2008) <https://www.dailymail.co.uk/news/article-547068/Facebook-harassment-trial-ends-farce-case-thrown-court.html> accessed 15 January 2019.


67 Ibid, 261.
Law Commission in its evaluation of the s 33 offence. The Commission’s report states that meeting this threshold has contributed towards the ‘significant level of attrition of section 33 cases from reporting to prosecution.’ It is suggested, then, that the *mens rea* of the CJCA should be lowered, in order to broaden the scope of the offence so that it catches offenders in all paradigmatic categories of defendants. This amendment would be in line with Scottish revenge porn legislation, which has a wider ambit than its English and Welsh counterpart. The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 requires that revenge porn defendants either intend fear, alarm or distress to be caused to the persons featured in the images or are reckless as to the same. By lowering the *mens rea* to include recklessness, the Scottish revenge porn provisions can catch revenge pornographers who are acting without the specific intention of causing victims distress.

It is suggested, then, that the *mens rea* requirement under s 33 1(b) of the offence should be lowered from ‘the intention to cause distress’ to ‘recklessness as to causing harm or distress.’ Doing so would widen the scope of the offence, inculpating more actors in the three paradigmatic categories of defendants. Lowering the *mens rea* requirement, as suggested, would thus close a legal loophole through which offenders can avoid liability.

Lowering the *mens rea* requirement would be congruent with both of the criminal law theories discussed in Chapter 5. First, this reform can be supported on the ground of deterrence theory. By creating public awareness that the offence does not require such a high evidential threshold, deterrollable offenders might adjust their behaviour and decide not to act. As the examination of deterrence theory in Chapter 5 has shown, there is a modest link between the certainty of punishment and crime reduction, which shows that some offenders do rationally adjust their behaviour when perceiving the certainty of punishment. Therefore, if perpetrators are more certain that they might face punishment as a result of making revenge porn disclosures, this could potentially reduce the amount of offending.

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69 Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2(1)(b).
70 See discussion in 5.3 and 5.3.1.
Removing the intention to cause distress element from the *mens rea* can also be supported by retribution theory. Revenge porn creates many individual and wider social harms, presenting a compelling argument for a censure-based retributive response to the conduct which justifies the punishment of offenders who have caused these harms. Widening the scope of the offence can be supported by retributivism, therefore, as more culpable actors would be caught within its ambit.

(iii) Criminalise the Non-consensual Creation and Distribution of All Types of Private Sexual images, Including Threats to Disclose, and Clarify the Meaning of ‘Consent’

The third significant limitation identified by the normative analysis in Chapter 6, when responding to revenge porn disclosures using the offence under s 33 of the CJCA, is that it does not respond adequately to all manifestations of revenge porn abuse. Notably, the offence excludes from its ambit threats to disclose images, the creation and disclosure of digitally manipulated images and the creation of and disclosure of ‘downblouse’ images. The offence also requires that a person’s genital or pubic area is exposed, meaning that where these body parts are covered by underwear, any disclosed images that have been obtained by ‘upskirt’ photography, also fall outside of the ambit of the offence. Additionally, the offence under s 33 provides a limited definition of consent, which, as the normative analysis has identified, can cause difficulties for courts in directing juries.

It is proposed that the offence under s 33 of the CJCA should be re-drafted to incorporate all manifestations of revenge porn abuse and that a specific definition of consent to disclosures should be provided to prevent further confusion. The offence, as constructed, has resulted in victims being faced with a piecemeal legislative approach when seeking redress for revenge porn disclosures, which creates uncertainty as to the circumstances under which a prosecution can even be brought. It is proposed, then, that the offence under s 33 of the CJCA is extended to criminalise the non-consensual creation and distribution of all types of intimate sexual images, including threats to do so. Although threats to disclose are also covered by other offences,71 arguably, incorporating threats within one comprehensive piece of legislation would

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71 Depending on the circumstances, threats to disclose revenge porn can be prosecuted under s 127 of the Communications Act 2003; s 1 of the Malicious Communications Act 1988; ss 21, 34 of the Theft Act 1968 if
help create more certainty for victims when reporting this misconduct, as well as for the police handling reports of this abuse. Extending the ambit of the offence could be achieved straightforwardly by amending the existing s 33(1)(a) provision so that it becomes an offence for a person ‘to create and/or disclose, including threats to disclose, a private sexual image without consent.’ The meaning of ‘private and sexual’ given in s 35(4)(a) could then be extended to include images that consist of a non-sexual photograph or film that has been altered in any way to make it sexual, which would also result in the exclusions in s 35(5) being dropped.72 Straightforwardly outlawing the creation of intimate sexual images without consent would cover digitally manipulated Photoshopped and ‘deepfake’ images, many of which are completely indistinguishable from the real thing. The creation and distribution of ‘upskirt’ and ‘downblouse’ images would also be caught, as this could include images which show the pubic area and breast area covered by underwear. Taking inspiration from s 3(1)(b) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, this latter reform could be achieved by amending the meaning of ‘private’ and ‘sexual,’ along the same lines as the Scottish legislation, to include a further subsection in the provisions in s 35(3) of the CJCA to provide that a photograph or film is ‘sexual’ if it shows ‘a person’s genitals, buttocks or breasts, exposed or covered only with underwear.’

The inclusion of threats to disclose images also closes a gap in the current provisions which is a serious omission, given the ease with which threats to disclose can be followed through online.73 Threats to disclose are most commonly experienced in the context of abusive relationships and those who threaten to disclose can commit other offences, for example, harassment or blackmail, or offences under s 1 of the Malicious Communications Act 1988 or s 127 of the Communications Act 2003. As the Law Commission identifies, however, research being conducted in this field by Clare McGlynn suggests that, while threats to disclose are reported to the police, charges are largely not laid, ‘indicating the law is inadequate in reflecting the harm caused to those receiving threats that can realistically, and easily, be carried out.74

72 These provide that a photograph or film is not private or sexual if it is only private and sexual as a result of alteration or by means of combining images to make it sexual.
74 Ibid, paras 10.93-10.94.
Threats to disclose images are also already covered by the Scottish revenge porn offence, and it is suggested that England and Wales should follow suit. By reforming s 33 of the CJCA to also include threats to disclose, this would bring the English and Welsh legislation into line with its Scottish counterpart. It would also remove uncertainty when a threat to disclose has been made by perpetrators using force or terror, which has resulted in consent being given for the actual disclosure, meaning the reform would find support in deterrence theory, as offenders would have more certainty as to when their conduct might bring them into conflict with the law.

‘Consent’ is undefined in the Act, meaning it is silent as to how this should be approached, for example, where consent is given under duress, or if a person gives consent while intoxicated. As a disclosure must actually be made in order for the offence to be triggered, this excludes from liability primary disseminators who attempt to control or coerce their partners by threatening to disclose their images. As identified above, by failing to clarify how consent should be approached, this is problematic when considering that any threats to disclose could conceivably have been carried out after consent was obtained under duress, meaning that perpetrators can avoid liability if consent had, in fact, been given. The Act is also silent as to whether consent is required by multiple persons featuring in the images. It is also unclear as to whether a good faith reasonable belief that a person in the image would consent to it being shared would trigger the offence. It is suggested, then, that the definition of consent given under s 33(7)(a) should be made clearer to address the current ambiguity surrounding consent to disclosures.

Inspiration for defining the meaning of consent can be taken from a recently enacted law in Australia, the Crimes Amendment (Intimate Images) Act 2017 No 29. This law straightforwardly criminalises all non-consensual creation and/or distribution of intimate sexual images, and provides a very precise definition of consent. Section 91O of the Act

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75 Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 creates the offence of ‘disclosing, or threatening to disclose, an intimate photograph or film.’
76 The Crimes Amendment (Intimate Images) Act 2017 No 29 amends Schedule 1 Amendment of Crimes Act 1900 No 40.
provides that a person consents to a recording or distribution of the image if the person ‘freely and voluntarily agrees’ to the recording or distribution.\textsuperscript{78} Agreeing to the recording or distribution of an image on one occasion, or to a particular person, or in a particular way, however, does not mean that a person will be taken to have agreed to recording or distribution of another image, or on another occasion, or to another person, or in another way.\textsuperscript{79} Distributing an image of oneself also does not mean that a person consents to another person distributing the same image.\textsuperscript{80} Consent given because of threats of force or terror are incorporated within the definition\textsuperscript{81} as is consent given by a person under the age of 16, or by a person who does not have the capacity to consent including because of cognitive capacity.\textsuperscript{82} This presumably, would also catch consent given while intoxicated. However, any confusion that might arise as to what is covered in the definition of consent, as given in s 91O, such as, for example, where a person agrees to a recording or not the distribution, or to the distribution but not the recording,\textsuperscript{83} is arguably mitigated by s 91O(8) which provides that this section ‘does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.’

Incorporating the definition of consent provided by the Australian legislation into the offence created under the CJCA would enable the courts to interpret the meaning of consent, therefore, according to the particular facts of the case before them, avoiding confusion over issues as to who should give consent and if there are multiple people featuring in the image. Incorporating this definition of consent into the offence created by the CJCA 2015 would, importantly, avoid the possibility of offenders avoiding liability where consent has been given under duress or while victims are intoxicated. The reform can be justified, therefore, on the ground of retribution theory, as all morally culpable wrongdoers would be punished for their wrongful act, not just those who are liable for the offence, as currently constructed.

\textsuperscript{78} Crimes Amendment (Intimate Images) Act 2017 No 29 s 91O(2). Although note that it is unclear as to the position as to when a person might agree to the recording but not the distribution, or conversely, if a recording by a partner was initially not agreed to, but that now it has happened, the person featured in the recording decides to make money for themselves and their partner by distributing it, as this presumably should not be an offence.
\textsuperscript{79} Ibid s 91O(5).
\textsuperscript{80} Ibid s 91O(6).
\textsuperscript{81} Ibid s 91O(7)(c).
\textsuperscript{82} Ibid s 91O(7)(a).
\textsuperscript{83} See note above (n 78).
(iv) Incorporate a Statutory Civil Remedy

The normative analysis in Chapter 6 has identified that the inclusion of a statutory tort in the targeted revenge porn offence, created under s 33 of the CJCA, would provide victims with a useful weapon with which to mitigate and/or redress the harm caused by revenge porn disclosures. The benefits for revenge porn victims of being able to access civil justice have been identified many times in the thesis. Chapter 1 established reasons why mobilising the civil law regime might provide an attractive option for revenge porn victims. These include the fact that the anonymity assured in civil proceedings might, then, encourage those who do not wish to pursue criminal proceedings to seek justice. Also, a lower standard of proof is required in the civil law than the criminal law, meaning claimants only have to prove the case on the balance of probabilities, rather than the prosecution having to prove that the defendant is guilty beyond reasonable doubt. This can be useful in cases where the evidential threshold required by the criminal law is difficult to reach. Next, in tort law, the most likely outcome for revenge porn claimants is that compensatory damages will be paid by the defendant, in order to make reparation for the claimant’s loss. However, where actions are successful, the remedies provided by a civil claim, whether damages or injunctive relief, may well be more beneficial to revenge porn victims seeking to rebuild their lives, than having their perpetrators face a short custodial or community sentence. Previous discussions in the thesis have also touched on the fact civil justice may be attractive to some revenge porn victims as a means by which they are able to uphold their substantive civil rights against those who have wronged them.

Revenge porn is an offence that clearly justifies the intervention of the criminal law. The moral reprehensibility and intrinsic badness of the conduct indicates a clear need for state intervention and the moral voice of the criminal law to signal the condemnation for the conduct that civil penalties do not and requires the greater deterrent effect and retributive response that criminal sanctions can bring. However, as the civil law can be a useful mechanism to claim damages and injunctive relief, the availability of injunctive relief is of particular benefit to victims. As the analysis of the Protection from Harassment Act 1997 (PHA) in Chapter 6 identified, a key

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84 See Chapter 1.5.2.1.
85 See, for example, Chapters 5.6 and 6.1.
weapon in staving off an actual or threatened revenge porn attack is the jurisdiction of the civil courts to grant injunctions to restrain conduct. While victims can, of course, use the PHA to seek damages and injunctive relief, it is suggested that they should also be able to access the civil law under the CJCA, to allow them to straightforwardly access both civil and criminal remedies using one comprehensive, tailored piece of legislation. It is suggested, then, that creating a statutory tort to run alongside the criminal offence under s 33 of the CJCA would provide victims with the best solution.

To recap, a statutory tort is provided by s 3(3) of the PHA, in respect of an actual or threatened breach of s 1(1). Once awarded, an injunction can effectively restrain revenge pornographers in all paradigmatic categories of defendants from pursuing any threatened or further conduct. S 3(2) also enables victims to bring a claim for damages for any anxiety caused by revenge porn, and/or any financial loss resulting from it. The PHA’s dual provisions make a particularly useful piece of legislation for revenge porn victims, as, if it is triggered, it gives them the choice of bringing a civil claim for damages or an injunction, in addition to, or alternatively, to pursuing a criminal prosecution. As well as creating criminal penalties which reflect the seriousness of the conduct, the PHA provides injunctive relief swiftly, offering victims the practical possibility of being able to prevent perpetrators from making further disclosures or making good the threat of a disclosure as well as providing them with a take-down mechanism, as the courts can order website operators to take the material down, at least in the jurisdiction of the EU.

It is proposed, then, that the offence under s 33 of the CJCA should be reformed to incorporate a statutory tort which runs alongside the criminal offence which mirrors the provisions of s 3 of the PHA. This would enable victims to straightforwardly access a tailored civil remedy specifically for actual or threatened revenge porn disclosures, without the need to establish a course of conduct, as required by the PHA, as the offence can be triggered by a single disclosure. There is strong academic support for such a reform. McGlynn and Rackley believe that ‘it is vital that victim-survivors of image-based sexual abuse should be able to harness the civil law, as well as the criminal law, when seeking redress.’ They support this

argument on the following grounds: (i) the statutory tort would guarantee victims anonymity; (ii) by correctly identifying and labelling the harm, this can avoid the gaps and distortions of current civil actions; (iii) the civil remedy would focus on the defendant’s violation of the victim’s statutory right and/or harm suffered, rather than on their motivation, or the victim’s reaction to it; and (iv) the inclusion of a statutory tort that runs alongside a criminal offence would ‘widen the net of potential defendants to include primary, secondary and hosting distributors, providing both proactive and reactive relief by preventing both the initial and subsequent distribution of the images, as well as providing financial compensation.’

McGlynn and Rackley observe that this approach is not without precedent, and also point to the Protection from Harassment Act 1997 as providing both civil and criminal remedies, both of which they note have been used in the context of revenge porn. They also note other jurisdictions that have introduced a private right of action alongside the criminal offences enacted to tackle revenge porn abuse. For example, the California Civil Code includes a private right of action, alongside the Criminal Offence in the Criminal Code,90 and an enquiry, in 2016, into revenge porn dissemination by the Australian Senate noted the need for victims to have a range of both criminal and civil remedies, recommending a federal law which would provide a statutory cause of action for serious invasions of privacy.91 The enquiry resulted in the recent enactment of the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018, which gives the Office of the e-Safety Commissioner a range of enforcement options to require rapid removal of image-based sexual abuse material and to hold perpetrators to account.92

The use of hybrid civil/criminal legislation specifically to target revenge porn abuse has also been adopted successfully in other jurisdictions. In 2015, the Florida Legislature created a

87 Ibid, 560.
88 Ibid.
89 California Civil Code §1708.85(a-j).
91 Legal and Constitutional Affairs Committee, Phenomenon Colloquially Referred to as ‘Revenge Porn’ (Commonwealth of Australia, 2016) Recommendation 6, [5.31].
new Act specific to ‘sexual cyberharassment’ in the US state of Florida. This creates both criminal penalties and civil remedies, enabling victims to access criminal and civil justice. The Act criminalises the act of ‘willfully and maliciously sexually cyberharassing’ another person, and the civil penalties enable victims to file a lawsuit for violation of the statute. In New Zealand, the Harmful Digital Communications Act 2015 (HDCA) was enacted to tackle the problem of cyberbullying and digital harassment. The HDCA has dual provisions, providing criminal and civil remedies for harmful digital communications. Its criminal law aims to deter, prevent, and mitigate harm caused to individuals by digital communications, while its civil remedy aims to provide victims of harmful digital communications with a quick and efficient means of redress. The civil regime process has been specifically designed to help people targeted by harmful digital communications. An approved agency first offers citizens a free service to assist with complaints relating to harmful digital communications, which uses negotiation and mediation to resolve complaints. If complaints are unresolved, individuals can then apply to the District Court for help. The District Court can also suppress the names of parties involved in the dispute to protect their identities, and can grant orders for material to be taken down or for Internet intermediaries to release the identity of persons behind anonymous communications.

Creating a statutory tort which runs alongside the criminal offence, under s 33 of the CJCA, can be supported by both the tort law theories explored in Chapter 2. The core rationale of economic analysis theory in tort law, the prevention of future wrongdoing, is mirrored in deterrence theory in the criminal law. Economic analysis can provide good justification, then, for imposing tort liability on revenge pornographers, as the threat of tort liability deters prospective revenge pornographers from acting, if these individuals are acting with clear-eyed vision and an awareness of the law. In addition, in identifying the conduct as tortious, this assists in establishing social norms about how people should treat each other. If the legal system deems that revenge porn is unacceptable and falls below the baseline of tolerable

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94 Section 784.049 Florida Statutes (3)(a).
95 section 784.049 Florida Statutes (5).
96 See also earlier discussion in 7.2(ii).
97 HDCA Part 1, Subpart 1, 3(a).
98 Ibid, 3(b).
99 HDCA Part 1, Subpart 1, 19.
conduct, this can create further disincentives for acting in prospective revenge pornographers who might be responsive to such normative messages.

Corrective justice can be understood as the civil law analogue to retributivism, albeit with an inverted goal. The core rationale of both theories is that people should be held accountable for past wrongdoing. Retributivist justice can be understood as ensuring offenders get the punishment they deserve and rescinding their rights, while corrective justice ensures that victims get the compensation they deserve and restores their rights. Corrective justice acknowledges, then, that a tortious action has occurred and cannot be undone, and that liability rectifies an injustice inflicted by one person on another, linking the victim’s right to compensation with the defendant’s duty to compensate. Creating a statutory tort under the s 33 offence created by the CJCA would, importantly, enable victims to straightforwardly claim compensation from the very revenge pornographer who has so egregiously harmed them. Additionally, in seeking civil redress, the role that revenge porn victims play in the civil law’s ‘formally equal forum’ may also give effect to corrective justice, providing victims with a sense of retribution, appeasement or therapeutic justice.\textsuperscript{100}

The provision of an offence created under s 33 of the CJCA, which has a statutory tort running alongside it, can also be justified on the ground of civil recourse theory. When individuals decide to flout society’s civility rules and cause harm to another person, civil recourse theory posits that the law should respond by empowering that person to bring an action against their wrongdoer to seek the best-fit remedy that the law can offer them. Creating dual provisions under the s 33 offence would provide revenge porn victims with means by which they can hold their perpetrators to account in the criminal law, as well as a means of obtaining compensation or an injunction - the latter providing victims with a welcome mechanism with which to prohibit actual or threatened disclosures and order the removal of images from hosting websites - then this would offer victims the best-fit remedy the law can offer. The provision of dual civil and criminal sanctions is justifiable, therefore, on the ground of civil recourse theory, as not only is the harm to victims’ interests serious enough to warrant redress in tort law, as a state-sponsored means by which they can seek civil recourse, but it is also serious enough to

warrant the machinery of the criminal law, to signal the moral condemnation for it, thus providing revenge porn victims with a means by which they are straightforwardly able to seek maximum legal redress possible, consistent with other weighty interests, concerns and rights.

7.4 Conclusion

This chapter has made proposals for reform to two existing criminal offences currently used to prosecute revenge porn, as provided by sections 2 and 4 of the PHA and s 33 of the CJCA. The reforms address the gaps in provisions identified by the normative analysis in Chapter 6. The reforms proposed to the PHA include narrowing the gap between sections 2 and sections 4, which would justify increasing the sentencing powers on a section 2 conviction, so that offenders receive a harsher sentence for their crimes. The chapter also suggests that the PHA should be amended to make it clear that harassment can involve instances where a single online act by offenders can have a continuing and protracted effect on victims, and that this can amount to a course of conduct.

Reforms to the offence created by s 33 of the CJCA include first, labelling the misconduct as a sexual offence, thus granting victims automatic anonymity. Second, the chapter proposes that that the mens rea requirement under s 33 1(b) of the offence should be lowered from ‘intention to cause distress’ to ‘recklessness as to causing harm or distress’ in order to broaden the scope of the offence. Third, it is proposed that s 33 should criminalise all non-consensual creation and distribution of private sexual images, thus providing for all manifestations of the abuse and creating more certainty in the law. Last, the chapter outlines proposals for a statutory civil remedy to run alongside the offence, enabling victims to straightforwardly access both criminal and civil justice. It is submitted that making the reforms to each offence, as proposed, would enable both offences to respond to revenge porn misconduct more effectively than current provisions allow.

The thesis has previously identified that revenge porn conduct theoretically warrants the attention of both the criminal and civil law. It has also identified the limitations of responding to revenge porn in either regime, in isolation, and to that end advocates the provision of both
criminal and civil remedies in both of the offences under discussion. This supports the thesis findings that a hybrid solution might offer the best solution to the problem of revenge porn. Revenge porn is an offence which undoubtedly deserves the attention of criminal sanctions, and there is a clear need for the blaming voice of the criminal law to signal moral condemnation for the conduct. However, this does not preclude the use of tort law for victims seeking legal redress for revenge porn, as there are many benefits to seeking civil justice. The thesis argues, then, that adopting a hybrid approach offers a good solution as it enables victims to access the benefits of redress in both regimes. As this chapter has identified, the adoption of a hybrid approach has not only been effective in other jurisdictions, but it also has strong academic support and can be justified theoretically. However, the inclusion of a statutory tort in these offences, McGlynn and Rackley warn, cannot be a ‘panacea’ for all the difficulties faced by revenge porn victims, in particular because it is likely to be of limited cross-jurisdictional effect. Nor can it replace or distract from arguments for an effective criminal law remedy.  

What it can do, however, they assert, is to provide victims with ‘an alternative, cost-effective, flexible and, most importantly, accessible avenue of redress.’

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101 Ibid.
102 Ibid.
Chapter 8: Conclusions and Recommendations

‘As long as the world shall last, there will be wrongs, and if no man objected and no man rebelled, those wrongs would last forever.’

Clarence Darrow (1857-1938)\(^1\)

Revenge porn is a pervasive social problem which is constantly evolving to adapt to new technologies; consequently, it has an almost infinite number of potential incarnations. It causes a myriad of harms both to individuals, and to wider society. Individual harms include damage to health, careers, reputation, dignity and self-respect, and a difficulty in maintaining and securing future romantic relationships. Revenge porn harms wider society by contravening socially accepted norms of conduct, by placing what should be private into public view. It is a gendered form of abuse, typically targeting women, who can suffer long-term psychological effects following this intentional sexual violation. Understanding the scale and manifestations of the problem and the extent of the harms it causes, both to individuals and to wider society, are crucial in understanding how the law should respond to the problem, so that victims are provided with the best solutions possible.

The central argument running through the thesis is that, in England and Wales, neither the civil law regime or the criminal law regime in isolation is capable of vindicating all the interests of victims. Nor do relevant, existing laws in either regime provide victims with a holistic solution; rather, they offer a piecemeal, ad hoc approach to the problem of revenge porn, as to date, it has been treated in relatively diffuse ways, in this jurisdiction. To this end, the thesis has evaluated the effectiveness of existing legal responses to revenge porn in England and Wales, providing theoretical foundations to justify addressing the conduct in the civil and criminal law

regimes and identifying significant gaps in provision. It has offered novel recommendations for reform, underpinning these with robust theoretical arguments.

8.1 Summary of Thesis, Conclusions and Recommendations

The primary research question sought to establish whether existing laws in the civil and criminal law regimes, in England and Wales, provide effective solutions for victims of revenge porn. This study set out to answer the primary research question by answering six different sub questions, each of which was considered in a separate chapter.

8.1.1 What are the Theoretical Foundations for Addressing Revenge Porn in the Civil Law Regime?

Chapter 2 considered justifications for responding to revenge porn on the grounds of two contemporary tort theories: economic analysis (optimal deterrence) theory and corrective justice theory. It sought to determine whether, theoretically, revenge porn can be sufficiently addressed solely in the civil law regime, or whether it also warrants the attention of the criminal law.

The analysis revealed that there is some theoretical justification for addressing revenge porn in tort law on the basis of economic analysis theory, if the threat of tort liability can deter some prospective revenge pornographers from acting. However, deterrence justification can only be partially effective, because of economic analysis’s reliance on rational choice models, which assume that most individuals will be incentivised to behave efficiently and thus deterred from acting, which arguably fails to account for much of human behaviour. Additionally, unless it has an instrumentalist effect, economic analysis does not focus on the moral aspect of conduct or take into account the relationship between the injurer and the victim. The analysis found, then, that there might be a stronger theoretical justification for addressing revenge porn in tort law on the ground of corrective justice theory. This provides an incontrovertible link between the wrong and the remedy, imposing a duty on revenge pornographers to repair the wrongful losses caused by their actions. The justification for addressing revenge porn in tort law on the
ground of corrective justice theory can, again, only be partial, however, as traditional theories have difficulty accounting for the ambit of remedies available in tort law, particularly punitive damages. The analysis found that civil recourse theory - a distinct but related version of corrective justice theory - offers good justification for addressing revenge porn in tort law, as this posits that the law should respond by correcting wrongdoings, empowering victims to seek the best-fit remedy available to redress these wrongs, including seeking punitive damages.

However, the analysis found that the biggest challenge faced by any of the prominent contemporary theories of tort law is that civil justice is less concerned with the moral culpability of a person’s actions than with whether the conduct in question has complied with community standards. It also identified that revenge porn can cause intangible, subjective harms that can be difficult to quantify and that some of these harms may well be incommensurable. A civil law response to revenge porn ultimately has its limitations because the types of harm caused by revenge porn are not the types of harm that tort law traditionally recognises. Therefore, if the intrinsic badness of the conduct and its moral reprehensibility are also to be addressed, a criminal law response is needed, as criminal sanctions can signal the moral condemnation for the conduct, which civil sanctions cannot do as effectively. For this reason, tort law in isolation cannot sufficiently address the blameworthiness of revenge porn conduct, nor can it satisfy victims who need the moral wrongfulness of the conduct to be publicly acknowledged.

8.1.2 How Effective are Existing Civil Law Responses to Revenge Porn?

Chapter 3 explored two applicable common law causes of action that can be used to address revenge porn: the equitable remedy of breach of confidence and the tort of misuse of private information. It evaluated their effectiveness when applied specifically to revenge porn disclosures, by three paradigmatic categories of defendants. It also provided a normative analysis of the benefits and limitations of using the causes of action to respond to revenge porn, and identified areas in need of reform.
The analysis found that a benefit of using the equitable remedy of breach of confidence to respond to revenge porn disclosures is its fundamental purpose of protecting individuals’ interests in their confidential communications. It also identified some important limitations, however. First, although the action aims to redress certain rights and values, namely trust and confidence, it does not redress violations of many other important interests, such as violations of sexual privacy, bodily autonomy, dignity and self-esteem. Second, the discussion highlighted the inadequacy of the remedies available when using breach of confidence, as quantum of damages awarded for the mental distress caused by revenge porn dissemination can be quite modest. The analysis also identified that punitive damages are not available in equity for breaches of confidence, even in cases where the harm caused by disclosures is particularly severe.

Second, the analysis identified that using the tort of misuse of private information to respond to revenge porn has some benefits, because it focuses on the reasonable expectation of privacy a person can expect to have in respect of their private information. This is a useful cause of action for revenge porn victims, as the focus of the tort is on the quality of the information disclosed and how this might affect victims’ autonomy and dignity, rather than redressing the violations of trust and confidence which led to the disclosure. The analysis revealed some important limitations, however. First, non-pecuniary welfare losses, such as emotional distress, may not be recoverable, unless emotional distress is part of an overall award. This is a significant limitation, as recovering for emotional distress may, in many cases, be a motivating factor for victims in bringing an action in the civil courts. Second, the analysis highlighted a worrying gap in provision for victims of ‘upskirting,’ or ‘downblousing,’ due to the fact that in common law jurisdictions there is no general right to privacy, for adults, for this kind of physical intrusion, in public spaces.

8.1.3 How Should the Civil Law be Reformed to Respond More Effectively to Revenge Porn?

*Drawing on the limitations identified in Chapter 3, Chapter 4 explored how the civil law causes of action, the equitable remedy of breach of confidence and the tort of misuse of private information should be reformed, in England and Wales, to respond more effectively to revenge porn disclosures. The chapter adopted a comparative approach, examining how revenge porn*
is dealt with in the common law jurisdictions of Australia, New Zealand and Canada, using successful strategies adopted by these jurisdictions to inform potential reform in England and Wales.

First, Chapter 4 identified that quantum of damages awards, in equity, for breaches of confidences that result in severe mental distress are generally quite modest, in England and Wales, and recommended that quantum should be increased. The chapter identified that equitable compensation for mental distress is traditionally largely constrained, in equity, in common law jurisdictions, but noted that Australia has extended its common law to award equitable compensation for the embarrassment, anxiety and distress arising from revenge porn disclosures. The chapter recommended that a similar approach should be adopted in this jurisdiction, when a suitable case arises. Second, the analysis proposed that the tort of misuse of private information should be extended by broadening the categories under which exemplary damages can be made available. This approach would follow the example of Canada, which has found that punitive damages can be awarded for breaches of privacy, where revenge porn dissemination has caused particularly serious harm. It also recommended that misuse of private information in this jurisdiction should be reformed by extending the tort to protect against unwanted physical privacy interferences in public spaces. The extended tort would protect against unwanted physical privacy invasions such as ‘upskirting’ and ‘downblousing.’ The idea for this reform is taken from Canada and New Zealand, two jurisdictions that have recently extended their common law to create tortious liability for the unwanted intrusion into a person’s private space.

Chapter 4 also identified the urgent need for the common law to evolve by extending both the equitable remedy of breach of confidence and the tort of misuse of private information to accommodate for advancements in technology and private communications. This is because developments in this area, such as the increased portability and functionality of Internet-connected devices, have engendered a new type of harm, creating a social problem on an unprecedented scale.

8.1.4 What are the Theoretical Justifications for Addressing Revenge Porn in the Criminal Law Regime?
Chapter 5 considered justifications for responding to revenge porn on the grounds of two criminal law theories: deterrence theory and retributive justice theory. The chapter sought to determine whether, theoretically, revenge porn can be sufficiently addressed in the criminal law regime, or whether victims should also be able to access a tailored civil remedy. It concluded by reflecting that a tailored hybrid civil/criminal approach might offer victims a more robust solution than is currently available in either regime.

The analysis in Chapter 5 found that there is at least partial justification for addressing revenge porn on the ground of deterrence theory, due to its instrumental consequences of deterring at least some potential offenders. However, it also concluded that deterrence theory lacks moral condemnation, when considering the quality of revenge porn conduct. Chapter 5 found that there might be better justification, then, for addressing revenge porn in the criminal law on the ground of retribution theory, due to its traditional links with immoral behaviour and its non-consequentialist concerns with the moral content of revenge porn. It is an attractive theory for justifying the intervention of the criminal law when responding to revenge porn, because of its focus on the morality of a given conduct, this conduct’s potential for causing broader social harm, and the degree to which criminalisation can be justified for transgressing social norms of conduct.

Chapter 5 found that, theoretically, revenge porn is an offence that justifies the intervention of the criminal law, as there is a clear need for state intervention and criminal sanctions to signal the moral condemnation for the conduct that civil penalties do effectively not. It also requires the greater deterrent effect and retributive response that criminal sanctions can bring. The chapter found, however, that this theoretical justification does not preclude the need for victims to turn to the civil law to seek redress. Bringing a tort claim can be a useful mechanism for victims of revenge porn to claim damages or injunctive relief. Where actions are successful, the remedies victims are awarded may enable them to move on with their lives. Pursuing a civil claim for revenge porn, therefore, can empower victims by putting them back in control of the situation and their lives. The prospect of a criminal trial and the publicity this can bring might, reasonably, put many victims off pursuing a criminal prosecution in the first place, whereas the anonymity assured in civil proceedings, conversely, might encourage those who
do not wish to pursue criminal proceedings to seek justice. The chapter recommended, that, as well as being able to utilise the criminal law, victims should also be able to access a tailored civil remedy, suggesting that an alternative solution for victims of revenge porn should lie in a tailored hybrid criminal/civil response to the problem.

8.1.5 How Effective Are Existing Criminal Law Responses to Revenge Porn?

Chapter 6 explored two existing criminal law offences used to address revenge porn disclosures: the Protection from Harassment Act 1997 (sections 2 and 4) and the Criminal Justice and Courts Act 2015 (s 33). It evaluated their effectiveness when applied specifically to revenge porn disclosures, by three paradigmatic categories of defendants. It also presented a normative analysis of the benefits and limitations of using the offences to respond to revenge porn, identifying areas in need of reform.

First, Chapter 6 found that using the PHA to respond to revenge porn has many benefits, as it can potentially catch revenge porn dissemination by individuals in all paradigmatic categories of revenge porn defendants, due to its particularly wide ambit. It has the potential to cover a wide range of image-based abuse, as it can also provide effectively for the harm caused to victims by the disclosure of digitally manipulated images, including ‘deepfake’ pornography, and ‘upskirt’ and ‘downblouse’ photography. It also provides a tailored civil law remedy that victims can use to seek damages and injunctive relief, thus offering victims the benefit of straightforwardly being able to access justice in both the civil and criminal law regimes.

The normative analysis identified a couple of drawbacks for prosecutors using the PHA to respond to revenge porn, however. First, the PHA’s low threshold for criminal liability can act as a limitation for victims, who may opt to secure a conviction using the lower threshold of the section 2 offences, rather than pursue a prosecution under the more serious section 4 offences, even if these might be more appropriate. A further limitation identified is that the requirement by the PHA for a course of conduct potentially narrows the scope of the Act for revenge porn victims in the case of a single online disclosure.
Second, Chapter 6 identified that using the specific offence created under s 33 of the CJCA to respond to revenge porn has some benefits, where the offence is perpetrated with the malicious intent to cause victims distress. However, the chapter also found that the offence, as constructed, does not respond to all manifestations of revenge porn abuse. Most notably, it excludes from its ambit: (i) disclosures made without the intention of causing victims distress; (ii) the creation and dissemination of digitally manipulated images which may be indistinguishable from the real thing; (iii) the creation and dissemination of ‘upskirt’ and ‘downblouse’ images; and (iv) threats to disclose images. The chapter also found that the Act fails to define adequately the meaning of ‘consent.’

**8.1.6 How Should the Criminal Law be Reformed to Respond More Effectively to Revenge Porn?**

*Chapter 7 explored how the criminal law should be reformed, drawing on limitations identified by the normative analysis in Chapter 6. The chapter adopted a comparative approach, exploring how revenge porn has been dealt with in the criminal law other jurisdictions. It focused primarily on New Zealand and Scotland and employed identified successful strategies as models for potential reform in England and Wales.*

The reforms proposed to the PHA include narrowing the gap between sections 2 and section 4 and to justify increasing the sentencing powers on a section 2 conviction so that sentencing judges have the discretion to impose harsher sentences on offenders for their crimes. The chapter also suggested that the PHA should be amended to make it clear that harassment can involve instances where a single online act by offenders can have a continuing and protracted effect on victims, and that this can amount to a course of conduct. Such a reform has recently been adopted in New Zealand, where an amendment to harassment legislation now provides that the offence can be triggered where one specified act perpetrated online has a continuing effect over a protracted period.

The reforms proposed to the offence created by s 33 of the CJCA include, first, labelling the misconduct as a sexual offence, thus granting victims automatic anonymity. Second, the
chapter recommended that the ‘intention to cause’ distress requirement should be reduced to include ‘recklessness’, thus expanding its ambit and inculpating actors currently not caught by the offence. Third, the chapter recommended that the offence under s 33 should criminalise all non-consensual creation and distribution of private sexual images, including threats to disclose images, thus providing for all manifestations of the abuse and creating more certainty in the law. Finally, the chapter outlined the recommendation for a statutory civil remedy to run alongside the criminal offence created by s 33 of the CJCA. As Chapter 6 identified, a key weapon in staving off an actual or threatened revenge porn attack is the jurisdiction of the civil courts to grant an injunction or restrain conduct. Once awarded, an injunction can effectively restrain revenge pornographers in all paradigmatic categories of defendants from pursuing any threatened or further conduct. In offering a tailored civil remedy, as well as the means of pursuing a criminal prosecution, this solution would provide victims with the most effective means of straightforwardly accessing both criminal and civil justice.

8.2 Conclusion on Central Thesis

The central argument running through the thesis is that neither the civil law regime or the criminal law regime, in England and Wales, in isolation, is capable of vindicating all victims’ interests. Although revenge porn can be addressed in both regimes to some degree, the thesis concludes that neither regime is completely effective when considered in isolation. Revenge porn is an offence which undoubtedly deserves the attention of the criminal law. A significant benefit of addressing aberrant conduct in the criminal law is that this signals its moral reprehensibility, and the criminal law attracts greater deterrent and retributive responses than civil sanctions can bring. A criminal prosecution can also offer victims public recognition of their victimisation, which is important when responding to offences where victims have been sexually violated. However, pursuing a criminal route can often leave revenge porn victims feeling re-victimised, as the publication of their names can compound the already painful invasion of privacy that has been suffered by the disclosure of their images. As there is no mechanism for the effective removal of images available in the criminal law, this means that when victims’ names are published, their images can be searched for, effectively doubling their humiliation.
The civil law, conversely, gives victims the opportunity to have trial proceedings conducted anonymously, thus empowering them to bring their abusers to court and providing them with a means of upholding their dignity and equal rights. The civil law also offers victims a useful mechanism with which to prevent or limit an actual or apprehended revenge porn attack. As the study identifies on several occasions, a key tool in staving off an actual or potential revenge porn attack is the jurisdiction of the civil courts to grant injunctions to restrain conduct and order the removal of images from hosting websites. Also, where civil actions are successful, the remedies awarded - whether injunctive relief or damages - may enable victims to move on with their lives. However, the thesis has also identified that there are problems and limitations with a tort law response to revenge porn, because there will always be important harms which go unredressed, rights which go unvindicated and victims who go uncompensated. This is because tort law cannot sufficiently address the intrinsic badness and reprehensibility of revenge porn conduct and cannot satisfy, therefore, victims who need the moral wrongfulness of the conduct to be publicly acknowledged.

The existing combination of both regimes is not adequate, as reforms are needed to both criminal and civil law responses. This thesis has sought to identify and defend necessary changes to both the civil and criminal law responses to revenge porn. Having identified the limitations of responding to revenge porn in either regime, in isolation, and made suggestions for reform, the thesis has recommended that providing tailored hybrid civil/criminal legislation would ultimately offer the best solution. Adopting this approach would synthesize the current piecemeal, ad hoc system, currently used to address the problem of revenge porn, in England and Wales, by creating one simple, straightforward solution that would enable victims and prosecutors to efficiently access the benefits of both regimes. The availability of a criminal law, which incorporates the recommendations that the thesis has proposed, with a tailored statutory tort running alongside it, would, therefore, offer the most effective legal solution, as it would comprehensively provide victims of revenge porn with the most accessible and robust means of obtaining legal redress.
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