

# *The impact of proposed intimate image abuse offences on domestic violence and abuse*

Article

Accepted Version

Bishop, C. (2022) The impact of proposed intimate image abuse offences on domestic violence and abuse. Northern Ireland Legal Quarterly, 73 (AD2). pp. 125-153. ISSN 0029-3105 doi: 10.53386/nlq.v73iAD2.969 Available at <https://centaur.reading.ac.uk/107364/>

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Identification Number/DOI: 10.53386/nlq.v73iAD2.969  
<<https://doi.org/10.53386/nlq.v73iAD2.969>>

Publisher: School of Law, Queen's University Belfast

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# **The impact of proposed intimate image abuse offences on domestic violence and abuse**

Dr Charlotte Bishop, Senior Lecturer in Law, Exeter University

Version accepted for *Northern Ireland Legal Quarterly*, May 16<sup>th</sup>, 2022

## **ABSTRACT**

This article explores how proposed reforms to the law on intimate image abuse could address situations where intimate images are shared, or threats to share are made, in a relationship where there is domestic violence and abuse (DVA). In exploring the purposes and motivations behind the use of non-consensual intimate images in this context, the harmful impact is demonstrated to be the denial of autonomy and personhood that ‘entraps’ the victim in the relationship. It is essential that this harm, and the underlying motivations of those who use intimate image abuse for this purpose, is made visible under the proposed legislation to ensure that the criminal law effectively condemns and remedies conduct of this kind. It is for this reason that the article concludes that the Law Commission is right to consider introducing an offence of ‘intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person depicted.’<sup>1</sup> It is further suggested that this fault element may better reflect the culpability of those who engage in *threats* to share intimate images and should be introduced not just where images are taken and shared, but also where threats to share such images are made.

**Key words – intimate image abuse, gender-based violence, domestic violence, domestic abuse, coercive control, law reform**

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<sup>1</sup> Law Commission, *Intimate Image Abuse* (Law Com No 253, 2021) at para 10.93.

## INTRODUCTION

In November 2018 the Law Commission noted a compelling need for review and reform of the law on the non-consensual taking and sharing of intimate images.<sup>2</sup> A project then commenced in June 2019 to review the current offences in this area, identify gaps in the scope of the protection currently offered, and make recommendations to ensure the criminal law provides consistent and effective protection against the creation and sharing of intimate images without consent.<sup>3</sup> As part of this review, a consultation seeking feedback on provisional reform proposals was published in February 2021.<sup>4</sup> This article develops responses provided by the author to specific aspects of the proposed reforms as they would relate to intimate image abuse<sup>5</sup> that occurs within the context of domestic violence and abuse (DVA).<sup>6</sup> While this is not the only area in which urgent reform is needed, the prevalence of non-consensual taking, making and sharing of intimate images in this context make this an important area of focus.<sup>7</sup> The harm that results from intimate image abuse is serious, far-reaching, and long-lasting, extending from distress and humiliation to psychological trauma, anxiety and depression, suicidal ideation, loss of employment, and, in extreme cases, suicide.<sup>8</sup> In the context of DVA, sharing and/or

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<sup>2</sup> Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018)

<sup>3</sup> <https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/> Para 1.9

<sup>4</sup> Law Commission (n1).

<sup>5</sup> This is the term adopted by the Law Commission in its current consultation on taking, making and sharing intimate images without consent. Terminology is discussed below.

<sup>6</sup> There is a discussion on terminology below with reference to ongoing debates with regards the most effective term to use in referring to violence and abuse against intimate partners.

<sup>7</sup> While it is estimated that globally between 8 and 13% of individuals have experienced intimate image abuse (A Eaton and others, '2017 Nationwide Online Survey of Nonconsensual Porn Victimization and Perpetration' (June 2017) Cyber Civil Rights Initiative <https://cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> accessed 11 March 2022; '8 Percent of Brits are Victims of 'Revenge Porn' (21 March 2019) Open Access Government <https://www.openaccessgovernment.org/revenge-porn/65529/> accessed 14 March 2022), there is a strong relationship between intimate image abuse, domestic abuse and coercive control (N Henry and others, *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge 2021). Threats to share intimate images are particularly common in this context. Research by Refuge indicates that 1 in 7 young women have experienced threats, with 72% stating that these were from a current or former partner (Refuge, 'The Naked Threat Report' (July 2020) <https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf> accessed 1 November 2021). The Revenge Porn Helpline reports that 1 in 4 of the calls they receive relate to threats (Law Commission (n 1 para 3.76).

<sup>8</sup> C McGlynn and others, 'It's torture for the soul': The harms of image-based sexual abuse' (2020) 30 Social and Legal Studies 541; C McGlynn and others, 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (July 2019) Durham University and the University of Kent <https://dro.dur.ac.uk/28683/> accessed 1 November 2021; C McGlynn and E Rackley, *Image-Based Sexual Abuse* (2017) 37 Oxford J Legal Studies 534; C McGlynn and others, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) 25 Fem. Leg. Stud. 25; DK Citron and MA Franks, 'Criminalising Revenge Porn' (2014) 49 Wake Forest Law Review 345; A Powell and N Henry, *Sexual Violence in a Digital Age* (Palgrave Macmillan 2017) ch 5; T Crofts and T Kirchengast, 'A Ladder Approach to Criminalising Revenge Pornography' (2019) 83 Journal of

threatening to share intimate images have become a central component of the tools used by perpetrators to maintain power and control and prevent victims from leaving the relationship.<sup>9</sup> The harm that results from this extends beyond that which arises from the act of sharing or from fear that the threat to share the image will be realised.<sup>10</sup> Here intimate images are used to disempower the victim, thus depriving them of autonomy and personhood and leaving them isolated and dependent on the very person who is abusing them.<sup>11</sup> These harms make it vital that this aspect of intimate image abuse is effectively captured in any new legal framework that is introduced.

This article begins by discussing the societal and cultural context in which intimate image abuse must be understood and the best terminology to be used when discussing its role within abusive relationships. It then outlines the ways in which sharing and threatening to share intimate images have become tools of coercion and control within intimate relationships and articulates the importance of understanding the motivation behind this behaviour, as well as the harmful loss of autonomy it results in, when perpetrator culpability is determined. Following this, the limitations of the existing criminal law relating to intimate images are outlined, underlining the need for legal reforms in this area to provide more consistent protection and ensure victim experiences and perpetrator motivations are adequately reflected in legal definitions and considered appropriately at sentencing. The article then discusses the

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Criminal Law 87; S Bates, 'Revenge porn and mental health: A qualitative analysis of the mental health effects of revenge porn on female survivors' (2017) 12 *Feminist Criminology* 22.

<sup>9</sup> N Henry and A Powell, 'Beyond the 'Sext': Technology-Facilitated Sexual Violence and Harassment against Adult Women' (2015) 48 *Australian and New Zealand Journal of Criminology* 113; A Eaton and others, 'Nonconsensual Porn as a Form of Intimate Partner Violence: Using the Power and Control Wheel to Understand Nonconsensual Porn Perpetration in Intimate Relationships' (2021) 22 *Trauma, Violence and Abuse* 1140; Citron and Franks (n7); M Dragiewicz and others, 'Technology facilitated coercive control: Domestic violence and the competing roles of digital media platforms' (2018) 18 *Feminist Media Studies* 609; C Dardis and E Richards, 'Nonconsensual Distribution of Sexually Explicit Images Within a Context of Coercive Control: Frequency, Characteristics, and Associations with Other Forms of Victimization' (2022) *Violence Against Women* 1; Henry and others (n 6).

<sup>10</sup> D Cuomo and N Dolci, 'New tools, old abuse: Technology-Enabled Coercive Control (TECC)' *Geoforum* 126 (2021) 224, 230.

<sup>11</sup> E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007); V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004) 65 *Louisiana Law Review* 989.

proposed offences and makes recommendations about how these issues of motive and impact could usefully be captured in assessing culpability and determining the fault elements.

## CONTEXT AND TERMINOLOGY

A rapidly growing body of research demonstrates that the vast majority of images being shared and traded online are of women and that intimate image abuse is committed mainly by men.<sup>12</sup> Most frequently this is a current or former romantic partner and the abuse often co-occurs with offline forms of male-to-female assault.<sup>13</sup> However, because both DVA and intimate image abuse are part of the broader constellation of gender-based violence<sup>14</sup> it is not just that women and girls are statistically more likely to be victims, but that both phenomena are ‘qualitatively gendered.’ As McGlynn and Rackley emphasise, the harms of intimate image abuse are gendered due to the ‘sexualised and misogynistic form and manner in which they are manifested’ and the sexual double standards that prevail at a societal and cultural level.<sup>15</sup> They draw attention to societal gender disparities that enable and facilitate the production and prevalence of intimate image abuse.<sup>16</sup> The same can be said of the prevalence and nature of DVA. When understood as a programme of coercive control intended to disempower the victim, rather than as ‘incidents’ of physical violence and other types of abuse, DVA can be seen as a gendered social phenomenon that results from structural inequality and is delivered

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<sup>12</sup> C Uhl and others, ‘An examination of nonconsensual pornography websites’ (2018) 26 *Feminism & Psychology* 50; J Halliday, ‘Revenge Porn: 175 Cases Reported to Police in Six Months’ *The Guardian* (Manchester, 11 October 2015). 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).

<sup>13</sup> N Henry and A Powell, ‘Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence’ (2015) 21 *Violence Against Women* 758, 760; W DeKeseredy, ‘Image-Based Sexual Abuse: Social and Legal Implications’ (2021) 8 *Current Addiction Reports* 330, 330; Y Ruvalcaba and A Eaton, ‘Nonconsensual pornography among U.S. adults: A sexual scripts framework on victimization, perpetration, and health correlates for women and men’ (2020) 10 *Psychology of Violence* 68; M Hall and J Hearn, ‘Revenge Pornography and Manhood Acts: A Discourse Analysis of Perpetrators’ Accounts’ (2017) 28 *Journal of Gender Studies* 158; N Henry and A Flynn, ‘Image-based sexual abuse: Online distribution channels and illicit communities of support’ (2019) 25 *Violence Against Women* 1932.

<sup>14</sup> Gender-based violence is defined by the UN as ‘harmful acts directed at an individual based on their gender and rooted in gender inequality, the abuse of power and harmful norms’ (United Nations, ‘Gender-based Violence’ (UN Refugee Agency) <https://www.unhcr.org/uk/gender-based-violence.html> accessed 1 November 2021).

<sup>15</sup> McGlynn and Rackley (n 7) 544.

<sup>16</sup> *Ibid.*

via the exploitation of gender norms. The behaviours characteristic of coercive control focus on the micro-regulation of many of the everyday activities and roles already typically associated with women in their roles as homemakers, parents and sexual partners.<sup>17</sup> This means women are held accountable for their performance of femininity at the same time as masculinity is reinforced through the normalisation of male power and control. Stark explains the rise of coercive control in recent decades as resulting from women's formal equality gains in the public sphere because the dismantling of uncontested male power at a societal level has left men needing to bolster masculine identity by developing more overt ways of controlling the *individual* women in their personal lives.<sup>18</sup> However, the rise in the public sharing of private images of women, alongside accompanying text that objectifies, shames and humiliates them, can be positioned as a contemporary device that is enabling the re-normalisation of male power and control over women in the public sphere. As Nussbaum observes, '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>19</sup> Collectively, women are 'kept in their place' through the pervasive normalisation and eroticisation of male dominance and female subordination that occurs through the non-consensual sharing of explicit and intimate images in online, public spaces. In this way, distributing or threatening to distribute intimate images is a highly effective tactic for disciplining victims and keeping them in abusive relationships, since they know that ongoing systemic sexism will position them as responsible for the impact of the abuse.<sup>20</sup>

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<sup>17</sup> Stark (n 10) 129–130. Also see K Anderson, 'Gendering coercive control' (2009) 15 Violence Against Women 1444.

<sup>18</sup> Stark (n 10).

<sup>19</sup> M Nussbaum, 'Objectification and Ressentiment', unpublished paper on file with Danielle Keats Citron and quoted in DK Citron, 'Law's Expressive Value in Combating Cyber Harassment' (2009–10) 108 Mich L Rev 373, 389.

<sup>20</sup> Cuomo and Dolci (n 9) 230. For discussions of victim-blaming in this context, see McGlynn and Rackley (n 7); S Bothamley and R Tully, 'Understanding revenge pornography: public perceptions of revenge pornography and victim blaming' (2018) Journal of Aggression, 10 Conflict and Peace Research 1; Crofts and Kirchengast (n 7); Hall and Hearn (n 12); E Rackley and others, 'Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse' (2021) 29 Feminist Legal Studies 293; A Powell and others, 'Image-based sexual abuse: The extent, nature, and predictors of perpetration in a community sample of Australian residents' (2019) 92 Computers in Human Behavior 393; Henry and others (n 6); Eaton and others (n 8).

While practical suggestions for addressing the wider collective harm of intimate image abuse fall beyond the scope of this article, it is essential to acknowledge the public nature of the wrong to ensure the legal response is premised upon an assessment of the seriousness of wrongdoing that takes account of the harm to individual and *collective* interests.<sup>21</sup> As highlighted by Von Hirsch and Jareborg, collective interests are relevant when assessing harm.<sup>22</sup> Ashworth views crimes as public wrongs, even where they are an attack on an individual as with intimate image abuse, because they are 'wrongs that are shared by other members of the community with which the victim is identified and by which her or his identity is partly constituted.'<sup>23</sup> Therefore, when considering how to ensure legal reforms are as effective as possible, both intimate image abuse and DVA must be situated within their wider social and cultural context to enable the impact and the harm caused to victims, and the culpability of those who engage in it, to be appropriately captured in legislation and wider government and criminal justice policy.

### **Intimate image abuse**

Different terms have been used to describe the non-consensual sharing of sexual and/or intimate images, some of which have proved problematic and controversial. Commonly used by the media and within official guidance,<sup>24</sup> the term 'revenge porn' is widely criticised as oversimplifying and misrepresenting perpetrator motivations and victim experiences.<sup>25</sup> It

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<sup>21</sup> Crofts and Kirchengast (n 7) 90.

<sup>22</sup> A Von Hirsch and N Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 Oxford Journal of Legal Studies 1, 33

<sup>23</sup> A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225, 243

<sup>24</sup> See Ministry of Justice promotional materials available at <https://www.gov.uk/government/publications/revenge-porn-be-aware-b4-you-share> accessed 1 November 2021; Ministry of Justice, 'Revenge Porn factsheet' (2021) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/405286/revenge-porn-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/405286/revenge-porn-factsheet.pdf) accessed 1 November 2021; Crown Prosecution Service, 'Social Media - Guidelines on prosecuting cases involving communications sent via social media' (2018) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 1 November 2021; College of Policing, 'Revenge Pornography' (2020) [https://www.app.college.police.uk/wp-content/uploads/2020/10/CoP\\_2020\\_Revenge\\_Pornography.pdf](https://www.app.college.police.uk/wp-content/uploads/2020/10/CoP_2020_Revenge_Pornography.pdf) accessed 1 November 2021.

<sup>25</sup> Henry and others (n 6).



reduces the severe harms that result from the non-consensual publishing of intimate images to a ‘simple ‘scorned ex-boyfriend’ narrative’ and suggests that perpetrators are motivated only by personal vengeance.<sup>26</sup> This implies that victims must have done something to cause the perpetrator to seek ‘revenge’, thus perpetuating victim-blaming and shifting focus away from the motivations and behaviours of the perpetrator and on to the content of the images and the actions of the victim.<sup>27</sup> Popular use of such an inadequate term has shaped the development of new laws around the world and influenced police responses to victims.<sup>28</sup> For example, in England and Wales prior use of the term ‘revenge porn’ in legislative debates narrowed the scope of discussions and limited the applicability of the ‘disclosure’ offence<sup>29</sup> to those seeking to cause distress.<sup>30</sup> The examples provided in a recent study by Henry and others shows a diverse range of motivations that often overlap and intersect, with power and control commonly the overarching theme.<sup>31</sup>

Franks coined the term ‘non-consensual pornography’ (NCP) in an attempt to foreground the underlying disregard for women’s consent.<sup>32</sup> However, as with ‘revenge porn’, categorising the sharing of intimate images as a ‘subgenre of commercially produced online pornography’ is problematic. It implies an element of choice and autonomy on the part of the victim and overlooks the fact the images were not created for public consumption, may not even have been *taken* with the consent of the victim, and are often not shared or accessed with the primary aim of sexual gratification.<sup>33</sup> More recently McGlynn and Rackley proposed the term image-based

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<sup>26</sup> S Maddocks, ‘From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names’ (2018) 33 *Australian Feminist Studies* 345, 347.

<sup>27</sup> McGlynn and Rackley (n 7) 536.

<sup>28</sup> Henry and Powell (n 7) 203.

<sup>29</sup> Section 33 Criminal Justice and Courts Act 2015.

<sup>30</sup> McGlynn and Rackley (n 7) 553.

<sup>31</sup> Henry and others (n 6) 85.

<sup>32</sup> MA Franks, *An-Aesthetic Theory: Adorno, Sexuality, and Memory*, in R Heberle (ed) *Feminist Interpretations of Theodor Adorno* (Pennsylvania State University Press 2016).

<sup>33</sup> Maddocks suggests that the explanatory power of the term ‘pornography’ should not be disregarded since porn sites have become the main repositories for non-consensually distributed sexual content (Maddocks (n21, 349).

sexual abuse (IBSA), defined as ‘the non-consensual creation and/or distribution of private, sexual images.’<sup>34</sup> Drawing on Liz Kelly’s notion of a ‘continuum of sexual violence’<sup>35</sup> IBSA is conceptualised as one harm situated along a continuum of sexual abuses – from catcalling to rape – driven by the same societal disregard for women’s consent.<sup>36</sup> NCP and IBSA cover an almost identical range of harms, their difference is in emphasis: NCP refers to the product (pornography), while IBSA describes the conduct and its impact on victims (abuse).<sup>37</sup> While there are clear advantages to the term IBSA, particularly over terms such as revenge porn or NCP, the Consultation chose to use the term ‘intimate image abuse’ on the basis that this is an inclusive term, encompassing both the nature of the images under consideration and the range of harmful behaviours demonstrated by perpetrators.<sup>38</sup> It is agreed that this is a favourable term since ‘intimate’ denotes the nature of the images and retention of the word ‘abuse’ ensures, as with IBSA, the impact on victims is centred. At the same time, as noted in the consultation, it acknowledges and reflects the lack of consensus on whether all examples of this behaviour should be identified and punished as sexual offending.<sup>39</sup>

## **Victim/survivor**

The term ‘survivor’ is now often preferred over the label ‘victim,’ in recognition of the agency and coping capacities of women who have experienced gender-based violence.<sup>40</sup> However, in the present context it may reduce the persuasiveness of the arguments to use the term ‘survivor,’ with the agency and free will this implies, since the article is arguing for attention to be paid to the ways in which intimate images are being used to deprive women of autonomy and ‘entrap’ them in coercively controlling relationships. ‘Staying’ in the abusive relationship must also not

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<sup>34</sup> McGlynn and others (n 7).

<sup>35</sup> L Kelly, *Surviving Sexual Violence* (1988 Polity Press).

<sup>36</sup> This is discussed further in McGlynn and others (n 7).

<sup>37</sup> Maddocks (n21) 350.

<sup>38</sup> Law Commission (n 1) at para 1.13.

<sup>39</sup> Law Commission (n3) at para 1.15.

<sup>40</sup> Kelly (n 34).

be constructed as being driven by ‘choice’ in any meaningful sense and it must be remembered that coercive control is often ongoing even where the relationship has officially ended.<sup>41</sup> It is also consistent in an article on reforms to the criminal law to refer to the person against whom an offence has been committed as a ‘victim,’ since this is the term used by CJS agencies (as well as the ‘complainant’, prior to conviction). Therefore, the term ‘victim’ is retained, while at the same time it is recognised that it is neither accurate nor desirable to present women as passive victims given the myriad strategies and tactics of resistance that they engage in on a daily basis while navigating male violence and control.<sup>42</sup>

### **Domestic violence and abuse**

Debates on how to refer to and define violence and abuse against intimate partners are well rehearsed and long running.<sup>43</sup> A range of different terms are used and are often reflective of the particular theoretical and methodological approach used, the type of violence and abuse being studied, and the contexts that the researcher wishes to foreground.<sup>44</sup> In the UK, domestic violence was the most commonly used term until relatively recently when there has been a shift towards ‘domestic abuse’ in law and official policy.<sup>45</sup> Aldridge notes the problematic and unusual nature of this move and suggests this could be a deliberate move to underplay DVA as a gendered issue, with the removal of ‘violence’ as a key rubric suggesting a ‘watering down’ or obfuscation of the serious and gendered nature of DVA.<sup>46</sup> DVA is therefore the term used

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<sup>41</sup> C. Wiener, ‘From social construct to legal innovation: The offence of controlling or coercive behaviour in England and Wales’ in M. McMahon and P. McGorrey (eds), *Criminalising Coercive Control* (Springer, 2020); D Tuerkheimer, ‘Breakups’ (2013) 25 *Yale Journal of Law and Feminism* 51; H Douglas, ‘Legal systems abuse and coercive control’ (2018) 18 *Criminology & Criminal Justice* 84.

<sup>42</sup> Stark (n 10); M Dutton and L Goodman, ‘Coercion in Intimate Partner Violence: Toward a New Conceptualization’ (2005) 52 *Sex Roles* 743; C Wiener, ‘What is “Invisible in Plain Sight”: Policing Coercive Control’ (2017) 56 (4) *The Howard Journal of Crime and Justice* 500.

<sup>43</sup> Dragiewicz and others (n8) 610.

<sup>44</sup> *Ibid.*

<sup>45</sup> For example, in the recently passed Domestic Abuse Act 2021 and accompanying statutory guidance.

<sup>46</sup> J Aldridge, ‘“Not an Either/or Situation”: The Minimization of Violence Against Women in United Kingdom “Domestic Abuse” Policy’ (2020) *Violence Against Women* 2.

in this article to facilitate focus on a broader range of harms but at the same time it is acknowledged that no term is perfect; each has its limitations and advantages.<sup>47</sup>

As will be explored more fully below, DVA is best understood as a ‘liberty crime’ in which abusers entrap victims, undermine their social support, subvert their autonomy and deprive them of equality.<sup>48</sup> The inclusion of ‘coercive control’ as a distinct ‘type’ of DVA is therefore regarded to be erroneous.<sup>49</sup> In recent years, researchers have emphasised the role of digital technologies in facilitating this pattern of abuse.<sup>50</sup> Technology and digital media offer a variety of everyday options for effectively controlling partners in often similar ways to traditional forms of abuse, such as stalking and surveillance, but the accessibility and immediacy of mobile, digital, and social media may result in abuse perpetration with greater ease, using new methods and channels.<sup>51</sup> Therefore, terms such as ‘technology-enabled’ and ‘technology-facilitated’ coercive control (TECC and TFCC) usefully draw attention to the range of abusive behaviours that are carried out using digital technology, of which intimate image abuse is clearly only a part.<sup>52</sup> However, for the purposes of this article it is not considered useful to break behaviour down into types of coercive control depending on whether it takes place in an online or offline space. Instead, it is most useful to use the term DVA – defined as a programme of coercively controlling behaviours aimed at disempowering the victim - and to then consider perpetrator motivations and intentions when engaging in this behaviour, for the purposes of assessing offender culpability.

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<sup>47</sup> Dragiewicz and others (n8) 610.

<sup>48</sup> Stark (n 10); Tadros (n 10).

<sup>49</sup> This approach is found in the definition of ‘domestic abuse’ contained in s 1 of the Domestic Abuse Act 2021.

<sup>50</sup> Cuomo and Dolci (n 9); Dragiewicz and others (n 8).

<sup>51</sup> D Woodlock, ‘The abuse of technology in domestic violence and stalking’ (2017) 23 *Violence Against Women* 584–602; Cuomo and Dolci (n 9) 224.

<sup>52</sup> Researchers note that digital technologies form part of a ‘constellation of tactics’ that perpetrators of domestic abuse employ alongside other more widely recognised forms of physical and psychological abuse that take place in face-to-face encounters (H Douglas and others, ‘Technology-facilitated domestic and family violence: Women’s experiences’ (2019) 59 *British Journal of Criminology* 551; L Reed and others, ‘Snooping and sexting: Digital media as a context for dating aggression and abuse among college students’ (2016) 22 *Violence Against Women* 1556).

## INTIMATE IMAGE ABUSE AS A TOOL OF COERCIVE CONTROL

A number of scholars have already described and examined relationship-based intimate image abuse as a form of DVA and it is clear that taking, making, sharing, and threatening to share sexual and intimate images are now integral parts of the constellation of behaviours carried out by perpetrators in abusive relationships.<sup>53</sup> In assessing how intimate images are used in abusive relationships, and ensuring the harm to the victim and the culpability of the defendant are captured in any legal reforms in this area, it is necessary to understand how DVA itself typically manifests and how intimate images are then used in this context.

In recent years, the conceptual framework of coercive control, developed by Evan Stark, has been used by feminist scholars in an attempt to shift the collective understanding of DVA away from a narrow focus on decontextualised acts of physical violence. By foregrounding patterns of behaviour and the constellation of abusive tactics used to entrap partners and limit their freedom and autonomy, DVA can be seen as a systematic process of coercive control intended to disempower the victim. In moving away from the dominant incident-based approach, the use of physical violence and other ‘episodes’ of abuse become understood as tools used to disempower the victim, rather than as articulations of the harm in and of themselves.<sup>54</sup> Although a set of discrete abusive incidents can typically be identified within an abusive relationship, DVA is not episodic; these incidents are connected by dynamics of power and control.<sup>55</sup> As Mary Ann Dutton has emphasised, ‘to negate the impact of the time period between discrete episodes of serious violence... is to fail to recognize what some battered

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<sup>53</sup> Eaton and others (n 8); Henry and Powell 2015a (n8); Henry & Powell 2015b (n10); Powell & Henry 2017 (n7); L Tolman and others, ‘Snooping and sexting: Digital media as a context for dating aggression and abuse among college students’ (2016) 22 *Violence Against Women* 1556–1576; Refuge (n 6); Citron and Franks (n 7); Cuomo and Dolci (n 9); Dardis and Richards (n 8); Dragiewicz and others (n 8).

<sup>54</sup> Stark (n 10).

<sup>55</sup> Tuerkheimer (n 39) 52.

women experience as a continuing "state of siege."<sup>56</sup> The victim never knows when the next episode will occur and lives in a permanent state of hypervigilance, as reflected by victims who describe DVA as an ongoing, 'everyday' reality in which much of their behaviour is 'micro-managed' by their abuser.<sup>57</sup> Once attention is drawn to the overall impact of the myriad controlling, violent and abusive behaviours carried out by the perpetrator, the ways in which victims are entrapped in the relationship become evident and the question 'why didn't she just leave?' becomes obsolete. Understandings of the harm, and the motivation of the perpetrator, are also transformed.

The concept of 'separation assault' describes a particular type of assault 'on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation.'<sup>58</sup> Separation assaults commonly occur when the victim makes an attempt to leave, or expresses the desire to end the relationship, meaning a great deal of 'separation' assaults take place *during* the relationship in an attempt to regain and maintain power and control over the victim. This concept shifts the focus on to what the perpetrator is doing that is limiting the victim's autonomy and makes visible the dynamics and behaviours that are keeping the victim entrapped. Studies draw attention to the routine use of 'credible threats' by the perpetrator to maintain power and control over the victim.<sup>59</sup> These may be threats of rape or physical violence, threats to take children away or report the victim to the authorities, or threats to humiliate the victim in public or in front of family, friends, or work colleagues. Importantly, they are used when the victim attempts to leave or to assert their autonomy and therefore each threat functions as a means by which the perpetrator entraps the victim in the relationship and

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<sup>56</sup> MA Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 Hofstra Law Review 1191, 1208.

<sup>57</sup> Stark (n 10).

<sup>58</sup> M Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Michigan Law Review 1, 6.

<sup>59</sup> Dutton and Goodman (n 40); Weiner (n 40).

ensures compliance with the demands and rules they impose.<sup>60</sup> Each threat gains credibility, and therefore enables the perpetrator to maintain control, because the victim knows, based on past experience, that the perpetrator has the means and motivation to carry out the threat.

Given the ease with which images can now be taken and distributed, and the humiliation and harm that results, taking, sharing and threatening to share intimate images have become very effective tools of coercive control, often serving as ‘credible threats’ used by the perpetrator to entrap the victim and deprive them of autonomy. Sometimes the images are initially shared or captured consensually, during positive periods of the relationship.<sup>61</sup> Other times images are obtained under coercion or are obtained covertly through the use of hidden cameras, secretly recording webcam communications, or using other forms of surveillance that the survivor was not aware of at the time.<sup>62</sup> The threat of dissemination can be used to intimidate victims, ensure compliance with demands, prevent them from leaving or reporting abuse, and may be retained for future use in case coercion or blackmail is needed.<sup>63</sup> Research by Refuge indicates that threats to share leave women feeling forced into telling perpetrators where they are, resuming or continuing the relationship, or allowing contact with children.<sup>64</sup> Abuse in a relationship is context-specific and built and maintained over time, such that, over time, fewer threats are needed to ensure compliance and, the carrying out of credible threats in the past, means the victim has good reason to believe that the perpetrator will follow through with the threat in future, leading to greater vulnerability to threats or demands based around sexual images in the future.<sup>65</sup>

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<sup>60</sup> Dutton and Goodman (ibid).

<sup>61</sup> Cuomo and Dolci (n 9).

<sup>62</sup> Cuomo and Dolci (n 9) 229; Henry and others (n 6) 81

<sup>63</sup> Eaton and others (n8); Citron and Franks (n 7); Refuge (n 6). Law Commission (n3) para 12.3.

<sup>64</sup> Refuge (ibid).

<sup>65</sup> Dutton & Goodman (n 40); Stark (n 10). Also see Dragiewicz and others (n 8); Dardis and Richards (n 8); Cuomo and Dolci (n 9).

Previous research has theorized intimate image abuse as a form of DVA, based on feminist theories of power and control. Eaton and colleagues conceptualized the tactics of intimate image abuse (or non-consensual pornography (NCP) as they refer to it) by applying the Power and Control Wheel<sup>66</sup> to illustrate the interconnected tactics used by abusers to assert dominance and control. In doing this, they evidence that NCP and DVA are perpetrated using similar tactics, and thus co-occur within an ‘interlocking pattern of abuse.’<sup>67</sup> As emphasized by Dardis and Richards, this theory complements the framework of coercive control and credible threats outlined above; the Power and Control Wheel specifies tactics used within patterns of coercive control that are established more strongly over time with repeated and varied forms of violence. However, in calling for NCP in relationships to be treated as a potential ‘form’ of partner violence, it is important not to reinforce understandings of DVA as consisting of different ‘types’ of abuse. For present purposes, it is therefore more useful, and more in line with theorising by Dragiewicz and others discussed above, to conceptualise the various ways intimate image abuse manifests in abusive relationships as tactics of coercive control, rather than seeking to show that intimate image abuse is perpetrated via coercive control tactics.

When considering the role of intimate image abuse in DVA, it is not that intimate image abuse must now be seen as a ‘type’ of abusive behaviour, it is that the use of intimate images must now be recognised as part of a constellation of behaviours used to coercively control victims and deprive them of their autonomy. This focuses on the purpose intimate images are used for, and the overall pattern of abusive behaviour, rather than on specific aspects of it, therefore enabling articulation of harm and corresponding culpability. Referring to ‘types’ of abusive behaviour isolates and decontextualises the acts from the relational context in which they occur,

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<sup>66</sup> The Power and Control Wheel was developed in the 1980s (E Pence and M Paymar, *Education groups for men who batter* (Springer 1993) to characterise an interrelated and interlocking system of abusive and violent behaviours.

<sup>67</sup> Eaton and others (n 8), 11.



thus obscuring the meaning, underlying motivation, and impact on the victim that the behaviour has. This leads to a rupture between women's experiences and the remediation offered by the criminal law; the law cannot fully condemn or remedy harm that it doesn't recognise.<sup>68</sup> The functioning of the system, and the justification for imposing punishment, is contingent on its proper recognition of harm and therefore, if the criminal law does not accurately capture the experience of the victim then its legitimacy is severely undermined.<sup>69</sup> Although a full critique of the offence of 'controlling or coercive behaviour' under s 76 of the Serious Crime Act 2015 (hereafter s 76 offence) is not possible here, legal scholarship has demonstrated the limitations of this offence because of its misconstruction of the nature and harm of coercive control.<sup>70</sup> The legal reforms currently under discussion present an opportunity to learn from this mistake by ensuring harm and corresponding culpability are appropriately reflected in the proposed offences.

## CURRENT LAW

At the moment no criminal offence comprehensively covers the taking, making and sharing of intimate images without consent. There are three specific offences that may apply to some forms of these behaviours and a number of other offences that may also be used in this context. None are specific to situations of DVA, but all *could* be relevant in this context, depending on the circumstances. There is also no specific offence that criminalises all forms of *threats* to take, make, and share intimate images without consent, but a number of the offences could be used to address threats of this kind. Each of these existing offences is addressed in turn.

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<sup>68</sup> D Tuerkheimer, 'Recognising and remedying the harm of battering: A call to criminalize domestic violence' (2004) 94 Journal of Criminal Law and Criminology 970, 961

<sup>69</sup> Tuerkheimer (ibid) 1015.

<sup>70</sup> Wiener (n 39); Wiener (n 40).

Section 33 Criminal Justice and Courts Act 2015 criminalises the disclosure of private sexual photographs or films without consent with intent to cause that individual distress (the ‘disclosure’ offence). However, it is not widely used and the attrition rate is high.<sup>71</sup> The specific intent requirement, whereby it must be proven that the defendant intended to cause distress to the victim, operates as a significant evidential barrier.<sup>72</sup> The offence is also categorised as a communications offence which limits the maximum sentence to 2 years on conviction in the Crown Court and 6 months in the magistrates’ court, as well as denying victims the protections afforded them in sexual offences cases.<sup>73</sup> Where images are shared as a tool of coercive control, ‘intention to cause distress’ does not fully capture the motivations of the perpetrator or the resultant harm to the victim, which can be far more devastating than mere ‘distress’.

Following a campaign by Refuge highlighting the prevalence of threats, the disclosure offence was amended in 2021 to include threats to disclose intimate sexual images.<sup>74</sup> When this amendment was proposed, the primary harm targeted was identified to be coercion and control in an abusive relationship.<sup>75</sup> However, in mirroring the existing offence, it suffers the same limitations and particularly, with the same specific fault element, does not adequately capture the motivation behind this behaviour when used a tool of coercion and control in intimate relationships.

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<sup>71</sup> According to data provided to Law Commission in October 2020, prosecutions have been falling since 2018 and no action was taken in 64% of reported offences, the main reasons given being a ‘lack of evidence’ and ‘the victim withdrawing support’ (Law Commission (n 1) para 3.8).

<sup>72</sup> Law Commission (n 1) at paras 3.46 and 3.63-3.66.

<sup>73</sup> These measures include the granting of automatic anonymity under s 1 Sexual Offences (Amendment) Act 1992, special measures in court under ss 16-30 Youth Justice and Criminal Evidence Act 1999, and limitations on cross-examination are required following a line of cases concerning changes to the questioning practices as regards vulnerable witnesses (*Barker*, E [2011] EWCA Crim 3028; *W* [2010] EWCA Crim 1926; *Wills* [2011] EWCA Crim 1938). See also E Henderson, ‘Taking Control of Cross-Examination: Judges, Advocates and Intermediaries discuss Judicial Management of the Cross-Examination of Vulnerable People’ (2016) *Crim Law Rev* 181. Details of cases involving the disclosure of intimate images are widely reported on in the press, suggesting the cases are going to cross-examination and underlining the importance of these protections in cases of this kind (A Dymock and C van der Westhuizen, ‘A dish served cold: targeting revenge in revenge pornography’ (2019) 39 *Legal Studies* 361, 370).

<sup>74</sup> Section 69 Domestic Abuse Act 2021.

<sup>75</sup> In introducing the proposed amendment, Baroness Morgan of Cotes stated ‘this is an issue about the exercise of control by one person—the abuser, the maker of the threats—over another. Too often, the threats are followed by physical abuse (Hansard (HL), 8 February 2021, vol 810, col 145).

The voyeurism offences under the Sexual Offences Act 2003 (SOA 2003) can be applied to intimate image abuse, provided the defendant acted with the purpose of obtaining sexual gratification.<sup>76</sup> The ‘upskirting’ offence may also be used, provided the *actus reus* is fulfilled.<sup>77</sup> This offence extends to situations where the perpetrator is acting with the purpose of humiliating, alarming or distressing the individual in the images, rather than being limited to sexual gratification. However, this specific purpose must be proven by the prosecution, which may cause similar difficulties to those outlined above with regards the ‘disclosure’ offence. The offence also only applies to the taking of images, not where images are subsequently shared, and only applies to this particular type of behaviour so is narrow in scope and unlikely to be used in the context of DVA.

Some intimate image abuse, including threats to share images, may fall under the stalking and harassment offences contained in the Protection from Harassment Act 1997.<sup>78</sup> For both the stalking and harassment offences there must be a ‘course of conduct,’ defined as conduct on at least two occasions.<sup>79</sup> This may be challenging for prosecutors, since in many cases there is likely only to be a small number of incidents; a threat to share an intimate image may only need to be made once to create the effect desired by the perpetrator. If a threat is not repeated, it may be difficult to substantiate a course of conduct and therefore apply the offence.<sup>80</sup> The legislation also does not apply where a relationship is ongoing, meaning it cannot be used where intimate image abuse, including threats, happens in this context.<sup>81</sup> Harassment is defined in s 7(1) to

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<sup>76</sup> There are four voyeurism offences under s 67 Sexual Offences Act 2003, all of which are designed to criminalise the observing or recording of private acts of others without their consent.

<sup>77</sup> The practice of ‘upskirting’ involves operating equipment under a person’s clothing without their consent, with the intention of viewing their genitals or buttocks, with or without underwear. The offence was introduced under s 67A SOA 2003 by the Voyeurism (Offences) Act 2019.

<sup>78</sup> The relevant offences are s 2 (harassment); s 2A (stalking); s 4 (putting people in fear of violence); s 4A (stalking involving fear of violence or serious alarm or distress).

<sup>79</sup> Section 7(3).

<sup>80</sup> Law Commission (n 1) para 12.41.

<sup>81</sup> *Curtis* [2010] EWCA Crim 123; [2010] 3 All ER 849; *Widdows* [2011] EWCA Crim 1500; [2011] Crim LR 959. See also V Bettinson and C Bishop, ‘Is the creation of a discrete offence of coercive control necessary to combat domestic violence?’ (2015) 66 NILQ 179-197, 187-90.

include ‘alarming the person or causing the person distress’ and has been further defined by Lord Sumption as a ‘persistent and deliberate course of ‘unreasonable and oppressive conduct’, which is calculated to – and *does* – cause that person alarm, fear or distress’.<sup>82</sup> Although intimate image abuse could often constitute conduct of this kind, the proof of harm requirement is problematic. There is a strong risk of re-traumatising victims by asking them to provide evidence of the harm they experienced in order to secure a conviction. In addition, victims must experience distress before the perpetrator is at fault, which may not be the case – or may not be provable – despite a high level of culpability. The base offences of harassment and stalking under s 2 are also summary only offences, meaning the severity of the harm is not reflected in perpetrator culpability and, for the more serious offence under s 4 to apply, the harassment must cause the victim to fear that violence will be used against them.<sup>83</sup> While a victim of intimate image abuse will often experience fear, particularly where threats are made, this will not often be fear that physical violence will be used specifically. The more serious offence of stalking under s 4A includes where the course of conduct causes the victim to fear violence will be used against them *or* causes serious alarm or distress which has a substantial adverse effect on the victim’s daily life but is again limited by the requirement for a course of conduct. Therefore, while some intimate image abuse may meet the required thresholds for these offences, much will not.

The communications offences under s 1 Malicious Communications Act 1988 (MCA 1988) and s 127 Communications Act 2003 (CA 2003) could apply to intimate image abuse as they criminalise a range of grossly offensive, indecent, threatening and menacing communications. However, classifying conduct of this kind as a ‘communications’ offence does not fully convey the true nature and impact of the underlying offending behaviour. Section 127 is also a

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<sup>82</sup> *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 at [1].

<sup>83</sup> S 4(1).

summary only offence, thus not reflecting the gravity of the harm caused by behaviour of this kind. Images must also be ‘indecent’ or ‘grossly offensive’ to engage the offence, which may well not be the case.

The Parliamentary debate on the Policing and Crime Bill<sup>84</sup> noted that the offence of blackmail could be used for some forms of threats to disclose intimate images without consent, but only where threats were made with a view to make a gain or cause a loss.<sup>85</sup> Therefore, as noted in the Consultation, while this offence may cover some instances of threats to disclose, such as ‘sextortion’ where a victim is threatened with the sharing of their intimate image unless they pay money or send more intimate images, it is unlikely it could be utilised in the domestic context where threats are typically made to humiliate or distress, or to coerce and control the victim.

The offence of ‘controlling or coercive behaviour in an intimate relationship’ (the s 76 offence) was introduced in 2015 with the express aim of closing a legal ‘loophole’ by criminalising non-physical harm that was previously outside of the law’s protection.<sup>86</sup> Notwithstanding the fact that this offence misconceptualises Stark’s conceptualisation of coercive control, at first glance it appears that it would be the most appropriate charge where it is alleged that intimate images were shared, or threats to share were made, as a tool of coercion and control in an intimate relationship. Where the perpetrator has taken, made, shared, or threatened to share non-consensual intimate images, the requirements could be met if the behaviour is shown to be

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<sup>84</sup> Hansard (HL), 16 November 2016, vol 776, col 1442.

<sup>85</sup> While a ‘gain’ for these purposes need not be financial, the Court of Appeal has ruled that the gain must consist of ‘property’ (R v Bevens (Ronald George Henry) (1988) 87 Cr App R 64).

<sup>86</sup> In introducing the clause on coercive control, then Attorney General Robert Buckland stated that the consultation ‘identified a gap in the law - behaviour that we would regard as abuse that did not amount to violence. Violent behaviour already captured by the criminal law is outside the scope of the offence... we want an extra element that closes a loophole (Hansard, HC Deb, 20 January 2015, Vol 591, Col 172). As Weiner (forthcoming) points out, this is empirically incorrect as coercive control consists of physical violence and other abusive tactics to gain and maintain power and control over the victim.

‘repeated or continuous’ and has a ‘serious effect’ on the victim ‘serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.’<sup>87</sup> Amendments recently introduced under the Domestic Abuse Act 2021 have also extended the offence of controlling or coercive behaviour (CCB) under s 76 Serious Crime Act 2015 to former partners<sup>88</sup> meaning that where images are shared after the relationship ends, as a final act of ‘revenge’ or retaliation, or where threats are made as a tool of ongoing coercion and control, this could fall within the offence. There is no requirement that the prosecution prove the defendant was acting to cause a particular harm or for the purposes of sexual gratification, thus avoiding some of the limitations inherent in the offences discussed above, but there is a requirement that harm in the form of a ‘serious effect’ is established. Proof of harm was already shown to be a problematic requirement in the context of the harassment and stalking offences. In addition, for a successful prosecution it would need to be shown that the perpetrator (A) repeatedly or continuously engaged in behaviour towards the victim (B) that was controlling or coercive.<sup>89</sup> This could be problematic if there was just one (provable) threat or incident of sharing as it would not then be seen as repeated or continuous behaviour, thus limiting the scope of the offence in the same way as the requirement for a ‘course of conduct’ was shown to restrict the harassment and stalking offences. As the discussion on separation assault and credible threats makes clear, one threat made to share an image if the victim leaves could well be enough to keep the victim entrapped in the relationship and subservient to the demands of the perpetrator. The dynamics of coercive control are hard to discern and can be hard to evidence due to the ways in which they can merge with socially accepted gender roles in heterosexual relationships.<sup>90</sup> Research also indicates that police still find it hard to identify coercive control, particularly where there

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<sup>87</sup> Section 76(4).

<sup>88</sup> Section 68(4) Domestic Abuse Act 2021.

<sup>89</sup> S 76(1)(a)

<sup>90</sup> See C Bishop and V Bettinson, ‘Evidencing Domestic Violence, including Behaviour that falls under the new Offence of ‘Controlling or Coercive Behaviour’ (2018) 22 *International Journal of Evidence and Proof* 3 for a discussion of gender roles and evidencing coercive control.

is no evidence of serious physical violence.<sup>91</sup> These limitations mean that, while the s 76 offence may be used in this context, it is not likely to be applicable in many cases and there are in fact indications that the offence is not being charged where intimate images are shared, or threats to share are made in the context of DVA.<sup>92</sup>

This analysis confirms the conclusions reached in both the Shattering Lives report and the consultation; the existing patchwork of offences does not effectively criminalise all forms of intimate image abuse.<sup>93</sup> The protection offered is piecemeal and conceptually inconsistent, with many of the offences overlapping but using different language and terminology. The lack of coherence in the law leads to a ‘failure to safeguard victims’<sup>94</sup> with different types of intimate image abuse conceptualising the harm differently and requiring proof of different purposes and motivations. Different protections are also provided for victims depending on how the offence is classified. Reform is therefore essential to address the gaps and lacuna in the law and provide more effective protection for victims.<sup>95</sup> Four categories of intimate image offence are provisionally proposed on the basis that this would provide a more unified and structured approach by capturing the range of behaviours that constitute intimate image abuse, making the law governing this conduct clearer and more consistent, and ensuring that behaviour that is more culpable is dealt with appropriately.<sup>96</sup> These will be outlined and then discussed in the next section.

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<sup>91</sup> A Robinson and others, ‘Under the radar: policing non-violent domestic abuse in the US and UK’ (2016) 40 International Journal of Comparative and Applied Criminal Justice 195; I Brennan and A Myhill, ‘Domestic Abuse Matters 2.0: Evaluation of First Responder Training’ (2017, College of Policing) [www.college.police.uk/News/College-news/Documents/Domestic\\_Abuse\\_Matters.pdf](http://www.college.police.uk/News/College-news/Documents/Domestic_Abuse_Matters.pdf) accessed 16 November 2021; Wiener (n 56).

<sup>92</sup> Law Commission (n 1) para 3.160.

<sup>93</sup> See Law Commission (n 1) paras 3.130-3.201 for the Law Commission’s analysis of these offences and their limitations.

<sup>94</sup> Law Commission, *Intimate Image Abuse: Summary of the Consultation Paper* (Law Commission, 2021) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/03/Intimates-Images-summary-final.pdf> accessed 16 November 2021.

<sup>95</sup> Ibid.

<sup>96</sup> Law Commission (n 1) para 14.8.

## THE PROPOSED REFORMS

The offences provisionally proposed by the Law Commission are:

- (1) a “base” offence of taking or sharing an intimate image without consent, without a reasonable belief in consent, but with no additional intent element.
- (2) an “additional” more serious offence of taking or sharing an intimate image without consent, with an intention to humiliate, alarm or distress the depicted person.
- (3) an “additional” more serious offence of taking or sharing an intimate image without consent, without a reasonable belief in consent, for the purpose of obtaining sexual gratification, for oneself or another.
- (4) an offence of threatening to share an intimate image.

As well as seeking feedback on the proposed categories of offences, responses are also sought on a number of other issues including the proposed terminology and definitions. For the purposes of this article the focus will be on the consultation questions most pertinent to issues of coercion and control and the proposed threats offence, since these are of the most relevance where intimate images are used as tool of coercive control in abusive relationships.<sup>97</sup> The proposed offences classify the conduct of perpetrators into three separate categories of taking, making and sharing an intimate image with the common thread being that ‘the conduct takes place without the consent of the person in the image and violates their sexual privacy, autonomy and freedom, their bodily privacy and their dignity’.<sup>98</sup> The consultation proposes that the intimate image abuse offences are classified as sexual offences, rather than as communications offences.<sup>99</sup> This is important for a number of reasons, including the availability of the

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<sup>97</sup> There are 47 consultation questions in total, with the ones of specific interest to this article being those concerning the four offences that are provisionally proposed (consultation questions 26-28 and 40 at paras 10.60; 10.73; 10.79 and 12.138); whether proof of actual harm should be an element of intimate image offences (consultation question 24 at para 9.12.), whether an additional offence with a mens rea of ‘intention to coerce or control’ is needed (consultation question 30 at para 10.93), and whether a specific threats offence should be introduced (consultation question 40 at para 12.138).

<sup>98</sup> Law Commission (n3) at para 1.15.

<sup>99</sup> Law Commission (n3) at para 14.32.



protections and procedural safeguards that are already provided to victims of sexual offences, such as anonymity, special measures, and limitations on cross-examination.<sup>100</sup>

### **Culpability, harm and the hierarchy of offences**

The provisional view of the Law Commission is that proof of actual harm should not be an element of any of the proposed intimate image offences because it would be an unnecessary barrier to prosecution and could cause unnecessary distress to the victim.<sup>101</sup> This reflects the view of the majority of stakeholders during the pre-consultation stage, nearly all of whom agreed that offences of this kind should be categorised as criminal regardless of impact and that there should be no requirement for proof of harm.<sup>102</sup> Rackley and Johnson rightly pointed out that harm to the victim can be considered at the sentencing stage.<sup>103</sup> Critics of New Zealand's harmful digital communications offence<sup>104</sup> claim that the requirement that actual harm to the victim be proven makes the threshold for prosecution too high and whether a victim can prove that they were harmed is 'a subjective and arbitrary determination of whether an offence has occurred.'<sup>105</sup> As emphasised by this author during the pre-consultation, an approach that requires proof of harm, as required under the s 76 offence, is often problematic and off-putting for victims because of the risk of re-traumatisation through an offence that

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<sup>100</sup> These measures include the granting of automatic anonymity under s 1 Sexual Offences (Amendment) Act 1992, special measures in court under ss 16-30 Youth Justice and Criminal Evidence Act 1999, and limitations on cross-examination are required following a line of cases concerning changes to the questioning practices as regards vulnerable witnesses (*Barker*, E [2011] EWCA Crim 3028; *W* [2010] EWCA Crim 1926; *Wills* [2011] EWCA Crim 1938). See also E Henderson, 'Taking Control of Cross-Examination: Judges, Advocates and Intermediaries discuss Judicial Management of the Cross-Examination of Vulnerable People' (2016) *Crim Law Rev* 181. Details of cases involving the disclosure of intimate images are widely reported on in the press, suggesting the cases are going to cross-examination, underlining the importance of these protections in cases of this kind (A Dymock and C van der Westhuizen, 'A dish served cold: targeting revenge in revenge pornography' (2019) 39 *Legal Studies* 361, 370).

<sup>101</sup> Law Commission (n 1) para 9.11.

<sup>102</sup> Law Commission (n 1) para 9.6.

<sup>103</sup> *ibid*

<sup>104</sup> Section 22 Harmful Digital Communications Act 2015.

<sup>105</sup> N Macdonald, 'Revenge porn: Is the Harmful Digital Communications Act working?' (Stuff, 9 March 2019) <https://www.stuff.co.nz/national/crime/110768981/revenge-porn-is-the-harmful-digital-communications-act-working> accessed 12 November 2021.

requires them to give evidence of how and to what extent they were harmed by the actions of the defendant.<sup>106</sup>

During initial discussions this author proposed that there *should* be a ‘proof of harm’ requirement for any new intimate image offence. However, part of the reason for this suggestion was that at that time key stakeholders were of the view that there should be just one basic offence, established where the defendant shared images without the consent of the victim, rather than a ladder of offences with different levels of culpability, similar to the non-fatal offences under the OAPA.<sup>107</sup> Whilst it is apparent that there are some benefits to the former approach as it would be straightforward to prove and pivots solely on the defendant’s state of mind with regards to the victim’s lack of consent (in the same way many sexual offences do), it is contended that this would be problematic because, without culpability, the harm inflicted on the victim may not be reflected in the penalties for the proposed offences.<sup>108</sup> Given that the framework of offences proposed by the Law Commission provides for different levels of culpability through the inclusion of a basic offence, two additional intent offences, and a threats offence, the need for a harm-based approach is unnecessary because culpability can be demonstrated through the other elements of the offence. However, it is vital that the final recommendations to Parliament clearly reflect the nature and extent of the harm of the different forms of intimate image abuse and establish the need for different levels of culpability.

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<sup>106</sup> C Bishop cited in Law Commission (n 1) at para 9.8.

<sup>107</sup> The concern that introducing a separate base offence and then more serious additional intent offences risks being overly complex for prosecutors, thus potentially impeding the effective prosecution of intimate image offences is reflected in the consultation at paras 10.94 and 10.95.

<sup>108</sup> While the s 76 offence requires proof that the prohibited behaviour had a ‘serious effect’ on the victim, the offence and accompanying guidance does not demonstrate understanding of the nature of the harm to the victim. This is also seen in discussions prior to the introduction of the offence. This has resulted in a very low maximum sentence despite the serious harm that typically results from this type of behaviour (see Bishop and Bettinson (n 89)). The maximum prison sentence on indictment is 5 years (s 76 (11)(a)) with the maximum provided for in the Sentencing Council Guidelines being 4 years, with the presence of aggravating factors (Sentencing Council Definitive Guidelines: Intimidatory Offences, available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Intimidatory-offences-definitive-guideline-Web.pdf> accessed 14 November 2021).

In England and Wales culpability is determined by reference to the level of harm caused and also by reference to the mental state of the offender at the time they caused the harm that constitutes the actus reus of the offence they are charged with.<sup>109</sup> This makes the outcome of an action, or the level of harm caused, an integral element when determining the severity of an offence and the corresponding penalties. However, it is not the only element; the fault element is concerned with both the defendant's state of mind at the time they committed the actus reus of the offence (the subjectivity principle) and the harm committed through their actions (correspondence principle).<sup>110</sup> This ensures a ladder of offences is constructed in 'ascending order of gravity.'<sup>111</sup> Although the fault element must relate to the harm committed, culpability is then determined by the defendant's state of mind.

This approach justifies the proposed hierarchy of offences and negates concerns that including a number of offences with higher culpability carries the implication that *less* harm is caused where the defendant is liable only for the base offence. It is not that culpability is being increased based on an objective assessment of harm, thereby implying that the harm to the victim is less when the defendant acted without one of the intentions or purposes listed for the 'additional' offences. Instead, the defendant is deemed less *culpable* when not acting with one of the additional purposes or motivations and therefore a lesser penalty is justified. Indeed, it is contended that the offence itself reflects the level of harm and then *culpability* is increased when the defendant acted with intention to cause a particular harm, rather than the additional offences reflecting greater harm to the victim.

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<sup>109</sup> For example, under the Offences Against the Person Act 1861 (OAPA), culpability is predominantly approached in terms of physical harm (or, under *R v Chan Fook* [1994] 1 W.L.R. 689, psychological harm where there is a recognised psychiatric condition) with offenders being held liable when they intentionally, or sometimes recklessly, cause harm to a victim.

<sup>110</sup> In constructing offences, the Law Commission already recognises the importance of both the subjectivity and correspondence principles in determining defendant culpability. See Law Commission, *A New Homicide Act for England and Wales* (Law Com No 177, 2005) and also the ladder of non-fatal offences under the Offences Against the Person Act 1861.

<sup>111</sup> Law Commission (n 1) para 1.32.

The symbolic importance of this legislation cannot be underestimated. Attempting to implement fewer offences, or just one basic offence, to avoid impeding the prosecutorial process risks not adequately articulating the various types of harm or effectively reflecting the motivations and culpability of those who make, take and share intimate images. A ladder of offences is therefore needed to capture the various forms of intimate image abuse and the different motivations behind it. This would also emphasise the pervasive nature of intimate image abuse by bringing attention to the fact that it occurs in numerous contexts with various motivations and impacts, and therefore has a number of important implications for victims and wider society. It is not something that can be captured and dealt with under one simple offence. An offence with a very low maximum sentence, which would be the case with a low threshold for *mens rea* and no requirement for proof of harm to the victim, risks diluting the symbolic message about the severity of the consequences of intimate image abuse. This would fail to send a strong message about the serious nature of this crime and the severe, devastating and often lifelong implications it has for victims. The next subsection will consider how the motivations of the perpetrator where intimate images are utilised as tools of coercive control could be best accommodated within the proposed offences.

### **Motive: to control or coerce**

The consultation invites views on whether there should be an additional offence of intentionally taking or sharing an intimate image without consent *with the intent to control or coerce* the person depicted, and whether this would be substantially different from an offence where the intent is to humiliate, alarm or distress the victim.<sup>112</sup> It is submitted that intention of this kind should be included within the proposed offences, either as a standalone offence or within the first additional offence (intention to distress, alarm or humiliate). An offence of this kind would

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<sup>112</sup> Ibid para 10.92-3.

more effectively encapsulate the nature of the harm inflicted on the victim and the motives of the defendant in certain situations, particularly where there is a state of coercive control maintained over the victim in an intimate relationship. This would reflect situations where images are shared by the perpetrator to restrict the victim's autonomy and freedom, prevent them from ending the relationship, and coerce them into behaving in a particular way. For example, images that have been taken, sometimes non-consensually, may be shared with a small group of people and this would leave the victim in fear of further images being taken and shared more widely. Indeed, it is known that the risk of future harm increases where intimate images exist and/or where threats have been made to share them.<sup>113</sup> Alternatively, where there was an intention to coerce or control it could be considered an aggravating factor at the sentencing stage, thereby increasing perpetrator culpability in that way.

During the pre-consultation some stakeholders suggested that where intimate image abuse takes place in the context of an intimate relationship it should be dealt with under existing domestic abuse legislation. However, while it is undoubtedly the case that where appropriate the s 76 offence should be used, and that police need to be trained to recognise the ways in which intimate images are used in a coercively controlling relationship, the s 76 offence, as outlined above, is far from satisfactory both in terms of the substantive law and its implementation.<sup>114</sup> It should not be assumed that the s 76 offence can, or even should, be charged where intimate images are used as a tool of coercive control. Automatic anonymity for

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<sup>113</sup> Citron and Franks (n 7); E Sharratt, 'Intimate image abuse in adults and under 18s' (South West Grid For Learning, 2019) <https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf> accessed 16 November 2021.

<sup>114</sup> Office for National Statistics, 'Domestic abuse and the criminal justice system, England and Wales: November 2020' (ONS, 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020> accessed 14 November 2021; HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (HMIC 2014); J Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79 *Journal of Criminal Law* 55; Bettinson and Bishop (n 80); C. Bishop, 'Domestic Violence: The Limitations of a Legal Response,' in Sarah Hilder and Vanessa Bettinson (eds), *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention*. (Palgrave 2016); Bishop and Bettinson (n 89); M Hester, 'Making it Through the Criminal Justice System: Attrition and Domestic Violence' (2006) 5 *Social Policy and Society* 79; Wiener (n 56); Brennan and Myhill (n 90).

victims is also not granted for complainants where a s 76 offence is charged and therefore it may be preferable to charge under the proposed offences for this reason also, since the Law Commission provisionally proposes the provision of automatic lifetime anonymity for victims.<sup>115</sup> On the other hand, while naming coercion and control in this context is important for reasons outlined above, it may be that introducing too many new offences would be undesirable and overly complex, in which case it may be preferable to incorporate an intention to coerce or control within the second additional offence (taking or sharing an intimate image without consent, with an intention to humiliate, alarm or distress the depicted person) or as an aggravating factor in sentencing. A specific intention to ‘coerce and control’ could be incorporated in the context of threats to share.

### **Coercive control and the proposed threats offence**

It is clear from the prevalence of threats to share intimate images, and the motivations of those who use them as a tool of coercive control, that the creation of a specific offence is justified.<sup>116</sup> As noted in the consultation, a number of threats offences already exist under criminal law, confirming that threats can warrant criminalisation even where they are not immediately actionable or effective, and that whether a threat has been made can be established objectively.<sup>117</sup> In recognition of the fact that threats to share intimate images are the most common type of threat, with evidence suggesting that these mainly take place in the context of abusive relationships,<sup>118</sup> the consultation provisionally proposes that it should be an offence for D to threaten to share an intimate image of V, where:

- (a) D intends to cause V to fear that the threat will be carried out; or

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<sup>115</sup> Law Commission (n 1) para 14.85.

<sup>116</sup> As suggested by Refuge, criminalising threats could mean images are never actually shared, something that currently happens in 23% of cases where a threat has been made (Refuge (n 6)).

<sup>117</sup> Law Commission (n 1) 12.24

<sup>118</sup> Ibid para 12.3

(b) D is reckless as to whether V will fear that the threat will be carried out.<sup>119</sup>

In provisionally proposing the introduction of a specific threats offence, the Law Commission has chosen to take the lead from jurisdictions such as Australia, where threats constitute a separate offence<sup>120</sup> rather than following in Scotland's footsteps where threats are combined with the taking, making and sharing offences.<sup>121</sup> In doing so the different character of threats as compared with taking, making and sharing is noted; here the harm arises from the threat itself rather than the taking, making or sharing that may or may not follow. Creating a specific threats offence means that it can be tailored to ensure that only harmful behaviour is criminalised and that the elements are not unduly restricted by a focus on the taking, making or sharing offences.<sup>122</sup> The consultation further submits that an alternative additional intent requirement, such as the intent to cause distress, is unnecessary for the threats offence due to the proposed fault element. The argument behind this is that, '[i]nherent in a threat which the defendant intends the victim to fear will be carried out (or is reckless thereto) is an intention to cause the victim distress (or recklessness as to whether distress is caused)', making such an additional intent requirement superfluous.<sup>123</sup> However, there may be a different offence to articulate here, where D threatens to share an image with the intention of controlling or coercing V. This seems to make D more culpable than where they intentionally or recklessly threaten to share an image without comprehending how much harm might be caused to V through this

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<sup>119</sup> Law Commission (n 1) at para 12.138. The Law Commission propose that the same definition of 'intimate image' is used for both the offences of sharing and threatening to share an intimate image (para 12.139). The test of recklessness would be the same as for other criminal offences, that is to say a subjective test with an objective element (*R v Cunningham* as confirmed by *R v G and R*).

<sup>120</sup> There are separate threats offences in Victoria under section 41DB of the Summary Offences Act 1966, in New South Wales by virtue of s 91R Crimes Amendment (Intimate Images) Act 2017 No 29 [NSW], in Western Australia where the Criminal Law Amendment (Intimate Images) Act 2019 amended the Criminal Code to make an offence of distributing an intimate image of another person without their consent, or threatening to distribute an intimate image of another, and in the Australian Capital Territory where the Crimes (Intimate Image Abuse) Amendment Act 2017 amended the Crimes Act 1900 to include intimate image offences, with s 72E of the Crimes Act 1900 creating a specific threats offence.

<sup>121</sup> Section 2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

<sup>122</sup> Law Commission (n 1) at para 12.114.

<sup>123</sup> Law Commission (n 1) at para 12.133.

apprehension (i.e., where they intend or are reckless as to causing V to fear the image may be shared, but do not consider the impact that this fear may have on V). The impact of a threat to distribute intimate images extends beyond the humiliation or shame that a survivor might be concerned about should the abuser follow through with the threat.<sup>124</sup> It is important that the harmful impact of the behaviour and the motivations of the perpetrator are articulated and reflected in the offence.

Of course, where threats to share are made as part of a clear and provable programme of coercive control the s 76 offence is available and should be used. However, as discussed above, there may be situations in which it is not possible to evidence this offence or it is not relevant or desirable to bring a charge for other reasons, and therefore it is important that the proposed threats offence can accommodate the more serious nature of the harm and culpability where threats form part of an overall programme of coercive control. An objection may be raised that having two threats offences would lead to the creation of too many offences in total. However, this implies that threats to share are less serious than situations where the images are in fact shared, something which the above discussion shows is often not the case. It is this author's view that the threats offence should articulate the intentional or reckless use of threats in order to control or coerce the victim as a different harm and level of culpability than where the defendant threatens to share images solely intending or being reckless that V will fear the image will be shared.

The Law Commission expresses understandable reluctance to criminalise the mere possession of intimate images without consent to avoid over-criminalisation.<sup>125</sup> However, in the context of DVA, particularly where there is coercive control, the existence of an image can harm the

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<sup>124</sup> Cuomo and Dolci (n 9) 230.

<sup>125</sup> Law Commission (n 1) Consultation Question 18 at para 7.86.



victim even where there is no explicit threat to share it. It may prevent them from leaving or attempting to leave and deter them from disclosing the violence and abuse, reporting to the police, or seeking help because they are aware that the images exist and that they could be used against them. It is for this reason that threats - for the purposes of the proposed threats offence - must be broadly construed to include implicit as well as explicit threats. This would reflect the New South Wales threats offence which makes clear that the threats offence can be committed by any conduct, explicit or implicit, conditional or unconditional.<sup>126</sup> Training and guidance around this will need to be thorough and inclusive, and where the *existence* of images, without threats to share, are responsible for keeping the victim in an abusive relationship, or stopping them reporting, disclosing or seeking help, then the s 76 offence should be used where relevant.

The preceding discussion indicates that the Law Commission is right to consider introducing an additional offence of ‘intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person’. However, including an intention to coerce and control as an aggravating factor at the sentencing stage could also be considered. The creation of a specific offence of threatening to share has also been justified, with the suggestion that incorporating an intention to coerce and control in this context may better reflect the culpability of those who engage in *threats* to share intimate images and should therefore be introduced not just where images are taken, made, and shared, but also where threats to share such images are made.<sup>127</sup> It is suggested that, were these offences to form part of the framework of reforms implemented, it would significantly increase the ability of the criminal law to protect victims and impose penalties befitting the severity and nature of the harm intended and caused.

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<sup>126</sup> 91R Crimes Amendment (Intimate Images) Act 2017 No 29 (NSW)

<sup>127</sup> Law Commission, *Intimate Image Abuse* (Law Com No 253, 2021) at para 10.93.

## CONCLUSION

The proposed reforms, in seeking to provide a framework that covers all forms of intimate image abuse and recognises a range of motivations, provide an important opportunity to address one of the most pervasive and ubiquitous tools utilised by perpetrators to maintain power and control in intimate relationships. In discussing the need for intimate image abuse that takes place in the context of DVA, as a tool of coercive control, to be included in the legal framework, this article has emphasised the importance of the law fully recognising the harm that it seeks to remedy and the motivations behind the behaviour that causes this harm. It is therefore clear that the harmful loss of autonomy and personhood that results from the use of intimate images as tools of coercive control must be reflected in the new legal framework and used to determine the level of culpability, and appropriate penalties, for each offence. Detailed consideration of the proposed offences confirms that there is the potential for legal reforms to effectively conceptualise intimate image abuse as a tool of coercion and control and to reflect the motivations of those who engage in this behaviour through the inclusion of several offences with differing levels of culpability.

Of course, substantive law reform can only ever be one strategy used to address gendered harms and violence against women and girls. Victim reluctance to report or participate in the criminal justice process, alongside the widely documented barriers to successful conviction of gender-based crimes, make it clear that introducing new legislation will not be a panacea when it comes to increasing protection and bringing perpetrators to justice.<sup>128</sup> In addition, intimate image

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<sup>128</sup> Unwillingness to report, retraction of complaints and the withdrawal of support for prosecution is already an issue with DVA, sexual offences and prosecutions under the 'disclosure offence'. A BBC freedom of information request revealed that no action was taken in 61% of cases of 'revenge porn' recorded by the police between April and December 2015. Many of these reported incidents failed to proceed due to evidential difficulties or because the complainant had withdrawn their support for prosecution (P Sherlock, *Revenge pornography victims as young as 11, investigation finds*, BBC News (27 April 2016) <https://www.bbc.co.uk/news/uk-england-36054273> accessed 16 November 2021). For attrition in domestic violence cases see A Cretney and G Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36 *Howard J. Crim. Justice* 146; L Bennett and others, 'Systemic obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective' (1999) 14 *Journal of Interpersonal Violence* 761; Hester (n 113); A Robinson and D Cook, 'Understanding Victim Retraction in Cases of Domestic Violence: Specialist Courts, Government Policy, and Victim-Centred Justice' (2006) 9

abuse, particularly when perpetrated against partners and former partners, sustains and normalises male power and privilege in the domestic sphere at a cultural level. This highlights that the taking, making, and sharing of intimate images without consent is harmful not only to individual victims but also to women as a group, due to the normalisation of harmful sex-role stereotypes it facilitates, indicating that wider social change, that goes beyond the criminalisation of individual perpetrators, is needed to fully address this issue. However, criminal law is an important first step in facilitating the wider changes needed as it can play an important role in shaping these new manners or ethics' and new offences can strengthen perceptions about the wrongfulness of behaviour.<sup>129</sup> This is particularly relevant in the context of intimate image abuse because it is a – relatively – new behaviour and therefore new norms are still forming.<sup>130</sup> Legal reforms that condemn and appropriately punish harmful behaviours are therefore an important first step towards the wider change needed at the same time as being able to ensure that the harmful loss of autonomy resulting from the sharing of images, or threats to share images, in the context of DVA is appropriately captured in the legal framework.

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Contemp. Justice Rev. 189. With regards rape, it is estimated that only 15% of victims report to the police (Ministry of Justice, Home Office and the Office for National Statistics, 'An Overview of Sexual Offending in England and Wales' January 2013) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214970/sexual-offending-overview-jan-2013.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf) accessed 19 November 2021) and an extremely high attrition rate means only 1.4% of reported rapes result in even a charge or summary (D Shaw, Rape convictions fall to record low in England and Wales, BBC News (30 July 2020) <https://www.bbc.co.uk/news/uk-53588705> accessed 16 November 2021).

<sup>129</sup> Crofts and Kirchengast (n 7) 93. See also D Citron, 'Sexual privacy' (2019) 128 Yale Law Journal 1874; Citron and Franks (n 7); D Citron and J Penney, 'When law frees us to speak' (2019) 87 Fordham Law Review 1; McGlynn and Rackley (n 7).

<sup>130</sup> Crofts and Kirchengast (ibid).