

“Trust me, it’s only for me”: ‘Revenge Porn’ and the Criminal Law

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The Obscene Publications Act 1959 (OPA) can probably legitimately be considered to be the first modern statute that sought to control access to, *inter alia*, pornography. Since that Act has been passed there have been ten other pieces of legislation that have sought to control pornography in England & Wales. Recent years have seen an acceleration in the number of legislative instruments being passed, with six being introduced since 2000. The *Criminal Justice and Courts Act 2015* introduced two new offences relating to pornography. Section 33 criminalises the disclosure of private sexual photographs and films (tackling so-called ‘revenge porn’) and s.37 widens the definition of extreme pornography to encompass images of rape. This article seeks to explore one of these new offences – revenge pornography – and seeks to understand why it was introduced, whether it will meet its aims, and whether there were alternatives to doing so.

The new offence

The new offence does not mention the term ‘revenge pornography’ but it is clear from Hansard that this was the reasoning behind its introduction.¹ The offence was introduced at a relatively late stage, the original Bill making no mention of this provision even by the time it completed its passage through the House of Commons. An Early Day Motion² urged the government to introduce legislation to combat this phenomenon and the House of Lords introduced an amendment to do so.³ The government agreed to work with the Lords and ultimately s.33 was created.

Section 33(1) states:

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

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

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¹ See section 33 of the *Explanatory Notes*.

² Early Day Motion 192 of Session 2014-15 sponsored by Julian Huppert MP, Tim Farron MP, Peter Bottomley MP, Alan Meale MP, Greg Mulholland MP and Julian Lewis MP.

³ Hansard, HL Debates, vol 755, col.968, 21 July 2014 noting an amendment by Lord Marks of Henley-on-Thames.

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

It is not an offence to disclose the photograph⁴ to an individual who features in it.⁵ Presumably this provision was included to ensure that there was no danger that a couple who consensually agree to film themselves in a sexualised way would be criminalised for showing each other that image as part of their relationship. However this section would not have been required for this purpose as s.33(1) clearly indicates *mens rea*, that being the intention to cause distress. Where X and Y look at the photograph they took of each other then there would, presumably, be no intention to cause distress. However the blanket exemption causes problems in other contexts:

D films himself and V having sexual intercourse in his bedroom. Three days later he shows V the image saying ‘I’ve got a little souvenir of our time together’. This causes V considerable distress because she did not know she was being recorded and is fearful of what D may do with the image.

This would not be an offence under s.33(1) because D has only shown the image to the person that is featured within it, something protected by s.33(2). Of course this may not be a loophole because D may well have committed the offence of voyeurism.⁶ However it is not necessarily that easy.

D and V decide ‘for a bit of fun’ to record V performing a sex act on D. After watching it D promises V that he will delete the footage. In fact he does not. A week after V ends the relationship with D he contacts her and shows her the footage saying “look what I’ve got”.

The above example could cause V considerable distress and yet would not infringe s.33(1) because of s.33(2). Nor could D be guilty of voyeurism because the recording was consensual. This is odd. V would have to rely on the *Protection from Harassment Act 1997*

⁴ Whilst s.34(4)-(8) defines ‘photograph’ this article will not consider this definition as it is largely non-contentious and therefore reference will be made to ‘photograph’ throughout this article. There remains an issue about pseudo-photographs that is picked up below.

⁵ s.33(2), CJCA 2015.

⁶ s.67, *Sexual Offences Act 2003*.

although this would require a course of conduct, or if it was disclosed to her through a communications device, then communication offences could be used.⁷

Three further defences are introduced by the Act:

- D reasonably believed the disclosure was necessary for the purposes of preventing, detecting or investigating crime (s.33(3)).⁸
- D made the disclosure in the course of, or with a view to, the publication of journalistic material and he or she reasonably believed that publication of the material was in the public interest (s.33(4)).⁹
- D reasonably believed the footage had been disclosed for reward (by the individual or anyone else) and he or she had no reason to believe that the previous disclosure was made without the consent of the person who features in it (s.33(5)).

The second and third defences require D to prove the facts above although it is clear that it is an evidential burden, with D required to adduce ‘sufficient evidence of the matter...to raise an issue with respect to it’. The prosecution must then disprove this beyond all reasonable doubt.¹⁰ The first defence however imposes no burden on D.

Disclosure and Consent

At the heart of this offence are the concepts of ‘disclosing’ and ‘consent’. The former is relatively easy to define. Section 34(2) states ‘a person “discloses” something if, by any means, he or she gives or shows it to the person or makes it available to the person’. The Act states that whether it is disclosed for reward is irrelevant¹¹ as is whether it has previously been given, shown or made available.¹²

⁷ *Malicious Communications Act 1988*, s.1 (which was itself amended by the CJCA 2015 when s.32 increased the maximum penalty to two years’ imprisonment) or *Communications Act 2003*, s.127. Both of these provisions are discussed below.

⁸ Interestingly nothing in the Act requires the disclosure in such circumstances to be to the police although presumably who it was disclosed to will be a factor in judging its reasonableness.

⁹ This may appear an unusual defence but it has been suggested that if, for example, at that time a photograph of Bill Clinton and Monica Lewinsky was disclosed by someone to a journalist, this would be an example of a newsworthy story and an action that should not be criminalised: C. Barmore ‘Criminalization in Context: Involuntariness, Obscenity, and the First Amendment’ (2015) 67 *Stanford Law Review* 447-478 at 470.

¹⁰ s.33(6), CJCA 2015.

¹¹ s.34(3)(a), CJCA 2015.

¹² *Ibid.*, s.34(3)(b).

It is unlikely that either ‘gives’ or ‘shows’ is going to cause any problems in interpretation. The expression ‘make available’ is something that can be applied in a number of contexts, particularly in respect of technology. In the context of indecent photographs of children it was held in *R v Dooley*¹³ that ‘making available’ can include use of Peer-to-Peer networks where material is left in the ‘my shared’ folder and there is no reason to suppose that the same should not apply to the offence of revenge pornography.¹⁴ By the same logic, placing images onto a web-hosting service, social network site etc. should constitute ‘making available’.

The second issue is that of consent. The offence is only triggered where the image is disclosed without the consent of the individuals who are featured within the image. The Act is silent as to what happens where multiple people are in the photograph. The logical response would be to require consent from all those featured although that potentially raises an oddity, which is expanded upon below.

‘Consent’ is not specifically defined although s.33(7)(a) states that ‘consent...includes general consent covering the disclosure, as well as consent to the particular disclosure’. This would suggest there is no requirement to show the individual consented to each and every distribution (which would be problematic) but the Act is silent on the converse. So what of the following position?

D, a citizen of Sweden, takes a sexualised picture of V, her British girlfriend, as an ‘art project’. V consents to the image being disclosed in a discreet art exhibition in Sweden believing few people that know her would ever see such an exhibition. In fact D uploads the picture to a pornography site and it is seen by a number of V’s work colleagues.

Setting aside *mens rea* for a moment, could D be culpable under s.33? Section 33(7)(a) suggests a person can give general consent but what about limited consent? In other words, can V specify those to whom the image may be disclosed such that if D went

¹³ [2006] 1 WLR 775; [2006] Crim LR 544.

¹⁴ *Dooley* raised an issue of *mens rea* but that is specific to indecent photographs of children and the ratio of that offence would not apply to the offence of revenge pornography as here it is part of the *actus reus*.

beyond that he would act without V's consent? Ordinary understandings of consent would suggest that V can provide specific limits on consent¹⁵ but why did Parliament not make that express if it felt it necessary to introduce s.33(7)(a)? Realistically this subsection is superfluous as it could have been left to contemporary understandings of consent.

Private and Sexual

The image disclosed must be private and sexual. These terms are defined in s.35. 'Private' means 'it shows something that is not of a kind ordinarily seen in public'¹⁶. Interestingly the section does not require that it is done in private (thus it could apply to public spaces, something not the case in respect of voyeurism¹⁷) but simply requires that the act is not one ordinarily done in public. What is the point of this section? It is very difficult to conceive of a sexual activity that would ordinarily be done in public and by not requiring the actual act to be done in private the section appears superfluous. Realistically the only relevant test is whether the activity recorded is sexual.

A photograph is sexual if:

- (a) it shows all or part of an individual's exposed genitals or pubic area,
- (b) it shows something that a reasonable person would consider to be sexual because of its nature, or
- (c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.¹⁸

To an extent this is largely uncontroversial, but rather than create another definition of 'sexual' it would have been sensible to use existing definitions, most notably that given in s.78, *Sexual Offences Act 2003*. Section .35(3)(a) would still have been required because the depiction of the genitals or pubic area is not by itself sexual. However paragraph (a) raises other questions. We can presume the reference to 'exposed' must apply equally to genitals and the pubic region because otherwise photographs of a person in underwear could potentially be caught. By why only genitals? The female breast is not considered a genital and so this potentially limits the offence. For example, if V sends a picture of

¹⁵ See, for example, *R (on the application of F) v DPP* [2014] QB 581.

¹⁶ s.35(2).

¹⁷ ss.67(1), 68(1), *Sexual Offences Act 2003* and see A.A.Gillespie '“Upskirts” and “down-blouses”': Voyeurism and the Law' [2008] Crim LR 370-382.

¹⁸ s.35(3).

herself topless to D and he subsequently uploads this to an internet sex site, is that caught by s.33?

Of course it could in principle be covered under s.35(3)(b) or (c) but this will inevitably depend on context. Whilst a picture of V posing topless in a sexualised way would be caught by the provisions of s.35(3) it is unlikely that a photograph of a female posing topless on a beach would. This could be problematic:

V, an 18-year-old female, is on holiday with two of her friends (X and Y) for the first time alone. Despite knowing their parents would disapprove, V, X and Y decide to sunbathe topless on the beach because they feel it is unlikely that they would be recognised by anyone. X has taken photographs during the day. The penultimate night of the holiday V and X have a verbal fight. When they return, X sends an email to V to say, 'I've had enough of you. I took a picture of you on the beach and I've emailed it to your parents. Let's see what they make of their little daughter with her bits hanging out'.

In the example above it would seem that the offence under s.33 would not apply for two reasons. The first is that s.35(2) would not apply in that topless sunbathing is something that is ordinarily done in public so it is probably not a private act, and the second is that it is highly unlikely that it would be considered sexual. However X is almost certainly acting in order to cause distress, and the photograph itself is unquestionably private and one that V would not want distributing. It seems a little odd that this photograph is not caught by the Act. If we ignore the requirement that it be a private act (that I have previously argued is superfluous) – so it was a photograph of the three of them posing topless as part of a drunken game inside a house – the sexual element is probably still not satisfied but this is certainly an image that V would not want circulating and which is being circulated to cause distress. Subject to what is said below, it could be thought that this would be a good example of conduct that should be tackled by this offence.

Section 35(5) then adds another twist to the meaning of private and sexual. This subsection applies only to a photograph that is altered or which is a composite.¹⁹ Such photograph is not considered to be private and sexual if:

¹⁹ s.35(4).

- (a) it does not consist of or include a photographed or filmed image that is itself private and sexual,
- (b) it is only private or sexual by virtue of the alteration or combination mentioned in subsection (4),²⁰ or
- (c) it is only by virtue of the alteration or combination mentioned in subsection (4) that the person mentioned in section 33(1)(a) and (b) is shown as part of, or with, whatever makes the photograph or film private and sexual.

This is obviously addressing the issue of pseudo-photographs - those images that have been the subject of alteration or produced through splicing additional images together. However it potentially removes a large sub-set of images from the scope of the offence. Let us take an example:

D and V work together. D is obsessed by V and wishes to be in a romantic relationship but V is not interested. Using a graphic manipulation package, D takes a photograph of V from her Facebook page and superimposes her head from that photograph onto a pornographic image of a porn star. The resultant image makes it look as if V is performing a sex act on herself. D sends this image to everyone at work.

It would seem that this would not contravene s.33 because of s.35(5)(c). It is only the alteration or combination – the splicing of the head to the body – that makes the photograph private and sexual. However is it likely that V’s colleagues will realise that this image is fake? Computer manipulation packages are so sophisticated that spotting fake images is not always easy. Assuming D does this for the purposes of causing V distress – which is likely – is this not an example of the type of conduct that this offence should tackle?

Multiple Persons

It was noted above that the Act is silent as to who must give consent and this, in combination with the definitions of sexual, could lead to interesting questions where

²⁰ This simply describes the way that footage can be adapted or combined.

multiple persons are featured in the footage. Whilst admittedly the example that follows would be somewhat unusual, it is plausible:

A agrees to be recorded by C performing a sex act on B. Unbeknown to A, B and C, X is visible in the resultant footage clearly watching A and B engaging in this sexual act. C realises that X is a local church minister and he tells X that he has sent the footage to his congregation to show them ‘what kind of person he is’. C knows this will cause X distress but does so anyway.

It is unclear whether C would be culpable under the legislation. The syntax of the legislation leaves it unclear. Section 33(1)(a) would appear to be satisfied because the footage that is disclosed is sexual and is disclosed without the ‘consent of an individual who appears in the photograph’ (ie X). The Act does not say that the person in s.33(1)(a) has to be the person who is performing or engaging in the private, sexual act although that is clearly what Parliament intended. However the wording does not achieve this. Section 33(1)(a) requires a photograph to be disclosed without the consent of an individual who appears in the photograph. X appears in the photograph. It is sexual for the purposes of s.35 if, *inter alia*, it shows something that a reasonable person would consider sexual. Clearly this test is satisfied and thus the offence under s.33 would appear complete. However it would be odd in the example above if A and B are happy for the footage to be shown but X’s lack of consent means that any disclosure becomes criminal when the mischief would appear to be to safeguard the sexual autonomy of the person(s) featured (discussed further below).

Mens Rea

The *mens rea* requirement for this offence is quite specific. By virtue of s.33(1)(b) D must act ‘with the intention of causing that individual distress’, thus the offence is one of intent. The requirement is that D intends to cause V distress which would ordinarily be considered to be an emotion more severe than, but related to, upset. However other instruments that mention distress do not restrict themselves to this one emotion²¹ and this must provide more flexibility where the intent is to do something else.

²¹ See, for example, s.1, *Malicious Communications Act 1988* (distress or anxiety) or s.4A, *Public Order Act 1986* (harassment, alarm or distress).

The Act then continues by stating ‘[a] person charged with an offence under this section is not to be taken to have distributed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure’ (s.33(8)). This obviously relates to the issue of oblique intent but the inclusion of this wording is confusing. The first problem is the use of the term ‘natural and probable consequences’ which has, of course, been disapproved of as the test for oblique intent.²² Presumably its use was included to reflect the language of s.8 of the *Criminal Justice Act 1967* but this simply adds to the confusion.

Section 8 states that a jury is not *bound* to infer intention from the fact that it was the natural and probable consequences of the act. This is now accepted to mean that the jury *can* find intent (but only where it meets the *Woollin* threshold) but that they do not *have* to find intent.²³ Section 33(8) would initially appear to suggest the converse – ‘a person...is *not* to be taken to have...’ – but this cannot be correct since it concludes ‘*merely* because that was a natural and probable consequence’ which indicates that there are circumstances when oblique intent could apply.

Perhaps Parliament was concerned that there would be some legitimate disclosures that would inevitably cause distress (and thus caught by oblique intent) and for which they did not believe criminal liability would be appropriate. Let us take two examples:

Example A

X is sent a film that shows A and B engaging in a sex act in the primary school classroom where A works. X sends the footage to the headmistress of the school.

Example B

D recorded footage of V engaging in an explicit sex show. After they split up, D sends the footage to V’s headteacher at a faith-school where V works.

Section 33(8) could be an attempt to criminalise the behaviour in Example B but exclude example A. It could be said in example A that X is potentially liable because distress is virtually certain to be caused by A’s dismissal (a likely consequence of the disclosure). However this culpability only arises because distress is a ‘natural and probable

²² *R v Nedrick* [1986] 1 WLR 1025 and *R v Woollin* [1999] 1 AC 82, [1998] CRIM LR 890.

²³ *R v Matthews and Alleyne* [2003] 2 Cr App R 30, [2003] Crim LR 533.

consequence' of the reporting. There was no apparent malice in the reporting but if oblique intent were to apply then X could be liable.

In example B there would similarly be the oblique intent to cause distress (as the direct intent is likely to have D dismissed from her job) but it cannot be said that D's intention to cause distress arises *merely* from the natural and probable consequences of the reporting. The reasons for disclosure and the person to whom the footage is disclosed would suggest that the actions were deliberate and for an ulterior purpose. Thus this is more than merely relying on the natural and probable consequence, meaning intent could be inferred.

Assuming this is correct then Parliament has adopted a very long-winded solution to the problem. It could have simply relied on s.8, CLA 1967 as the jury could decide in scenario A that it did not wish to infer intent under those circumstances. It is conceded however that would be somewhat high-risk since s.8 is not particularly clearly drafted itself. The alternative would have been to create a defence of disclosing for a legitimate purpose. This could have encompassed the existing defences and also catered for example A above. By creating s.33(8) Parliament has arguably muddied the waters by creating a provision of uncertain wording and application.

Justifying Criminalisation

As the offence has been outlined and, it is submitted, flaws have been detected in its drafting, it is worth noting why the offence was introduced and what the justification is for acting against revenge pornography. There has been some concern in recent years that the law is becoming increasingly paternalistic in its attitude to pornography²⁴ and some may argue that this section follows this pattern. It will be shown, however, that this is not the case.

Relatively little has been said about why the offence was justified, partly because it was introduced at the Lords stage by way of amendment, and partly because it was almost

²⁴ Carline, A. 'Criminal justice, extreme pornography and prostitution: Protecting women or promoting morality?' (2011) 14 *Sexualities* 312-333. It should be noted that not everyone agrees with this and it has been argued that the 'cultural harm' produced by pornography can justify criminalisation: see McGlynn, C. and Rackley, E. 'Criminalising extreme pornography: a lost opportunity' [2009] *Crim LR* 245-260 at 257 et seq.

universally supported by Parliament. A number of different rationales were put forward, including causing victims psychological trauma,²⁵ a breach of an intimate relationship²⁶ or a desire to humiliate ex partners.²⁷ Reference is also made to the fact that there could be consequences to the images being posted, including loss of employment.²⁸ This echoes the literature that exists in respect of revenge porn laws in the USA. There, along with making reference to these effects, the primary justification put forward is that it constitutes an infringement of privacy.²⁹

The difficulty with these justifications is that revenge porn is not unique in this respect. There are many aspects of a person's life which, if disclosed, could cause distress and the loss of employment etc. However breaches of privacy have not ordinarily been protected by the criminal law (save, for example, where they amount to harassment). For example, the disclosure of infidelity could have an impact on employment status in some professions, details of a person's sexuality could cause distress where they wish to keep this private and the release of medical information could lead to both. For example: if D discloses that V is H.I.V. positive in circumstances where this could cause embarrassment or distress (because, for example, friends or colleagues would not understand, or it would result in the loss of employment) the consequences could be significant. The disclosure of such private and sensitive information is central to their identity and autonomy but we would not consider such disclosure to be a criminal wrong (save where it constitutes a pattern of behaviour³⁰).

Therefore we need to consider alternative reasons for criminalising revenge porn. It has been suggested by some that revenge pornography should be criminalised because it can lead to offline harassment or stalking³¹, but this is not particularly convincing. There are lots of acts that can lead to harassment or stalking, but not every such act is criminalised. Indeed, it is the fact that ordinary behaviour can constitute harassment or stalking that

²⁵ Hansard, HC Deb, vol 589, col 122. 1 December 2014.

²⁶ Hansard, HL Deb, vol 755, col 969. 21 July 2014. Lord Marks of Henley-on-Thames.

²⁷ Hansard, HL Deb, vol 755, col 971. 21 July 2014. Baroness Berridge.

²⁸ Hansard, HL Deb, vol 755, col 971. 21 July 2014. Baroness Berridge.

²⁹ Citron, DK and Franks, MA 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345-391 and Barmore, C. 'Criminalization in Context: Involuntariness, Obscenity, and the First Amendment' (2015) 67 *Stanford Law Review* 447-478.

³⁰ Where it could amount to harassment contrary to the *Prevention from Harassment Act 1997*.

³¹ Martinez, C. 'An argument for states to outlaw 'Revenge Porn' and for Congress to Amend 47 USC 230' (2014) 1 *Journal of Technology Law and Policy* 236-252 at 239.

led to Parliament deciding to criminalise a course of conduct for harassment and stalking rather than relying on individual acts.³²

During the passage of the Bill, an interesting statement was made in the House of Commons where it was said that disclosing intimate pictures in this way amounted to a breach of consent³³ and this, or perhaps an adaption of this argument, may be a stronger basis to justify criminalisation. Perhaps the reason for criminalising such conduct is that it is a breach of the individual's ability to control their own (sexual) identity.

A parallel can arguably be drawn with voyeurism. The voyeur gazes on a person without their consent and, in the same way, the distributor allows others to do this. Whilst the voyeur will do this for sexual gratification³⁴ the revenge pornographer will not. However, it is submitted that the underlying wrong does not change because of this. Both revenge pornography and voyeurism involve the misuse of the image of a person's body without their consent. It has been suggested by Calvert and Brown that a difficulty with the posting of the images of an individual is that it interferes with the 'ability of individuals to control the flow of information about themselves',³⁵ which would seem an echo of the same arguments that were rejected above. However if instead of 'information' we consider the integrity of the individual, the sense of what Calvert and Brown says is not lost and indeed it becomes more potent. The essential wrong in both voyeurism and revenge pornography is that it is an attack on the bodily integrity of an individual.

It can be said that both the voyeur and the discloser 'fail to show proper regard for his victim as a chooser, manipulating her into doing things she would otherwise not do if fully 'aware of the circumstances'.³⁶ This comment is pertinent in the context of revenge pornography. In many instances images will have been gathered consensually but if the victim thought there was any chance that her partner would show the footage to others then she would not have agreed to the taking of them in the first place. More than this however it can be said that it is wrong because it fails to show common respect for the

³² For a good discussion on the genesis of the 1997 Act see Finch, E. *The Criminalisation of Stalking* (2001, Cavendish: London).

³³ Hansard, HC Deb, vol 589, col 123. 1 December 2014. Julian Huppert MP.

³⁴ See, for example, R.S. Smith 'Voyeurism: A Review of the Literature' (1976) 5 *Archives of Sexual Behaviour* 585-608.

³⁵ C. Calvert and J. Brown 'Video Voyeurism, privacy and the internet: exposing peeping Toms in Cyberspace' (2000) 18 *Cardozo Arts & Entertainment Law Journal* 469-568 at 488.

³⁶ Doyle, T. 'Privacy and perfect voyeurism' (2009) 11 *Ethics and Information Technology* 181-189 at 182 citing Benn.

individual.³⁷ Whilst people are not ashamed of having sex, sex remains a personal and private act and one that (most) people would not wish to be seen doing.³⁸ The disclosing of sexualised footage offends this principle, and acts against the right of an autonomous individual to choose whether to disclose their sexual identity to others, and to whom.

It is sometimes said that consent to disclosure is simply a binary choice: you either consent to disclosure or not.³⁹ However that is too simplistic. Why should V, who decides that she is happy for her boyfriend to have a picture ‘to remember her by’, be deemed to have consented to the image being uploaded to the internet? We would not consider that an appropriate argument for any other form of sexual consent, so why should it apply to photographs? We must accept that consent can be limited and that just because V chooses to give an image to someone it does not mean that she would be happy for it to be disclosed to others. This is a fundamental part of sexual autonomy and identity, and it is this which the offence should be seeking to protect.

Unfortunately the offence fails to secure the sexual autonomy and identity of an individual because of the way it is framed. As noted in the previous section it does not criminalise the non-consensual disclosure of a sexualised picture of an individual *per se* but only when it is done with the intent of causing distress.

Alternatives

The preceding sections have shown that the drafting of this offence is problematic and that it arguably does not tackle the underlying issue that should be protected, i.e. respecting the right of a person to control their sexual identity. Therefore this section considers alternative ways of tackling revenge pornography.

Existing legislation

The proposers of the Early Day Motion responsible for this offence indicated their belief that existing law could not tackle this phenomenon. However the Crown Prosecution

³⁷ *Ibid.*, at 183.

³⁸ Richards, DAJ ‘Sexual Autonomy and the Constitutional Right to Privacy’ (1979) 30 *Hastings Law Journal* 957-1018 at 980.

³⁹ Desai, S. ‘Smile for the Camera: The Revenge Pornography Dilemma, California’s Approach, and its Constitutionality’ (2015) 42 *Hastings Constitutional Law Quarterly* 443-469 at 466.

Service did not agree with that suggestion, and have noted publicly that even before this offence came into force, existing laws applied.⁴⁰

As revenge pornography includes sexualised imagery then it may seem that an obvious alternative would be to rely on the offence of obscenity.⁴¹ Unlike the offences relating to prohibited images of children⁴² and extreme pornography,⁴³ this offence is not one of simple possession, but rather relates to the distribution of images, something that has previously been held to be ‘publication’ within the meaning of the OPA 1959.⁴⁴ However it is unlikely that the OPA 1959 would be an effective alternative. For the OPA 1959 to apply the material must be considered ‘obscene’ which, somewhat famously, requires that it is such that it would ‘deprave and corrupt’ its likely consumers.⁴⁵ This is now quite a high threshold⁴⁶ and the reality is that it is unlikely to be met in respect of revenge pornography, where the acts portrayed are usually either nude photographs or persons engaging in mainstream sexual activity. It is highly unlikely that such material would constitute obscenity for these purposes and therefore other alternatives need to be sought.

Where the material is disclosed through an electronic communications device – which is the most likely possibility⁴⁷ – then two offences already exist to combat this crime. Section 1 of the *Malicious Communications Act 1988* criminalises, *inter alia*, the sending of a communication that is indecent, grossly offensive, threatening or false, so long as there is an intention to cause distress or anxiety to a victim. Presumably the intention to cause distress was chosen for the purposes of s.33, CJCA 2015 because it was comparable to the MCA 1988, but the *mens rea* for the latter is wider by including intent to cause anxiety.

Section 127 of the *Communications Act 2003* makes it an offence to send, or cause to be sent, using a public communications network a message that is ‘grossly offensive or of an

⁴⁰ ‘CPS offers dear guidance for prosecutors on “revenge pornography”’ (http://www.qps.gov.uk/news/latest_news/crown_prosecution_service_offers_dear_guidance_for_prosecutors_on_revenge_pornography/)

⁴¹ s.2, *Obscene Publications Act 1959*.

⁴² Contrary to s.62, *Coroners and Justice Act 2009*.

⁴³ Contrary to s.63, *Criminal Justice and Immigration Act 2008*.

⁴⁴ See, for example, *R v McKinnon* [2004] 2 Cr App R (S) 46 and *R v Waddon* (2000, unreported)

⁴⁵ s.1(1), *Obscene Publications Act 1959*.

⁴⁶ A useful reference case is *R v Perrin* [2002] EWCA Crim 747 where a guilty verdict was only obtained in respect of adult pornographic material that was not hidden behind a ‘pay wall’.

⁴⁷ As most disclosures take place via smartphones or the Internet.

indecent, obscene or menacing character'. In *DPP v Collins*⁴⁸ it was held by Lord Bingham that the purpose of s.127 is 'to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society'.⁴⁹ On the face of it there is no *mens rea* requirement, but it is clear that the message must be sent intentionally⁵⁰ with it being likely that D must know that the message was grossly offensive, indecent, obscene or menacing.⁵¹

In the House of Commons it was said that these offences could not apply because the images would not necessarily be considered grossly offensive⁵² but this is undoubtedly the wrong element to focus on. Both the MCA 1988 and CA 2003 include reference to 'indecent' and 'obscene' which are more likely to be applicable. The courts have warned that it is not their job to define these terms⁵³ as they are 'ordinary words of the English language' and it 'is unnecessary and may be misleading to give to a jury any interpretation of them.'⁵⁴ They have also stated that the terms should be measured against recognised standards of decency,⁵⁵ something that accords with the dictionary definition, which suggests immodesty and a lack of decency.⁵⁶ Given the type of images that feature in revenge pornography (which, it will be remembered, will be either sexual or show a person's genitals) it would seem inevitable that a tribunal of fact would consider such images to be at the very least indecent. That being the case, either the MCA 1988 or CA 2003 could apply.

A problem with both the MCA 1988 and the CA 2003 was that they carried a very low penalty - a maximum of six-months' imprisonment. It has already been noted that s.32 of the CJCA 2015 has raised the maximum sentence for the MCA 1988 to two years' imprisonment, the same as for an offence under s.33.⁵⁷ Given that the CPS believes (and it is submitted, correctly) that these offences could be used to combat revenge porn, would it not have been simpler to enact s.32 and not s.33? Certainly, s.33 is a more

⁴⁸ [2006] 1 WLR 2223.

⁴⁹ *Ibid.*, at 2227.

⁵⁰ *Ibid.*, at 2228.

⁵¹ *Ibid.* Technically *Collins* referred only to grossly offensive messages but there is no reason why

⁵² See Hansard, HC Debates, vol 589, col 120. 1 December 2014 per Maria Miller MP.

⁵³ Unlike the OPA 1959 neither the MCA 1988 nor CA 2003 defines the term 'obscene'.

⁵⁴ *R v Kirk* [2006] EWCA Crim 725 at [6].

⁵⁵ *DPP v Collins* [2006] 1 WLR 2223 at at 2228.

⁵⁶ Concise Oxford English Dictionary.

⁵⁷ s.33(9).

complicated offence, and many of the technical issues presented above could have been avoided. The only argument in favour of a new offence is that of labelling. Those who intentionally disclose these images are not committing a communications offence - they are trying to commit an offence against a person. The MCA 1988 recognises this already because of its *mens rea* requirement that there is an intent to, *inter alia*, cause distress. It is not, unlike the CA 2003, an offence that could be construed as a victimless crime. The CA 2003 offence could be so construed because it is committed whether or not the message is received by anybody⁵⁸ or whether or not the victim is aware of the conduct. To that extent it can be said to be an offence that directed to D's actions over a communications network, rather than her actions towards a victim.

An interesting question is whether the MCA 1988 or CA 2003 might be preferred in any event? The MCA 1988 now has the same penalty as s.33. Given the definition of 'indecent' it may be that a prosecutor would consider it simpler to prove the offence under s.1 rather than s.33. Certainly s.1 contains none of the defences that exist under s.33, and this raises a more general point. What is the position where D has an arguable case for a defence under s.33? Could the CPS decide not to charge s.33 but to charge s.1 instead? It might be considered unfair, but in law there is nothing to prevent it from happening,⁵⁹ something of an issue whenever politicians use legislation as a political reaction, to show that 'they are doing something', irrespective of whether the law already tackles the behaviour.⁶⁰

The Law in America

The USA is sometimes referred to as a jurisdiction where revenge porn has already been tackled by the law, and so perhaps lessons could be learnt from there. Strictly speaking it is not true to say that 'America' has examined these issues since, so far, it has not been considered a Federal matter, but left to individual States to resolve. This remains the position although in other contexts the internet has been considered to be *prima facie* an

⁵⁸ *DPP v Collins* at [2006] 1 WLR 2223 at 2227 per Lord Bingham.

⁵⁹ See, for example, *R v G* [2009] 1 AC 92 where the House of Lords refused to compel the CPS to initiate a charge under s.13, SOA 2003 (which would have allowed D to claim a defence) rather than s.5, SOA 2003 in circumstances where a 15-year old boy was accused of having sexual intercourse with a girl aged 12. The European Court of Human Rights later agreed with this ruling (*G v United Kingdom* (2011) 53 EHRR SE25).

⁶⁰ Indeed the CA 2003 is itself perhaps an example of this where realistically it largely duplicates the MCA 1988, albeit without *mens rea*. However this replication existed before (see s.11(1)(b), *Post Office Act 1953* and s.43(1), *Telecommunications Act 1984*). Perhaps the best known recent example of legislating to criminalise something already illegal is the stalking legislation. Sections 2A and 4A criminalise behaviour already covered by sections 2 and 4 of the same Act.

issue of inter-state commerce (triggering Federal jurisdiction).⁶¹ For whatever reason the Federal government has not yet sought to introduce a law governing revenge porn, although a number of states have acted to introduce their own laws.

The State of New Jersey was the first US State to introduce a law relating to revenge porn. The Criminal Code states that a person commits an offence ‘if, knowing that he is not licensed...he discloses any photograph...or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or contact, unless that person has consented to such disclosure’.⁶²

Like the English offence, the issue at the heart of this offence is consent. However there is no requirement for ulterior intent, which implies that New Jersey recognises that the harm is caused by the breach of a person’s autonomy and right to control their own image rather than because D acts maliciously towards V. The offence has been praised by some for creating a tailored approach to revenge porn⁶³ but there is a potential loophole. A defence applies where the actor provides prior notice of what he intends to do, and he acts for a lawful purpose.⁶⁴ ‘Lawful purpose’ is not defined, but if it is taken to encompass both civil and criminal matters could this seriously weaken the offence? Let us take an example:

D and V are in a relationship. He films V performing a sex act on him, the recording take place with V’s consent. After their relationship ends, D writes to V to say that he intends to sell the picture to X, a third party.

Since D filmed the encounter then presumably he owns the copyright to the film and so, if he were to sell this, would that be a lawful purpose? Take another example.

D has consecutive relationships with A, B and C. He takes photographs of them nude with their consent as his ‘model’ as he makes clear to all three that he is a keen amateur photographer. Six months after his last relationship, he writes to A,

⁶¹ Article I, section 8 of the US Constitution and see *US v Carroll* 105 F.3d. 740 (1st Cir, 2007) cf *US v Schaefer* 501 F.3d. 1197 (10th Cir, 2007) and see s.103(a), *Effective Child Pornography Prosecution Act of 2007* which reworded 18 USC § 2252.

⁶² NJ Criminal Code, Title 2C:14-9(c).

⁶³ Citron, DK and Franks, MA ‘Criminalizing Revenge Porn’ (2014) 49 *Wake Forest Law Review* 345-391 at 371-372.

⁶⁴ NJ Criminal Code, Title 2C:14-9(d).

B and C to notify them that he intends to hold an art exhibition and the images of A, B and C will be displayed.

Again, is this for a lawful purpose? An ordinary interpretation would appear to suggest that the answer is ‘yes’, and so the offence could be flawed. Of course the English offence would not cater for this latter example either, since it is unlikely that it would be possible in those circumstances to prove that D has the relevant ulterior intent.⁶⁵

After New Jersey a number of other states began to introduce laws to combat revenge pornography. A number of these, like the English offence, contain an ulterior intent requirement. For example, the Alaskan state offence requires that a person acts ‘with intent to harass or annoy another person’ by, *inter alia*, publishing or distributing a photograph that shows the genitals, anus, female breast or depicts a sexual act.⁶⁶ Similar language is to be found in Colorado,⁶⁷ Georgia⁶⁸ and Pennsylvania.⁶⁹ ‘Harass’ or ‘annoy’ is, it is submitted, wider than the ‘distress’ required by the English law. It is perhaps strange that harassment was rejected under English law given that this is a term ordinarily understood in other contexts and it would seem to encapsulate much of the behaviour which is likely to occur.

Not all States have adopted this model and other variants have problems that are akin to the English offence. For example, the Texan law requires the ‘intent to arouse or gratify the sexual desire of any person’.⁷⁰ Whilst placing an image onto a sex site would probably breach this law (as some individuals will view these sites for the purposes of sexual gratification) it would not work in all contexts. For example:

D and V, a school teacher at a religious school, are in a relationship during which D records them having sex. When the relationship ends D sends the recording to V’s employer intending that she will lose her job.

⁶⁵ Indeed it is conceded that this example raises questions as to what actions concerning the disclosure of an image should be left the civil law rather than invoking the criminal law.

⁶⁶ Alaska Statutes § 11.61.120.

⁶⁷ Colorado Revised Statutes § 18.7.107.

⁶⁸ Official Code of Georgia § 16.11.90.

⁶⁹ Pennsylvania Consolidated Statutes Title 18 § 3131.

⁷⁰ Texas Penal Code § 21.15.

There is no intention that anyone receives sexual gratification in this example, and thus the offence would seem inapposite.

California's law⁷¹ is similar to the English offence except it requires not only an intent to cause 'serious emotional distress' but also that the same occurs. 'Serious' adds an even stronger element into the *mens rea* than under the English law and it raises the problem of what 'serious' emotional distress is. The requirement that the victim must, in fact, be caused serious emotional distress is also problematic as it treats victims differently according to whether they are aware of the disclosure. It creates an interesting ethical question for the police:

D records herself having sexual intercourse with V. D decides to place the footage onto a sex site because she is annoyed at how V treated her, and knows the disclosure will cause her shame and distress. The police, when investigating another case, come across V's image.

In this example do the police tell V? If they do not, the crime will not have been committed (because V is so far unaware of the footage and so cannot be distressed) but if they do, have the police not, in part, caused the distress (albeit by acting properly)?

The varying approaches adopted in America demonstrate how difficult it is to draft a law to tackle this behaviour. The range of behaviour covered by the notion of 'revenge porn' is very broad, and it can be conducted for a range of reasons.

Conclusion

The issue of 'revenge porn' has captured the imagination of the public in recent years. There is no doubt that those who post images or footage of another without their consent are acting in an offensive way. It is also clear that some victims of revenge pornography suffer emotional harm or other consequences, such as embarrassment and loss of employment. To that extent it is clear that the law needs to act against those who do distribute this material.

⁷¹ California Penal Code § 647(j)(4).

However it is unclear that s.33 is the solution. This article has noted the flaws within the drafting of the offence, including the unusual *mens rea* requirement. This author believes that requiring *mens rea* is necessary, and so the New Jersey offence arguably goes too far. However restricting the *mens rea* to an intention to distress is limiting when it should cover other purposes, including harassment. There is also the difficulty of s.33(8) which adds a level of uncertainty that is to be regretted. It would have been simpler for the law to simply recognise that an individual has the right to control his or her sexual identity, and this includes not having it manipulated for nefarious reasons. A defence of legitimate reason could have been introduced to cater for those rare situations when disclosure is necessary rather than, as now, limit it to law enforcement and journalistic purposes.

It has been seen that the MCA 1988 and the CA 2003 could also have addressed this issue. The OPA 1959 can apply in theory, but prosecutions under that Act are problematic and can therefore be largely dismissed. However the MCA 1988, especially with its new maximum sentence, could be appropriate, especially as it has a broader *mens rea*.

Introducing a specific offence can be useful. Speaking of the position in the USA, it has been noted that a problem with those seeking to criminalise revenge pornography ‘is a lack of empathy amongst the general population’⁷² and there is no reason why people in England & Wales may not similarly believe that victims are, in part, to blame for the release of the footage. Introducing a specific offence could help to change these attitudes. It introduces the general population to the real harm that can be caused by revenge pornography and marks its disapproval. Rather than relying on communications offences it labels the behaviour as something different: an attack against an individual, and a crime related to pornography. That is a noble aim, but s.33 of the *Criminal Justice and Courts Act 2015* probably does not quite deliver on this, and that is something to be regretted.

⁷² Martinez, C. ‘An argument for states to outlaw ‘Revenge Porn’ and for Congress to Amend 47 USC 230’ (2014) 1 *Journal of Technology Law and Policy* 236-252 at 250.