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# *Image-Based Sexual Abuse*

Clare McGlynn\* and Erika Rackley\*\*

**Abstract-** Advances in technology have transformed and expanded the ways in which sexual violence can be perpetrated. One new manifestation of such violence is the non-consensual creation and/or distribution of private sexual images: what we conceptualise as 'image-based sexual abuse'. This article delineates the scope of this new concept and identifies the individual and collective harms it engenders. We argue that the individual harms of physical and mental illness, together with the loss of dignity, privacy and sexual autonomy, combine to constitute a form of cultural harm, impacting directly on individuals, as well as on society as a whole. While recognizing the limits of law, we conclude by considering the options for redress and the role of law, seeking to justify the deployment of the expressive and coercive powers of the criminal and civil law as a means of encouraging cultural change.

**Keywords-** image-based sexual abuse, revenge porn, non-consensual pornography, cultural harm, cyber harassment, online abuse

## *1. Introduction*

Advances in technology have transformed and expanded the ways in which sexual violence can be perpetrated. One of these new manifestations of violence and abuse is the non-consensual creation and/or distribution of private sexual images: a phenomenon we have conceptualized as image-based sexual abuse.<sup>1</sup> While the misuse of such images is not itself a new phenomenon, the ubiquity of the smart phone and internet access has led to the easy perpetration of this form of sexual abuse. News reports of vengeful ex-partners distributing private sexual images without consent and media debates about the latest hacking and distribution of a celebrity's intimate

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\*\* Professor of Law, University of Birmingham. We would like to thank Julia Downes and Jason Haynes for their research assistance in preparing this article, Fiona de Londras for her valuable insights on an earlier draft and the anonymous referees for their comments and suggestions. In developing this work, we have benefited hugely from the experiences shared with us by survivors of image-based sexual abuse, and those working to support victim-survivors, particularly at a workshop in April 2015 that we co-organized with McAllister Olivarius, at the conference 'More than Revenge: addressing the harms of revenge porn' at Monash University in February 2016 and at a discussion forum organized by Tyneside and Northumberland Rape Crisis Centre in November 2015.

<sup>1</sup> As a term, this was first used in a news report: see Cossima Mariner, 'Revenge porn: government urged to make it illegal' *Sydney Herald* 4 October 2015. We subsequently adopted the language and developed it as a concept, defining its scope and justifying its use, deploying it first in our publicly available evidence to the Scottish Parliament Justice Committee in November 2015, 'Submission on the Abusive Behaviour and Sexual Harm (Scotland) Bill 2015' (ABSH 3), available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/93304.aspx> and in a related blog: 'New law on "revenge pornography"' is "unlikely" to tackle hackers distributing intimate images', 18 November 2015, *Holyrood.com* <https://www.holyrood.com/articles/comment/new-law-revenge-porn-unlikely-tackle-hackers-distributing-intimate-images>. Our concept was further developed in a lecture given by Clare McGlynn, 'More than just revenge porn: challenging image-based sexual abuse' (Monash University, February 2016) and in the blog: Clare McGlynn and Erika Rackley, 'Not 'revenge porn' but abuse: let's call it image-based sexual abuse' (9 March 2016)

<http://everydayvictim-survivor-survivorblaming.com/news/not-revenge-porn-but-abuse-lets-call-it-image-based-sexual-abuse-by-%E2%80%8Fmcglynnclare-erikarackley/>.

images are commonplace. As a result, we are also witnessing a growth in social movements demanding changes to the law to challenge and combat this form of sexual abuse. Many of these campaigns have been partially successful and have resulted in a myriad of legal reforms. However, while many of these new legislative initiatives are broadly welcome, more often than not they represent *ad hoc*, piecemeal or misplaced interventions that largely fail to understand the nature of the problem and, as such, are unable to tackle its root causes. This particularly includes measures tackling only some forms of image-based sexual abuse, or those deploying terminology and thresholds that seriously limit prosecutorial possibilities. It is vital therefore that we understand this phenomenon better in order to develop specially tailored forms of legal redress.

In this article, we establish our concept of 'image-based sexual abuse', delineating its scope and harms, and articulating the role of law in responding to it. We justify the use of our term image-based sexual abuse, preferring it to others such as 'revenge pornography', 'non-consensual pornography' or 'involuntary porn', as more accurately reflecting the nature, reach and harms of this phenomenon. We then define the concept, situating it among the multitude of forms of sexual violence and as a form of gendered abuse, before going on to examine its varied harms – individual physical and mental illness, loss of dignity, privacy, and sexual autonomy – which combine to constitute a form of cultural harm, impacting not only directly on individuals, but also on society as a whole. While recognizing the limits of law, we conclude by considering the options for redress and the role of law, justifying the deployment of the expressive and coercive powers of the criminal and civil law as a means of encouraging cultural change.

## ***2. Image-Based Sexual Abuse: Delineating the Concept***

Terminology frames debates and options for legal redress, as well as playing a vital expressive role. In this area, the label 'revenge porn' is routinely used as a catch-all phrase to include a wide variety of non-consensual image-based harms. However, while this term resonates with the public,<sup>2</sup> its use is problematic.<sup>3</sup> Not only does it refer to a relatively small, albeit pernicious, subset of private sexual images, it concentrates on the motives of perpetrators, rather on the harms to victim-survivors.<sup>4</sup> At the same time, it skews the focus of legislative debates, with the language of 'pornography' leading some legislatures, including (at least initially) England & Wales, to consider that regulation is dependent on an image being 'pornographic', or that the perpetrator must be acting for the purposes of sexual gratification.<sup>5</sup> Further, the term 'porn' tends to instill a sense of choice and legitimacy that is inappropriate when debating the creation and/or distribution of sexual images without consent. This is not to suggest that all pornography is abusive, though

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<sup>2</sup> Hence why it continues to be used by those who are critical of it, including by ourselves 'New law on "revenge pornography" is "unlikely" to tackle hackers distributing intimate images', 18 November 2015, *Holyrood.com* <https://www.holyrood.com/articles/comment/new-law-revenge-porn-unlikely-tackle-hackers-distributing-intimate-images> and 'The new law against "revenge pornography" is welcome, but no guarantee of success' *The Conversation* 16 February 2015 <http://theconversation.com/the-new-law-against-revenge-porn-is-welcome-but-no-guarantee-of-success-37598>.

<sup>3</sup> As also recognized by the Scottish Parliament Justice Committee which accepted evidence of the problems with the term 'revenge porn' and recommended using 'non-consensual sharing of intimate images': Scottish Parliament Justice Committee 2nd Report, 2016 (Session 4): Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill, [50]-[52].

<sup>4</sup> As noted in the recent Australian Senate 'revenge porn' inquiry, (Legal and Constitutional Affairs Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (Commonwealth of Australia, 2016), [5.4].

<sup>5</sup> See, eg, Lord Marks and Baronesses Grender, Brinton and Barker, 'Amendment to Criminal Justice and Courts Bill 2015 after Clause 28' (3 July 2015).

some would make this argument.<sup>6</sup> But it is to suggest that this term is salaciously used in the media and, as currently understood, fails to focus on the harms of these practices.<sup>7</sup>

Nevertheless, 'revenge porn' has joined a host of other equally media-friendly monikers used to describe either a specific type of non-consensual image-based harm (including 'peeping tom' and 'upskirt') or a related event (such as 'celebgate' or 'the fapping'). These terms minimize the harm associated with these activities and provide little overarching sense that these different actions are connected as a phenomenon. This piecemeal approach masks and distracts from the driver common to these forms of non-consensual creation and/or distribution of private sexual images: sexual harassment and abuse. It also weakens our response, by encouraging the adoption and deployment of *ad hoc* legal responses.

Our concept of 'image-based sexual abuse', which we define as the 'non-consensual creation and/or distribution of private sexual images', avoids these pitfalls.<sup>8</sup> The use of the phrase 'sexual abuse' immediately and accurately conveys the significant harms that may occur and reflects the experiences of victim-survivors.<sup>9</sup> It also identifies image-based sexual abuse as a form of sexual violence, locating it within sexual offence law and policies.<sup>10</sup> By situating image-based sexual abuse on what Liz Kelly has identified as the continuum of sexual violence, we seek to generate legal and policy responses which make connections between such abuse and other forms of sexual violence, as well as with gendered societal practices more generally, such as victim-blaming.<sup>11</sup> Finally, understanding image-based sexual abuse as part of the broader phenomenon of sexual violence also has ramifications for the support victim-survivors receive; and enables the development of a coherent approach, as part of an overall violence against women strategy. In this way, developing this concept enables us to see connections between seemingly discrete forms of abuse that, in turn, should engender a more comprehensive and effective legal and policy response. This does not mean that all forms of image-based sexual abuse will necessarily attract criminal sanctions; it does mean, however, that all forms of abuse are examined together with the aim of developing a holistic legal and policy response.<sup>12</sup> Our concept of image-based sexual abuse encompasses a range of ways in which private sexual images are created and/or distributed

<sup>6</sup> Catharine MacKinnon, 'Not a moral issue' (1984) 2 *Yale Law and Policy Review* 321; Meagan Tyler, 'All porn is revenge porn', *FeministCurrent*, 26 February 2016, available here: <http://www.feministcurrent.com/2016/02/24/all-porn-is-revenge-porn/>

<sup>7</sup> Similar concerns arise regarding the inclusion of the word 'pornography' in other terms such as 'non-consensual pornography', used by Danielle Keats Citron and Mary Ann Franks ('Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345) and 'involuntary porn' adopted by Cynthia Barmore ('Criminalization in Context: Involuntariness, Obscenity and the First Amendment' (2015) 67 *Stanford Law Review* 447-478). Nonetheless, we recognize that different political and legal contexts may justify the use of alternative terminology.

<sup>8</sup> For a further explanation of why we developed this concept and use this specific term, see Clare McGlynn and Erika Rackley, 'Not porn, but abuse: let's call it image-based sexual abuse' *Everyday Victim Blaming*, 9 March 2016: <http://everydayvictimblaming.com/news/not-revenge-porn-but-abuse-lets-call-it-image-based-sexual-abuse-by-%E2%80%8Fmcglynnclare-erikarackley/>.

<sup>9</sup> For example, Hunger Games actor Jennifer Lawrence whose private sexual photos were hacked and distributed worldwide has described what happened to her as a 'sex crime': *Vanity Fair*, 'Jennifer Lawrence calls 'photo hacking' a sex crime', 7 October 2014, available at: <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>

<sup>10</sup> A closely related term is 'image-based sexual exploitation' discussed in Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) *Social & Legal Studies* 397-418 which draws on the terminology of child exploitation material. Our concept uses the language of 'abuse' as we consider this better conveys the nature of the harms and reflects the experiences of victim-survivors.

<sup>11</sup> Liz Kelly, *Surviving Sexual Violence* (Polity Press 1987).

<sup>12</sup> The development of the concept also supports the need that has been identified for 'clarity' in conceptualizing the relationships between sexual violence and emerging technologies. N Bluett-Boyd, B Fileborn, A Quadara, and S Moore (2013) *The role of emerging technologies in experiences of sexual violence* (Australian Institute of Family Studies, Research Report No 23) at xi.

without the consent of the individual depicted, some of which we outline below to illustrate the scope of the concept and prevalence of the activities, before going on to examine the harms of these practices.

### A. Non-Consensual Distribution of Private Sexual Images

As noted above, perhaps the most familiar form of image-based sexual abuse is the practice of so-called 'revenge porn'. Typically this involves an ex-partner (usually a man) distributing private sexual pictures of their former partner (usually a woman) online in order to exact 'revenge' following the break-up of their relationship.<sup>13</sup> The images quickly go viral, including on dedicated revenge and regular pornography websites.<sup>14</sup> In such cases, while the motive is usually malicious, images may also be circulated for financial gain, for 'a laugh', to gain notoriety amongst a friendship group, or to control, harass or blackmail.<sup>15</sup> Though the practice of 'revenge porn' predates the internet, the relative ease by which visual media and personal information can now be shared online has amplified the problem.<sup>16</sup> The term 'revenge porn' is also commonly used to include the distribution of images obtained by hacking and theft, such as the release in 2014 of nude images of women celebrities, hacked or stolen from iCloud accounts.<sup>17</sup>

Our concept of image-based sexual abuse extends beyond these familiar forms of non-consensually distributed private sexual images and their initial 'publication', to include all subsequent 'distributions' whether in hard form or electronically, including via peer-to-peer networks, and whether or not the person to whom it is distributed has already seen it. Distribution covers, therefore, the 'primary' distributor (e.g. the ex-boyfriend or hacker), as well as 'secondary' distributors who later forward the image (though this does not necessarily mean that every distribution attracts criminal sanction, as discussed further below).<sup>18</sup> The inclusion of secondary distributors is important, conceptually, because it is their actions that enable the image to 'go viral' and, particularly when accompanied by threatening and abusing text, their actions escalate the harms suffered. Similarly, those who host non-consensually created and/or distributed private sexual images, such as website operators and social media applications, facilitate the harassment

<sup>13</sup> Evidence suggests that women are far more likely to be victim-survivors of 'revenge porn' than men: Josh Halliday, 'Revenge porn: 175 cases reported to police in six months' *The Guardian* 11 October 2015. Similarly, figures from the UK's Revenge Porn Helpline show that 75% of 1800 calls over six months were from women: Government Equalities Office Press Release, 'Hundreds of victim-survivors of revenge porn seek support from helpline', 20 August 2015. Snapshot data of a 'revenge porn' website over a 28 day period found that just 18 (5%) of the 356 new posts featured men: Abby Whitmarsh, 'Analysis of 28 Days of Data Scraped From a 'revenge pornography' Website' *everlastingstudent.wordpress.com* 13 April 2015. While victim-survivors are predominantly women, policy and legal responses must respond to all victim-survivors.

<sup>14</sup> Before being shut down in 2012, one dedicated revenge porn website was said to receive over 300,000 unique visitors a day: Dave Lee, 'IsAnyoneUp's Hunter Moore: "The net's most hated man"' *BBC News Online* 20 April 2012. Though figures vary, and date quickly, as of November 2015 there were said to be around 3000 dedicated 'revenge porn' websites and more than 30 sites operating in the UK: Louise Ridley, 'Revenge Porn Is Finally Illegal: Who Are The Victims And Perpetrators Of This Growing Phenomenon?' *Huffington Post* 12 February 2015.

<sup>15</sup> Citron and Franks (n 7).

<sup>16</sup> Figures from the US-based Cyber Civil Rights Initiative suggest that one in ten ex-partners have threatened to post intimate photos of their former partners online, with around 60 per cent going through with it: Cyber Civil Rights Initiative, End Revenge Porn Infographic 3 January 2014. Similarly, a 2015 Australian study found that 1 in 10 participants reported that someone had distributed an intimate image without their consent: Anastasia Powell and Nicola Henry, 'Digital Harassment and Abuse of Adult Australians' (RMIT University, 2015).

<sup>17</sup> Paul Farrell, 'Nude photos of Jennifer Lawrence and others posted online by alleged hacker' *The Guardian* 1 September 2014.

<sup>18</sup> Though note that the Irish Law Commission has recommended a strict liability offence covering secondary distribution of non-consensually taken and/or distributed intimate images: Law Reform, *Harmful Communications and Digital Safety* (Law Commission, 2016), paras 2.193-2.195.



and abuse (though again with varying degrees of culpability and legal responsibility).<sup>19</sup> While there is inevitable and reasonable disagreement as to the level of culpability of primary, secondary and 'hosting' distributors, all fall within the category of distributors of private sexual images and play a key role in perpetrating and facilitating image-based sexual abuse. This is because without secondary or hosting distributors, the harms of image-based sexual abuse would not be so significant.

## B. Non-Consensual Creation and Distribution of Private Sexual Images

In the examples so far, the harm of image-based sexual abuse arises from the non-consensual *distribution* of private sexual images and this is the focus for the plethora of 'revenge porn' laws recently adopted across many jurisdictions. Crucially, our concept of image-based sexual abuse also encapsulates the harms perpetrated when private sexual images are *created* without consent of the individuals depicted as well as, where relevant, from their subsequent non-consensual distribution.<sup>20</sup> Voyeurism is one such example. Technological advances have offered new means of both perpetrating the crime, which generally entails the surreptitious viewing of private activities for the purposes of sexual gratification where the viewer knows the individual does not consent,<sup>21</sup> and sharing its product.<sup>22</sup> However, the requirements of a sexual motive and the victim-survivor being in 'private' limit the scope of legal redress and demonstrates how an *ad hoc* approach to image-based sexual abuse leaves many victim-survivors unprotected. These limitations are exemplified by the lack of legal redress for many instances of 'upskirting' (involving the non-consensual taking of images or videos of an individual's pubic area underneath their outer clothing).<sup>23</sup> While a perpetrator may or may not take or record images for their own sexual gratification,<sup>24</sup> typically the images also end up on websites dedicated to the sharing of non-consensually taken photos.<sup>25</sup>

<sup>19</sup> Many of the larger companies have (rightly) begun to self-regulate: see Andrew Griffin, 'Facebook updates banned content guidelines, including what nudity can be shared' *The Independent* 16 March 2015. Proposed federal law in Australia (Criminal Code Amendment (Private Sexual Material) Bill 2015) makes website operators liable for up to 5 years if they possess, control, produce, supply or obtains for commercial purposes or some kind of benefit 'private sexual material for use though a carriage service' (Henry and Powell (n 10).

<sup>20</sup> We take creation to mean the making of any image, defined as a photograph, film or filming (including live-streaming), whether in hard copy or on any medium from which a still or moving image may be produced, by any means, including digital manipulation. It is important to note that the boundaries between consensually and non-consensually created sexual images are porous, with one report finding that for young people, 'sexting' is 'often coercive, linked to harassment, bullying and even violence' and that girls were more likely to be adversely affected: Jessica Ringrose, Rosalind Gill, Sonia Livingstone and Laura Harvey, *A qualitative study of children, young people and 'sexting'* (NSPCC, 2012) 7.

<sup>21</sup> For example, Sexual Offences Act 2003 s 67.

<sup>22</sup> There has been a 23% rise in reported acts of voyeurism in England & Wales with nearly 8,000 reported offences in 2014- 2015 (Office for National Statistics, Crime in England and Wales, Year Ending March 2015).

<sup>23</sup> See further Clare McGlynn and Julia Downes, 'Why we need a new law to combat upskirting and downblousing' *Inherently Human* 15 April 2015: <https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-and-downblousing/> There is also the Scottish variant of 'upkilting', see Clare McGlynn and Erika Rackley, 'New law on "revenge pornography" is "unlikely" to tackle hackers distributing intimate images' *Holyrood.com*, 18 November 2015.

<sup>24</sup> Such images are, however, unlikely to fall within the remit of the offence of voyeurism most obviously because the person will not usually be 'doing a private act' (see further Alisdair Gillespie, "'Upskirts' and 'downblouses': voyeurism and the law' (2008) *Criminal Law Review* 370, 376).

<sup>25</sup> Such sites are big business with one reportedly receiving 70,000 views a day and being valued at £130 million: Rebecca Perring, 'British women targeted by perverts taking 'up-skirt shots' to put on £130m porn site' *Daily Express* 18 May 2015. A Google search for 'upskirt shot websites' generates 795,000 results [accessed 1 February 2016].

One of the most disturbing examples of non-consensually created private sexual images involves the recording of rapes or other forms of sexual assault. In a notorious US case from 2013, two high school footballers were found guilty of raping an incapacitated young woman after pictures and films of the crime were distributed online and across social media by the attackers. In this case, the images were used to further harass and humiliate the victim-survivor, blaming her for the assaults and including death threats against her.<sup>26</sup> In a similar vein, there is an increasingly common practice of sexual extortion (often labelled 'sextortion'), whereby sexual images are shared coercively, often through webcams, with threats and blackmail used to solicit further images and/or sexual practices.<sup>27</sup> Such coercion and threats to distribute images are also used as a means of control in abusive relationships.<sup>28</sup>

Finally, a further category of non-consensually created and/or distributed private sexual images are those in which images have been altered or 'photoshopped' so that it appears that the individual has engaged in certain sexual activity: what we have called 'sexualised photoshopping'.<sup>29</sup> Advances in technology mean that it is often impossible to tell that such images have been manipulated. This activity falls within our category of image-based sexual abuse as the victim-survivor is likely to suffer many of the harms detailed below regardless of it resulting from a doctored image.<sup>30</sup>

### C. Defining 'Private Sexual Images'

We have discussed the above examples not to circumscribe the scope of image-based sexual abuse, but to aid understanding of the range of different phenomena within this concept. What connects each of the activities is that they all concern the non-consensual taking and/or distribution of images that are *private* and *sexual*. In the following sections, we define the terms 'private' and 'sexual' in order to delineate the scope of our concept of image-based sexual abuse. We prefer these terms to others, such as 'intimate' (which goes beyond sexual and is therefore potentially too broad) and 'sexually explicit' (which may unduly limit options for redress).<sup>31</sup>

#### (i) Sexual images

We suggest that the non-consensual creation and/or distribution of private sexual images involve a particular sort of wrong and a particular sort of harm to those depicted in those images. While judgments as to what is sexual differ, this wrong involves a form of abuse through the exploitation

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<sup>26</sup> BBC News Online, 'Steubenville Ohio school footballers guilty of rape' 17 March 2013; Megan Carpentier, 'How the Steubenville case exposes the cruelty faced by rape survivors' *The Guardian*, 8 January 2013. In another example, the images of the sexual assault of YouTuber Chrissy Chambers have been viewed over 'tens of thousands' of times and posted on 35 separate pornographic websites causing immeasurable harm and distress: Jenny Kleeman, 'US woman pursues ex-boyfriend in landmark UK revenge-porn action' *The Guardian* 3 June 2015.

<sup>27</sup> See the recent report by the Brookings Institute into 'sextortion', available at: <http://www.brookings.edu/research/reports2/2016/05/sextortion-wittes-poplin-jurecic-spera>. For a discussion, see Henry and Powell (n 10) and Nicola Henry and Anastasia Powell 'Beyond the 'sext': technology-facilitated sexual violence and harassment against adult women' (2015) 48(1) *Australian and New Zealand Journal of Criminology* 104-188.

<sup>28</sup> See, for example, Scottish Women's Aid campaign to 'Stop Revenge Porn', available at: <http://www.scottishwomensaid.org.uk/node/1940>.

<sup>29</sup> For a recent case of 'sexualised photoshopping', see Sandra Laville, 'Revenge Porn decision sparks anger at police' *The Guardian* 8 May 2016.

<sup>30</sup> Alexis Fung Chen Pen, 'Striking Back: a practical solution to criminalizing revenge porn' (2014-15) 37 *Thomas Jefferson Law Review* 405, at 407.

<sup>31</sup> For the use of intimate in this context see, eg, Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 3(1). In relation to the term 'sexually explicit' (Henry and Powell n 10), we are concerned this would exclude, for example, 'upskirt' images where the victim-survivor is wearing underwear.

of a victim-survivor's sexual identity, and harm to their sexual dignity and autonomy.<sup>32</sup> Accordingly, a sexual context is one which has the potential to be exploited in this way and for exacting this form of harm.<sup>33</sup>

Images, therefore, of sexual intercourse are sexual and it may seem straightforward to extend this to other sexual acts, though we know from the regulation of sexual offences that determining this question is not always as simple as it seems. Some jurisdictions have, therefore, gone to great lengths to specify what sorts of images will be deemed sexual, resulting in a detailed array of specified sexual activities.<sup>34</sup> Alternatively, other jurisdictions leave the definition of sexual to the 'reasonable person' such as in the recently enacted English 'revenge porn' law which, as well as focusing on specific body parts, defines an image as sexual if 'it shows something that a reasonable person would consider to be sexual because of its nature' or 'its content, taken as a whole, is such that a reasonable person would consider it to be sexual'.<sup>35</sup> For our purposes, a broad and flexible approach is preferable, enabling the law to be interpreted in the context of its purpose and taking into account the nature of the harms suffered.

## (ii) Private images

The potentially broad category of 'sexual' is qualified by our requirement that the image is also 'private'. The public/private distinction is helpful here as it serves to delineate between circumstances in which an individual voluntarily exposes their sexual self and those where the exposure (or its extent) is involuntary. The focus should be on the choices of the individual depicted both in terms of who sees the image and the circumstances in which the image is taken, rather than on whether the sexual act or particular body part is one that is 'ordinarily seen in public'.<sup>36</sup> Thus, a photograph of a naked person taken for a pornographic magazine is a sexual image, but not a private one. Conversely, a 'sext' (a naked selfie taken for one's partner and not intended to be seen by anyone else) is both a private and a sexual image.<sup>37</sup> In these examples, that the image is private is determined by the intentions and expectations of the person represented in that image. Indeed, we might take all sexual images to be presumptively private, unless and until the person represented in that image intends or agrees to their publication to an identified person or specific group.<sup>38</sup>

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<sup>32</sup> We acknowledge that the mis-use of non-sexual images can cause harm. Our focus, however, is with practices of sexual violence of which image-based sexual abuse is one type.

<sup>33</sup> Thus, images of a person's feet, even if used for sexual purposes, are not on this view a 'sexual image' for, at least for the vast majority of people, their feet are not an integral part of their sexual identity and such images have no potential to impact on their own sexual dignity.

<sup>34</sup> For example: Distribution of intimate images, misdemeanor, Utah Code 76-5b-203; Unlawful dissemination or sale of images of another person, Code of Virginia 18.2-386.2; Non-consensual dissemination of private sexual images, Illinois Criminal Code 11-23.5

<sup>35</sup> Criminal Justice and Courts Act 2015, s 33.

<sup>36</sup> Such as, eg Criminal Justice and Courts Act 2015, s 35(2).

<sup>37</sup> But no less private is the video of the woman secretly filmed having sex at home by her partner (or another) who has, therefore, given no consent to either the creation or distribution of the video.

<sup>38</sup> However, an image does not cease to be private simply because the object of that image consents to it being viewed by someone else. The naked selfie sent to one's partner is a private image. Nor does it cease to be private simply because it is sent (with the permission of the individual depicted) to two people, or to three, or four. For in such cases, the individual's agreement to those others to view the image is not willingness for that image to be viewed by all. For this reason, their sexual autonomy and dignity is compromised if it is then made accessible to those outside the closed class of people they have consented to view it. Eady J in *Mosley v NGM* [2008] EWHC 1777 was of same view (supported by authority of *ADT v UK* (2000) 31 EHRR 33).



More complicated, perhaps, are sexual images taken in public places. The simple fact that the image was taken in public does not mean that the image ceases to be private.<sup>39</sup> Rather, developing Helen Nisselbaum's concept of 'privacy in public',<sup>40</sup> we would suggest that sexual images taken in public are also private, unless the person depicted intends or agrees to their publication, or they have acted in some way to relinquish control over who can view the image. Thus, an 'upskirt' photograph taken on public transport, or an image of a sexual assault in a nightclub, are both private sexual images.<sup>41</sup> In contrast, an image of a streaker would not constitute a private sexual image, as there has been voluntary public exposure by the individual depicted.<sup>42</sup> In the same vein, an image of individuals engaged in a sex act in public, even in a secluded space, is unlikely to be a private sexual image, as they have resigned control by choosing to expose themselves in public. On this basis, we are suggesting that we might reasonably class some images as non-private even where there was no consent to the taking of that particular image, or indeed any image at all, because of the public nature of the context in which the image was created and the participation of the individual depicted in them.<sup>43</sup> In these cases, the person has voluntarily relinquished control of who sees their naked body or sexual act and they cannot say that their choice was only to expose themselves to a closed list of chosen viewers, for they had no idea who would see them.

Inevitably, however, whether a sexual image should be classed as private will, at times, be a matter of degree. Ambiguity and difficult cases are unavoidable. In terms of determining the boundaries of such a concept, it is vital to return to the reasons for adopting this approach. 'Private' and 'sexual' permit both a broad focus on the multiple forms of image-based sexual abuse, as well as limiting the concept to the particular harms ensuing from the perpetration of these activities.

#### D. Scope of Consent

Finally, just as 'private' qualifies 'sexual' in relation to the images in question, so too 'non-consensual' determines the scope of image-based sexual abuse. Thus, where a private sexual image is either consensually taken, and/or consensually taken and distributed, no harm arises. In fact, far from it: the consensual taking and sharing of sexual images is an important aspect of sexual expression.<sup>44</sup> But how is consent, and in turn the absence of consent, to be defined in cases of image-based sexual abuse?

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<sup>39</sup> Just as, conversely, an act is not 'private' simply because it is not done in public as noted by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63: 'There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private' at [42].

<sup>40</sup> Helen Nisselbaum, 'Protecting Privacy in an Information Age: The Problem of Privacy in Public' (1998) 17 *Law and Philosophy* 567.

<sup>41</sup> Similarly, an image of inadvertent nudity in public – such as a 'lucky' tabloid image of the moment a gust of wind catches a woman's skirt from behind to reveal her bare bottom – would on this measure, and for this purpose, be a private, sexual image: as was the experience of one victim-survivor, see: Anon, 'New laws needed to tackle "upskirting"' *Metro Radio*, 21 April 2015.

<sup>42</sup> While it might be possible to argue that the streaker at a sports match only wished those attending the event to view their nudity, and that this is a closed category and therefore 'private', where there is voluntary exposure to a potentially open class in public, we would argue that the image can no longer be deemed 'private'.

<sup>43</sup> This would mean, for example, that where photos of a group of young male rowers were taken and posted on gay websites would not be covered as these were images of activities taking place in public where there would be no expectation of privacy: Jessica Whyte, 'Criminalising "Camera friends": photography restrictions in the age of digital reproduction' (2009) 31 *Australian Feminist Law Journal* 99, 114-115. Such images would also unlikely to be 'sexual', though there was debate over the use of such images for sexual gratification.

<sup>44</sup> For a discussion, see Edgar Gómez Cruz and Eric T Meyer, 'Creation and Control in the Photographic Process: iPhones and the emerging fifth moment of photography' (2012) 5(2) *Photographies* 203. Moreover, developing technologies enable greater freedom to engage in relationships and explore sexuality outside of face-to-

While determining the existence of consent in the context of sexual offences is often evidentially fraught, there are a plethora of definitions of consent, including the English approach which requires agreement by choice, where there is 'freedom and capacity' to make that choice.<sup>45</sup> In relation to the taking and subsequent distribution of covert images, the absence of consent is straightforward. Nor is there consent in circumstances where the image is overtly taken, but the individual is unaware of it taking place, such as the filming of a sexual assault. Once again, there will be hard cases, such as a young woman being pressured into sending a nude selfie. What is clear, however, is that an individual's awareness of a picture being taken, or even taking it one's self, is not determinative of consent. Similarly, in situations where the original creation of the image is consensual but the subsequent distribution – or more accurately its extent – is not, an individual must be able to put limits on their consent, such as specific disclosure to only to a partner or small group of friends. Where the image is disclosed beyond the specified group, then the distribution of the image is non-consensual. Consent to one course of action is not consent to another.<sup>46</sup>

### 3. *The Harms of Image-Based Sexual Abuse*

We can see, therefore, that the concept of image-based sexual abuse encompasses a broad range of phenomena that have at their core the non-consensual creation and/or distribution of private sexual images. While some jurisdictions have adapted existing legal measures to address this problem, others have adopted specific *ad hoc* legislation to counter the phenomenon, typically in response to particular public outcries or campaigns. Thus, while well-meaning, typically such legislation only tackles isolated examples and fails to consider the nature and extent of the harms of image-based sexual abuse. The result is that the rush to legislate likely hinders the long-term effectiveness of new laws and policies. Therefore, before considering further legal and policy reform, it is vital to understand fully the individual and collective harms of image-based sexual abuse.

First and foremost, it is important to recognize that the harms suffered by victim-survivors are deeply gendered. Most obviously, victim-survivors of image-based sexual abuse are predominantly women.<sup>47</sup> However, the harms are also gendered by means of the sexualized and misogynistic form and manner in which they are manifested. Without doubt, societal gender disparities, particularly the persistence of sexual double standards, enable humiliation, stigma and shame to be visited on women, facilitating the production and prevalence of image-based sexual abuse. As Martha Nussbaum comments, the online objectification of women can be seen as some men's attempts to 'restor[e] the patriarchal world before the advent of sex equality, the world in which women were just tools of male purposes'.<sup>48</sup> In a similar vein Michael Salter et al, in their consideration of possible motivations for image-based sexual abuse, reflect that these might be

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face encounters (Al Cooper, Irene P McLoughlin and Kevin M Campbell, 'Sexuality in Cyberspace' (2000) 3(4) *CyberPsychology and Behavior* 521, 522, discussed in Anastasia Powell, 'Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault' (2010) 43(1) *Australian and New Zealand Journal of Criminology* 76, 78).

<sup>45</sup> Sexual Offences Act 2003, s 74.

<sup>46</sup> See also Alisdair Gillespie who argues that the presentation of consent to disclosure as a binary choice is 'too simplistic' ('"Trust me, it's only for me": "revenge porn" and the criminal law' (2015) 11 *Criminal Law Review* 866-880, 875).

<sup>47</sup> See n 13. Though other marginalized communities are also vulnerable: Danielle Keats Citron, 'Cyber Civil Rights' (2009) 89 *Boston University Law Review* 61, 64-66.

<sup>48</sup> Martha Nussbaum, 'Objectification and Ressentiment', unpublished paper on file with Danielle Keats Citron and quoted in Danielle Keats Citron, 'Law's expressive value in combating cyber harassment' (2009-2010) 108 *Michigan Law Review* 373, 389.

linked to 'perceived injuries to masculine pride in the aftermath of a relationship breakdown, or generalized aggression towards girls and women',<sup>49</sup> both of which emphasize the gendered nature of these practices and their relationship with other forms of sexualized coercion and abuse. We can see this played out in the myriad ways in which the harms of image-based sexual abuse are experienced.

## **A. Harm to Individuals: Violations of Mental and Physical Integrity, Dignity, Privacy and Sexual Expression**

### **(i) Violating personal and bodily integrity**

When considering the harms of image-based sexual abuse, perhaps the most familiar are the immediate, direct harms to the physical and mental well-being of the individuals depicted in the images. Typically, the images distributed online (whether via pornography websites or social media) are accompanied by information identifying the individual, including contact details, social media links and home addresses – a practice known as 'doxxing' – as well as often unsubstantiated allegations about the victim-survivor. This information, which is perpetually and easily available via a simple internet search, is then used to perpetrate the multiple abuses by members of the online community intent on harassing (mostly) women.<sup>50</sup> The impact on victim-survivors is profound, with many fearing physical assaults, as well as suffering incessant online abuse. Not surprisingly, sustained and often serious adverse mental health effects result, including panic attacks and suicide. A study by the US Cyber-Civil Rights Initiative found that over 80 per cent of 'revenge porn' victim-survivors experienced severe emotional distress and anxiety.<sup>51</sup> For young people, the pressures of being victimized can be intense with many examples of suicide, as well as extensive studies showing profound impacts on education and emotional development.<sup>52</sup>

The professional costs to victim-survivors are also potentially severe. Many are dismissed from their current employment and/or struggle to find work as a result of an online presence dominated by private, sexual images and abuse.<sup>53</sup> Understandably, victim-survivors often retreat from public spaces, both offline and online. They 'leave jobs, change schools, retreat from public discourse, refrain from expressing their opinions and withdraw from social media',<sup>54</sup> all of which can lead to further serious, adverse consequences for their family, social, professional and sexual lives.<sup>55</sup>

### **(ii) Infringing dignity and privacy**

<sup>49</sup> Michael Salter, Thomas Crofts, Murray Lee, 'Beyond Criminalization and Responsibilisation: Sexting, Gender and Young People' (2012-2013) 24(3) *Current Issues in Criminal Justice* 301, 311.

<sup>50</sup> In one US study, over half of victim-survivors reported that their sexual images were accompanied by their full name and social network profiles, with one fifth of victim-survivors reporting that their email addresses and phone numbers were also provided (Cyber-Civil Rights Statistics on Revenge Porn, discussed in Citron and Franks (n 7) at 350-351).

<sup>51</sup> *ibid* at 351.

<sup>52</sup> See, for example: Danielle Keats Citron *Hate Crimes in Cyber Space* (Harvard University Press 2014) at 11; Nicola Henry and Anastasia Powell, 'Technology-Facilitated Sexual Violence: a literature review of empirical research' (2016) *Trauma, Violence and Abuse* forthcoming, DOI: 10.1177/1524838016650189; Jessica Ringrose et al, *A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC* (NSPCC 2012).

<sup>53</sup> Discussed in Danielle Keats Citron, 'Revenge Porn should be a crime in the US', available at: <http://edition.cnn.com/2013/08/29/opinion/citron-revenge-porn/> See also Citron (n 47) at 64-65.

<sup>54</sup> Mary Ann Franks, 'The Fights Against Digital Abuse: the view from the US', available at: <http://www.womensaid.ie/16daysblog/2015/12/15/the-fight-against-digital-abuse-the-view-from-the/>

<sup>55</sup> Citron (n 52) at 7-10.

While emphasis on the immediate and long-term physical and psychological harms of image-based sexual abuse may expedite law and policy reforms, it risks obscuring some of the more subtle and pervasive harms. These include the adverse impact on an individual's fundamental rights to dignity and privacy, as well as their freedom of sexual expression and autonomy.

The concept of dignity emphasizes the worth of all individuals: all are deserving of respectful treatment, to be treated as ends and not means. Dignity, Jeremy Waldron argues, is about status – one's status as a member of society in good standing – and it generates demands for recognition and treatment that accord with that status.<sup>56</sup> An individual's dignity is, therefore, 'dishonoured through a failure to show respect, through the treatment of others as less than creatures of inherent worth'.<sup>57</sup> Image-based sexual abuse violates the dignity of victim-survivors by its deliberate infringement of their self-worth and failure to treat them with respect. In this way, dignity takes the moral relevance of an act seriously, independent of its consequences, such that the dignity of a victim-survivor of image-based sexual abuse is violated simply by a 'failure to show respect' to the individual as an equal in society, regardless of the fact that she may have *also* suffered physical, psychological or financial harms.<sup>58</sup> Nor need she experience or demonstrate distress or anger.<sup>59</sup> Thus, while dignity is inherent in the individual, it has to be 'nourished and maintained by society and the law'.<sup>60</sup> At the 'very least', Waldron argues, 'we are required in our public dealings not to act in a way that undermines one another's dignity',<sup>61</sup> to provide 'assurance' to all in society that they are deserving of equal respect and dignity. This 'dignity-based assurance' is both 'a public good provided to all by all' as well as benefiting the individual.<sup>62</sup>

Image-based sexual abuse compromises the dignity not only of the individuals involved, but also of all members of the same group (here typically women) who live in that society. Though Waldron's focus is on visible manifestations of hate in public life, including pornography, analogies with image-based sexual abuse are helpful. The ubiquity of image-based sexual abuse sends a message to all women that they are not equal, that they should not get too comfortable, especially online; that it might happen to them. It legitimates the attitudes of those who might not yet have participated directly in the abuse, but who have similar attitudes towards women, or who think that the abuse is 'just a bit of fun' and that it is therefore acceptable to disregard the dignity of the individual.<sup>63</sup> Put another way, while small acts of hate or harassment may not seem significant individually, cumulatively they are 'at odds with the idea of an autonomous person working out their own destiny under conditions of justice and dignity'.<sup>64</sup>

In a similar way, the non-consensual creation and/or distribution of private sexual images constitutes an egregious violation of the victim-survivor's privacy – again, whether or not they also suffer distress, financial hardship or physical or psychological harm. In the case of consensually created images distributed without the victim-survivor's consent, the violation arises from the breach of trust by the perpetrator who nevertheless shares the image; while the non-consensual dissemination of a non-consensually created image involves a breach of the victim-survivor's privacy at both stages. In both cases, the victim-survivor's privacy right stems not from

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<sup>56</sup> Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123 *Harvard Law Review* 1596, 1611-1612.

<sup>57</sup> Denise Reaume, 'Discrimination and Dignity' (2003) 63 *Louisiana Law Review* 645, at 31-32.

<sup>58</sup> *ibid.*

<sup>59</sup> Jeremy Waldron, *The Harm of Hate Speech* (Harvard University Press 2012) 108-109.

<sup>60</sup> Waldron (n 56) 1612.

<sup>61</sup> Waldron (n 56) 1612.

<sup>62</sup> *ibid* at 1632.

<sup>63</sup> Waldron (n 59) 88-92.

<sup>64</sup> *ibid* at 89.

the intimacy, or *secrecy*, of the image or its subject, but rather from a breach of what Daniel Solove describes as the victim-survivor's 'expectation of trust and confidentiality'.<sup>65</sup> Such an approach not only reflects a nuanced understanding of privacy, and one that is more aligned with that of those who have grown up with an online presence, but also allows privacy to 'flourish'.<sup>66</sup> This facilitates and protects the key concern for many: retaining control over their personal data and information. Once privacy is distinguished from privateness, the suggestion that victim-survivors of 'revenge porn' or hacking are 'complicit' for having posed for the nude or intimate photos in the first place – or simply for being 'member[s] of the very generation that has normalized digital nakedness'<sup>67</sup> – falls away. And it can be recognized that an individual's privacy is protected not by blanket concealment, but by their ability to determine with whom they share any imagery.

At other times, however, most obviously where the private sexual image is taken non-consensually, the individual has had no 'choice' at all. In such cases, it is vital to challenge any tendency toward a public/private spilt in privacy protection whereby acts done in realm of the 'private' are more easily or immediately protected, over – or even at the expense of – activities that take place in 'public' or civic spaces. As noted above, a right to 'privacy in public'<sup>68</sup> is essential if we are to adequately recognize and respond to the challenges now posed by developing technology in relation to an individual's privacy in which any rigid separation on the basis of location has become meaningless.

### (iii) Inhibiting sexual autonomy and expression

An individual's confidence in the security of their privacy and dignity forms the conceptual foundation for the protection and enjoyment of their rights to sexual autonomy and expression. To the extent that image-based sexual abuse restricts an individual's willingness or ability to exercise such rights, it constitutes a further serious and distinct harm.

The harassment and abuse that typically accompanies these forms of abuse is predicated on gendered assumptions relating to women's sexual activity and agency. Women are shamed for creating, or 'allowing' the creation of, sexual images of themselves and this 'shame punishment' is fueled by cultural and social conditions of sexual inequality.<sup>69</sup> One key way in which it does this is by inhibiting women and girls from creating and sharing sexual images of themselves in the first place. Women and girls are consistently told – by newspapers, friends and family, the police, the government, schools – that *they* are responsible for preventing image-based sexual abuse. All they need to do is to 'simply' refuse to create images in the first place.<sup>70</sup> In short, women and girls are positioned 'as the main agents in prevention in a similar way to which women have been held

<sup>65</sup> Daniel Solove, 'Speech, Privacy and Reputation on the Internet', in Saul Levmore and Martha Nussbaum (eds) *The Offensive Internet* (Harvard University Press 2010) 15, 20. This is reflected UK privacy jurisprudence – see, eg, *Loreena McKennitt v Niema Ash* [2006] EWCA Civ 1714.

<sup>66</sup> Saul Levmore and Martha Nussbaum (eds) *The Offensive Internet* (Harvard University Press 2010) 11.

<sup>67</sup> Robin Abcarian, 'Why Jennifer Lawrence is so wrong about her stolen nude photos' *LA Times* 9 October 2014.

<sup>68</sup> Nisselbaum (n 40) and as recognized the European Court of Human Rights in *Peck v UK* (2003) 36 EHRR 41.

<sup>69</sup> Martha Nussbaum, 'Objectification and Internet Misogyny' in Saul Levmore and Martha Nussbaum (eds) *The Offensive Internet* (Harvard University Press 2010) 68, 68.

<sup>70</sup> In the words of Australian federal police assistant commissioner, Shane Connelly: 'People just have to grow up in terms of what they're taking and loading on to the computer because the risk is so high ... if you go out in the snow without clothes on you'll catch a cold – if you go on to the computer without your clothes on, you'll catch a virus' (quoted in Gabrielle Jackson, 'Revenge porn and the morality police: stop blaming women for being alive' *The Guardian* 19 February 2016).

responsible for protecting themselves from sexual assault'.<sup>71</sup> Public debate across multiple jurisdictions has been framed around discourses of user naïveté and responsibility, as opposed to challenging gender-based violence and cultural stereotypes.<sup>72</sup> This is further evidenced in public education campaigns in women are encouraged to 'think again' before sharing intimate images.<sup>73</sup>

This approach not only fails to appreciate the importance of consensual production and sharing of private sexual images as a form of sexual expression,<sup>74</sup> and the integral role which technology plays in contemporary sexual and social practices, but crucially misses the proper target of criticism: namely, the pernicious and damaging myths about women's sexuality and sexual expression and the shaming and abuse of women who choose to exercise sexual agency in a way that is contrary to these myths. Against this backdrop, there is a real possibility that women and girls will heed the siren call of 'self-censorship' and allow the threat of abuse, and the ever-present surveillance and appraisal of their sexual expression and identity, to constrain their choices, curtailing the enjoyment of rights to sexual autonomy and expression and, at least for some, rendering them meaningless.

Of course, this not to suggest that all women's self-production, or agreement to the creation, of sexual imagery is positive, or that it is never coerced. As Salter et al argue, we must resist a 'simplistic victimization/empowerment dualism' when considering the production of sexual media, especially among young women.<sup>75</sup> However, while in practice women are negotiating their sexuality in an 'environment characterized by significant gender disparities',<sup>76</sup> to resort to either extreme also works to deny women's agency and sexual autonomy. However, insofar as the threat and reality of image-based sexual abuse limits women's sexual autonomy and expression, its proliferation runs the real risk that as a society we erase the sexual agency women have fought so hard to own.

## **B. From Individual to Societal Impacts: the Cultural Harm of Image-Based Sexual Abuse**

What has been largely absent from discussions of the harms of image-based sexual abuse to date is the recognition of what we term its '*cultural harm*'. This is the instantiation of a culture that accepts the creation and/or distribution of private sexual images without consent as a 'harmless prank'; where the vast majority of perpetrators are 'rarely reprimanded' while victim-survivors continue to be 'frequently chastised as hypersensitive or humourless'.<sup>77</sup> In this way, image-based sexual abuse risks normalizing non-consensual sexual activity. Thus, while the 'acceptance' of such abuses causes significant *individual* harms, the repercussions adversely impact on all members of society (though its effects are felt by women and girls in particular) as well as society more generally. Its prevalence, combined with the minimization of its harms and potential

<sup>71</sup> Salter et al (n 49) at 312.

<sup>72</sup> Henry and Powell (2015), (n 27).

<sup>73</sup> Salter et al (n 49) at 308-309.

<sup>74</sup> To the extent that women freely create their own images, they could be said to be acting with welcome sexual agency. Indeed, contrary to the dominance of the pornographic gaze, so often violent and misogynistic, self-generated and self-controlled sexual imagery can represent a valuable expression of women's sexual autonomy and identity. On the commonplace use of technology and imagery in sexual expression, see further: Edgar Gomez Cruz and Cristina Miguel, 'I'm Doing This Right Now and It's for You: The role of images in sexual ambient intimacy', in Marsha Berry and Max Schleser (eds.), *Mobile Media Making in an Age of Smartphones* (Palgrave Macmillan 2014), 139-147; Moira Carmody, *Sex & Ethics: young people and ethical sex* (Palgrave 2012).

<sup>75</sup> Salter et al (n 49) at 304.

<sup>76</sup> *ibid.*

<sup>77</sup> Emma Jane discussing what she labels 'e-bile' which includes image-based sexual abuse: "'You're a Ugly, Whorish, Slut'" (2014) 14 *Feminist Media Studies* 531, 539.



normalization of non-consensual sexual activity, engenders a culture which is conducive to further forms of sexual violence. In other words, image-based sexual abuse may help to sustain a culture – a set of attitudes that are not universal but which extend beyond those immediately involved as perpetrators or victim-survivors of image-based sexual abuse – in which sexual consent is regularly ignored. And by extension, this means that acts of sexual violence which are also predicated on an absence of consent are perhaps less likely to be recognized as such.

This is not to suggest that image-based sexual abuse causes rape or sexual assault; or that all (or indeed any) perpetrators of such abuse will also go on to commit rape or sexual assault. Nor is it to suggest that of the many phenomena which contribute to this culture, image-based sexual abuse is the 'worst'. Individual acts of sexual violence are rarely, if ever, the exclusive product of one immediate stimulus. Further, even if we were suggesting a direct link (and we are not), we are unlikely to be able to provide verifiable evidence of, or to test or disprove, said link.

However, the fact that we cannot test for a link does not mean we ought to proceed on the basis that there is no connection at all between image-based sexual abuse and, at best, 'uncertainty' around, and, at worst, 'disregard' for, the presence of consent in a sexual context. Rather, in the absence of some sort of empirical measure or experiment, we might ask ourselves what would have to be true for image-based sexual abuse to have no such impact on attitudes toward consent and, in turn, sexual violence. Certainly, the cultural harm argument could be refuted if it were true that cultural factors, including image-based sexual abuse, played no part at all in shaping attitudes towards sexual violence. Alternatively, we might acknowledge a role for cultural influences on those who perpetrate such crimes, but argue that, of all the things that shape or influence social values and attitudes, image-based sexual abuse is not one of them (or even that if it is, then it does so in a positive way). Both responses are implausible. In particular, unless we really do think that indifference toward consent is simply and exclusively predetermined, then this attitude must come from somewhere, that is it must be, at least in part, a product of our environment (broadly understood).

If we accept that our attitudes and values are influenced by our cultural environment, the question then becomes 'what aspects of this environment contribute to particular attitudes?' If we are concerned specifically with attitudes towards sexual consent, then it would be surprising if image-based sexual abuse – which relies on the *absence* of consent – was not one potential such contributing factor. In fact, it seems likely that image-based sexual abuse is one of many factors likely to encourage and sustain a way of thinking that devalues women's sexual autonomy. On this basis, there is reason to conclude that image-based sexual abuse is more likely to be culturally harmful than not, and that it plays a role in enabling and maintaining a social and political context conducive to high levels of sexual coercion.<sup>78</sup>

Central to the ability of image-based sexual abuse to potentially effect broader societal harm is the collective manner in which it is perpetrated. While the creation or distribution of a private sexual image without consent is usually the act of one person, the adverse impacts felt by many victim-survivors occur following the sharing of the images by many (sometimes hundreds of thousands) of people. This relies on what Salter and Crofts refer to as the 'loosely affiliated networks of anonymous men who collectively mobilize to stalk, vilify and threaten' the women in

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<sup>78</sup> Our argument has resonances with that of Jeremy Waldron who explores, in the context of pornography, 'the cumulative effect on the visible environment of numerous individual defacements' (n 59 at 90). He continues, '[t]he visibly pornographic aspect of our society has a pedagogical function ... Not only does pornography present itself as undermining society's assurance to women of equal respect and equal citizenship, but it does so by effectively intimating that *this is how men are around, around here*, on the streets and on the screen, if not in school, about how women are treated' (at 91).

the images.<sup>79</sup> It is the cumulative effect of each individual sharing or commenting on the image which not only amplifies the harms suffered by the individual, but also creates and sustains a culture in which such actions are not simply tolerated but encouraged. It is this 'mob-mentality' that has the further effect of forcing women off-line.<sup>80</sup> And so women sign off (or fail to sign on).<sup>81</sup> This not only 'solidifies male dominance of online spaces by eliminating and *muting* women's voices from the internet',<sup>82</sup> inhibiting women's ability and willingness to 'participate in online life as equals',<sup>83</sup> but also deprives us all of a richer, more varied and diverse public and online discourse.<sup>84</sup> A 'hostile and hateful mode of discourse' is 'normalized' which threatens the 'realization of broad ideals such as civil discourse, social inclusivity and democratic engagement' online.<sup>85</sup> In addition, and crucially, in failing to expose and challenge a culture in which women's consent is systematically ignored, we risk creating a culture conducive to the proliferation and toleration of image-based sexual abuse.

#### 4. Redress and the Role of Law

Given the harms it produces, image-based sexual abuse requires a coherent legal response that adequately expresses societal condemnation of this phenomenon and demands for justice, redress and change. A fragmented, *ad hoc* and reactive approach is inadequate for these purposes. As outlined below, the current labyrinthine approach adopted in most jurisdictions fails victim-survivors, potential defendants and society as a whole. It offers neither effective redress and justice for victim-survivors, nor a robust deterrence and framework for change. In the following section, we examine, in broad terms, the existing and potential legal avenues for redress, arguing for a holistic framework of criminal and civil remedies.

##### A. Harnessing the Expressive Power of Law

When seeking cultural change, harnessing the expressive power of law is crucial.<sup>86</sup> Law has the ability to communicate society's commitments and beliefs. It can both affirm and solidify existing norms, as well as articulating new ones, and plays a key role in protecting our individual entitlement to be regarded as a member of society in good standing.<sup>87</sup> It is this combination of affirmation and formation that is vital in relation to image-based sexual abuse, enabling current laws to be embedded and new approaches to be developed. While the expressive power of law may be deployed in many different circumstances and for varied purposes, in relation to image-based sexual abuse, the time has never been better for action. As Danielle Keats Citron argues in

<sup>79</sup> Michael Salter and Thomas Crofts, 'Responding to revenge porn: Challenging online legal impunity' in Lynn Comella and Shira Tarrant (eds) *New Views on Pornography: Sexuality, politics and the law* (Praeger 2015) 233-253.

<sup>80</sup> As Amanda Hess comments: when anonymous posters say they would like to 'rape us, or cut off our heads, or scrutinize our bodies in public, or shame us for our sexual habits – they serve to remind us in ways both big and small that we can't be at ease online' ('Why Women aren't Welcome on the Internet: The Next Frontier of Civil Rights' *Pacific Standard Magazine* January 2014, 45 cited in Citron (n 52) at 126.

<sup>81</sup> Nonetheless, it must also be remembered that online spaces can provide opportunities for resistance to abuse and forums of support. See further: Anastasia Powell, 'Seeking rape justice: Formal and informal responses to sexual violence through technosocial counter-publics' (2015) 19(4) *Theoretical Criminology* 571-588.

<sup>82</sup> Citron (n 48) at 391, emphasis in original.

<sup>83</sup> Danielle Keats Citron, 'Civil Rights in Our Information Age', Saul Levmore and Martha Nussbaum (eds) *The Offensive Internet* (Harvard University Press 2010) 31, 31.

<sup>84</sup> Citron (n 52) at 85.

<sup>85</sup> Jane (n 77) at 542.

<sup>86</sup> For a detailed discussion of the expressive function of law in the broader context of cyber harassment, see Citron (n 48). See also Cass Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021-2053, at 2051 where he states that: 'There can be no doubt that law, like action in general, has an expressive function.'

<sup>87</sup> Waldron (n 59) at 105-106.

the context of cyber harassment more broadly, acting now provides the opportunity to 'transform online subcultures of discrimination into those of equality and dignity before they become too entrenched'.<sup>88</sup> With technology developing and as awareness grows of the problems and harms of image-based sexual abuse, we have the chance to establish the norms by which society views and addresses this phenomenon.

This is not to suggest that the expressive role of law is more important than its coercive power. However, as Waldron has pointed out, in a well-ordered society we should expect the expressive function to be at the fore.<sup>89</sup> This is because it is individual citizens who, in practice, enact and enforce the law by obeying it in daily life. Without this active compliance, especially in the fast-moving technological context of image-based sexual abuse, the law would have little impact or effect. In this way, therefore, harnessing the expressive function of law is fundamental to a project of change. In practical terms, the aim of the law here is to shape people's behaviour, deterring them from committing the criminal acts or civil wrongs proscribed by law. Further, the prohibition of specific acts ideally results in greater societal disapproval of those acts. In this way, the law can be said to operate symbolically to restore and affirm the dignity of the victim-survivor.<sup>90</sup> Therefore, to be effective, the law must be coherent so that it is clear in its meaning and scope and be widely known and understood.

### **B. Deploying the Coercive Power of Law**

At the same time, the coercive dimension of law is also important. Indeed, it is the potential deterrent and therefore educative aspect of the coercive role of law, rather than its punitive aspect *per se*, which can encourage cultural change.<sup>91</sup> Criminal law also serves the demands of justice and redress for victim-survivors.<sup>92</sup> Further, the availability and accessibility of a range of civil law remedies is vital to ensure that victim-survivors are able to tailor the form of their redress, but also as a means of seeking to deter future actions. Insofar as the imposition of liability encourages changes in behavior, this may prove one of the most effective means of regulation. It may provide a wider recognition of the many and collective harms of image-based sexual abuse, with the availability of both criminal and civil liability enabling women's equality and dignity in both physical and digital spaces

### **C. Criminalising Image-Based Sexual Abuse**

The foundation to tackling image-based sexual abuse is a coherent criminal law response providing clarity for victim-survivors, potential perpetrators and actors in the criminal justice system. Many jurisdictions, including the UK and Australia, have various offences against malicious communications and forms of voyeurism which are currently being haphazardly deployed.<sup>93</sup> Offences in England & Wales, for example, prohibit sending electronic communications which are 'indecent, grossly offensive, threatening or false' or of a 'menacing

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<sup>88</sup> Citron (n 48) at 409.

<sup>89</sup> Waldron (n 56) at 1622.

<sup>90</sup> Salter and Crofts (n 79).

<sup>91</sup> While there is limited empirical evidence demonstrating a direct deterrent effect of specific laws or sentences, our argument is focussed on law as creating a 'set of meanings and shared understandings' that 'shape and influence society's norms' (Citron n 48, at 407).

<sup>92</sup> We currently know little of the specific justice interests of victim-survivors of image-based sexual abuse. On the justice interests of sexual violence survivors more generally, see Clare McGlynn, Julia Downes and Nicole Westmarland, 'Seeking Justice for Survivors of Sexual Violence: recognition, voice and consequences', in Marie Keenan and Estelle Zinsstag (eds) *Sexual Violence and Restorative Justice: legal, social and therapeutic dimensions* (Routledge 2016).

<sup>93</sup> See, eg, Gillespie (n 46) (England & Wales); Henry and Powell (n 10) (Australia).

character'.<sup>94</sup> There are a number of problems with these sorts of provisions including the focus on the content of the image (is it 'obscene' or 'indecent'?) and high thresholds for prosecution.<sup>95</sup> Further, the focus is unduly on the motives of the perpetrator (at the expense of considering the variety of harms experienced), with English law requiring an intention to cause 'distress or anxiety' to the recipient of the communication (ie seeking 'revenge').<sup>96</sup> Moreover, because these laws were enacted with different targets and victim-survivors in mind, their existence and applicability to this area is not well known to victim-survivors, the public (and therefore potential defendants) or criminal justice personnel. This seriously hampers their effectiveness in relation to specific cases and, as Alisdair Gillespie notes, renders any educative function minimal.<sup>97</sup>

Similar failings blight other potentially applicable laws. The voyeurism offence, for example, was enacted in England & Wales to address the harm of so-called 'peeping toms', once considered a mere 'nuisance'. However, the provision is set out in 'obsessive detail'<sup>98</sup> limiting the law to a 'classic' scenario of the offender who, for sexual motives, hides himself (or his camera) and looks directly into the private spaces of our homes, changing rooms and toilets. It fails, therefore, to cover modern variants of the voyeurs' activities such as taking 'upskirt' images in public spaces. In such cases, the victim-survivor is not performing a 'private act'; rather they will be going about their everyday business in public. There is another potential criminal response to such activities in England & Wales, the common law offence of outraging public decency. But this is another largely unknown offence, with a focus on disgust – actions must be of a 'lewd' character<sup>99</sup> – rather than the serious harms of this form of sexual abuse.

The pattern is evident. There are many criminal laws which can be applied to some forms of the varied ways of perpetrating image-based sexual abuse. Some of these offences were enacted with very different aims in mind, such as the communications offences, with the result that they are not well known to the public or criminal justice personnel and are constrained in their applicability. Other offences, while ostensibly adopted with particular forms of image-based sexual abuse in mind, such as voyeurism, often fail to encompass the broader context of the abuse and are, therefore, in their own ways equally constrained. In particular, the emphasis on the motives of perpetrators (whether sexual or intending to cause distress), the morally questionable nature of the images (whether indecent, lewd or obscene) and the 'obsessive' specificity of offences, seriously constrains their ability to tackle image-based sexual abuse. They have also failed to keep pace with technological advances which magnify the harms and newer conceptions of privacy.

In light of this, many jurisdictions have adopted new criminal provisions aimed at targeting forms of image-based sexual abuse that fall outside current legislation – typically focused on the

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<sup>94</sup> Malicious Communications Act 1988, s 1; Communications Act 2003 s127.

<sup>95</sup> Crown Prosecution Service guidelines in England & Wales provide for a high threshold for action, available at: [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/).

<sup>96</sup> Malicious Communications Act 1988. Therefore, while this clearly applies in cases involving doxxing (where personal information is published alongside the image), it is of little use against the original distributor if there is no contact with the victim-survivor (for example, where the images have been sent to others), where they are able to establish they never intended the victim-survivor to know, or alternatively that it was perpetrated for financial gain rather than to cause 'distress or anxiety'. Nor does it apply in relation to secondary distributors who 'simply' forward on the image via social media or other methods.

<sup>97</sup> Gillespie (n 46) at 877.

<sup>98</sup> David Ormerod, 'Voyeurism: elements of offence - privacy - reasonable expectation of privacy' (2008) 12 *Criminal Law Review* 12.

<sup>99</sup> *R v Hamilton* [2007] EWCA Crim 2062 [21].

paradigmatic example of 'revenge porn'.<sup>100</sup> Many other countries are currently considering new provisions. The enactment of these laws is the result of high-profile and effective campaigns raising awareness of the nature and harms of this phenomenon. While these new laws are broadly welcome, representing a first step towards securing some form of redress for victim-survivors, their predominant focus on 'revenge porn' skews legislative provisions, most obviously by focussing on the motive of the perpetrator – the 'revenge' – and on non-consensual *distribution* only.

In England & Wales, for example, the perpetrator must distribute the prohibited images with the intention to cause distress to the victim-survivor.<sup>101</sup> Similar, though often less restrictive, ulterior intent provisions can be found in other jurisdictions, such as the requirement to 'harass or annoy' in a number of US states.<sup>102</sup> While the paradigmatic 'revenge porn' case may involve a declared intention to cause distress, images are distributed for a wide variety of reasons including financial gain, notoriety/bonding, amusement and/or sexual gratification. Still further, malicious intent does not cover situations where the distributors do not know the identity of the person in the image or have no intention of the victim-survivor finding out an image was taken or shared. While allowing for reckless intent does expand the range of motives caught, as reflected in the recently enacted Scottish 'revenge porn' provisions, generally the focus remains on distress.<sup>103</sup> Not only does this preclude, and silence, the range of motives behind these actions, it also signals that 'distress' is the appropriate and expected impact of these practices, impeding consideration of the other harms considered above. Indeed, some jurisdictions, such as California, require the victim-survivor to have actually suffered distress.<sup>104</sup>

In addition, the focus on 'revenge porn' further limits the scope of measures by largely restricting any culpability to the original distributor of an image, rather than also catching 'secondary' or 'hosting' distributors. The lack of public debate on this issue can be explained partly due to the media focus on the prurient 'revenge porn' stories, but also because it involves a difficult decision as to where to draw the line of liability. After all, people will disagree on the extent to which the criminal law should capture the actions of someone who may be one of thousands who shares an image on social media. The Scottish Government, for example, sought to limit the scope of the new 'revenge porn' law on the basis that it did not wish to criminalize 'much activity' not typically considered 'criminal' such as the 'routine sharing of images on social networking sites'.<sup>105</sup> However, it is exactly this routine sharing which is responsible for the harms suffered by many. As Derek Bambauer emphasizes, in the context of 'revenge porn', the harm is generally felt in the widespread distribution of the images mainly by persons unknown to the victim-survivor.<sup>106</sup>

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<sup>100</sup> New laws have recently been enacted in England & Wales, Scotland, Israel, Japan, Canada, Victoria (Australia), New Zealand and over thirty states in the US. For further discussion, see Henry and Powell (n 10). For a regularly updated list of US states adopting laws on 'revenge porn' see <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

<sup>101</sup> Moreover, the English legislation goes on to provide that an intention to cause distress cannot be assumed from the act of distribution itself. For a detailed discussion, see Gillespie (n 46).

<sup>102</sup> See Barmore (n 7) and Gillespie (n 46) at 878-879.

<sup>103</sup> Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 2(1)(b).

<sup>104</sup> This, as Gillespie points out, draws an unwarranted distinction between victim-survivors and creates dilemmas for law enforcement about informing a victim-survivor of the distribution of images (n 46 at 879).

<sup>105</sup> Scottish Government, *Equally Safe: Reforming the Criminal law to address domestic abuse and sexual offences* (March 2015) [2.13].

<sup>106</sup> He suggests that: 'For most people whose photos or videos have been shared without their consent, the principal harm is not the disclosure by a former partner: that relationship is past. Rather, the injury occurs from the ongoing, repeated dissemination of the sensitive content.' Derek E Bambauer 'Exposed' (2013-2014) *Minnesota Law Review* 2025, 2029.

Nevertheless, while hard questions remain, it is possible to identify the key principles that should underpin any comprehensive and coherent law criminalizing forms of image-based sexual abuse. First, as discussed above, the scope should be determined by the terms 'private and sexual' which have a number of advantages over alternative formulations such as 'intimate' or 'sexually explicit'. Provisions must be carefully drafted, but a reasonableness standard, providing flexibility to deal with the unforeseeable range of actions of determined perpetrators, should be paramount.

Second, the law should only require the intention to create and/or distribute private sexual images without consent; that is, there should be no additional element of maliciousness.<sup>107</sup> It should also cover threats to distribute images without consent. This approach has the benefit of recognizing that, whatever the motivation of the perpetrator, the harm is similar and significant for the victim-survivor. The potentially wide scope of such a provision can be constrained by providing a defence along the lines of a reasonable belief that images were already in the public domain for gain (such as images on pornographic websites) and/or that the images were originally publically distributed with consent.<sup>108</sup> In this way, the criminalization of such activities might inform and sustain a culture that is aware of the potential harm that non-consensual distribution inflicts and where care and thought is given before forwarding a private sexual image.

Third, given the diverse forms of image-based sexual abuse, the law must cover the non-consensual *creation* as well as distribution of private, sexual images, including images that have been manipulated ('sexualised photoshopping'). The harm experienced by victim-survivors whose images have been manipulated to make them private sexual images are equally deserving of legal protection. Finally, it is vital to see these forms of abuse as sexual (rather than communication) offences.<sup>109</sup> This better captures the harms and broader context; vital for the expressive role of the criminal law. It will also encourage targeted integration of prevention measures into broader efforts to tackle violence against women. Further, in many jurisdictions, sexual offences attract specific accommodations including special measures in court proceedings and anonymity. In relation to the latter, we already know that victim-survivors are reluctant to come forward to report image-based sexual abuse, not surprising in view of the fact that the harm is the distribution of the images and publicity following a police report is only likely to amplify the publicity and harm. It is vital, therefore, that provision is made for automatic anonymity for those reporting image-based sexual abuse so as to encourage greater reporting and prosecutions.<sup>110</sup>

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<sup>107</sup> As is the case in New Jersey and Arizona, see Barmore (n 7) at 450-452. More specifically, the prosecution would have to show that the defendant had the requisite knowledge of non-consent, as is the case in the English law offence of disclosing private sexual photographs and films with intent to cause distress (sec 33(1) Criminal Justice and Courts Act 2015). If intention to cause distress is specified, we recommend following the Scottish example of providing that the mens rea is also satisfied when 'A is reckless as to whether B will be caused fear, alarm or distress' (sec 2(1)(b) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016).

<sup>108</sup> This recommendation follows the Scots law approach where the defence is required to adduce evidence raising the defence which will be successful if 'the prosecution does not prove beyond reasonable doubt that it is not the case' (Abusive Behaviour and Sexual Harm (Scotland) Act 2016, sec 2(6)).

<sup>109</sup> As is the position in Israel: Yifa Yaakov, 'Israeli law makes revenge porn a sex crime' *The Times of Israel* 6 January 2014. For further discussion of image-based sexual abuse as a sexual offence, see Centre for Gender and Equality in the Media Research Briefing, 'Anonymity for Complainants of Image-Based Sexual Abuse' available at: <https://claremcglynn.com/centre-for-gender-equal-media/anonymity-campaign/>

<sup>110</sup> As recommended in our evidence to the Scottish Justice Committee (n 1) and in 'Not revenge but abuse: let's call it image-based sexual abuse' *Everyday Victim Blaming*, 9 March 2016: <http://everydayvictimblaming.com/news/not-revenge-porn-but-abuse-lets-call-it-image-based-sexual-abuse-by-%E2%80%8Fmcglynnclare-erikarackley/>.



Without doubt a specific offence that addresses the harms of image-based sexual abuse has many advantages. It can make clear that such actions are wrong and that responsibility for the harm rests on those who post private sexual images without consent. In criminalizing these activities, it can undercut those who seek to gain from such actions (such as website providers) by restricting the supply of the images on which they depend. Financial responsibility and accountability also rests with the state for ensuring the enforcement of the law. The ability to punish convicted perpetrators can follow criminal sanctions which may help to engender culture change, as well as providing a form of redress and justice for victim-survivors. This expressive role for law is also more likely to be realized by legal provisions which, as William Wilson suggests, 'package crimes in morally significant ways'.<sup>111</sup> This means a coherent criminal law labeled as a sexual offence and clearly targeting all forms of image-based sexual abuse.

#### D. Beyond the criminal law: civil law as a source of redress

Alongside a coherent criminal law response, it is vital that victim-survivors of image-based sexual abuse are able to harness the civil law when seeking redress. The primary advantage of either a common law or statutory civil law action is that it puts the victim-survivor of image-based sexual abuse back in control.<sup>112</sup> Not only do civil actions provide the claimant with additional avenues to pursue but, unlike their criminal counterparts, civil actions are not reliant on persuading others (most obviously the police) of the seriousness or strength of their case in order to bring a claim. Nor are such actions necessarily dependent on the *consequences* of the defendant's wrong, or indeed the claimant's response to the wrong. Rather the focus is on the defendant's *actions* – their harassing behaviour, invasion of the claimant's privacy, breach of personal data, copyright infringement and so on. Moreover, again unlike in relation to many related criminal claims, the claimant's anonymity can, at least in England & Wales, be protected.<sup>113</sup> Finally, if successful, the remedies provided for by a civil claim – substantial damages and/or injunctive relief – may well be more beneficial to the claimant as she seeks to re-build her life, than the perpetrator facing a (relatively short) custodial or community sentence.

Unsurprisingly then, while the precise form of the various civil law actions differs across jurisdictions, they are already being used by victim-survivors of image-based sexual abuse.<sup>114</sup> Take 'privacy' claims, for example. In England & Wales, it is well established that, in accordance with article 8 of the European Convention on Human Rights, an individual has a 'reasonable expectation of privacy' in relation information relating to their private consensual sexual activities.<sup>115</sup> And so, in *ABK v KDT & FGH* [2013] the claimant was granted an interim non-disclosure order to protect her 'right to confidentiality and privacy' in respect of 'sexual' photos and personal text messages she had sent to the second defendant during the course of their affair (which had since ended).<sup>116</sup> Such actions are not limited to the UK. In the Australian case of

<sup>111</sup> William Wilson 'What's wrong with murder?' (2007) 1(2) *Criminal Law and Philosophy* 157-177, 162.

<sup>112</sup> See, eg, Joanne Conaghan, 'Civil Liability: Addressing Police Failures in the Context of Rape, Domestic and Sexual Abuse' Inaugural lecture, University of Bristol, 19 February 2015; Nikki Godden-Rasul, 'Retribution, Redress, and the Harms of Rape: The Role of Tort Law' in Nicola Henry, Anastasia Powell and Asher Flynn (eds) *Rape Justice: Beyond the Realm of Law* (Palgrave Macmillan 2015) 112.

<sup>113</sup> By virtue of an anonymity order under CPR r 39.2(4).

<sup>114</sup> Such civil actions include harassment provisions, intentional/negligent infliction of emotional distress, negligence, defamation, privacy or breach of confidence, intellectual property, data protection and copyright infringement as well as nascent specific statutory 'cyber exploitation' torts. While cases are typically brought against the primary or (less often) secondary distributors, the recent refusal by a Northern Irish judge to 'strike out' a claim against Facebook allows for the possibility of claims against 'hosting' distributors (Alexandra Topping, 'Facebook revenge pornography trial "could open floodgates"' *The Guardian* 9 October 2016.

<sup>115</sup> *Mosley v News Group Newspapers* [2008] EWHC 1777 at [100].

<sup>116</sup> *ABK v KDT & FGH* [2013] EWHC 1192.

*Wilson v Ferguson* [2015], the claimant was awarded over \$47,000 in damages, alongside an injunction, in breach of confidence against her former partner who had uploaded private sexual photos and videos taken during their relationship to Facebook.<sup>117</sup> And in the US, in what was reported as the first case of a civil claim for 'revenge porn',<sup>118</sup> a jury awarded the victim-survivor \$250,000 (including \$60,000 punitive damages) for invasion of privacy (intrusion into private affairs and public disclosure of private facts) after her former partner posted intimate photos of her on a Facebook account in her name.

However, while great efforts have been made to adapt and extend various common law torts to address the harms of image-based sexual abuse, their scope as effective forms of redress is limited for a number of reasons. First, few cases fit neatly within the confines of a particular action. In England & Wales, the utility, for example, of the tort in *Wilkinson v Downton* is limited both by the requirements that the defendant 'intended' to cause the claimant emotional distress and that any distress so caused was 'severe'.<sup>119</sup> At other times, efforts to harness an existing civil law remedy require an unacceptable level of distortion of the harm/s of image-based sexual abuse. For example, in both the US and UK, though copyright law provides a remedy for the claimant who has 'authorship' of the image, it does so by re-characterizing the harm as a breach of their property rights.<sup>120</sup> This not only mis-represents the harm involved but also limits its scope. While copyright law may be of some help in relation to non-consensually distributed 'selfies' or, potentially, where the person in the image played some role in the image's composition,<sup>121</sup> it is of no use for those who have simply posed for photos taken by another or who were unaware that the image had been taken.<sup>122</sup>

What this means is that even those claimants with a strong case often find in practice that they lack the money and resources to bring an effective claim. Many cases of image-based sexual abuse involve a 'perfect storm' of time – and cost – increasing factors: fast-moving technological innovations, novel applications of particular, and often contested, facts to pre-internet common law actions, multiple potential causes of action, a large number of often unknown and cross-jurisdictional defendants, and complex technological and legal arguments. The result is that, even in relation to more straightforward actions, the cost of bringing a claim is prohibitively expensive for many victim-survivors. Further, like its criminal law counter-part, a successful civil law claim does not necessarily resolve the matter. An award of compensation, for example, is not much use against a defendant who is unable to pay.<sup>123</sup> Nor does an injunction against a particular individual remove the images from the web or prevent their posting elsewhere.<sup>124</sup> This not only limits the expressive and coercive power of the civil law on an individual basis, but also significantly

<sup>117</sup> *Wilson v Ferguson* [2015] WASC 15 (Supreme Court of Western Australia)

<sup>118</sup> Julia Love, 'San Jose Jury Returns Groundbreaking Revenge Porn Verdict' *Law.Com* 19 February 2014.

<sup>119</sup> *Liamsithisack v Bruce et al* (Case No. 112CV233490) (US); *Rhodes v OPO* [2015] UKSC 32 (UK).

<sup>120</sup> Citron and Franks (n 7) at 360. On an intellectual property based approach to the production of intimate media, see Bambauer (n 98).

<sup>121</sup> Copyright, Design and Patents Act 1988 (CDPA) s 1.

<sup>122</sup> Ordinarily, under section 9 of CDPA the author of the image retains ownership of the image and can choose to use/distribute it however s/he pleases. However, if the victim-survivor could be said to have 'commissioned' the image/s for 'private and domestic purposes' they may by virtue of s 85 of the CDPA have a right to restrict copies of it from being issued, exhibited, show or otherwise communicated to the public. See further Justine Mitchell, 'Censorship in Cyberspace: Closing the Net on "Revenge Porn"' (2014) 25(8) *Entertainment Law Review* 283.

<sup>123</sup> Citron and Franks (n 7) at 358.

<sup>124</sup> However, cf, the UK case of *AMP v Persons Unknown* [2011] EWHC 3454 (TCC) in which the claimant was awarded an interim injunction in respect of a breach of her privacy and the provisions of the Protection from Harassment Act 1997 after private sexual photographs were hacked or stolen from her mobile phone. Significantly, Ramsey J granted the injunction against 'persons unknown' on the basis that '[i]f each Defendant had to be notified before this relief could be granted it would effectively deprive the Claimant of the opportunity to obtain the immediate interim relief which would otherwise be appropriate to protect her Article 8 rights' (at [34]).

restricts civil law's broader deterrent effect. In particular, it does little to deter the abuse being committing in the first place. After all, as Danielle Citron and Mary Anne Franks note, 'would-be perpetrators are unlikely to fear a course of action that is unlikely to materialize'.<sup>125</sup>

However, while current civil law remedies largely fall somewhat short, this is not to dismiss the potential of the civil law in this context. Rather, what is needed is a specific statutory civil action encompassing all forms of image-based sexual abuse and providing both injunctive and compensatory forms of redress and which runs alongside a criminal offence. Such an approach is not without precedent. For example, the California Civil Code includes a private right of action,<sup>126</sup> alongside the criminal offence in the Criminal Code,<sup>127</sup> against any person who intentionally distributes a photograph or recorded image of another without consent where: first, the victim-survivor had a 'reasonable expectation' the image would remain private; secondly, the image 'exposes an intimate body part or shows an act of intercourse, oral copulation, sodomy, or other act of sexual penetration'; and thirdly the victim-survivor suffers recognized general or special damage. Similarly, the recent Australian Senate 'revenge porn' inquiry noted the need for victim-survivors to have a range of both criminal and civil remedies and recommended a federal law providing a 'statutory cause of action for serious invasion of privacy'.<sup>128</sup> And, in the UK, the Protection from Harassment Act 1997 provides for both a criminal offence and a civil claim for harassing behaviour, both of which have been used in this context.

Clearly, a statutory civil action for image-based sexual abuse is not a panacea for all the difficulties faced by victim-survivors. In particular, it is likely to be of limited cross-jurisdictional effect. Nor can or should it replace – or distract from arguments for – an effective criminal law remedy. However, what it can do is provide victim-survivors of image-based sexual abuse with an alternative, cost-effective, flexible and, most importantly, accessible avenue of redress. It can guarantee their anonymity. It can correctly identify and label the harm, avoiding the gaps and distortions of current civil actions. It can focus on the defendant's violation of the claimant's statutory right and/or harm suffered, rather than on their motivation, or the victim-survivor's reaction to it. Finally, it can widen the net of potential defendants to include primary, secondary and hosting distributors and provide proactive, and reactive, relief – preventing the initial, and subsequent, distribution of the images as well as providing financial compensation.

## 5. Conclusions

Sexual violence and the harassment of women is (sadly) not new. Nor is the taking or distribution of private sexual images, either with or without the party's consent, or for sexual or non-sexual purposes. What is new, however, is the easy availability of technology and media which facilitates and intensifies these activities. Such technological advances have engendered new means of perpetrating a variety of forms of harassment and abuse against, mainly, women. In this article, we have conceptualized these harms as image-based sexual abuse. We suggest that our concept best encapsulates both the multiple manifestations of this phenomenon and, in particular, the nature, scope and significance of the individual and collective harms that image-based sexual abuse engenders. We recommend harnessing the expressive and coercive power of civil and criminal law in new ways to provide redress for victim-survivors and to encourage cultural change, replacing current piecemeal approaches which fail to encompass the breadth of activities or extent of the harms.

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<sup>125</sup> Citron and Franks (n 7) at 358.

<sup>126</sup> California Civil Code §1708.85(a-j).

<sup>127</sup> California Penal Code §647(j)(4)(A).

<sup>128</sup> Legal and Constitutional Affairs Committee (n 4) Recommendation 6 at [5.31].

Accordingly, the time is ripe for action. Social and cultural practices are evolving rapidly and we have an opportunity now to influence attitudes, ensuring that ideas of respect and consent shape our actions, rather than normalizing the often callous disregard for victim-survivors' rights and dignity. This is a time when a new 'sexual ethics' is being fashioned in our technologically advancing era.<sup>129</sup> It is therefore vital that we appropriately understand, confront and regulate image-based sexual abuse which has steadily and effectively seeped into the practices of communities worldwide, (re)shaping gender-relations and embedding itself as part of the cultural wallpaper. Recourse to law is one means by which we can achieve these aims, alongside vital educative campaigns. The challenge, of course, is how to regulate image-based sexual abuse, at the same time as enabling women (in particular) to exercise their rights to sexual autonomy and expression in ways of their choosing. The answer, we suggest, lies not in self-restraint: we should all be free to choose how we express ourselves sexually. Rather, it lies in the acceptance and promotion of a social and cultural reality in which consent, respect and dignity shape and secure our sexual lives.

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<sup>129</sup> Carmody (n 74).