Censorship in Cyberspace: Closing the Net on "Revenge Porn"

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All human beings have three lives:
A public life, a private life and a secret life.[1]

Introduction

In today's fast-moving digital world, private images and personal data can be posted online to global platforms within seconds and shared instantaneously between innumerable persons. Once shared, images can be impossible to track down for removal. Such acts of vengeance yield devastating consequences for the victim causing insurmountable damage to careers, family life and indeed, the individual's health and welfare. In 2010, a teacher from Caerphilly, Wales working in the Middle East was purported to have committed suicide after an ex-boyfriend posted naked pictures of the victim on her Facebook page.[2] Amanda Todd, a Canadian citizen, also committed suicide in 2012 due to intense cyber bullying after she was blackmailed into exposing herself on a webcam, images of which were subsequently distributed online.[3] Reality TV star Lauren Goodger, was victimised when photographs of her engaged in private acts were taken surreptitiously by her boyfriend with whom she lived. The images were subsequently shared via messaging technologies and distributed online with her private telephone number, resulting in "a number of unwanted and sexually prying messages from members of the public".[4] Even the British Government felt its effects recently when the nanny of current Prime Minister Cameron, fell victim to the practice when private photographs of her appeared in the media, published by an ex-partner.[5] In the age of social media, information explosion and fast-moving technology, "Revenge Porn", or its proper terminology, "non-consensual pornography", imbues the dangerous combination of spurned lovers, avaricious website owners and the social media.

This article argues that in the United Kingdom, current legal actions and remedies fail to protect adequately, victims of persons who publish sexually explicit images without consent. This is primarily because legal actions and remedies are generally only available after the event and do nothing to prevent publication at the outset. Ergo, the article proposes that publishing, sharing and disseminating non-consensual pornography in the media via electronic and conventional methods, ought to be criminalised under the Coroners and Justice Act 2009 by introducing a statutory instrument entitled, "Misuse of Private Information Regulations 2014".

The legal infrastructure

"There is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image".[6] Nor is there an "over-arching, all-embracing cause of action for 'invasion of privacy'".[7] Notwithstanding this, UK citizens are guaranteed fundamental rights emanating from the ECHR such as respect for private and family life. These fundamentals are directly enforceable in UK courts under the Human Rights Act 1998 ("HRA"). The Act is vertical in nature as it imposes obligations on the state (and its institutions) to uphold fundamental rights guaranteed to citizens by the Convention. In contrast, there is no corresponding horizontal effect. Whilst the court must interpret primary and subordinate legislation to give effect to Convention rights,[8] there is no legal duty imposed upon individuals to act in accordance with the Convention.[9] This is qualified however, by obligations under HRA s.6 preventing a public authority from acting "in a way which is incompatible with a Convention right".[10] Hence, the court[11] must act in accordance with the Convention when ruling in disputes between individuals, not just between the individual and the state.[12] In practice therefore, actions between individuals are not immune from the effects of the HRA.

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[1] Gerald Martin, *Gabriel García Márquez* (London: Bloomsbury, 2009), 205/
[2] BBC News, "Teacher, 24, died after drinking cleaning fluid" February 24, 2010 at *http://news.bbc.co.uk/1/hi/wales/8534899.stm* [Accessed September 15, 2014].
[3] Press Association, "Dutch suspect in webcam abuse may have targeted British girl" The Guardian, April 18, 2014 at *www.theguardian.com/uk-news/2014/apr/18/dutch-webcam-suspect-british-victim* [Accessed September 15, 2014].
[4] Daisy Wyatt, "Lauren Goodger sex tape: Reality star calls for tougher laws on revenge porn after intimate video leaks online" The Independent, July 27, 2014 at *www.independent.co.uk/news/people/news/lauren-goodger-calls-for-tougher-laws-on-revenge-porn-after-sex-tape-leaks-online-9631203.html* [Accessed September 15, 2014].
[5] Adam Withnall, "David Cameron nanny sex pictures: Charities provide 'revenge porn' warning" The Independent, June 9, 2014 at *www.independent.co.uk/news/uk/home-news/david-cameron-nanny-sex-pictures-charities-issue-revenge-porn-warning-9512015.html* [Accessed September 15, 2014].
[6] *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* [2013] EWHC 2310 (Ch); [2013] W.L.R.(D.) 310 at [2] per Birss J. referring to *Douglas v Hello* [2007] UKHL 21; [2007] 4 All E.R. 545.
[7] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 at [11] (Lord Nicholls) referring to *Wainwright v Home Office* [2003] UKHL 53; [2004] A.C. 406.
[8] Human Rights Act 1998 s.1.
[9] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (2003-04, HL 39, HC 382), para.86.
[10] Human Rights Act 1998 s.6(1).
[11] Human Rights Act 1998 s.6(3).
[12] See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [18].

The current law: breach of confidence and privacy

There is no sui generis law prohibiting publication of non-consensual pornography. However, the common law tort of breach of confidence may offer remedies where private images have been published without consent, as this type of civil action protects confidential information within and outside of marriage.[13] Similarly, further dissemination of private images ("sharing") may also be privy to a breach of confidence suit as there is no requirement for a confidential relationship to exist between the parties; the obligation of confidence can be implied.[14] Individuals publishing and sharing private images without consent may find themselves implicated as "a 'duty of confidence' [arises] whenever a person receives information he[15] knows or ought to know is fairly and reasonably to be regarded as confidential"[16] or, more specifically, when it is to be regarded as "private"[17]. The HRA has intensified development of the tort by virtue of ECHR arts 8 and 10. The Act has "provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court"[18] as the law protects "violation of a citizen's autonomy, dignity and self-esteem".[19] Essentially, the court will consider whether the subject had a reasonable expectation that the images would remain private and confidential; if so, whether the publisher has a "public interest" defence under art.10.[20]

Photographs and video footage including "selfies"

Images taken by the subject (known as "selfies") or by the partner and shared with each other through a technological medium such as picture messaging, undoubtedly fall within the sphere of confidential or private information.[21] Clearly the subject would have a reasonable expectation that sexually explicit images shared with a partner would remain private and confidential as the images are not readily available in the public domain and are unlikely to be "known by anyone other than the participants"[22]. As Tugendhat J. recounts, photographs are an intrusive medium affording viewers the opportunity to minutely focus on the most intimate details of an individual's private life.[23] Moreover, the level of intimacy and intrusion imbued by disseminating sexually explicit images will render any defence of public interest unlikely.[24] Even where a public interest defence may be legitimate such as in *Mosley v News Group Newspapers Ltd*[25] (had the "Nazi-themed" roleplay been successfully proven) and *Theakston v MGN Ltd* [26] (detailing prominent visits to a brothel by a children's television presenter), it is likely that publishing pictures or video footage depicting the "gory details" would be a step too far.[27]

Even if the defendant's art.10 freedom of expression right prevails in certain circumstances, this is likely to be confined to a textual description because images provide a more lurid and memorable expression. The public cannot unsee what it has seen but it can more easily forget what it has read. Consequently, publishing explicit images without consent would amount to a breach of confidence or misuse of private information. [28] Hence, evidence prevailing, claimants founding a breach of confidence suit in these circumstances are likely to be successful, regardless of whether the images were taken with or without consent, by themselves or the partner, and subsequently shared with each other. The problem for the litigant however, is proving the defendant's guilt if he does not admit liability.

Practical considerations of breach of confidence

Although distributing non-consensual pornography will likely fall within the sphere of breach of confidence, it can be argued that the practical implications of private law offer little scope to save the victim's pain, humiliation and expense.

Costs and damages

In the first instance, breach of confidence is a civil action and generally requires the claimant to fund the cost of litigation from the outset.[29] Although the Jackson Reforms of curtailing uplifted civil litigation costs do not extend to privacy and publication proceedings such as breach of confidence and misuse of private information,[30] civil action for non-consensual pornography would probably

[13] *A v B Plc* [2002] EWCA Civ 337; [2003] Q.B. 195.
[14] *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302; [1965] 2 W.L.R. 790 at 322 per Ungoed-Thomas J.
[15] "He", "him" and "his" in this article refer to both genders (Interpretation Act 1978 s.6.
[16] *Att-Gen v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109 at 281 per Lord Goff.
[17] See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [14] per Lord Nicholls.
[18] *A v B* [2002] EWCA Civ 337 at [29] per Lord Woolf C.J. referring to Jack J. in the High Court: *A v B Plc* [2001] 1 W.L.R. 2341 at [63].
[19] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20 at [7] per Eady J.
[20] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [10] per Eady J.
[21] *Contostavlos v Michael Mendahun* [2012] EWHC 850 (QB).
[22] *A v B* [2002] EWCA Civ 337 at [4] per Lord Woolf C.J.
[23] See *Contostavlos v Michael Mendahun* [2012] EWHC 850 (QB) at [105] per Tugendhat J.
[24] *Contostavlos v Michael Mendahun* [2012] EWHC 850 (QB) at [25] per Tugendhat J.
[25] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).
[26] *Theakston v MGN Ltd* [2002] EWHC 137 (QB); [2002] E.M.L.R. 22.
[27] See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [60] per Lord Hoffmann.
[28] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 at [14] per Lord Nicholls.
[29] The Right Honourable Lord Justice Leveson, "An Inquiry into the Culture, Practice and Ethics of the Press" HC 780 -IV (November 2012) 1479, 1500 [2.4] at *http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_iv.pdf* [Accessed September 15, 2014].
[30] Ramsey J., "Implementation of the costs reforms" (2013) C.J.Q. 32 112, 115.

only be undertaken on a conditional fee arrangement basis[31] if the litigant solicitors are convinced of the likelihood of winning.

In the event that the claimant can either afford to fund litigation independently or via a CFA and wins the case, costs may be recovered from the defendant as, notwithstanding the court's discretion to make an alternative order, "(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"[32] (CPR Pt 44). Celebrities, politicians and newspapers may have the financial means to instigate civil proceedings and pay costs and damages should they lose. However, in such cases where parties are members of the general unknown public, the potential for reclaiming costs and suing for damages largely depends on the financial capabilities of the parties. If the claimant has no money, it is likely they cannot sue unless their chances of winning are very high. If the defendant has no money, it is likely they cannot pay costs and damages in practice, even if required legally. Hence, the financial freedom of both parties will impact massively on whether a claimant can pursue a cause of action in the first place and if so, the likelihood of ever recovering costs and damages awarded.

To mitigate this, it may be possible to hold to account, as joint tortfeasors, other parties who subsequently share and publish private images.[33] "Other parties" includes individuals sharing and publishing private images on social media networks like Twitter, Facebook and, more likely, dedicated revenge porn websites. It is unlikely that internet service providers ("ISPs") who have no control over external content can be held liable as joint tortfeasors in such circumstances unless the claimant submits a request for image removal which is then ignored.[34] Certainly, in defamation cases such as *Tamiz v Google*,[35] *Godfrey v Demon Internet*[36] and *Bunt v Tilley*,[37] ISPs may be facilitators of information but they are not secondary publishers.

In the context of non-consensual pornography however, it is suggested that under the principles in *Tamiz*, it may be possible to hold to account as a joint tortfeasor the owner of a revenge porn website. He is not passive and there is an argument that he may be a publisher of information.[38] His role is to facilitate non-consensual pornography by providing a dedicated platform which encourages publishers to upload sexually explicit images of their ex-partners specifically to wreak revenge and public humiliation; images which very likely fall within the sphere of breach of confidence/misuse of private information. Without such platforms, there would be nowhere dedicated to upload the images. Publishers would have to use regular social media such as Facebook where, in the first instance, the victim has a large degree of control over what can be posted on her personal page by altering privacy settings and in the second, the webmaster would ultimately remove the offending images upon request or discovery. The same cannot be said for a dedicated revenge porn website owner who will very likely leave the images ad infinitum or endeavour to charge inexorable amounts of money for their removal.[39] Furthermore, although uploading and viewing images is generally free of charge on such websites, the owner very likely profits from advertising revenue as the more traffic the website receives, the more the owner can charge in advertisement and website referral fees. Indirectly, he facilitates and profits from misuse of private information. Although this is mitigated to some extent by the recent *Google Spain* case encompassing the "right to be forgotten"[40] which affords subjects the right to request search engines to remove links regarding certain information, (a move which has been criticised by the UKHL on freedom of expression issues[41]), it does nothing to prevent publication at the outset.

Notwithstanding this, damages may only extend proportionately to the subsequent tortfeasor's contribution to the breach or misuse of private information.[42] Where the image has been shared innumerably, the claimant may have to settle for the defendant with "the deepest pockets". Given that a quick search on a notorious US revenge porn website[43] reveals almost a thousand pages of explicit images posted of the general public rather than celebrities, it is suggested that a breach of confidence suit offers limited, if any, protection for violations against the majority of its victims, regardless of whether action is taken against the primary infringer alone or others as joint tortfeasors.

Remedies

In the second instance, damages cannot be quantified to alleviate the suffering and humiliation inflicted on the claimant. Victims of non-consensual pornography may

[31] CFA: no-win-no-fee/uplifted costs.
[32] CPR 44(2)(2) at *www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#section1* [Accessed September 15, 2014].
[33] *Contostavlos v Michael Mendahun* [2013] EWHC 4026 (QB).
[34] *Tamiz v Google Inc* [2013] EWCA Civ 68; [2013] 1 W.L.R. 2151.
[35] *Tamiz v Google Inc* [2013] EWCA Civ 68.
[36] *Godfrey v Demon Internet Ltd* [2001] Q.B. 201.
[37] *Bunt v Tilley* [2006] EWHC 407 (QB); [2007] 1 W.L.R. 1243.
[38] *XY v Facebook Ireland Ltd* [2012] NIQB 96 at [21] per McCloskey J.
[39] Christopher Hope, "British women paying hundreds of dollars to US websites to remove revenge porn images" The Telegraph, July 21, 2014) at *www.telegraph.co.uk /news/politics/10981462/British-women-paying-hundreds-of-dollars-to-US-websites-to-remove-revenge-porn-images.html* [Accessed September 15, 2014].
[40] *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (C-131/12) [2014] 3 W.L.R. 659.
[41] *The Law Society Gazette*, at *www.lawgazette.co.uk/law/right-to-be-forgotten-must-go-lords-committee-says/5042439.article* [Accessed September 15, 2014].
[42] See *Contostavlos v Michael Mendahun* [2012] EWHC 850 (QB) at [24] per Dingemans J.; rather than 100% liability as in causation in a negligence tort: *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovenor & Son)* [2002] UKHL 22; [2002] Lloyds Rep. Med. 361.
[43] See *www.myex.com* [Accessed September 15, 2014] PLEASE NOTE SITE CONTAINS SEXUALLY EXPLICIT MATERIAL THAT MAY NOT BE SUITABLE FOR OR MAY OFFEND SOME READERS.

be powerless to prevent publication at the outset as civil actions and remedies are generally only available after the event. A breach of confidence suit can be brought quickly to prevent publication with an interim injunction before the case is decided,[44] and in the context of private information, a final injunction preventing publication entirely would be the most likely outcome.[45] However, this requires awareness by the victim or prior notification that the images will be published; something which the perpetrator is unlikely to do given that the seminal purpose of non-consensual pornography is to publicly humiliate the subject. Furthermore, even if a final injunction is granted, private images are incredibly difficult to locate once shared.

The current law: other causes of civil action

Copyright infringement

In relation to "selfies" published on revenge porn websites, copyright will be owned by the victim as the person who took the photograph is the author of the work, and owns the copyright.[46] Legal action can be brought against persons or legal entities publishing or sharing images as exclusive publication and distribution rights vest with the author.[47] Unless the infringer has attempted to profit from his actions thereby potentially attracting criminal sanctions,[48] the claimant will pursue civil action.

The impracticalities of a civil cause of action for copyright infringement in these circumstances however, are tripartite. In the first instance, similar problems arise as with a breach of confidence suit in that the claimant will most likely have to fund the cost of litigation from the outset, reclaiming costs and damages if she wins. Secondly, revenge porn websites allow for anonymous uploading of images.[49] The problem for the claimant therefore is evidential. How do you prove that an ex-partner has infringed copyright unless there are identifiable upload records? In the third instance, evidential problems may arise in relation to the territorial nature of copyright ownership. Taking the United States as an example, due to registration requirements before legal action,[50] a petition to the website owner for swift removal of the images may require the complainant to produce a formal registration of copyright ownership; otherwise, lengthy court action for copyright infringement pursuant to the Berne Convention[51] will be the claimant's only option. Again, this is problematic given that Berne does not have direct effect. In other words, the claimant cannot sue in their domestic court for infringements in another jurisdiction; they must sue in the country where the infringement occurred.

Harassment and offensive, threatening and malicious communication

Where additional private information has been published alongside non-consensual pornography such as names and telephone numbers, it may be possible to bring an action against the perpetrator for harassment[52] or threatening and/or malicious communication. [53]In relation to harassment, this action may incur criminal and/or civil sanctions where the perpetrator has "stalked" the victim on two or more occasions.[54]

Criminal charges for harassment could be brought against the perpetrator by the CPS under s.2A(3) of the Act for "stalking" providing that the contact satisfies the Crown Prosecutor's evidential and public interest stage.[55] The course of conduct concerned would have to be proven, beyond reasonable doubt, to amount to at least two occasions and where "a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other". In the alternative, harassment victims could pursue a civil cause of action under s.3 of the Act for an injunction preventing further conduct, and a claim for damages/costs. The standard of proof is lower than in a criminal suit as the claimant would only have to prove guilt on the balance of probabilities.

Similarly, perpetrators of oral or written communication by conventional or electronic means of an indecent, grossly offensive, threatening or false nature, with the purpose of causing anxiety and distress,[56] may be prosecuted subject to the CPS evidential and public interest test. This includes messages conveyed by "a public electronic communications network"[57] such as Twitter and Facebook. Once again, none of these actions prevent publication of private images at the outset which causes the most damage to the claimant. Furthermore, such images, unless of an extreme nature, are unlikely to fall within the sphere of the existing Statutes.[58]

[44] *A v B* [2002] EWCA Civ 337 at [7] per Lord Woolf C.J.
[45] *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 A.C. 253.
[46] Copyright, Designs and Patents Act s.1; s.9.
[47] Copyright, Designs and Patents Act s.16; s.18.
[48] Copyright, Designs and Patents Act s.107.
[49] As an example: *www.myex.com/faq/* [Accessed September 15, 2014] PLEASE NOTE SITE CONTAINS SEXUALLY EXPLICIT MATERIAL THAT MAY NOT BE SUITABLE FOR OR MAY OFFEND SOME READERS.
[50] US Copyright Act 1976 s.411.
[51] Berne Convention art.3(1). Without the author's consent, the works will be classed "unpublished".
[52] By virtue of the Protection from Harassment Act 1997.
[53] Malicious Communications Act 1998; Communications Act 2003.
[54] Protection from Harassment Act 1997 s.2; Serious Organised Crime and Police Act 2005 s.125(3A)(7).
[55] CPS: The Code for Crown Prosecutors 4.1–4.12 at *www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html* [Accessed September 15, 2014].
[56] Malicious Communications Act 1988.
[57] Communications Act 2003 s.127.
[58] Select Committee on Communications, *Social media and criminal offences* (2014-15, HL 37), para.40.

Proposed changes to the current law: introducing a new criminal offence

There has been a notable sea change in relation to intrusive misuse of private information, particularly since the phone hacking scandal and the subsequent Leveson Inquiry. Notably, former Culture Secretary Maria Miller, advocates that revenge porn should be seen as a "criminal sexual offence against its victims"[59]. Given the futility of current laws in preventing publication of non-consensual pornography at the outset, this article proposes introducing a new criminal offence for misuse of private information under the Coroners and Justice Act 2009.

European and International developments

Germany

It is useful to consider comparatively what other countries have proposed as non-consensual pornography is a global phenomenon. Recently, a higher regional court in Koblenz ruled that intimate photographs from a previous relationship should be deleted where a partner requests.[60] In this context, personal rights were "valued higher than the ownership rights of the photographer".[61] Oxford University Professor Viktor Mayer-Schönberger, suggests that the ruling came directly in response to the CJEU ruling in *Google Spain*[62]; however, it is too early to say whether this may set precedence in the German courts.

United States

The United States appears to be leading the way for criminalisation. During the last two years, 11 US states have enacted specific revenge porn laws prohibiting unlawful distribution of private images.[63] In California, for example, it is a criminal offence to:

> "intentionally distribute by any means an image of the uncovered, or visible through less than fully opaque clothing, body … parts of another identifiable person or an image of another identifiable person engaged in a sexual act, knowing that the depicted person does not consent to the distribution of the image."[64]

In Hawaii, it is an offence to:

> "knowingly disclos[e] an image or video of another identifiable person either in the nude or engaging in sexual conduct without the consent of the depicted person with intent to harm substantially the depicted person;"[65]

whilst in Arizona, it is against the law to:

> "intentionally disclose, display, distribute, publish, advertise, offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure."[66]

In Colorado, the offence is specifically engendered to the social media. It is unlawful to:

> "post or distribute through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older"[67]

if the intention is to harass the depicted person and inflict serious emotional distress, post without consent or when the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private, and the action results in serious emotional distress of the depicted person. [68]In other US states, Bills have been introduced to prohibit non-consensual pornography.[69]

Canada

In Canada, a Bill (known as C-13) was introduced in November 2013[70] encompassing a range of offences, including the introduction of a new criminal offence to combat revenge porn. Although controversial due to its alleged intrusive nature,[71] the Bill passed the second reading in May this year. The sanctions proposed for the new offence include no more than five years' imprisonment on indictment and a maximum of six months' imprisonment for a summary offence.[72] It is not yet law.

[59] BBC, "PMQs: Cameron and Miller on 'revenge porn' offences" News Politics, July 9, 2014 at *www.bbc.co.uk/news/uk-politics-28228608* [Accessed September 15, 2014].
[60] Philip Oltermann, "'Revenge porn' victims receive boost from German court ruling" The Guardian, May 22, 2014 at *www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling* [Accessed September 15, 2014].
[61] Philip Oltermann, "'Revenge porn' victims receive boost from German court ruling" The Guardian, May 22, 2014.
[62] Philip Oltermann, "'Revenge porn' victims receive boost from German court ruling" The Guardian, May 22, 2014; see above also.
[63] Arizona, California, Colorado, Georgia, Idaho, Hawaii, Maryland, Pennsylvania, Utah, Virginia and Wisconsin. National Conference of State Legislatures at *www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx* [Accessed September 15, 2014].
[64] See *www.leginfo.ca.gov/pub/13-14/bill/asm/ab_2601-2650/ab_2643_bill_20140221_introduced.htm* [Accessed September 15, 2014].
[65] Hawaii State Legislature at *www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=1750&year=2014* [Accessed September 15, 2014].
[66] State of Arizona at *www.azleg.gov/legtext/51leg/2r/laws/0268.pdf* [Accessed September 15, 2014].
[67] See *www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont3/B8622059E18D26C687257C9A005794F0?Open&file=1378_enr.pdf* [Accessed September 15, 2014].
[68] See above.
[69] Notably: Delaware, Illinois, Missouri, New Jersey and New York at *www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx* [Accessed September 15, 2014].
[70] Protecting Canadians from Online Crime Act.
[71] Government of Canada Department of Justice at *www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_33010.html* [Accessed September 15, 2014].
[72] Alex Cochrane, "The Perils of 'Revenge Porn'—Part 2" Collyer Bristow, July 17, 2014 at *www.collyerbristow.com/content/the-perils-of-revenge-porn-part-2* [Accessed September 15, 2014].

Australia

The State of Victoria became the first to criminalise revenge porn by amending its current "stalking" offence to include sanctions for "non-consensual distribution of intimate images"[73] at the end of 2013. Action may be brought under the Crimes Act 1958 if the perpetrator publishes "other information"[74] on the internet which could include intimate images or "act[s] in any other way that could reasonably be expected … to cause physical or mental harm to the victim".[75] It has been criticised for not going far enough.

Proposed changes to the current law: the case for criminalisation in the United Kingdom

It is suggested that publishing, disseminating and distributing non-consensual pornography by electronic and conventional methods, ought to be criminalised under the Coroners and Justice Act 2009 by introducing a statutory instrument entitled, "Misuse of Private Information Regulations 2014". Drawing from US State Legislature, this could be inserted into the Act as follows:

"Coroners and Justice Act 2009
PART 2 CRIMINAL OFFENCES
CHAPTER 3 OTHER OFFENCES
73A Misuse of private information

(1) A person (D) commits an offence if—

(a) D intentionally or recklessly publishes, disseminates and/or distributes by any means an image of a person over the age of eighteen,[76] either moving or still, captured by D or the subject in any format, of the uncovered, or visible through less than fully opaque clothing, body parts of another identifiable person or an image of another identifiable person engaged in a sexual act, where D knows or ought to know that the depicted person does not consent to the distribution of the image; or,

(b) By virtue of the Serious Crime Act 2007 Part 2, D encourages or assists another to commit the offences outlined in (1) (a) or (d); or,

(c) D facilitates the practice of non-consensual distribution outlined in (1) (a) and (d) by providing a dedicated website or similar platform for online distribution of private information.

(d) In addition to, and in the context of, the offences outlined in (1) (a) and (c), D intentionally or recklessly distributes by any means other information relating to the depicted person deemed to be private. For the purpose of the Act, 'other information' includes but is not limited to:

(i) Names
(ii) Addresses including home, business, employment
(iii) Age
(iv) Date of birth
(v) Email addresses
(vi) Telephone numbers including landline and mobile
(vii) Employee, national insurance and/or tax reference numbers
(viii) Details of the subject's immediate family
(ix) References to the subject's social media and/or business networking profiles.

(2) For the purpose of this statutory provision—

(a) 'images' and 'private information' includes but is not limited to—

i. Photographs in print or digital format;
ii. Video footage stored on hard copy format including but not limited to a DVD, CD, videotape recording, or in digital format;
iii. Information outlined in Section 73A (1) (d) Coroners and Justice Act 2009

(b) 'publishing' includes but is not limited to—

i. Disseminating with the intent or recklessness that such image or images or other

[73] Government of Canada Department of Justice, at *www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/a2.html#ftn54* [Accessed September 15, 2014].
[74] Crimes Act 1958 s.21A(2)(ba).
[75] Crimes Act 1958 s.21A(2)(g).
[76] Images of persons under the age of 18 fall within Coroners and Justice Act 2009 Pt 2 Ch.2 s.62.

information be made available by any means to any person; or,

ii. Disseminating with the intent or recklessness that such image or images or other information be sold by another person; or,

iii. Post, present, display, exhibit, circulate, advertise, sell or allow access by any means so as to make an image or images or other information available to the public; or,

iv. Disseminating with the intent or recklessness that an image or images or other information be posted, presented, displayed, exhibited, circulated, advertised, sold or made accessible by any means and to make such image or images available to the public.

(c) 'body parts' is limited to—

i. Unclothed external genitalia, the perineum and anus of a male or female

ii. Buttocks of a male or female

iii. Breasts and nipples of a female

iv. Covered erectile genitalia of a male.

(d) 'sexual act' includes but is not limited to sexual intercourse including genital-genital, oral-genital, anal-genital, oral-anal, whether between persons of the same or opposite sex.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a level 5 fine not exceeding £5000, or both;

(b) on indictment for conviction, to imprisonment for a term not exceeding 24 months or a fine not exceeding £5000, or both.

(4) Section 73A Coroners and Justice Act 2009 does not apply in situations involving voluntary exposure in public or commercial settings."[77]

The draft encompasses research of US state legislature recently enacted to combat revenge porn. There is however, a lacuna in this proposal where anonymous publishing is permitted. As has been recognised, "there is little point in criminalising certain behaviour and at the same time legitimately making that same behaviour impossible to detect".[78] Anonymity is a contentious issue. Compelling website owners to collect and maintain data pertaining to individual users is untenable due to the impracticality of checking user credentials for authenticity. In contrast, anonymity renders prosecution under the draft problematic if the perpetrator cannot be identified. Technological advances may pinpoint the precise electronic device used to upload private information[79] but it does not follow that the owner of the device carried out the unlawful activity.

It could be argued that adult-natured website owners should be prevented from allowing anonymity due to the potentially intrusive, damaging nature of such images. However, this is unworkable for websites facilitating consensual image uploads where users voluntarily choose to post sexually explicit images but seek to maintain a degree of anonymity. Posting consensual private images is not a crime unless they are classified "extreme" or illegal. However, it must be argued that where a website facilitates unlawful activity, such as music sharing websites for example, the owners should and will be prosecuted. Given that a revenge porn website would facilitate a crime under the new proposal, it is suggested that removing websites that encourage and incite revenge porn by criminalising such platforms mitigates, to some extent, this highly contentious area. There still remains the issue of social networking where users may not use genuine identities and are unidentifiable.[80] However, persons engaging in the social media must take precautions against unsolicited posts on their personal pages. The law will facilitate prosecution but it cannot protect everyone from everything all of the time.

Regretfully, the House of Lords rejected proposals to criminalise non-consensual pornography, as it was not "necessary to create a new set of offences specifically for acts committed using the social media and other information technology".[81] It is suggested that in this context, the House failed to consider fully the impact of revenge porn. It was noted that private and criminal law

[77] Other defences may be permitted and drafted accordingly such as lawful and common practices of law enforcement, criminal reporting, legal proceedings and/or medical treatment.
[78] Select Committee on Communications, *Social media and criminal offences* (2014–15, HL 37), para.54.
[79] Select Committee on Communications, *Social media and criminal offences* (2014–15, HL 37), para.50.
[80] Such as Facebook, Twitter, Ask.fm.
[81] See Select Committee on Communications, *Social media and criminal offences* (2014–15, HL 37), para.94.

already assists. However, only marginal commentary was made regarding the cost implications of private law, and nothing about the consequences on the victim as highlighted in this article: that in reality, private and criminal law is only available when catastrophic damage to the victim, her family and possibly her career has already been done. In the words of Lord Woolf C.J., the damage will have been done if publication is not prevented swiftly[82]; damage that cannot be quantified in money.[83] Deterrence must be paramount. It must be argued that the failure of current criminal and civil action allows perpetrators to carry out the intrusive and humiliating practice of publishing private images with little deterrent; a practice which is already deemed unlawful in the courts under fundamental rights enshrined in the HRA.[84] It has been suggested that people may not be "afraid of being sued because they have nothing to lose, [but] are afraid of being convicted of a crime because that shows up on their record forever".[85] Publication must be deterred from the outset and, given the inherent failure of the current law to adequately combat this increasing and worrying phenomenon, deterrence can only be achieved by introducing a new criminal offence. Criminal law punishes acts against the state rather than the individual.[86] Revenge porn is an act against the public morals of the state and should be subject to public censure. No law-abiding citizen could ever imagine that the act of posting pornographic images without consent has a place in society.

Conclusion

Publishing non-consensual pornography negatively impacts upon a person's well-being, career and standing within the community. It affects future relationships and naturally attracts criticism of the victim rather than the perpetrator. Whilst there have been commendable developments in the law of privacy and breach of confidence in the dawn of the 21st century, this article has highlighted inadequacies in the current law to combat revenge porn. Furthermore, it has proposed amendments to current criminal legislation to deter publication of private sexually explicit images at the outset. It is already good case law that the art.10 freedom of expression right to publish such images does not outweigh the individual's right to privacy, autonomy and dignity in this context[87]; nor is it a vehicle for publishing confidential information.[88] It is further recognised that to act as a deterrent, the law must be robustly enforced with the correct toolkit. Whilst it is, as yet, impractical to remove anonymity from the social media, criminalising dedicated websites is a manifest step forward in preventing this worrying trend:

> "The purpose of the Criminal Justice System … is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent."[89]

The current law does little to protect the innocent and even less to punish the guilty. It is time for change.

[82] *A v B Plc* [2002] EWCA Civ 337 at [7] per Lord Woolf C.J.
[83] *A v B Plc* [2002] EWCA Civ 337 at [43(v)].
[84] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457; *A v B Plc* [2002] EWCA Civ 337; [2003] Q.B. 195; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20.
[85] Mary Ann Franks, "Combating Non-Consensual Pornography: A Working Paper" (December 2013), (8) (fn.17) citing Tracy Clark-Flory, Salon.com, "*Criminalizing Revenge Porn*," April 6, 2013 at *http://ssrn.com/abstract=2336537* [Accessed September 15, 2014].
[86] See Select Committee on Communications, *Social media and criminal offences* (2014–15, HL 37), para.11.
[87] See above.
[88] European Convention of Human Rights art.10.
[89] Centre for Crime and Justice Studies at *www.crimeandjustice.org.uk/resources/purpose-criminal-justice-system* [Accessed September 15, 2014].