

THE WRONGNESS OF IMAGE-BASED SEXUAL ABUSE

MARTHE GOUDSMIT

EXETER COLLEGE

UNIVERSITY OF OXFORD

MICHAELMAS TERM 2022

Thesis submitted for the degree of
Doctor of Philosophy

THE WRONGNESS OF IMAGE-BASED SEXUAL ABUSE

MARTHE GOUDSMIT

Abstract

What is the nature of the wrongfulness of image-based sexual abuse ('ibsa')? That is the main question addressed in this thesis. The answer is found to depend on the understanding of personhood underpinning the interpretation of wrongs. It can be summarised as follows: on atomistic personhood, ibsa is a moderate infringement of autonomy, sexual integrity, privacy, and positive freedom of expression. There is limited theoretical scope for finding the absolute wrong of failing to minimally respect personhood. On relational personhood, ibsa is found to be much more seriously wrongful: it is a severe infringement of autonomy, sexual integrity, privacy, positive and negative freedom of expression, and can constitute a breach of trust. The absolute wrong of failing to minimally respect personhood can readily be found. On both approaches to personhood, ibsa is understood as part of the continuum of violence against women and, as such, as reinforcing and being reinforced by inequality.

A central claim of this thesis is that personhood is a fundamental element of interpreting wrongs against persons. Personhood is not typically appreciated as such, nor is wrongfulness usually at the focus of discussion when considering justified criminalisation. This thesis first sets out the justified scope of the criminal law in liberal democracies as demarcated by harmful, public wrongs. Wrongfulness is considered as an underexplored, core part of criminalisation theory. The thesis presents an original analysis of the significance of personhood in the context of interpreting wrongfulness and justifying criminalisation. That is followed by a discussion of atomistic and relational consent, and the role of (lack of) consent in finding wrongfulness. This thesis then uses the preceding analysis to interpret the wrongs of ibsa both on an atomistic and on a relational understanding of personhood, thus offering a two-part answer to the main question of this thesis. Finally, the thesis explores the implications of its findings on criminalisation theory and the criminalisation of ibsa. It defends the view that the law should take a relational understanding of personhood and that ibsa should be criminalised as a sexual offence.

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time
- T.S. Eliot

Acknowledgements

In writing this thesis I have been supported by many colleagues, friends, and family, without whom this project could not have taken shape. I am deeply grateful for their generous support, tireless encouragement, and mentorship. In particular, I express my thanks to some people that I am most indebted to.

My greatest debt is to my supervisor, Jonathan Herring. I am very grateful for his encouragement, patience, and good humour throughout this DPhil project. His kind teaching and guidance have been a wonderful invitation to develop my mind, learning, and scholarship. It has been inspiring and lots of fun to be his student, and for that I thank him.

I am most grateful too to my colleagues at the University of Oxford and beyond. I thank Barbara Havelková, Camilla Pickles, Rebecca Williams, and Lucia Zedner for their constructive and insightful comments on my work, and for helping me develop the direction of this thesis. I am very grateful to Clare McGlynn and Charles Foster for their examination of this work. I also wish to thank Charlotte Elves, Maurits Helmich, Megan Johnson, Lama Karamé, Molly Masterson, Andrew Small, Ned Summers, Leonie Thies, and Suzanne Zaccour for their morale boosting, guidance, and friendship. I feel very fortunate to have worked with such an inspired group of people.

This research could have made me very lonely had there not been many dear friends, across many borders. Even in times when I had nearly disappeared, I found that they were still there upon my return. I am very thankful to them. In particular, I want to thank Fatima Jarmohamed, Annemiek Simonse Te-Kiefte, Rosanne Schot, Rick van der Steur, and Suze Zijlstra for their support in getting me organised, and Kia Brouwers and

Daan Lutjeboer for their help in carrying tough days whenever I was far away. It made distances much more bearable. I am deeply grateful for their care, jokes, and friendship.

I am grateful to my parents, Rosemarie Samaritter and Arno Goudsmit, and my siblings Eva and Ben, for their love, support, and tirelessness for engaging me on my thesis and many other topics. It is wonderful to have such inspired and inspiring family members. Above all, I am grateful to them for making it near impossible for me to understand what atomistic personhood is meant to be.

To my partner, Wouter Hollenga, I am immensely grateful for shared love, humour, and joy. His confidence in my work, endurance, encouragement, and care have been a tremendous support to me throughout this DPhil project. I am grateful, but unsurprised, that we made it through Oxford's poor phone network.

And finally, I am grateful to the cat sleeping on my desk, for keeping me company.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS	VII
TABLE OF CASES OF ENGLAND AND WALES	VII
TABLE OF CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	VII
TABLE OF CASES OF OTHER JURISDICTIONS	VIII
TABLE OF STATUTES OF ENGLAND AND WALES.....	IX
TABLE OF STATUTES OF OTHER JURISDICTIONS	IX
TABLE OF OTHER PRIMARY LEGAL SOURCES	IX
CHAPTER 1: INTRODUCTION	1
1.1 RESEARCH AIMS AND RELEVANCE	2
1.2 LITERATURE ON THE WRONGNESS OF IBSA	5
1.3 SCOPE OF THE THESIS	6
1.4 DEFINING IBSA.....	7
1.5 STRUCTURE OF THE THESIS	16
CHAPTER 2: IBSA AND THE CRIMINAL LAW’S JUSTNESS AND FAIRNESS	20
2.1 INTRODUCTION	20
2.2 THE JUSTIFIED CRIMINAL LAW	22
2.3 THE FAIR CRIMINAL LAW: THE PRINCIPLE OF FAIR LABELLING.....	63
2.4 CHAPTER CONCLUSION.....	71
CHAPTER 3: WRONGNESS AND PERSONHOOD	75
3.1 INTRODUCTION	75
3.2 PERSONHOOD AS A THEORETICAL FOUNDATION FOR IDENTIFYING WRONGNESS.....	77
3.3 ATOMISTIC PERSONHOOD.....	88
3.4 HUMAN SPECIES MEMBERSHIP PERSONHOOD.....	96
3.5 RELATIONAL PERSONHOOD	103
3.6 CHAPTER CONCLUSION.....	121
CHAPTER 4: IDENTIFYING WRONGS OF IBSA AND THE POWER OF CONSENT.....	123
4.1 INTRODUCTION	123
4.2 THE Φ -ING THAT DEFINES IBSA.....	124
4.3 THE ROLE OF CONSENT IN ASSESSING WRONGFULNESS	127
4.4 CHAPTER CONCLUSION.....	150
CHAPTER 5: IBSA’S WRONGS TO PERSONHOOD INTERESTS	152
5.1 INTRODUCTION	152
5.2 THE WRONG IN IBSA OF INFRINGING AUTONOMY.....	153
5.3 THE WRONG IN IBSA OF INFRINGING SEXUAL INTEGRITY.....	176
5.4 THE WRONG IN IBSA OF INFRINGING PRIVACY	201
5.5 THE WRONG IN IBSA OF INFRINGING FREE EXPRESSION	218
5.6 THE WRONG IN IBSA OF BREACHING TRUST	229
5.7 CHAPTER CONCLUSION.....	239
CHAPTER 6: IBSA AS AN ABSOLUTE WRONG AGAINST PERSONS AND ITS WRONGNESS ON THE CONTINUUM OF INEQUALITY	241
6.1 INTRODUCTION	241
6.2 IBSA AND THE WRONG OF FAILING TO MINIMALLY RESPECT PERSONHOOD	242
6.3 IBSA AND THE WRONG OF REINFORCING AND BEING REINFORCED BY INEQUALITY ...	272
6.4 CHAPTER CONCLUSION.....	284

CHAPTER 7: CONCLUDING REMARKS	286
7.1 INTRODUCTION TO THE CONCLUSION	286
7.2 THE MAIN QUESTION: WHAT IS THE NATURE OF THE WRONG OF IBSA?	286
7.3 THE RELEVANCE OF PERSONHOOD FOR CRIMINALISATION THEORY	289
7.4 THE NECESSITY OF CRIMINALISING IBSA AND NOTES FOR FURTHER RESEARCH.....	292
7.5 A FAIR LABEL FOR OFFENCES ADDRESSING IBSA	294
7.6 APPROPRIATE <i>MENTES REAE</i> OF LAWS CRIMINALISING IBSA	297
7.7 APPROPRIATE <i>ACTUS REI</i> OF LAWS CRIMINALISING IBSA.....	299
7.8 TOPICS FOR FURTHER RESEARCH	300
7.9 FINAL CONCLUDING COMMENTS	305
APPENDICES.....	308
APPENDIX A: THE JUSTIFIED SCOPE OF THE CRIMINAL LAW.....	308
APPENDIX B: A DIAGRAM ON THE OVERLAP OF PUBLICNESS AND PRIVATENESS.....	309
APPENDIX C: SOCIALLY DISTANCED THEATRE INSTALLATION	310
BIBLIOGRAPHY.....	311

Table of Abbreviations

D	Defendant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IBSA	Image-based sexual abuse
UDHR	Universal Declaration of Human Rights
V	Victim

Table of cases of England and Wales

<i>A Local Authority v C & Ors</i> [2021] EWCOP 26.....	190
<i>Attorney-General's Reference (No 90 of 2009)</i> [2009] EWCA Crim 2610	233, 251
<i>Collins v Wilcock</i> [1984] 1 WLR 1172.....	140
<i>R v Brown and Stratton</i> [1988] Crim LR 484.....	69
<i>R v Richards</i> [2020] EWCA Crim 95	2, 192
<i>The Secretary of State for Justice v A Local Authority & ors</i> [2021] EWCA Civ 1527	190

Table of cases of the European Court of Human Rights

<i>ADT v United Kingdom</i> Application no 35765/9 (ECHR, 31 July 2000).....	200
<i>Botta v Italy</i> Application no 21439/93 (ECHR, 24 February 1998)	216
<i>Brüggemann and Scheuten v Federal Republic of Germany</i> Application no 6959/75 (ECHR, 12 July 1977)	201
<i>Case of Bălșan v Romania</i> Application no 49645/09 (ECHR, 23 May 2017)	284
<i>Case of Gillberg v Sweden</i> Application no 41723/06 (ECHR, 3 April 2012)	229
<i>Case of Rumor v Italy</i> Application no 72964/10 (ECHR, 27 May 2014).....	270, 284

<i>Case of Stojanović v Croatia</i> Application no 34425/04 (ECHR, 19 May 2009).....	229
<i>Case of Talpis v Italy</i> Application no 41237/14 (ECHR, 2 March 2017)	284
<i>Case of Volodina v Russia</i> Application no 41261/17 (ECHR, 4 November 2019) 270, 284	
<i>Eremia v the Republic of Moldova</i> Application no 3564/11 (ECHR, 28 May 2013).....	284
<i>Friend and Others v the United Kingdom</i> Application nos 16072/06; 27809/08 (ECHR, 24 November 2009)	176
<i>MC v Bulgaria</i> Application no 39272/98 (ECHR, 4 December 2003).....	202
<i>Moohan and Gillon v the United Kingdom (dec.)</i> Application nos 22962/15; 23345/15 (ECHR, 13 June 2017).....	229
<i>Opuz v Turkey</i> Application no 33401/02 (ECHR, 9 June 2009)	284
<i>Tunikova and Others v Russia</i> Application nos 55974/16, 53118/17, 27484/18, 28011/19 (ECHR, 14 December 2021).....	284
<i>Valiulienė v Lithuania Case of Valiulienė v Lithuania</i> Application no 33234/07 (ECHR, 26 March 2013).....	270
<i>Wanner v Germany (dec)</i> Application no 26892/12 (ECHR, 23 October 2018).....	229
<i>X and Y v The Netherlands</i> Application no 8978/80 (ECHR, 26 March 1985).....	201, 202

Table of cases of other jurisdictions

<i>Commune de Morsang-sur-Orge et Ville d'Aix-en-Provence</i>	
ECLI:FR:CEASS:1995:136727.19951027; ECLI:FR:CEASS:1995:143578.19951027 (27 October 1995).....	278, 281
ECLI:NL:RBAMS:2022:557 C/13/680916 / HA ZA 20-284 (2022) Rb Amsterdam	253
<i>Jacobellis v Ohio</i> 378 US 184 (1964).....	101, 180
<i>Sorrell v Procurator Fiscal, Greenock</i> [2019] SAC (Crim) 2.....	298

Table of statutes of England and Wales

Criminal Justice and Courts Act 2015	2, 16, 74
Serious Crime Act 2015.....	45, 95, 271
Sexual Offences Act 2003	67, 179

Table of statutes of other jurisdictions

Codice Penal, Italy	2
Criminal Code, Canada.....	67
Harassment, Harmful Communications and Related Offences Act 2020, Ireland	2
Strafgesetzbuch, Germany	67
Wetboek van Strafrecht, The Netherlands	2

Table of other primary legal sources

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) .85, 176, 190, 200, 201, 202, 215, 228, 229, 268, 269, 270, 271, 285, 294	
United Nations Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Ill-Treatment or Punishment (adopted 10 December 1984) UNGA Res 39/46	269
Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).....	85, 88

CHAPTER 1: INTRODUCTION

If you go to level three of the British Museum and enter room 55 of the Mesopotamia exhibition, you will find a statue of a naked woman. Well over 3000 years ago, versions of this statue were sent all around Assyria to humiliate the woman it depicts.¹ The inscription on the statue's back tells us that people who would see the statue would know whom it represents and would laugh at her expense.

I first saw this statue when I was a year into this DPhil project. It conveyed to me that using depictions as a tool of abuse is as old as the act of depicting. To this day, depictions are used to abuse others. But the internet and technological developments have made abuse through depictions much more accessible: there no longer is a need to send very heavy, labour-intensive statues all around the country — the ease with which image-based sexual abuse ('ibsa') can be committed has increased infinitely. I define ibsa as any type of non-consensual taking, making, and/or disclosure of intimate images (including videos), regardless of motive.² A more extensive definition of ibsa is presented below.

¹ The plaque displayed next to this statue reads 'King Ashur-bel-kala sent versions of this statue all around his kingdom in an elaborate and expensive act of victimisation. This is the only know example remaining and shows a completely naked woman. In the inscription on her lower back the king suggests that people who saw the statue would know who it was meant to be and laugh at her expense. The type of stone chosen, the way the woman stands and her nakedness match the inscription's tone of mocking derision. Reign of Ashur-bel-kala, 1073-1056 BC, from Nineveh, northern Iraq. ME 124963'.

² On terminology see section 1.4 below and Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 1. On motive see section 1.4. and chapter 2, section 2.4.

Today, anyone could be two clicks away from abusing someone through images. They are equally close to being violated thus.³ Simultaneously, methods of depicting have improved alongside technological advancements. An image can very accurately reflect a person's actual physical appearance, making it even more challenging to separate the person from the depiction. Yet, images are commonly treated by the law as though they are not genuinely part of the person reflected in them.

1.1 Research aims and relevance

Since 2014, legislators around the world are increasingly criminalising (aspects of) ibsa.⁴ But they seem to be doing so without a thorough understanding of what makes ibsa *wrong*. I hold that an understanding of wrongness is necessary to justify criminalisation and ensure the law's fairness, and therefore aim to fill that knowledge gap. To help clarify how wrongness is assessed, I turn to personhood theory. This is not typical: usually, what is understood as 'a person' is implied in law rather than explicated. However, that can obscure what is wrongful and why: by implying, rather than explicating, what a person is, it remains unclear how such a person could be wronged. In this thesis, I look at personhood theory as a moral concept defining the highest moral

³ Chapter 6 considers that ibsa does not affect all persons equally. Women and persons with minoritised identities are more likely to experience severe harm through ibsa than straight, white, cis-gender men.

⁴ Pre-2014 only Israel, Japan, the Philippines, and several states in the USA and Australia had laws dedicated to addressing ibsa with consensual images. Ibsa with non-consensual images may have implicitly been criminalised more widely under voyeurism laws, although it should be noted that laws on voyeurism do not appear to have been used to address ibsa, see e.g. *R v Richards* [2020] EWCA Crim 95. Since 2014, around two dozen states have adopted laws criminalising (aspects of) ibsa, e.g. England and Wales (s.33 Criminal Justice and Courts Act 2015); Ireland (Harassment, Harmful Communications and Related Offences Act 2020); The Netherlands (art. 139h Wetboek van Strafrecht); and Italy (art. 612ter Codice Penal). Among states in the process of drafting legislation criminalising ibsa are e.g. Chile and New Zealand.

status. I use that as a theoretical foundation upon which to interpret wrongs against persons. While I recognise that considering personhood theory is not commonly part of justifying criminalisation or considering criminalisation theory, I find that one's approach to personhood has a substantial impact on what wrongs are identified and to what extent. Therefore, personhood is considered here as a significant part of determining the justified scope of the criminal law, as a theoretical foundation for interpreting wrongs against persons.

One reason I find for the current underappreciation of the wrongness of ibsa is that the law tends to use an atomistic approach to personhood, in which a person is defined by mental capacities and wholly contained by their body. An image, as separate from the body, would then not be regarded as a genuine infringement of the person. I consider that such an understanding of personhood contributes to unfair laws on ibsa, as it minimises the wrong of ibsa to something that is *about* the person rather than a direct infringement of *them*.

This thesis addresses the question 'what is the nature of the wrongfulness of ibsa?' and explores how ibsa may be understood as a genuine infringement of the person. I first consider why it is relevant to know the nature of ibsa's wrongs. I do this through a discussion of criminalisation theory. I then discuss personhood theory as the foundation for establishing people's equality and interpreting how they may be wronged. Finally, I consider the nature of the wrongs of ibsa from the perspective of atomistic personhood

and from the perspective of relational personhood.⁵ I conclude that while the law in liberal democracies has traditionally taken an atomistic approach to personhood, that approach does not theorise persons in line with how persons actually exist in the world, nor does it serve the appreciation and interpretation of wrongs against persons. This is illustrated by wrongs that materialise through other means than a direct infringement of a person's body, such as in ibsa: on atomistic personhood ibsa is only recognised as severely wrongful in extreme cases, but its wrongness can more fully be appreciated using a relational approach to personhood. On atomistic personhood, ibsa is a moderate infringement of autonomy, sexual integrity, privacy, and positive freedom of expression. There is limited theoretical scope for finding the absolute wrong of failing to minimally respect personhood. On relational personhood, ibsa is a severe infringement of autonomy, sexual integrity, privacy, positive and negative freedom of expression, and can constitute a breach of trust. The absolute wrong of failing to minimally respect personhood can readily be found. On both approaches to personhood, ibsa constitutes the wrong of reinforcing and being reinforced by inequality, but the two personhood approaches result in a different set of wrongs. Because persons are inherently relational as opposed to atomistic, relationally theorising personhood is preferable and avoids over- or undervaluing certain wrongs. As such, in addition to an answer to the main question, this thesis offers preparatory arguments for (re-)considering the theoretical foundations based on which the law is constructed and interpreted.

⁵ This term was introduced in the academic discourse by Clare McGlynn and Erika Rackley, 'Not 'Revenge Porn', but Abuse: Let's Call It Image-Based Sexual Abuse' *Inherently Human* (15 February 2016).

1.2 Literature on the wrongness of ibsa

The wrongness of ibsa has been recognised in legal scholarship. Clare McGlynn and Erika Rackley hold that ibsa infringes ‘fundamental rights to dignity and privacy, as well as their freedom of sexual expression and autonomy.’⁶ They further note that ibsa ‘violates the dignity of victim-survivors by its deliberate infringement of their self-worth and failure to treat them with respect.’⁷ Nicola Henry and Anastasia Powell consider ibsa a ‘direct violation of an individual’s sexual autonomy’.⁸ Ganaele Langlois and Andrea Slane view ibsa ‘as an attack on human dignity’ and hold that it ‘plays especially brutally on the victim’s disempowerment, robbing her of her sexual integrity and of her dignity to inhabit her body as her own’.⁹ They further consider that ibsa infringes

the victim’s connections to others: both those who she never meant to see her in this context (family, coworkers, neighbors) and those she never meant to take as intimate partners (unknown quantities of online viewers who now have access to her body and sexual actions).¹⁰

⁶ McGlynn and Rackley (n 2), 13.

⁷ *ibid*, 546. I use both the terms ‘victim’ and ‘victim-survivor’. I maintain use of the term ‘victim’ to mark a particular position in the criminal law process, which is passive, not part of criminological (restorative justice) considerations, and not defined or affected by survival. I use the term ‘victim-survivor’ where individual experiences are described, where persons subjected to offences (re)claim the narrative or where victim-survivors have shared their experiences as participants in research. The term ‘victim-survivor’ retains ‘the empowerment conveyed by the word survivor and the outrage implied by the word victim’, Mary Koss, ‘Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes’ in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press 2009), 219.

⁸ Nicola Henry and Anastasia Powell, ‘Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence’ (2015) 21 *Violence Against Women* 758, 766.

⁹ Ganaele Langlois and Andrea Slane, ‘Economies of Reputation: The Case of Revenge Porn’ (2017) 14 *Communication and Critical/Cultural Studies* 120, 126.

¹⁰ *ibid*, 126.

Danielle Citron and Mary Anne Franks consider ibsa to be an infringement of privacy and autonomy; further explicated by Citron as ‘sexual privacy’: ‘Nonconsensual pornography invades sexual privacy by preventing victims from determining for themselves who sees them naked.’¹¹ Franks further holds that

The unauthorized disclosure of private, sexually explicit images harms not only individual victims but society as a whole. The abuse violates multiple values essential to a democratic society: privacy, freedom of expression, bodily autonomy, and gender equality.¹²

All of these considerations point at wrongs of ibsa. However, they do not explain why these wrongs are wrong or how they materialise in ibsa. As wrongness is a requirement of justified criminalisation, it is important to be able to explain fully how and why ibsa is wrong to assess whether and to what extent ibsa meets the requirements of justified criminalisation. This thesis offers an analysis of the nature of the wrongfulness of ibsa to fill that gap.

1.3 Scope of the thesis

The scope of this thesis on the wrongness of ibsa is confined to apply to the law of liberal democracies. This limitation is informed by the notion that criminalisation theory and personhood theory are similar across such states. Ibsa — as something that happens

¹¹ Danielle Keats Citron and Mary Anne Franks, ‘Criminalizing Revenge Porn’ (2014) 49 *Wake Forest Law Review* 345, 362; Danielle Keats Citron, ‘Sexual Privacy’ (2019) 128 *Yale Law Journal* 1870, 1918.

¹² Mary Anne Franks, ‘The Crime of “Revenge Porn”’ in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019), 663.

primarily online — is not restricted by borders. For that reason I have sought to define the scope of this thesis as widely as possible, and have avoided restricting my analysis to apply to any particular jurisdiction. I preferred this over writing the thesis in language that would, for example, be appropriate specifically for the English and Welsh criminal law, which could obscure the fact that the same considerations on ibsa’s wrongfulness apply to other countries.

1.4 Defining ibsa

I define ibsa as any type of taking, making, and/or sharing of intimate images and/or videos without consent of the depicted person.¹³ The terms ‘taking’, ‘making’, and ‘sharing’ are understood here to include things such as photographing and filming, but also photoshopping, using machine-learning technologies to create ‘deepfakes’, and could include methods of depiction that may be devised in future. It does not include artworks such as paintings and statues. In today’s world ‘seeing a statue’ does not create the same sense of ‘having seen a person’ (or for the depicted person of ‘having been exposed’) that for example a photograph or realistic fake image does.¹⁴ The Mesopotamian example would thus today not be what I consider ibsa. My reason for excluding artworks such as paintings and statues is that the ‘hand’ of the artist remains visible in them: the viewer is not invited to interpret the image as precisely reflecting reality, but rather as the artist’s interpretation.¹⁵ In the artworks I exclude from the

¹³ See also Clare McGlynn and others, ‘“It’s Torture for the Soul”: The Harms of Image-Based Sexual Abuse’ (2020) *Social & Legal Studies* 541, 544.

¹⁴ See in particular chapter 3, section 3.5.4 on images as part of selfhood.

¹⁵ The line may get blurred with, for example, hyperrealistic drawings or paintings. There, it is heavily implied that what is being shown is a rather precise reflection of reality. However, the audience is still invited to marvel at the artistry, and so at the artist, rather than invited to forget that the artist exists. Therefore, hyperrealistic artworks could be

definition of ibsa, the viewer sees and can appreciate that what they are looking at has been interpreted by the artist who created the depiction. This is unlike images or videos that appear to be a genuine reflection of reality, where the audience is invited to (and does in fact) forget that what they are looking at is being shown them by someone who, for example, took the picture or chose to disclose it. In the images meant in ibsa, the ‘hand of the artist’ disappears and instead only the depicted person is seen.¹⁶

The term ‘intimate images’ is used throughout this thesis to refer to both videos and static images. By intimate I mean something that is often referred to as ‘private and sexual’.¹⁷ These terms are further explored in chapter 5. By using the term ‘intimate’ instead of ‘private and sexual’ I aim to signal that there is space for those forms of ibsa where the defendant (‘D’) and the depicted person (as the victim ‘V’) interpret the image as sexual, but where an uninformed ‘reasonable person’ may not.¹⁸

outside the scope of ibsa. However, it does not *comfortably* sit outside its scope. Certainly, where an artist has worked of an existing image that may strengthen the argument that their artwork should be considered a form of ibsa after all.

¹⁶ If something is being pointed at, it is easy to forget to look at who is pointing, instead looking at that which is pointed out. See: ‘Monsieur, quand le doigt montre le ciel, l’imbécile regarde le doigt’ (‘Sir, if a finger points at the sky, only the idiot looks at the finger’) from Jean-Pierre Jeunet, *Le Fabuleux Destin d’Amélie Poulain* (UGC-Fox Distribution 2001). I suggest that in ibsa we ought to look at the finger, not at what is being pointed at.

¹⁷ I have not used the term ‘sexual’ as part of ibsa’s definition because, as I explain in chapter 5, what is sexual may vary from person to person, day to day, culture to culture.

¹⁸ This may, for example, be the case where D uses an image of V who normally wears a headscarf but is depicted without one. The image may not have a sexual connotation to someone who is not aware of the context. See on additional boundary conditions of V also chapter 6 text at (n 29).

1.4.1 The term ‘image-based sexual abuse’

Ibsa has been known by many names, among which ‘revenge pornography’, ‘non-consensual pornography’, and ‘non-consensual intimate images’.¹⁹ While there are many terms to refer to the same type of conduct, I use the term ‘ibsa’.²⁰ That term best reflects the nature of the conduct and avoids the issues particularly prevalent in the initially widely used term ‘revenge pornography’.²¹ I identify two main issues with the term ‘revenge pornography’. Firstly, the word ‘revenge’ suggests that the conduct is committed with a particular motive and hints that the victim may have done something that warrants revenge. That feeds into victim-blaming, and may have influenced some of the legislation focusing on the offender’s motive: despite the fact that it is not typical to define the *mens rea* through motive, the law in England and Wales, s.33 Criminal Justice and Courts Act 2015, requires the defendant to have intended to cause distress.²² That *mens rea* requirement has been much criticised for being too narrow and very difficult to prove.²³ Ibsa is not defined by D’s motive, and demarcating the scope of the law to

¹⁹ See e.g. Clare McGlynn and Erika Rackley, ‘More than ‘Revenge Porn’: Image-Based Sexual Abuse and the Reform of Irish Law’ (2017) 14 *Irish Probation Journal* 38; Elena Sharratt, *Intimate image abuse in adults and under 18s : A Comparative Analysis of Cases dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline* (University of Exeter; Economic and Social Research Council, 2019); Franks (n 12); Samantha Pegg, ‘A matter of Privacy or Abuse?: Revenge Porn in the Law’ [2018] *Criminal Law Review* 512.

²⁰ McGlynn and Rackley (n 2); Nicola Henry and Anastasia Powell, ‘Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law’ (2016) 25 *Social & Legal Studies* 397.

²¹ Mary Anne Franks, using the term ‘nonconsensual pornography’, notes ‘The term “nonconsensual pornography” is also limited in the sense that it describes the product rather than the action of the harm. Alternative terms such as “image-based sexual abuse,” ... are superior in this regard.’ Franks (n 12), 664.

²² On motive in criminal law see Ngaire Naffine, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019), 14.

²³ See e.g. Alex Dymock and Charlotte van der Westhuizen, ‘A Dish Served Cold: Targeting Revenge in Revenge Pornography’ (2019) 39 *Legal Studies* 361

include motive limits its application to such an extent that many forms of ibsa are excluded.²⁴

A second issue with the term ‘revenge pornography’ is the word ‘pornography’. While there are those who consider pornography generally inherently abusive, I hold that that is not its usual connotation.²⁵ Commonly, pornography is understood to be something pleasurable, meant to stimulate ‘erotic ... feelings’.²⁶ As such, the term ‘pornography’ does not convey the message that what is being shown is inherently abusive (even if it is recognised that consensual pornography *could* be abusive).²⁷ Labelling ibsa as a form of pornography would obscure that it is part of the abuse of ibsa that the materials are usable as pornography.²⁸

²⁴ McGlynn and Rackley (n 2), 6. On motives of ibsa of e.g. having a laugh or belonging to a group, see Colette Mortreux and others, *Understanding the Attitudes and Motivations of Adults who engage in Image-Based Abuse* (Australian Government eSafety Commissioner 2019).

²⁵ See Catharine A MacKinnon, ‘Pornography, Civil Rights, and Speech’ (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1; Andrea Dworkin, *Pornography : Men Possessing Women* (Plume 1991), who find pornography so inherently abusive that the term might even be considered appropriate to indicate ibsa. However, ‘pornography’ is not typically understood as so inherently abusive. On the typical meaning of pornography I reject the suggestion that ibsa should be defined as a form of pornography. In chapter 4, I consider whether consent could remedy all the wrongs of ibsa, and, by extension, of pornography. While I hold that consensual pornography can be inherently wrongful, I also hold that so long as pornography is not regarded as inherently abusive it wrongs victim-survivors of ibsa to label them as taking part in something pleasurable and consumable.

²⁶ Oxford English Dictionary, “*pornography, n.*” (Oxford University Press 2022).

²⁷ See e.g. Clare McGlynn and Erika Rackley, ‘Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography’ [2007] *Criminal Law Review* 677; Jill Bauer and Ronna Gradus, *Hot Girls Wanted* (Netflix 2015).

²⁸ I note that there are differences in the degree to which ibsa can be used as pornography, e.g. dependent on the type of ibsa and the scale on which it is shared. For example, when images are taken but not shared, only the person who took them can (ab)use them as pornography. If images are shared on e.g. a pornography website, a very large group of people can use the images as pornography. Yet another form of ibsa exists where intimate images are used in breach of the depicted person’s conditions for consent to being used as

To label abuse a form of pornography focuses on the purpose that the abused materials serve for those who (ab)use them, meaning: by defining ibsa as a porn category through terms such as ‘revenge pornography’ or ‘non-consensual pornography’, the abusive aspect of ‘being used to stimulate erotic feelings’ is obscured. Part of the abusive nature of ibsa is that intimate images are made available to be *used as* pornography, thereby using and sexually objectifying the depicted person without their consent.²⁹ The abusive nature of that aspect of ibsa is obscured by the term ‘pornography’. The term ibsa avoids these issues. In the following subsections, I consider ten types of ibsa, all of which are included in my understanding of the term.

1.4.2 Ibsa with entrusted consensual genuine images

Ibsa with entrusted consensual genuine images consists of intimate images that were taken/made with consent of the depicted person, but which were shared without consent of the depicted person by a person to whom the images were entrusted. This is the type of ibsa that was most commonly referred to as ‘revenge pornography’.³⁰ Ibsa with entrusted consensual genuine images is defined as ‘genuine intimate images, taken/made with consent of the depicted person, shared without consent of the depicted person by someone to whom the images were entrusted’.

pornography. In that case it is not the use as pornography per se that is abusive, but rather the circumstances in which that use takes place, see section 1.4.10.

²⁹ See on objectification and use as pornography section 6.2.2. See on pornography generally also Franks (n 12), 664.

³⁰ See for instance: Criminal Justice and Courts Act 2015, Explanatory Notes §37; Ministry of Justice, *Revenge Porn: Sharing Private Sexual Materials with Intent to Cause Distress* (United Kingdom Government 2015).

1.4.3 Ibsa with appropriated consensual genuine images

Ibsa with appropriated consensual genuine images uses images that were taken/made with the consent of the depicted person (as with ibsa with entrusted consensual images), but not entrusted to the person who shares them. This could be someone who, for example, hacked the depicted person and provided themselves with access to the images, but it could also be done by someone who shares previously disclosed images further. Ibsa with appropriated consensual images is defined as ‘genuine intimate images, taken/made with consent of the depicted person, shared without consent of the depicted person by someone to whom the images were not entrusted’.

1.4.4 Ibsa with undisclosed non-consensual genuine images

Ibsa with undisclosed non-consensual images consists of intimate, genuine images that were taken/made without consent of the depicted person, and not shared by the person who took or made the images. It is defined as ‘genuine intimate images that are not shared with others, taken/made without consent of the depicted person’.

1.4.5 Ibsa by sharing genuine, non-consensual images

Ibsa by sharing genuine, non-consensually taken or made images, is the non-consensual disclosure of intimate images that were taken or made without consent of the depicted person *and* shared without consent of the depicted person. It is defined here as ‘genuine intimate images, taken or made without consent of the depicted person and shared without consent of the depicted person’.

1.4.6 Ibsa with undisclosed non-consensual edited intimate images (including ‘deepfakes’)

Ibsa with undisclosed non-consensual edited intimate images (including ‘deepfakes’) is non-genuine intimate images made without the consent of the depicted person, edited to look as though they are genuine images of the depicted person. Edited intimate images are, for example, ‘deepfakes’, which are faked images constructed through machine-learning technology. Machine-learning software used for making ibsa with edited portrayals enables an editing result that is virtually indistinguishable from a genuine image.³¹ Ibsa with edited portrayals also includes images depicting a person’s body with the head of another person edited onto it, made to look as if it is also portraying the body of the individual whose head is depicted. If this type of ibsa uses genuine images of someone’s face, those may have previously been published with consent of the depicted person, but the depicted person did not consent to the edited portrayal. Ibsa with undisclosed non-consensual edited portrayals is defined as ‘non-genuine intimate images that are not shared with others, made without consent of the depicted person’.

1.4.7 Ibsa by sharing non-consensual edited intimate images (including ‘deepfakes’)

Ibsa by sharing non-consensual edited intimate images (including ‘deepfakes’) is the non-consensual sharing of non-consensually made edited intimate images that are made to look as though they are genuine images of the depicted person. It is defined here as

³¹ The term ‘deepfakes’ is used to indicate all types of edited portrayals made with machine-learning, and is often used to refer to ibsa with edited portrayals more generally. See on deepfakes and law generally Robert Chesney and Danielle Citron, ‘Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics’ (2019) 98 *Foreign Affairs* 147.

‘non-genuine intimate images, made without consent of the depicted person and shared without consent of the depicted person’.

1.4.8 Ibsa with entrusted consensual edited intimate images

Ibsa with entrusted consensual edited intimate images consists of intimate edited portrayals that were made with consent of the depicted person but which were shared without consent of the depicted person by a person to whom the images were entrusted. This type of ibsa is included in this list because I recognise it as a theoretical possibility, but I am not aware of any examples of it. Ibsa with entrusted consensual non-genuine images is defined as ‘non-genuine intimate images, made with consent of the depicted person, shared without consent of the depicted person by someone to whom the images were entrusted’.

1.4.9 Ibsa with appropriated consensual edited intimate images

Ibsa with appropriated consensual edited intimate images consists of intimate edited portrayals that were made with consent of the depicted person but which were shared without consent of the depicted person by someone to whom the images were not entrusted. Like ‘ibsa with entrusted consensual edited intimate images’, this type of ibsa is included in this list because I recognise it as a theoretical possibility, although I do not know of any examples of it. Ibsa with appropriated consensual edited intimate images is defined as ‘non-genuine intimate images, made with consent of the depicted person, shared without consent of the depicted person by someone to whom the images were not entrusted’.

1.4.10 Ibsa with sharing consensually accessible images in breach of the depicted person's conditions for consent for access

Ibsa with sharing consensually accessible images in breach of the depicted person's conditions for consent for access involves images that the depicted person shared with consent under certain conditions. One example of this type of ibsa is where the depicted person sells access to sexual images of themselves but where those images have been copied and made freely available without the consent of the depicted person. The depicted person has conditions for consent regarding the accessibility of their intimate images, and those conditions are not met on this occasion *but they could have been*, for example, by paying for access. In that regard, this type of ibsa differs from ibsa with entrusted images: there, the person who entrusts images shares that image with *specific persons* and does not offer general access to them under certain conditions. Ibsa with sharing consensually accessible images in breach of the depicted person's conditions for consent for access, is defined as 'consensually accessible intimate images, shared in a manner that breaches the depicted person's conditions for consent for access'.

1.4.11 Threat of ibsa

Finally, ibsa by threatening to share intimate images could be regarded as a form of ibsa. It might also be perceived as an inchoate or quasi-inchoate form of ibsa. I include threats in my understanding of ibsa because — at least on a relational approach — the wrongs of ibsa could materialise from threats of ibsa as much as from actual taking, making, and/or sharing of intimate images. Threats of ibsa can restrict autonomy, infringe integrity, privacy, free speech, and breach trust the same as when images are taken, made, and/or shared. It draws from the same inequalities that make committing ibsa a form of gender-

based violence.³² The harms of ibsa are equally present in threats of ibsa.³³ As such, threatening to commit ibsa contains the same harms and wrongs as committing ibsa, which removes the *need* to distinguish between the two concepts legally. Threats of ibsa (that are not in themselves already one of the forms of ibsa described above) could for example be threatening to share entrusted images, or threatening to make deepfakes. While there might not be any actual non-consensual taking, making, and/or sharing whether abuse of intimate images is a threat, threatening ibsa should not be minimised.³⁴ Where threats give rise to the same harms and wrongs as actually committing ibsa does, there does not seem to be a need to exclude threats of ibsa from the broader understanding of the term.

1.5 Structure of the thesis

This thesis seeks to answer the question ‘what is the nature of the wrongfulness of ibsa?’. I first outline why the question of wrongfulness is relevant in the context of criminalisation. I do this in chapter 2, by considering questions of justness and fairness in the context of criminalisation theory. That is also where my exploration of the wrongness of ibsa began, prompted by ill-fitting and unsuitable criminal laws addressing it.³⁵ I consider that criminalisation theory in liberal democracies requires that Φ -ing ought to be harmful, wrongful, and public in order to be justifiably criminalised. I consider that

³² See chapter 6 section 6.3.

³³ McGlynn et al. (n 13), 3.

³⁴ *ibid.*

³⁵ See e.g. the English and Welsh law: ibsa is only criminalised if the defendant (‘D’) intended to cause distress (s.33 Criminal Justice and Courts Act 2015). See also Clare McGlynn and Erika Rackley, ‘More than ‘Revenge Porn’: Image-Based Sexual Abuse and the Reform of Irish Law’ (2017) 14 *Irish Probation Journal* 38, 46-7.

the criminal law can justifiably address moral wrongs. What is meant by wrongfulness at the criminalisation stage is *prima facie* wrongfulness. I further consider that in order for the criminal law to be fair, the label attached to offences ought to reflect the defendant's moral wrongdoing. A justified and fair criminal law on ibsa thus requires an answer to two related questions: 'are the wrongs of ibsa moral wrongs?' and, if so, 'what are the moral wrongs of ibsa?' These are the questions considered in subsequent chapters.

In chapter 3, I argue that the infringement of a person necessarily constitutes a moral wrong because personhood is a moral status. I first consider that personhood theory holds that all persons are equal. I further consider how personhood may be used to identify moral wrongness and can serve as a theoretical foundation for understanding wrongs and rights-infringements against persons. As such, I recognise that one's understanding of personhood informs and affects what can be recognised as a wrong against the person. I discuss three approaches to personhood: atomistic personhood, human species membership personhood, and relational personhood. These could be used as a theoretical foundation upon which to interpret what is a wrong against a person — though I argue that they are not all equally suitable for it. I set out atomistic personhood as the approach to personhood that is traditionally most prevalent in the laws of liberal democracies. This personhood approach takes mental capacities as the defining moral value, which I reject. I then discuss human species membership personhood as an alternative for atomistic personhood. I reject this approach because it does not offer reasons why persons are persons. It merely describes what persons are. As such, I hold that human species membership personhood does not offer tools for interpreting rights and wrongs. The final part of this chapter sets out relational personhood. This personhood approach takes 'caring relations' as the identifying characteristic of

personhood. In this thesis, I subscribe to a relational approach to personhood as the one that best reflects what is morally valuable and how people develop and exist in the world.

In chapter 4, I consider how the interpretation of the moral wrongs of ibsa varies between atomistic personhood and relational personhood. I identify that the wrongs of ibsa can include

- infringing autonomy
- infringing sexual integrity
- infringing privacy
- infringing free speech
- breaching trust
- failing to minimally respect personhood
- reinforcing and being reinforced by systemic inequality

I further consider that consent, or lack thereof, does not inform *prima facie* wrongness. This is because consent can be a justification for *prima facie* wrongness. It comes after *prima facie* wrongness. Consent *can* help prevent all-things-considered wrongness.

In chapter 5, I discuss the wrongs of the infringement of autonomy, sexual integrity, privacy, free speech, and breaching trust. These wrongs are clustered there as wrongs that infringe various personhood interests. I hold that these are wrongs that could be justified by consent.

In chapter 6, I discuss the wrong of failing to minimally respect personhood and the wrong of reinforcing and being reinforced by systemic inequality. These are wrongs

that supersede individual persons or personhood interests and cannot be justified by consent.

Finally, in chapter 7, I set out some concluding thoughts on the nature of the wrongfulness of ibsa, its criminalisation, and the relevance of explicating personhood. Lastly, I indicate topics for further research.

CHAPTER 2: IBSA AND THE CRIMINAL LAW'S JUSTNESS AND FAIRNESS

2.1 Introduction

In this thesis, I set out to clarify the nature of the wrong of ibsa, and in this chapter, I offer two reasons why 'wrongness' is a concept that warrants clarification. Firstly, I consider that criminalisation is justified if it addresses conduct that is harmful, public, and wrongful. The wrongfulness requirement of justified criminalisation generally tends to be under-explored in criminalisation theory and -practice. Ibsa is no exception. One reason to analyse the nature of the wrong of ibsa is to help identify why ibsa's criminalisation is justified.

A second, closely related reason to consider the nature of ibsa's wrongfulness is that the criminal law ought to attach fair labels to its offences.¹ Fair labels reflect D's moral wrongdoing, and so the moral wrongness of D's conduct and/or its results ('Φ-ing') must be clearly identified at the time of criminalisation. Ibsa has been known by many names (e.g. 'revenge pornography', 'non-consensual intimate images', 'intimate image abuse'), and the nature of its wrongness is not comprehensively analysed. As such, there is no thorough understanding of what would be a fair label for ibsa, which can cause a failure to offer fair labels on ibsa offences.² This is another reason to clarify the nature of the wrong of ibsa.

¹ See e.g. James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *The Modern Law Review* 217, 218.

² See chapter 1 section 1.4 on the terminology of ibsa.

Both of these reasons for analysing the nature of the wrong of ibsa are grounded in criminal law theory. As I noted in chapter 1, ibsa is increasingly criminalised.

Academics, lawyers, victim-survivors, and activists have been arguing, and continue to do so, that criminalisation is an essential aspect of tackling ibsa.³ I subscribe to this view, recognizing criminalisation as a necessary, though not sufficient aspect of addressing ibsa. Criminal laws addressing ibsa are regularly criticised for falling short, for instance, because they do not cover the full scope of ibsa or focus on irrelevant factors, such as the defendant's motive.⁴ One reason current criminal laws addressing ibsa are ill-fitting is because of a lack of understanding of the nature of ibsa's wrongfulness. As I consider in this chapter, criminalisation is justified if Φ -ing is harmful, public, and wrongful. In this chapter, I consider what harmfulness is, how it may be gauged, and what the literature shows as the harmfulness of ibsa. Ibsa meets this requirement of justified criminalisation. I also consider the requirement of publicness. Ibsa can be understood as public if, for

³ On victim-survivors speaking out see e.g. Noelle Martin, 'Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist's Perspective' in Anastasia Powell, Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Springer 2021); Annmarie Chiarini, 'I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This' *The Guardian* (19 November 2013); Emma Holten, 'Someone Stole Naked Pictures of Me. This is What I Did About It - Video' *The Guardian* (21 Januari 2015); 'Jennifer Lawrence Calls Photo Hacking a "Sex Crime"' *Vanity Fair* (8 October 2014). On academics arguing in favour of criminalisation see e.g. Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345; Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 1. On activists see e.g. in the UK the Not Your Porn collective and in the US the Cyber Civil Rights Initiative. Similar initiatives exist around the world in various forms and structures. On lawyers see the discussion of the work of Carrie Goldberg in Margaret Talbot, 'The Attorney Fighting Revenge Porn' *The New Yorker* (5 December 2016).

⁴ See for a discussion of some of the shortcomings of laws criminalising ibsa Clare McGlynn and Erika Rackley, 'More than "Revenge Porn": Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 14 *Irish Probation Journal* 38, 46-7. See on motive and *mens rea* e.g. Ngaire Naffine, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019), 14; Douglas N Husak, 'Motive and Criminal Liability' (1989) 8 *Criminal Justice Ethics* 3; Jeremy Horder, 'The Irrelevance of Motive in Criminal Law' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 2000).

example, it constitutes human rights infringements (which I argue it does) and, as such, fulfils this requirement of justified criminalisation. While the literature suggests that ibsa is wrongful, this is not a claim that has been researched in-depth. In this chapter, I set out what wrongness means in the context of justified criminalisation in preparation of my analysis of the wrongs of ibsa. Ibsa meets the wrongfulness requirement of justified criminalisation if it is *prima facie* morally wrongful. In subsequent chapters, I set out how ibsa meets the wrongfulness requirement. The *prima facie* moral wrongs of ibsa are analysed in chapters 5 and 6.

Additionally, this chapter considers the principle of fair labelling, which holds that the label attached to offences ought to reflect the defendant's moral wrongdoing in order for the law to be fair. The principle of fair labelling is discussed in terms of achieving fairness for defendants, victims, and society. What is a fair label for ibsa is informed by the wrongs discussed in chapters 5 and 6.

2.2 The justified criminal law

2.2.1 Introduction

Criminalisation, and by extension the criminal law, involves a serious infringement of personal liberty and is a tool for severe censure.⁵ For that reason, I hold that criminalisation is itself wrongful.⁶ This means that criminalisation requires justification,

⁵ See e.g. Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986), 418; Jonathan Schonsheck, *On Criminalization : An Essay in the Philosophy of Criminal Law* (Kluwer Academic 1994), 1; Grant Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609, 610.

⁶ Jonathan Herring and Michelle Madden Dempsey, 'Rethinking the Criminal Law's Response to Sexual Penetration: on Theory and Context' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law : International and Comparative Perspectives*

which is the aspect of criminalisation theory discussed in this section. While there is no unified theory of criminalisation, liberal democracies all use similar approaches.⁷ The justified scope of criminal law is demarcated by three overlapping requirements, namely ‘harmfulness’, ‘publicness’, and ‘wrongfulness’.⁸ The liberal understanding of justified criminalisation is a reason why it is important to have a clear understanding of the nature of the wrong of *ibsa*. Because ‘wrongfulness’ is a requirement of justified criminalisation, justifying *ibsa*’s criminalisation depends on it being wrong.

What makes criminalisation wrongful is that it causes an infringement of personal liberty.⁹ Such use of state power is *prima facie* wrongful and requires justification.¹⁰ That the infringement of personal liberty is a serious wrong is a claim grounded in personhood theory, further discussed in chapter 3. Briefly put, an interference in liberty can prevent a person accessing that which gives them the highest moral status of personhood. For example, atomistic personhood takes autonomy as the highest moral value.¹¹ Because a

(Abingdon : Routledge 2010), 38; John Gardner, ‘Prohibiting Immoralities’ (2007) 28 *Cardozo Law Review* 2613, 2628; Andrew Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press 2009), 22. cf Peter Cane, ‘Taking Law Seriously: Starting Points of the Hart/Devlin Debate’ (2006) 10 *The Journal of Ethics* 21, 22.

⁷ Duff et al. hold that criminalisation theory is similar across liberal democracies, see for a discussion on normative theory of criminal law RA Duff et al., *The Boundaries of the Criminal Law* (Oxford University Press 2010), 7-8. It is outside the scope of this thesis to attempt to present a universal unified justification for the criminal law.

⁸ Duff et al. (n 7), 7-8. See also the recognition of the prevention of harm and of immoral conduct in Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1987), 12. See Appendix A for a diagram of the justified scope of the criminal law.

⁹ See e.g. Raz (n 5), 418.

¹⁰ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7 edn, Oxford University Press 2013), 22. See on *prima facie* wrongs versus all-things-considered wrongs section 2.2.3.4.

¹¹ See chapter 3 section 3.3.

criminal conviction limits someone's liberty, it affects how they can be autonomous. On relational personhood, I find that 'caring relations' are taken as the highest moral value.¹² Here too, criminal convictions, through their infringement of personal liberty, affect that highest moral value by restricting how a person can engage in relations. These two approaches to personhood take very different identifying characteristics as the highest moral value. Nevertheless, on either approach to personhood, the highest moral value is threatened where there is criminalisation (both 'autonomy' and 'caring relations' can be infringed through criminalisation). As such, both on atomistic personhood and relational personhood, 'criminalisation' is a wrong against persons, and that requires justification.¹³

A personhood approach can have significant implications for the interpretation of harms and wrongs. However, I hold that it does not affect the formal requirements of justified criminalisation. That is because, regardless of the approach to personhood, what needs justification is the infringement of personal liberty. I consider below that the requirements of a justified criminal law can be the same in a society that uses atomistic personhood as its foundation as in a society that uses relational personhood as its foundation. While personhood theory affects how those requirements are made out, it does not affect that they are requirements of justified criminalisation.

¹² See chapter 3 section 3.5.

¹³ Ashworth (n 10), 22; Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 *Oxford Journal of Legal Studies* 467; Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017). See on personhood as a theoretical foundation for assessing wrongs against person chapter 3 section 3.2.

The wrong of criminalisation can be justified if criminalised Φ -ing is a harmful public wrong.¹⁴ In this section, I consider the requirements of harmfulness, wrongfulness, and publicness individually. Firstly, I consider harmfulness as a requirement of justified criminalisation. I point at approaches to gauging harmfulness based on the theories of personhood discussed in chapter 3 and briefly consider harms of ibsa. Secondly, I consider the requirement of wrongfulness for justified criminalisation. I distinguish between ‘wrongs’ as a type of Φ -ing; and ‘harms’ as a type of effect of Φ -ing. I point at two types of wrong, namely *mala in se* and *mala prohibita*. In this thesis, I focus on the first type of wrong. I hold that infringements of personhood are necessarily moral wrongs (*mala in se*) because personhood is a moral status (see chapter 3). Wrongfulness can be assessed *prima facie* and all-things-considered. In this thesis, I am concerned with identifying *prima facie* moral wrongs of ibsa.¹⁵ Thirdly, I consider the requirement of publicness for justified criminalisation. I consider ‘publicness’ in the meaning of ‘the state’s business’.¹⁶ I suggest that human rights infringements are an example of something that is necessarily public. One way in which ibsa may be considered public in this sense is, for example, because of any human rights infringements it effects.

¹⁴ See Appendix A for a diagram on the demarcation of the justified scope of the criminal law.

¹⁵ The wrongs of ibsa are discussed in chapters 5 and 6.

¹⁶ As derived from Michelle Madden Dempsey, ‘Public Wrongs and the ‘Criminal Law’s Business’: When Victims Won’t Share’ in Rowan Cruft, Matthew H Kramer and Mark R Reiff (eds), *Crime, Punishment, and Responsibility : The Jurisprudence of Antony Duff* (Oxford University Press 2011).

2.2.2 Requirements for justified criminalisation: harmfulness

2.2.2.1 Introduction

The first requirement of justified criminalisation I discuss in this thesis, is ‘harmfulness’. I first consider why this is a requirement of justified criminalisation. I then consider that the criminal law uses Φ-ing’s ‘standardised’ harm at the criminalisation stage: this requires an assessment of the harmfulness that typically occurs when an act of this kind is performed. I therefore consider approaches to gauging standard harmfulness as tools through which the level of harm can be determined for the criminal law. Finally, I consider these approaches to gauging harms in light of the harms of ibsa.

2.2.2.2 Harmfulness as a requirement of justified criminalisation

Harmfulness is a requirement of justified criminalisation because the criminal law restricts liberty and applies censure.¹⁷ Doing both those things is wrongful and requires justification.¹⁸ Writing in the context of liberty, John Stuart Mill considers that ‘the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.’¹⁹ The harm principle, derived from Mill, holds that conduct ought to be harmful for it to be justifiably criminalised.

¹⁷ See (n 5) of this chapter.

¹⁸ Herring and Dempsey (n 6), 38; Gardner (n 6), 2628; Ashworth (n 10), 22; Raz (n 5), 418.

¹⁹ John Stuart Mill, *On Liberty* (JW Parker and Son 1859), 26.

This is a core part of criminalisation theory in liberal democracies.²⁰ Preventing harm to others can be part of justified criminalisation.²¹

Per Mill, the criminal law's justification should be sought in the prevention of harm. Only harmful acts could then be considered 'justifiably criminalised'. Gardner and Shute explain that the harm principle is to be understood to include those acts that would cause harm if they were not criminalised, and so should include Φ -ing that it would be harmful not to criminalise:

It is no objection under the harm principle that a harmless action was criminalized, nor even that an action with no tendency to cause harm was criminalized. It is enough to meet the demands of the harm principle that, if the action were not criminalized, that would be harmful.²²

Justifying the criminalisation of harmless actions is a particularly relevant notion where Φ -ing poses a great risk of harm but where, in a particular case, the harm does not materialise. Equally, it helps justify the criminalisation of conduct where it is impossible to determine how much harm has actually been done, and so supports the use of 'standard harms' in criminalisation.²³ John Gardner and Stephen Shute illustrate their

²⁰ See e.g. RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018); Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (10 edn, Oxford University Press 2022); David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Text, Cases, & Materials on Criminal Law* (Oxford University Press 2020); David Brink, 'Mill's Moral and Political Philosophy' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall edn, Stanford University 2022).

²¹ John Stuart Mill, *On Liberty* (JW Parker and Son 1859), 26; Herring (n 20), 17-9.

²² John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence*, vol 4 (Oxford University Press 2000), 216.

²³ *ibid*, 196.

argument by considering the harm done to a comatose rape victim. They hold that it may be impossible to prove that a person who was raped while in a coma suffered harm. In such a case, the criminal law might struggle to assess actual harm done but could still rely on rape's 'standard' harm to hold that raping a person (even if they are in a coma) is harmful and so justifiably criminalised because sexual penetration of a person (without their consent) standardly (typically) does cause harm.²⁴

Per Gardner and Shute, to fulfil the requirement of harmfulness for justified criminalisation it is sufficient to criminalise Φ -ing where lack of criminalisation would be harmful. This helps account for the justifiability of criminalising Φ -ing where, in a particular case, harm cannot be established or where there is only a risk of harm: for justified criminalisation it suffices that Φ -ing is typically harmful. It also helps explain why it may be justified to criminalise things such as 'driving on the right side of the road' (and vice versa): such rules prevent harm in the sense that before the rule's existence, neither driving on the left side nor the right side would have been less harmful than its opposite. However, picking one side makes traffic safer, and so now that the rule exists, 'adherence to it' prevents harm.

That it may be justified to criminalise where lack of criminalisation could be harmful, is relevant in the context of ibsa, for example where a person is not aware of

²⁴ See on harms of rape also Dempsey and Herring (n 13). Gardner and Shute suggest that the rape-victim-in-a-coma may not have suffered harm. While supportive of the core point they are making about harm, I am not convinced by their conclusion. On atomistic personhood, it might be argued that a comatose rape victim does not suffer harm. However, even there it should be accepted that there could be harm that remains undetectable to an outsider. On relational personhood there is more room to assess the harm done to the rape-victim-in-a-coma, not only by assessing the harm done to their body but also harm done through their relations to others. See also methods of gauging harms in section 2.2.2.4.

their victimisation. The depicted person may well be harmed by that even without knowing what caused the harm.²⁵ Even if no identifiable harm materialises, it may be justified to criminalise ibsa: to meet the requirement of harmfulness for justified criminalisation, it suffices that ibsa is *normally* harmful.²⁶ If a victim-survivor claims not to have been harmed, or if it is not known who the victim is, or if a person has since died, or possibly even if a victim was only subjected to ibsa *after* they died: the assessment that ibsa is typically harmful is, per Gardner and Shute's analysis, sufficient to meet the harmfulness requirement of justified criminalisation. As such, Gardner and Shute's analysis helps justify the use of standardised harm in the criminalisation process: instead of looking at the actual harm caused in the particular case at hand, the criminal law gauges how harmful Φ -ing normally is. That 'standard harm' is used to determine the harm of Φ -ing at the criminalisation stage, meaning: separate from the facts of specific cases of Φ -ing.²⁷

2.2.2.3 *The need for gauging Φ -ing's standard harmfulness*

In this subsection, I consider three ways in which the ordinary level of harm of Φ -ing could be gauged for criminalisation. 'Harmfulness' has an objective definition, but

²⁵ On relational personhood it would be possible that a person's relations have been affected by others seeing their intimate images without the depicted person knowing. The changed relations can be a form of harm, see below section 2.2.2.4 on relational approach to gauging harms and chapter 3 section 3.5.

²⁶ See e.g. a 2011 case of image-based sexual abuse where the depicted person claims not to have been harmed, in Jessica Diehl, 'Scarlett Johansson on those Nude Photos She Sent to Ryan Reynolds: "I Know my Best Angles"' *Vanity Fair* (1 November 2011). On denying harm as a coping mechanism see Diane R Follingstad, Ann P Neckerman and Julia Vormbrock, 'Reactions to Victimization and Coping Strategies of Battered Women: The Ties that Bind' (1988) 8 *Clinical Psychology Review* 373, 379.

²⁷ 'Standard harm' is a term borrowed from Andrew Von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 4.

whether the objective definition of harm materialises in a specific instance can be a subjective assessment.²⁸ For example, a person may find ‘getting slapped’ harmful, while another person may not. Whether harm has materialised can depend on those who are (possibly) harmed. Harm can be subjective when considered as the impact experienced by the victim, but it is objective when considering the harm that is *typically* caused (rather than caused in a particular case). By standardising Φ -ing’s ‘harm’, subjectivity can be minimised and the assessment of that harm can become objective.

A general standard of harmfulness helps avoid difficulties where, for instance, victims are unknown, unaware of harm, or unwilling or unable to testify to the level of harm. It is not uncommon that victims of coercive control testify that the abuse for which their abuser is prosecuted was not very severe or that it was not harmful to them, but that should not be taken as an indication that the conduct is therefore outside the scope of justified criminalisation.²⁹ By abstracting the harm of Φ -ing into a general scale, the law offers a tool by which it can be assessed that something is objectively harmful, regardless of victims’ testimonies. Using standard harm also helps avoid, to some extent, undue pressure on victims during a trial.³⁰ That does not mean that a victim’s testimony could

²⁸ For objective definitions of harm see e.g. the Oxford English Dictionary, where ‘harm’ is defined as ‘Evil (physical or otherwise) as done to or suffered by some person or thing; hurt, injury, damage, mischief.’ and ‘Grief, sorrow, pain, trouble, distress, affliction.’ Oxford English Dictionary, “*harm, n.*” (Oxford University Press 2022); and in the Cambridge dictionary as ‘physical or other injury or damage’ Cambridge Dictionary, “*harm, n.*” (Cambridge University Press 2022). There are some exceptions to the materialisation of harm as a subjective experience, e.g. if the harm is ‘death’, or e.g. ‘broken bones’ or ‘wounds’, which may be assessed as a materialisation of harm by others than the person(s) experiencing the harm.

²⁹ Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009), 17. Dempsey also notes the difficulties faced by victims when they are not believed, which is a different way in which harm can be minimised without justification.

³⁰ See on the burdens of the criminal justice process for victims and secondary victimisation e.g. Hildur Fjóra Antonsdóttir, “‘A Witness in My Own Case’: Victim–Survivors’ Views

not be relevant to determining the severity of the harm. It merely means that while harm is experienced by the person subjected to a harmful act, the law abstracts harmfulness at the time of criminalisation. That can help make the criminal law less dependent on testimony and apply more equally to all: theft of £5 is not a more serious offence if it is stealing from a very poor person compared to when it is stealing from a very rich person, even though the actual harm experienced through the loss of £5 might be more severe in the former than in the latter case. The justifiability of criminalisation is identical in either case because that justification is derived from the typical harm of stealing £5. The actual harm done does not inform the severity of the offence itself (regarding its justified criminalisation), but that harm could matter at trial: the individual impact of Φ -ing can be taken into account in considering sentencing. In this thesis, I am concerned with the justification of criminalisation, and not with the justification of trials or sentencing. As such, I focus on standardised harm, not on actual harm done.

In addition to remedying difficulties regarding (perceived) subjectivity, standardised harms also help meet the *nulla poena sine lege* principle.³¹ That is because, while harmfulness is a requirement of justified criminalisation, in practice, conduct will have to be criminalised before the harm has occurred for that conduct to be a crime. Because the criminalisation of Φ -ing precedes any actual harm it may cause, the criminal law works with a standardised harm at the criminalisation stage: at the time of criminalisation, it is determined that Φ -ing normally causes X level of harm. This

on the Criminal Justice Process in Iceland' (2018) 26 *Feminist Legal Studies* 307; Kathy Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 *Criminal Law Forum* 327.

³¹ No act is criminal without a preceding law and the criminal law does not work retroactively. See on the principle of *nullum crimen, nulla poena sine lege* e.g. Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 *The Yale Law Journal* 165.

‘standard harm’ is then used to justify Φ -ing’s criminalisation.³² As such, offences are developed using an abstracted scale of harm at the criminalisation stage.

To summarise the points made in the discussion in this section so far: to determine whether something can justifiably be criminalised, the criminal law can use the abstracted harm that Φ -ing normally brings about. The justification of criminalisation then relies on the assessment that Φ -ing is normally harmful, and Φ -ing would be criminalised based on its standard harm. The criminal law’s standardisation of how harmful Φ -ing is can thus exist quite separately from how persons actually (subjectively) experience harm.³³ Per Gardner and Shute’s assessment, criminalising Φ -ing-that-is-normally-harmful falls within the scope of justified criminalisation if *not* criminalising such Φ -ing would be harmful.³⁴ The level of actual harm can be a subjective assessment, and the criminal law uses standard harms to enable a more objective, equal treatment of defendants based on their wrongdoing.³⁵ For individual convictions it need not be shown that X level of harm indeed emerged. The offence exists separate from the actual level of harm caused, so D’s actual Φ -ing is at the focus of criminalisation (rather than Φ -ing’s actual harmfulness). Abstracting harms into a standard scale is a tool to assess that the requirement of ‘harmfulness’ is fulfilled at the criminalisation stage.

³² Von Hirsch and Jareborg (n 27), 4.

³³ See on that also Von Hirsch and Jareborg (n 27), 4.

³⁴ See Gardner and Shute (n 22).

³⁵ This helps meet the principle of legal certainty, see Ormerod and Laird (n 20), 10.

2.2.2.4 Gauging harmfulness

The criminal law uses standardised harms during the criminalisation stage to justify criminalisation. The ‘standard harm’ should be distinguished from *actual* harm caused by Φ -ing in the experience of persons subjected to it. Still, a good method of standardising harm should reflect, as accurately as possible, how persons generally actually experience the level of harm of Φ -ing. Referring to the use of standard harm in criminal law may suggest that there are models for standardisation. However, Andrew von Hirsch and Nils Jareborg note

Virtually no legal doctrines have been developed on how the gravity of harms can be compared. The substantive law provides little guidance, because the occurrence of harm is not explicitly made a general condition of criminal liability. The legal offence-definitions simply describe various kinds of prohibited conduct-which the legislature is assumed to have considered harmful enough to be criminalized.³⁶

For the criminal law to be consistent in its standardisation of harm, a model could be very helpful. In this section, I consider three approaches for devising a model for gauging harmfulness, namely i) the living standard approach to gauging harms, ii) a relational approach to gauging harms, and iii) an autonomy-based approach to gauging harms. These are approaches for standardising harms to separate harmfulness from actual experiences by persons. These approaches to gauging harmfulness can be connected to the three approaches to personhood considered in chapter 3. The aim of standardisation is to reflect as accurately as possible how harmful certain Φ -ing typically is. Some

³⁶ Von Hirsch and Jareborg (n 27), 3.

harms, such as environmental harms and harms against animals, are not captured by the gauging approaches discussed below.

i) The 'living standard' approach to gauging harms

The first approach I discuss is Von Hirsch and Jareborg's approach to gauging harmfulness. It takes Amartya Sen's understanding of 'the living standard' as a basis for determining Φ -ing's standard harm.³⁷

Von Hirsch and Jareborg provide a scale of degrees of harmfulness on which different 'interest dimensions' cause different 'degrees' of harm. Ranked from most severe-when-infringed to least severe, these are:

- 1) physical integrity;
- 2) material support and amenity;
- 3) freedom from humiliation; and
- 4) privacy/autonomy.³⁸

Von Hirsch and Jareborg do not identify the moral aspects of the harms-scale they develop. As such, they offer a descriptive approach to gauging harms rather than a normative one. That causes difficulties for the appreciation of psychological harms: any harms to moral aspects of a person that do not fit into the four interest dimensions

³⁷ Based on the economic model of the 'living standard' derived from the economic concept of Amartya Sen in Amartya Sen, 'The Standard of Living: Lecture II, Lives and Capabilities' in Amartya Sen, John Muellbauer and Geoffrey Hawthorn (eds), *The Standard of Living* (Cambridge University Press 1987), per Von Hirsch and Jareborg (n 27), 7.

³⁸ Von Hirsch and Jareborg (n 27), 20.

identified by Von Hirsch and Jareborg are excluded from appreciation as ‘genuine harms’. For example, psychological harms are explicitly excluded from the ‘living standard’ approach to gauging harmfulness.³⁹ On the ‘living standard’ approach, ‘getting slapped’ (which affects the physical integrity in the first interest dimension) is necessarily considered more harmful than ‘being cheated on by one’s partner’ or ‘being subjected to severe verbal bullying’, which at most fall under the third interest dimension (freedom from humiliation). For the most part, (aspects of) psychological harms cannot be framed as affecting any of the interest dimensions above: such harms are excluded from the ‘living standard’ approach to gauging harms. That delegitimises psychological harms, treating them as non-genuine.

Von Hirsch and Jareborg do not offer a reason for excluding psychological harms from ‘genuine harms’, nor does a formal definition of ‘harmfulness’ require such exclusion.⁴⁰ That is a weakness of a descriptive approach to gauging harmfulness: when psychological harms have traditionally been excluded or devalued, describing how harms are commonly gauged repeats such traditions without explanation or substantiation. The relational and atomistic approaches to gauging harms discussed below offer a rule for gauging harms in terms of severity. As such, where particular types of harm are principally excluded from a scale, on those approaches, at least, it can be deduced *why* they are excluded. Relational personhood is best suited for including psychological harms in a scale of harms against persons. That is because, on relational personhood, if a

³⁹ *ibid*, 24.

⁴⁰ See Oxford English Dictionary, “*harm, n.*” (Oxford University Press 2022). The label ‘psychological harms’ refers to a particular type of harm, not to a non-harm (or the label would be inappropriate, which is not what I am arguing, nor what Von Hirsch and Jareborg claim).

person is affected in their ability to engage others in caring relations, that could be seen as very serious harm regardless of whether it has a psychological cause.⁴¹ I hold that the explicit exclusion of psychological harms in the ‘living standard’ approach distorts the scale of gauging harms without reason.

To summarise, the ‘living standard’ approach to gauging harm seems to rank Φ -ing in order of its effects on a person’s chances of staying alive. However, it does not clarify why ‘staying alive’ is good. I am not arguing that ‘staying alive’ is *not* good, but the issue is that the living standard approach does not substantiate or explain why it is good, or why Φ -ing’s effect on one’s chances of staying alive is the best way to assess the severity of harms. Without an understanding of what makes life (or ‘living’) *good*, it is not possible to assess the severity of harms. A value-free standard of gauging harms can only describe the *status quo*. While Von Hirsch and Jareborg set out to provide a normative theory for gauging harms, they do so based on a theory that does not make a moral claim: they suggest that the ‘living standard’ approach ‘appears to fit the way one ordinarily judges harms’, and does not offer an ‘ethical norm, but a useful standard’.⁴² As such, Von Hirsch and Jareborg describe how harms are usually gauged in practice rather than offer a theory or justification for why they should be weighed thus.⁴³ Without

⁴¹ See chapter 3, section 3.5 on relational personhood. The ‘living standard’ approach to harmfulness tries to standardise harms without reference to how harms may be affected by moral factors. The human species membership approach to personhood I discuss in chapter 3 section 3.4 takes a similar approach to trying to define persons without reference to their moral qualities. As such, I connect the ‘living standard’ approach to gauging harms to the human species membership approach to personhood. Both are rejected in this thesis because they do not offer justificational theories, merely descriptions of practical circumstances.

⁴² Von Hirsch and Jareborg (n 27), 11-2.

⁴³ This is an example of naturalisation: something that is normative is presented as something that is descriptive. ‘Naturalisation’ is a term borrowed from the essay ‘Epistemology

exploring *why* harms are or should be gauged a certain way, existing inequalities in recognising and valuing certain types of harm are perpetuated and sustained, with no clarification as to why. It means that harms that are suffered disproportionately by, for example, women, people in the LGBTQ+ community, and people of colour will continue to be valued as less severe than harms that are also generally suffered by straight, white, cis-gender men: by continuing that which is typically done, without assessing or exploring its reason or foundation, one inevitably also continues the patriarchal inequalities that persist in liberal democracies, because that is the way that things typically have been done.⁴⁴

ii) A relational approach to gauging harms

A second approach to gauging harmfulness is relation-based. On this approach, Φ -ing that interferes most with a person's caring relations is considered most harmful, and Φ -ing that interferes least with a person's caring relations is considered least harmful.⁴⁵ This standardisation of harmfulness is based on a relational approach to personhood. In chapter 3, I consider that a relational approach to personhood holds that 'caring relations' are what is most morally valuable. I am sympathetic to this value and believe this approach to personhood best theorises how persons actually exist in the world. That also means that a relational approach to gauging harms can accurately reflect how persons

Naturalized' in Willard Van Orman Quine, *Ontological Relativity and other Essays* (Columbia University Press 1969), 69-90.

⁴⁴ See e.g. Clare McGlynn et al., 'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2020) *Social & Legal Studies* 541, 546; and chapter 6 section 6.3 on equality.

⁴⁵ Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019), 167-78.

actually experience harm. On a relational approach, in the context of the justified criminal law, ‘the greatest harms are the wrongs done to the relationships that make up our selves’.⁴⁶

The relational approach to gauging harms takes into consideration that persons are inherently relational beings. That also means that harms are best appreciated in their context. Isolation of harms, or separation of connected harms, can result in underestimating the severity of those harms.⁴⁷ On a relational approach to gauging harms, the sum of separate harms may be greater than its parts, and that is a reason to consider the harms *as a sum*, in its entirety, rather than by addressing separated harms when the intention is to address the full scope of harm of Φ -ing.

iii) An autonomy-based approach to gauging harmfulness

Finally, one could develop an atomistic, autonomy-based approach to gauging the severity of harms. Φ -ing that interferes most with a person’s autonomy would be considered most harmful, and Φ -ing that interferes least with a person’s autonomy would be considered least harmful. This approach to gauging harmfulness can be connected to an atomistic approach to personhood because of the shared notion that autonomy is a person’s most valuable characteristic.⁴⁸ This approach to gauging harms is described, for

⁴⁶ ibid, 169. See section 2.2.3 on wrongs. In chapter 3, section 3.2.3 I consider ‘selfhood’ as a potentially slightly wider concept than ‘personhood’, but do not explore that question fully in this thesis. Should ‘personhood’ indeed be a narrower concept then the definition of most severe harms might be rephrased to ‘the greatest harms are the wrongs done to the relationships that define our personhood’.

⁴⁷ McGlynn et al. (n 44). See on contextualising harms of ibsa section 2.2.2.5.

⁴⁸ See chapter 3, section 3.3.

instance, by Von Hirsch in respect of Joel Feinberg's work.⁴⁹ As with the relation-based approach to gauging harms, this approach uses the infringement of personhood as a basis for its standardised harm. On atomistic personhood, too, there may be harms that are not wrongful. On atomistic personhood, where mental capacities are valued most highly, developing a condition that affects cognitive abilities, such as dementia, should be considered extremely harmful. It would not, however, be a wrong. Again, only that conduct that is both harmful and wrongful would be within the scope of justified criminalisation.

With regards to harms and wrongs against persons this means that the standardised harm in the context of justified criminalisation on atomistic personhood could be summarised as 'the greatest harms are the wrongs done to the autonomous capacities that define personhood'.⁵⁰ Unlike the relational approach to gauging harms, the autonomy-based approach does not offer tools by which a combination of harms or harms informed by context could be regarded more harmful than the individual harms put together. That is because the atomistic nature of this approach isolates rather than contextualises.⁵¹ On the autonomy approach, the sum of harms is identical to its parts. That is due to the nature of atomistic personhood, where persons are defined not as relational beings but as beings with a certain level of mental capacities. Context and relations, as such, do not affect the impact that Φ -ing is understood to have. That does not accurately reflect how

⁴⁹ Andrew von Hirsch, 'Injury and Exasperation: An Examination of Harm to Others and Offense to Others' (1986) 84 *Michigan Law Review* 700; Feinberg (n 8).

⁵⁰ Based on Herring's phrasing of relational harms against persons, text at (n 46).

⁵¹ See chapter 3 section 3.3.

harm is actually experienced, and that is a reason to reject the autonomy-based approach to gauging harms.⁵²

The three approaches to gauging standard harm of Φ -ing are substantially different. Nevertheless, they may — in certain cases — reach virtually identical conclusions regarding the severity of harm. For instance, on all three approaches, ‘being killed’ is the most harmful thing that could happen to a person: on the ‘living standard’ approach to gauging harms, ‘staying alive’ is the ultimate goal. ‘Being dead’ is an irreversible failure to meet that goal, and, as such, it should be considered a very severe harm. On a relational approach to gauging harms, a person’s moral value is derived from their caring relations. As death irreversibly ends a person’s ability to continue to engage in caring relations, ‘being killed’ is again a most severe harm. On an autonomy approach to gauging harms, ‘being killed’ is a most serious harm because ‘being dead’ permanently disables any autonomous capacities that the killed person had. In other cases, the three approaches to gauging the standard harm of Φ -ing can reach vastly different outcomes. For instance, in ibsa it seems very unlikely that the outcomes of gauging the severity of harm would be similar on each approach to gauging harms. I explore this below after considering the harms of ibsa.⁵³

In this thesis, I subscribe to a relational approach to personhood. Because I believe that relational personhood best identifies how persons actually exist in the world, I also hold that a relational approach to gauging harms best reflects how persons would normally experience harm. That said, any standardisation of harmfulness moves away

⁵² See on harms experienced in context rather than isolation McGlynn et al. (n 44).

⁵³ See section 2.2.2.5.

from actual experience of harm. That is useful for the criminal law at the criminalisation stage, but it might not benefit the support offered to victims.⁵⁴ A standardisation of harmfulness should aim to come as close to actual experiences of harm but, by definition, cannot be equal to it. I hold the relational approach to gauging harms to be most successful out of the three approaches discussed here in reflecting how harms are actually experienced because it most accurately reflects how persons exist in the world.⁵⁵

2.2.2.5 *The harms of ibsa*

The harms of ibsa are extensively analysed by McGlynn et al.⁵⁶ As harmfulness is a requirement of justified criminalisation, identifying that ibsa is harmful helps justify its criminalisation. McGlynn et al. consider approaches to contextualising the harms of ibsa that largely overlap with some of the considerations above on developing standardised harm. They hold that the harms of ibsa are best appreciated when they are regarded holistically instead of in isolation (separated from their context, as might happen on the atomistic approach to gauging harms) or through a ‘medicalised trauma-based framework’ (seemingly in line with the living standard approach to gauging harms).⁵⁷ McGlynn et al.’s phenomenological approach to understanding the actual harms of ibsa as contextualised and relational fits in well with the relational approach to standardising

⁵⁴ Victim support should *not* be concerned with standardised harm and instead focus on the harm suffered by the victim they aim to support. As such, there is a discrepancy between the criminal law’s needs and the victim’s needs, which may in itself be harmful to victims, see e.g. Lee Madigan and Nancy C Gamble, *The Second Rape: Society’s continued betrayal of the Victim* (Macmillan Publishing Company 1991).

⁵⁵ See also chapter 3, section 3.5.

⁵⁶ McGlynn et al. (n 44).

⁵⁷ *ibid*, 4.

harm discussed above. As such, I consider this a relational approach to standardising harms. McGlynn et al.'s research is an abstraction of actual harms of ibsa as suffered by 75 victim-survivors to five categories of harms that together reflect the 'ordinary' harm of ibsa. As noted above, individuals may experience harm differently from what is considered the 'standard', but a good standard reflects as closely as possible how persons subjected to Φ -ing normally experience its harm. Accurately gauging the ordinary level of harms of ibsa is served by the strong foundation offered by a large qualitative study into the harm of ibsa. McGlynn et al. recognise the typical harms of ibsa as 'social rupture', 'constancy', 'existential threat', 'isolation' and 'constrained liberty'⁵⁸. On a relational understanding these can be very serious harms.

As I argue throughout this thesis, persons are inherently relational beings.⁵⁹ Using an approach to personhood (and standardising harm based on that approach to personhood) that reflects how persons actually exist in the world helps create harm-gauging standards that better reflect what actually harms persons. Such a standard is least at risk of gauging harms in a way that misses, minimises, and/or misunderstands the harm that persons subjected to ibsa or other Φ -ing actually typically suffer.

Having seen how a relational approach would recognise the harm of ibsa, I will briefly explain why the other two approaches would be less appropriate for gauging the harms of ibsa. Using the living standard approach to gauging harms, it seems very unlikely that ibsa would be considered very seriously harmful as it does not directly affect the interest dimensions used to gauge harms. Insofar as there is a constraint of

⁵⁸ ibid, 10-6.

⁵⁹ See mainly chapter 3, section 3.5.

liberty that can be framed as an autonomy-infringement, ibsa can be a harm on the fourth interest dimension. Some (but not necessarily all) cases of ibsa could be a harm on the third interest dimension regarding freedom from humiliation. Although ibsa is increasingly understood as harmful, many of the harms it gives rise to are not harms to one of the four interest dimensions identified by Von Hirsch and Jareborg. As the living standard approach to gauging harms aims to be descriptive of how harms are actually usually gauged intuitively, the standard can be affected by changing understandings of what is harmful, but that does not mean that ibsa can more readily be gauged as severely harmful. That is because the approach is restricted by the four interest dimensions. Any harm that does not fit into any of the four interest dimensions is excluded from being gauged as genuine harm. As such, the living standard approach to gauging harms would exclude a substantial part of the harms of ibsa on its standardisation. That means that the harmfulness of ibsa would be appreciated and standardised as much less severe than it actually typically is. If that standard is used to justify the criminalisation of ibsa, then there is less scope for developing a severe offence compared to if a relational approach to gauging harms is used.

In that light, I note McGlynn et al.'s concern regarding the framing of harms of ibsa when these are conceptualised through a 'medicalised trauma-based framework'. The 'medicalised trauma-based framework' to assessing harmfulness shows distinct similarities to the 'living standard' approach to gauging harm: physical well-being is the main indicator of how harmful Φ -ing is, and any factors not directly related to physical

well-being are secondary in importance.⁶⁰ When such an approach is used to gauge the harmfulness of ibsa

harms become categorised and defined in narrow ways that do not adequately capture the wide array of complex and interconnected ways that image-based sexual abuse impacts on victim-survivors (this is further discussed in the next subsection). As such, the nature of harm experienced by many victim-survivors risks being missed, minimised and misunderstood within a medical trauma model.⁶¹

For these reasons, a relational approach to gauging harms is more appropriate than the ‘living standard’ or ‘medicalised trauma based’ approach.

Furthermore, in the context of ibsa, a relational approach to gauging harms is more appropriate for gauging harms than an atomistic approach because of the highly contextual and interconnected nature of the standard harms of ibsa. The autonomy approach to gauging harms can appreciate the harms of ibsa only insofar as they affect the depicted person’s mental capacities and autonomous capabilities. It abstracts harms in isolation. Where context and/or relations affect the severity of harm, this could not be taken into account on an autonomy approach. That means that the harms of ibsa as identified by McGlynn et al. could barely, if at all, be taken into account as harms against

⁶⁰ Jonathan Herring, ‘Conversion Practice and Coercive Control’ (Society of Legal Scholars Conference, London 7 September 2022).

⁶¹ McGlynn et al. (n 44), 546. As noted in the discussion of the ‘living standard’ approach to gauging harms, that is a form of naturalisation where normative values are minimised by presenting them as descriptive, see (n 43) on naturalisation.

persons on an autonomy-based scale. That again minimises the standard harms of ibsa in comparison to its actual typical harm.

It is increasingly acknowledged that relational harms are genuine harms. That can be seen in, for example, understanding domestic violence as coercive control: the finding that harms do not exist in isolation but ‘along a broad spatial and temporal continuum’ has translated into legal provisions.⁶² Full acknowledgement of the harms of, for example, coercive control or ibsa as severe harms against the persons cannot be based on a living standard or autonomy-based approach to gauging harms: the autonomy approach does not leave space for appreciating the relational and contextual harms at the core of coercive control, and the living standard model equally does not leave room for gauging such harms because it is based on a tradition in which the atomistic individual is the norm.⁶³ As the law has traditionally taken an atomistic, isolated approach to persons (and as such to harms suffered by those persons), the fact that contextual, relational harms are increasingly appreciated could lead some to conclude that a relational approach to gauging harms is not needed. After all: the law recognises these harms, and the assumption might be that the law was able to recognise these harms using its traditional, atomistic approach. However, the law does not explicate its approach to gauging harms. That the appreciation of coercive control as severely harmful is a *relational* understanding of harms is not commonly acknowledged or recognised. This failure to explain the foundation upon which harmfulness is recognised creates blind spots which

⁶² Evan Stark, *Coercive Control : The Entrapment of Women in Personal Life* (Oxford University Press 2007); s.76 Serious Crime Act 2015 of England and Wales.

⁶³ That is the result of the living standard’s aim of describing harms as they are ordinarily valued, and doing so from within a tradition of liberalism in which the atomistic individual is the norm. This tradition is not mentioned by Von Hirsch and Jareborg, but evidenced by the interest dimensions that include harms to autonomy, but exclude relational harms.

can lead to dismissing relational models as unnecessary because all that is seen is that the law already appreciates such harms. It is important to recognise and explicate that, where the harms of coercive control and ibsa are fully appreciated in law, the law has implicitly used a relational approach to gauging harms. A gradual shift from an implicitly atomistic approach to an implicitly relational approach may not be recognised as such, but that does not mean it is not there. When it is explicated which harm-gauging approach is used in law, it can be explained why a relational model can be useful and appropriate. The harms of ibsa are best and most fully appreciated when standardised using a relational approach to gauging harms.

2.2.2.6 Concluding harms

In this section, I considered that harmfulness is a requirement of justified criminalisation, per the harm principle. That includes the justified criminalisation of risk of harms. I considered three approaches to gauging harmfulness to standardise harmfulness of Φ -ing at the criminalisation stage. I reject the ‘living standard’ approach to gauging harms because it does not explain why it assesses harms as it does. It separates persons from their moral foundation and, as such, cannot accurately reflect how persons normally experience harm.

The relational- and autonomy-based approaches to gauging harms base their assessment of standardised harm on what is most morally valuable. They recognise persons as moral beings. The highest moral value is the identifying characteristic of persons, which varies by personhood approach. In this thesis, I subscribe to a relational

approach to personhood.⁶⁴ The standard harms of ibsa, as recognised by McGlynn et al., are social rupture, constancy, existential threat, isolation, and constrained liberty. In this section, I have pointed at these as relationally defined harms.

Harmfulness, as a criterion for justified criminalisation, is insufficient to wholly justify criminalisation. As noted, I do not consider ‘losing a loved one’ or ‘diminishing mental capacities’ part of the justified scope of the criminal law, even though they can be identified as harms. That is because these are not harms that result from wrongdoing. Wrongness is discussed in the next section.

2.2.3 Requirements for justified criminalisation: wrongfulness

2.2.3.1 Introduction

In this section, I consider the second requirement of justified criminalisation, namely ‘wrongfulness’. It is this requirement that is at the focus of this thesis. In this section, I first consider why ‘wrongfulness’ is a requirement of justified criminalisation. I then consider the notions of *mala in se* and *mala prohibita*. Both can fulfil the requirement of wrongness towards justifying criminalisation, but in this thesis, I am concerned with *mala in se* (moral wrongs). This is followed by a discussion of different perspectives from which to analyse wrongfulness, namely *prima facie* and all-things-considered. I hold that criminalisation is concerned with *prima facie* wrongness, which shall therefore be the perspective of interest in this thesis, while criminal convictions rely on all-things-

⁶⁴ Atomistic personhood takes mental capacities as the defining characteristic of personhood, human species membership personhood takes being human as a defining characteristic of personhood, and relational personhood takes caring relations as its defining characteristic. See further chapter 3.

considered wrongs, which are a *prima facie* wrongs that are not justified or excused.

Finally, I point at the wrongs of ibsa, which are discussed more fully in chapters 5 and 6.

2.2.3.2 Wrongfulness as a requirement of justified criminalisation

Wrongfulness is a requirement of justified criminalisation because the criminal law is a tool for censure, and non-wrongful conduct need not be censured.⁶⁵ Therefore, only wrongful conduct should be criminalised.⁶⁶ That something is wrongful means that it is an infringement of a moral value or a legal requirement (see the next subsection on *mala in se* and *mala prohibita*). In this section, I consider that personhood is a basis upon which some wrongs can be recognised.⁶⁷ Where the criminal law focuses on wrongs against persons, harmfulness and wrongfulness are determined by asking a very similar question about Φ -ing in respect of the person subjected to it. That does not mean that harmfulness and wrongfulness are the same concepts: wrongfulness assesses Φ -ing, harmfulness assesses the effect of Φ -ing. As I consider in this section, wrongs against the person are an infringement on personhood that exists separately from harm. Equally, there can be very serious harms to persons that are not the result of wrongdoing, for example, the natural death of a loved one. Such harm would be unsuitable for criminalisation: there is no wrongdoing, so the requirements for justified criminalisation are not met. Non-wrongful harm cannot justifiably be criminalised.

⁶⁵ Duff (n 20), 22; Raz (n 5), 418.

⁶⁶ See e.g. Victor Tadros, *Wrongs and Crimes* (Oxford University Press 2016); Lindsay Farmer, *Making the Modern Criminal Law : Criminalization and Civil Order* (Oxford University Press 2016); Duff et al. (n 7).

⁶⁷ See also chapter 3, section 3.2.

2.2.3.3 What is a wrong for the criminal law: *mala in se* and *mala prohibita*

Two types of wrongs can justifiably be criminalised: *mala in se* and *mala prohibita*.⁶⁸

Mala in se are moral wrongs.⁶⁹ These are wrongs that are wrong in and of themselves.⁷⁰

However, there is no universal agreement on what is morally right or wrong.⁷¹ For the law to be able to make objective claims about moral wrongness, it needs to clarify the moral values on which such an assessment is based. That is not usually done — *mala in se* are presented as inherently wrong without explanation. But that does not mean that no moral values underpin the assessment of *mala in se* in law. It merely means that to separate law and morality, the moral values that influence the law are not acknowledged as such. In chapter 3, I consider that personhood as a moral concept can offer a theoretical foundation upon which to base the assessment of moral wrongness. In that chapter, I also note that liberal democracies are sometimes mistakenly thought of as free from morality.⁷² If it is a wrong against a person, then it also is a moral wrong because

⁶⁸ For a discussion on content of the criminal law see for instance: Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others*, vol 2 (Oxford University Press 1985); RA Duff, *Answering for Crime : Responsibility and Liability in the Criminal Law* (Hart 2007); Duff (n 20).

⁶⁹ See e.g. AP Simester and Andrew Von Hirsch, *Crimes, Harms, and Wrongs : On the Principles of Criminalisation* (Hart 2011); Tadros (n 66); Duff (n 20); Duff et al. (n 7); Lindsay Farmer, 'Definitions of Crime' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).

⁷⁰ See on law in combination with morality HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593. The separation of law and morals is a principle of liberalism and of liberal democracies, but it seems unavoidable that there is some overlap between the realm of morality and the realm of law.

⁷¹ It is commonly suggested that it is impossible comprehensively define morality. See for different understandings e.g. Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol 4 (Oxford University Press 1988); Thomas Nagel, *Equality and Partiality* (Oxford University Press 1995); Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

⁷² See chapter 3 text at (n 2)

personhood is a moral status.⁷³ By clarifying the theoretical (moral) foundation upon which wrongness is assessed, whether or not something is wrongful becomes an objective, verifiable assessment.

Where the criminal law considers moral wrongs as a foundation for justifying criminalisation, it would be good to clarify how it is determined whether something is a moral wrong. In this thesis, I use personhood theory to clarify the standard based upon which the criminal law would assess whether Φ -ing is a wrong against a person. That enables objective assessment of wrongfulness, even if debates as to what is the best approach to personhood were to remain — so long as is clear what approach is used, at least the assessment that ‘based on X approach to personhood Φ -ing is a moral wrong’ is an objective claim. By clarifying the standard based upon which wrongness is assessed, it can be shown that disagreements as to what is wrong are not about the Φ -ing itself, but about differences in values based upon which Φ -ing is assessed. Clarifying the moral claims made by the law helps make the law more objective and verifiable. Furthermore, as analysed in chapters 5 and 6, when using an atomistic approach to personhood *ibsa* seems far less wrongful than it does when using a relational approach to personhood. The question of *ibsa*’s wrongfulness then depends to no uncertain extent on the theory of personhood used as a foundation for its assessment. That is why I consider personhood theory to answer a question about wrongness. The type of wrongs at the focus of this thesis are moral wrongs against persons.

⁷³ See for a development of this argument chapter 3, section 3.2.

Mala prohibita are post-legal wrongs. These wrongs are wrong because the law says so. To avoid circularity in the justification of criminalisation, *mala prohibita* must be derived from an area of law that is not the criminal law.⁷⁴ That means that the wrongness of *mala prohibita* must precede the criminal law. *Mala prohibita* are wrongful *before* criminalisation, though not altogether pre-legally wrongful. For instance, traffic safety laws may prohibit (not: criminalise) driving on the wrong side of the road. ‘Driving on the other side of the road’ is not a moral wrong: strong feelings about ‘what is the appropriate side of the road for driving’ aside, one side is not inherently better than the other. For road safety, what matters is that everyone follows the same rule. That way, the rule’s objective (i.e. to prevent harm and increase road safety) can be fulfilled. The requirement of wrongness for justified criminalisation may be derived from a non-criminal rule that turns Φ -ing into a wrong, for example, a rule that notes which is the wrong side of the road to drive on. So: criminalising ‘driving on the wrong side of the road’ should *follow* a legal rule that sets out what side to drive on. For *mala prohibita* wrongs to be justifiably criminalised, the legal provision that creates the wrong must precede the provision that criminalises that wrong.

A third type of wrongness is excluded from justified criminalisation entirely, namely non-legal, non-moral normative evaluations. So, while it can be said that infringing bodily integrity is wrong (*malum in se*), driving on the other side of the road is wrong (*malum prohibitum*), and wearing mismatched socks is wrong, the last one is not the type of wrongness that fulfils the requirement of justified criminalisation. The assessment that ‘wearing mismatched socks is wrong’ is a non-legal, non-moral

⁷⁴ For a discussion on *mala prohibita* criminalisations see Duff (n 20), 130.

normative evaluation that does not appear to give sufficient reason to involve the (criminal) law.⁷⁵ Distinguishing between *mala in se*, *mala prohibita*, and non-legal, non-moral normative evaluations helps identify Φ -ing that may justifiably be criminalised. In this thesis, I limit myself to discussing Φ -ing *mala in se* that are wrongs against the person.⁷⁶ *Mala prohibita* are not considered in this thesis beyond this subsection.

2.2.3.4 Perspectives on assessing wrongfulness: *prima facie* and all-things-considered

In this subsection, I consider two perspectives from which to determine Φ -ing's wrongfulness, namely *prima facie* and all-things-considered.⁷⁷ *Prima facie* wrongness is an assessment that happens *before* taking into account any justifications or excuses. It precedes consideration of the facts of a case. As such, it assesses whether Φ -ing is wrongful in general terms. In this thesis, I consider three main reasons why *prima facie* wrongs should be recognised as *genuine* wrongs, even if all-things-considered it is a justified wrong.⁷⁸

⁷⁵ Tadros (n 66), 15.

⁷⁶ In chapters 5 and 6 I make a different type of distinction, not to be confused with *mala in se* and *mala prohibita*, namely of 'moral wrongs' and 'legal wrongs'. Moral wrongs are the same as *mala in se*, but the term 'legal wrongs' is wider than *mala prohibita*: by legal wrongs I mean *all* wrongs that are recognised in the law, i.e. moral wrongs that have been addressed through a legal framework, as well as *mala prohibita*. This distinction is important because moral wrongness may justify the law's interference, but does not automatically establish it: the mere fact that something is a moral wrong does not make it a legal wrong, see Hart 1958 (n 70).

⁷⁷ Dempsey and Herring (n 13).

⁷⁸ See for a discussion on treating *prima facie* wrongs as genuine wrongs *ibid*, 470.

i) Identifying *prima facie* wrongs to clarify the justified scope of criminalisation

The first reason to discuss *prima facie* wrongs is so as not to obscure which wrongs can justifiably be criminalised (even if D should not be convicted in those cases where there is a justification or excuse). Criminalisation occurs *before* a criminalised wrong is committed.⁷⁹ At that point in time, *there is no all-things-considered wrong*. Only a *prima facie* perspective on wrongness exists at the time of criminalisation if criminalisation is non-retroactive. If we accept that it is possible to justify criminalisation if Φ -ing is wrongful, and *prima facie* wrongness is the only available perspective through which wrongfulness can be assessed at the time of criminalisation, it must be the case that *prima facie* wrongness fulfils the wrongness requirement of justified criminalisation. However, it is *not* sufficient to show that D can justifiably be convicted: '*prima facie* wrongdoing is sufficient only to establish the need for moral justification or excuse.'⁸⁰ All relevant factors must be considered to determine whether criminal censure is appropriate. If there is no justification or excuse for a *prima facie* wrong, then such Φ -ing is all-things-considered wrongful. There can be a difference between the wrongs that are justifiably criminalised, namely *prima facie* wrongs, and the wrongs for which D is justifiably subjected to censure, namely all-things-considered wrongs. It is important to distinguish between these different viewpoints on wrongfulness when aiming to identify whether it is justified to criminalise Φ -ing. The fullest answer to that question is given on a *prima facie* assessment of wrongfulness.

In this chapter, I am concerned with identifying the requirements for justified criminalisation (not: justified conviction), it is *prima facie* wrongfulness that is relevant

⁷⁹ See (n 31) on the principle of non-retroactive laws.

⁸⁰ Dempsey and Herring (n 13), 472.

here. For example, ‘cutting someone with a knife’ infringes a person’s bodily integrity. Without knowing anything else, it can be determined, *prima facie*, that cutting another person is a moral wrong and would meet the requirement of ‘wrongness’ for justified criminalisation. If someone has good reasons to cut another person (e.g. they are a surgeon doing a necessary and consensual surgery), it may not be an all-things-considered wrong. Cutting a person can be justifiably criminalised in terms of wrongness, but a person who cuts for good reason, for example, the surgeon, should not be found guilty of an offence that criminalises cutting: the surgeon has a justification and should not be subjected to criminal censure. A *prima facie* wrong that is not an all-things-considered wrong may be justifiably criminalised, but D may not justifiably be subjected to the force and censure of the criminal law for it.⁸¹ *Prima facie* wrongfulness is relevant to determine justified criminalisation, whereas all-things-considered-wrongfulness is relevant to determine justified conviction.

⁸¹ See also Hyman Gross, ‘Rape, Moralism, and Human Rights’ [2007] *Criminal Law Review* 220, and Jonathan Herring, ‘Human Rights and Rape: A Reply to Hyman Gross’ [2007] *Criminal Law Review* 228, on using the criminal law to guide behaviour: Gross seems to hold that criminalising *prima facie* wrongs serves only to guide and improve the moral quality of people’s conduct (Gross, 226). However, Gross seems to overlook the fact that criminalising *prima facie* wrongs does not inherently prohibit conduct (and as such does not seek to improve moral quality of people’s conduct), it merely signals that such conduct requires justification *or else* be a crime. There is a difference between moralism as impressing one’s own values on someone else (which seems to be what Gross has in mind), and identifying *mala in se* as *prima facie* wrongs, i.e.: as conduct that is inherently wrongful and requires justification. As *mala in se* are a core part of liberal criminalisation theory it would be odd to suggest – while adhering to liberal standards of criminalisation – that the law could not legitimately address them.

ii) Prima facie wrongs as genuine but defeasible wrongs

A second reason to consider *prima facie* wrongs is to identify them as ‘genuine but defeasible’ wrongs.⁸² That signals that even though a *prima facie* wrong may be justified, it is wrong, which is a reason to look for an alternative course of conduct. If a non-wrongful course of conduct and a *prima-facie-but-not-all-things-considered* wrongful course of conduct achieve the same results the *prima facie* wrongfulness of the latter course of conduct could be a reason to avoid it and instead opt for the former.⁸³ For example, a doctor treating a patient through surgery commits a *prima facie* wrong by cutting the patient. That may well be justified if there are good reasons (for instance, the patient’s consent for the surgery) so that there would not be an all-things-considered wrong. However, there is a *prima facie* wrong because the patient’s bodily integrity is infringed through cutting. That a *prima facie* wrong is justified does not make it (here: the act of cutting another person) itself *non*-wrongful.⁸⁴ Rather, it should be recognised as a justified wrong (*prima-facie-but-not-all-things-considered* wrongful). If an alternative treatment does not involve an infringement of bodily integrity that might be the preferable option from a wrongfulness perspective. ‘Cutting the patient’ may still be justified even if an appropriate alternative treatment does not contain such a severe *prima facie* wrong (e.g. ‘the patient takes a pill instead of getting surgery’). However, if there is such an alternative, there seem to be fewer good reasons for acting through surgery, so

⁸² Dempsey and Herring (n 13), 470 note 20.

⁸³ It could be argued that good reasons only provide justification to the least wrongful act. A version of this argument is presented in *ibid*, 488.

⁸⁴ Dempsey and Herring consider that a *prima facie* wrong that is not an all-things-considered wrong nevertheless offers reasons for ‘lingering regret’ with the actor (Dempsey and Herring (n 13)).

the justification for cutting may be weaker.⁸⁵ That is because it is not *necessary* to cut the patient: they could be cured using a non-wrongful (or at least: less severe *prima facie* wrongful) method. If *prima facie* wrongfulness were not recognised as genuine wrongfulness, then the two options might be considered equal. It would then not be possible to distinguish between non-wrongs and justified wrongs.

iii) *Prima facie* wrongs as identifying the wrong done to the person subjected to Φ

A third reason to consider *prima facie* wrongs is that a *prima facie* assessment can identify the wrongs suffered by V, even if D acted with a justification. If the infringement of a person is justified or excused, then there may not be an all-things-considered wrong. If *prima facie* wrongness is nevertheless recognised, that facilitates appreciation for the infringement of the person subjected to Φ -ing regardless of any defences D may have had. All-things-considered wrongfulness facilitates space for considering reasons D may have had for Φ -ing, and as such, is of particular importance for determining whether D can justifiably be subjected to criminal censure. As such, I consider that *prima facie* wrongness identifies the wrong done to the person subjected to Φ , and all-things-considered wrongfulness to identify the wrong that D can justifiably face liability for.

In this thesis I am concerned with identifying the *prima facie* wrongs of ibsa to identify the scope of justified criminalisation in the context of ibsa. Along the way, by considering ibsa's *prima facie* wrongs, I identify the full range of wrongs to which victims of ibsa are subjected.

⁸⁵ *ibid*, 488.

2.2.3.5 *The wrongs of ibsa*

The wrongs of ibsa are discussed in chapters 5 and 6. I discuss them there so that I can incorporate the considerations presented in chapters 3 and 4 into the discussion of the wrongs of ibsa. In chapter 5, I first consider that ibsa may constitute the wrongs of infringing autonomy, sexual integrity, privacy, free speech, and trust. In chapter 6, I then consider ibsa as a failure to minimally respect personhood and ibsa as constituting the wrong of reinforcing and being reinforced by systemic inequality. Whether and to what extent these wrongs materialise in ibsa depends on the approach to personhood used to interpret them.

2.2.3.6 *Concluding wrongfulness*

In this section, I have discussed various aspects of wrongfulness. I considered that only things that are *wrong* require censure. I discussed that *mala in se* and *mala prohibita* may justifiably be criminalised. I further noted that in this thesis, I am concerned with wrongs that are *mala in se*, specifically moral wrongs against the person. Legal positivism requires that legislative steps are taken in order for such moral wrongs to become legal wrongs.⁸⁶

I then considered that there are different perspectives from which wrongfulness can be assessed. *Prima facie* wrongness is used to justify criminalisation. In wrongs against persons, *prima facie* wrongness acknowledges that Φ -ing infringes an aspect of personhood. All-things-considered wrongness is the perspective necessary to justify the

⁸⁶ Hart (n 69).

application of criminal censure in individual cases. In this thesis, I am concerned with identifying the *prima facie* moral wrongness of *ibsa*. I do this in chapters 5 and 6.

2.2.4 Requirements for justified criminalisation: publicness

2.2.4.1 Introduction

In this section, I discuss the third and final requirement of justified criminalisation, namely publicness.⁸⁷ I discuss ‘publicness’ in the meaning of ‘being the state’s business’.⁸⁸ The requirement that Φ -ing be ‘public’ for it to be justifiably criminalised is typically discussed in combination with the requirement of ‘wrongfulness’ as ‘public wrongs’.⁸⁹ I have separated my discussion of publicness and wrongfulness to identify the requirements for justified criminalisation more precisely. For example, non-public harmful wrongs cannot justifiably be criminalised, but that does not make them less wrongful. If ‘public wrongfulness’ is treated as a single requirement, then saying that ‘there is no public wrong’ where conduct is ‘harmful’ and ‘wrongful’ but not ‘public’ misleadingly suggests that there may not have been a wrong, as opposed to ‘no publicness’. An example of a harmful wrong that is not typically treated as ‘public’ in liberal democracies is cheating on a partner: it may be harmful and wrongful, but it is not public in the sense that it is considered for the state to regulate. Public and private are

⁸⁷ See for instance: SE Marshall and RA Duff, ‘Criminalization and Sharing Wrongs’ in Paul H. Robinson, Stephen Garvey and Kimberly Kessler Ferzan (eds), *Criminal Law Conversations* (Oxford University Press 2011).

⁸⁸ Dempsey (n 16).

⁸⁹ See e.g. SE Marshall and RA Duff, ‘Public and Private Wrongs’ in James Chalmers and Fiona Leverick (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010); Dempsey (n 16); Duff (n 20), 75-9; Tadros (n 66), 121; Farmer (n 66), 66.

often treated as each other's opposites. However, they are not necessarily so: something can be public and private simultaneously.⁹⁰ Finally, I make a suggestion as to how ibsa may be 'public' in the sense that it is for the state to regulate, although a thorough exploration of this requirement is outside the scope of this thesis.

2.2.4.2 Publicness as a requirement of justified criminalisation: the meaning of 'publicness'

Publicness is a requirement of justified criminalisation because the state cannot justifiably interfere in things that are not public: publicness is defined here to mean that Φ -ing is the state's business.⁹¹ A feminist concern regarding juxtaposing publicness and privacy is that it can be used to 'hide' issues such as domestic abuse from the reach of the criminal law by arguing that it is private and, therefore, not for the state to address.⁹² I do not suggest here that the public/private distinction ought to be abolished entirely, at least in the context of justifying criminalisation. Rather, I reconsider the juxtaposition: I explicitly move away from treating 'public' and 'private' as each other's opposites.⁹³ I do this to remedy some of the feminist concerns with the traditional public/private divide.⁹⁴ Labelling Φ -ing as public (in the sense that it is the state's business) does not mean that such Φ -ing could not also be private. I do not hold publicness and privacy to

⁹⁰ See section 2.2.4.2 and Appendix B.

⁹¹ See e.g. Dempsey (n 16); Shazia Choudhry and Jonathan Herring, 'Righting Domestic Violence' (2006) 20 *International Journal of Law, Policy and the Family* 95.

⁹² I return to this point in chapter 5 where I discuss the meaning of privacy, section 5.4.

⁹³ This distinction is again considered in respect of privacy, in chapter 5, section 5.4.2.

⁹⁴ See e.g. Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989), 191; Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989); cf Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1.

be opposites. Instead, I suggest that the opposite of ‘public’ is ‘non-public’, and the opposite of ‘private’ is ‘non-private’. What is ‘public’ may overlap with what is ‘non-private’, and vice versa, but it is not defined as each other.⁹⁵

It means that the state has a legitimate interest in regulating such Φ -ing. For the requirement of publicness, the safeguards of liberal democracies are particularly fundamental to ensuring that there is no abuse of power. That is because the state itself determines when it has an interest in regulating Φ -ing, meaning that it is, in theory, possible that it labels any and all Φ -ing as public. However, that would not legitimately be within the state’s power, which is restricted by the principles of liberal democracies safeguarding against abuse of power.⁹⁶ It is outside the scope of this thesis to explore whether the safeguards of liberal democracies are sufficient to prevent abuse of power in the context of labelling Φ -ing ‘public’.⁹⁷ However, it can be said that if the state has a legitimate interest in regulating Φ -ing, then Φ -ing is public.⁹⁸ In liberal democracies, one

⁹⁵ See Appendix B for a diagram representing the relations between publicness and privateness.

⁹⁶ See for safeguards of liberal democracies on the concept of ‘liberal democracy’ as democracy and *Rechtsstaat* e.g. Nicholas Wolterstorff and Terence Cuneo, *Understanding Liberal Democracy : Essays in Political Philosophy* (Oxford University Press 2012). Among the principles of liberal democracy can be (though are not necessarily always present) e.g. the principle of legality, fundamental rights, entrenchment of those fundamental rights (they cannot be changed as readily as other laws), constitutionalism, and judicial review, see Michael J Perry, *The Political Morality of Liberal Democracy* (Cambridge University Press 2010); Joseph Raz, *The Authority of Law : Essays on Law and Morality* (Clarendon Press 1979); Zehra F Kabasakal Arat, ‘Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property, and Discrimination’ (2008) 30 *Human Rights Quarterly* 906. If people in power abuse that power severely enough, they change the nature of the state (e.g. the state would cease to be a liberal democracy).

⁹⁷ Dempsey has developed arguments on this issue in Michelle Madden Dempsey, ‘Towards a Feminist State: What Does ‘Effective’ Prosecution of Domestic Violence Mean?’ (2007) 70 *Modern Law Review* 908.

⁹⁸ On what makes conduct ‘public’ see also Marshall and Duff who hold that conduct is public if it is shared between the person subjected to it and the community (Marshall and

way in which conduct would be legitimately the state's business is if it constitutes a violation of rights the state has a duty to protect. An example of such rights are human rights flowing from treaties to which the state is party. In this thesis, I consider the moral wrongs and not the not legal wrongs of ibsa.⁹⁹ However, I do point at some human rights that seem to be infringed through the moral wrongs of ibsa discussed in chapters 5 and 6. Ibsa appears to constitute several human rights infringements, which would mean that ibsa is public because the state has a legitimate interest in regulating such infringements. I submit that this is not a claim explored in-depth in this thesis.

2.2.4.3 Concluding publicness

Publicness is a requirement of justified criminalisation. It is used here in the meaning that Φ -ing is legitimately the state's business. I further noted that 'publicness' and 'privateness' are not opposites, even if (historically) 'publicness' and 'non-privateness' may have been virtually identical (and vice versa).¹⁰⁰ Where states have human rights obligations, infringements of those rights are necessarily public. However, publicness is not limited to human rights infringements. Human rights are merely pointed at here as at least one way in which ibsa would meet the requirement of being public. Beyond that, ibsa's publicness is not explored in this thesis.

Duff (n 87), 235; SE Marshall and RA Duff, 'Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7) versus Dempsey who considers that victims need not share their wrong with the community for a wrong done to the victim to be public, instead finding that the state's legitimate interest in a wrong may be borne out of its own (re)constitution (Dempsey (n 16), 269).

⁹⁹ See (n 76) on the distinction of legal wrongs and moral wrongs.

¹⁰⁰ See chapter 5, section 5.4.2.1.

2.2.5 Concluding the justified scope of the criminal law

Criminalisation is justified if Φ -ing is a harmful public wrong. The criminal law requires a justification because criminalisation is itself wrongful. That is because it interferes with people's abilities to enjoy and gives rise to the highest moral value that identifies personhood.¹⁰¹ In this section on justified criminalisation, I considered that the justified scope of the criminal law is demarcated by requirements of harmfulness, wrongfulness, and publicness. The justified scope of the criminal law is where publicness, harmfulness, and wrongfulness overlap.¹⁰² I presented an overview of how these requirements may be understood. I distinguish between a wrong as a type of Φ -ing; and a harm as a type of effect of Φ -ing. I indicated how ibsa meets the requirements of harmfulness and publicness: recent research has identified ibsa's harmfulness, and ibsa's publicness may be derived, in part, from the wrongs discussed in this thesis where they translate to human rights infringements. Ibsa's wrongfulness is at the heart of this research and is considered more thoroughly in chapters 5 and 6. Overall, I hold that it seems very likely that ibsa meets the requirements of justified criminalisation. So: it would be justified to criminalise ibsa. What that entails should be informed by the nature of the wrong of ibsa

¹⁰¹ See chapter 3.

¹⁰² As I consider in the next section, justifiability is not the same as fairness. One major issue that should be considered during the criminalisation process is whether liability depends on blameworthiness. It is outside the scope of this thesis to offer an analysis of the requirement of blameworthiness. See on blame, justifications and excuses Nicola Lacey, 'Community, Culture, and Criminalization' in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds), *Criminal Law and Cultural Diversity* (Oxford University Press 2014); Andrew Simester, 'On Justifications and Excuses' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012). See on blameworthiness and culpability Michael S. Moore, *Placing Blame : A General Theory of the Criminal Law* (Oxford University Press 2010); on criminal blameworthiness as separate from moral blameworthiness David Shoemaker, 'Blame and Punishment' in D. Justin Coates and Neal A. Tognazzini (eds), *Blame: Its Nature and Norms* (Oxford University Press 2012), and Elinor Mason, *Ways to be Blameworthy : Rightness, Wrongness, and Responsibility* (Oxford University Press 2019), cf David Lefkowitz, 'Blame and the Criminal Law' (2015) 6 *Jurisprudence* 451.

because that identifies *what about ibsa* makes it meet the requirements for justified criminalisation. The wrongness of ibsa, as such, identifies what needs to be addressed by the criminal law.

2.3 The fair criminal law: the principle of fair labelling

2.3.1 Introduction

In the previous section, I considered requirements for justified criminalisation. I hold that the requirements for justified criminalisation do not necessarily ensure the criminal law's fairness. To help facilitate fairness, the criminal law must adhere to certain principles, such as non-reciprocity, *ne bis in idem*, and fair labelling.¹⁰³ These principles are to be considered after criminalisation is deemed justified. That is because the principles of criminal law are not a formal requirement of justified criminalisation. Instead, I consider that the principles of criminal law offer tools by which the criminal law's fairness can be assured, separate from the justifiability requirements discussed in the previous section. In this section, I consider one principle of criminal law in particular, namely the principle of fair labelling. I do this for two reasons.

The first reason is that the principle of fair labelling is particularly relevant in the context of ibsa. As I noted in chapter 1, ibsa has been known by many names, ranging from 'revenge pornography' to 'intimate image abuse' and 'ibsa'. Fair labelling is of interest in the context of ibsa because that principle is concerned with 'the naming and

¹⁰³ See generally on principles of criminal law Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 253-5; Herring (n 20), 9-14.

classification of offences'.¹⁰⁴ The principle of fair labelling helps explain why the name used to describe all forms of non-consensual creation and/or sharing of intimate images matters in the context of ensuring that the criminal law is fair.

The second reason for considering the principle of fair labelling is that identifying wrongfulness is particularly relevant in light of that principle. That is because the principle of fair labelling holds that in order to be fair, the label attached to an offence ought to reflect the defendant's moral wrongdoing.¹⁰⁵ To devise a fair label, it is thus necessary to know the defendant's moral wrongdoing.

2.3.2 The principle of fair labelling

The principle of fair labelling holds that the label attached to offences should fairly reflect the defendant's moral wrongdoing.¹⁰⁶ The label attached to an offence consists of, for example, the name of Φ -ing (such as 'ibsa' or 'revenge porn') and the offence's classification, that is, its place within the criminal law (such as 'sexual offences', 'public order offences', etc.).¹⁰⁷ Even though it may be theoretically possible to cover all criminalised Φ -ing with a minimal set of criminal provisions, these would necessarily be very wide, and their label could not accurately reflect the nature of wrongdoing covered by such offences. The principle of fair labelling suggests that such a system would not

¹⁰⁴ Chalmers and Leverick (n 1), 218.

¹⁰⁵ Andrew Ashworth, 'The Elasticity of Mens Rea' in CFH Tapper (ed), *Crime, Proof & Punishment : Essays in Memory of Sir Rupert Cross* (Butterworths 1981), 53.

¹⁰⁶ *ibid*, 53. See also Glanville Williams, 'Convictions and Fair Labelling' (1983) 42 *The Cambridge Law Journal* 85.

¹⁰⁷ Chalmers and Leverick (n 1), 218.

benefit the fairness of the criminal law.¹⁰⁸ To meet the principle of fair labelling, it would not suffice to have a single offence that covers everything from theft to murder, even if sentences would be adjusted to apply appropriate censure for different types of Φ -ing covered by such a law.

2.3.3 Fairness for whom with the principle of fair labelling

If the label attached to offences is ‘fair’, this increases the overall fairness of the criminal law. James Chalmers and Fiona Leverick discuss that the principle of fair labelling can affect defendants, the public, and victims alike.¹⁰⁹ The criminal law may affect these parties, even if victims are not technically party to a criminal law trial. Based on the discussion on fair labelling by Chalmers and Leverick, I present here a brief overview of the relevance of the principle of fair labelling towards parties affected by the criminal law, namely i) defendants, ii) victims, and iii) the public.

i) Fairness towards defendants

Defendants, the public, and victims all have an interest in fair labelling. For defendants, the interest lies in the fact that they are subjected to the criminal law’s censure when they are found guilty and are labelled per the offence they are convicted of.¹¹⁰ D’s interest is thus not to be labelled in ways ‘that overestimate or otherwise mislead others about the

¹⁰⁸ See e.g. Barry Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling’ (2001) 64 *Modern Law Review* 393, 398.

¹⁰⁹ Chalmers and Leverick (n 1).

¹¹⁰ *ibid*, 225.

gravity or the kind of conduct in which they have engaged.’¹¹¹ For example, there could be a law that does not distinguish (in terms of labelling) between ‘verbal sexual harassment’ and ‘rape’. In such a legal system, a person who catcalls a woman in the streets might be convicted of the same offence as someone who commits rape. While their sentences may reflect who committed the more serious wrong, the label does not. Although the catcaller’s behaviour could be justifiably criminalised, it is not as wrongful and harmful as rape. Under the principle of fair labelling, the unifying implications that result from wide offences (the catcaller and rapist are convicted of the same offence) could be considered unfair and, therefore, inappropriate. To fulfil the principle of fair labelling towards defendants it would be preferable to have more specific offences phrased more narrowly (e.g. ‘verbal harassment’ and ‘rape’). That would better reflect the moral wrongdoing of the defendant.

ii) Fairness towards victims

Victims also have an interest in fair labelling. Victims are not technically subjected to the censure of the criminal law. Yet, the victim is labelled as having been subjected to the offence D is convicted of. In the example above, a victim of rape would be labelled as having suffered the same wrong as a victim of catcalling. A similar example may be found in the Canadian law on sexual assaults: this law covers conduct ranging from ‘a brief unwanted sexual touch’ to what would be labelled ‘rape’ in other jurisdictions and

¹¹¹ Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012), 68.

applies the same label to all these different types of conduct and wrongs.¹¹² Someone convicted for kissing someone without consent would be convicted of the same offence as someone convicted for ‘intercourse ... without ... consent’.¹¹³ Their victims would equally be labelled as having suffered the same wrong. That could lead to perceiving the wrongness that victims have been subjected to in a way that minimises or increases it, which affects the fairness of the law towards victims.

Furthermore, using wide labels such as ‘sexual assault’ to cover a broad range of sexual offences impedes the victim’s ability to accurately describe wrongdoing they have suffered. As language shapes cognition, if an offence is overly broad that may mean that victims are denied the language to indicate, claim, or even recognise the wrong to which they have been subjected.¹¹⁴ If the law does not label offences in accordance with wrongdoing, it becomes more challenging (at the very least in legal terms) to recognise wrongdoing one may be subjected to: this is the case if the tools available to describe the wrong do not match the nature of the wrong. For wrongdoing to be most accurately described, the label attached to that wrongdoing ought to match the nature of the wrong. I noted that a broadly framed offence, such as ‘sexual assault’ in the Canadian system, may offer challenges for victims regarding identifying that that which has happened to them is a wrong covered by the broad offence. However, (relatively) broad labels can also have an advantage, for example, where a victim is hesitant to label their experiences

¹¹² s.271 of the Criminal Code, Canada. See on non-consensual sexual intercourse as rape e.g. s.1 Sexual Offences Act 2003 (England and Wales); §177(6)(1) Strafgesetzbuch (Germany); art.242 Wetboek van Strafrecht (The Netherlands).

¹¹³ s.271 Criminal Code of Canada.

¹¹⁴ See e.g. Gary Lupyan, ‘The Centrality of Language in Human Cognition’ (2016) 66 *Language Learning* 516; Lera Boroditsky, ‘How Language Shapes Thought’ (2011) 304 *Scientific American* 62.

as rape but nevertheless recognises the wrong they were subjected to as within the scope of ‘sexual assaults’.¹¹⁵ The principle of fair labelling thus requires a balancing act: laws should not be overly broad, but they also should not be overly specific.

Chalmers and Leverick find ‘that there sometimes exists a tension between the desire of the victim and fairness to the offender.’¹¹⁶ However, I consider that fair labelling is not concerned with what victims ‘desire’. Nor is it concerned with what offenders ‘desire’, so that what is fair by the victim may not be what the defendant desires. Either party’s desires are irrelevant in labelling wrongness: I discussed that the law’s assessment of wrongfulness is objective, and so a label that fairly describes a wrong does not take subjective assessments (e.g. desires) into account.¹¹⁷ A wrong that is fairly labelled in terms of describing the defendant’s moral wrongdoing would also be fair in terms of the moral wrongdoing suffered by that defendant’s victim: if it is too lenient, the defendant may be happy and the victim unhappy (or vice versa), but neither are treated fairly.¹¹⁸ Whether all parties *agree* that particular Φ -ing amounts to wrong X and not wrong Y is a different matter and draws the discussion into experiences of wrongs rather than an assessment of actual wrong. At the criminalisation stage in particular only abstracted, objective concepts can be taken into account (as there is no

¹¹⁵ See also Clare McGlynn, ‘Rape as ‘Torture’? Catharine MacKinnon and Questions of Feminist Strategy’ (2008) 16 *Feminist Legal Studies* 71.

¹¹⁶ Chalmers and Leverick (n 1), 237.

¹¹⁷ Note the additional boundary conditions that people set for themselves may be taken into account e.g. on determining the presence of degrading treatment, see chapter 6 text at (n 29).

¹¹⁸ Jeremy Horder, ‘Rethinking Non-Fatal Offences Against the Person’ (1994) 14 *Oxford Journal of Legal Studies* 335, 351.

actual case to speak of at that stage, there is no subjective experience to draw from either).¹¹⁹

Nevertheless, Chalmers and Leverick identify an important notion: it is a reality of the criminal law that it takes the wrong (and harm) suffered by V as a reason to act against D, rather than primarily aiming to support V.¹²⁰ As much as the occasion of the offence against V is reason to act against D, it is not the criminal law's formal aim to do justice by V, but rather to do justice by itself, or by society.¹²¹ The criminal law is not primarily concerned with meeting the victim-survivor's (subjective) assessment of justice and fairness.¹²²

iii) Fairness towards the public

Finally, I consider that the public has an interest in fair labelling. The public's interest in fair labelling relates to circumstances in which society has a legitimate interest in a person's criminal acts. For instance, a person convicted of possessing images of child sexual abuse may not be the best person for a job working with children. Fair labelling

¹¹⁹ Other principles of criminal law, such as the principle of legal certainty may offer guidance on how appropriate it could be to take subjective assessments of wrongs (and harms) into account. A discussion of those principles is outside the scope of this thesis.

¹²⁰ Michelle Madden Dempsey, 'Sharing Reasons for Criminalization? No Thanks ... Already Got 'Em!' in Paul H. Robinson, Stephen Garvey and Kimberly Kessler Ferzan (eds), *Criminal Law Conversations* (Oxford University Press 2011).

¹²¹ See e.g. Marshall and Duff (n 98); Dempsey (n 120).

¹²² See e.g. from English and Welsh case law *R v Brown and Stratton* [1988] Crim LR 484, where the trial judge initially seemed to give the direction that if the victim thought they had been subjected to grievous bodily harm the jury might accept that. The Court of Appeal rejected this notion and considered that the level of harm done was an objective test. Note also in this context the secondary victimisation that can be caused through the criminal justice system, see e.g. Madigan Gamble (n 54).

could provide insight into a person's acts rather than merely notifying society that a crime was committed. That would enable a societal response that could help society keep itself safe (which is a primary aim of the criminal law) and help prevent renewed (similar) wrongdoing. Refusing a job in a school to someone who was convicted of child sexual abuse might be seen as censure separate from any sentencing and conviction. It is outside the scope of this thesis to explore whether it is fair to apply societal censure after someone has served a sentence. Regarding society's interest in fair labelling however, some labels might be too vague to provide insight into the type of crime, which means that the public is denied access to the nature of a person's wrongdoing even if there is a legitimate interest in knowing it. For example, if a person convicted for possession of images of child sexual abuse were convicted of a general sort of offence along the lines of 'possession of illegal materials' (that would encompass anything from possession of weapons to drugs to images of child sexual abuse), that could cause problems, such as that someone seeking to fill a vacancy at a school might not be sufficiently informed of the particular risks associated with appointing the convicted person. Not providing insight into the type of acts committed by someone with a criminal record may be unfair to that society. Camilla Pickles explains:

if the label fails to adequately reflect the wrong done society will have no clear reason to exclude perpetrators from positions of trust or members of society will not perceive perpetrators to be a form of danger to particular members of society.¹²³

¹²³ Camilla Pickles, 'When 'Battery' is not Enough: Exposing the Gaps in Unauthorised Vaginal Examinations During Labour as a Crime of Battery' in Camilla Pickles and Jonathan Herring (eds), *Women's Birthing Bodies and the Law* (Hart Publishing 2020), 137.

While defendants', victims', and society's interests in the principle of fair labelling differ for each category, 'what is a fair label' is the same across the board. That is because, as I considered in the first part of this chapter, the law's assessment of wrongfulness is objective. If a label fairly describes wrongfulness, it does so fairly towards defendants, victims, and society.

2.3.4 Concluding fair labelling

In this section, I discussed the principle of fair labelling as the idea that the name and categorisation of offences ought to reflect their moral wrongdoing fairly.¹²⁴

Wrongfulness, assessed on an identified, clarified theoretical foundation such as personhood, is objective. It exists separate from individual experience of the wrong.

What is a fair label towards D is the same as what is fair towards the public and V.

Defendants, victims, and society all have different reasons for having an interest in fair labels for offences, but that does not affect what fairness actually is. Fair labels indicate the nature of the wrong of the criminalised conduct. This is a reason to offer a thorough analysis of the nature of the wrong of ibsa, because appreciating the nature of ibsa's wrongness enables the application of a fair criminal law label.

2.4 Chapter conclusion

In this chapter, I have set out that analysis of the nature of the wrong of ibsa is warranted to ensure justified criminalisation and fair criminalisation. I considered that the law's

¹²⁴ Note that this means that where there is not necessarily moral wrongdoing, e.g. in *mala prohibita* strict liability offences, the lack of moral wrongness might also need to be reflected by the label.

assessment of wrongfulness should be an objective assessment. This thesis identifies it as the infringement of a moral status. By explicating what that moral status entails, wrongfulness becomes a verifiable, objective assessment.

I noted that the criminal law requires justification because criminalisation is itself *prima facie* wrongful. I found that harmfulness, wrongfulness, and publicness are requirements for justifying criminalisation. I noted that actual harmfulness is a subjective experience and only happens after criminalisation has already occurred (due to the principle of *nulla poena sine lege*). For that reason, the criminal law uses abstracted harm. I considered three approaches through which abstracted harms may be gauged and standardised: the living-standard approach, a relational approach, and an autonomy approach. I considered that the living standard approach does not offer an explanatory theory and is merely descriptive. The relational approach is most likely to accurately gauge harm, as it best reflects how persons exist in the world (see further chapter 3). On a relational approach, ‘the greatest harms are the wrongs done to the relationships that make up our selves’.¹²⁵ Φ -ing that is the most severe infringement of personhood — and as such a very severe moral wrong — is also considered objectively most harmful for the criminal law.¹²⁶

Publicness is defined in this thesis as that which is legitimately the state’s business. I suggested that the requirement of publicness could be fulfilled by ibsa if ibsa constitutes human rights infringements. At the identification of the wrongs of ibsa in chapters 5 and 6, I point out that I indeed believe that to be the case.

¹²⁵ Herring (n 45), 169.

¹²⁶ See on infringement of personhood as moral wrong chapter 3.

I considered that wrongfulness can exist *in se* and *prohibita*. I also noted two perspectives from which to gauge wrongfulness and identified that I am concerned with *prima facie* moral wrongs in this thesis. Those moral wrongs ought to be reflected in the label attached to an offence criminalising ibsa for the criminal law to be fair. The principle of fair labelling requires a thorough understanding of the nature of the wrong of ibsa. On the other hand, the requirement of justified criminalisation may be fulfilled by merely determining *that* ibsa is wrongful (regardless of *how* or what makes it so). In chapter 3, I consider personhood as a theoretical foundation for finding moral wrongfulness.

A just and fair criminal law must have a thorough understanding of the nature of the wrongfulness of Φ -ing it addresses. The nature of the wrong of ibsa should inform the elements of offences and the label attached to such offences. For instance, in chapter 5, I consider that ibsa is an infringement of sexual integrity. That would justify labelling and criminalising ibsa as a sexual offence.¹²⁷ Furthermore, the wrongs of ibsa, as identified in this thesis, are not (in first instance) informed by the defendant's motive.¹²⁸ That means that to include the motive into the elements of an offence criminalising ibsa is not called for based on the requirements of justified criminalisation or fair labelling. If ibsa is criminalised depending on motive, as is the case in the English and Welsh law on ibsa in s.33 Criminal Justice and Courts Act 2015, then such a criminalisation excludes many instances of ibsa from criminalisation that it would be justified and fair to

¹²⁷ See Stuart P Green, *Criminalizing Sex : A Unified Liberal Theory* (Oxford University Press 2020), 4; and chapter 5, section 5.3 on sexual integrity.

¹²⁸ In chapter 6 I consider the absolute wrong of failing to minimally respect personhood, which can be a type of constructed wrong of which the defendant's harmful motive could, in some cases, be an indication.

criminalise.¹²⁹ If a legislator considers it relevant to address a malicious motive, it might be done, for example, by having an aggravated offence that specifies motive and a base offence where the defendant's motive is not specified.¹³⁰ However, specifying a defendant's motive is done only in exceptional cases.¹³¹

This thesis does not address the question whether all forms of ibsa should be criminalised. I merely intend to identify and assess that criminalisation would be justified and analyse the nature of the wrongs of ibsa. I hold that it could be considered justified and fair to criminalise all forms of ibsa but do not assess to what extent states ought to do so.¹³²

¹²⁹ That is a reason why the English and Welsh law on ibsa in s.33 Criminal Justice and Courts Act 2015 is misguided.

¹³⁰ A recommendation along these lines was made by the Law Commission of England and Wales in Wales, *Intimate Image Abuse : A Final Report* (Law Com No 407 2022), from [7.4]; and Law Commission, *Intimate Image Abuse : A Consultation Paper* (Law Commission Consultation Paper No 253 2021), [14.7].

¹³¹ See Clare McGlynn, 'Cyberflashing: Consent, Reform and the Criminal Law' (2022) 86 *The Journal of Criminal Law* 336, 342; Shachar Eldar and Elkana Laist, 'The Irrelevance of Motive and the Rule of Law' (2017) 20 *New Criminal Law Review* 433. See also 'purpose is not a particularly common way of defining the fault element in crimes' Law Commission of England and Wales, *Modernising Communications Offences : A Final Report* (Law Com No 399 2021), [2.198].

¹³² Note e.g. the recommendation of the Law Commission of England and Wales in its final report on intimate images to exclude what I would call ibsa with undisclosed non-consensual edited intimate images in (n 130), [4.280].

CHAPTER 3: WRONGNESS AND PERSONHOOD

3.1 Introduction

In this chapter, I consider the concept of personhood. I do this because personhood can be used as a foundation for assessing moral wrongfulness. In the previous chapter, I considered that if ibsa is *prima facie* morally wrongful, it would fulfil the wrongfulness requirement of justified criminalisation. I did not address *how* it can be determined that something is a moral wrong. I noted that there is no universal agreement as to what is morally right or wrong, which is a difficulty the law needs to overcome if it is to make objective claims on moral wrongness. One way to do this is to clearly define the moral foundation of one's assessment. Then it can objectively be determined that using the set of rules that the moral foundation offers indeed results in finding something wrongful or not wrongful.

Yet, the law of liberal democracies does not usually explicate or clarify its moral foundation: the law does not tell us *why* it finds something to be a moral wrong but rather suggests that it just 'is'.¹ This reluctance might be an effort to avoid the difficulty of explaining *what* moral claim is at the foundation of assessing Φ -ing's wrongfulness and *why* it is at the foundation of assessing Φ -ing's wrongfulness. Failing to explicate the theoretical foundation upon which the legal system is based can obscure the moral quality of that foundation to the extent that it has sometimes been suggested that

¹ See on this and the implied nature of the law's subjects e.g. Ngaire Naffine, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019), 28.

liberalism makes no moral claims.² However, that is not quite right: the law in liberal democracies is not free from morality.³ While the law is not *equal* to what is morally good or bad (as it might be on legal moralism or natural law theory), the law is informed by and based on what is considered morally good or bad.⁴ But in a positivist system (as liberal democracies usually are), if there was some sort of mistake (e.g. the law is morally bad), that does not stop it from being the law. The question ‘how do we determine what the law actually is?’ is quite distinct from ‘how can be determined what is legitimately the concern of the law?’.⁵ I am not concerned with the former question,

² See on the notion that liberalism is amoral or value-neutral, and tolerates individual moralities as part of individual liberty (which is valued over all) e.g. Samuel Scheffler, ‘The Appeal of Political Liberalism’ (1994) 105 *Ethics* 4. Somehow the suggestion is that ‘valuing the individual’ is *not* a moral claim (see also (n 3)). However, it is my view that liberalism does make a moral claim in valuing individual autonomy. See further Raymond Geuss, ‘Liberalism and its Discontents’ (2002) 30 *Political Theory* 320. On the criticism that liberalism does not consider moral values see Michael J Sandel, *Democracy’s Discontent : America in Search of a Public Philosophy* (Belknap Press of Harvard University Press 1996), 20-1. Note the debate between Hyman Gross, ‘Rape, Moralism, and Human Rights’ [2007] *Criminal Law Review* 220, and Jonathan Herring, ‘Human Rights and Rape: A Reply to Hyman Gross’ [2007] *Criminal Law Review* 228, on the question when moral wrongness ‘appears’. I argue that moral wrongness is pre-legal, Gross might disagree. I distinguish here between the legal moralism of natural law, and the morality that positivism can use as a foundation to consider it legitimate to criminalise Φ , see text at (n 5).

³ I hold that liberalism is informed by the moral claim that each individual is most morally important and that individual freedom is at the foundation of a just and fair society, see e.g. John Rawls, *A Theory of Justice* (Harvard University Press 1971), 31, 47-50; Margaret Moore, ‘Liberalism and the Ideal of the Good Life’ (1991) 53 *The Review of Politics* 672; Bruno Amable, ‘Morals and Politics in the Ideology of Neo-Liberalism’ (2011) 9 *Socio-Economic Review* 3. See also Arthur Kuflik, ‘Liberalism, Legal Moralism and Moral Disagreement’ (2005) 22 *Journal of Applied Philosophy* 185, 190-2 on democratic decisions informed by moral considerations

⁴ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593.

⁵ The former question is about form, the latter about content. The first question is one that natural law and positivism address but answer very differently: natural law holds that the content of the law *is* what is morally right/wrong, positivism holds that that which has gone through the correct formal proceedings is law. On natural law theory see e.g. John Finnis, ‘Natural Law Theories’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer edn, Stanford University 2020); Thomas Aquinas, *Summa Theologiae* (Aquinas Institute for the Study of Sacred Doctrine 2012); William Blackstone and Gareth H Jones, *The Sovereignty of the Law : Selections from Blackstone’s*

which is one of natural law versus positivism. I am concerned only with the latter question. That is a question relevant for the law's objectivity. Conceptualisations of personhood are a way in which (part) of the theoretical foundation that is used to determine wrongfulness in liberal democracies (and what is the legitimate concern of the law) can be explicated. By explicating moral claims they become verifiable, and the subjective aspect of the law's moral foundation is taken out as much as possible, as opposed to when something is pronounced 'wrong' without explanation.

In this chapter, I first consider that personhood offers a theoretical foundation for the moral status of persons and for assessing whether Φ -ing is a moral wrong against persons. It is a way by which 'what is a moral wrong' can be turned into an objective assessment. I then discuss three approaches to personhood discussed in this thesis, namely atomistic personhood, human species membership personhood, and relational personhood.

3.2 Personhood as a theoretical foundation for identifying wrongness

3.2.1 Introduction

In this section, I first note what I mean by personhood. That is followed by considering why personhood can be used as a theoretical foundation to determine wrongs against

Commentaries on the Laws of England (Macmillan 1973). Positivism, as such, does not contain a moral claim. On positivism see e.g. Leslie Green and Thomas Adams, 'Legal Positivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (msWinter edn, Stanford University 2019); Joseph Raz, *The Authority of Law : Essays on Law and Morality* (Clarendon Press 1979). The second question, of how it is determined what is law *does* contain moral claims, because we want the law to be 'good', and not criminalise conduct that is not wrongful and harmful (see chapter 2, section 2.2.1 on justifying criminalisation). Holding that it would be wrong to criminalise non-wrongs and non-harms is a moral claim even in liberalism. Liberalism is not free from morality.

persons. I then point at three approaches to personhood discussed in this chapter and note why I find it relevant to consider the concept of personhood in this thesis thoroughly.

3.2.2 The concept of personhood

Personhood is considered here as a moral status.⁶ I consider personhood as a moral claim: ‘it holds that a being that has personhood (“a person”) is entitled to the highest moral status.’⁷ Because all persons are equally entitled to the highest moral status, all persons are to be treated as equals. Personhood is presented here as a construct (and part of a language game) rather than a factual entity.⁸ The highest moral *status* is defined by the highest moral *value*. What the highest moral value is, is the question that is at the heart of personhood: ‘what characteristics or capacities generate a claim to moral worth or respect?’⁹ This claim is both at the heart of the moral equality of persons and of determining what is a wrong against persons.¹⁰ In this chapter, I discuss three personhood approaches, each taking a different characteristic to define personhood:

⁶ See on personhood as an ethical concept further e.g. Ruth Macklin, ‘Personhood in the Bioethics Literature’ (1983) 61 *The Milbank Memorial Fund Quarterly Health and Society* 35.

⁷ Jonathan Herring, ‘Relational Personhood’ (2020) 1 *Keele Law Review* 24, 24. See also Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017), 49.

⁸ See on personhood as a social construct e.g. Jeanne Gaakeer, “‘Sua cuique Persona?’” A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences’ (2016) 28 *Law and Literature* 287; see on the meaning of words as part of language-games Ludwig Wittgenstein et al., *Philosophische Untersuchungen : Philosophical Investigations* (Wiley-Blackwell 2009), 161, 163; see for an explanation of language games David Bloor, *Wittgenstein, Rules and Institutions* (Routledge 1997), 27.

⁹ See e.g. Foster and Herring (n 7), 72. I consider in section 3.4 that the human species membership approach to personhood falls short in this regard: it does not identify a moral value. That is my primary reason for rejecting that approach, because it means that human species membership personhood is not a moral status.

¹⁰ See section 3.2.4.

atomistic personhood, human species membership personhood, and relational personhood. By explicating the theoretical foundation used to interpret the law (both in terms of developing the law and applying the law), the moral basis used to determine whether something can legitimately be addressed through law can be reconciled with positivist values. It shows that claims about moral wrongs are not something that can arbitrarily be proclaimed and must then be the law, but that moral wrongness is an assessment based upon a standard that can indicate that the law *could* legitimately address Φ -ing but need not necessarily do so.

Finally, personhood is considered here as an indication of equality: anyone who fulfils the definition of personhood is a person in equal measure to any other.¹¹ All persons are considered equally morally valuable and should be treated as equals. Some approaches to personhood are more suitable for explaining why persons are morally equal than others, but all three approaches discussed in this thesis have some issues in this regard.¹²

I hold that personhood gives a formal definition of what it means to be a person. As such, it can be objectively assessed whether a being is a person. Equally, when such a foundation is clear, it is an objective assessment whether a person has been wronged through infringement of their moral status.¹³

¹¹ On the equality of persons and personhood see Foster and Herring (n 7), 54; Herring (n 7), 28.

¹² See section 3.3.4 at iii); section 3.4.3 at iii); and section 3.5.5 at iv).

¹³ See section 3.2.4.

3.2.3 Personhood and selfhood

The concepts of personhood and selfhood are often mentioned together. While there may be some conceptual difference between personhood and selfhood, they are not always discussed as distinct concepts.¹⁴ I would be inclined to distinguish between personhood and selfhood as follows: personhood offers a formal definition of persons, selfhood is to have a sense of self.¹⁵ I regard it as a subjective assessment that one is a ‘self’.¹⁶ Selfhood may be a moral status, but it is not the *highest* moral status (personhood). It is possible to have moral status but not have personhood.¹⁷

Whether there is a difference between beings-indicated-by-personhood versus beings-indicated-by-selfhood, and how substantial that difference is, depends on one’s theory of personhood and understanding of selfhood: on atomistic personhood, selfhood describes precisely the same beings as personhood. Atomistic personhood holds that a being is a person when they have a certain level of mental capacities, and those mental capacities are also present in beings recognising themselves as selves: if someone can think about themselves as a subject (as a self), they also meet the definition of a person

¹⁴ See e.g. Susanna Lindroos-Hovinneimo, *Private Selves : Legal Personhood in European Privacy Protection* (Cambridge Studies in European Law and Policy, Cambridge University Press 2021); Foster and Herring (n 7). Noted as distinct concepts e.g. in the sense of (public) body versus (private) mind in Catherine C McCall, *Concepts of Person : An Analysis of Concepts of Person, Self and Human Being* (Avebury 1990).

¹⁵ I do not define selfhood as ‘personhood’ or ‘having a sense of being a person’, because (dependent on approach to personhood) there can be selves who are not persons and persons who are not selves. The concepts may not be defined by each other.

¹⁶ See e.g. Dan Zahavi, *Subjectivity and Selfhood: Investigating the First-Person Perspective* (MIT Press 2005). A different understanding of selfhood is presented in John Shotton, *Social Accountability and Selfhood* (Basil Blackwell 1984).

¹⁷ Non-human animals are normally treated as having moral status, though be it lower than persons, they are higher than non-moral things such as stones. See (n 9).

and vice versa.¹⁸ So, on atomistic personhood, ‘persons’ and ‘selves’ are the same group. On relational personhood however, ‘selfhood’ could describe a group of beings that overlaps with the beings described by personhood but which is not necessarily identical to it. Relational *personhood* is defined using ‘caring relations’ as the highest moral value, and that means that abusive or otherwise bad relationships do not give rise to personhood.¹⁹ However, they may well give rise to selfhood: someone who is exclusively engaged in bad relationships may develop an understanding of themselves as a self, even if a strict application of relational personhood could find that there is no personhood there.²⁰ In such cases, there would be relational selfhood but not relational personhood.²¹ On human species membership personhood too the concepts of personhood and selfhood may overlap, but are not defined by each other.

I hold that personhood and selfhood should be distinguished as objectively versus subjectively made out. This is not a distinction I draw out in this thesis. Further research analysing the conceptual differences between personhood and selfhood would be needed, and it is outside the scope of this thesis to offer it. I believe it suffices to note, firstly, that if selfhood and personhood are distinct, the infringement of selfhood could still constitute a moral wrong in its own right (see next subsection) and, as such, meet the

¹⁸ See further section 3.3.

¹⁹ See further section 3.5.

²⁰ Although there would be a potential for personhood. Note that Foster and Herring would find it unlikely that someone with the capacity for engaging in caring relations does not have personhood: they argue that everyone receives some care, which may be sufficient to make out their personhood. See Foster and Herring (n 7), 51. See on this further section 3.5.5 at iii) and Jonathan Herring, *Caring and the Law* (Hart Publishing 2013), 49; Martha Fineman, *The Autonomy Myth : A Theory of Dependency* (The New Press 2005), xvii.

²¹ If there is only an infringement of selfhood but not personhood that is a lesser moral wrong than if personhood had been infringed, see next subsection.

requirement of justified criminalisation discussed in chapter 2 even where it does not overlap with personhood. Secondly, I note that selfhood may be framed as a personhood interest if it is not conflated with it. In the personhood literature on which I base my reflections, personhood and selfhood are not typically marked as distinct concepts, and, as it is beyond the scope of this thesis to offer a full comparative analysis of the two concepts, I adhere to that approach in this thesis.²²

3.2.4 Using personhood to identify moral wrongness

In this thesis, I use personhood as a moral status to identify the type of conduct that is a moral wrong against a person, in line with the requirement of justified criminalisation set out in the previous chapter.²³ The argument is as follows: the infringement of a moral status is a moral wrong. Personhood is a moral status, and the infringement of personhood is a moral wrong. When a distinction is drawn between personhood and selfhood an infringement of the moral status of selfhood would equally result in a moral wrong. However, it may not be as severe a moral wrong as if it had been an infringement of personhood because selfhood is not defined as the highest moral status.

Because personhood is a moral status, persons are moral beings, and an infringement of personhood (of ‘persons’) is a moral wrong. To make an objective assessment regarding moral wrongness, it needs to be clear which moral values underpin it. Merely being aware that something is typically considered ‘wrong’ does not mean that it is wrong in a moral sense, and if it is not wrong in a moral sense, then it would not

²² See e.g. Foster and Herring (n 7); McMahan (n 9). cf Peter Singer, *Practical Ethics* (Cambridge University Press 2011), 53.

²³ See chapter 2, section 2.2.3.

justifiably be within the scope of criminal law (unless it is *mala prohibita*).²⁴ For example, if both ‘wearing mismatched socks’ and ‘killing’ is wrong, I can know that they are wrong without knowing *why* they are wrong. If I need to assess whether something is justifiably within the scope of criminal law, I need to know that it is wrong either in a moral sense or in a legal sense. It is generally accepted that ‘killing’ is a moral wrong, so we might not question that it is. But it is not usually accepted that ‘wearing mismatched socks’ is a moral wrong. If someone were to argue that it is, that claim could only be refuted by pointing at the foundation upon which moral wrongness can be assessed. In this thesis, I do that by pointing at personhood: wearing mismatched socks is not a moral wrong (at least against a person) because it does not infringe the moral status of personhood. Without clarification of the theoretical foundation upon which to base an assessment of wrongness, that assessment could not be objective. In this chapter, I aim to clarify theories of personhood that could be used to objectively identify what moral wrongness is. I take personhood to be a formal definition of what beings are entitled to the highest moral status. Through using that definition, it can be objectively assessed that a being is a person.²⁵ Moral wrongness can then be derived from an assessment that Φ -ing infringes personhood. It should be noted that not all moral wrongs can be derived from personhood. For example, wrongs against the environment or non-person animals may not be determined based on my considerations in this thesis, but they may nevertheless be moral wrongs on grounds other than personhood.²⁶

²⁴ See chapter 2, section 2.2.3.3.

²⁵ Unlike my understanding of selfhood.

²⁶ There is an exception where animals are considered persons. It varies by theory of personhood if animals are strictly excluded from having personhood status. If there are animals with personhood then wrongs against those animals may indeed be assessed using their personhood as a theoretical foundation.

The infringement of personhood is understood here as the infringement of any interest of persons that helps them enjoy and give rise to the highest moral value. As I noted above, it depends by personhood theory what is considered the highest moral value. Equally, what exactly are personhood interests depends on one's theory of personhood. Generally, personhood interests are understood here as that which helps give rise to and protect the highest moral value. For example, through free speech, someone may exercise their mental capacities and develop them, and so free speech should be considered a 'personhood interest' on atomistic personhood. But one may also maintain relationships through speech, so it should be considered a 'personhood interest' on relational personhood too.

I note that many personhood interests are protected by human rights law, and I understand human rights as protecting (aspects of) personhood.²⁷ However, there is no *direct* right to personhood.²⁸ That means that conduct that infringes personhood — while morally wrong — is not necessarily a legal wrong. Where it has been protected by, for example, a human right, it would be a legal wrong in addition to a moral wrong. In positivism, steps are required for a wrong against a person to have legal meaning.²⁹

²⁷ Human rights seem to be defined to apply specifically and only to persons: treaties refer to 'everyone', 'human beings', and 'persons'. However, they do so using these terms interchangeably and without defining them. For example, the ECHR ('ECHR') applies to 'everyone' within the jurisdiction of state parties, while the Universal Declaration of Human Rights ('UDHR') refers to 'human beings'. This may be sufficient on species membership personhood. However, I do not find that such an approach offers reason to accept personhood as a moral status, see section 3.4.1 at i).

²⁸ I hold that 'a right to personhood' would not be feasible: it is too large a concept to fit within a single right, similar to the notion that there could not be a right to health, see Octávio Luiz Motta Ferraz, *Health as a Human Right : The Politics and Judicialization of Health in Brazil* (Cambridge Studies in Law and Society, Cambridge University Press 2021).

²⁹ Hart (n 4).

Where rights protect aspects of personhood, that translation (from ‘merely’ moral wrong to legal wrong) has been made. As such, human rights law is an example of where a translation from ‘moral wrong’ to ‘legal wrong’ has been made.³⁰ However, human rights law does not specify what it means by humans, persons, or ‘everyone’, and so does not offer tools with which the scope of application of rights, or wrongs, could be interpreted. Nor does it offer a tool by which it can be assessed whether all personhood interests are covered by human rights law. Personhood theories can offer a tool for interpreting rights and finding gaps in human rights law too.

3.2.5 Personhood theory and interpreting the law

As I noted in chapter 2, there is no universal agreement regarding what is morally right or wrong.³¹ Nevertheless, it is accepted that the criminal law of liberal democracies addresses moral wrongs. Equally, human rights law covers wrongs against persons without specifying its theoretical foundation as a tool for interpreting rights. Legal theory does not usually explicate what theoretical foundation is used to assess Φ -ing’s moral wrongfulness. Instead, the law seems to use the concept of moral wrongfulness with an (implicit) understanding of what identifies such wrongness.

One reason I discuss personhood theory in this thesis is that it can function as a theoretical foundation for interpreting moral wrongs against persons. As such, I hold that

³⁰ I note that understanding the protected aim of rights can serve as a tool for interpreting those rights and might e.g. help resolve human rights clashes. The protected aim of human rights law depends on the theory of personhood. Where there is a discrepancy between ‘personhood interests’ and ‘human rights’ that might mean that there is a gap in human rights law.

³¹ See chapter 2, section 2.2.3.3.

it can help inform the interpretation of rights, wrongs, and harms. I hold that it would be helpful to explicate the theoretical foundation based upon which wrongs, rights, and harms are interpreted because that foundation substantially impacts the interpretations (implicitly) based upon it. For ibsa, these differences can be substantial to the point that a wrong or harm might hardly be recognised on an atomistic approach but considered of the utmost severity on a relational approach. I show this in chapters 5 and 6, where I set out the moral wrongness of ibsa as interpreted on atomistic personhood compared to on relational personhood.

A second reason to engage in a more extensive discussion on the concept of personhood is that I deviate from the atomistic approach to personhood that is (implicitly) traditionally prevalent in the law of liberal democracies and want to explain why I do so.³²

3.2.6 Conclusion

In this section, I considered that personhood can offer a theoretical foundation for assessing moral wrongs against persons. That is because personhood is understood as a moral status. I hold that whether or not an infringement is a moral wrong depends on whether its foundation (i.e. that which is infringed) has a moral quality. As such, the infringement of personhood is a moral wrong, which can fulfil the wrongfulness requirement for justified criminalisation discussed in chapter 2.

³² For my reasons to reject atomistic personhood see sections 3.3.4 and 3.3.5.

I hold that it would be good to explicate and clarify the theoretical foundation upon which wrongs are interpreted for the law: a clear understanding of the foundation upon which a right or wrong is, or should be interpreted, helps facilitate a more objective, repeatable interpretation.³³ Personhood theory can offer a tool by which the assessment of wrongs (and harms) can be done objectively.³⁴ Because personhood offers a formal definition of ‘persons’, I consider the concept of personhood to be objective: whether a being is a person is not a subjective assessment but rather an objective answer to the question that identifies the highest moral value. That is why I hold that wrongfulness is objective too: whether something infringes an objective definition can be an objective assessment.³⁵ By offering a formal definition on which to ground the assessment of moral right and wrong, the law can incorporate the necessary morality without being moralistic. After all: I am free to hold my moral beliefs as I see them, as is anyone else. My experience of morality may be subjective, but the law would not be based on it. Instead, the law (implicitly) uses personhood as a basis upon which to determine wrongs against persons. The concept of personhood can offer a theoretical foundation upon

³³ That the law should seek to do this is due to the principle of equality under law, see T H Bingham, *The Rule of Law* (Penguin 2011), 55 and art. 7 UDHR.

³⁴ For personhood as a tool for objectively assessing harm through standardisation see chapter 2, section 2.2.2.4.

³⁵ It can also be a subjective assessment, e.g. if a person experiences Φ as wrongful. That subjective assessment is not of interest to the law: if I feel that I was morally wronged if someone wore a wrinkly jumper, I could feel very strongly about that and still not attract the legitimate attention of the legislator. My assessment of moral wrongness will only be reflected in law if an objective assessment of wrongfulness happens to reach the same conclusion as I do. Subjective assessment of wrongfulness should not be confused with adding boundary conditions to minimally acceptable conduct, see chapter 6 text at (n 29), for example, that someone who normally covers their hair does not want to be depicted showing their hair. That might be degrading treatment assessed through that person’s additional boundary condition. That is not the same as a subjective wrong: the issue there is that the boundary condition may not have been recognised in the first instance by someone making an assessment of wrongness, but an objective assessment of wrongfulness could be made based on it once the boundary condition is known.

which to base the objective assessment of moral quality of wrongs against persons. In the remainder of this chapter, I explore three approaches to personhood.

3.3 Atomistic personhood

3.3.1 Introduction

The first approach to personhood I discuss here is atomistic personhood. It is the approach traditionally most prevalent in the law of liberal democracies.³⁶ Atomistic personhood is presented here as an individualistic approach to defining persons that takes ‘mental capacities’ as a defining characteristic. Below, I set out how I understand atomistic personhood. I reject it as a theoretical foundation for the interpretation of morality in law for two main reasons: I do not find that it takes the highest moral value as its defining characteristic, and it excludes some humans from personhood.

3.3.2 Defining atomistic personhood

Atomistic personhood defines persons as individuals with a certain degree of mental capacities. What defines persons is that they are self-aware, that they can recognise themselves as persons, and that they are autonomous.³⁷ David Wasserman et al. provide

³⁶ See e.g. Pierre Manent, *An Intellectual History of Liberalism* (Princeton University Press 1994). On ‘the liberal subject’ see e.g. Tatiana Hansbury, *The Relational Self and Human Rights : Paul Ricoeur’s Hermeneutics of Suspicion* (Birkbeck Law Press 2022), 10-1; Ngaire Naffine, *Law’s Meaning of Life : Philosophy, Religion, Darwin, and the Legal Person* (Hart Publishing 2009), 180-1.

³⁷ Michael Tooley, ‘Abortion and Infanticide’ (1983) 2 *Philosophy & Public Affairs* 37, 302; John Harris, *The Value of Life* (Routledge 1989), 18; Jeff McMahan, *The Ethics of Killing* (Oxford Ethics Series, New York: Oxford University Press 2002), 6, 235; Singer (n 22), 94; Mary Anne Warren, ‘On the Moral and Legal Status of Abortion’ (1973) 57 *Monist* 43, 55.

the overview that accounts deriving moral status from an individual's capacities typically include

self-consciousness, awareness of and concern for oneself as a temporally-extended subject; practical rationality, rational agency, or autonomy; moral responsibility; a capacity to recognize other selves and to be motivated to justify one's actions to them; the capacity to be held, and hold others, morally accountable.³⁸

On this approach, 'various mental capabilities, such as cognition, self-consciousness and practical rationality are key to personhood.'³⁹ On a strict application, only beings with the necessary mental capacities are persons. Some theorists offer exceptions to the theory to avoid the conclusion that some humans would not be persons. One example of such an exception is the suggestion that personhood should be attributed where something has gone 'wrong', by which is meant that, for instance, personhood should be attributed to someone who has a mental disability and therefore does not develop the level of mental capabilities they might have had if they were not disabled.⁴⁰ This type of exception makes many others uncomfortable, not in the least because of the suggestion that mentally disabled people are less than what they ought to be, as opposed to inherently valuable exactly as they are.⁴¹ In the following, I refer to the capabilities that define

³⁸ David Wasserman et al., 'Cognitive Disability and Moral Status' in Edward N Zalta (ed), *Stanford Encyclopaedia of Philosophy* (Fall edn, Stanford University 2017).

³⁹ Foster and Herring (n 7), 52.

⁴⁰ See e.g. Jeremy Waldron, *One another's Equals : The Basis of Human Equality* (The Belknap Press of Harvard University Press 2017), 252.

⁴¹ Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person sends Notes from the Battlefield' (2009) 40 *Metaphilosophy* 606, 621.

atomistic personhood with the shorthand of ‘autonomy’. For atomistic personhood, moral value is found in being autonomous and having the ability to rationally decide for oneself.

Atomistic personhood offers a highly individualistic understanding of what it means to be a person. Furthermore, it finds ‘personhood’ to be contained in one’s mind. That is the idea of the separation of body and mind described by René Descartes in his meditations: he can pretend not to have a body, but he cannot pretend to not exist.⁴² The body is merely an object in the world that the self inhabits or uses. This conception of selfhood as an atomistic cogito fits with later liberalist thought in which the self is an atomistic individual.⁴³

3.3.3 Atomistic personhood’s definition of wrongs against persons

A wrong against a person, on atomistic personhood, would be phrased in terms of infringing their autonomy because that defines their personhood. Restricting someone’s capacity to think rationally and decide for themselves would wrong them at the core of what defines their personhood status. Because the moral value of persons is found in

⁴² René Descartes, *Discourse on Method, and Meditations on First Philosophy* (Fourth edn, Hackett Publishing Company 1998), 33.

⁴³ The individual takes primacy in the work of e.g. Bentham (e.g. Jeremy Bentham, J H Burns and H L A Hart, *A Comment on the Commentaries and A Fragment on Government* (Clarendon Press 1977), 373, 426) and Mill (e.g. John Stuart Mill, ‘On Liberty’ in Mary Warnock (ed), *Utilitarianism and On Liberty : Including Mill’s ‘Essays on Bentham’ and selections from the writings of Jeremy Bentham and John Austin* (Blackwell Publishing 1962), 130-46). As a response to authoritarian societies the ideas of Enlightenment were that everyone should think for themselves (Stuart Hampshire, *The Age of Reason : The 17th Century Philosophers* (Mentor Books 1956)).

their mental capabilities, determining an infringement of personhood relies on an assessment of whether those mental capabilities have been infringed.

3.3.4 Some concerns about atomistic personhood

Although an atomistic approach to personhood is traditionally prevalent in the law of liberal democracies, I deviate from it. I reject atomistic personhood for two main reasons. Firstly, i) I do not believe atomistic personhood successfully identifies the highest moral value. Secondly, ii) I take issue with excluding some human beings from having personhood. Charles Foster and Jonathan Herring identify a third concern, namely that iii) atomistic personhood does not properly account for the equality between persons. I address these concerns in this subsection.

i) A moral concern

The first concern I have with atomistic personhood is that I am not convinced that atomistic personhood successfully identifies a particularly high moral value.⁴⁴ As such, I am unconvinced that this should be the defining characteristic for personhood as the highest moral status. I note that this assessment of what has moral value is subjective. I do not think there is a way around that subjectivity (as this precedes the objective foundation upon which wrongness is assessed for the law), and the challenge is to find a moral quality of which the value can be agreed upon. Simo Vehmas notes that ‘Intelligence is essentially a normative concept, reflecting the concept of what kind of

⁴⁴ This concern is identified in Foster and Herring (n 7), 58.

being a human should be'.⁴⁵ Even if there is *some* moral value in mental capacities, it would be a problem for atomistic personhood if mental capacities are not the highest moral value. That would render mental capacities the wrong basis for identifying personhood because the highest moral status needs to be defined by the highest moral value. Taking a lower value to demarcate personhood does not actually identify the highest moral status, although it could still be useful for identifying why all members of the group identified by mental capacities are morally equal. I consider that even if there may be some moral value in them, it does not seem to me to be *high* value. As such, I hold that if personhood is understood as the highest moral value, mental capacities are not a useful source for identifying and defining persons.

Immanuel Kant's work points at the idea that mental capacities enable the choosing of morally good acts, and, for Kant, that is what has moral value.⁴⁶ That is: if a being does not have a higher level of mental capabilities, they are not able to choose to do good, and 'doing good', for Kant, is only morally valuable if it is chosen. Accidental 'doing good' is not morally valuable. That could be regarded as the assessment that persons can only subjectively decide on their moral values if they have the necessary mental capacities. For Kant, however, there is no distinction between moral value and mental capacities. For him, 'having mental capacities' means that one also knows what is morally good, suggesting that there is a universal moral good. Morality, for Kant, is treated as an objective truth.⁴⁷ If mental capacities are needed to make morally valuable

⁴⁵ Simo Vehmas, 'Discriminative Assumptions of Utilitarian Bioethics Regarding Individuals with Intellectual Disabilities' (1999) 14 *Disability & Society* 37, 47.

⁴⁶ Immanuel Kant, Mary J Gregor and Roger J Sullivan, *The Metaphysics of Morals* (Cambridge University Press 1991), [6:405].

⁴⁷ Immanuel Kant, *Critique of Practical Reason* (Cambridge University Press 2015), [5:36].

decisions, those capacities would enable the doing of moral good (i.e. having moral capacities enables a being to choose to do good). However, Foster and Herring hold that ‘it is often incorrectly assumed that those with “higher cognitive functioning” use this to make decisions. Many of our decisions ... have little to do with cognitive function.’⁴⁸ As such, they reject the claim that mental capacities are morally valuable as a tool to enable or aid in making ‘good’ decisions.

ii) A practical concern

My second concern with atomistic personhood is that neonates and people with severe cognitive disabilities, on a strict application, are excluded from personhood and, as such, labelled less morally valuable.⁴⁹ Wasserman et al. note, ‘These attributes pick out different subsets of human beings.’⁵⁰ Some theorists may take no issue with this conclusion.⁵¹ However, such conclusions have led others to develop exceptions so that personhood might be attributed to all humans after all.⁵² While those exceptions may mean that, for example, very young children and severely cognitively disabled people should be *treated* as though they are of the highest moral status, that it is an exception means that they are not *actually* considered to fulfil the requirements to be of the highest moral status. Some theorists supporting atomistic personhood make that exception

⁴⁸ Foster and Herring (n 7), 60.

⁴⁹ See text at (n 39), concern identified in Foster and Herring (n 7), 56-7.

⁵⁰ Wasserman et al. (n 38).

⁵¹ See e.g. Tom Regan, *The Case for Animal Rights* (University of California Press 2004), 324; Helga Kuhse and Peter Singer, *Should the Baby Live? : The Problem of Handicapped Infants* (Oxford University Press 1985), 143.

⁵² See e.g. Waldron (n 40), 252.

because the exclusion of some humans from personhood status would be an unacceptable conclusion to them. However, the need for an exception to circumvent the conclusion that neonates and cognitively disabled people are not persons shows that mental capacities are not a good basis for personhood: some humans would be excluded on the theory, which creates the need for an exception. As such, this reason to reject atomistic personhood is practical: atomistic personhood does not describe the full scope of beings that are usually considered persons. The theory should reflect the facts: if, at the very least, all humans are considered persons, then the theory of personhood should reflect that.⁵³ That all humans are usually considered persons is already reflected in human rights law, which attributes rights to all human beings, and uses the terms ‘persons’ and ‘humans’ interchangeably.⁵⁴ Although the law in liberal democracies has traditionally taken an atomistic approach to personhood, atomistic personhood is, in practice, not a good foundation for the law.⁵⁵

iii) An equality concern

Thirdly, I note a concern with atomistic personhood raised by Foster and Herring. They hold that atomistic personhood does not explain or warrant that all persons should be treated as equals. As atomistic personhood values mental capabilities above anything else, Foster and Herring argue that a person with a higher level of mental capacities

⁵³ See also chapter 2 on the standardisation of harms reflecting how they are usually experienced: a good model for standardisation reflects usual experience the best, see chapter 2 section 2.2.2.4.

⁵⁴ See (n 27).

⁵⁵ See e.g. the criminalisation of coercive control in England and Wales in s.76 Serious Crime Act 2015) for an example of where the law takes a more relational approach because an atomistic approach was found to fall short. Discussed further in chapter 6 text at (n 125).

seems to have more of the moral value that entitles them to personhood than someone with fewer mental capacities but still meets the personhood threshold. As such, Foster and Herring note that atomistic personhood does not actually, even on its own standard, identify the being with the highest moral value but puts the bar lower so that people with lower-but-sufficient mental capacities may also be attributed personhood. They note that ‘The claim is that we are all morally equal, not just that we should pretend we are.’⁵⁶ I believe that a social construct, such as personhood, is to some extent ‘pretending’: a social construct is not a factual entity but something that is accepted as if it were a fact (i.e. that all persons are of equal moral value). Therefore, I do not take as much issue with atomistic personhood’s failure to identify the being with the highest possible mental capacities, and I think similar concerns exist for other approaches to personhood too. It could be sufficient to meet the threshold of personhood if a being has the potential to give rise to the identifying characteristic. I do not mean this in the sense of the exception to meeting the threshold described in the first concern, where it is suggested that personhood should be attributed to someone who is a type of being that would usually be able to meet the threshold requirement, but ‘tragically failed to fulfill’ their usual nature.⁵⁷ I mean that the equality concern may be remedied by looking at the question whether a being has the actual ability to fulfil the threshold requirement of personhood rather than the question how much they have of it. I note that this does not remedy the concern that atomistic personhood fails to identify beings that are actually of the highest moral value.

⁵⁶ Herring (n 7), 28.

⁵⁷ See Waldron (n 40), 252.

3.3.5 Concluding atomistic personhood

I have outlined atomistic personhood as defining persons as beings with such a degree of mental capabilities that they can be autonomous. On this approach to personhood, the ‘self’ defines the ‘person’: a being that can think about itself as a self is a person because of the abilities needed for self-cognition.

I discussed my two main concerns with this approach to personhood: it does not actually reflect that which is most morally valuable and excludes beings from the theory of personhood that in (legal) practice are typically attributed personhood. The latter concern is one that the human species membership approach to personhood (discussed in the next section) aims to remedy. Finally, I pointed at a concern that I recognise but do not fully share, namely that atomistic personhood does not actually attribute equal moral value but is an invitation to pretend that all persons have equal moral value.

3.4 Human species membership personhood

3.4.1 Introduction

In this section, I consider a human species membership approach to personhood. This approach to personhood is sometimes offered as an alternative to atomistic personhood because it remedies the concern described in the previous section that not all humans might be considered persons. In this section, I discuss how human species membership personhood defines persons. I reject it for not offering a moral quality as defining characteristic of personhood.

3.4.2 Human species membership personhood's definition of persons

The human species membership approach to personhood defines persons as human beings.⁵⁸ This is an approach to personhood that attributes personhood based on, and descriptive of physical characteristics. Species membership is defined based on physical qualities such as body shape or DNA. The theory of personhood 'claims that it is simply by virtue of being a human being that someone is entitled to personhood.'⁵⁹ That approach remedies an issue that arises on a strict application of atomistic personhood theory, namely that, for example, severely cognitively disabled people and young babies would not be considered persons.⁶⁰

In theory, a wrong against a person, on this approach, should be regarded as an infringement of someone's species membership.⁶¹ However, as I consider in the next

⁵⁸ Thomas Scanlon, *What we Owe to Each Other* (Belknap Press of Harvard University Press 1998), 185; Bernard Williams, 'The Human Prejudice' in Bernard Williams and AW Moore (eds), *Philosophy as a Humanistic Discipline* (Princeton University Press 2006), 150; Rahul Kumar, 'Permissible Killing and the Irrelevance of Being Human' (2008) 12 *The Journal of Ethics* 57, 76; John Finnis, 'The Fragile Case for Euthanasia: a Reply to John Harris' in John Keown (ed), *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge University Press 1995), 48. See also on human species membership as sufficient for personhood Eva Feder Kittay, 'The Moral Significance of Being Human' (2017) 91 *Proceedings and Addresses of the American Philosophical Association* 22, 39.

⁵⁹ Herring (n 7), 31.

⁶⁰ A strict approach of the human species membership approach to personhood makes no requirements on mental capacities. Some theorists are an exception to this, see e.g. Finnis (n 58), 48. Unlike atomistic personhood, on this approach persons need not be self-aware, i.e. they need not have selfhood. I note however that the human species membership approach could co-exist comfortably with a phenomenological approach to selfhood, where the self is considered the body-in-the-world-with-others (unlike cartesian mind-body dualism where the self is separate from the body, see text at (n 42)). See on 'being-in-the-world with others' and the body-subject e.g. Maurice Merleau-Ponty, *Phenomenology of Perception* (The Humanities Press 1965), 92-4, 333; and on the self and embodiment e.g. GH Marcel, *Being and Having* (Dacre Press 1949), 14.

⁶¹ It could be argued that undergoing body modification or use of prosthetics makes someone less human and therefore is a wrong against the person. However, it is not usually the case that a person who has undergone changes to the composition of their body would not be considered human anymore. See on body embodiment of prosthetics e.g. Craig D Murray,

subsection, this would not be a *moral* wrong. That is because species membership personhood is not a moral claim: ‘there is nothing in or invariably correlated with membership in the human species that can be the basis of our moral equality’.⁶² It does not seem theoretically possible to commit a moral wrong against something that has no moral value. For example: it does not seem likely that there is a moral wrong when I throw a pebble out of the window, because the pebble has no moral status. However, it would normally be considered a moral wrong to throw a person out of the window, but that moral wrongness cannot be explained by the species membership approach to personhood. As such, I find the human species membership approach to personhood an unsuitable foundation for legislating on moral wrongness. My reasons for rejecting human species membership personhood are considered further below.

3.4.3 Some concerns about the human species membership personhood

I reject human species membership personhood as an alternative for atomistic personhood. That is because i) I fail to see the moral quality of its foundation, and ii) it does not tell us why personhood ought to be attributed. A third concern notes that iii) human species membership personhood struggles to account for the moral equality of persons.

‘An interpretative phenomenological Analysis of the Embodiment of artificial Limbs’ (2004) 26 *Disability and Rehabilitation* 963; on losing and gaining body parts see Jonathan Herring, *Medical Law and Ethics* (Oxford University Press 2018), 472-86; on humans living with technologically modified bodies see e.g. Liza Ireni-Saban and Maya Sherman, ‘Cyborg Ethics and Regulation: Ethical Issues of Human Enhancement’ (2021) 49 *Science and Public Policy* 42.

⁶² Jeff McMahan, ‘Challenges to Human Equality’ (2008) 12 *The Journal of Ethics* 81, 93.

i) A moral concern

One concern regarding human species membership personhood is in respect of its foundation for a moral status. I hold that there is no inherent moral value in human species membership.⁶³ Human species membership is a factual description, not a moral one: there is no moral foundation to belonging to a species or having certain physical qualities.⁶⁴ That causes a serious issue for personhood-as-the-highest-moral status because moral qualities cannot be derived from a non-moral basis. That means that if there is no moral value in human species membership, personhood based on such membership is not a moral concept and would not be the type of personhood I have discussed in this chapter. The infringement of personhood, if it is not a moral concept, is not a moral wrong. As I noted, one reason for why I consider personhood useful in the context of law is that it could help guide how rights and wrongs ought to be interpreted. However, if no moral claim is made, then the theory is merely descriptive and does not offer any such interpretative tools. It also does not explain why persons are moral beings, let alone beings of the highest moral status. As such, I consider human species membership personhood to lack the qualities that make personhood a useful concept in a legal context.

ii) A practical concern

A second (practical) concern is that human species membership personhood may not offer a sufficiently clear definition of who ought to be attributed personhood.⁶⁵ The

⁶³ See also Foster and Herring (n 7), 62; McMahan (n 37), 93.

⁶⁴ Foster and Herring (n 7), 62.

⁶⁵ *ibid*, 62.

definition might not enable resolving cases where there is a question of personhood, for instance on matters such as whether a foetus is a person.⁶⁶ On the human species membership approach to personhood, humans might be recognised as persons through the ‘I know it when I see it’ method: we can learn to recognise humans as humans, elephants as elephants, and even sort physically identical baby chickens by sex.⁶⁷ But that is no help in difficult cases. The difficulty that the human species membership approach has regarding clarification of ‘penumbra’ cases is that its definition does not tell us *why* a person ought to be attributed personhood.⁶⁸ Human species membership personhood is a descriptive approach of persons intended to include all humans in personhood. But it does not tell us where to draw the line between humans and non-humans, or persons and non-persons. That is unlike the personhood approaches that define personhood on a principle, for example, ‘those beings with a high level of mental capabilities are of the highest moral value’ or ‘those beings with caring relations are of the highest moral value’. On those approaches to personhood, the line between persons and non-persons is drawn at meeting that threshold. Human species membership personhood does not define its threshold, and so there exists a penumbra of personhood that cannot be clarified. Note that this is unlike the concerns regarding the making of exceptions discussed on atomistic and relational personhood: those exceptions are recognised as a bending of the threshold in specific cases, whereas human species

⁶⁶ Foster and Herring hold that personhood based on physical characteristics might exclude people with physical disabilities and include human-shaped robots. Defining humans based on DNA is a challenge regarding where to draw the line, because ‘we share 50% of DNA of bananas.’ Foster and Herring (n 7), 62-3.

⁶⁷ *Jacobellis v Ohio* 378 US 184 (1964), [concurring judgment of Justice Potter Stewart]; on the intuition of chicken-sexing see e.g. Richard DeWitt, ‘Critical Thinking and Sexing Chickens’ (1992) 10 *Inquiry: Critical Thinking Across the Disciplines* 8.

⁶⁸ On ‘problems of the penumbra’ see Hart (n 4), 607. On reasons for human species membership personhood see Williams (n 58), 150.

membership personhood does not have a sufficiently precise way of identifying where the threshold is to even be able to bend it.⁶⁹

Because human species membership personhood does not tell us why a being is a person, it offers no tools for interpreting cases where there is disagreement (e.g. whether a foetus should be considered a person), nor tools for interpreting rights and wrongs. As this latter tool is one of the main reasons I think the law would benefit from (a clear understanding of) personhood, human species membership personhood is not a useful understanding of personhood in the context of clarifying legal theory.

iii) An equality concern

Finally, I note that Foster and Herring raise an equality concern regarding human species membership personhood. Where it is attempted to remedy the too vague definitions of persons-as-humans concern above, it has been suggested that species membership might be defined by the ‘characteristic life-cycle of the species to which the individual belongs’.⁷⁰ That would then include those human beings who do not achieve that ‘characteristic life-cycle’. However, that can be seen as affecting the moral equality of those individuals who would not otherwise have been considered ‘persons’. Herring holds that ‘Assessment of moral worth should be based upon an individual’s own intrinsic nature and not on what other members of the species achieve.’⁷¹ The concern is

⁶⁹ See text at (n 52), on the atomist concern exception, and section 3.5.5. at iii) on the relational concern exception.

⁷⁰ Kumar (n 58), 76.

⁷¹ Herring (n 7), 33.

that where personhood is defined as group membership and a being is attributed the highest moral value because *some* members of the group achieve something that identifies the personhood, moral value is derived from the characteristics of group members rather than a person's own qualities. That affects their moral value, as they may not themselves have the quality that identifies their personhood. As on atomistic personhood above, I note that social constructs are not factual realities, and so it could be possible to attribute equal moral value to all beings identified as persons regardless of how they got to be so identified. However, human species membership personhood does not even make a claim about moral value. That is the main issue of human species membership personhood: no moral value is identified at all, and so no moral quality can be derived (equally or not).

3.4.4 Concluding human species membership personhood

In this section, I considered human species membership as an alternative to atomistic personhood. It defines persons as humans. However, it does not offer a moral claim or substantiation for the attribution of personhood and, as such, cannot underpin personhood as a moral status. The human species membership approach seems to aim to describe 'who normally has personhood' without offering clarification as to why that might be.⁷² The factual description of human beings as a definition of persons does not offer a sufficiently clear threshold for personhood, nor does it offer tools by which to assess moral wrongs or interpret rights.

⁷² See also Andrew Von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, as described in chapter 2, section 2.2.2.4 at i).

3.5 Relational personhood

3.5.1 Introduction

In this section, I consider a relational approach to personhood. This is the approach to personhood that I subscribe to. It defines persons as inherently relational and identifies them through caring relations. In this section, I first set out my understanding of relational personhood. I consider the topic of relational selfhood to identify the centrality of relationality in human development. I then consider ‘perceiving’ and ‘being perceived’ as a way in which relationality can take shape. I do this to identify that because it is fundamental for relationality, abuse of someone’s image would be understood as an infringement of the person on relational personhood. Finally, I discuss some concerns that have been raised against relational personhood.

3.5.2 Relational personhood’s definition of persons

The relational approach to personhood takes the view that what is most morally valuable are caring relations. As such, it ties moral value to relationality, specifically to caring relations: Foster and Herring hold ‘that caring relationships are of the highest moral value.’⁷³ A person is thus defined as ‘a being engaged in a caring relationship’. I subscribe to this notion. I am sympathetic to the idea that moral value can be found in caring relationships. Although relationality is a relatively new approach to defining personhood and not widely reflected in law, ‘love’, or what might be described as ‘caring relations’, are quite universally considered morally valuable.⁷⁴

⁷³ Foster and Herring (n 7), 72.

⁷⁴ See e.g. Benedict J Douglas, ‘Love and Human Rights’ (2023) forthcoming *Oxford Journal of Legal Studies*; and generally Adrienne M Martin (ed), *The Routledge Handbook of Love in Philosophy* (Routledge 2019).

Based on the four markers of ‘care’ as identified by Herring, ‘caring relations’ could be indicated by the markers of ‘meeting needs’, ‘respect’, and ‘responsibility’.⁷⁵ Simply engaging with someone is not necessarily morally valuable. It may indeed be the opposite, for example, if a relationship is abusive. The element of ‘caring’ in the definition of personhood is essential to avoid attributing the highest value to abusive or otherwise bad relationships: it enables a distinction between relationships that are of the highest moral value and those that are not. I note that this is an important difference between relational personhood and relational selfhood: while personhood may only exist where there are caring relations, selfhood (as a sense of self and identity) can develop even in bad relationships.⁷⁶ While not all relations are valued equally on this account of personhood, relational personhood seems very unlikely to exclude any humans from personhood.⁷⁷ Eva Feder Kittay emphasises that without care, no one would be able to grow up, and no one would have been able to develop into the person they are. On this approach, unlike the two theories of personhood discussed above, personhood does not exist in a vacuum. The idea is that ‘our value lies not in our selves as isolated units but in our caring relationships.’⁷⁸ Relational personhood cannot exist in isolation, as it requires relationality.⁷⁹

⁷⁵ See Herring (n 20), 14.

⁷⁶ See on relational selfhood e.g. Miriam Kyselo, ‘The Body Social: An Enactive Approach to the Self’ (2014) 5 *Frontiers in Psychology* 1, 9; Miriam Kyselo, ‘More than our Body: Minimal and Enactive Selfhood in Global Paralysis’ (2019) 13 *Neuroethics* 203, 207; Hilde Lindemann, *Holding and Letting Go : The Social Practice of Personal Identities* (Oxford University Press 2014), 85.

⁷⁷ Feder Kittay (n 41), 625.

⁷⁸ Foster and Herring (n 7), 77.

⁷⁹ ‘Selves can only exist in relation to other selves’, in Kenneth J Gergen, *An Invitation to Social Construction* (SAGE 1999), 123 citing George Herbert Mead, *Mind, Self, & Society : From the Standpoint of a Social Behaviorist* (University of Chicago Press 1934). See also Kenneth J Gergen, *Relational Being : Beyond Self and Community* (Oxford University Press 2015). That relational personhood does not exist in isolation is a substantial

I take a relational approach to personhood because I hold it to reflect how persons actually exist and what is actually valuable to them generally.⁸⁰ I noted in chapter 2 that I am concerned with identifying a criterion that helps reflect, as closely as possible, what actually harms and wrongs persons. On relational personhood, infringing a person's caring relations would be considered such a wrong against the person.

3.5.3 Relational selfhood

I discuss relational selfhood to explain why I believe a relational approach is a good reflection of the inherent nature of those beings that we usually understand to be persons (e.g., they are attributed human rights).⁸¹ I hold that we are inherently relational beings, which I explain through a discussion of selfhood. That is because selfhood is concerned only with our relationality. To move from a discussion on selfhood to a discussion on personhood, one need only add the criterion of 'care' for 'caring relations' rather than 'any relation'. Where I reference relationships that give rise to selfhood it should be noted that these need not necessarily be good or caring relationships.

difference compared to other theories of personhood. This need not cause practical issues: I doubt that personhood is a useful concept on a desert island, and question whether selfhood could develop at all if a being was not related to. Because personhood is a social construct, it may not be useful outside of a social structure. Having personhood only has practical implications in context with others, not in absolute isolation.

⁸⁰ On humans as inherently social also e.g. psychotherapy literature on autism-spectrum syndrome: people with autism can experience great sadness at not being able to get to mutual engagement with others, see Rosemarie Samaritter, 'Danstherapie en de Behandeling van Autisme : De Shared Movement Approach' in Rosemarie Samaritter and Nicki Wenthof (eds), *Danstherapie* (Acco Uitgeverij 2021), 117-8.

⁸¹ See (n 27).

Relational selfhood, as ‘a sense of self’ or ‘identity’, develops in and through relationships with others.⁸² This means that through your relationships with others, you come to identify yourself: through being referred to as ‘you’ and as ‘Marthe’, I have come to identify myself as that which is meant by those references.⁸³ It is in our initial relationships (for example, with parents) that persons develop language skills and develop their identity. Identity and sense of self can change as our relationships change, but that we are able to see ourselves as ‘selves’ comes from these initial relationships at the start of life.⁸⁴

Selfhood can also be understood as that which is contained by one’s body and the others who inform one’s selfhood through one’s relationships with them. Hilde Lindemann considers that moral agency is an aspect of identity and developing selfhood. That is, it is part of selfhood that the self understands itself as such.⁸⁵ But, on relational selfhood, as Lindemann holds, moral agency need not be present ‘in’ a particular body: by having someone else as part of your identity because of your relationship with them, you do not only affirm your own selfhood, but theirs too — the other’s and your selfhood are the same to the extent that it is shared (as part of the relationship that you have with

⁸² Jonathan Herring, ‘Health as Vulnerability; Interdependence and Relationality’ (2016) 22 *The New Bioethics* 18, 29.

⁸³ Annette C Baier, ‘Cartesian Persons’ (1981) 10 *Philosophia* 169, 186. See also Arno Leo Goudsmit, ‘Towards a Negative Understanding of Psychotherapy’, (Rijksuniversiteit Groningen 1998), 34. It may not be possible to establish whether my first sense of myself is as ‘you’ or as ‘Marthe’ because of the language barrier with e.g. very young children. See Elizabeth Bates, ‘Language about Me and You: Pronominal Reference and the Emerging Concept of Self’ in Dante Cicchetti and Marjorie Beeghly (eds), *The Self in Transition : Infancy to Childhood* (University of Chicago Press 1990), 180-1.

⁸⁴ Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019), 12; Kenneth J Gergen, *An Invitation to Social Construction* (Third Edition edn, SAGE 2015).

⁸⁵ Lindemann (n 76), 85, 92.

each other). By ‘holding on to’ the other, their identity is shaped as well as yours.⁸⁶ That is a way to attribute selfhood where someone may not (independently) be able to claim it.⁸⁷

While the self is understood as inherently relational, it is also distinct, meaning that it is not an unidentifiable member of a large blob of people. This is explained by, for example, Miriam Kyselo, who considers that to develop a sense of self, one must engage with others but also distinguish oneself from them as an individual.⁸⁸ She holds that the self is primarily relational and bodily mediated.⁸⁹ The bodily mediation is what enables us to interact and to exist in the world: without a body, no relations could be engaged in (nor could we do anything else). A similar, though differently emphasised, view is defended by Michelle Maiese, who suggests that the self is primarily embodied and secondarily, through its embodiment, relational.⁹⁰ On either account, the self is understood to develop by engaging with others and separating from them.⁹¹ Balancing this back-and-forth action between engagement and distinction is where the subjectivity of the self develops (see figure 1). I understand the integrity of the relational self as

⁸⁶ ibid, 85.

⁸⁷ That someone may not be able to communicate their sense of self does not mean they do not have it. On the need to be humble regarding assessment of other’s abilities see Vehmas (n 45), 50.

⁸⁸ Kyselo 2019 (n 76), 207.

⁸⁹ Kyselo 2014 (n 76), 9.

⁹⁰ Michelle Maiese, ‘Embodiment, Sociality, and the Life Shaping Thesis’ (2019) 18 *Phenomenology and the Cognitive Sciences* 353, 355. On the interconnection of bodies see Jonathan Herring and P-L Chau, ‘My Body, Your Body, Our Bodies’ (2007) 15 *Medical Law Review* 34, 45-9; and on the interface between persons as facilitating the ‘ego’ Goudsmit (n 83), 120.

⁹¹ Kyselo uses the terms ‘distinction’ and ‘participation’, Kyselo 2019 (n 76), 9.

maintaining the tension between ‘engaging with others’ and ‘distinguishing from others’. Integrity is infringed if one is *being engaged* without themselves engaging.⁹² The disrupted tension resulting from being engaged without engaging is a disturbance of the relational self that is understood here as an infringement of integrity.

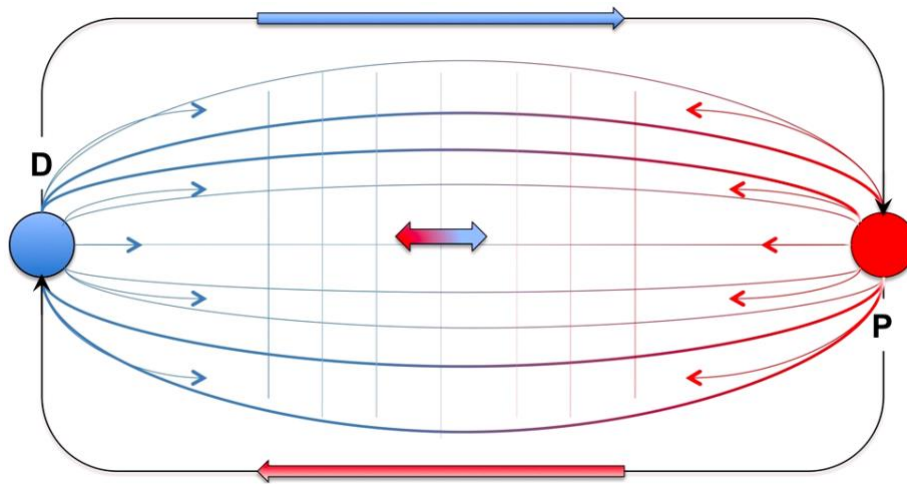


Figure 1: From Kyselo 2014 (n 76) **socially enacted autonomy**, basic organisation of network of processes that constitute the self as individual socially enacted autonomy. D stands for ‘distinction’, P stands for ‘participation’.

A final note on relational selfhood is that it does not cease to exist if a person is no longer engaged in relationships: once a sense of self has developed, it would not disappear through the mere absence of continued relationships. That is because once there is a sense of self (established through the self-other relation), the self can relate to itself as a self. That is the self-self relationship. A person who is very lonely or isolated does not necessarily lose their sense of self because of their isolation. Self-other relations

⁹² See also chapter 5 section 5.3.3.3.

are essential for enacting the self but not essential for maintaining it.⁹³ That also means there is a substantial difference between someone who has been hidden away since birth and someone who — once their selfhood is fully established — decides to become a hermit. A child who has no relationships cannot develop a sense of self, nor does a self-self relation develop.⁹⁴ A hermit has selfhood enacted through relations with others, and that selfhood can be maintained through the self-self relation. The previous relations with others enabled their sense of self, and the hermit could maintain that sense of self even when all relations are cut off. The self-self relation can be sufficient to maintain selfhood even when self-other relations are gone, but the self-self cannot develop if a being is never engaged with as a self by others (self-other relationship).

I believe that a relational approach to personhood would be best suited to offer tools for interpreting rights and wrongs in a way that matches how persons are actually affected, because our identities develop in relationships with others. We are inherently and essentially relational beings. As such, I argue in favour of adopting a relational approach. Recognising the relevance of interference with relations enables a fuller

⁹³ That is not to say that loneliness could not be very harmful, see e.g. Kimberley Brownlee, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford University Press 2020), 39-74. There is a difference here between solitude as isolation that is a result of the subject's wants (e.g. a hermit who chooses to live isolated from everyone else) and loneliness as isolation that the self is subjected to by other's lack of engagement with them where that engagement might nevertheless be desired by the subject, see e.g. Jenny De Jong Gierveld, Theo Van Tilburg and Pearl A Dykstra, 'Loneliness and Social Isolation' in Anita L Vangelisti and Daniel Perlman (eds), *The Cambridge Handbook of Personal Relationships* (Cambridge University Press 2006).

⁹⁴ On feral children see Stefan C Dombrowski et al., 'Feral Children' in Stefan C Dombrowski, Karen L Gischlar and Martin Mrazik (eds), *Assessing and Treating Low Incidence/High Severity Psychological Disorders of Childhood* (Springer 2011).

understanding of the wrong and harm inflicted through ibsa that is more in line with how persons exist and develop than atomistic or human species membership personhood.⁹⁵

3.5.4 Reflecting the self: perceiving and being perceived

I briefly discuss ‘reflecting the self’ as a quality of the relational self that is important to understanding how the self can be infringed through ibsa. I hold that the relational person (‘A’) can only use their body to perceive others. Perceiving others is necessary for engaging with them. But while A can only use their body to perceive, it is not the only way in which A can be perceived by others. This distinction is set out below and is relevant to ibsa because ‘being perceived’ can be an infringement of the relationally defined person.

Persons are understood here to develop through their relationships with others and are bodily mediated. Their bodies are their ‘interface for connection’.⁹⁶ The body enables the relational self to perceive and to be perceived. I think it helpful to look at these as two connected but distinct functions of the body: one is to enable the self to *perceive* and have senses, the other is to *be perceived*. Being perceived enables others to engage with the perceived. The body enables us to perceive (to see, to feel, etc.), and it enables us to be perceived (be seen, be felt, be recognised, etc.). We can perceive through the body, and we can be perceived when people see, for instance, our bodies, images, names, or avatars.⁹⁷

⁹⁵ See e.g. Gergen (n 79), 108.

⁹⁶ Kyselo 2014 (n 76), 12.

⁹⁷ An avatar can enable a person to be recognised by others. It could be very much part of the identity of the person using the avatar, in which case in particular abuse of the avatar should be understood as an infringement of their selfhood. On use and abuse of avatars in

‘Perceiving’ necessarily happens through the body. Whether I meet someone in person, talk to them online, or engage with them in any way, my ability to engage with them is facilitated by my body: I perceive others through it, whether because I see them standing before me, or recognise their name signed under the email they have sent me, or know them by their avatar — my relations are facilitated by my perceiving others through my body. And my body also enables others to perceive me. However, this function is not *exclusively* fulfilled by the body (as ‘perceiving’ is). A person’s name enables them to be perceived too, and so does an image. Even an avatar might reflect the self if the person using it is associated with and recognised through that avatar by the people the person is engaging with. If I am being perceived without perceiving the other (no reciprocity), that does not mean that the perception *of me* is separate from me: I argue that if I am being perceived, even if I am not (yet) aware of it, my selfhood is reflected to someone else, which enables them to relate to me. That can affect my relations — good, and bad. For example, if someone tells me something unpleasant about a friend, that might affect how I relate to that friend. My friend does not need to be aware of my (changed) perception of them through the story I was told for their relationality to be affected because of the change in their relationship with me. That could be an infringement of relational personhood. To recognise a person it is not necessary to see their body, and the same goes for wronging them: a wrong against the person can be conducted without physical infringement. That an image reflecting a person can wrong that person as an inherent infringement of them is an important part of the relationally interpreted analysis of the wrongs of ibsa. That abuse through a person’s

the context of e.g. disability and sexual violence see Tom Boellstorff, ‘The Ability of Place: Digital Topographies of the Virtual Human on Ethnographia Island’ in Loraine Gelsthorpe, Perveez Mody and Brian Sloan (eds), *Spaces of Care* (Hart 2020).

reflection can be understood as an infringement of the person is because a person's reflection can affect the caring relations that establish someone's personhood.⁹⁸

3.5.5 Concerns with the relational approach to personhood

As noted, I subscribe to a relational approach to personhood. I hold that it best reflects how we exist in the world, what is valuable to us, and includes, at least, all humans.⁹⁹ As such, relational personhood avoids some of the concerns of atomistic and human species membership personhood.¹⁰⁰ However, it also gives rise to some concerns. Some of these I share, others I do not consider genuine issues. I discuss four concerns: i) that relational personhood could be considered to find moral value in qualities extrinsic to persons; ii) that it could be regarded as overemphasising the importance of relations; iii) that it could exclude uncared-for people from personhood; and iv) that there may be an equality-between-persons concern regarding possessing the morally most valuable quality in unequal measure. I reject the first two of these outright. The latter two concerns can, to some extent, be resolved. Insofar as they persist, they do not persuade me to reject relational personhood because of these concerns.

i) A concern regarding finding moral value in extrinsic qualities

One concern raised regarding relational personhood is that it would find moral value in qualities that are extrinsic to the person. In other words, the challenge is that

⁹⁸ In chapter 5, I consider the difference between perceiving someone and thinking about them, see section 5.3.3.5.

⁹⁹ See e.g. Herring (n 84); Douglas (n 74); Martin (n 74); Feder Kittay (n 41).

¹⁰⁰ See sections 3.3.4 and 3.4.3.

relationships are not inherently part of persons but something that is between persons and is external to them. This concern is flagged by Kate Greasley, who holds that relational personhood is ‘grounding personhood in purely “extrinsic” properties’.¹⁰¹ However, I believe that this understanding of relational personhood is informed by the use of an atomistic understanding of the person. The relational definition of personhood locates the defining characteristic not in the isolated individual (personhood does not exist in a vacuum) but rather in the connection between (at least) two beings.¹⁰² That understanding of personhood deviates from the atomistic view that persons are isolated individuals, which seems to underpin the present concern towards relational personhood. As such, the concern is grounded in the use of a different theoretical framework (namely atomism) and applying it to relationality. On relational personhood, as I have aimed to set out above, relationships are very much at the core of persons and selves. Therefore, I do not believe this to be a genuine concern of relational personhood.

ii) A concern regarding over-emphasising the importance of relationships

A second concern that can be raised against relational personhood is that it puts too much weight on relationships. As not all relationships are good, the concern is that relational personhood could be used to legitimise abusive relationships and reinforce inequality. Defining persons through their relationships is feared to uphold and reinforce patriarchal

¹⁰¹ Kate Greasley, *Arguments about Abortion : Personhood, Morality, and Law* (Oxford University Press 2017), 111.

¹⁰² cf Greasley (ibid, 111). Greasley holds that it is implausible that a human who is isolated from others since birth would lack personhood. My view is that personhood is that it is not necessarily implausible or problematic that personhood should be absent where a being exists in total isolation, because it is only valuable against others. I do think it is implausible that a being *could* live in total isolation. See also text at (n 107).

institutions at the expense of those typically suppressed in patriarchal societies.¹⁰³ The worry is that taking ‘relationality’ as the highest moral value might obscure the wrongness and harmfulness of abusive relationships. Natalie Stoljar identifies three types of cases in which relations might be considered problematic: i) excessive deference to others (‘self-abnegation’); ii) ‘adaptive preference formation’ as ‘deformed desire’ where ‘the oppressed come to desire that which is oppressive to them ... [and] one’s desires turn away from goods and even needs that, absent those conditions, they would want’; and iii) ‘agents appear to self-consciously adopt (what are alleged to be) practices of oppression’.¹⁰⁴

I note that this criticism of relational personhood would be entirely valid where personhood was not defined by *caring* relations. Foster and Herring’s considerations for emphasising the ‘caring’ part of the definition of relational personhood is grounded in their acknowledgement of the fact that relations can be abused and that not all relationships hold a high (or even any) value.¹⁰⁵ The moral good of relational personhood is very much grounded in the idea that caring relationships are most morally valuable. It is on this basis that I distinguished too between personhood and selfhood: selfhood, as a sense of self, may develop in bad relationships, but personhood may not. That means I

¹⁰³ See for feminist critiques e.g. Natalie Stoljar, ‘Feminist Perspectives on Autonomy’ in Zalta EN and Nodelman U (eds), *The Stanford Encyclopedia of Philosophy* (Winter edn, Stanford University 2018), referring to Ann E Cudd, *Analyzing Oppression* (Oxford University Press 2006), 181. See also e.g. Jules Holroyd, ‘Relational Autonomy and Paternalistic Interventions’ (2009) 15 *Res Publica* 321; Uma Narayan, ‘Minds Of Their Own: Choices, Autonomy, Cultural Practices and Other Women’ in Louise M Antony and Charlotte Witt (eds), *A Mind of one’s Own : Feminist Essays on Reason and Objectivity* (Westview 1992).

¹⁰⁴ Stoljar (n 103).

¹⁰⁵ Foster and Herring (n 7), 81.

do not consider relational personhood to over-emphasise the importance of relationships generally. Nevertheless, I do hold that it is worth being aware of this concern to stress and keep in mind the importance of the ‘caring’ aspect of morally valuable relations.

iii) A concern regarding exclusion from personhood in the absence of caring relations

A third concern raised against relational personhood is that it may not attribute personhood to all beings that we would want to consider persons. The concern is that lonely or unloved (uncared for) people might be excluded from personhood. I see two possible responses to this concern.

The first option to remedy the raised concern is Foster and Herring’s suggestion that for someone who is a member of society, it is virtually impossible not to receive any care at all:

While it might be possible to imagine a person who is not loved by anyone, nearly everyone will be receiving care. We must not forget the extent to which people rely on a host of care provided by (broadly) society. The prisoner in solitary confinements may still be cared for by their friends preparing and working for their release. The hermit may still have relatives who think of them and are ready to help if the need arises. No one manages to forge a life which has no caring relationships and does not depend on (for instance) food, medicine, power or sewers.¹⁰⁶

¹⁰⁶ ibid, 81.

Foster and Herring's example of the hermit, if they have isolated themselves from society entirely and had no one who thought of them anymore, there might be two options. I am not sure that it would be a wrong to say that a completely isolated being, living removed from society, has no personhood. That is because they also do not need personhood. Personhood is useful as a claim against others. That does not mean it should be taken lightly to stop attributing personhood to someone, particularly where their isolation is not wanted. If someone *wants* to engage with others but is denied the chance, that could in itself be a wrong against them: it could infringe their ability to sustain their personhood.¹⁰⁷

Such a wrong may indeed exist regarding the prisoner in the example above. When taking that example further, for example, if such a prisoner did not have friends and was completely unloved, we suggest that the prisoner could be considered as 'receiving care' because they are being kept alive. However, this seems to greatly dilute what a *caring* relationship is, to the extent that I would question it as identifying the highest moral value. It might need to be concluded that some conduct, such as 'solitary confinement', is not, in fact, reconcilable with respect for personhood even if a person is being kept alive and receives a minimal level of care.¹⁰⁸ If the prisoner had personhood because of previous relationships, and the circumstances of imprisonment resulted in undoing or preventing the development of caring relations, then that imprisonment should be seen as

¹⁰⁷ A second option for the hermit who has a fully established sense of self is that they have a self-self relationship. If that is a caring relationship, it might be possible to conceive of a type of isolated relational personhood where a person sustains their own personhood. However, this option seems at odds with the inherent social nature of relational personhood.

¹⁰⁸ See on the devastating nature of solitary confinement e.g. Lisa Guenther, *Solitary Confinement: Social Death and its Afterlives* (University of Minnesota Press 2013).

a serious wrong. If it goes so far as to undo (at least in a theoretical sense) someone's personhood, I might argue that that should be considered an unjustifiable wrong. So, the response to the raised concern might be either that some care is still being given and so personhood remains intact, or, if imprisonment causes such a severe infringement of personhood that it is lost, that imprisonment might be an unjustifiable wrong. Note, however, that this is an example that builds on a situation where personhood already exists. There might not be such a wrong (on the theory) where personhood has not developed at all. However, the circumstances in which personhood would fail to develop would be very serious indeed. It would mean that a child would be neglected and abused from birth.¹⁰⁹ I would rather make an exception to the theory of relational personhood so that, for instance, a neglected child might be included than hold that they are not a person.

That leads me to a second option regarding resolving the raised concern. That is to offer an exception to those people who are not engaged in caring relations. The idea would be to judge based on the *ability* to engage in caring relations or, if there had previously been a caring relationship, to argue that personhood persists even if the relationship did not. This option should be met with the criticism that it would mean that there are persons who do not actually reflect the highest moral value.¹¹⁰ If 'the ability to engage in caring relations' is morally valuable, 'actually doing it' would appear to be *more* morally valuable. Despite this issue, I am not unsympathetic to this option. I hold that it is more prudent to ensure inclusion of those people who are, for example, severely

¹⁰⁹ See Dombrowski et al. (n 94).

¹¹⁰ A similar concern was raised regarding exceptions on atomistic personhood, see text at (n 57).

abused or neglected. That the highest moral value can nevertheless be attributed is due to my understanding of personhood as a social construct. Nevertheless, I recognise this as the weakest theoretical point of relational personhood. It is not cause for me to reject relational personhood, not in the least because other approaches to personhood are no better at avoiding this concern.

iv) An equality concern regarding relational personhood

Finally, relational personhood could be challenged on the extent to which it presents a basis for equality between persons. This challenge would be similar to one discussed regarding the mental capacity approach.¹¹¹ If it is most morally valuable to be in a caring relationship, then it might be argued that a person who has multiple caring relationships is *more* morally valuable than someone who only has one caring relationship (which would still meet the threshold of relational personhood).

Foster and Herring suggest that this is not a genuine concern for relational personhood because relational personhood does not attribute value to *participants* to a relationship but to the relationship itself (between those participants).¹¹² That means that a being that is engaged in many caring relationships would be engaged in many forms of personhood, each caring relationship being as much of the highest moral value as the next. Personhood protection should then be understood only in terms of aiming to protect the relationship, of which the participants are essential parts. Any perceived protection

¹¹¹ See section 3.3.4 at iii).

¹¹² Foster and Herring (n 7), 81.

that the participants to a relationship might have from personhood status is then merely a side-effect of personhood, not a primary aim.

One objection to this solution might be that this might suggest that the relationship should be understood as something external to the being that is engaged in it. If it were internal, the relationships (which are all of equal moral value) might still add up ‘in’ the person, and the person with many caring relationships would have more of the quality that entitles them to personhood than a person who has only one relationship.¹¹³ Having more of the quality that entitles to personhood could mean that there are persons who are more entitled to personhood than others, which goes against the principle of equality that personhood seeks to protect. However, I do not think the relationships *are* external to the being engaged in it. Nor do I think that this is what Foster and Herring mean by relational personhood. The alternative is also not ideal: in personhood as a social construct, persons can be considered to have equal moral value regardless of the level to which they *surpass* the threshold of personhood. That is: if a person has more of the quality that entitles them to personhood (*in casu* caring relations), they do not become ‘more’ of a person because personhood is only ever a threshold, not a measuring guide. As such, there can be a difference between identifying the highest moral value and identifying who has most of it. Relational personhood takes caring relations as the highest moral value. Engaging in a caring relationship means that someone is a person (‘has personhood’). That is the idea of a threshold concept of personhood — you can only meet it once. On this latter approach, all persons are morally equal because that is how the concept of personhood is defined.

¹¹³ See the concern regarding extrinsic qualities discussed above at i).

3.5.6 Conclusion

In this section, I discussed the concept of relational personhood. I considered that persons are essentially relational and can be defined as beings engaged in caring relations. An infringement of their caring relations is a moral wrong against a person. I noted that selfhood, relationally defined, points at relations for our source of identity and sense of self, but that selfhood is not defined as *caring* and so not identical to personhood.

I subscribe to this relational approach to personhood despite concerns that may be raised because I believe it reflects how humans actually exist in the world.¹¹⁴ As such, I hold it to be the most suitable approach to personhood in respect of interpreting wrongs, rights, and harms in line with how people usually experience them. As I noted in chapter 2, the challenge for the law, and thus for an underpinning approach to personhood, is to — despite and through abstraction and standardisation — connect as closely as possible to how infringements and interests are actually experienced. Because humans develop in relation with others and have an inherent relationality, a relational approach would be most appropriate. Secondly, I am much more drawn to the suggestion that caring relations are most morally valuable than mental capacity or human species membership. I note that love and care are typically, and virtually universally, presented as *a* moral

¹¹⁴ See e.g. Rosemarie Samaritter and Helen Paine, ‘Kinaesthetic Intersubjectivity: A Dance Informed Contribution to Self-Other Relatedness and Shared Experience in Non-Verbal Psychotherapy with an Example from Autism’ (2013) 40 *The Arts in Psychotherapy* 143, 144; Feder Kittay (n 41); Lindemann (n 76); Herring (n 82). The COVID-19 pandemic showed that need for social interaction is so great that lockdowns and social isolation can have severe effects on mental health Luca Pancani et al., ‘Forced Social Isolation and Mental Health: A Study on 1,006 Italians Under COVID-19 Lockdown’ (2021) 12 *Frontiers in Psychology* 663799. Lockdowns and physical distancing also inspired novel ways of seeking engagement, see e.g. theatre installation where actors engage with each other’s shadows reflected on a screen between them Eva Goudsmit, *Laf me/Lief me* (Podium Mozaiek 2021), see Appendix C.

good.¹¹⁵ In this thesis, caring relations are understood as the highest moral value, subscribing to relational personhood.

3.6 Chapter conclusion

In this chapter, I considered personhood as a theoretical foundation upon which to base the assessment of wrongs against persons. I considered that if personhood is a moral status, its infringement is a moral wrong, which would meet the ‘wrongfulness’ requirement of justified criminalisation as set out in chapter 2. The clarification of the nature of the foundation, namely ‘personhood’, enables assessment of, for example, what is needed to protect that foundation and what would infringe it. Therefore, I considered that clarifying the theoretical foundation upon which wrongs, rights, and harms are, or should be, interpreted offers a tool to guide such interpretation.

I then noted that the law of liberal democracies typically uses an atomistic understanding of personhood. That means that the law would normally be interpreted so that individual autonomy is ultimately protected because autonomy, as mental capacity, is considered the highest moral value on this approach. I rejected atomistic personhood because I am not convinced that intellect has high moral value. Furthermore, this approach excludes some humans from personhood. The human species membership approach to personhood seeks to remedy that concern. However, it does so through a definition of personhood that is entirely descriptive, not normative: no moral value is

¹¹⁵ Certainly, within major world religions, but also in secular philosophy. See e.g. Douglas (n 74); and generally Martin (n 74).

identified in the state of ‘being human’. As such, human species membership personhood does not offer tools for interpreting wrongs against persons.

I considered relational personhood as my preferred approach to personhood. I noted that we are not primarily atomistic beings and are not well served by a theory of personhood that suggests that we are.¹¹⁶ To my mind, relational personhood best reflects how people actually exist in the world and therefore is most likely to offer a fitting tool for interpreting what actually infringes them. I note that the claim that ‘caring relations’ are of the highest moral value is subjective (as would be the claim that ‘mental capacities’ or ‘human species membership’ is the highest moral value). Placing value in caring relationships reflects my understanding of what is morally valuable. As noted, I do not see that there is an absolute way to avoid subjectivity in moral claims. However, I find myself supported by a substantial and quickly growing body of literature defending the claim that a relational approach to personhood and selfhood would be a preferable alternative to atomism.¹¹⁷ As such, I note that I am, at the very least, not alone in taking this subjective understanding of moral value.

¹¹⁶ Kyselo 2019 (n 76), 207; Foster and Herring (n 7), 77.

¹¹⁷ See e.g. Herring (n 84); Foster and Herring (n 7); Hansbury (n 36); Jennifer Nedelsky, *Law's Relations : A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press 2012); Ngaire Naffine, *Being Relational: Reflections on Relational Theory and Health Law* (University of Calgary 2014). See also Douglas (n 74); and generally Martin (n 74).

CHAPTER 4: IDENTIFYING WRONGS OF IBSA AND THE POWER OF CONSENT

4.1 Introduction

In this chapter, I identify the wrongs of ibsa. These are the infringement of autonomy, sexual integrity, privacy, free speech, and trust (analysed in chapter 5), a failure to minimally respect personhood, and reinforcing and being reinforced by systemic inequality (analysed in chapter 6). These wrongs are discussed in chapters 5 and 6 through an atomistic and a relational lens to offer a comparison between the tools of interpretation offered by these approaches to personhood. The discussion in chapters 5 and 6 combined offers an answer to the main question, ‘what is the nature of the wrongfulness of ibsa?’.

This chapter aims to clarify how these wrongs of ibsa were identified and why they are relevant in the context of ibsa and the criminal law. I also aim to explain why ‘consent’ (or lack thereof) is not part of this discussion of wrongness. In this chapter, I first briefly outline which wrongs are drawn out from the taking, making, and/or sharing of intimate images. These wrongs are further discussed in chapters 5 and 6. I then consider the role of ‘lack of consent’, which is the part of ibsa’s definition that is not covered by a discussion of its wrongs.

4.2 The Φ -ing that defines ibsa

In chapter 1, I defined ibsa as any type of non-consensual taking, making, and/or sharing of intimate images. The conduct that constitutes ibsa, from which some of ibsa's wrongs can be derived, is thus 'any type of taking, making, and/or sharing of intimate images'.¹

Based on my considerations in chapter 2, I am concerned with identifying the *prima facie* wrongs of ibsa, that is: wrongs abstracted from facts of the case and not taking into consideration any justifying conditions.² As I discussed in chapter 2, *prima facie* wrongness identifies the need for justification, and justifications do not affect the status of *prima facie* wrongfulness. Instead, justifications can prevent a *prima facie* wrong from becoming an all-things-considered wrong. Even if it is not an all-things-considered wrong, the *prima facie* wrongness remains, which is what justifies criminalisation: *prima facie* wrongfulness is needed to justifiably criminalise conduct, while all-things-considered wrongfulness is needed to justifiably convict wrongdoers. That means that where a person has a justification for doing something *prima facie* wrongful, they should not face censure for it. I merely hold that where there is a *prima facie* wrong, there is a need for justification (to avoid all-things-considered wrongness). Because I am concerned with establishing the *prima facie* wrongful nature of ibsa towards justifying criminalisation, there is no role for consent (or the lack thereof) in identifying these wrongs. 'Consent' can be used to justify wrongful conduct, but it does not affect *prima facie* wrongness. As such, consent is not part of defining ibsa's

¹ See chapter 1 and Clare McGlynn et al., 'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2020) *Social & Legal Studies* 541.

² See chapter 2, section 2.2.3.4.

wrongness: any defences that may help avoid an all-things-considered wrong are not considered *prima facie*.

In chapter 1, I pointed at wrongs of ibsa as they have been identified by academics working on ibsa.³ From this and a consideration of the conduct and context of ibsa I compiled the list of wrongs discussed below. I discuss the wrongs of ibsa individually in order to identify the full scope of ibsa's wrongness.

Ibsa's Φ -ing is any type of taking, making, and/or sharing of intimate images.⁴ From this definition is derived that ibsa may be an infringement of the following personhood interests:

- autonomy, when 'taking, making, and/or disclosing images' involves autonomous capacities;
- sexual integrity, when 'intimate images' are understood to see to the intimate aspect of the self that sexuality sees to, and integrity is a type of being free from outside interference;

³ Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 1, 13; Nicola Henry and Anastasia Powell, 'Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence' (2015) 21 *Violence Against Women* 758, 766; Ganaele Langlois and Andrea Slane, 'Economies of Reputation: The Case of Revenge Porn' (2017) 14 *Communication and Critical/Cultural Studies* 120, 126; Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 362; Danielle Keats Citron, 'Sexual Privacy' (2019) 128 *Yale Law Journal* 1870, 1918; Mary Anne Franks, 'The Crime of "Revenge Porn"' in Larry Alexander and Kimberly Kessler Ferzan (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019), 663, echoed by the Law Commission of England and Wales in *Intimate Image Abuse: A Consultation Paper* (Law Commission Consultation Paper No 253 2021), 117-9. I have also drawn from suggestions regarding the wrongness of domestic violence, see Jonathan Herring, 'The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3' (2011) 33 *Journal of Social Welfare and Family Law* 297, 301 (particularly 'domestic abuse as a breach of trust').

⁴ See chapter 1 and McGlynn et al. (n 1).

-
- privacy, when ‘intimate images’ are part of someone’s identity that they do not want to share with just anyone;
 - free speech, when ‘taking, making, and/or disclosing images’ is understood to make the depicted person express a message they did not set out to send;
 - a breach of trust, when ‘intimate images’ were entrusted and shared without consent, or where there was trust that no intimate images would be taken or made but where they were.⁵

Additionally, ibsa may constitute the wrong of failing to minimally respect personhood.

That can be the case where the infringements listed above are particularly severe or where a person is treated solely as an object through abuse of their images.⁶ Finally, ibsa is considered on a violence continuum as the wrong of reinforcing and being reinforced by inequality.⁷ This wrong is found in the role that ibsa plays on the ‘continuum of sexual violence’, affecting women and people with minoritised identities more severely than straight, white, cis-gender men.⁸

Although the infringement of dignity has sometimes been identified as an independent wrong of ibsa, I do not identify it as a wrong separate from what I discuss in this thesis.⁹ That is because I think of dignity as that which is entailed by the moral status

⁵ These wrongs are discussed in chapter 5.

⁶ Discussed in chapter 6 section 6.2.

⁷ Discussed in chapter 6 section 6.3.

⁸ See e.g. Nicola Henry et al., *Image-Based Sexual Abuse : A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge 2020), 34-8; see also Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse’ (2017) *Feminist Legal Studies* 25.

⁹ McGlynn and Rackley (n 3), 12; Langlois and Slane (n 3), 126.

of personhood.¹⁰ As such, it may be affected by the same conduct that personhood status would be affected by. It should thus be understood that the infringement of dignity is implied by the infringement of personhood. The infringement of dignity is then not understood as a wrong in itself but rather as a result of the wrongs of ibsa. Alternatively, it might be that what I refer to as ‘infringing personal integrity’ broadly corresponds to what is meant when the infringement of dignity is suggested as a wrong of ibsa.¹¹ On either of these understandings of dignity, its infringement is not a wrong *in addition* to the wrongs discussed in this thesis, but either overarches all of the wrongs through its connection to the concept of personhood, or is part of the wrong of infringing sexual integrity. The wrongs of ibsa noted in this section are discussed in chapters 5 and 6.

4.3 The role of consent in assessing wrongfulness

4.3.1 Introduction

In this section, I discuss the role of consent towards assessing the nature of the wrong of ibsa. As noted above, I do not consider ibsa’s ‘lack of consent’ when identifying its wrongs. That is because consent is a justification. As such, it is not considered at the time that *prima facie* wrongness is assessed, but at the time that all things get to be considered

¹⁰ See Charles Foster, *Human Dignity in Bioethics and Law* (Hart Publishing 2011), and in correspondence on 2 December 2021. It is beyond the scope of this thesis to offer an analysis of the rich body of literature on the concept of dignity. See e.g. George Kateb, *Human Dignity* (Harvard University Press 2011); Patrick Lee and Robert P George, ‘The Nature and Basis of Human Dignity’ (2008) 21 *Ratio Juris* 173; Christopher McCrudden, *Understanding Human Dignity* (Oxford University Press 2013); Doris Schroeder, ‘Dignity: Two Riddles and Four Concepts’ (2008) 17 *Cambridge Quarterly of Healthcare Ethics* 230; Suzy Killmister, ‘Dignity: Not such a useless Concept’ (2010) 36 *Journal of Medical Ethics* 160.

¹¹ See chapter 5, section 5.3.

(towards determining all-things-considered wrongness).¹² That means that ibsa's *prima facie* wrongs exist quite independently from the fact that there is no consent for the taking, making, and/or sharing of intimate images. Where there is consent for such conduct, there may not be an all-things-considered wrong, in which case it would not be justifiable to *convict*. But: criminalisation and conviction are two different matters.¹³ 'Lack of consent' is not part of what justifies criminalisation. Instead, lack of consent should be considered a relevant part of what may justify conviction.

In chapter 2, I discussed *prima facie* wrongs as 'genuine but defeasible' wrongs.¹⁴ In this section, I consider the meaning of consent. I then consider why justifications are not, and should not be, part of establishing whether there is a *prima facie* wrong. Finally, I discuss how consent may affect the all-things-considered wrongness of taking, making, and/or sharing intimate images to indicate whether 'non-consent' could usefully be included in the *actus reus* or should be treated as a defence.

¹² Taking lack of consent as part of the *prima facie* wrong results in a circular argument: one would first need to determine that Φ -ing requires a justification and that consent could offer it, to then pose Φ -ing without consent as the *prima facie* wrong. However, this fails to acknowledge that the very reason consent is needed is that there is a *prima facie* wrong that consent could have helped justify. As such I hold that where *lack of consent* is considered as part of the *prima facie* wrong, that *prima facie* wrong can also be recognised without such 'lack of consent' precisely because lack of consent is the absence of a justification for a *prima facie* wrong, i.e.: the *prima facie* wrong exists *regardless* of justification.

¹³ See chapter 2, text at (n 32).

¹⁴ Chapter 2, section 2.2.3.4., and Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 *Oxford Journal of Legal Studies* 467.

4.3.2 The meaning of consent

4.3.2.1 Introduction

In this section, I discuss the concept of consent to help clarify how it may justify *prima facie* wrongs. I do this in preparation of my discussion in chapters 5 and 6, where I consider whether the wrongs described *could* be justified by consent, even if, in ibsa, they are not. The topic of consent is far too rich to cover comprehensively within the scope of a single chapter. I therefore merely set out to clarify aspects of consent to support a discussion on whether consent can justify the wrongs of ibsa.

Consent is discussed here as a moral justification that can justify moral wrongs.¹⁵ I do not make claims as to legal understandings of consent.¹⁶ As I considered in chapter 3, I hold that the interpretation of moral concepts is heavily dependent on their foundation: something that is wrongful on atomistic personhood may not be equally wrongful on relational personhood, and vice versa. That also holds for consent: something that might count as consent on atomistic personhood may not count as consent on relational

¹⁵ Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 12. See also Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121; Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others*, vol 2 (Oxford University Press 1985); Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1987); Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol 4 (Oxford University Press 1988).

¹⁶ See e.g. Jonathan Herring et al., 'Proposing a Definition of Consent' (Conversations on Consent, 2021); Vera Bergelson, 'The Right to be Hurt: Testing the Boundaries of Consent' (2007) 75 *The George Washington Law Review* 165; Vera Bergelson, 'Consent to Harm' in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent* (Oxford University Press 2009); Peter Westen, *The Logic of Consent : The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Routledge 2016); Rebecca Williams, 'Deception, Mistake and Vitiating of the Victim's Consent' (2008) 124 *Law Quarterly Review* 132; Jonathan Herring, 'Implied Consent and Vaginal Examination in Pregnancy' in Camilla Pickles and Jonathan Herring (eds), *Women's Birthing Bodies and the Law* (Hart Publishing 2020).

personhood, and something that counts as consent on relational personhood may not do so on atomistic personhood. Ideally, consent would be clarified in terms of the personhood approach that underpins its interpretation. It is beyond the scope of this thesis to offer an extensive evaluation of such variations in understandings of consent.

Broadly, I hold that atomistic consent is a one-sided act that makes subjecting the consenting person to Φ -ing permissible for another person.¹⁷ From an atomistic point of view, this is morally transformative because it respects the subjected person's autonomy (in the sense of self-determination).¹⁸ Relational consent is not a one-sided act, but, like the relationship itself, exists *between* the persons that consent. For relational consent, there only is consent if all involved parties consent. Otherwise, there is no valid consent, and Φ -ing has not been morally transformed (it is still wrongful). I note that it is possible that even where there is valid consent, Φ -ing can be all-things-considered wrongful, for instance where duties require that one does not take up the permission that consent provides.¹⁹

These approaches to consent and the comparison between them need further research. However, for the topic discussed in this thesis there seems to be little practical difference in justification dependent on whether atomistic consent or relational consent is used. That is because ibsa is, by definition, non-consensual, and so consent is no justification for it. In ibsa, the depicted person does not consent to the taking, making, and/or sharing of intimate images. On an atomistic approach to consent, the depicted

¹⁷ Dempsey (n 15), 17.

¹⁸ See chapter 5, section 5.2.2.

¹⁹ See next subsection.

person ('A') would, if they did consent, render 'taking, making, and/or disclosing intimate images of A' a permissible act for person B. On a relational approach to consent, both A's and B's consent to 'taking, making, and/or sharing private, sexual images' is required for consent. On both approaches, ibsa must be understood as non-consensual because the person subjected to ibsa does not (validly) consent.

4.3.2.2 Atomistic and relational consent

One approach to defining consent is set out by Michelle Madden Dempsey.²⁰ She conceives of consent as making conduct permissible towards the consenting person.²¹ That is an atomistic understanding, as discussed below. Understood thus, consent can be a moral justification. Dempsey holds that where B's reasons *not* to Φ are grounded in A's well-being, A's consent for it justifies B's Φ -ing. A question that Dempsey does not explore is whether consent can remedy all such *prima facie* wrongdoing. For example, say A is offered a glass of wine by B. B's reasons not to offer that glass of wine may be that alcohol is toxic and can cause inebriation, which are reasons grounded in A's well-being. A's consent *could* justify B giving them a glass of wine. If I am offered a glass of wine by my friend and accept that glass, this may indeed be true: I have consented to being given something that my friend should not have given me had I not consented, for reasons grounded in my well-being. Now that I have consented, my friend's act would be considered justified because my consent is sufficient to justify the giving of a glass of wine. However, if A is a recovering alcoholic, and B offers them a glass of wine, then A's consent may not be sufficient to justify the giving of a glass of wine, even if it is A's

²⁰ Dempsey (n 15).

²¹ *ibid*, 17.

request to be given the wine. The question is whether A's consent gives B blanket permission to act on it, or whether other reasons need to be taken into account. On an atomistic approach to consent, only A's consent is relevant. On a more relational understanding, the relationship between A and B is relevant in answering that question (see also further discussion of relational consent below). Whether B can rely on A's consent regarding something that may not be altogether 'good' for A (so: reasons grounded in A's well-being) depends on the relationship between A and B. If B is a server in a restaurant, and A is their customer, then B has few relational obligations towards A. Suppose that A orders a glass of wine: B might not be wronging them if they bring A a glass of wine per their request, and with their consent. B acts on A's permission, which could be sufficient for B to avoid wronging A. However, if A and B are close friends (they are in a caring relationship), then A's request for a glass of wine might not be sufficient justification for B to avoid wronging A if B indeed brings A a glass of wine. Where there is a caring relationship, doing something that is not caring can be an infringement of that relationship and, thus, a wrong. In a caring relationship, B should not want to consent to bringing A wine if B knows that A is a recovering alcoholic. That should stand in the way of B's consent to bringing wine, so it should not be possible, in a caring relationship, to consensually bring a recovering alcoholic a glass of wine. If B ignores these concerns grounded in A's well-being and acts purely on A's consent in bringing them wine, that would not be a caring act: B would have to not care about A, their efforts on getting out of an addiction, and the effects that drinking alcohol again might have on A. In such circumstances, acting on A's consent may not be sufficient justification to avoid all-things-considered wrongness because of the relationship between A and B. That is because the caring relationship between A and B is morally valuable, and doing something that is non-caring (that goes against A's well-

being interests) is a wrong that requires strong justification. A's permission need not necessarily constitute a sufficiently strong justification. If there is an established relationship, it is wrong not to care. If there is no established relationship, it is not necessarily wrong not to care. There is no duty to care about all and any others. Just as there is no duty to engage any others in caring relations: it is not an infringement of another person not to engage them in a caring relationship.²² But where a caring relationship has already been established, there is a duty to see the care through. That does not mean that there is an obligation to maintain the relationship forever, but it does mean that even ending a relationship might need to be done with care to avoid wronging the other. Ending a caring relationship with care can include, for example, ending it in a way that does not breach trust and respects the other. Where there is an ongoing caring relationship, to bring a recovering alcoholic a glass of wine is a sign of not caring. It is, therefore, a wrong within that relationship, even if there was consent. While the relationship persists, there is, at the very least, a duty to refrain from non-caring acts against the other. That duty exists even if A momentarily does not care for themselves (in wanting to be brought a glass of wine): B's responsibility of caring for A persists even then.

Dempsey's approach, as 'making conduct permissible', is an atomistic approach to defining consent. That is because consent, as described by Dempsey, is a one-sided act: where there is consent, the person subjected to conduct would be the consenter, and the person doing the conduct would be acting with consent. On a relational approach, all parties involved in *prima facie* wrongful Φ -ing between them ought to consent to that

²² See chapter 5, section 5.3.3.3.

Φ -ing in order for that Φ -ing to be considered consensual. For example, regarding consent for sexual penetration, an atomistic focus would be on whether the person subjected to the penetration consents, and not on whether the person who penetrates consents. There are good reasons to take the consent of the person subjected to penetration very seriously, for instance, because penetration is harmful to the penetrated person or is easily abused.²³ In conduct such as sexual penetration, one person may be more at risk of being wronged than the other, which can mean that extra care should be taken to ensure that they fully consent (have their conditions met, are not deceived, have capacity to consent).²⁴ But that does not mean that the other's consent is irrelevant. Atomistic personhood can sometimes obscure that fact when it only looks at one person's consent at a time. If two people consent, that would be two separate instances of consent, even if those two people are engaging in the same act together. It could even lead to the conclusion that sex was consensual for one party but not the other.

On relational consent, an *act* is either consensual, or it is not. Relational consent focuses on the moral permissibility of the act itself, whereas atomistic consent focuses on the moral permissibility of an act towards the person subjected to it and not on the consent of the person doing the act. The atomistic understanding of consent feeds into the notion that acts are not done together, but done to one another.²⁵ In some cases, this

²³ See Dempsey and Herring (n 14).

²⁴ See also Tom Dougherty, 'Informed Consent, Disclosure, and Understanding' (2020) 48 *Philosophy & Public Affairs* 119; Jonathan Herring and Jesse Wall, 'Capacity to Consent to Sex' (2014) 22 *Medical Law Review* 620; Jonathan Herring, 'Consent in the Criminal Law: The Importance of Relationality and Responsibility' in Alan Reed and Michael Bohlander (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2015).

²⁵ Catharine A MacKinnon, 'Rape Redefined' (2016) 10 *Harvard Law & Policy Review* 431, 440-1.

is not problematic. For instance, in ibsa the depicted person is subjected to conduct. Ibsa is done to them, not with them. That would be understood as such even on a relational approach. In other situations, the language of ‘doing acts to others with their consent’ as opposed to ‘doing consensual acts together’ is less comfortable, for instance when it suggests that sex is done to a person, as opposed to done together. To suggest that one person consents to sex while the other person ‘does’ sex fails to acknowledge that sex is a shared, mutual act, and to suggest that only A or B’s consent is relevant minimises the conditions the other might have for consent. Furthermore, where acts are consensual, atomistic consent belittles the consenting person as someone who is passively subjected to acts.

A relational approach to consent seeks to change the moral status of an act itself: that the act between people is consensual, rather than what atomistic consent does, where, if both consent, the act towards A is permissible for B, and the act towards B is permissible for A. If consent is understood in a relational sense, then, for example, consent for sexual penetration needs to exist *between* A and B. Both persons need to have their conditions for consent met. Neither can be deceiving the other as to meeting their conditions for consent, and both need to have the capacity to consent. This relational approach is not the way consent is usually understood, and I submit that it is beyond the scope of this thesis to analyse what precisely are the morally significant differences between atomistic consent and relational consent.

Consent can only be a justification between A and B: if a third person is affected by B’s wrongdoing, then the wrong towards the third person cannot be justified by A’s

consent.²⁶ One example of a wrong that does not just affect the person who consents is the wrong of reinforcing and being reinforced by systemic inequality (see chapter 6): all members of A's social group are affected by B's conduct, and A's consent cannot justify the wrong on behalf of others.²⁷ It should be noted that if *all* members of a group consent, whether on a relational or on an atomistic understanding, that may make Φ -ing permissible. Regarding infringing equality, however, I would argue that there is no valid consent, even if *all* members of a particular social group consent. That is because consenting to unequal treatment would be consenting to treatment that does not respect personhood. It is the very basis of personhood theory, as discussed in this thesis, that the premise is that all persons are equal. Consenting to treatment that fails to acknowledge the moral equality between persons cannot be valid consent. I do not have space to consider the full scope of the argument here. I am inclined to suggest that this is connected to one's capacity to consent, for example, because capacity to consent may not stretch so far as to include consent to conduct that does not respect the equal moral value of all persons. That is connected to the arguments presented in chapter 5 regarding the ability to be autonomous: it requires strong normative evaluations that include knowing one's own worth.²⁸ If one fails to consider oneself worthy of equal treatment to the extent that one consents to unequal treatment, that is a sign that a person is mistaken. It

²⁶ Dempsey (n 15), 14.

²⁷ See chapter 6, text at (n 15).

²⁸ Capacity to consent may be connected to autonomy. On atomistic personhood, autonomy as self-determination sets few limits to what one can validly decide to do to oneself, and by extension to what one can consent. Relational personhood defines autonomy in light of relational interests, and suggests that where one cannot make strong normative evaluations one is not autonomous. In that line, it can be argued that there is no capacity to consent to conduct that fails to recognise one's equal moral status to others, because it suggests being misguided as to norms, and so suggests there is no strong normative evaluation. See on autonomy chapter 5, section 5.2.

would be a sign of the severity of suppression if a person, or an entire social group, readily accepts unequal treatment because they have internalised the message that they are less valuable than others.

Another limitation to the validity of consent is that consent is only morally transformative of wrongful conduct if B acts *for that reason*.²⁹ That is, if B had acted *regardless* of A's consent, then A's consent is not a justification for B's conduct. That is an important distinction, but it will be difficult to determine in legal practice whether a defendant acted because of the victim's consent (and as such justifiably) or whether they were acting regardless of the victim's consent (and so cannot rely on consent as justification). Nevertheless, there is a distinct moral difference in the all-things-considered wrongness between B, who acted because of A's consent, and D, who acted regardless of consent. This distinction is also considered in respect of the wrong of failing to minimally respect personhood.³⁰

4.3.2.3 A rich understanding of consent

In the wider topic of consent, there is discussion as to what type of consent is sufficiently strong to justify particular Φ -ing.³¹ For instance, there is debate as to whether there is

²⁹ Dempsey (n 15), 23, see also chapter 6, text at (n 24).

³⁰ See chapter 6, section 6.2.2.

³¹ See on implied consent e.g. Herring (n 16); Alan Wertheimer, 'Consent to Sexual Relations' in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent* (Oxford University Press 2009); Rachael Burgin and Asher Flynn, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21 *Criminology & Criminal Justice* 334; Robert B Voas et al., 'Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes' (2009) 40 *Journal of Safety Research* 77; Tom Dougherty, 'Affirmative Consent and Due Diligence' (2018)

such a thing as ‘implied consent’, where someone may have morally transformed the act of being touched by simply stepping onto a crowded train.³² The reasoning is that by boarding a crowded train, one accepts that people may bump into each other and, as such, implicitly accepts that one might be touched. However, implied consent is, at best, a justification for a very limited set of wrongs, if it is a justification at all. Possibly, it is justifiable to bump into someone accidentally on a crowded train for reasons other than their implied consent.³³

Regarding the wrongs derived from taking, making, and/or sharing intimate images, it has been suggested on occasion that there may be implied consent. For example, regarding ibsa with entrusted consensual images where only the sharing is non-consensual, victims have been told that they ought not to have consented to having intimate images taken, and that the sharing of those images was a natural result of their consensual existence.³⁴ That is a form of victim-blaming that relies on implied consent. It

46 *Philosophy & Public Affairs* 90; Michael B Gill, ‘Presumed Consent, Autonomy, and Organ Donation’ (2004) 29 *Journal of Medicine and Philosophy* 37.

³² Unwanted touch is an infringement of the person. There are many degrees of unwanted touch: a person standing on a crowded train may not want to be touched, but there may not be much others can do to avoid a touch (and indeed those others may equally not want to be touched, so that the touch on the train is entirely non-consensual). On unwanted touching in such situations in respect of the definition of battery in England and Wales see *Collins v Wilcock* [1984] 1 WLR 1172. Where there is only a moderate infringement, it is likely to be presumed, in practice, that there are sufficient legally recognised good reasons in favour of the unwanted touch to outweigh the reasons against acting and as such to avoid wrongfulness. The more severe an infringement is, the better reasons a person will have to have to justify their touch. This thesis does not consider justifications other than consent.

³³ Consent is not the only thing that can justify wrongful conduct. However, it is beyond the scope of this thesis to consider other justifications. Consent is included in the present discussion to help clarify its role in the definition of ibsa.

³⁴ See Nicola Henry, Asher Flynn and Anastasia Powell, ‘Policing Image-Based Sexual Abuse: Stakeholder Perspectives’ (2018) 19 *Police Practice & Research* 565; Tahee McKinlay and Tiffany Lavis, ‘Why Did She Send it in the first Place? Victim Blame in the Context of ‘Revenge Porn’’ (2020) 27 *Psychiatry, Psychology and Law* 386; Tegan S Starr

suggests that consent for *taking* images also indicates consent for *sharing* them. I believe this to be misguided: taking, making, and sharing are separate acts, each of which requires justification, for example, through consent.

I would argue that a person ('A') consenting to a serious wrong, such as the wrongs of ibsa (see chapters 5 and 6), can only do so validly if they are well-informed of all the factors that are relevant to their decision, not deceived as to the circumstances or the fulfilment of their conditions for consent, and have capacity to consent. In other words: I hold that A's consent for taking, making, and/or sharing intimate images must be a rich consent in order for it to be a possible justification for the severe wrongs that ibsa constitutes.³⁵ If B acts without care for A (without caring whether or how A consented), that is a wrong and there would not be (relational) consent. Generally, B cannot rely on A's consent if that consent is not well-informed, if A was deceived as to the circumstances or the fulfilment of their conditions for consent, and if B did not act for reasons grounded in that consent.

4.3.2.4 Conclusion on the meaning of consent

In this section, I considered that consent can be understood in atomistic and relational ways and that this affects what is considered consensual. On either understanding, consent makes conduct morally permissible. On atomistic consent, it does this one-

and Tiffany Lavis, 'Perceptions of Revenge Pornography and Victim Blame' (2018) 12 *International Journal of Cyber Criminology* 427.

³⁵ See on rich consent e.g. Jonathan Herring and Michelle Madden Dempsey, 'Rethinking the Criminal Law's Response to Sexual Penetration: on Theory and Context' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law : International and Comparative Perspectives* (Abingdon : Routledge 2010), 35.

sidedly: A's consent makes B's act, to which A is subjected, morally permissible. It tells us nothing about B's consent for the act. On relational consent, consent can morally transform the act itself, regardless of whether it is viewed from A or B's perspective. Consent is commonly understood as making conduct morally permissible. In this section, I noted that on relational consent, there might be other factors that can affect the moral permissibility of conduct. For example, where there is a close relationship between A and B, B might have a duty to maintain that caring relationship and not do something that would negatively impact A, even if A consents to it.

To summarise: consent can be understood in a relational and atomistic way. Further research would be needed to tease out the differences between the two approaches more fully. In this thesis, what is most relevant is that consent can only justify a wrong between consenting people, not third persons.³⁶ I considered that to have valid consent, persons must be fully informed about the factors relevant to their consent, they must not be deceived about the fulfilment of their conditions for consent, and they must have capacity to consent. Furthermore, on my understanding, a person can only legitimately act on another person's consent if these factors apply.

4.3.3 *Prima facie* wrongfulness and justifications

In this thesis, I am concerned with establishing the *prima facie* wrongfulness of ibsa. I consider why justifications are not to be taken into account when establishing *prima facie* wrongness and then consider that consent, as a justification, does not inform the nature of the wrong of ibsa.

³⁶ See chapter 6, section 6.3.

Prima facie wrongness fulfils the wrongness requirement for justified criminalisation. Still, it may not be the way that one usually speaks about wrongs in everyday life or at the trial stage in criminal law: when discussing whether conduct that has already happened is wrongful, it is common to consider whether Φ -ing was wrong in this case (all things considered), or whether it was justified. For example, person A hits person B. If we discuss the wrongfulness, it seems very likely that we will also ask ‘why’ A hit B, which is a question towards assessing whether there are any potential justifications for A’s conduct. If it turns out that A was acting in self-defence, for instance, we might conclude that it was not wrong for A to hit B on this occasion. In other words, when we think about wrongness, in practice, we seem to think about all-things-considered wrongness, not of *prima facie* wrongness. But all-things-considered wrongness is an assessment after the fact: the wrong has already happened, and, as such, it is possible to inquire about any reasons that may help justify the conduct. When Φ -ing’s wrongfulness is assessed at the criminalisation stage, there are not yet any *actual* justifying or excusatory factors because no criminalised Φ -ing can yet have happened.³⁷

When assessing the *prima facie* nature of Φ -ing, it would be misguided to include justifications for such Φ -ing into the definition of the wrong. That is because justifications do not yet matter or exist at the point in time at which *prima facie* wrongfulness is determined.³⁸ As I considered in chapter 2, *prima facie* wrongfulness is concerned only with the wrongfulness of Φ -ing generally for identifying the need for justifications to avoid all-things-considered wrongfulness: *because it is prima facie*

³⁷ See chapter 2 (n 31), on criminalisation before the fact and the principle of *nulla poena sine lege*.

³⁸ See Dempsey and Herring (n 14), 472.

wrongful to hit someone, A needs a justification when hitting B or else is found to commit an all-things-considered wrong. *Prima facie* wrongfulness signals the need for justification and so does not itself take justifications into account to establish whether or not there is a *prima facie* wrong.

An inclination to look for justifications when discussing whether Φ -ing is wrongful is a strong indication of its *prima facie* wrongfulness, namely that it needs a justification because there is conduct that would be (all things considered) wrong if there was no justification. As I discuss below, it is important to explicitly acknowledge such *prima facie* wrongfulness because that is what justifies the criminalisation of conduct, even if, all-things-considered the wrong is justified and the actor should not be convicted.

Prima facie wrongness is not concerned with whether conduct was justified in specific circumstances but rather with whether conduct requires justification in order to be acceptable.³⁹ For ibsa, this means that the wrongness of taking, making, and/or sharing intimate images should be recognised prior to establishing whether there is consent as a justification. That is because failing to acknowledge *prima facie* wrongfulness as genuine wrongfulness obscures that there is a need for justification. If, *prima facie*, it were to be taken into consideration that conduct was consensual, that would fail to acknowledge that the conduct *would be all-things-considered wrongful had it not been consensual*, and that that is precisely the reason why such conduct requires

³⁹ On justifications and excuses see Nicola Lacey, 'Community, Culture, and Criminalization' in Will Kymlicka, Claes Lernerstedt and Matt Matravers (eds), *Criminal Law and Cultural Diversity* (Oxford University Press 2014); Andrew Simester, 'On Justifications and Excuses' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012).

justification (that may indeed come in the form of consent). In other words: if consent were taken to remedy the *prima facie* wrong, that would obscure the fact that there is a need for a justification where there is no consent.

In the next subsection, I consider more fully that if lack of consent is treated as creating the wrong (rather than as a failure to remedy a wrong), then the suggestion is that conduct only requires justification *if there was no consent*. That overlooks that consent is itself a justification. It is only required if conduct is wrongful. That is why wishing someone ‘good morning’ does not require consent, as that is not (normally) wrongful.⁴⁰ Additionally, treating lack of consent as constitutive of the wrong suggests that ‘lack of consent’ is somehow not the norm. It suggests that conduct would be justified unless the person subjected to it does not consent, which places the burden of signalling that there is wrongful conduct on the person subjected to it, rather than on the person doing it. That feeds into victim-blaming: if conduct is treated as ‘normally justified’, the victim is placed under a burden to raise that, on this occasion, the conduct is *not* justified because there is no consent. If conduct is treated as if it were normally not wrongful, then there is no need to seek justification.

4.3.4 Consent does not inform the *prima facie* wrong of *ibsa*

I hold that it is important to recognise *prima facie* wrongs as genuine wrongs. That is because this emphasises that there, there is conduct that requires a justification. By recognising the wrong in that way, the risk of obscuring and minimising wrongs can be

⁴⁰ There may be exceptions in specific circumstances where conduct that is not normally wrongful becomes wrongful because of its context, such as in stalking or harassment.

minimised.⁴¹ That is because when wrongfulness is flagged, it signals the need for a sufficiently strong justification.⁴²

For example, I might say that it is wrong to take someone else's belongings without their consent. But I could also say that it is wrong to take someone else's belongings and that I need a justification, for instance the owner's consent, to do so anyway. The former phrasing obscures the *prima facie* wrongness of taking someone else's things, regardless of whether or not they consent to the taking. The latter phrasing identifies that there is something wrong with taking such things, but that there may be justifications for it.

If non-consent is treated as a defining characteristic of wrongfulness (as in the first phrasing), that obscures the fact that *prima facie* wrongs are genuine wrongs and, as such, hides that this wrong is why there is a need for justification. The example of taking someone's things may be considered common sense ('of course it would be wrong to take them'). The relevance and importance of not obscuring *prima facie* wrongfulness might better be exemplified by Φ -ing that is less readily recognised as wrong and, as such, less readily acknowledged as being the type of Φ -ing that one would need a justification for. I suggest that one such example may be found in 'ibsa with sharing consensually accessible images in breach of the depicted person's conditions for consent for access'.⁴³ This form of ibsa uses images that may, under different circumstances, be shared with the depicted person's consent. As such, whether or not such sharing is

⁴¹ Dempsey and Herring (n 14).

⁴² See chapter 2, section 2.2.1.

⁴³ See chapter 1.

justified in a particular case is heavily dependent on whether the depicted person's conditions for consent were met. But if the wrongness is not recognised *other than in an explicit circumstance of non-consent*, the question of whether *conditions* for consent were met may not even be considered: there is no explicit non-consent, and so if wrongfulness were to be dependent on such explicit non-consent, where consent is contentious or conditional, wrongfulness may not be recognised. Indeed, this type of ibsa is often excluded from criminalisation and legislative action, which could suggest that it is not recognised that the *only* reason that consensually sharing intimate images avoids being an all-things-considered wrong is that the depicted person consents.

'Lack of consent' is not in itself a wrong, but rather a failure to offer consent as a justification for a *prima facie* wrong.⁴⁴ Ibsa is, by definition, non-consensual. That means that consent is not a justification for the wrongs of ibsa. Where there is consent for taking, making, and/or sharing intimate images, there simply is no ibsa because ibsa's definition is not met. While ibsa is, by definition, not justified through consent, the wrongness of ibsa does not depend on the non-consensual part of the definition. Rather, the 'non-consent' that is part of the definition of ibsa is a way to distinguish it from consensual wrongs that occur in, for example, pornography. Where there is consent for the full process of taking, making and/or sharing the depicted person is subjected to, there would not be *ibsa*. There might instead be consensual pornography. As I identify the nature of the wrong of taking, making, and/or sharing of intimate images 'pre-consent', taking the presence (or lack) of consent as a defining distinction between ibsa and pornography suggests that there is substantial overlap between the *prima facie*

⁴⁴ Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26 *National Law School of India Review* 62, 64.

wrongs of pornography and the *prima facie* wrongs of ibsa. I do not claim to assess the full scope of wrongness of pornography, which may encompass additional wrongs. However, I do hold that the wrongs identified here as *prima facie* wrongs of ibsa are also *prima facie* wrongs of pornography. The difference between pornography and ibsa, in that regard, is that ibsa is, by definition, non-consensual, whereas pornography is not. That means that some of the *prima facie* wrongs of taking, making, and/or sharing intimate images may be justified by consent in pornography, but not in ibsa. For ibsa, where all aspects of the conduct are non-consensual, the all-things-considered wrongness is the same as the *prima facie* wrongness (barring any other type of justification, which are not considered in this thesis).⁴⁵ For example, in ibsa, where the images are taken or made with consent but shared without consent, part of the *prima facie* wrongness may be justified (the wrongness that is affected by taking or making intimate images), but another part of the wrongness persists (the wrongness that is affected by sharing).

The presence of consent in something such as pornography may help justify *prima facie* wrongs, so that there may not be an all-things-considered wrong. However, as I discussed in chapter 2: *prima facie* wrongs are genuine wrongs, and even if they are justified, for example, through consent, that justification does not remove the wrongful nature of the conduct entirely.⁴⁶ That is important in order to recognise the need for

⁴⁵ See e.g. the assessment that there might be a public interest, for example in the case of US politician Katie Hill: Seema Mehta, 'Katie Hill ordered to pay \$220,000 in Attorneys' fees in Revenge Porn Case' *Los Angeles Times* (2 June 2021). I am not convinced that public interest can generally be a justification for *showing* images when the message in which the public has a legitimate interest may also be conveyed by other means and in a less infringing way (see on the argument that only the least wrongful course of conduct could be justified also chapter 2, text at (n 84)). Certainly, where ibsa is an absolute wrong there cannot be a justification, regardless of the level of interest to the public.

⁴⁶ Chapter 2, section 2.2.3.4, and Dempsey and Herring (n 14), 471.

justification. As *prima facie* wrongfulness is the type of wrongfulness relevant for justifying criminalisation, consent is not a relevant factor in establishing wrongfulness towards justified criminalisation.

4.3.5 Consent as part of the *actus reus*

Considering the justificatory power of consent moves towards a discussion of all-things-considered wrongness, which is what is considered at the time of prosecution. However, even at the criminalisation stage the power of consent needs to be considered (just not in light of *prima facie* wrongness). If the law were to aim to address both pornography and ibsa in criminalisation, then ‘non-consent’ might function as an aggravating factor by which it would be acknowledged that a particular type of justification was absent. On ibsa, ‘lack of consent’ does not create the wrong, but rather ‘lack of consent’ indicates that there is no justification in the form of consent. Consent is thus not part of what defines the nature of the wrong of ibsa. In the context of criminalisation, it may still be relevant to consider lack of consent as an aggravated form of consensual Φ -ing and incorporate it into the *actus reus* if it is considered prudent to attach weight to the absence of that specific type of justification. In this section, I address some considerations regarding the inclusion of consent into the *actus reus*.

The way consent features in the elements of an offence signals something about whether or not the criminalised conduct is understood as *normally* justified. The absence of consent as part of the *actus reus* suggests that the criminalised conduct is normally deemed to have happened with consent, whereas if consent is a justification for whatever is described in the *actus reus*, then the criminalised conduct seems to be considered to

normally happen without consent.⁴⁷ For example, the English and Welsh criminal law criminalises rape as non-consensual penile penetration. The burden of proof that there was no consent is on the prosecution, and this suggests that the ‘usual’ course of action is that there is consent for penile penetration. However, while penile penetration *can* be consensual, it certainly is not true that it would *usually* be consensual: people do not tend to go through life with a general presence of or willingness to consent to sex, but only consent to it in limited cases and circumstances. Therefore, I would argue that ‘consent for penetration’ is an exception to a person’s normal state. I hold that consent for sex should be treated as ‘normally absent’ rather than ‘normally present’ to offer a more accurate reflection of norms regarding consent for penetration.

By putting non-consent in the *actus reus* of an offence, the *prima facie* wrongful nature of the criminalised conduct is obscured, and the suggestion is raised that this conduct is only wrongful because it was non-consensual. Presenting ‘lack of consent’ as part of the *actus reus* suggests that the absence of consent is an exception, rather than the norm. That consent is an exception could be reflected in law by moving from lack of consent in the *actus reus* to consent as a defence. One example of an offence where consent is signalled to be considered ‘normally absent’ is battery: consent is a defence, but the *actus reus* can be fulfilled even if there was consent.⁴⁸

To summarise, where the law seeks to address both consensual and non-consensual Φ -ing but wants to indicate that Φ -ing without consent is more serious, it could adopt

⁴⁷ See e.g. *ibid*, 468.

⁴⁸ Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (10 edn, Oxford University Press 2022), 322.

one offence that criminalises Φ -ing generally, and an additional offence that criminalises non-consensual Φ -ing as an aggravated form. However, if Φ -ing without consent is not a criminal offence, then there may be little use for including ‘non-consent’ into the elements of the offence (i.e. as part of the *actus reus*). Yet, this does happen in practice. For example, in the English and Welsh law on sexual offences, lack of consent is part of the *actus reus*, rather than ‘presence of consent’ as a defence. That significantly affects the burden of proof regarding consent: if lack of consent is part of the *actus reus*, then the burden of proof is on the prosecution. If ‘consent’ is a defence, then the burden of proof is on the defendant. I suggest that unless lack of consent is part of an aggravated offence (i.e. where there also is an offence that criminalises Φ -ing without reference to whether or not there was consent), including ‘non-consent’ in the *actus reus* normalises the criminalised conduct as consensual and places an unfair burden of proof on the prosecution.

4.3.6 Conclusion

In this section, I discussed that consent can make conduct morally permissible, but it need not necessarily do so. I held that for consent to be valid, persons must be fully informed about the factors relevant to their consent, they must not be deceived about the fulfilment of their conditions for consent, and they must have capacity to consent.

I further considered that (lack of) consent is not relevant for considering *prima facie* wrongness because consent is a justification. It only comes into play at the stage where all things are considered, not *prima facie*. Consent does not define the *prima facie* wrong of criminalised conduct, but it may help justify such wrongs. Where consent is a justification, there can be ‘*prima facie* but not all-things-considered wrongs’. Consent is

discussed in this thesis to help clarify which aspects of ibsa are particular to it, and which wrongs exist regardless of consent.⁴⁹ In chapter 5, I discuss the wrongs of taking, making and/or sharing intimate images that may be justified through consent. The wrongs of ibsa discussed in chapter 6 cannot be justified by consent. Taking ‘non-consent’ as part of the definition of ibsa merely indicates that this is conduct for which there is no justification in the form of consent. It does not, and could not, indicate that the wrong is *caused* by lack of consent – it just is not remedied by consent.

4.4 Chapter conclusion

In this chapter, I considered that the wrongs of ibsa are the infringement of autonomy, sexual integrity, privacy, free speech, trust, reinforcing and being reinforced by systemic inequality, and potentially the failure to minimally respect personhood. These wrongs are discussed in the next two chapters.

I further considered that justifications are not taken into consideration as part of *prima facie* wrongfulness (i.e. the wrongness needed to justify criminalisation the assessment). That means that consent, or the lack thereof, is not part of what informs the *prima facie* wrongness of ibsa. I noted that the inclusion of non-consent into the *actus rei* of offences may obscure the *prima facie* wrongfulness of criminalised conduct. It could also imply that presence of consent is the norm. Inclusion of non-consent in the *actus reus* mostly seems appropriate where legislators seek to adopt an aggravated form of an offence that is defined without lack of consent in its *actus reus*.

⁴⁹ Wrongs that persist with consent are also wrongs of consensual pornography.

I then considered the meaning of consent to help identify what wrongs of ibsa may be justified. The wrongs discussed in chapter 5 could all be justified by consent. In chapter 6, I discuss the wrong of failing to minimally respect personhood, which is not a wrong that can be justified, and so consent does not affect its all-things-considered wrongness. In chapter 6, I also consider the wrong of reinforcing and being reinforced by systemic inequality, which is a wrong that cannot be justified by consent because it affects the subjected person's entire social group, not just consenting parties. Notably, ibsa is defined as non-consensual, and so if all aspects of ibsa are consented to (i.e. the taking, making, and/or sharing of intimate images), then there is no ibsa. Ibsa can, by definition, not be justified through consent.

CHAPTER 5: IBSA'S WRONGS TO PERSONHOOD INTERESTS

5.1 Introduction

With this chapter, I begin my discussion of wrongs of ibsa. Unless explicitly stated otherwise, I am referring to *prima facie* wrongs wherever I discuss wrongness in this chapter and the next. I consider each of the wrongs of ibsa on an atomistic interpretation and on a relational interpretation. This is based on the approaches to personhood discussed in chapter 3, where I held that the infringement of the moral status of personhood is a moral wrong. By identifying how ibsa infringes personhood, I identify its moral wrongness. I do not offer a human species membership-based interpretation because, as noted in chapter 3, I do not find that such an approach to personhood identifies a moral value and so it does not offer tools for interpreting moral wrongs against persons. Atomistic personhood and relational personhood both identify a protected aim (rather than fact) and can be used to guide the interpretation of moral wrongs.

This chapter discusses five wrongs of ibsa: infringing autonomy, infringing sexual integrity, infringing privacy, infringing free speech, and breaching trust. The discussion of these wrongs is combined in this chapter because they are derived from personhood interests. That can be juxtaposed to the wrong of failing to minimally respect personhood discussed, where it is not *interests-as-aspects* that are infringed, but personhood altogether, as well as to the wrong of reinforcing and reinforced by inequality, where all members of one's social group are wronged as opposed to subjective persons. These wrongs are discussed in chapter 6.

The wrongs discussed in this chapter are discussed individually. For each wrong, I start with an interpretation of the meaning of the personhood interest. I then offer discussions of the wrong as interpreted on atomistic and relational personhood. For the first four wrongs in this chapter, I find that the wrong exists on both accounts, though more prominently so on a relational approach to personhood. Regarding the wrong of ‘breaching trust’, I consider that it may not be possible to conceive of it as a wrong against the person on an atomistic understanding of personhood, but it would be found as a wrong on relational personhood.

5.2 The wrong in ibsa of infringing autonomy

5.2.1 Introduction

In this section, I address the wrong of infringing autonomy that may materialise through ibsa. I present a discussion of the moral wrong of infringing autonomy as interpreted on an atomistic approach to personhood versus a relational approach to personhood. I consider what might be a way to conceive of a corresponding legal wrong and conclude that ibsa can be an infringement of autonomy both on atomistic personhood and relational personhood. However, I find that the wrong can be more fully recognised on a relational approach to personhood.

5.2.2 Atomistic autonomy

5.2.2.1 Introduction

In this section, I discuss the moral wrong of infringing autonomy as materialising in ibsa. I present a discussion of this wrong as interpreted on an atomistic personhood

perspective and as on a relational personhood perspective. For each approach, I will first set out what ‘autonomy’ means on that approach to personhood and then offer a suggestion as to how autonomy might be infringed on that approach to personhood.

5.2.2.2 Atomistic understanding of autonomy

The atomistic definition of autonomy is self-determination.¹ Self-determination as a conception of autonomy reflects the idea that people are individuals, free to make their own decisions.² As discussed in chapter 3, atomistic personhood takes autonomy as a marker of the highest moral value.³ As such, the infringement of autonomy, that is: the restriction of a person’s self-determination, should be considered a very serious wrong against the person.

¹ This is sometimes described as an ‘authenticity approach’ to autonomy (James Stacey Taylor, ‘Introduction’ in James Stacey Taylor (ed), *Personal Autonomy : New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005); Gerald Dworkin, ‘Acting Freely’ (1970) 4 *Noûs* 367. This individualistic approach to autonomy has been criticised for being an unrealistic notion of human nature. See Linda C McClain, ‘“Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence’ (1992) 65 *Southern California Law Review* 1171; Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1993), 17; Jonathan Herring, ‘Relational Autonomy and Rape’ in Shelley Day Sclater et al. (eds), *Regulating Autonomy Sex, Reproduction and Family* (Hart Publishing 2009), 54.

² In this sense ‘self-determination’ and its rise as a defining characteristic of personhood (during Enlightenment) may be understood as a response to authoritarianism. See e.g. John Stuart Mill, ‘On Liberty’ in Mary Warnock (ed), *Utilitarianism and On Liberty : Including Mill’s ‘Essays on Bentham’ and Selections from the Writings of Jeremy Bentham and John Austin* (Blackwell Publishing 1962), 88. See also on atomism as a response to authoritarianism that it focuses on individuals, rather than treating ‘people as members of their class’, e.g. clergy, nobility, commoners (see e.g. David Parker, *Class and State in Ancien Régime France : The Road to Modernity?* (Routledge 1996), from 111).

³ See chapter 3, section 3.3.

A circumstantial part of self-determination is liberty. Self-determination (autonomy) requires both that a person has negative liberty (freedom from outside interference), as well as positive liberty (the liberty to act freely).⁴ Joseph Raz exemplifies this by demonstrating that a man in a pit might be free from interference (he has negative liberty) but has no positive liberty, as there are options to choose from.⁵ ‘Lack of options’ is not (positive) freedom. Raz considers that autonomy requires ‘adequate choice’ and ‘variety of choice’.⁶ Having positive liberty means having genuine options. While autonomy requires options, it is not necessary, in order to be autonomous, that *all* and any options are genuine options.

If the essential aspect of personhood is considered ‘autonomy’, then “‘protecting citizens” autonomy lies at the heart of any liberal society’.⁷ On atomistic personhood, protecting autonomy is the best thing a state can do to protect personhood. The theory of atomistic personhood allows for absolute self-determination. Mill notes specifically ‘that individuals be free to act in accordance with their own desires and agency, subject only to the restriction that, in so doing, they do not impede the freedom of others to do the same.’⁸ That is at the foundation of the modern day’s understanding of persons as ‘equal’. Persons are equal, so their autonomy is also equal — their autonomy is even

⁴ See on the concepts of positive and negative liberty generally Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press 1958).

⁵ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986), 374-5.

⁶ *ibid*, 374.

⁷ Vanessa Munro, ‘Sexual Autonomy’ in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014), 747; also referred to as ‘the shade of John Stuart Mill’, Nicola Lacey, ‘Beset by Boundaries: The Home Office Review of Sex Offences’ [2001] *Criminal Law Review* 3, 5.

⁸ Munro (n 7), 747.

what defines them as persons. However, this causes conceptual problems: if all persons have equal rights to self-determination, then there is a problem where two persons want the opposite with regards to each other.⁹ Jed Rubenfeld gives an example of such conflicting wills (also discussed in the section on sexual integrity below), in which he presents ‘John’s desire to have sex with Jane’ and ‘Jane’s desire not to have sex with John’ as irreconcilable if both equally exercise autonomy.¹⁰ John and Jane cannot both act autonomously without impeding on the autonomy of the other.

Where there is a clash such as the one between John and Jane in this example, it is unavoidable that one person’s autonomy will be infringed. Just looking at atomistic autonomy it is not apparent who should suffer that infringement: John’s and Jane’s autonomy are equally valuable. If one would only use the concept of autonomy, there would be no clear solution to the clash.¹¹ Where there is a clash of autonomous wills, it is unavoidable that the very quality that entitles to the highest moral value will be infringed

⁹ Mackenzie and Stoljar identify five types of feminist critique on autonomy which they label Symbolic, Metaphysical, Care, Postmodernist, and Diversity critiques, in: Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy : Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000), 7-11.

¹⁰ See Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 *The Yale Law Journal* 1372, 1418; and for further discussion of Rubenfeld’s argument section 5.3.3.4. What is described here is also very much an issue of bodily integrity and not just of autonomy. Integrity is more inherently part of personhood than autonomy, but where personhood is defined by autonomy that distinction is very minimal: on atomistic personhood, integrity is negative autonomy, and takes prevalence over positive autonomy. On relational personhood, integrity is defined separately from autonomy and more readily distinguished from it, see section 5.3.3). Where there is an autonomy clash, integrity can be used to help resolve the clash because integrity is a more fundamental part of personhood, see text at (n 80). See also on integrity and autonomy Jonathan Herring and Jesse Wall, ‘The Nature and Significance of the Right to Bodily Integrity’ (2017) 76 *The Cambridge Law Journal* 566.

¹¹ See section 5.3.3.4 for a discussion on resolving such a clash.

for at least one person: there is no way to resolve such a clash without infringing at least one person's autonomy in the sense of self-determination.¹²

5.2.2.3 The wrong in ibsa of infringing autonomy on atomistic personhood

Ibsa, as the use of an image rather than of the physical body, is not a very serious infringement of autonomy on atomistic personhood. That is because, on atomistic personhood, images are separate from the person. A person's ability to make decisions is not impacted by the fact that an image of them is taken, made, or shared. Images are not part of what defines a person, and, as such, abuse of images is not a direct infringement of the person or their interest in self-determination. On atomistic personhood, the person is defined in terms of mental capacities and contained by their body.¹³ Nevertheless, a moderate infringement of autonomy through ibsa may be found on atomistic personhood.

One reason why an autonomy infringement can be found in moderation is that images, as a reference to the person, may be conceived of as 'information relating to the person'. Taking, making and/or sharing images would then be separate from the atomistic person but still related in a secondary capacity because it is information about them. In the same way as disclosing one's income is subject to autonomy rights, disclosing images would also be: it is an infringement of autonomy rights on an atomistic approach if those types of 'information' are disclosed. Images of a person are not an inherent part of them, nor their self-determination. Images are external to the self.

¹² See on sexual autonomy also Green who holds that a right stretches only so far as it does not clash with the same right of others, Stuart P Green, *Criminalizing Sex : A Unified Liberal Theory* (Oxford University Press 2020), 20-1.

¹³ See chapter 3, section 3.3.2.

Neither income nor images are part of the atomistic person and, as such, do not constitute a direct infringement of the person. Possibly, the atomistic person may claim that it is part of their self-determination interests to decide about information that concerns them. Phrased that way, ibsa could be understood as a rather minimal infringement of atomistic autonomy because the conduct constituting ibsa is not conduct that is considered to inherently infringe the person. That is because it leaves them unimpeded to act as they wish and to make decisions. By contrast, a punch causing a broken arm may interfere with their ability to execute self-determined plans.

On atomistic personhood, an image can be conceived as a second-degree aspect of the person: not directly part of it, but still closely related, and something by which a person may be affected. Taking, making, and/or sharing images in ibsa is an infringement of autonomy to the extent that information is taken, made, and/or shared. That information should be subject to the self-determination of the person it concerns. This layered, stepping-stone approach is necessary because images are not directly part of the person and so not directly subject to the depicted person's autonomy.

Secondly, it is possible to conceive of a moderate autonomy infringement in ibsa on atomistic personhood in terms of a restriction of positive liberty by looking at others' responses to ibsa that the depicted person is confronted with. For example, if victims are fired from their job, or not hired to a job, or otherwise stopped from exercising self-determination *as a result* of ibsa, this could be considered a type of second-degree wrong. Autonomy is infringed, not because of ibsa itself (which on atomistic personhood is not a direct infringement of the person), but because of what happens after: the depicted person may have fewer options and so may suffer a decreased level of positive

liberty. Despite the really harmful effects of such autonomy infringements, I label this a moderate wrong on atomistic personhood.¹⁴ That is because atomistic personhood cannot take into account relational aspects of wrongs, as it simply has no tools by which to appreciate such infringements as wrongs against the person. That someone may face social exclusion as a result of ibsa can thus not be taken into account in gauging ibsa's wrongfulness on atomistic personhood. Because of this, the restriction of positive liberty that may be closely connected to social exclusion cannot be fully appreciated.¹⁵

A person subjected to ibsa will not be as free to do what they want as others and, as such, is restricted in their self-determination. That can, for example, be recognised through the evidence of victims losing jobs.¹⁶ The responses to that recording and/or disclosure can be understood to limit the depicted person's autonomy, though in a constructive sense. This way, a moderate infringement of autonomy can be recognised on atomistic personhood.

5.2.2.4 Conclusion

On atomistic personhood, autonomy should be understood as self-determination with positive liberty. Ibsa can then be seen as a moderate infringement of autonomy. The infringement of 'self-determination' effected by ibsa mainly lies in the limitation of freedom to self-determine *after* ibsa has been committed, as opposed to an infringement

¹⁴ See for severity of harm Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 1, and chapter 2, section 2.2.2.5.

¹⁵ See on restricted liberty also harms of ibsa *ibid*, 15.

¹⁶ Clare McGlynn, Erika Rackley and Kelly Johnson, *Shattering Lives and Myths : A Report on Image-Based Sexual Abuse* (Durham University; University of Kent 2019).

through ibsa in itself. That is because the images used in ibsa are not considered truly part of the person but, at most, ‘information regarding the person’. That means they are something in which a person has a secondary interest, but there is no direct infringement of them as a person.¹⁷ The autonomy that is infringed in ibsa, on atomistic personhood, is that a decision about private information was not subject to that person’s autonomy, as it should have been.¹⁸

5.2.3 Relational autonomy

5.2.3.1 Introduction

In this section, I discuss the moral wrong of ibsa of infringing autonomy from a relational personhood perspective. I first set out my understanding of autonomy on relational personhood as conceived by Stoljar and Mackenzie. I then consider how ibsa constitutes an infringement of that autonomy.

5.2.3.2 Relational understanding of autonomy

Autonomy, on a relational approach, is understood as ‘normative authority’.¹⁹ It is not feasible to understand it in the meaning it has on atomistic personhood, where autonomy is self-determination. That is because, on relational personhood, social conditions are not external to the person, and the self necessarily involves others. Self-determination, on a

¹⁷ I consider this issue too at the infringement of privacy in section 5.4.

¹⁸ See Stuart Green’s assessment of sexual images as subject to autonomous decision in the section on sexual integrity, Green (n 12), 20.

¹⁹ Catriona Mackenzie, ‘Relational Autonomy, Normative Authority and Perfectionism’ (2008) 39 *Journal of Social Philosophy* 512, 513.

relational approach to personhood, would involve determining part of others, as they help enact the self.²⁰ That means that complete self-determination actually infringes others when considered from a perspective of relational personhood.²¹ Absolute self-determination is theoretically impossible on relational personhood, as the ‘self’ involves ‘others’.²² On atomistic personhood, I pointed at theoretical difficulties with the notion of self-determination, but there it is (despite challenges) at least theoretically possible for everyone to have absolute self-determination.²³ That is not the case on relational personhood. Catriona MacKenzie and Stoljar note

‘relational autonomy’ is an umbrella term, designating a range of related perspectives ... premised on a shared conviction that persons are socially embedded, that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.²⁴

On relational personhood, autonomy needs a different definition than ‘self-determination’, which is where ‘normative authority’ comes in. Normative authority means that conduct that affects persons is subject to those persons’ authority (or

²⁰ See chapter 3, section 3.5.3, and Miriam Kyselo, ‘The Body Social: An Enactive Approach to the Self’ (2014) 5 *Frontiers in Psychology* 1.

²¹ A related issue was identified above that clashing wills necessarily infringe someone’s personhood on an atomist approach, text at (n 12).

²² The exception where self-determination would be possible on relational personhood is the example of the hermit who has completely removed themselves from society after establishing a sense of self. See chapter 3, section 3.5.5 at iii).

²³ Text at (n 10).

²⁴ Mackenzie and Stoljar (n 9), 4.

authority on their behalf if they lack capacity).²⁵ If a person lacks capacity, for example, because they are a young child, authority would be exercised on their behalf by others who are part of their selfhood, such as their parents. Such authority should be exercised with care and should not neglect the child's subjectivity. That means that decisions made on behalf of a child should be — insofar as possible — discussed with the child, and, where appropriate, the child's wishes could be taken into account.

In my discussion on relational selfhood in chapter 3, I pointed at some of the feminist concerns on relationality: excessive deference to others ('self-abnegation'), 'adaptive preference formation', and appearing 'to self-consciously adopt (what are alleged to be) practices of oppression'.²⁶ Those concerns are particularly relevant to exercising autonomy because they suggest that a person lets others decide for them instead of governing their own decisions. The worry is that relationality legitimises paternalistic control over others. Relational autonomy (understood as normative authority) should help relieve some of that worry because of the requirements it makes on the subjective person's involvement in the decisions that concern them.²⁷ Stoljar explains relational autonomy and its requirements through four main themes.²⁸ These are i) that the self is relational; ii) that persons are self-interpreting; iii) that autonomy

²⁵ See on best interest assessments generally Jonathan Herring, *Medical Law and Ethics* (Oxford University Press 2018), 217-22.

²⁶ Natalie Stoljar, 'Feminist Perspectives on Autonomy' in Zalta EN and Nodelman U (eds), *The Stanford Encyclopedia of Philosophy* (Winter edn, Stanford University 2018).

²⁷ For example, if someone subjects, without reflection, to another person's will, they may have done so willingly but it would not be considered an exercise of autonomy on a relational account. That may qualify as autonomy on an atomistic account.

²⁸ Natalie Stoljar, 'Informed Consent and Relational Conceptions of Autonomy' (2011) 36 *Journal of Medicine and Philosophy* 375, 376; drawn from the work of Charles Taylor, *Philosophy and the Human Sciences* (Cambridge University Press 1985).

requires both negative and positive liberty; and iv) that that autonomy requires strong evaluation, that is: ‘capacity to make distinctions using a vocabulary of worth among desires’.²⁹ I go through these elements one by one to consider what is entailed by them.

i) The self is relational

The first element of relational autonomy is part of what was discussed in chapter 3.³⁰

There, I considered that the self is relational because it enacts in relations with others. On relational personhood, persons are defined as those beings engaged in caring relations. That is what I understand as ‘the self is relational’, and which fulfils the first element of relational autonomy identified by Stoljar.

ii) Persons are self-interpreting

The second element of relational autonomy was also discussed in chapter 3, namely that persons are self-interpreting.³¹ I described this in chapter 3 as the self-self relationship: from relations with others develops a sense of self, and a being with a sense of self can identify itself. That need not be a uniform identity — persons have different identities in different circumstances, for example, as a parent they are different than as their parent’s child, as a teacher they are different than as their friends’ friend, and so on.³² Recognising oneself as a self, as having particular identities, is self-interpretation and constitutes the second element of relational autonomy recognised by Stoljar.

²⁹ Stoljar (n 28), 377-80.

³⁰ See chapter 3, section 3.5.3.

³¹ See chapter 3 text at (n 93).

³² A person can have as many identities as he has relationships, see William James, *The Principles of Psychology* (Harvard University Press 1983), 281-2. This is further discussed as developing a sense of self, in the next section on privacy, text at (n 117).

iii) Autonomy requires negative and positive liberty

The third element of relational autonomy, as considered by Charles Taylor and Stoljar, is that positive liberty is necessary to enable ‘self-realization’.³³ On a relational account, negative liberty (‘freedom from interference’) is not sufficient to exercise autonomy.³⁴ In chapter 3, I considered that the self may develop in a field of tension between engaging with and distinguishing from others.³⁵ The act of ‘distinguishing’ may be understood as a form of negative liberty: to be free from interference by others. That was presented in chapter 3 as a necessary but not sufficient requirement for self-enactment. ‘Distinction’ is necessary so that there is something that can be recognised as a subject that is separate from others (rather than a large body of persons who have merged together so fully that they cannot be distinguished).³⁶

Self-enactment requires such distinction, but it also requires engagement with others. That engagement can be part of positive liberty: the freedom to engage with others. That freedom is essential for enabling the subject’s balancing of ‘engaging’ and ‘disengaging’: negative liberty only facilitates ‘disengaging’, which is not sufficient for self-enactment on relational personhood. It should be noted that freedom to engage with

³³ Stoljar (n 28), 379.

³⁴ Berlin (n 4).

³⁵ See chapter 3, section 3.5.3.

³⁶ Note here the similarities between pre-liberal, pre-atomistic thought and the hints towards class thinking that are suggested by critics of relational personhood: I noted above (text at n 2) that atomistic personhood was a strong response to authoritarian regimes. In relational personhood there is a worry that the person is defined by the other, and does not have individual qualities that enable recognising them as an individual. In a sense, that would be reminiscent of the pre-enlightenment structure of society. However, I think this overlooks the way the self is enacted: it is not *only* about engaging with others, it is also about disengaging from them and maintaining a balance between those two wherein a sense of self can be developed.

others is subject to those others' freedom not to engage with a person. In the discussion of the next wrong of ibsa, I consider integrity as negative liberty, whereas autonomy can exist both as negative and positive liberty. Positive freedom cannot be guaranteed at all times, particularly where it might interfere with negative liberties of others (e.g. negative autonomy or integrity).³⁷ Nevertheless, states should aim to facilitate positive liberty as much as possible.

As considered in the discussion on atomistic autonomy, positive liberty requires that a person has genuine options.³⁸ Regarding the relational person, that might mean that a person has genuine options for engaging with others.³⁹ However, Raz notes that not all options need to be genuine options in order to have positive liberty.⁴⁰ That is an important notion on relation autonomy because others do not have an obligation to engage you just because you would like them to: just because someone refuses to engage with another does not mean that that other's positive liberty is so infringed that they should be considered to have none.⁴¹ Rejection is not detrimental for the self because while the self requires relations to enact, it does not require any *particular* relations.⁴²

³⁷ See on integrity the next section, 5.3.3.

³⁸ Text at (n 5).

³⁹ That is one reason to argue that the prisoner in solitary confinement discussed in chapter 3, section 3.5.5 at iii), is subjected to treatment that cannot be reconciled with relational personhood.

⁴⁰ Raz (n 5), 374-5.

⁴¹ That is quite separate from any harm that may be cause through rejection. For example, social rejection can cause physical harm, as well as pain to the relational self, see Naomi I Eisenberger, 'Why Rejection Hurts: What Social Neuroscience has Revealed about the Brain's Response to Social Rejection' in J Decety and J Cacioppo (eds), *The Oxford Handbook of Social Neuroscience* (Oxford University Press 2011).

⁴² This is an issue of self-enactment and touches on what I call 'integrity' in section 5.3.3.3. See also on breach of trust in this context section 5.6.4.

The issue is more serious if *all* people refuse to engage with a particular person. A very lonely person may not suffer active interference with their ability to relate to others, but somehow they became isolated and so do not have positive liberty to engage (lack of genuine options is not positive liberty). In such a case, ‘lack of engagement’ *could* be considered an infringement of the self, and could be considered absence of positive liberty. That is because a completely isolated person does not have opportunity for essential engagement (they lack options).⁴³ If social isolation gets so severe that there is no engagement with a person at all, this may be too much of a limitation of their positive liberty. In such cases, there can be a question whether there is a duty on states to remedy such isolation.⁴⁴

In addition to external obstruction of positive liberty (e.g. not having genuine options), Taylor holds that positive liberty may be infringed by internal obstacles.⁴⁵ He considers that a person is ‘not free if you are motivated, through fear, inauthentically internalized standards, or false consciousness, to thwart your self-realization.’⁴⁶ One example of such internal obstructions may be found in harmful social norms that have

⁴³ See also text at (n 84).

⁴⁴ See Kimberley Brownlee, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford University Press 2020). However, note the problematic claims of ‘incels’ (term referring to (online) groups of men claiming to be involuntary celibate) that the reason they are misogynistic is that they are rejected by women. They may claim to be socially rejected, but that should not be confused with what I have in mind here: incels have a social network and relations, which means they are not so socially isolated that their isolation would be a wrong against them. Incel groups themselves are networks of relations that could help maintain their personhood. See Roberta Liggett O’Malley, Karen Holt and Thomas J Holt, ‘An Exploration of the Involuntary Celibate (Incel) Subculture Online’ (2022) 37 *Journal of Interpersonal Violence* NP4981; Anastasia Powell and Lisa Sugiura, ‘Resisting Rape Culture in Digital Society’, *The Routledge International Handbook of Violence Studies* (Routledge 2018).

⁴⁵ Taylor (n 28), discussed in Stoljar (n 28), 379.

⁴⁶ Taylor (n 28), 215-6.

been internalised, for instance where a woman agrees her husband's choices or wishes are worth more than hers.⁴⁷ Such internalisation may (particularly on an atomistic approach) *look* like the exercise of autonomy in conditions of positive liberty. After all: on atomistic autonomy, if a person chooses freely, they have made an autonomous decision. One of the worries for relational autonomy is that it, too (because of its emphasis on relationships) would find the 'deferential wife' to be autonomous. However, per Taylor and Stoljar, it can be explained that this would not actually be considered an exercise of autonomy on a relational approach.⁴⁸ One reason is that the oppressive standards that she has internalised would restrict her positive liberty to the extent that she does not have any genuine options but to defer to her husband. That is not positive liberty. As autonomy requires positive liberty, it is not autonomy either. The second reason why the deferential wife would not be regarded as having made an autonomous decision is discussed below as the requirement of the ability to make strong normative evaluations.

iv) Autonomy requires strong evaluation

The fourth point addressed by Stoljar is that a person is only autonomous if they are capable of strong evaluation. On an atomistic account of autonomy, a person who internalises harmful norms can easily meet the requirements of autonomous decision-making, despite choosing to subject themselves to harmful conditions. 'The Deferential Wife' who submits to her husband willingly is an example of where there is no or limited

⁴⁷ Stoljar (n 26).

⁴⁸ *ibid*; Susan E Babbitt, 'Feminism and Objective Interests: The Role of Transformation Experiences in Rational Deliberation' in Linda Martín Alcoff and Elizabeth Potter (eds), *Feminist Epistemologies* (Routledge 1993), 248.

evaluative action, but where there would be autonomy on an atomistic account: ‘No one is trampling on her rights, she says; for she is quite glad, and proud, to serve her husband as she does.’⁴⁹ She seems to exercise self-determination, and so, on atomistic personhood would be considered autonomous. On atomistic autonomy, the deferential wife is autonomous, because she exercises self-determination: she decides to let her husband decide on her behalf.⁵⁰ However, on relational autonomy, choices made based on internalised oppressive standards are not autonomous if those standards are not subjected to strong normative evaluation by the person who submits to them. That means that the deferential wife *could* be regarded as autonomous on a relational approach, but only if she has genuine options (above) and subjects the standards to which she submits to a strong evaluation. For example, if a person submits to oppressive standards because they think they are worth less than their partner, that could not be reconciled with the equal moral value of persons and should not be part of autonomous liberties.⁵¹ If they evaluate the norms they are subjecting to and have genuine other options, then choosing the course of conduct in line with what would be oppressive social standards might be an autonomous decision on relational personhood too. I would argue that those social standards might then no longer be oppressive.⁵² In practice, it will be difficult to assess whether someone acts a certain way because they are culturally expected to or because they genuinely would choose that option (even where cultural norms that suggest it as the correct option would not exist). This is a point where the regulation and facilitation

⁴⁹ Thomas E Hill, *Autonomy and Self-Respect* (Cambridge University Press 1991), 5-6.

⁵⁰ Babbitt (n 48), 250.

⁵¹ Persons cannot be free to find themselves worth less than others. That is because, although it may appear to only affect themselves, it affects the general principle that all persons are equally valuable. See chapter 6, section 6.3 on equality.

⁵² In patriarchal societies this may need to be understood as a theoretical point.

of positive liberty is challenging: if a choice is considered ‘unfree’ because of internalised oppressive standards, that can look a lot like overriding a person’s own choice. The challenge is to distinguish between paternalism for the sake of control (which could not be easily reconciled with positive liberty) and paternalism that is used as a tool to free someone from oppression despite their own hesitancy (which could be reconciled with positive liberty on a relational account).

In chapter 3, I noted an issue connected to the present discussion on autonomy: while relations are essential for self-enactment, not all relations are equally good. I distinguished, therefore, between relations that can help establish self-enactment and relations that are what personhood seeks to value: any type of relationship can give rise to self-enactment, but only caring relations give rise to personhood. The infringement of a *non-caring* relationship is not an infringement of personhood because personhood does not protect such relationships. For autonomy, that would mean that interfering in a non-caring relationship is not an infringement of the personhood interest of autonomy. Only the infringement of caring relations constitutes a wrong against personhood. Where a non-caring relationship is infringed, that may even be in the interest of personhood. For example, where a person was being abused and (e.g. as a result of that abuse) thinks of themselves as worth less than their partner, interfering in that relationship could help facilitate placing someone in a position where they can better give rise to personhood values (i.e. engage in caring relations and recognise their own value and equality).

If an abused person does not make strong normative evaluations (and has positive liberty) regarding staying in their relationship, then interfering with that relationship is not understood as an infringement of autonomy on a relational account. That person

lacks autonomy regarding that relationship: they are unable to make a strong normative evaluation regarding it. That does not mean they have altogether lost autonomy: they may well be able to make strong evaluations on other matters. It is not entirely uncontroversial to say that a person who tolerates being abused cannot do so autonomously: the law's tradition of taking an atomistic view on personhood (and rights derived from it) means that a lot of value is attached to individuals' choices, even if those choices have very negative effects on those persons. The relational approach is sometimes criticised for being paternalistic because it leaves room for circumventing a person's choices in order to place them in a situation in which they can properly engage in caring relations (again). On a relational approach, removing someone from domestic violence — even if that person says they want to stay — is in the interest of their autonomy. That is because autonomy is understood not as self-determination but as normative authority, which may not be present in circumstances of domestic abuse.

A relationship in which the equal moral value of participants to the relationship is not recognised may not be a caring relationship if it lacks a minimum level of respect. If that argument is accepted, then the relationship is outside the scope of personhood protection. There would not be autonomy (as a personhood interest) where there is no relationship that is protected by personhood. A situation in which persons are treated as less morally valuable cannot be part of caring relations because it goes against the purposes of personhood, and so is not protected by it. As such, getting someone out of a situation in which they are treated as less morally valuable, even if they chose to be in that situation, is not an infringement of the personhood interest of autonomy on a relational approach.

It is autonomy-enhancing, on a relational approach, to facilitate circumstances in which a person can engage in caring relations and be treated as morally equal.⁵³ As personhood does not protect abusive or otherwise non-caring relations, the infringement of such relations is not recognised as a wrong against the person. As such, relational autonomy does not legitimise the control of partners or others that one is in a close relationship with. It may, however, legitimise — only for the purposes of enabling caring relations — interference with what a person may claim to want for themselves, but which is not the result of a strong normative evaluation made in circumstances of positive liberty. That means that relational personhood is much better suited for explaining why there is no infringement of autonomy when the state interferes in, for example, domestic violence than an atomistic personhood. Relational personhood does not cover abusive or otherwise bad relationships, and so no infringement of personhood interests exists where there is an infringement in such relationships. The relational aspect of relational personhood and relational autonomy cannot be (ab)used to justify the suppression and domination of others. Just because others may be involved in making decisions does not mean that relational autonomy supports or legitimises suppression. Relational autonomy only exists where a person can do a strong normative evaluation in circumstances of positive liberty, and engaging in non-caring relations is a sign that relational autonomy was not exercised.

⁵³ For discussion of the wrongs of coercive control and advancement of autonomy through interfering in abusive relationships see Shazia Choudhry and Jonathan Herring, 'Righting Domestic Violence' (2006) 20 *International Journal of Law, Policy and the Family* 95.

5.2.3.3 *The wrong in ibsa of infringing autonomy on a relational approach to personhood*

On relational personhood, ibsa is a serious infringement of autonomy. That is because a person's image is part of their personhood and, as such, is a tool by which they engage in and maintain relationships. In the discussion of ibsa as an infringement of autonomy on atomistic personhood (above), it was an issue that images are not part of the person on that approach to personhood. This issue does not exist on relational personhood because images are considered *part* of the person on relational personhood: anything that reflects me to others is part of me and vice versa.⁵⁴ Use of someone's image should be subject to their autonomy as normative authority. As such, ibsa constitutes the *prima facie* wrong of infringing autonomy, raising the need for identifying whether someone was able to exercise their normative authority.⁵⁵

Secondly, ibsa restricts positive liberty: where ibsa reduces a person to a sexual object that limits their autonomy by giving one context in which they must act.⁵⁶ They no longer have the option to present themselves in a certain way to one person and a different way to another. They are not able to decide what aspects of themselves to make accessible to others. Furthermore, a person subjected to ibsa cannot be sure who has seen their image and may worry that everyone has, which could affect how they themselves relate to others. Autonomy requires positive liberty (genuine options), which is limited

⁵⁴ See chapter 3, section 3.5.4.

⁵⁵ Ibsa, by definition, is an infringement: without consent there cannot be normative authority. Where there is consent, there can be normative authority, but there need not necessarily be. I argue that the infringement may persist even where there is consent if such consent does not meet the requirements that relational personhood puts on autonomy.

⁵⁶ This is one of the areas of harm identified in Clare McGlynn et al., 'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2020) *Social & Legal Studies* 541, noted in chapter 2, section 2.2.2.5.

by ibsa. I hold that ibsa is an infringement of autonomy both in the sense that it fails to respect a person's normative authority over themselves (autonomy) and that it restricts a person's positive liberty.

5.2.3.4 Conclusion

Autonomy, on relational personhood, is defined as normative authority exercised with positive liberty. Ibsa is a *prima facie* infringement of such autonomy because images are considered part of the person on a relational approach and, as such, ought to be subject to a person's normative authority. While infringing autonomy is a *prima facie* wrong that could be justified by consent, on ibsa, by definition, it is not. Secondly, ibsa limits relational autonomy because victims find themselves with fewer options than they had before they were victimised, for example, when employers do not offer jobs, or when they are fired, or ousted from their communities. It means that ibsa infringes the positive liberty of the depicted person.

5.2.4 Framing the wrong in a legal context

I note briefly that the infringement of autonomy is protected against in liberal democracies by a vast body of laws. It is beyond the scope of this thesis to identify and analyse them all. I limit myself to pointing at the provision contained in the European Convention of Human Rights ('ECHR'), in article 8: that article holds that persons have a right to autonomy. Where ibsa is recognised as an infringement of autonomy, there is nothing to suggest that it should not be considered an infringement of the right contained in this article, but the degree to which the legal wrong of infringing article 8 ECHR will

be found does depend on the approach to personhood used to interpret the right.⁵⁷ I also note that the article is phrased widely and also contains the right to private life, which is discussed below.⁵⁸ As such, it does not, in a legal sense, offer tools by which to distinguish between an infringement of autonomy and an infringement of privacy.

5.2.5 Concluding autonomy

In this section, I have set out that ibsa can constitute the moral wrong of infringing autonomy both on an atomistic understanding of personhood and a relational understanding of personhood. As images are not part of the person on an atomistic understanding of personhood, the moral wrong of abuse through images on that account is less strong than it is on relational personhood where images are readily recognised as part of the person. Both accounts of personhood recognise the importance of positive liberty and options for effecting genuine autonomy, whether understood as self-determination (on atomistic personhood) or as normative authority (on relational personhood). Ibsa can be seen to limit the depicted person's positive liberty and, as such, restrict their autonomous capacities.

⁵⁷ I note that autonomy is usually specified further, see (n 102) on 'sexual autonomy'. On the *general, unspecified* aspect of autonomy contained by article 8, some limitations follow from case law: limit the right to autonomy: the right to 'personal autonomy does not cover every public activity a person might seek to engage in with other human beings', such as fox hunting with dogs (Council of Europe and European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights : Right to Respect for Private Life, Home and Correspondence* (2020), §233; *Friend and Others v the United Kingdom* Application nos 16072/06; 27809/08 (ECHR, 24 November 2009),). However, there are only a few cases considered under a *general, unspecified* right to autonomy.

⁵⁸ See section 5.4.

I hold that the moral wrong of ibsa on an atomistic approach to personhood would be regarded as lack of autonomy over information relating to a person, but not as an infringement of the person themselves. On atomistic personhood, ibsa does not interfere with the self because images are not part of the self. As such, it is not a primary infringement of the personhood interest in autonomy on atomistic personhood. On atomistic personhood, autonomy is defined as ‘self-determination’, and images are not an inherent part of the person. For that reason, the infringement of autonomy is limited on that account: self-determination is infringed because the depicted person could not exercise self-determination with regards to *information* about themselves, and in terms of positive liberty a person’s options may be limited, for example when employers decide not to employ them because of ibsa.

On a relational approach to personhood, autonomy rights stretch beyond self-determination over one’s body. Persons are part of each other’s selves when conceived as relational beings. That is why complete self-determination for one person would infringe on an other’s capacity to do the same. For that reason, autonomy, on a relational approach to personhood, is understood as having normative authority over the self. Ibsa infringes this right, as a depiction is part of the person, and so that person is entitled to normative authority over what happens to/with such images. Ibsa is also an infringement of positive liberty on relational personhood because it restricts a person’s genuine options for engagement with others. On relational personhood, the infringement of autonomy would be more severe. That is because ibsa is a direct infringement of the person (as images are part of what reflects a person to others and, therefore, part of their personhood). Therefore, the infringement of relational autonomy through ibsa is not

‘merely’ an infringement of self-determination about personal *information* but rather a direct infringement of the person and their autonomy as normative authority.

5.3 The wrong in ibsa of infringing sexual integrity

5.3.1 Introduction

In this section, I discuss the wrong of infringing sexual integrity as materialising in ibsa. I first set out what I mean by ‘sexual’. I then consider the meaning of integrity on atomistic personhood versus relational personhood. I then offer a discussion on whether sexual integrity can be considered to have been infringed in ibsa on atomistic and relational personhood.

5.3.2 The meaning of ‘sexual’

Before I discuss the moral wrong of infringing sexual integrity, I consider the meaning of ‘sexual’. The meaning of the term sexual has been notoriously difficult to define.

Dictionary definitions are indeed mostly circular, for example, where sexual is defined as

- a. Relating to, tending towards, or involving sexual intercourse, or other forms of intimate physical contact
- b. Of or relating to sexuality as a social or cultural phenomenon; regarding sexual conduct.
- c. Characterized by sexual instincts or feelings, or the capacity for these;

possessing or displaying sexuality.⁵⁹

Moreover, what is meant by ‘sexual’ in academic work, varies between disciplines (i.e. what is meant by ‘sexual’ is different in law from what is meant by it in e.g. psychology or pedagogy). Because I am concerned in this thesis with identifying the moral wrongness of ibsa for the purposes of justifying and informing the label of its criminalisation, I find it appropriate to draw from the legal understanding of ‘sexual’ in my clarification of the term here.

Guidance on the legal definition of ‘sexual’ could be derived from, for example, the criminal law of England and Wales in s.78 Sexual Offences Act 2003. This provision suggests that something can either be inherently sexual or sexual because of its context.⁶⁰ This definition is circular because it contains the term it aims to define. What it conveys is that, for the law, Φ-ing can be sexual because it is inherently sexual, or it is sexual because its circumstances make it sexual. It does not tell us what ‘sexual’ is. Nevertheless, this provision helps demarcate the scope of the application of the Sexual Offences Act 2003 to that which is perceived as sexual, either inherently or because of its circumstances.

A very similar problem is encountered in defining pornography, likely for similar reasons, namely because there is no clear definition of ‘sexual’. In the context of pornography Justice Potter Stewart suggested that it may not be possible to define it, but

⁵⁹ Oxford English Dictionary, “*sexual*, *adj. and n.*” (Oxford University Press 2022).

⁶⁰ s.78 Sexual Offences Act 2003.

that ‘I know it when I see it’.⁶¹ It seems then that the best the law has been able to offer is an imprecise approach to defining ‘sexual’. It may be that this is the best the law *will* be able to do, because ‘sexual’ is a subjective experience: an act could be sexual for V but not for D, or could be experienced as sexual on one day and not the next.⁶² Turning a subjective concept into something that is objective involves some imprecision, and not all subjective experiences will be reflected in the objective definition.

The subjectivity of sexuality is echoed both by atomistic theorists and relational theorists: Nicola Lacey suggests that ‘The ultimate trespass on the liberal legal subject’s sexual personhood is that his sexuality is appropriated without his consent’ and that ‘sexuality is an area of human experience in which the body is vividly implicated’.⁶³ Yet, she also considers that sexuality is marked by values of ‘self-expression, connection, intimacy, relationship’ and risks ‘violation of trust, infliction of shame and humiliation, objectification and exploitation’, which is not typically part of a liberal understanding of personhood (atomistic personhood).⁶⁴ Both on atomistic personhood and relational personhood, sexuality is considered an intimate aspect of the person and their identity.⁶⁵

⁶¹ *Jacobellis v Ohio* 378 US 184 (1964), [concurring judgment of Justice Potter Stewart], [concurring judgment of Justice Potter Stewart].

⁶² See also text at (n 66).

⁶³ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998), 112, 106.

⁶⁴ *ibid*, 110. Atomistic personhood has difficulty including these aspects of sexuality within an understanding of personhood.

⁶⁵ See on sexuality as part of identity e.g. Leslie J Moran, *Sexuality and Identity* (Ashgate 2006); Eric A Heinze, *Sexual Orientation: A Human Right : An Essay on International Human Rights Law* (Martinus Nijhoff 1995), 157; on the development of sexuality as part of developing the self, see Gargi Bhattacharyya, *Sexuality and Society : An Introduction* (Routledge 2002), 8; on sexuality as an integral part of identity see Malorie G Parker and Matthew K Yau, ‘Sexuality, Identity and Women with Spinal Cord Injury’ (2012) 30 *Sexuality and Disability* 15, 16; Dikaïos Sakellariou, ‘If not the Disability, then what? Barriers to Reclaiming Sexuality Following Spinal Cord Injury’ (2006) 24 *Sexuality and*

Sexuality does not *inherently* require a special status.⁶⁶ However, in liberal democracies, ‘sexuality’ is typically treated as something of particular meaning. That affects, for example, standards of who one’s sexuality can appropriately be shared with, or that criminalisation of conduct infringing on sexual integrity triggers a particular label. Whether something is considered sexual varies between people, and even for the same person an act might feel sexual one day and not do so the next.⁶⁷ What is considered ‘sexual’, and its status in society, varies between cultures.⁶⁸ The status sexuality has in liberal democracies may have a problematic history. Note, for instance, the colonial aspects of protecting the ‘purity’ of white women, in particular, by raising ‘sexuality’ to a higher status.⁶⁹ Nevertheless, it cannot be denied that sexuality *has* a special status in liberal democracies, even if one may argue that it should not have it.

Disability 101; on sexual identity as belonging Nayan Shah, ‘Sexuality, Identity, and the Uses of History’ in Alvin Eng (ed), *Q & A Queer And Asian: Queer & Asian In America* (Temple University Press 1998).

⁶⁶ See on asexuality and identity Anthony F Bogaert, ‘Asexuality and Autochorissexualism (Identity-Less Sexuality)’ (2012) 41 *Archives of Sexual Behavior* 1513; on asexuality and identity e.g. Sarah M Steelman and Katherine M Hertlein, ‘Underexplored Identities: Attending to Asexuality in Therapeutic Contexts’ (2016) 27 *Journal of Family Psychotherapy* 85. Particularly in a highly sexualised society, the absense of a strong sexual identity may be a substantial part of their identity.

⁶⁷ That supports the suggestion that sexuality is part of the self and bodily mediated, rather than experienced by the self because the body experiences a certain sensation. What is sexual can vary: for the person themselves and from person to person: it is not a bodily sensation per se, in the sense that hot, cold, pain, and comfort are bodily sensations. Sexuality is not merely bodily.

⁶⁸ See on sexuality and culture e.g. Patricia Caplan, *The Cultural Construction of Sexuality* (Psychology Press 1987); Jeffrey Weeks, ‘Sexuality and History Revisited’ in Lynn Jamieson and Helen Corr (eds), *State, Private Life and Political Change* (Springer 1990).

⁶⁹ See Anne McClintock, *Imperial Leather* (Routledge 1995).

5.3.3 The meaning of integrity

5.3.3.1 Introduction

In this subsection, I set out the meaning of integrity on an atomistic approach and on a relational approach. I then offer some considerations regarding the connection (or lack thereof) between integrity and autonomy and discuss how perceiving someone may infringe their integrity.

Integrity is fundamental to personhood both on an atomistic and a relational approach. Integrity, as the core of personhood, is defined by autonomy on atomistic personhood. On relational personhood, integrity is defined as the tension between distinction and participation. ‘Being engaged’ has the potential to disrupt that tension. ‘Not being engaged’ does not: there is no infringement.

5.3.3.2 Atomistic integrity

On an atomistic understanding of personhood, integrity is a form of negative autonomy. The dictionary meaning of integrity is that something is in an unimpaired condition.⁷⁰ When applied to personhood, I understand this as an unimpaired condition of *that which entitles to personhood*. On atomistic personhood, that is ‘being autonomous’. That is why, on atomistic personhood, integrity is negative autonomy: this personhood is defined by autonomous capacities, and freedom from interference with autonomous capacities maintains integrity. For integrity, the quality that entitles to personhood should not be

⁷⁰ ‘The condition of not being marred or violated; unimpaired or uncorrupted condition; original perfect state; soundness.’: Oxford English Dictionary, “*integrity, n.*” (Oxford University Press 2022).

infringed. Positive autonomy is not part of integrity, as it covers the freedom to do, rather than freedom from infringement.

The definition of integrity indicates that integrity is the unimpaired state of something, and an infringement of negative freedom results in a more severe impairment than the infringement of positive freedom, which does not directly alter someone's state from 'uninfringed' to 'infringed'. As these definitions are very similar, confusion may easily arise. Indeed that is what I think happens in Rubenfeld's example on sexual autonomy (discussed below), where he fails to distinguish between John's positive autonomy and Jane's negative autonomy.⁷¹ Nevertheless, I submit that, on atomistic personhood, personal integrity is the same as negative autonomy.

5.3.3.3 Relational integrity

On relational personhood, integrity is quite separate from autonomy. I consider the integrity of the self on relational personhood to be the tension between 'engaging' and 'disengaging'. A person's integrity should be considered 'infringed' if they are being engaged without having a say, and if they are being disengaged in an almost absolute way (e.g. social exclusion, solitary confinement). For disengagement to be a disruptive interference of the balance between engaging and disengaging, it would have to be very severe, such solitary confinement or severe bullying. Otherwise, a person would not be disrupted by lack of engagement. On relational personhood, a person's integrity is infringed if they are not engaging or disengaging, but are nevertheless being engaged or

⁷¹ Rubenfeld (n 10). See section 5.3.3.4.

disengaged. It means they cannot maintain the balance between engaging and disengaging that makes up their selfhood.⁷²

Respect for a person requires treating them with respect for how they navigate the engagement and distinction in which their selfhood is enacted. Because relational personhood is defined by caring relations, the integrity of the being entitled to personhood is understood here as freedom from *being engaged* without the subject *engaging*. That means that if someone touches me when that is not part of my navigating my relationship with them, I am being engaged, but I am not engaging. An infringement of integrity exists where there is a relational act without the reciprocity of relationships. There, what happens to me is an other-I engagement rather than part of an I-you relationship. When a person cannot navigate which engagements to enter into and which not to (e.g. because they lack the necessary capacities), then their integrity should be guarded on their behalf in their best interest.⁷³

The full scope of the concept of personal integrity on a relational account does not just refer to the integrity needed for maintaining the balance between engagement and distinction. The body enables engagement in the relations that enact our ‘selves’. As

⁷² For persons without perceivable selfhood those who decide on their behalf need to decide in such a way as they consider best for the tension between engaging and disengaging. See on best interest: Herring (n 25), 217-22.

⁷³ In some cases that might be virtually impossible to navigate a best interest assessment. For example, is it in the best interest of a person with severe cognitive disabilities to engage in a sexual relationship, or would it be better to decide that there should be no engagement? It seems particularly challenging to determine on behalf of someone else whether their sexual integrity would be served by or infringed through deciding on their sexual relations. See on a closely related topic the question whether there is capacity to consent to sex Jonathan Herring, ‘Mental Disability and Capacity to Consent to Sex: A Local Authority v H [2012] EWHC 49 (COP)’ (2012) 34 *The Journal of Social Welfare & Family Law* 471.

such, it is essential for our relations, for our bodies are what we use to interact with the world.⁷⁴ It is what Kyselo calls the ‘interface for connection’.⁷⁵ Bodily integrity is part of personal integrity.⁷⁶ I would consider, more generally, that respect for human rights necessitates respect for personal integrity, though, as noted, I do not think it is possible to conceive of a right to personhood or personal integrity (such a right would be impossible to guarantee and too wide to be practical).⁷⁷ Using the example of autonomy, Herring and Jesse Wall note that respect for autonomy *requires* respect for bodily integrity. That supports the relational claim that integrity can exist without autonomy, but the reverse is not possible. A person can have bodily integrity even if they lack mental capacity and cannot have autonomy. Herring and Wall conclude on that basis that autonomy and integrity must be separate constructs.⁷⁸ Their discussion is focused specifically on bodily integrity: they hold that the body, as a person’s interface with the world, requires integrity. I add that the same is true for the person who is mediated through that body: a disruption of the tension between ‘engaging’ and ‘disengaging’ could be understood as an infringement of personal integrity. The self requires integrity: without it, a self could not maintain the relations that help enact it.

⁷⁴ See Herring and Wall (n 10), 577.

⁷⁵ Kyselo (n 20), 12.

⁷⁶ See e.g. Marie Fox, Michael Thomson and Joshua Warburton, ‘Embodied Integrity, Shaping Surgeries and the Profoundly Disabled Child’ in Chris Dietz, Mitchell Travis and Michael Thomson (eds), *A Jurisprudence of the Body* (Palgrave Macmillan 2020).

⁷⁷ See chapter 3, text at (n 28), and Octávio Luiz Motta Ferraz, *Health as a Human Right : The Politics and Judicialization of Health in Brazil* (Cambridge Studies in Law and Society, Cambridge University Press 2021).

⁷⁸ This is not uncontested and that goes back to the debate on integrity versus autonomy referred to above. See also Herring and Wall (n 10), 583.

I considered in chapter 3 that a reflection of the self, such as my body, but also my image or my name, can be used to infringe the self.⁷⁹ Here, it is important to distinguish between the body as our tool for perception, and the body (among other means) as a tool to be perceived by others: while it may be true that we need our bodies to become aware of an infringement of the self, that does not mean that that infringement would necessarily be an infringement of bodily integrity. For example, an online profile on social media may be used to reflect the self to others. As I set up my Twitter account, I use my body to navigate the mouse and the keyboard and the browser, but my body is not that which is perceived by those who interact with me online. They recognise me by my name, my picture, and my handle. Should my account be hacked, or should someone make a very similar profile under my name, I may suddenly be perceived as saying all sorts of things I have not said nor intended to say. Particularly if those are not the kinds of things I would normally be expected to say, the misrepresentation of me online could affect my relations with others who may think poorly of me for having said or done something: I may not really have said or done it, but I am nevertheless perceived as having said or done it. I consider this an infringement of personal integrity. I would not become aware of such an infringement until I see it, or hear about it, or in some other way use my body to take in information that tells me that this has happened.

‘Integrity’ is a quality that is necessary for personhood: for example, the body needs integrity because it is a person’s interface to connect with the world. Without the body, there would be no relations to maintain and no highest moral status. Similarly, personal integrity is necessary for that person to be able to maintain their relations and

⁷⁹ Chapter 3, section 3.5.4.

position themselves in those relations the way they want. Conversely, autonomy is not necessary for maintaining relations. Many caring relations are maintained between persons where at least one has not got autonomy rights: for instance, young children and cognitively severely disabled people all engage in caring relations (for which they need integrity) without having full autonomy rights.⁸⁰

5.3.3.4 *Autonomy and integrity*

On relational personhood, Rubenfeld's example of John wanting to have sex with Jane but Jane not wanting to have sex with John values Jane's position as the stronger one: if she gets her way, no one's integrity is infringed, even if John cannot exercise his autonomy as he would like.⁸¹

Autonomy, both on atomistic and on relational personhood, is an interest that serves personhood and cannot rightfully be used to infringe its foundation (i.e. the person). Where autonomy infringes personal integrity, personal integrity takes prevalence.⁸² While both atomistic personhood and relational personhood recognise an interest in autonomy for personhood, on atomistic personhood it is a much more important interest than it is on relational personhood. That is because atomistic personhood is defined by autonomy; relational personhood is not. On atomistic

⁸⁰ See Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person sends Notes from the Battlefield' (2009) 40 *Metaphilosophy* 606.

⁸¹ Rubenfeld (n 10), 1418. See chapter 4 (n 32).

⁸² There is no autonomy without integrity, but there can be integrity without autonomy. The minimal protection of the relational self is its integrity, and autonomous rights can be attributed secondarily.

personhood, it would be virtually impossible that integrity can exist without autonomy because the person (and their integrity) is defined by autonomy. That would mean that an infringement of autonomy would automatically be considered an infringement of integrity. On atomistic personhood, John, if he does not get his way, suffers an infringement of personal integrity and autonomy, but not one of bodily integrity. Jane's position would be marginally stronger than John's, as Jane would suffer an infringement of bodily integrity, in addition to infringed personal integrity and autonomy. That can be contrasted to the relational approach, where John cannot be considered to have suffered an integrity infringement at all:

A relational approach to personhood separates the concepts of integrity and autonomy more fully: any person needs integrity, which has to do with respect for their personhood and what defines it (caring relations), and autonomy can contribute to integrity but is not essential for it. That means that neonates and severely disabled people are entitled to integrity as much as any other person, even if they lack autonomy rights or capacities. It also means that an infringement of autonomy, such as one suffered by John if he does not have sex with Jane, would not be considered an infringement of his integrity: he is not being engaged or disengaged. He simply cannot engage the way he would like to, but this (particularly if not all-compassing) does not interfere with his ability to maintain the tension between engaging and disengaging that makes up his selfhood. That tension is not externally being disrupted, and so there is no infringement of his integrity. On the other hand, if Jane is raped by John, she suffers both an infringement of personal and bodily integrity as well as an infringement of autonomy. Engaging a person without touching them can be an infringement of their personal integrity, but not their bodily integrity. I argue below that this is what happens in ibsa.

When images are used, they are engaged but not physically touched. The infringement of sexual integrity on relational personhood is ‘to be sexually engaged without governing that engagement’.

There is a distinction between ‘engaging and disengaging’ and ‘being engaged’ and ‘being disengaged’. I have noted that for disengagement to count as an infringement of integrity, it would have to be very severe.⁸³ ‘Being engaged’ (without reciprocity) can be an infringement of negative liberty and an infringement of the person. For instance, subjecting someone to sexual acts against their will denies their subjectivity and/or rights. It signals ‘you are not the kind of being whose consent is morally relevant to me or whose views affect my reasoning.’ Refusing to engage in sexual activity with another person does not send that message. This is one reason why, on relational personhood, Jane’s position from Rubinfeld’s example is so much stronger than John’s. A lack of engagement usually means a lack of infringement (bar for extreme circumstances such as solitary confinement or in the course of bullying). On relational personhood, the self is understood to enact through ‘engaging’ and ‘disengaging’. However, lack of a particular participation will not ‘dissolve the self’, nor will it disrupt the tension between engagement and disengagement that makes up the self. The self is enacted through engagement with ‘others’ (plural) and would only fail to (continue to) be enacted if all people everywhere always would refuse to engage.⁸⁴

⁸³ See section 5.3.3.3.

⁸⁴ One might argue that extreme loneliness is an infringement of personal integrity and as such construct the argument that the state ought to act against it. See on a right to be social generally Brownlee (n 44).

That said, the tension that makes up the self may be disrupted by a severe act of ‘being disengaged’, which is an infringement of personal integrity. When one thinks of the self as enacted in a tension between ‘engaging’ and ‘disengaging’, then (non-)engagement that is subject to the self does not disrupt that tension.⁸⁵ However, *being* engaged or disengaged (in a non-reciprocal manner) can disrupt the tension that makes up a person’s selfhood. That is a violation of the self: an infringement of that person’s integrity. Where that violation is of a sexual nature, it could be particularly severe, as sexuality can be a very intimate aspect of selfhood.

5.3.3.5 *Infringing integrity through perception versus thinking about a person*

‘Being perceived (sexually) may be an infringement of the integrity of the perceived person, as opposed to ‘being thought of (sexually) without tools for perception’, which is not an integrity infringement. On relational personhood, ‘being perceived’ is a way in which integrity can be infringed, and I hold that this, indeed is part of what happens in *ibsa*. Perceiving another person happens, for example, by seeing their physical body. But it could also be done through any other reflection of them, such as a photo or their

⁸⁵ An argument could be made that denial of sexual acts is a form of social exclusion that damages the relational self. Such an argument overlooks that for the self to be successfully enacted it is not necessary to have relations with any one person in particular. Nevertheless, someone might argue that their self-enactment is hampered through the lack of opportunity for engaging in sexual relations. The question is whether, if a person claims that sexual relations are essential for their self-enactment, they have been wronged if they cannot find someone willing to engage them in sexual activity. See on this issue also the topic of ‘incels’ noted in (n 44). It is questionable that sexual engagement could be part of such a right. See on the positive right to sexual relations the case of *A Local Authority v C & Ors* [2021] EWCOP 26. In first instance the Court skirted the question whether article 8 ECHR provides a positive right to sex. This case turned on discrimination of disabled people, i.e. if non-disabled people can visit sex workers then disabled people should also have opportunity to do so. On appeal it was held that article 8 ECHR does not provide a positive right to sex, and so the state does not have a duty to facilitate sexual relations, see *The Secretary of State for Justice v A Local Authority & ors* [2021] EWCA Civ 1527 at [53].

name.⁸⁶ The perceived person's reflection is part of their person because it enables relations: because you can be perceived, others can perceive you and engage with you. Without such reflection, be that the body, a picture, a name, or even an avatar, one person could not be distinguished from another, and their selfhood could not develop.⁸⁷

To clarify the difference between perception-with-thought and thought-without-perception, I distinguish between two types of cases. The first is 'having sexual thoughts about another person'. The second is 'sexual thought about another person, triggered by perceiving that person'.⁸⁸

The relevant difference is that 'perceiving someone' uses a tool, and 'thinking of someone' does not. More importantly, the tool that is used to trigger thought is *another person*, which is a form of objectification.⁸⁹ Perception is different from thought-not-triggered-by-perception. The tool-that-is-used-for-perception is external to the person who uses it, unlike thought. For example, I cannot see what someone else is thinking. They might tell me, but their thought does not exist without or outside them. If someone used an image to trigger thought, I could see that same image for myself. So while we

⁸⁶ Chapter 3, section 3.5.4.

⁸⁷ Chapter 3, section 3.5.3.

⁸⁸ It should be noted that there is an issue here regarding proof. If someone privately thinks of another person while looking at an image of them, that may be understood as an infringement of the other. However, if no one ever discovers the infringement it seems that, in practical terms, it would be impossible to hold them accountable for such wrongdoing. Not all perception of another person would be an infringement of them. 'Thought triggered by perception' can be distinguished from 'perception without thought', e.g. mindless staring. Perception without thought, to my mind, means that there is no engagement (and no 'use' of another person) with that which is being perceived.

⁸⁹ See e.g. the act of perceiving as objectification in the scenario of looking through a keyhole in Jean-Paul Sartre, *Being and Nothingness* (Methuen&Co LTD 1957). On objectification see also chapter 6, section 6.2.2.2.

might, for example, disagree on whether an image is of a sexual nature, we can at least agree that we are looking at the same picture.⁹⁰ So, one person might use an image to trigger sexual thought, and even if another person might not think of that same image as ‘sexual’, they could agree that it is the same image, and that when they use this image they use exactly the same tool. The same does not go for thought. Thoughts can be described to me, but I can never be certain when painted a ‘word picture’ that what I imagine the other is thinking is precisely the same thing that they are thinking of. That is what I mean by the idea that perceiving something refers to something that is external to the self, whereas thinking is internal only.

‘Perception’ and ‘thought’ can coincide, for instance, when ‘that which is perceived’ (e.g. a body or a depiction of a body) is used as a tool to trigger thought.⁹¹ That is a way in which an aspect of another person (i.e. their reflection) is used.⁹² The perceived person is being engaged. If that happens without offering the perceived person the opportunity to engage or distinguish themselves in response to that engagement, it is an infringement of their integrity. I consider someone’s reflection part of that person (see chapter 3). The use of that reflection to trigger sexual thoughts is an infringement of that person because they are being used. Such an infringement may be justified, for example

⁹⁰ See on sexuality differing between persons (n 67).

⁹¹ There may be a practical distinction between a person seeing another person and having sexual thoughts about them, and that person actively moving into a position from which they can perceive the other in order to have sexual thoughts about them. The act of moving into position may make the wrong more serious. It may also contribute to the extent to which the wrong can be perceived (and therefore addressed). See e.g. *R v Richards* [2020] EWCA 95, §20-3, where a distinction is drawn between the casual observer who is aroused seeing a person in a public shower; and the person who stops to film it.

⁹² See on reflection as part of the self (that which makes a person recognisable as them, as opposed to an other) chapter 3, section 3.5.4.

through consent. My argument is that *because* it is an infringement it requires such justification or be all-things-considered wrong.⁹³

Thoughts-not-triggered-by-perception should be distinguished from thoughts-triggered-by-perception based on how the thought is brought about. The latter objectifies a person through their reflection. The former does not use a person as an object. This distinction is relevant in considering whether there may be an infringement of the other's integrity: it helps explain why 'thinking of someone sexually (without using any reflection of them)' is not an infringement, whereas 'using someone's reflection to trigger sexual thought' is. The perceived person who is being used to trigger thoughts is being engaged because part of them is used. Because they are 'being engaged', it is necessary that they are also themselves engaging in that action (e.g. a consensual sexual act) — or are given the opportunity to withdraw from the engagement (distinction). If the person who is being engaged does not themselves engage, that person's integrity is infringed, as the tension between 'engaging' and 'distinction' from which their selfhood can develop is disturbed without their direction. That is what happens in ibsa because images are taken, made, and/or shared: the depicted person is being perceived against their will and not offered opportunity to decline the engagement. I hold that everyone engaging with the images engages with the depicted person and infringes their integrity. It may be a very brief engagement, for example, when someone is sent an image they do not want to see, which should be considered a non-blameworthy integrity infringement, but it may also be a more extensive integrity infringement, for example, when the image is used as pornography.

⁹³ Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 *Oxford Journal of Legal Studies* 467.

Triggering sexual thought based on images seen in the past could still be regarded as a type of use of that image and, therefore, of the depicted person. It might be that at some point, the recollection becomes too remote to label it a genuine (re-)infringement of the depicted person, though I argue it should be a theoretical possibility that it is. That also means that it could be an infringement of the depicted person if someone had fleetingly seen an image of them (even if it was without wanting to) and thought about it later. If a person remembers the image they had unwillingly seen and remembers it in order to trigger sexual thought, that means that even though they did not initially intend to violate a person and were not blameworthy in seeing the image, recollecting in order to use the memory as pornography *would* be something that should be considered a blameworthy infringement. If the picture is thought of at a later time because it pops up in one's mind — as memories do — but not because that person actively uses it or even wants to remember it, that illustrates one of the really awful things about ibsa: that it can keep affecting someone's relations long after a disclosure has been made. The relationship is affected by the fact that an image is planted in someone else's mind who might remember it even without wanting to. 'Thinking' (without using any tools) is not, in itself, wrongful. The 'perception' of another person is where an infringement can be established.⁹⁴

5.3.3.6 Integrity summary

In this section, I considered 'integrity' to be the unimpaired state of the quality that is necessary to give rise to personhood. On atomistic personhood, this means that integrity

⁹⁴ See on objectification chapter 6, section 6.2,2 on denial of subjectivity and objectification. See also Martha C Nussbaum, 'Objectification' (1995) 24 *Philosophy & Public Affairs* 249.

is to be free from interference with autonomous capacities. Atomistic integrity and atomistic negative autonomy are the same thing. On relational personhood, integrity is freedom from interference with how one engages in relationships and distinguishes the self from others. This understanding of integrity is closely connected to my understanding of relational selfhood discussed in chapter 3, where I set out that the self enacts in the field of tension between distinction and engagement. Integrity on relational personhood is an undisrupted field of tension in which the self enacts.⁹⁵

I discussed that autonomy and integrity are not necessarily the same concepts. On atomistic personhood, this is a minor difference, as integrity is defined as negative autonomy, and the personhood interest of autonomy also includes positive autonomy. On relational personhood, the difference is more substantial: a person can have integrity even if they lack autonomous capacities. This difference can help explain why ‘to be subjected to unwanted sexual conduct’ is a more serious infringement of personhood interests than ‘to be prevented from doing wanted sexual conduct’.⁹⁶

Finally, I discussed that using someone’s reflection, whether that be their body, image, name, or avatar, can be an infringement of their integrity. That is a substantial difference between atomistic personhood and relational personhood: on relational personhood, anything that can be used to reflect a person to others is part of their person, and use of any such reflection can infringe their integrity. On atomistic personhood, anything that is not encapsulated by the body is not part of the person. That means that

⁹⁵ See chapter 3, section 3.5.3, figure 1.

⁹⁶ However, see in that light also sexual autonomy in the sense of being free to act on sexual preferences in (n 102).

abuse of images, names, or avatars is not a direct infringement of the person, nor does it directly interfere with a person's negative autonomy and integrity.

5.3.4 The wrong in ibsa of infringing sexual integrity on atomistic personhood

On atomistic personhood, the question whether sexual integrity has been infringed is the same question as whether someone's (sexual) negative autonomy has been infringed. As discussed above, there is a moderate autonomy infringement through ibsa on atomistic personhood. Whether that is a *sexual* infringement (in a moral sense) depends on whether the depicted person perceives the image as sexual. In law, it is generally uncommon to take the victim's perception of whether something was sexual as leading: it is either considered sexual by nature or sexual due to the circumstances. Depending on the jurisdiction, this is for the jury or judge(s) to determine (the 'reasonable person'): D's and the reasonable person's assessment are used to determine sexual nature, circumstances, and intention. Not V's. In a moral sense, however, whether sexual integrity has been infringed is subject to V's understanding of what is sexual.

On atomistic personhood, 'integrity' is 'negative autonomy'. On atomistic personhood, the integrity infringement regarding ibsa would see to the self-determination about information of a sexual nature. As images are not considered to be part of the person on atomistic personhood, ibsa and images can only be *about* the person (as information comparable to bank statements), not as genuine infringements of the *person*. I am not convinced that on an atomistic approach, 'information about the person' is part of a person's integrity interest: it may be too far removed from the person on atomistic personhood. Only that which *is* the person would be part of their integrity. Even if ibsa can qualify as a moderate infringement of negative autonomy, it might not be an

infringement of integrity (as a direct infringement of the person). That depends on whether integrity is regarded as applying only to the person (and not to information about the person) or whether it would also apply to information about the person that should be subject to that person's autonomy. Either approach may be available on atomistic personhood. When taking the former approach, ibsa could not be considered an infringement of sexual integrity on atomistic personhood, whereas it could be considered such an infringement when taking the latter approach.

5.3.5 The wrong in ibsa of infringing sexual integrity on relational personhood

On relational personhood, integrity is essential for selfhood. I discussed in chapter 3 that I hold that people develop their sense of self in relationships with others, but that they also need to *distinguish* themselves from others.⁹⁷ Therefore, I considered that the self enacts in a field of tension between engaging with others and distinguishing from them. I consider this field of tension to be the integrity of the relational self, which others can disrupt: if I am *being engaged* but do not get opportunity to engage or disengage, this disrupts my ability to balance the field of tension from which my identity develops. That is what I consider an infringement of the integrity of the relational self. Without integrity, the self could not be enacted because the tension between engaging and disengaging would be disrupted by others' interference with the subjective self. The interest in integrity and the right to autonomy are closely related, but they are not identical: one can have integrity even if one does not have autonomy.⁹⁸ For example, a

⁹⁷ See chapter 3, section 3.5.3.

⁹⁸ See on best interest assessments generally e.g. Herring (n 25), 217-22. If a person has autonomy, then a non-consensual interference with their selfhood can be both an infringement of autonomy and an infringement of integrity.

very young child may not be considered to have sufficient autonomous capacities to be able to make strong normative evaluations. Nevertheless, they have personal integrity, meaning that someone engaging them should be careful to assess whether the child wants to be engaged, and a child's refusal to engage should be taken very seriously on a best-interest assessment that would take the place of the child's autonomy. The person(s) exercising autonomy on behalf of the child should not be careless regarding the child's interest in maintaining their personal integrity.⁹⁹

Integrity is not subject to autonomy: everyone, regardless of their autonomous capacities, has an interest in integrity. That means that babies, cognitively disabled people, and people in a coma all have integrity, even if they cannot be said to have autonomy. On atomistic personhood, integrity is defined by autonomy, and so one cannot exist without the other. On relational personhood, integrity may exist without autonomy because integrity does not refer to a type of autonomy but to an aspect of relationality.¹⁰⁰

⁹⁹ For example, if a doctor wants to examine a child but the child does not want them to, it is an infringement of the child's integrity to forcibly subject them to the examination even if it is considered to be in their best interest that they undergo the medical treatment. There would have to be very strong good reasons to forcibly subject someone to treatment. Usually, a doctor should seek a way in which the child could be persuaded to engage with the doctor so that an infringement of personal integrity may be prevented.

¹⁰⁰ A full discussion of integrity versus autonomy is beyond the scope of this thesis. See on that topic generally Herring and Wall (n 10); Rupsa Mallik, 'Bodily Integrity and Freedoms: A Cross-Movement Perspective' (2017) 60 *Development* 40; Joseph Mazor, 'On the Child's Right to Bodily Integrity: When is the Right Infringed?' (2021) 46 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 451; but integrity is not dependent on other personhood interests. Hyman Gross, 'Rape, Moralism, and Human Rights' [2007] *Criminal Law Review* 220; Jonathan Herring, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] *Criminal Law Review* 228; Rubinfeld (n 10); Elizabeth Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart 2016).

Ibsa is an example of conduct where personal integrity is infringed, even where there is no infringement of bodily integrity. In this section, I set out this infringement as the moral wrong of infringing sexual integrity as viewed from a relational personhood perspective. I argued that the self may use other means than its body to be reflected to others, that is: to be recognisable to others.¹⁰¹

Ibsa, misrepresenting a person online, and non-physical abuse are not infringements of bodily integrity. Nevertheless, they can readily constitute an infringement of the integrity of the relational self. That is because integrity, on a relational account, sees to more than the body. Infringing the relational self and infringing the body that mediates that self should be seen as infringements of personal integrity. I argued that any reflection of the self can be used to infringe that person's relations and disrupt the balance they maintain between engagement and distinction. As such, on a relational approach, abuse through an image can readily be regarded as the infringement of someone's integrity.

A person subjected to ibsa is objectified, and their reflection can be used for sexual purposes without their consent. That is an infringement of their integrity. An infringement that is sexual *and* constitutes an infringement of personal integrity can be labelled an infringement of sexual integrity. Because of the status sexuality tends to have as particularly intimate and personal, labelling the infringement accordingly better helps identify the type of wrong. Because the images used in ibsa are of a sexual nature, and because images are part of the person who is depicted, the non-consensual use of those

¹⁰¹ Text at (n 79).

images is an infringement of sexual integrity of the depicted person. On relational personhood, the infringement of sexual integrity through ibsa is a severe wrong.

5.3.6 Framing the wrong in a legal context

In this subsection, I point at some considerations relevant towards the legal protection of sexual integrity. The ECHR is one example where the interest of sexual integrity may be protected as a right. While sexuality is not explicitly mentioned in article 8 ECHR, it is generally accepted that the protection offered by that article sees to a person's sexuality.¹⁰² The European Court of Human Rights ('ECtHR') does not, in terms of terminology, distinguish between sexual integrity and sexual autonomy. I consider that this may be connected to the lack of distinction between these concepts when interpreted from an atomistic approach to personhood. However, two separate concepts may be recognised in the Court's case law.

Firstly, article 8 protects a positive and negative right to autonomy regarding *sexuality*, or sexual *preferences*. The article has been interpreted as a right to be free

¹⁰² The protection of bodily integrity and sexual autonomy are considered as part of the right to private and personal life in article 8 ECHR. See for instance: *ADT v United Kingdom* Application no 35765/9 (ECHR, 31 July 2000); 'The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons.' in *Brüggemann and Scheuten v Federal Republic of Germany* Application no 6959/75 (ECHR, 12 July 1977), [55]. This was determined in relation to whether homosexual relations could lawfully be prohibited and is generally understood to hold the Court's view that sexual autonomy is protected under article 8 ECHR. Equally, sexual offences are considered an infringement of article 8 ECHR (*X and Y v The Netherlands* Application no 8978/80 (ECHR, 26 March 1985)). See also the discussion of 'private life' as a space to develop identity, rather than geographical location.

from state interference regarding sexual preferences, which is a negative right.¹⁰³ The positive aspect of the right is freedom regarding sexual preferences. Note that this is *not* a positive right to engage in any particular act, merely a right to have particular sexual preferences. What it protects is the right to *consensual* sexual activities. Secondly, article 8 protects a negative right only regarding sexual *conduct*. That is the right to be free from unwanted sexual engagement. That may include, for example, the right to be free from being used to trigger sexual thought. For example, if A is used in an objectifying way by B without wanting to be used that way, that interferes with A's ability to engage with B meaningfully and could constitute an infringement of the negative right to sexual autonomy/sexual integrity as contained in article 8 ECHR. That the right to sexual autonomy in the sense of 'conduct' is a negative right only, and not a positive right, is heavily implied by the Court's emphasis on the strength of the negative right to be free from unwanted sexual conduct.¹⁰⁴ That negative right is so strong that the state may have duties to criminalise conduct that infringes it. That means that a positive right could not exist alongside it. There is no right in the ECHR to positive sexual autonomy, which in itself can be interpreted as a (limited) protection of sexual integrity. The protection of sexual integrity as separate from autonomy is not explicitly part of the ECHR but can be recognised in it. Possibly it exists in other places in the law, but it is beyond the scope of this thesis to explore fully what the status of 'sexual integrity as a right' is.

¹⁰³ *Brüggemann and Scheuten v Federal Republic of Germany* Application no 6959/75 (ECHR, 12 July 1977), [55].

¹⁰⁴ See e.g. *X and Y v The Netherlands* Application no 8978/80 (ECHR, 26 March 1985); *MC v Bulgaria* Application no 39272/98 (ECHR, 4 December 2003).

5.3.7 Concluding integrity

Both on atomistic personhood and relational personhood, ibsa can be understood as an infringement of sexual integrity. Because of the way I understand personal integrity, I believe that the atomistic approach to establishing an infringement of sexual integrity results in the same wrong as I was able to identify towards the infringement of autonomy, insofar as there was an infringement of negative autonomy.

In the previous section, I concluded that the moral wrong of ibsa on an atomistic approach to personhood would be regarded as a lack of autonomy over personal (sexual) information. There is a very limited conceptual difference between ‘personal integrity’ and ‘autonomy’ on atomistic personhood. On atomistic personhood, the infringement of integrity is an infringement of negative autonomy that is most readily established when there is an infringement of bodily integrity. The one quality that can be added to the nature of the wrong as a result of the discussion in this section is that the infringement is of a sexual nature.

On a generous reading of atomistic personhood, ‘information about the person’ can infringe that person’s integrity. This relies on the argument that a person is defined by their autonomy. Where that autonomy is infringed, the person is infringed. Ibsa could then be considered an infringement of personal integrity because the disclosure of personal information should have been subject to that person’s autonomy, and as such, is an autonomy infringement and thus an integrity infringement.¹⁰⁵ A narrower interpretation of atomistic personhood does not leave room for including personal

¹⁰⁵ See section 5.2.2 on atomistic interpretation of autonomy wrong for the argument regarding considering images as personal information.

information into the scope of integrity because although the disclosure of personal information should have been subject to that person's autonomy, it is not part of their person and, as such does not constitute an infringement of personal integrity even if it infringes autonomy.

On a relational approach to personhood, integrity is the tension between engaging and disengaging that helps enact the self. On relational personhood, unlike atomistic personhood, images depicting a person are considered part of that person because they reflect them to the world and, as such, help enact and maintain their relations. Integrity can be infringed through any reflection of the self: it is not necessary that the infringement is *physical*. 'Being engaged or disengaged' without reciprocity can infringe personal integrity. As images are part of the person on relational personhood, engaging with a person's image without their consent is an infringement of their integrity. Because the infringement is of a sexual nature, the infringement may be labelled an infringement of sexual integrity.¹⁰⁶

5.4 The wrong in ibsa of infringing privacy

5.4.1 Introduction

In this section I consider the infringement of privacy as a wrong of ibsa. I first consider the meaning of privacy. I consider that an atomistic approach to privacy is more closely defined by geographical locations than a relational approach is. I note that the opposite of

¹⁰⁶ I do not distinguish here between sexual and a-sexual people, as I consider that regardless of sexual preferences anyone has the right to be free from unwanted conduct. If to the asexual person that means that they are free from all sexual conduct that is a valid exercise of their right. Their sexual integrity is infringed when they are subjected to sexual conduct against their will.

private is non-private (and the opposite of public is non-public).¹⁰⁷ I then consider how the wrong of infringing privacy might be interpreted using an atomistic approach versus using a relational approach to personhood.

5.4.2 The meaning of privacy

5.4.2.1 Introduction: the general meaning of privacy

Historically, the notion of privacy was tied to being in the home and was the opposite of ‘public’. The right to privacy was initially understood as ‘the right to be let alone.’¹⁰⁸ The benefit of ‘having privacy’ is commonly understood to be that it creates a space in which the self can develop without interference.¹⁰⁹ Privacy, then, is aimed at supporting the development of identity. On an atomistic account of selfhood, ‘being left alone’ would indeed be all that is needed to develop the self to its fullest. After all, on that account, the self is atomistic and does not rely on others for its identity. On a relational approach however, ‘being left alone’ is not helpful towards self-enactment – it may even be harmful for it. The right to privacy as the opposite of that which is public (i.e. that which the state can legitimately address) faced much criticism.¹¹⁰ It was considered to stand in the way of women’s equality and hide domestic abuse from the reach of the criminal

¹⁰⁷ See also chapter 2, section 2.2.4.2.

¹⁰⁸ Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 Harvard Law Review 193, 194; see also: Megan Richardson, *The Right to Privacy : Origins and Influence of a Nineteenth-Century Idea* (Cambridge University Press 2017).

¹⁰⁹ See e.g. John Eekelaar, *Family Law and Personal Life* (Oxford University Press 2006), 96.

¹¹⁰ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989), 191; Okin, Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books 1989), 174. But cf Ruth Gavison, ‘Feminism and the Public/Private Distinction’ (1992) 45 *Stanford Law Review* 1.

law: that which happened in a geographically non-public location would be considered private and out of the reach of the state. On the relational approach, privacy is understood as a realm for personal development. Anything that does not contribute to personal development, such as an abusive relationship, is not private and not covered by privacy protections.¹¹¹ As such, on a relational approach, privacy is not infringed if the state interferes in an abusive relationship. The atomistic approach may consider that domestic violence is private if those involved in it choose not to share (as privacy is understood there as the right to be left alone). State interference with domestic violence, in that case, may need to acknowledge that it infringes privacy, but for good reason, and that the state has an interest in regulating and so the conduct is also public.¹¹² As I held in chapter 2, I do not think ‘private’ and ‘public’ are opposites.¹¹³ The opposite of ‘private’ is ‘not private’; the opposite of ‘public’ is ‘not public’. What that means will be explored in this section.

Conceiving privacy as ‘having space to develop one’s personality and personal interaction free from the external gaze’, rather than primarily ‘a right to be left alone’, might help remedy some feminist concerns regarding a traditional understanding of privacy.¹¹⁴ A space in which to develop one’s personality and relations can be demarcated as such rather than as a geographical location. If privacy is defined by

¹¹¹ See on this argument Choudhry and Herring (n 53); and Elizabeth M Schneider, ‘The Violence of Privacy’ (1991) 23 *Connecticut Law Review* 973, 998-9.

¹¹² See on ‘publicness’ as ‘the state’s business’ Michelle Madden Dempsey, ‘Public Wrongs and the ‘Criminal Law’s Business’: When Victims Won’t Share’ in Rowan Cruft, Matthew H Kramer and Mark R Reiff (eds), *Crime, Punishment, and Responsibility : The Jurisprudence of Antony Duff* (Oxford University Press 2011).

¹¹³ See also appendix B for a diagram on the relations between what is ‘public’ and ‘private’.

¹¹⁴ Eekelaar (n 109), 96.

purpose rather than location, then conduct that does not contribute to self-development and self-enactment is not covered by the right to privacy. Note that changing the definition to purpose rather than location does not result in a major shift in the meaning of privacy on an atomistic account, but it does substantially change its meaning on a relational account.

On relational personhood, part of self-development involves ‘relating to others’. Relations that help enact that person.¹¹⁵ As such, engaging in relationships may be deeply private, even if those relationships are very public. One of the interests protected by privacy is ‘having a reasonable measure of control over ways in which we present ourselves to others.’¹¹⁶ Privacy means that I can choose whom to share which parts of my identity with. The right to privacy thus has two aspects: a positive right to share personal information with certain others (meaning that the act of disclosure does not make it publicly accessible to anyone) and a negative right to privacy in which persons are free from unwanted disclosures of personal information.

5.4.2.2 Positive privacy

Firstly, positive privacy is the notion that one can disclose private information to others, in the understanding that the information will remain private, that it will remain ‘between us’. On relational personhood, the act of sharing with another person has not made that which is shared non-private. Rather, it has brought it within the privacy of a particular

¹¹⁵ e.g. I am my parent’s child, my partner’s partner, my friends’ friend and my neighbour’s neighbour, by students’ teacher and my teacher’s student, etc.

¹¹⁶ Andrei Marmor, ‘What Is the Right to Privacy?’ (2015) 43 *Philosophy & Public Affairs* 3, 25.

relationship, which is part of self-enactment. On atomistic personhood, when something private is shared there may be lingering privacy interests that are subject to the autonomous decisions of the person whose information is concerned regarding ‘sharing’ or ‘not sharing’. That means that something that has been shared does not become entirely non-private on an atomistic understanding either. However, atomistic personhood maintains a stronger sense of geographical location in defining privacy as isolation, and so it might matter with whom and with how many people information was shared when exploring the question whether it still counts as private.

On an atomistic approach to personhood, privacy is not much more than to be left alone when desired. On relational personhood, privacy can be a fundamental part of self-enactment (i.e. developing the self). On that account, sharing private information with another person may (for each of them) be part of self-enactment, as it is part of engaging in the relationship between them. The sharing of private aspects of the self would then not affect or undo the privateness of what is being shared. In that light, I consider Andrei Marmor’s understanding that

Different kinds of social expectations about what aspects of yourself you reveal to others are constitutive of different kinds of human relations. It is constitutive of friendships that friends are expected to be relatively open with each other, sometimes revealing intimate information that they would not be willing to share with just about any random person. ... Without having some control over things you reveal about yourself and ways in which you do it, different kinds of relationships with people

would be much more difficult to create and maintain.¹¹⁷

It might be that the understanding of whether something remains between two people would have to be explicated in some situations but not in others. Where personal preferences deviate from social expectations, those preferences may need to be discussed (they cannot be implied). For instance, a person may want to keep something seemingly mundane private, such as that they enjoy going to the cinema. It seems that there is no particular social norm that requires the privacy of this information. They might share this information with a friend who does not readily recognise it as private information. If the person-who-enjoys-the-cinema wants to rely on the privacy between them and their friend they may have to clarify that they hold the cinema-enjoyment to be private information.¹¹⁸ If information is particularly burdensome, it would be good to ask consent for sharing prior to burdening another person with it.¹¹⁹

On an atomistic approach, positive privacy means being entitled to choose what to share with others and what to keep to oneself ('keeping private', on an atomistic account). On a relational account, positive privacy enables self-enactment: it facilitates 'developing and maintaining relations that construct the self'. Positive privacy can involve disclosing to another person private information, without thereby making it

¹¹⁷ Marmor (n 116), 8.

¹¹⁸ To my mind, the sharing of intimate images inherently comes with the connotation of shared privacy. Where the depicted persons are required to explicate the expectation of privacy on something so intimate as sexual images, their privacy rights are not adequately protected by the state. A similar argument may be made with regards to requiring proof of non-consent for sexual penetration, see Dempsey and Herring (n 93).

¹¹⁹ See Jonathan Herring and Charles Foster, "'Please Don't Tell Me': The Right Not to Know" (2012) 21 *Cambridge Quarterly of Healthcare Ethics* 20, 23.

public.¹²⁰ Developing the relational self does not happen in isolation, and so it would be a mistake to consider the sphere in which one can develop the self as a sphere of isolation. Rather, privacy is about being able to develop one's sense of self and identities, regardless of *where* those identities are expressed.

Privacy interests, such as 'breast-feeding in public' or 'wearing a skirt outside', are not (anymore) strictly confined to geographical locations, even – limitedly – on an atomistic understanding.¹²¹ Marmor considers the example of being photographed in a crowded street. He argues that the act of having gone out in public might contain consent to be seen that way by whoever passes by, and that that would count as consent for being seen in public. However, he notes that consent for being seen in public 'is not an invitation, or even tacit consent, to gaze at you, and certainly not a consent to record your doings, digitally or otherwise.'¹²² That suggests that 'being perceived fleetingly' and 'being perceived intentionally' or 'being recorded' are different degrees of privacy infringement.

¹²⁰ See e.g. Hannah Arendt, *The Human Condition, Second Edition* (The University of Chicago Press 1958), 50 and on publicness as the state's business Dempsey (n 112).

¹²¹ These are examples of acts that are not always readily acknowledged as private acts: breastfeeding is non-consensually filmed and upskirting (taking images under someone's skirt) as though the visibility of the act or body has negated any privacy interests (see e.g. Law Commission of England and Wales *Intimate Image Abuse : A Consultation Paper* (Law Commission Consultation Paper No 253 2021)). It is an outdated understanding of privacy to suggest that everything that happens in a public place is therefore non-private. That relies too heavily on privacy as demarcated by geography. See on privacy interests and what they might be, e.g. Gavison (n 110); Judith Wagner DeCew, *In Pursuit of Privacy : Law, Ethics, and the Rise of Technology* (Cornell University Press 1997); Annabelle Lever, *On Privacy* (Routledge 2012). See Appendix B for a diagram on my understanding of the overlap of the public and the private.

¹²² Marmor (n 116), 25.

Privacy, as a tool for managing relations, enables the sharing of aspects of the self with certain others without thereby automatically consenting to sharing it with *all* others. Privacy in this sense, namely ‘sharing something private’, is not experienced in isolation. The relational aspect of privacy does not mean that it is *public*. The right to privacy can be understood as a right to develop the self/identity. That is not something that can be done in isolation, and privacy then is a right to determine who gets to have access to you when and in what capacity.

5.4.2.3 *Negative privacy*

Both on atomistic and relational personhood, negative privacy can be conceived as the right to be free from unwanted disclosures and infringements. That is the aspect of privacy that ‘seeks to protect against intrusion, external observation or disclosure’.¹²³ It might also include ‘being free from being burdened with the private information of others’ where being burdened thus might be an infringement of the self.¹²⁴ On a relational understanding of personhood, infringing in non-caring relationships is *not* an infringement of negative privacy. That is because only that which contributes to caring relations is a personhood interest. It means that interfering in an abusive relationship is not a privacy infringement on relational personhood.¹²⁵ On an atomistic understanding of

¹²³ Eekelaar (n 109), 97.

¹²⁴ This seems appropriate where it will destroy one’s identity or autonomy, e.g. a person knows they have a bias and do not want information that will play into that, see Herring and Foster (n 119).

¹²⁵ It should be noted that this considers domestic violence on the coercive control framework rather than primarily isolated instances of physical violence. See for extensive discussion of domestic violence, impact on victim’s ability for normative evaluation, and privacy rights Evan Stark, ‘Rethinking Coercive Control’ (2009) 15 *Violence Against Women* 1509; Evan Stark, *Coercive Control : The Entrapment of Women in Personal Life* (Interpersonal Violence, Oxford University Press 2007); Michael P Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple*

personhood interfering with an abusive relationship against the will of the abused person would be considered an infringement of negative privacy, because demarcating ‘what is private’ and ‘what is not private’ are subject to autonomous decisions. If a person decides to stay in an abusive relationship, that would look like an exercise of autonomy on an atomistic understanding of personhood, but it would not be so on a relational understanding of personhood.¹²⁶ That is because it seems that there is no opportunity for strong normative evaluation in domestic violence. That means that if a victim of domestic violence objects to state interference in their relationship on the grounds that their relationship is private and it is an infringement of their privacy and autonomy to remove them from an abusive relationship, a relational understanding of personhood would find that they are mistaken. If a relationship is not caring it is not part of the personhood interest in privacy, and infringing it is not an infringement of negative privacy.

5.4.2.4 Summarising privacy

Privacy is understood in this thesis as a realm in which personal identity may be developed. On atomistic personhood this is very similar to the traditional understanding of privacy as a geographical location, because on atomistic personhood ‘the self’ develops best in isolation. On relational personhood, the self develops in relation with

Violence (Northeastern University Press 2008); Michael Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women’ (1995) 57 *Journal of Marriage and the Family* 283; Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009); Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia 2020); Jonathan Herring, ‘The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3’ (2011) 33 *Journal of Social Welfare and Family Law* 297; Choudhry and Herring (n 53).

¹²⁶ See relational autonomy in section 5.2.3.

others. Privacy then is the realm in which the relationships that help give rise to one's identity, can develop. That can cover all sorts of relationships that inform one's identity, such as interpersonal relations, but also group membership, such as belonging to a sports group or being a stamp collector. Identities do not necessarily require a direct relationship with others. A collector of stamps may do so in solitude, and nevertheless, be a member of the social group of stamp collectors.

Positive privacy allows for an active development of the self. It is the *use* of the realm in which the self can be developed (and relates to how that realm is used by the subject). Negative privacy is that the realm in which the self can develop is not subject to unwanted outside interference. That means that where consensual sharing of intimate images is part of developing the self, it is part of positive privacy. That is a reason why it is not a solution to ibsa to ban all types of intimate images: if consensual taking, making, and/or sharing of intimate images can be part of a person's self-enactment, and, as such, part of their positive privacy, then prohibiting taking, making, and/or sharing such images would be an infringement of negative privacy. At the same time, if a person does not want to take, make, and/or share intimate images and they are subjected to that regardless, that can be an infringement of their privacy (positive and negative) as well. This is discussed in the following two subsections.

5.4.3 The wrong in ibsa of infringing privacy on atomistic personhood

On atomistic personhood, privacy covers authority over when to be left alone (private) and when not to. Ibsa would be an infringement of privacy only to the extent that it can be understood as the disclosure of private information. It may be considered information, because images convey something about the depicted person to the viewer. If privacy is

understood as an interest in being left alone, then some of the harmful effects of ibsa (‘social rupture’ and ‘isolation’) would *benefit* privacy, rather than infringe it.¹²⁷ As privacy is very closely related to autonomy on an atomistic approach to personhood, a similar line of reasoning can be recognised here as in the discussion of the previous wrong: ibsa is an infringement of privacy insofar as it is an unwanted disclosure of private information. In the discussion of the infringement of atomistic autonomy I considered that ibsa was no direct infringement of the person because the depiction of a person is not part of that person on atomistic personhood.¹²⁸ Nevertheless, ibsa constitutes an infringement of privacy on an atomistic understanding insofar as an interest in privacy extends to information about the person. From a personhood perspective that might not be a direct infringement of the person, but it seems that it would usually be considered covered by privacy. On atomistic personhood, privacy, for the most part, can be reduced to ‘information’ and, as such, is not usually seen as a direct infringement of the person. Ibsa is therefore usually an infringement of privacy on atomistic personhood, though be it not a very serious one because it does not infringe the person directly.

It could be a privacy infringement if the depicted person was ‘not being left alone’ as a result of ibsa, for example, if they are confronted with the image or its disclosure by others against their will. This is a type of infringement that can only materialise after ibsa has been taken, made, and/or shared — it is not inherently part of it but can be caused by it. If the depicted person never finds out that they have been victimised, or if everyone keeps quiet about it even though everyone — including the depicted person — knows of

¹²⁷ McGlynn et al. (n 56); McGlynn, Rackley and Johnson (n 16).

¹²⁸ See section 5.2.2.3.

the images, then it is much more challenging to find a severe privacy infringement on an atomistic approach to personhood.

5.4.4 The wrong in ibsa of infringing privacy on relational personhood

On a relational approach to personhood, privacy facilitates self-enactment, in that it protects a person's authority over the tension between distinction and participation that constitutes the relational self. The moral wrong of non-consensual taking, making, and/or sharing is a serious infringement of privacy because it affects the tension between engaging and disengaging. Ibsa uses the reflection of the depicted person, and that is part of what a person uses to enact their selfhood. As such, a person's reflection is part of their personhood interest in privacy. *Non-consensually* taking, making, and/or sharing intimate images means that the depicted person is no longer able to guide the access to (a very intimate aspect of) them. Privacy is understood here as a particular autonomy exercise, specifically aimed at the development of identity.

All-things-considered a privacy infringement may be more severe on some forms of ibsa than on others. For example if D secretly films another person, or makes a deepfake image of them, but does not share those images, the depicted person's privacy is not infringed towards others who are not D. This means that the depicted person maintains the ability to guide the tension between engaging and disengaging (i.e. to decide which aspects of themselves to share with whom) towards everyone but for the defendant. D's non-consensual recording is certainly a privacy infringement, it just is not as serious a wrong as a complete disclosure of the private images that would make it virtually impossible to (regain) control over what is visible in these images. The *prima*

facie wrong of infringing privacy is inherently identical throughout all forms of ibsa because it refers to the same personhood interest.

5.4.5 Framing the wrong in a legal context

There are many legal protections of the right to privacy in liberal democracies. One example of them may be found in the ECHR, again in article 8. The ECtHR has explained privacy as a right to a realm in which one can develop the self. While traditionally the right to privacy may be understood as a right to be maximally autonomous in a (geographically) non-public place, that is not necessarily what is needed to support circumstances in which the self can enact. The right protected by privacy is a *right to develop selfhood*, which is a right of all persons, regardless of whether they actually develop a sense of self.

To some extent this is a negative right: the realm in which to enact can often exist on its own accord, and all the state needs to do is ‘not infringe it’. However, as I noted, it is considered by Choudhry and Herring that non-infringement is not always sufficient for the protection of such a realm.¹²⁹ The ECtHR in that regard recognises that the right to private life may create duties for states to adopt ‘measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves’.¹³⁰ The Court recognises that states have a narrower margin of appreciation to determine the leniency or strictness of its measures to protecting the right to privacy ‘Where a

¹²⁹ Choudhry and Herring (n 53), 110; *Botta v Italy* Application no 21439/93 (ECHR, 24 February 1998).

¹³⁰ Council of Europe and European Court of Human Rights (n 57), 8.

particularly important facet of an individual's existence or identity is at stake'.¹³¹ I argue that sexuality might be such a facet, which would be an argument in support of thorough protections against ibsa — so long as ibsa is recognised as a privacy infringement. This understanding is somewhat dependent on one's understanding of personhood. On privacy, the ECtHR has taken an approach more in line with relational personhood (privacy as a realm in which to develop the self) than in line with atomistic personhood (privacy as a geographical opposite of public and a right to be left alone).¹³²

5.4.6 Concluding privacy

The moral wrong of infringing privacy can be recognised when using an atomistic account of personhood as well as when using a relational account of personhood. I hold that the infringement of privacy, out of the five interests discussed in this chapter, is the moral wrong that is least contested on atomistic personhood. Nevertheless, here too, I find that the scope of the wrong is more fully appreciated on relational personhood, where it can be recognised as a severe privacy infringement that may indeed disrupt all of V's relationships. For example, even if not all of V's acquaintances have seen the ibsa, V may worry that they have, and as such the ibsa would affect all of V's relationships and have a marked effect on their ability to engage in relationships as V might *want* for them to serve the development of their identity.¹³³

¹³¹ ibid, 8.

¹³² ibid, 8.

¹³³ This is related to the wrong of breaching trust discussed in section 5.6.

In this section I considered privacy to mean a realm in which personal development can be facilitated. On that understanding, only that which contributes to personal development can be private. That can include (consensual) taking, making, and/or sharing of intimate images: where such acts help enact the self they are private, and part of privacy interests. On atomistic personhood, (consensual) taking, making, and/or sharing intimate images can be part of the exercise and development of mental capabilities and autonomy: it can be part of setting boundaries and as such of self-determination, which is part of self-development on atomistic personhood. But the same holds true for things such as ‘viewing images of child sexual abuse’ and ‘domestic violence’: on atomistic personhood these things can be framed as being part of how a person decides to live their life, and as such as part of their privacy. That means that, on an atomistic approach, interfering in domestic violence can be an infringement of privacy. On a relational approach, this could not be regarded as such, because a relationship in which one partner abuses the other is not a caring relationship: there, only that which contributes to caring relations can be part of personhood interests. Therefore, on a relational approach, things such as ‘viewing images of child sexual abuse’ and ‘domestic violence’ are not private because such violence is detrimental to self-enactment and does not serve caring relations.¹³⁴ Sending intimate images to one’s partner *can* contribute to relationship satisfaction.¹³⁵ On a relational approach to personhood, maintaining caring relations is a strong personhood interest, and where

¹³⁴ See the harms of images of child sexual abuse e.g. Warren Binford et al., ‘Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad’ (2015) 35 *Children’s Legal Rights Journal* 117; on harms of domestic violence for other relations e.g. Noelle M St Vil, Takisha Carter and Susan Johnson, ‘Betrayal Trauma and Barriers to Forming New Intimate Relationships Among Survivors of Intimate Partner Violence’ (2018) *Journal of Interpersonal Violence* 1; Herring (n 125).

¹³⁵ Michelle Drouin, Manda Coupe and Jeff R. Temple, ‘Is Sexting Good for your Relationship? It Depends’ (2017) 75 *Computers in Human Behavior* 749.

intimate image sharing helps develop and maintain caring relationships in which the self can enact, image-sharing is part of privacy.

Where intimate images are abused against personal development they are not part of privacy. On relational personhood privacy is meant to help facilitate self-enactment. That involves demarcating which aspects of oneself to share with whom.¹³⁶ On that account, anything that does not help (or even actively impedes) the self to develop is not part of privacy as a personhood interest. Privacy can be infringed through taking, making, and/or sharing intimate images where it involves sharing aspects of the self with persons that the depicted person did not want to share those parts of themselves with. As noted above, images are understood as one way in which the self can be reflected to others: they facilitate others' engagement with the depicted person. As such, on relational personhood they are a direct part of the person. Abuse of someone's image is therefore a direct infringement of them as a person. That was identified as one way in which atomistic personhood would struggle to frame ibsa as a direct infringement of the person, and this is true also in the context of privacy. On atomistic personhood, images are separate from the depicted person, and abuse of images is not direct abuse of them. Intimate images would be understood as private information, and barely more personal than for example bank statements. On atomistic personhood both are about the person, not part of them as a person. Where intimate images are taken, made, and/or shared without consent (without being subject to the depicted person's autonomy) they may be understood as an infringement of privacy regarding private information.

¹³⁶ See chapter 3, section 3.5.3, on engaging with and distinguishing from others to develop a sense of self.

While one's approach to personhood affects the degree to which ibsa is understood as a privacy infringement, on both accounts it can be understood as an infringement of both negative and positive privacy. Ibsa is an infringement of negative privacy in the sense that a person is no longer free from interference with their self-enactment (particularly regarding their sexuality). Negative privacy has been infringed by enabling access to intimate images to others than the depicted person wanted to give access to them to. In order to qualify as a privacy infringement, it need not be the case that *anyone* has access to intimate images. It is sufficient that there is at least *someone* who the depicted person did not want to have access to the images who now do. 'Access to an image' is understood here as including 'taking or making an image the depicted person did not want to have taken or made'. It does not matter how many others are getting access for privacy to be considered 'infringed'. Privacy is infringed when someone has access to an aspect of another person that that person did not want them to have access to. It is not necessary for privacy infringements to be absolute before the infringement could be acknowledged. Ibsa is also an infringement of positive privacy, as the depicted person has been prevented from presenting themselves to others as they would want. It is an inherent part of identity that not every person gets to have access to the same aspect of another: someone may demarcate expressing sexual identity only to their partner; but not to their friends; or parents; or students.¹³⁷ This infringement of positive liberty to demarcate who gets access to which part of the self is an infringement of positive privacy and part of the wrong of ibsa. As noted above, while the wrong exists both on atomistic personhood and relational personhood, the wrong is likely to be recognised as more severe on a relational account, and as more moderate on an atomistic account. This

¹³⁷ See Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345.

difference is due to the differences in understanding images as inherently part of the depicted person versus as separate from the depicted person.

5.5 The wrong in ibsa of infringing free expression

5.5.1 Introduction

In this section I discuss the wrong of ibsa of infringing free expression. I first set out the meaning of free expression. I then consider the moral wrong of infringing free expression established through ibsa as on atomistic personhood versus as on relational personhood.

5.5.2 The meaning of free expression

Free expression is usually understood as ‘being free to say what one wants’. That is certainly *part* of it, and it is the part that is most explored in the literature.¹³⁸ I label this ‘positive expression’ or ‘positive speech’. While it is an important part of freedom of expression, it is not at the focus of my discussion. That is because ibsa does not directly infringe this positive aspect of free speech. There may be a (minor) infringement where victims fear increased harm of ibsa if they speak out against it, thus limiting the depicted persons options and limiting the scope of their positive liberty. In this section I mainly consider the opposite of ‘being free to speak’ of the free speech interest, namely ‘being

¹³⁸ See e.g. Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press 2008); Eric Barendt, *Freedom of Speech* (Oxford University Press 2005); Denis Muller, *Journalism and the Future of Democracy* (Palgrave Macmillan 2021), 77-97; and Andrew T Kenyon, ‘Assuming Free Speech’ (2014) 77 *Modern Law Review* 379 for a discussion of the negative right to freedom of speech (as freedom from state interference) and positive right to freedom of speech (as freedom to speak). The negative aspect of the positive right, as the right *not* to speak, is not part of discussions on free speech in the literature.

free *not* to speak'. I consider how ibsa is an infringement of free speech because it makes victims appear as expressing a message they had not intended to express — either at all, or beyond a certain realm of privacy.¹³⁹

Freedom of expression consists of both the freedom to speak, and the freedom *not* to speak. In ibsa, it seems that the second type of free speech infringement materialises in any case, and that there may be a stepping-stone infringement of positive free speech where victims refrain from expressing themselves against their victimisation for fear of making it worse. Note that if this wrong of positive speech materialises, it does so after ibsa has already happened, and then the ibsa itself is what limits positive liberty. Rather than that the infringement is part of the materialisation of ibsa itself, it happens after the rest of the wrongs have already materialised.

Regarding the negative infringement of free speech it is necessary to explore the type of message that the depicted person may be seen as sending. To that end, I consider 'pornography' in terms of speech. There is extensive debate as to the question whether or

¹³⁹ There are some questions that I cannot fully address in this thesis, but which I want to raise here because it regards abuse of rights by others. For example, one might wonder what is the relevant difference between a racist saying racist things in private, and a person saying sexual things in private. While it may practically be impossible to find the racist-in-private, that does not mean that the racism therefore loses its status as hate speech (if so) and would still be criminal (even if everyone in the room consent to hearing it). A person expressing themselves *sexually* in private does not commit a crime if everyone in the room consents to hearing it. This means that a racist who is e.g. recorded and published without consent cannot rely on an infringement of speech rights the same way that a victim of ibsa can, because they never had the right to express themselves that way: their free speech rights do not stretch that far, but while in private it might have been practically impossible to police. I am not convinced that an infringement of privacy would be a successful claim on the part of the racist, because the right to privacy may not stretch that far either (see section on privacy text at (n 125) and Choudhry and Herring (n 53)). On a relational approach one might argue that something such as hate is not part of caring relations, and as such cannot be part of the right to privacy, and for that reason cannot be part of the right to free speech either where that right relies on the private nature of what is being said.

not pornography ought to be considered a form of speech.¹⁴⁰ The message sent by pornography is one that is often discussed in feminist scholarship as reinforcing gender-inequality.¹⁴¹ The relevance of the question is that if pornography is speech, then it falls within free speech regulations, whereas if it is not speech it may be limited without needing to consider the safeguards of free speech legislation.¹⁴²

If, as I hold, pornography is a form of expression, then making someone send the message of pornography is an infringement of their free speech. If pornography is *not* speech, then making someone send the message of pornography could not readily be recognised as an infringement of free speech, though it should be noted that if pornography is not speech then D also loses a claim that is often presented as the ‘clash of rights’ in *ibsa*. On such arguments the suggestion is that D was using their free speech rights. That claim would not hold if pornography was not speech. I consider pornography a form of speech, as it sends a (negative) message.

The next issue I address is how *ibsa* fits into the pornography debates surrounding free speech. As I noted in chapter 1, I object to referring to *ibsa* as pornography. That is not because of its content, but because of its conceptualisation: the existence and/or visibility of materials used in *ibsa* are in themselves abusive, and to suggest that the

¹⁴⁰ See e.g. discussion in Andrew Altman and Lori Watson, *Debating Pornography* (Oxford University Press 2019); Barendt (n 138), 352. I consider that this discussion is particularly relevant in contexts where free speech interests or rights have a higher status than other interests or rights, in which case the permissibility of regulating pornography may depend on its lack of qualification as speech.

¹⁴¹ See text at (n 143).

¹⁴² Both in a moral sense regarding personhood as well as against the background of the e.g. the ECHR, expressions such as the messages sent by pornography are readily considered speech acts or acts of expression, and so will be considered as such.

materials are pornography is to label them as ‘intended for consumption’. That is because I understand pornography to be inherently intended for consumption. It would wrong victims of ibsa to say that what has happened to them is ‘pornography’ because that fails to acknowledge the fact that their image is seen as pornography, that they are consumed, is part of the abuse that they are suffering. Nevertheless, ibsa may well be *used as pornography*, and as such be perceived as sending the same message as pornography. The message sent by pornography can broadly be summarised as ‘women are tools for sexual gratification’.¹⁴³ As such, pornography contributes to the objectification of women generally (not merely the women in the pornographic materials).

Ibsa can readily be used as pornography when it ends up on pornography websites or is shared through other channels such as online forums or messaging apps. That means that although I would object to referring to ibsa as a type of pornography, it may still be used as such and in that way also be used to send the message that pornography sends: that women are objects and tools that can be used for sexual gratification without having to consider them as persons.

¹⁴³ On pornography as sending harmful messages about women see e.g. Rae Langton, ‘Subordination, Silence, and Pornography’s Authority’ in R Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Oxford University Press 1998); Rae Langton, ‘Speech Acts and Unspeakable Acts’ (1993) 22 *Philosophy & Public Affairs* 293; Andrea Dworkin, ‘Against the Male Flood: Censorship, Pornography, and Equality’ (1985) 8 *Harvard Women’s Law Journal* 1; Andrea Dworkin, *Pornography: Men Possessing Women* (Plume 1991); Catharine A MacKinnon, ‘Pornography, Civil Rights, and Speech’ (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1; Karen Boyle, ‘The Implications of Pornification’ in Nancy Lombard (ed), *The Routledge Handbook of Gender and Violence* (Routledge 2018); James Weinstein, *Hate Speech, Pornography, and the Radical attack on Free Speech Doctrine* (Westview Press 1999), 60.

Furthermore, the very notion of pornography may be understood as *reinforced by* gender-inequality.¹⁴⁴ While I object to labelling ibsa as a type of pornography for the sake of protecting victims, I do not intend to deny that ibsa is *used as* pornography.¹⁴⁵ Here I argue that that is the very core of this wrong of infringing speech, because depicted persons, in ibsa, are made to convey the message of pornography when they did not choose to do so or consent to it. Given the particular controversial nature of that message this seems a gross infringement of the depicted person's free speech (discussed in subsections 5.5.3 and 5.5.4): they were not made to convey an innocuous message (e.g. 'good morning'), but rather something that might be compared to hate speech in the sense that 'that which is conveyed' is in itself wrongful.¹⁴⁶ In other words, the depicted person in ibsa becomes a tool for abuse of other people in the same social group as that person. What I have aimed to clarify in this section is that ibsa sends the same message as pornography, which is a message that challenges the equality between persons. As such, it is subject to the personhood interest in free expression, which, like privacy, is a specified form of autonomy.

5.5.3 The wrong in ibsa of infringing free expression on atomistic personhood

On atomistic personhood, free speech is a type of autonomy exercise. That means that, on atomistic personhood, I understand 'being entitled to freedom of expression' to mean that a person is entitled to self-determination regarding their speech acts.

¹⁴⁴ See also discussion on reinforcing inequality as a wrong of ibsa in chapter 6, section 6.3.

¹⁴⁵ See chapter 1, section 1.4, on terminology regarding ibsa and pornography.

¹⁴⁶ For a discussion on hate speech theory see generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

If ibsa qualifies as a speech act on atomistic personhood, then ibsa should be considered an infringement of the freedom of expression. I am not convinced that this is the case however. That is in line with the arguments presented in previous sections, in the discussion of the moral wrong of infringing autonomy, integrity, and privacy, on an atomistic approach to personhood, because the issue centres around the question whether an image is considered to be sufficiently closely connected to the depicted person to count as a speech act by them.¹⁴⁷ Here the question is whether ‘being made to be perceived as sending a message’ is an infringement of self-determination regarding speech. A person is still free (in the sense of ‘physically unrestricted’) to say whatever they want, and so ibsa does not restrict them in their positive freedom. For ibsa to qualify as an infringement of freedom of expression, there would have to be a negative infringement of freedom of speech. I am not convinced that atomistic personhood would find such an infringement, because the ‘speech act’ is not performed by the depicted person (neither in a positive sense nor in a negative sense). That is because the depicted person does not *do* a speech act (positive), nor can they be said to have been made to send such a message (negative). On atomistic personhood only that which is part of a person’s body can qualify as an infringement of them in a negative sense. So: it would be an infringement of negative freedom of speech if a person had been forced to speak to the images of ibsa, or to physically send pornographic messages, or any other form of coerced speech directly performed by that person through their body. The issue with fitting ibsa into such an infringement is that images, on atomistic personhood, are not seen as part of that person because they are separate from the body. Therefore, publishing an image of another person, through which that person is perceived as

¹⁴⁷ See sections 5.2.2, 5.3.4, and 5.4.3.

sending a particular message, may not be sufficiently closely related to that person to qualify as an infringement of their freedom of speech. On atomistic personhood the depicted person is not actually being made to express something, they are being perceived as expressing it but they themselves did not actually do so — because the self and its reflection are different concepts in atomism. As I discuss below, this issue does not exist in the same way on relational personhood. I find that the separation between person and depictions of that person drawn by the theory of atomistic personhood leaves not much room for a different conclusion.

On autonomy, integrity, and privacy, above, I held that if ibsa counts as personal information (on atomistic personhood) then a moderate infringement could be found on those interests. I am not convinced that the same argument applies here, as ‘deciding about personal information’ or ‘being denied the opportunity to decide about personal information’ is not a negative speech act if the information is seen as separate from the person (as images generally, and ibsa specifically would, on this approach). On atomistic personhood then, the person depicted in ibsa cannot be regarded as doing a speech act, and so their negative free speech is not infringed. On the other hand, the person committing ibsa can be recognised as doing a speech act as they are the ones actually sending the pornography message. That has led to juxtaposing the depicted person’s privacy rights to the defendant’s free speech rights, presenting ibsa as an equal clash of rights. I find this a misguided discussion, which I consider in the discussion of free speech and relational personhood below.

There may be a very minor infringement of positive speech, insofar as the depicted person’s genuine options are restricted: speaking up against ibsa can increase the harm of

ibsa, which can deter victims from speaking out.¹⁴⁸ While there is no infringement of what a depicted person can *choose* to say or not, if a victim-survivor of ibsa speaks up against the abuse they have suffered that abuse tends to intensify. That is because if more people are aware of the existence of ibsa, more people will seek it out, and the depicted person will be victimised more often and more intensely: they may be harmed more severely when they speak up against ibsa than when they do not. That puts a burden on the depicted person to ‘not speak’, meaning that V needs to suffer the abuse in silence or make things worse for themselves. This silencing effect could be framed as an infringement of positive speech, as the genuine options for free expression that the depicted person has, are narrowed.¹⁴⁹ The depicted person can no longer decide what to say *safely*, that is: it may no longer be a genuine option for them to express themselves in certain ways.

5.5.4 The wrong in ibsa of infringing free expression on relational personhood

On relational personhood, freedom expression serves a purpose of enabling the development of and maintaining one’s identity. Through expression, others can get a sense of you and you get an opportunity to guide that impression. Being perceived as sending a message thus is an infringement of the self, and a direct infringement of the personhood interest in free expression. As considered, I hold that pornography sends a particular message, and that ibsa, when it is used as pornography, sends that message

¹⁴⁸ See e.g. the experiences of additional harms and ‘backlash’ to speaking out as described in Noelle Martin, ‘Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist’s Perspective’ in Anastasia Powell, Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Springer 2021), 62-3.

¹⁴⁹ See Raz (n 5).

too. As such, ibsa is an infringement of free expression on relational personhood because the image and the person are not separate and the image is used to send a message.

An image is part of the person it depicts (as it affects how the depicted person is perceived by others and as such affects their relations and ability to exercise authority over how to engage in those relations). As such, ibsa is an expression *by the depicted person* that is enforced by the defendant. On a relational approach, the depicted person in ibsa is forced to send a pornographic message, and their negative freedom of expression is thus actively, and directly, infringed.

As is the case on atomistic personhood it might be possible to conceive of a more remote infringement of positive freedom of expression if victims are silenced or subjected to aggravated harm through ibsa if they speak up against it. I hold this to be a more remote infringement because it is an infringement that is the result of responses to ibsa, rather than an infringement that is an inherent part of the wrongdoing.

5.5.5 Framing the wrong in a legal context

The right to freedom of expression is notably well-protected and in liberal democracies. It is regularly pointed at as one of the most important rights and seen as vital for the existence of the state structure. One of the rights protecting free speech is contained in article 10 ECHR. It is beyond the scope of this thesis to give a full account of the debates surrounding the scope of this right.¹⁵⁰ However, I note here that despite the vast

¹⁵⁰ See for a discussion on the right to freedom of speech e.g. Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303; Larry Alexander, *Is there a Right of Freedom of Expression?* (Cambridge University Press 2005).

legislation, case law, and academic debate on freedom of expression, its *negative* protection is not particularly well established. The ECtHR has called the right ‘not to speak’ the negative right to free speech. In its guide, the ECtHR considers that ‘negative speech’, as a right, *can* be covered by article 10, but that it needs to be assessed on a case by case basis whether it actually does.¹⁵¹ A case that comes relatively close to the type of negative speech infringement as present in *ibsa* considers that a person who did not make a particular statement has their speech rights infringed if others *perceive* them as having made that statement, which might be compared to *ibsa* where a person is perceived as sending a pornographic message they had not had the freedom to choose not to send.¹⁵² While the ECHR is not (yet) fully clarified regarding the question whether *ibsa* could be seen as an infringement of the right to free speech as contained in article 10, the Court has left some scope for determining such cases in future, and may find that *ibsa* is indeed covered.

5.5.6 Conclusion

In this section I have discussed the moral wrong of infringing freedom of expression or freedom of speech as materialising through *ibsa*. Freedom of expression requires both a negative liberty (to be free from outside interference and restrictions of speech) and a

¹⁵¹ *Case of Gillberg v Sweden* Application no 41723/06 (ECHR, 3 April 2012), §86, see also Council of Europe and European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights : Freedom of Expression* (2020), §25. The cases where the Court has *not* found such a right to exist see to vastly different issues than *ibsa* (such as false testimony or the right to vote, see *Wanner v Germany (dec)* Application no 26892/12 (ECHR, 23 October 2018); and *Moohan and Gillon v the United Kingdom (dec.)* Application nos 22962/15; 23345/15 (ECHR, 13 June 2017)). That means there is precedent that excludes *ibsa* from the scope of the provision in art. 10 ECHR as a negative infringement.

¹⁵² *Case of Stojanović v Croatia* Application no 34425/04 (ECHR, 19 May 2009), §39.

positive liberty (e.g. the freedom to hold and express opinions). I have found that there may be an infringement of negative speech when a person is being made to say something, as opposed to being free to choose to say that or not. I have argued that a relational approach to personhood would readily account for the message sent through a depiction as being a message sent by the depicted person, as an image is part of the person: through ibsa, the depicted person is being made to send the message of pornography. On atomistic personhood, this conclusion cannot readily be drawn, as the image is not part of the person and the message will be considered to have been sent only by the person recording and/or disclosing it, and not the depicted person.

Secondly, I have argued that there may be a moderate infringement of positive freedom of expression where victims of ibsa are strongly discouraged from speaking up against the abuse they have suffered, because it would make the harm they experience worse as more people will know about the abuse and more people will contribute to it by seeking out the abusive images. That limits the scope of positive liberty where it may no longer be a genuine option to speak, even if it may be a desired option. On both approaches to personhood discussed here I hold that it may be possible to find a moderate infringement of positive speech insofar as victims are strongly discouraged from speaking about the abuse they suffered, as speaking up against ibsa tends to make the scope of the abuse worse.

5.6 The wrong in ibsa of breaching trust

5.6.1 Introduction

In this section, I explore breaching trust as a wrong of ibsa. I first set out the meaning of ‘trust’ and then consider the atomistic and relational interpretations of the wrong in ibsa.

5.6.2 The meaning of trust

In this section, I discuss two approaches to understanding ‘trust’. One reason to want to have ‘trust’ has been described by Georg Simmel, who states

Without the general trust that people have in each other, society itself would disintegrate, for very few relationships are based entirely upon what is known with certainty about another person, and very few relationships would endure if trust were not as strong as, or stronger than, rational proof or personal observation.¹⁵³

Dmitry Khodyakov distinguishes between two types of trust that are described here: institutional trust, and interpersonal trust.¹⁵⁴ However, Simmel’s passage does not *define* trust. Dictionary entries refer to concepts such as ‘reliance’ and ‘faith’ when defining trust.¹⁵⁵ While these concepts may offer some clarification (at least to the extent that the

¹⁵³ Georg Simmel, *The Philosophy of Money* (Routledge 2011), 191. The idea that society would disintegrate without trust can also be found in the work of John Locke where he discusses the requirements of the law of nature: ‘so all society is abolished and all trust, which is the bond of society.’ in: John Locke and W von Leyden, *Essays on the Law of Nature* (Clarendon Press 1954), 213.

¹⁵⁴ Dmitry Khodyakov, ‘Trust as a Process: A Three-Dimensional Approach’ (2007) 41 *Sociology* 115.

¹⁵⁵ See e.g. Oxford English Dictionary, “*trust, n.*” (Oxford University Press 2022).

word ‘trust’ is usable), they may be criticised for overly focusing on the outcome of trust (‘having faith’, ‘relying on something’).¹⁵⁶ Based on Simmel’s work, Niklas Luhmann argues that ‘The basis for all trust is the presentation of the individual self as a social identity which builds itself up through interaction and which corresponds to its environment.’¹⁵⁷ Alternatively, trust can be seen as a process, which is the view of Guido Möllering and Khodiyakov.¹⁵⁸

Möllering holds that trust is ‘a process in which we reach a point where our interpretations are accepted and our awareness of the unknown, unknowable and unresolved is suspended.’¹⁵⁹ He accepts that this is not a comprehensive definition, and suggests that ‘the leap of trust’ may need to be explored further in order to fully explain what trust is.¹⁶⁰ Khodiyakov, like Möllering, also considers trust as a process.¹⁶¹ Defining

¹⁵⁶ See on trust defined by expectation of a certain outcome also e.g. Morton Deutsch, ‘Trust and Suspicion’ (1958) 2 *The Journal of Conflict Resolution* 265, 266; Dale E Zand, ‘Trust and Managerial Problem Solving’ (1972) 17 *Administrative Science Quarterly* 229, 230; BR Schlenker, B Helm and JT Tedeschi, ‘The Effects of Personality and Situational Variables on Behavioral Trust’ (1973) 25 *Journal of Personality and Social Psychology* 419, 419.

¹⁵⁷ Niklas Luhmann, *Trust and Power* (English edn, Polity 2017), 69.

¹⁵⁸ Guido Möllering, ‘The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension’ (2001) 35 *Sociology* 403; Khodiyakov (n 154).

¹⁵⁹ Möllering (n 158), 414.

¹⁶⁰ *ibid*, 415. This ‘leap of trust’ recalls the ‘movement of faith’ as conceived by Søren Kierkegaard, *Fear and Trembling; Repetition* (Princeton University Press 1983), 119. That would be a faith based approach to conceiving trust.

¹⁶¹ Khodiyakov distinguishes between ‘interpersonal trust’ and ‘institutional trust’, in Khodiyakov (n 154), 128. In this thesis, I am concerned with interpersonal trust only. See on trust developing as part of relationships also e.g. J David Lewis and Andrew Weigert, ‘Trust as a Social Reality’ (1985) 63 *Social Forces* 967, 968. Zand (n 156), 230; Schlenker, Helm and Tedeschi (n 156), 419. Susan D Boon and John G Holmes, ‘The Dynamics of Interpersonal Trust: Resolving Uncertainty in the Face of Risk’ in Robert A Hinde and Jo Groebel (eds), *Cooperation and Prosocial Behaviour* (Cambridge University Press 1991), 191.

trust-as-a-process moves away from an outcome-based approach to trust, that is, ‘the functional properties of the concept’ of trust.¹⁶² ‘Trust’ is not just useful because of its outcome, but also because of its process. I hold that ‘trusting’ is part of developing caring relations, and a process-based description may well capture this better than an outcome-based description of trust. However, it is beyond the scope of this thesis to explore, per Möllering’s suggestion, what a leap of trust entails and so to clarify what it means that trust is a process. For the purposes of this thesis it is sufficient to determine that trust can exist in (caring) relations, per Khodiyakov’s category of interpersonal trust.

Trust is essential for caring relationships.¹⁶³ That is because trust is needed to establish the relationships that make persons who they are but those relationships also cause vulnerability.¹⁶⁴ Trust is the notion that such vulnerability will not be exploited and

¹⁶² Möllering (n 158), 404.

¹⁶³ See also Keith E Davis and Michael J Todd, ‘Friendship and Love Relationships’ in Keith E Davis and Thomas Mitchell (eds), *Advances in Descriptive Psychology*, vol 2 (JAI Press 1982), 80, 84-5.

¹⁶⁴ By engaging in relationships, new vulnerabilities develop, such as knowledge of intimate information creates a vulnerability as this knowledge could be abused, see Jonathan Herring, ‘No More Having and Holding: The Abolition of the Marital Rape Exemption’ in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Hart 2011); *R v Ross* [2009] EWCA Crim 2610, §37; *Attorney-General’s Reference (No 90 of 2009)* [2009] EWCA Crim 2610. Trust in relationships is the belief that these vulnerabilities will not be abused. If trust in caring relations is breached and abused, that can be detrimental to one’s ability to engage in caring relations, see e.g. St Vil, Carter and Johnson (n 134), 6-7. At the same time, vulnerability cannot be avoided by *not* engaging in relationships: the hermit is vulnerable to physical harms and has to be entirely self-sufficient: they can rely on no one else to get food, water, shelter, clothing, etc. The vulnerability ‘gained’ from entering into relationships with others remedies the vulnerability of isolation, see Herring (n 165), 11; See on universal vulnerability e.g. Martha Albertson Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *Elder Law Journal* 71, 86; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016), 11.

abused.¹⁶⁵ Where there is trust there can be relationality, distrust leads to atomism.¹⁶⁶

‘People in close relationships are expected to recognize and respect the vulnerabilities that go with being in a close relationship.’¹⁶⁷ Disclosing vulnerabilities within the course of a relationship could be seen as a risk, and whether to take that risk could be decided by trust or distrust: ‘Trust alleviates fears of exploitation and minimizes feelings of vulnerability’.¹⁶⁸ Trusting another person results in the belief that they will not abuse the disclosed vulnerabilities.¹⁶⁹

Breaching trust in interpersonal relationships, as a moral wrong, would then be failing to meet that expectation. In the following to sections I consider whether such a breach could be considered a moral wrong *against the person*, and whether it materialises in ibsa.

5.6.3 The wrong in ibsa of breaching trust on atomistic personhood

On atomistic personhood, ‘a breach of trust’ is not within the realm of wrongs against persons. That is because ‘trust’ is not part of the person. The person, on an atomistic approach, is defined only by their mental capacities, which are not affected by a breach

¹⁶⁵ Kyselo (n 20), 2.

¹⁶⁶ Bernard Barber, *The Logic and Limits of Trust* (Rutgers University Press 1983), 21.

¹⁶⁷ Mark L Knapp, ‘Lying and Deception in Close Relationships’ in Anita L Vangelisti and Daniel Perlman (eds), *The Cambridge Handbook of Personal Relationships* (Cambridge University Press 2006), 518.

¹⁶⁸ Boon and Holmes (n 161), 191.

¹⁶⁹ Although it might be a reduction of the concept of trust to think of it only in terms of ‘a belief, an expectancy, and a feeling’, see: Philip Worchel, ‘Trust and Distrust’ in William G Austin and Stephen Worchel (eds), *The Social Psychology of Intergroup Relations* (Brooks/Cole Publishing Company 1979), 176.

of trust. When personhood is defined by atomistic capacities, anything to do with others is not part of personhood. Trust between persons is by definition interpersonal, and as such it is by definition separate from the person. In other words: a breach of trust, on atomistic personhood, cannot be conceived as an infringement of the person.

Breaches of trust, even if experienced as unpleasant, are something for the individual to deal with if they are bothered by it, but they are not a wrong against them as a person because they do not affect their mental capacities. A breach of trust is thus not a moral wrong against a person on atomistic personhood.¹⁷⁰

5.6.4 The wrong in ibsa of breaching trust on relational personhood

On relational personhood, relationships are at the core of personhood, and those relationships can exist and be strengthened through trust. The relations at the core of our identity make us vulnerable towards the people close to us.¹⁷¹ It can be argued that human beings are universally vulnerable.¹⁷² This universal vulnerability exists regardless of the strength of relationships. While relationships may help remedy some aspects of vulnerability (e.g. because you do not need to worry in isolation about how to keep warm, or build shelter, etc.), relationships also *create* vulnerabilities: in the course of relationships people disclose information, particularities become known to the other. For example knowledge of intimate information creates a vulnerability as this knowledge

¹⁷⁰ It may be that, on an atomistic account, the moral wrongness of breaching trust could be found as the infringement of a lower moral standard than personhood. It is beyond the scope of this thesis to consider what such a standard may be.

¹⁷¹ Herring (n 165), 11.

¹⁷² See on this argument Fineman (n 165), 86 and Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer 2018), 24-33.

could be abused. Trust in relationships is the belief that the disclosed and created vulnerabilities will not be abused. That does not remove the risk that the trusted person *could* abuse the disclosed vulnerabilities, and indeed this does sometimes happen.¹⁷³ In that case there is a breach of trust. Such a breach can be detrimental to a person's sense of self, particularly if it occurs in a close relationship. But even in distant relationships, a breach of trust could have very serious consequences for the relational person: if trust is breached that can have effects on all other relationships that person is engaged in — existing and future one's. For instance, victim-survivors of domestic violence sometimes report attempting to refrain from close relationships in an attempt to 'reduce vulnerability'.¹⁷⁴ However, avoiding relations would only reduce the type of vulnerability that arises within relations. It would be very detrimental to relational beings to avoid engagement.

In my discussion on integrity I considered that it might be a challenge for states to facilitate engagement so as to avoid people getting completely isolated (which would be an infringement of their integrity on relational personhood). The challenge is that a lack of engagement may not be anyone's fault in particular. If the state sought to ensure A's opportunities for engagement with person B, it could only do so if B wants to engage with A — otherwise B's integrity would be infringed instead. But, while 'getting isolated' may not easily be attributed to others, it is well-established that breaching a person's trust makes it more difficult for them to engage with others. As such, coercive control and ibsa may contribute to a person's isolation, which may then be regarded as a harmful effect of those types of abuse. If it is so severe that it limits a person's genuine

¹⁷³ Herring (n 165), 246.

¹⁷⁴ St Vil, Carter and Johnson (n 134), 6-7.

options to engage with others it may be an additional wrong of ibsa or coercive control that V's positive liberty, and thus their autonomy, is restricted and infringed.

Insofar as there are social norms that we expect strangers to abide by, trust can be breached by strangers. There may be social rules that can help facilitate a minimal trust between strangers, though I note that this is purely outcome-based trust and not at all derived from trust-as-a-process. As such, it can hardly be considered thick interpersonal trust. It may be argued that trust where there is no strong relationship, breached trust is less likely to cause damage to present and future close relations. However, if the breach is sufficiently severe, it may well do so.

Breaches of trust, both in close relationships and between strangers may even affect *others who are not part to the incident*. For example, there may initially be trust that a stranger is not about to attack you in the streets. If a woman hears of (regular) incidents of women being attacked while walking home alone at night, they may well stop trusting that a stranger would not attack them. They might, for example, adapt their behaviour, or change their social life patterns. Similarly, if one hears of partners sharing ibsa, one may stop trusting that one's own partner would not do so. Even if trust was breached in other relations than my own, my relationships (and thus my personhood) can be affected. On relational personhood, the breach of trust by a stranger (which would at best be a shallow trust derived from social norms, for example, that a person on the streets is not about to attack you) is less damaging because that other is less part of the core of your being.

Breaching trust can have effects even beyond individual relationships: abuse of trust can make people (both those whose trust has been breached as well as others who are aware of those types of breaches) hesitant to enter into relationships.¹⁷⁵ For instance, if ibsa is very common it may make people who have not been directly subjected to it worry that they might be, and they may end up trying to avoid relationships in which someone may end up treading their trust by subjecting them to ibsa. Note that, particularly in light of deepfakes, it is impossible for people to act in such a way that guarantees that they will not be subjected to ibsa. Lack of trust is about avoiding certain relationships for fear of ibsa, not about actually avoiding ibsa (which is not for V but for D to do).

Where ibsa is committed by a (former) intimate partner, a breach of trust may be very severe, whereas if it is committed by a stranger it may be much more shallow. However, even a breach of trust in a shallow relationship (e.g. as members of the same society) can infringe the relational person very severely through affecting the trust a person has in their other relationships. I hold that ibsa can constitute a breach of trust. The severity of this breach can depend on the closeness of the relationship a person has with the person who breached their trust, as well as the extent to which their trust in other relationships is affected.

¹⁷⁵ See for instance: *ibid*, 6-7. Fear of abuse of trust may be a reason why some forms of trust are legally protected, see section 5.6.5.

5.6.5 Framing the wrong in a legal context

Whether there is a general right not to have trust breached in the law of liberal democracies is a question that is outside the scope of this thesis. It seems that it is not a very well-recognised right, if indeed there is one.

There are a few instances where trust has been protected legally, in one way or another. Where trust is legally protected from being breached by one of the parties to a relationship, those relationships are not close caring relations in which thick interpersonal trust may naturally develop. For example, trust can be protected in a legal sense through doctor-patient confidentiality legislation, or where parties have the option to protect themselves against a breach of trust by the other such as in non-disclosure agreements.¹⁷⁶ A reason for protecting the trust in such relations could be that the state finds those relationships beneficial but recognises that sufficiently strong trust does not develop in them. For example, it is considered ‘a good’ if patients can get healthcare, and they would likely be more prepared to seek healthcare if the confidentiality of it is protected.¹⁷⁷ In a doctor-patient relationship it can be vital (both for individual patients as well as for public health) that people entrust their doctor with the information necessary to offer an appropriate diagnosis. As doctors and patients may be virtual strangers, this would not normally be a situation in which thick interpersonal trust exists, as it has not had opportunity to develop. Legal protections of trust in doctor-patient confidentiality

¹⁷⁶ On doctor-patient confidentiality see generally Jonathan Herring, ‘The Severity of Domestic Abuse’ (2018) 30 *National Law School of India Review* 37. On non-disclosure agreements see e.g. Maureen A Weston, ‘Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era’ (2021) *University of Illinois Law Review* 507.

¹⁷⁷ Herring (n 176), 313.

and non-disclosure agreements mimic such trust, removing the need for it to naturally develop and still facilitate the benefits of a trusting relationship.¹⁷⁸

But trust can also be protected against outside interference, for example in spousal privilege laws. However, such protection of trust is not the protection of trust between partners, but the protection against interference with trust between partners by the state. A person has the privilege not to testify against their spouse, but it is not a legal *duty* not to do so: the state cannot demand a breach of trust between spouses, but the partner choosing to disclose regardless of there not being a duty to disclose has then not themselves committed a legal wrong. While spouses are not obligated to breach trust in case of a public wrong, but they are permitted to. As such, none of these tools exemplify a legal right to not have one's trust breached by those one is in close relationships with. Whether or not it is feasible and desirable to develop or find a legal right protecting against a breach of trust is a question outside the scope of this thesis.

5.6.6 Conclusion

In this section I considered that trust is essential for developing close relationships. As such, I hold that it is a fundamental part of relational personhood. The infringement of trust should therefore be considered a serious wrong on relational personhood. On atomistic personhood however, it could not be recognised as a wrong against a person at all.

¹⁷⁸ I have used the term 'benefit' because that seems to be the reason to want to facilitate trust. However, I note that non-disclosure agreements are not always presented in a positive light, for instance where they are used to cover up reports of sexual violence, see also Shane Rader, 'The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements Comments' (2019) 3 *The Business, Entrepreneurship & Tax Law Review* 329.

For ibsa this means that there is no moral wrong against persons on an atomistic interpretation. There can be a really serious moral wrong against the person on a relational interpretation. That wrong can be two-fold. First of all, if there is a close relationship in which trust is breached, the breakdown of that relationship is a substantial infringement of the person because a close relationship is an important part of someone's personhood. Secondly, breached trust, even in not-so-close relations can affect how a person relates to others generally. As such, it could affect their entire, or a substantial part of their relationships and personhood.

5.7 Chapter conclusion

In this chapter I considered five wrongs of ibsa. I discussed that on atomistic personhood, ibsa can be interpreted as a moderate infringement of autonomy and sexual integrity, as an infringement of privacy, and as a moderate infringement of free expression insofar as a person's genuine options for speech are limited, for example through negative effects of speaking up against ibsa. I noted that a breach of trust is not a wrong against a person on an atomistic understanding of personhood. When using a relational approach to personhood ibsa can be interpreted as an infringement of autonomy, sexual integrity, privacy, free expression both in negative and positive meaning, and as a breach of trust. All of these are considered to be wrongs against the person.

One of the things shown in this chapter is that the interpretation of wrongness varies greatly between atomistic personhood and relational personhood, because they take such different values as their identifying characteristic. If the question is 'does ibsa infringe a person's mental capabilities and autonomous capacities', the answer is that it

barely does so. If the question is ‘does ibsa infringe a person’s caring relations’ then the answer is that it does so on all interests discussed in this chapter. Because I hold that relational personhood is the better approach in terms of reflecting how we actually exist in the world, I also hold that the relational approach offers the most appropriate understanding of the full nature of the wrongness of ibsa. In the next chapter I find this to an even greater extent, where I hold that ibsa can constitute an absolute wrong on a relational interpretation, but not so on an atomistic one, and interpret ibsa as an equality wrong on the continuum of sexual violence.

CHAPTER 6: IBSA AS AN ABSOLUTE WRONG AGAINST PERSONS AND ITS WRONGNESS ON THE CONTINUUM OF INEQUALITY

6.1 Introduction

In this chapter I consider two further wrongs of ibsa. These exist in addition to the wrongs discussed in chapter 5. The wrongs discussed in this chapter differ from those discussed in chapter 5 as they are not infringements of individual personhood interests, but rather more complete infringements of personhood directly. I first consider the failure to minimally respect personhood. That is one wrong, that can be constituted in different ways. I discuss the failure to minimally respect personhood as being constituted on a continuum between denial-of-subjectivity-with-objectification and denial-of-personhood-interests. The second wrong discussed in this chapter is ibsa as part of the violence against women continuum, on which it can be interpreted as an infringement of equality towards all members of the depicted person's social group.

Unlike the wrongs discussed in the previous chapter, the wrongs discussed here cannot be justified by the subject's consent. In the case of a failure to minimally respect personhood I argue that no justification can exist at all. Regarding the infringement of equality I consider that justifications other than the subject's consent might exist, so long as it does not amount to a failure to minimally respect personhood.

6.2 Ibsa and the wrong of failing to minimally respect personhood

6.2.1 Introduction

In this section I discuss the wrong of failing to minimally respect personhood. The wrong materialises when a person is being subjected to treatment that fails to meet the minimal level of respect persons are owed by virtue of their personhood. I consider that this wrong can materialise through a denial of subjectivity as well as through a denial of personhood interests.

Failing to minimally respect personhood is the most serious wrong discussed in this thesis. It is an infringement of the person that is so severe that it cannot be reconciled with a minimal level of respect for the status of personhood, and as such, it cannot be justified.

The way the nature of the wrong of ibsa is understood depends on the underlying approach to personhood. However, because personhood entitles to the highest moral status, by definition it is the most serious moral wrong against a person for that person to be treated as though they do not have personhood. I find that ibsa can amount to a failure to minimally respect personhood, particularly when considered on a relational understanding of personhood. An atomistic account of personhood has a more limited understanding of what is entailed by the person. That is why the wrongs discussed in the previous chapter only seemed to be moderate on atomistic personhood, and that is why it is less likely that ibsa will be a failure to minimally respect personhood on an atomistic approach.

Conduct can either *directly* fail to respect a person's moral status, namely when a person is subjected to a denial of subjectivity, and conduct can *indirectly* fail to respect a person's moral status, namely when a person is subjected to conduct that fails to acknowledge that the subject has personhood interests. These are two ways in which persons might be subjected to treatment that *cannot* be reconciled with their moral status, and as such should be considered wrongs against the person.

I discuss 'denial of subjectivity' and that of 'denial of personhood interests' separately. That is because while 'denial of subjectivity' and 'denial of personhood interests' result in the same type of moral wrong, namely failing to minimally respect personhood, they are different paths to the same destination. They are worth exploring individually because they can look very different dependent on their path, and both should be recognised as the severe wrong that they constitute.

6.2.2 The wrong in ibsa of failing to minimally respect personhood through a denial of subjectivity

6.2.2.1 Introduction

Denial of subjectivity can be a moral wrong of ibsa, but I argue it only does so on a relational approach to personhood. I set out my reasons for this conclusion below. Even on relational personhood I argue that this wrong may not always materialise in ibsa. Where it does however, ibsa is necessarily unjustifiable as a denial of subjectivity is irreconcilable with respecting a person's moral status. In order for a person to claim *mistreatment* as a result of denial of subjectivity there needs to be conduct that can be understood as 'subjecting a person to treatment'. A denial of subjectivity through, for

example, ‘ignoring a person’ may not amount to mistreatment. For this reason I distinguish here between ‘denial of subjectivity through ignoring a person’, and ‘denial of subjectivity through objectifying a person’.

The relevant difference between ‘objectification’ as an act, and ‘ignoring’ as lack of an act is that an act can readily infringe on an other, whereas absence of an act does not readily constitute an infringement.¹ If someone is being completely ignored there is no engagement with them and so they are not being used or treated as an object.² Therefore, there cannot be objectification (this is true both on an atomistic and relational approach to personhood).

In chapter 3, I considered that personhood is the highest moral status. One way in which the most serious wrong against persons can materialise is when a person is treated as though they are not a person, but rather an object.³ That is discussed here as the wrong of ‘denial of subjectivity through objectification’. I distinguish this from ‘denial of

¹ See chapter 3, section 3.5.3 on engaging with and distinguishing from others. See also chapter 5, section 5.3.3.4 for a discussion of infringements of the person versus infringements of autonomy.

² It does not seem inherently wrongful to ignore a person, and in order to respect other’s integrity there cannot be a right to be engaged whenever engagement is wanted. See also chapter 5 (n 85) on incels. Nevertheless, unwanted, absolute isolation or loneliness may be a wrong that the state has a duty to prevent, because it is detrimental to relational personhood to have no engagement at all. See Kimberley Brownlee, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford University Press 2020), 39-74.

³ It is wrong ‘not be treated as subjects’, regardless of whether the person-treated-as-subject actually ‘has’ subjectivity (e.g. they perceive themselves as a self). Treating a person only as an object fails to respect their personhood. In this section I hold that it is wrong to deny subjectivity even if a person is not aware of themselves, see also chapter 3, text at (n 87) and Simo Vehmas, ‘Discriminative Assumptions of Utilitarian Bioethics Regarding Individuals with Intellectual Disabilities’ (1999) 14 *Disability & Society* 37, on the need to be humble with regards to determining what another person experiences. In the next section I discuss the other way in which this most serious wrong can materialise, namely through a denial of personhood interests.

subjectivity through ignoring the other’, which I do not consider to be conduct that *subjects the other to treatment*. Where denial of subjectivity takes place in combination with some sort of use of that person, it should be considered denial of subjectivity with objectification. Without objectification, denial of subjectivity might not be a serious wrong: if there is no ‘use’, denial of subjectivity is ‘ignoring’ a person.

On a relational account to personhood an argument can be made that lack of engagement is morally wrongful, particularly if it is absolute, which seems unusual.⁴ An argument could be made, on a relational account to personhood, that ‘ignoring’ is a type of denial of subjectivity, and as such wrongful (particularly if a person were to be ignored by everyone else). This type of denial of subjectivity is outside the scope of this thesis, because it does not materialise through ibsa.⁵ Instead, I consider ibsa as ‘subjecting another person to treatment’. That is ‘treating a person as an object without acknowledging and respecting their subjectivity’.

6.2.2.2 Objectification

In this section I consider ‘objectification’ to help clarify what I mean by denial of subjectivity through objectification. ‘Objectification’ is a type of subject-object relationship in a grammatical sense: the subject does the action that the object is subjected to. That means that ‘to subject a person to treatment’ is ‘to make them into the object’ in a grammatical sense. The terms ‘subject’ (alongside ‘subjectivity’) and

⁴ See e.g. Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017), 81.

⁵ This argument would be based on some of the considerations presented by Brownlee on a right against social deprivation, see Brownlee (n 2), 39-74.

‘object’ (alongside ‘objectification’) are for example used in that sense when I say that a person is subjected to treatment and objectified.

I note that if a person is subjected to treatment while their subjectivity is *respected*, that would not be a denial of subjectivity, and the wrongness of objectification depends on whether or not a person’s subjectivity is respected. If subjectivity is respected, then a (necessarily partial) objectification of them would not necessarily be all-things-considered wrong. For example, when a patient visits their doctor and agrees that the doctor can examine their knee, the patient subjects to, and is subjected to, the doctor’s action. Describing this could look like: the doctor examines the patient. The doctor is the grammatical subject. Their actions subject the patient, the grammatical object, to treatment. That is a type of objectification, but not one that involves a denial of subjectivity. That is because the doctor would not (or at least should not) treat the patient as an object *only*. This may be clarified by changing the phrasing of the example to ‘the doctor and the patient agree that the knee will be examined’, making the knee into the object, but maintaining the patient’s subjectivity. A similar change is not possible where a person’s subjectivity is denied. By definition, ibsa is not something that is agreed to. A person (‘V’) who is subjected to ibsa by another person (‘D’) does not agree to this objectification. Their wishes and concerns may be ignored as though they had none, in which case ibsa can amount to an unjustifiable denial of subjectivity. In some cases of ibsa, V may be denied subjectivity while being subjected to treatment. That would be objectification in which there is no regard for V’s subjectivity and that would amount to a failure to minimally respect personhood.

Denial of subjectivity with objectification is ‘to subject someone to conduct that, *in itself*, does not respect that person’s personhood’. When a person is denied subjectivity they are not treated as a subject but only as an object.⁶ Treating a person as an object fails to respect their moral status, and where objectification is a form of denial of subjectivity it must be a direct failure to respect personhood. Persons who are ‘subjected to treatment’ ought to be ‘subjected to that treatment with respect for their subjectivity’, and not merely as objects.

6.2.2.3 Denial of subjectivity

Where there is objectification, there is not necessarily denial of subjectivity. In ibsa, the question is whether D (either as the initial discloser of images of ibsa, or as a subsequent user of images of ibsa) denies V’s subjectivity, or whether V’s personhood is still somehow acknowledged (even if poorly). On this basis I distinguish between having no regard for subjectivity at all, and abusing subjectivity. That is one of the differences between ‘denial of subjectivity’ and ‘denial of personhood interests’: denial of subjectivity requires lack of acknowledgement of the other as a person, whereas denial of personhood interests can be established when a person’s subjectivity and personhood are acknowledged but not minimally respected.

⁶ Martha Nussbaum considers denial of subjectivity to be a type of objectification, in Martha C Nussbaum, ‘Objectification’ (1995) 24 *Philosophy & Public Affairs* 249, 257. On an atomistic account of selfhood, objectification of a person could only be established by physical treatment of that person’s body whilst failing to respect their subjectivity. On a relational account of selfhood any treatment of a reflection of the self (body, name, image, avatar, etc.) whilst failing to respect that person’s subjectivity would amount to an objectification of that person.

Denial of subjectivity might exist, for example, when an image of ibsa is shared online and reaches people who neither know nor care who the depicted person is. They may nevertheless use the images, for example, for pornographic purposes, or distribute them further. An image, once it has been disclosed, can lead a life of its own on the internet. As such it may be used by people who have no regard for the depicted person's subjectivity at all. By using the image regardless of the depicted person's non-consent (or rather, lack of knowledge and/or care about whether the depicted person consented) the users demonstrate what I would consider denial of subjectivity through objectification.⁷ In such a case, the depicted person is treated only as an object, without regard for their subjectivity. Moreover, they have been used to facilitate their own objectification.⁸

Where D commits ibsa precisely *because* the depicted person does not consent to this, or where D uses images of ibsa while acquainted with V and knowing that V does not consent, the depicted person's subjectivity is acknowledged, and abused. That might be the case where, for example, D and V know each other and D knows that V will find the disclosure upsetting. I recognise the severity of this type of conduct, but I do not consider it a denial of subjectivity: the subjectivity of V is not denied. Rather, V may be subjected to ibsa precisely because D appreciates V's subjectivity and D decides to abuse

⁷ My assessment here works only on a relational approach to personhood, as I explain in sections 6.2.2.4 and 6.2.2.5. See those sections for a discussion of the difference between atomistic and relational interpretations of the moral wrong of denying subjectivity.

⁸ See, by analogy, victims being used as a tool of abuse against themselves in the context of domestic violence Jonathan Herring, 'The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3' (2011) 33 *Journal of Social Welfare and Family Law* 297, and in the context of theft Stephen Shute and Jeremy Horder, 'Thieving and Deceiving: What Is the Difference?' (1993) 56 *The Modern Law Review* 548.

that subjectivity.⁹ Such conduct may be a denial of personhood interests, discussed in the next section: a person disclosing an image *because* the depicted person did not consent treats that person without regard for their personhood interests, but not necessarily without regard for their subjectivity. Denial of personhood interests is not any less serious than denial of subjectivity. It merely has a different ‘route’ to materialisation of the moral wrong of failing to minimally respect personhood.

Denial of subjectivity seems most likely to occur where there is no relation between the defendant and victim. In ibsa, that means that denial of subjectivity would be mostly done by the audience *using* and re-sharing the images of ibsa with complete disregard for the depicted person’s personhood. I believe that this implies that the audience can seriously wrong victims of ibsa. Despite this, the audience is not usually considered to wrong victims of ibsa (at least not very severely).¹⁰ When the audience does not know nor care who the depicted person they are using is, that seems to be a type of negligence: by not ensuring that there was sufficient justification for using the reflection of another person. The wrong of ‘denial of subjectivity through objectification’ is established by not taking care to ensure that the person who is subjected to the treatment agrees to that treatment. As I consider below, the wrong of denial of

⁹ V is used as a tool against themselves, see Herring (n 8). See on D abusing intimate knowledge of particularities of V: *Attorney-General’s Reference (No 90 of 2009)* [2009] EWCA Crim 2610, and chapter 5 (n 164).

¹⁰ Re-sharing, or sharing beyond the reach of the initial disclosure, is not often part of laws addressing ibsa, which tend to focus on the initial act of recording and/or disclosure. See e.g. Nicola Henry and Asher Flynn, ‘Image-Based Sexual Abuse: Online Distribution Channels and Illicit Communities of Support’ (2019) 25 *Violence Against Women* 1932. However, secondary disclosures should be a core part of laws addressing ibsa because so much of the wrongness and harmfulness is established through ibsa’s widespread availability. See also Clare McGlynn and Erika Rackley, ‘Image-Based Sexual Abuse’ (2017) *Oxford Journal of Legal Studies* 1, 5.

subjectivity through objectification only materialises in ibsa on a relational approach to personhood, not on an atomistic one.¹¹

Where a user does not take care to ensure that the depicted person consented to being used ('subjected to treatment'), the wrong is one of being negligent. That is not a state of mind that is commonly considered sufficient to underpin serious offences.¹² While negligence is usually not considered a strong enough *mens rea* to justify criminalisation of really serious offences with that mental element, I hold that it can be appropriate in some cases, to use negligence as *mens rea* for serious offences. In non-sexual offences, 'negligence' as *mens rea* for an offence could be overly burdensome: for example, it is relatively easy to negligently damage the property of another person by accident. It would be quite restrictive to put a constant responsibility on people to ensure, for example, that what they did was not going to damage another's property. Accidentally being negligent is not as much of a risk in sexual offences, because it is much more unlikely that the *actus reus* could be committed accidentally. For instance in rape, it would be virtually impossible to be in the act of penetration without intending to do so. It might then not be overly burdensome to require that this act be done with consideration for the penetrated person's consent, and that negligently failing to ensure the other's consent would be a sufficiently strong *mens rea*. Indeed this is the approach I recognise in the criminalisation of rape in England and Wales, where the double *mens rea* of 'intentionally penetrating' and 'negligence towards consent' ensure that there is a strong *mens rea* that nevertheless appreciates the severity of negligence in acts

¹¹ See sections 6.2.2.4 and 6.2.2.5.

¹² See generally Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (10 edn, Oxford University Press 2022), 148-50.

concerning others.¹³ In a specifically chosen activity it is not overly oppressive to require ‘ensuring that there is good reason for it’. That is, it is not overly oppressive to ensure that there is consent for such conduct. That applies to offences like rape, and also to using ibsa: it seems very unlikely that a person would find themselves in the middle of using sexually explicit materials without having intended to do so.

In terms of *mens rea*, if it can be shown that a person intentionally used certain images, then it might not be overly burdensome to require they ensure they have the consent of the depicted person to use that person or else be negligent. In practical terms it would depend on the medium used for access and how it can be established that there is consent. When images are shared on messaging apps such as WhatsApp or Telegram, it may be impossible (and so the intentional user is necessarily negligent and fails to respect the depicted person). On pornography websites, establishing whether or not there is consent may be a duty for the website so that individual users can be certain that the people featured on the website consent to that. Indeed, a 2021 case in The Netherlands concluded that pornography websites have a duty to ensure that all materials on their website is disclosed with the consent of the depicted persons.¹⁴ That might require, for example, a regulated, inspected, and licenced pornography production and dissemination system. Where such a system exists there might then be a duty on users to seek out those websites that meet the legal requirements, though I submit that that is not a duty that can easily be practically enforced.

¹³ ibid, 148-50.

¹⁴ *ECLI:NL:RBAMS:2022:557 C/13/680916 / HA ZA 20-284* (2022) Rechtbank Amsterdam.

Use of verified pornography sources can avoid the risk of using of images that are disclosed without consent. I do not think it is a realistic suggestion to propose that individuals police their own conduct in this regard (i.e. asking pornography users to ensure that they have the necessary consent). Nevertheless, requiring that someone using pornography has ensured that they have the necessary consent for accessing and using those materials would be necessary (even if not practical) in order for the use of pornography to not be wrongful.¹⁵ It may well be appropriate for states to impose a requirement that consent be verified by platforms, even if that does not remedy the wrongness of users who would have used the materials regardless of the depicted persons' consent.¹⁶

Failing to ensure that there is consent for using a person as pornography can amount to a denial of subjectivity.¹⁷ As I discuss below, it depends on one's approach to personhood whether denying subjectivity in combination with using someone's reflection is regarded as a wrong against the person. On atomistic personhood it seems this will not be the case, because an image is not regarded part of the person it depicts. On relational personhood however, using someone's image is a form of using them,

¹⁵ See on acting for reasons of consent to remedy wrongness Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 23.

¹⁶ Regulations on pornography websites may be challenging to implement and may not find (instant) universal support. Nevertheless, they seem appropriate for the wrong identified here. Using licences as a necessary requirement for legal permissibility would not be unique, it happens e.g. in licencing of sex establishments and abattoirs. Enforcing them online will be practically challenging.

¹⁷ I note that this implies that many people using what is normally considered 'consensual pornography' might still be denying the depicted person's subjectivity if they fail to ensure consent.

which, if it takes the form of denying subjectivity with objectification, cannot be reconciled with respect for personhood.

In the context of ibsa, in order to establish when a person has been wronged it is relevant determine when an action can be considered to subject a *person* to treatment. In the following two subsections I address that question by considering atomistic and relational interpretations of the wrong of denial of subjectivity through objectification.

6.2.2.4 Atomistic interpretation moral wrong of denial of subjectivity

On atomistic personhood, a person is defined by their mental capacities, and fully contained in their body (see chapter 3). On atomistic personhood, a depiction of a person is not part of that person, as the image of the body is separate from the body. Therefore, abuse of a depiction is not a denial of subjectivity: abuse through a depiction is not direct abuse of a person, but rather conduct that may affect a person through an intermediate step. For example, on atomistic personhood, if D discloses an image of V, that does not subject *V (the person)* to treatment, but rather something that is *beyond* V, namely an image depicting them. On atomistic personhood it would be understood that the *image* is the object, the image is subjected to treatment, and the image is *not* the person, therefore, the person depicted in the image is not subjected to treatment when the image is disclosed. The same reasoning can be applied to making images, although where that involves the actual body of V (e.g. taking a picture, rather than constructing a deepfake), even on atomistic personhood some infringement of the person can be established as the depicted person's body was used. On atomistic personhood this would not amount to denial of subjectivity of that person, as atomistic personhood does not offer tools by which a person may be so seriously infringed through non-physical acts. To the extent

that a non-consensual depiction infringes autonomy, it might amount to a denial of personhood interests, discussed in the next section (see in chapter 5 the section on infringement of autonomy).¹⁸

Failing to minimally respect personhood through a denial of subjectivity by objectification therefore seems unlikely to be a wrong of ibsa when using an atomistic approach to personhood: the act of objectifying an image is simply not understood as subjecting a person to treatment. It is not understood to objectify *a person*. On atomistic personhood, a depiction cannot deny the depicted person's subjectivity.

6.2.2.5 Relational interpretation moral wrong of denial of subjectivity

On relational personhood, a depiction of a person is part of them: it is something that reflects them to the world, and as such a tool through which their relations can be affected.¹⁹ As discussed, 'denial of subjectivity' (as an act, rather than an omission) means that a person is subjected to conduct without regard for their subjectivity. On a relational approach to personhood, a person's depiction is part of them, and so the disclosure of an image can objectify the depicted person: 'D discloses an image of V', on relational personhood, translates to 'D subjects V to treatment'. That is the step where the wrong of 'failing to minimally respect personhood through denial of subjectivity by objectification' failed on an atomistic approach to personhood: there it was argued that there is no person who is subjected to treatment.

¹⁸ Chapter 5, section 5.2.

¹⁹ See chapter 3, section 3.5.4.

On relational personhood, one's image is part of their person. Therefore, the disclosure of the image is an act to which the depicted person is subjected. As discussed above, subjecting a person to treatment without any regard for their subjectivity is a denial of subjectivity. Equally discussed above is that this can be a type of objectification.

On relational personhood, when an image is used without the consent of the depicted person, this may indeed amount to denial of subjectivity through objectification. 'Not having any regard for a person's subjectivity' is most likely to occur towards strangers.

This approach to denial of subjectivity suggests that the role of the audience in wronging the victim of ibsa might be quite extensive, to the extent that the audience contributes to the infringement of the depicted person's absolute right to be free from torture, inhuman and degrading treatment.²⁰ From the perspective of relational personhood, the role of the audience in ibsa should not be considered to be limited to amplifying the harm done to the victim by using and spreading ibsa: the audience actively wrongs the depicted person by their use of them.²¹

²⁰ While this may mean that no one in particular could be blamed for causing ill-treatment, it could still be a duty of the state to prevent such ill-treatment. See also section 6.2.4.

²¹ While it may well be impossible to criminalise the audience for consuming ibsa (both on practical grounds as well as issues related to *mens rea* and blameworthiness) the state has a duty to prevent wrongs under article 3, even if criminalisation cannot be justified.

6.2.2.6 Concluding remarks on the moral wrong of denial of subjectivity through objectification

The discussion of whether there was denial of subjectivity can sometimes be rather theoretical. If a person ('V') is objectified and their subjectivity is being denied, they are treated as if they do not have personhood, which is a most serious moral wrong given the notion that personhood is the highest moral status: to deny those who are entitled to it treatment that is in accordance with that moral status is necessarily wrongful.

If there was consent for objectification (e.g. in consensual pornography) then it will be very difficult to prove in practice whether that consent was taken into account by the person doing the objectifying ('D').²² Did D only objectify V because V consented to it (so: with regard for V's subjectivity), or would D have objectified V regardless of V's consent (thus denying subjectivity)? A performance of denial of subjectivity (e.g. where V consents to being objectified) might not constitute genuine denial of subjectivity. Objectification could then be justified.

The difference between a performance of denial of subjectivity and actual denial of subjectivity may be impossible to tell. For practical purposes one may need to rely on the presence of consent as the difference. This issue is addressed further in the next section on equality with respect to consensual and non-consensual objectification and the message sent by pornography.²³ If apparent objectification and denial of subjectivity is done *only* because the subjected person consented to such treatment, then such conduct

²² See also chapter 4, text at (n 29).

²³ See chapter 5, text at (n 143).

might be justified.²⁴ If the person's consent matters, namely if they are (apparently) being objectified *only because they consented to it*, then they are not fully denied subjectivity – then it just looks as though they are not being engaged with as a complete person, but in actuality they are.²⁵ However, in practice it may be impossible to tell the difference between these two types of conduct — they likely look identical on the outside. Barring a statement from D regarding whether they acknowledged or denied V's subjectivity it might be impossible to know.

For example, an actor playing a role in a film is objectified by their audience. The actor may expect to be seen in the way they are being portrayed in the film, and uses their body as a tool to portray their character. The actor would know that it is impossible for their audience to engage with them as a person through their work, because the work does not provide genuine access to them. There can be a theoretical difficulty regarding the justification of objectification where a person *does* have access to the actor-as-a-person. For example, it might be wrong for an actor's friend to, for the purposes of sexual gratification, go and see a film in which their friend acts out sexual scenes. The friend who goes to see that film for sexual purposes might claim access to a part of their friend that the actor might not usually want to share with their friends. However, the public aspect of a film might mean that an actor may have to accept that their friends

²⁴ An argument could be devised that if subjectivity is taken into account there is no objectification at all, only something that looks like it. Another argument could be that it is objectification, because a person is treated as an object despite the fact that they are simultaneously treated as a subject.

²⁵ This does call into question whether conduct that looks like a denial of subjectivity (but which is not really) should be considered acceptable, as it could be interpreted as sending the message that it can be acceptable to deny subjectivity (because it looks like subjectivity is being denied, if that is deemed acceptable then it seems that it must send that message). It is outside the scope of this thesis to determine whether a performance of denial of subjectivity is justifiable.

could do this, although it does not have to be welcomed. Actors may routinely be objectified by their audience, and the audience should be able to rely on the idea that such objectification is consensual and expected. That also means that if an actor is coerced into acting a certain way, and this information were accessible to the public, objectification by the audience is no longer justified.

Failure to minimally respect a person's moral status is not justified, even if individual subjects are not bothered by such failure. I noted in chapter 2 that wrongfulness is objectively assessed.²⁶ That means that the question whether or not a person has been wronged is not dependent on their own interpretation. That has some paternalistic tendencies: valuing all persons as equal could be understood to mean that each person should decide for themselves whether conduct wrongs them.²⁷ Nevertheless, where wrongfulness can be objectively assessed it cannot be subjectively denied.²⁸ The subject's understanding of not-having-been-wronged does not change the wrongful nature of the conduct to which they have been subjected. In other words: others may determine that you have been wronged, even if you disagree. For example, where a victim of coercive control comes to comply with everything D asks, believing themselves to be a caring, good partner they may not regard themselves as being wronged. But objectively it might be assessed that this person is a victim of coercive control and they have been wronged. Where a wrong is *not* (readily) objectively

²⁶ Meant in the sense of 'objective versus subjective' (in terms of assessment), not 'object versus subject' (in terms of actor and those who experiences the act).

²⁷ That would appear to be the understanding on a mental capacities approach to personhood.

²⁸ Also see section 6.3, on the wrong of reinforcing inequality, where member of the same social group may be collectively wronged by certain conduct. In such cases, the individual's assessment of lack of wrongness can do nothing to justify the wrong.

recognised but experienced as a wrong by the subject, the subject's experience may help inform the assessment that indeed a wrong occurred. What is needed there is that the subject has additional boundary conditions that cannot readily be recognised without being made aware of them. For instance, if a person abides by modest dress rules that involves them covering their hair, they may consider themselves wronged if an image of them with uncovered hair is shared without their consent. To an uninformed assessor, it may not be clear that an image of a person who is otherwise fully clothed wrongs the depicted person. The additional boundary conditions for what is acceptable treatment need to be made known. Once they are known, however, the assessment of wrongness is clearly objective: to a person with these conditions, a picture showing them with uncovered hair is wrongful. As such, a wronged person's view may help confirm the occurrence of a wrong but it cannot as readily help deny it. One example where the law takes additional boundary conditions into consideration is in the concept of 'degrading treatment'. Additional boundary conditions can be a tool for showing that a wrong was committed where the law might otherwise fail to recognise it.²⁹ It is important to note that the subject's conditions can only serve to recognise a wrong where it might otherwise have gone unnoticed. V's experience does not serve to *deny* that a wrong was committed where the law objectively finds a wrong.

Denial of subjectivity as objectification is a refusal to engage with the other as a person. On atomistic personhood, ibsa does not give rise to this wrong. On relational personhood, this is a wrong of ibsa that is most apparent with the people who use the

²⁹ See Aisling Reidy, *The Prohibition of Torture : A Guide to the Implementation of Article 3 of the European Convention on Human Rights* (Human Rights Handbooks, Council of Europe 2002), 17. See also section 6.2.4 on considering the failure to minimally respect personhood in the context of article 3 ECHR.

images as pornographic materials. The act of non-consensual publication is not in itself necessarily denial of subjectivity. Where others are using an image of someone who is personally known to them, there may not necessarily be denial of subjectivity: for example, if a former partner discloses and shares an image of ibsa precisely because they know that the depicted person would not like it they are actually taking the depicted person's subjectivity into account and consciously acting in a manner that the depicted person would not like. While that may not be denial of subjectivity, such conduct may constitute denial of personhood interests (see next section). The wrongness of failing to minimally respect personhood may be a spectrum between 'neither knowing nor caring that the depicted person did not want this and nevertheless using their image' (i.e. denial of subjectivity) and 'knowing the depicted person did not want this and nevertheless using their image' (i.e. denial of personhood interests).

6.2.3 The wrong in ibsa of failing to minimally respect personhood through a denial of personhood interests

6.2.3.1 Introduction

In this section I consider the wrong of failing to minimally respect personhood through a denial of personhood interests. This version of the wrong of failing to minimally respect personhood is constructed out of the wrongs discussed in chapter 5: denial of personhood interests means that a person is treated with such utter disregard for the interests that help protect and give rise to their personhood that it was as though they did not have those interests at all. In this subsection I first set out what I mean by a denial of personhood interests and then whether that path to the wrong of failing to minimally respect personhood may be recognised in (severe) forms of ibsa.

6.2.3.2 *Denial of personhood interests*

The second way in which a person may be subjected to treatment that does not meet the minimal level of respect for personhood is by subjecting them to treatment that constitutes a really severe infringement of the rights they have because they are persons. That could also be phrased as a ‘denial of personhood interests’.

A denial of subjectivity through objectification (discussed above) is a denial of a person’s moral status in itself. A denial of personhood interests is not a denial of personhood status in itself, but a denial of the interests that together help protect personhood. Both of these types of denial amount to the wrong of failing to minimally respect personhood. As such it may be conceivable that the paths to that wrong exist on a continuum: it is possible that where there is only a very minimal level of recognition of subjectivity and a very severe infringement of personhood interests that too could amount to a failure to minimally respect personhood. I am not aiming to tease out all gradual changes between ‘denial of rights’ and ‘denial of personhood interests’ that could amount to the wrong of failing to minimally respect personhood. Instead, I aim to discuss the two outermost parts of the spectrum that can lead to the wrong, to clarify its scope.

A denial of personhood interests amounts to a failure to minimally respect personhood, because it is a denial of the interests that are necessary to give rise to and enjoy personhood status.³⁰ Where I speak of ‘denial of personhood interests’ I am

³⁰ That is a constructive route to the wrong of failing to minimally respect personhood, comparable to the way e.g. the offence of constructive manslaughter is made up. The offence of manslaughter is then constructed out of a different crime (e.g. ‘burglary’) that results in death, thereby offering grounds for a more severe charge. See Herring (n 12), 265-271.

referring to denial of those interests that persons need in order to give rise to personhood. Not all of these interests are needed all of the time in order to enjoy personhood. For example, on relational personhood a person who lacks autonomy is still very much a person, even though they lack capacity for a specific personhood interest. If a person lacks autonomy, then autonomy cannot be infringed or denied. But if a person *is* capable of autonomy and that interest is infringed so severely that it is as though they did not have it at all, that would be considered a denial of that personhood interest. Contrary to denial of subjectivity, denial of personhood interests can occur where personhood is acknowledged, but not minimally respected. If D commits *ibsa* precisely because they know that V will not like it, D treats V as a subjective person but may fail to respect or even to acknowledge that they have certain interests that help protect and give rise to their personhood status.

With denial of personhood interests a person is subjected to treatment that shows an utter lack of concern for their personhood. The interests-infringement needs to be of such a severity that, although an interest infringement could normally be justifiable, it is beyond justification. ‘Denial of personhood interests’ as a moral wrong is essentially a moral wrong constructed out of other moral wrongs, namely the infringement of the personhood interests as discussed in chapter 5.

A denial of personhood interests can exist on a spectrum, from complete failure to acknowledge personhood interests at all, to acknowledging the interest and attempting to

justify its infringement but infringing it unjustifiably regardless.³¹ Denial of interests through a very severe infringement is equal to failing to acknowledge personhood: personhood relies on those interests. Although not all of them are needed for personhood where there is no capacity for them, where there is capacity for them to deny them is to deny personhood. The denial of personhood interests cannot be reconciled with respect for personhood, because personhood is protected by those interests and to deny the interests is to deny personhood. Whether ibsa can be found to constitute a denial of personhood interests depends on the severity of the interest infringements and the approach to personhood used to interpret the nature of the infringement.

6.2.3.3 Atomistic interpretation of the moral wrong of denial of personhood interests

On atomistic personhood it may be challenging to recognise ibsa as a denial of personhood interests. Generally, atomistic personhood does not leave much room for gauging non-physical infringements as very severe. As discussed in chapter 5, the personhood interests of atomistic personhood are not very severely infringed through ibsa. As the main interest is the protection of autonomy, most of the ‘serious’ infringements will need to be a direct interference with a person’s autonomous capacities, such as physical restrains or limiting options. Where the infringement is non-physical, it will usually be gauged as a lesser wrong.

³¹ It is beyond the scope of this thesis to offer an analysis of when wrongfulness is sufficiently severe to count as a denial of personhood interests. That is a practical question that is usually assessed at the trial stage.

On atomistic personhood, ibsa might be seen as a denial of personhood interests, though arguably in a more limited set of circumstances than would be the case on a relational approach to personhood: many aspects of what is most valued in atomistic personhood, namely autonomous capacities, remain largely unaffected when images are taken, made and/or shared. Still, a person can be treated with utter lack for respect of their rights on an atomistic approach to personhood. As noted in chapter 5, ibsa might be seen as an infringement of the interests in privacy, autonomy, and (positive) free speech. In the second part of this chapter I consider that it may be a reinforcement of and reinforced by inequality. Where those infringements *are* sufficiently severe, they would amount to a denial of personhood interests on atomistic personhood. However, as I considered in chapter 5, ibsa mostly amounts to moderate wrongs against the person when interpreted from atomistic personhood. The issue for trying to establish a denial of personhood interests out of these wrongs of ibsa, is that none of the wrongs that a denial of personhood interests would be constructed of, are considered very severe. For that reason, I am not convinced that the legal wrongs of ibsa would be gauged as so severe that they amount to a denial of personhood interests on atomistic personhood.

Because image-based abuse does not directly interfere with a person's autonomous capacities it will generally not be considered a very serious infringement of personhood. However, as there is some room for recognising the wrongs of ibsa as rights-infringements on atomistic personhood, it is possible that the most severe cases of ibsa could be recognised as a denial of right on atomistic personhood. As such, it is possible to use an atomistic approach to personhood to make the argument that ibsa *should* be seen as a denial of personhood interests when it is sufficiently severe.

6.2.3.4 Relational interpretation of moral wrong of denial of personhood interests

On a relational approach to personhood, denial of personhood interests as a very serious wrong may more readily be recognised in ibsa than on an atomistic approach to personhood. That is because, on relational personhood, a depiction is part of a person and abuse through a depiction is therefore readily recognised as infringing that person.³² That leaves a wider scope for gauging interest infringements through abuse of images as very serious. As follows from the discussion of other wrongs in chapter 5 and the present chapter (in section 6.3 on equality below), ibsa can be understood to infringe the interests in autonomy, privacy, free speech, trust, and equality. Where those infringements are sufficiently severe, I consider that they might amount to a denial of personhood interests. I argued in chapter 5 that a relational approach to personhood interprets the personhood interest infringements of ibsa as much more severe wrongs than an atomistic approach does. It should equally be more likely that on a relational approach, those infringements could amount to being considered so severe that they amount to a denial of personhood interests.

6.2.3.5 Concluding remarks on the moral wrong of denial of personhood interests

A denial of personhood interests is a constructive moral wrong. It consists of other wrongs: where a person is treated as though they do not have personhood interests at all, those interests are not merely infringed, they are denied. Because personhood relies on those interests, denial of personhood interests cannot be reconciled with a minimal level of respect for personhood.

³² See chapter 3, section 3.5.4.

To establish whether ibsa amounts to denial of personhood interests, it has to be established that interests were indeed (severely) infringed. This variation of the most serious moral wrong is thus dependent on the other wrongs of ibsa. I argue that it is, in theory, possible to consider ibsa a form of denial of personhood interests both on an atomistic approach to personhood, as well as a relational approach to personhood. However, an atomistic approach to personhood would be reluctant to consider ibsa such a severe interests-infringement that it would indeed amount to a denial of personhood interests. A relational approach to personhood would equally require that the interest infringements be very severe, though would more readily gauge image-based abuse as a very serious interests-infringement than atomistic personhood could (see chapter 5).

6.2.4 Framing the wrong in a legal context

All persons ought to be treated with a minimal level of respect for their personhood. A failure to minimally respect personhood is an unjustifiable wrong. The law in liberal democracies can recognise such a failure and protect against it through an absolute right, as for example done in article 3 ECHR.

Wrongs of ibsa discussed in this part may be so severe, either inherently (in denial of subjectivity) or constructively (through severe materialisations of wrongs discussed in chapter 5 and below, on equality) that it fails to minimally respect personhood, and the harms caused by it can be very severe.³³ Firstly, the wrong of ibsa can be seen as treating a person as if they exist as an object for the pleasure of others; as a non-person whose

³³ See Clare McGlynn et al., ‘“It’s Torture for the Soul”: The Harms of Image-Based Sexual Abuse’ (2020) *Social & Legal Studies* 541.

feelings do not count; as a sub-citizen whose image can be used for the pleasure of others; as a being whose subjectivity and/or liberty does not matter. In other words: conduct that cannot be reconciled with respect for personhood. Where personhood is not at all acknowledged, ibsa can constitute a denial of subjectivity. Where personhood is acknowledged but not adequately respected, ibsa can constitute a denial of personhood interests. That means that ibsa fails to meet the minimal degree of acceptable conduct. It is inhuman to be treated without minimal respect for personhood, and it may also be experienced as degrading. I hold that it may also amount to torture where it is particularly severe.³⁴ If one insists on defining torture as state-sanctioned ill-treatment, or treatment that is done with a particular purpose, then ibsa may only fall within the categories of inhuman and degrading treatment. While this is not the approach I subscribe to, practically it has the same outcome as mine: ill-treatment, regardless of which type, is never justifiable and is an infringement of the right contained in article 3 ECHR. Where ibsa is sufficiently severe I consider it would be such an infringement. This is a topic raised for further research.

To develop the argument that ibsa could be an infringement of article 3 ECHR more fully, I consider an analogy with the ECtHR's case law on very severe cases of

³⁴ See by analogy Ilias Trispiotis and Craig Purshouse, '“Conversion Therapy” As Degrading Treatment' (2022) 42 *Oxford Journal of Legal Studies* 104. There are various ways to define torture. I subscribe to the definition that takes level of harm as a defining characteristic, per Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385, 389. Other definitions may go by identity of the actor (only state-actors can commit torture), see e.g. art. 1 United Nations Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Ill-Treatment or Punishment (adopted 10 December 1984) UNGA res 39/46. Another alternative is to take 'purpose' as a defining characteristic, see Reidy (n 29), 12; Paul D Kenny, 'The Meaning of Torture' (2009) 42 *Polity* 131, 153.

domestic violence.³⁵ The ECtHR in *Volodina v Russia* emphasises that the violence of intimate assaults is not limited to physical injury, but rather extends to an assault on victims' identities.³⁶ Such an attack on one's identity can equally be recognised in ibsa: the depicted person's identity is affected when they lose control over their image.³⁷ When severe coercive control is held to be an infringement of article 3, there usually is an attempt at identifying *who* has control instead of *V*.³⁸ However, unlike, for instance, in the coercive control cases where article 3 was found to be infringed (such as *Volodina v Russia*), in ibsa there would not be anyone who had control over the victim. I argue that for an article 3 infringement to be established it does not matter whether anyone has control at all. What matters is that *V* does *not* have control. The relevant question is not 'who has control over the person subjected to Φ -ing' but rather 'does the person subjected to Φ -ing lack control'.

Both ibsa and coercive control are examples where the gravity of a physical infringement is not leading for determining the gravity of the wrong.³⁹ Cases such as *Volodina v Russia* and coercive control offences such as s.76 Serious Crime Act 2015 in England and Wales exemplify that the law can grasp the severity of non-physical

³⁵ See e.g. Judge Pinto de Albuquerque, in his dissenting opinion on *Valiulienė v Lithuania Case of Valiulienė v Lithuania* Application no 33234/07 (ECHR, 26 March 2013); *Case of Rumor v Italy* Application no 72964/10 (ECHR, 27 May 2014).

³⁶ *Case of Volodina v Russia* Application no 41261/17 (ECHR, 4 November 2019). See Shannon Selden, 'The Practice of Domestic Violence' (2001) 12 *UCLA Women's Law Journal* 1, 21.

³⁷ See chapter 3, section 3.5.4, on image as part of identity. Kenny considers 'control' as an element of torture, to distinguish it from other types of violence that should not be considered torture, see Kenny (n 34), 153. An argument could be made that 'lack of control' may be a characteristic of all three types of conduct covered by article 3 ECHR.

³⁸ On control and powerlessness in this context see Trispiotis and Purshouse (n 34), 121.

³⁹ On coercive control see also chapter 5, text at (n 125).

wrongs: it is increasingly explicitly recognised that wrongfulness and harmfulness is not just about gauging the severity of physical violence, but about identifying the overall attack on the person and their identity.⁴⁰ The criminal offence of coercive control focuses on the connection between incidents as greater than the sum of its parts in terms of severity, which shows a (more) relational understanding of personhood than is typical in the law of liberal democracies.⁴¹ The recognition of a pattern of abuse helps contextualise the severity of the violence. A similar approach is needed in ibsa, particularly as the physical aspect is absent in that case. It may be possible to argue that ibsa can amount to infringements of absolute rights such as the one contained in article 3 ECHR. It is beyond the scope of this thesis to offer a full analysis of ibsa in terms of absolute legal wrongness.

6.2.5 Conclusion on ibsa as a failure to minimally respect personhood

In this section I have discussed the moral wrong of failing to minimally respect personhood, and have set out how this wrong can materialise through a denial of subjectivity with objectification, and through a denial of personhood interests. I consider that this wrong can materialise in ibsa, and that it is particularly recognisable when using

⁴⁰ The devastating nature of non-physical abuse can much more readily be explained on a relational approach to personhood than an atomistic approach: on an atomistic approach, abuse that physically interferes with a person would be considered most severe. The recognition contained in the offence of coercive control that a pattern of apparently moderate individual instances of violence may be more serious than, or equally serious as an individual instance of more severe physical violence. That is an implicit recognition of the relationality of persons. See Deborah Tuerkheimer, 'Recognizing and Remediating the Harm to Battering: A Call to Criminalize Domestic Violence' (2004) 94 *Journal of Criminal Law and Criminology* 959; Herring (n 8).

⁴¹ See also e.g. Herring (n 8), 301; see also Alafair S Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552.

a relational approach to personhood. Both denial of subjectivity through objectification and denial of personhood interests can be recognised as a wrong of ibsa when using relational personhood. The infringements of personhood interest that materialise through ibsa can be very severe on a relational interpretation. On an atomistic approach the moral wrong discussed in this section is less readily recognisable. Denial of subjectivity through objectification is not a wrong that can be materialised through ibsa when using atomistic personhood. Denial of personhood interests could be present in theory, but as I discuss in the upcoming sections, the rights-infringements constituted by ibsa are gauged as not very severe on atomistic personhood. In general, it is therefore less likely that ibsa would be understood to amount to denial of personhood interests on an atomistic approach to personhood than it would on a relational approach to personhood. In both cases the bar is high, as this is the most serious moral wrong. Therefore, it is not easily established. A strict application of atomistic personhood might not readily find ibsa a very serious infringement of personhood, regardless of its gravity. However, there is some theoretical scope for finding a denial of personhood interests even on an atomistic account, and so it is an option (even if mostly theoretical) that ibsa could be a failure to minimally respect personhood through this route.

I have presented two variations of establishing this moral wrong: denial of subjectivity through objectification, and denial of personhood interests. I considered that ‘denial of subjectivity through objectification’ is ‘to subject a person to conduct, without regard for their subjectivity’. I argued that ibsa cannot be considered a denial of subjectivity through objectification on atomistic personhood, but it can be recognised as such on relational personhood.

I then considered that a denial of personhood interests is to treat a person as though they have no personhood interests. It is a constructed wrong. In theory it can be established wherever interest infringements can be recognised. For ibsa this means that the moral wrong of denial of personhood interests could theoretically be recognised both on a relational approach to personhood, as well as on an atomistic one. I considered that whether or not this wrong can be established depends on how severe the interest infringements it is constructed out of, are considered to be. On atomistic personhood it seems unlikely that ibsa will amount to such a serious set of interest infringements that it is a denial of personhood interests. However, it is at least a theoretical possibility that really severe cases of ibsa can be considered to amount to a denial of personhood interests on atomistic personhood. On a relational approach to personhood the rights-infringements materialised through ibsa are generally gauged as more severe (because an image is part of the person, rather than separate from it). It follows that it is *more* likely that ibsa amounts to a denial of personhood interests on relational personhood than on atomistic personhood.

I have argued that failing to minimally respect personhood is the most serious moral wrong a person could be subjected to. While there are reasons to be careful in the labelling of wrongs as disguising or minimising the nature of the wrong — including to those who are subjected to it, I also hold that there might be good reasons on ibsa to compare it to torture and label it an unjustifiable wrong.⁴²

⁴² Karen Boyle, 'What's in a Name? Theorising the Inter-Relationships of Gender and Violence' (2019) 20 *Feminist Theory* 19, 23; Catharine A MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century : A Global Challenge* (Martinus Nijhoff 1993); Clare McGlynn, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy' (2008) 16 *Feminist Legal Studies* 71; Nicola Gavey, *Just Sex? : The Cultural Scaffolding of Rape* (Routledge 2005); McGlynn et al. (n 44).

6.3 Ibsa and the wrong of reinforcing and being reinforced by inequality

6.3.1 Introduction

In this section I discuss ibsa as ‘part of a continuum of sexual violence’ to identify it as a wrong of reinforcing and being reinforced by inequality.⁴³ This is a social wrong, that does not and cannot exist in isolation. One reason for this is that moral equality between persons is a comparison of a person’s moral status to that of another. A second reason for this is that a continuum of violence draws out connections, and so cannot be identified without its context.⁴⁴ In this section, I use the continuum of violence against women as a framework on which to consider the wrong of ibsa of reinforcing, and being reinforced by inequality.

6.3.2 The continuum of violence

Nicola Henry et al. argue that ibsa is ‘part of a continuum of sexual violence’.⁴⁵ The ‘continuum’ of violence framework is used to draw out that incidents of violence are connected.⁴⁶ It does this by identifying the character of abuse as part of the same spectrum so that ‘what might otherwise be seen as disparate phenomena’ can be regarded as connected to each other.⁴⁷ Violence should be considered in its context, because

⁴³ Nicola Henry et al., *Image-Based Sexual Abuse : A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge 2020), 39.

⁴⁴ Boyle (n 42), 21.

⁴⁵ Henry et al. (n 43), 39.

⁴⁶ Boyle (n 42), 21.

⁴⁷ Liz Kelly, *Surviving Sexual Violence* (Polity Press 1988), 76.

‘Abstracted incidents are uprooted from their place of meaning.’⁴⁸ McGlynn et al., drawing from Liz Kelly, hold that ‘The common character in sexual abuse is the ‘abuse, intimidation, coercion, intrusion, threat and force’ used to control (predominantly) women.’⁴⁹ Examples of conduct that feed into the continuum of sexual abuse are ibsa, but also coercive control, gender-based violence, street harassment, and pornography.⁵⁰ The gendered nature of ibsa should be sought in that same continuum, sharing that common character of the continuum of violence. As such, ibsa contributes to a common experience of violence. It not only reinforces the continuum in which it takes place, but is also reinforced by it. That is: ibsa, like other forms of gendered violence, is worse when it is part of a continuum of violence than it is if it is an isolated incident of abuse in someone’s life.

A study among 6109 participants found that ‘overall victimisation rates are not markedly different according to gender, with men and women reporting similar overall

⁴⁸ Tuerkheimer (n 40), 985. See also Herring (n 8), 300.

⁴⁹ Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse’ (2017) *Feminist Legal Studies* 25, 27.

⁵⁰ See on the violence continuum Boyle (n 42), 20; on coercive control Evan Stark, ‘Coercive Control’ in Nancy Lombard and Lesley McMillan (eds), *Violence Against Women : Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers 2013), 21; Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009), 115; on street harassment Fiona Vera-Gray, *Men’s Intrusion, Women’s Embodiment : A Critical Analysis of Street Harassment* (Routledge 2017); Deirdre Davis, ‘The Harm that has no Name: Street Harassment, Embodiment, and African American Women’ (1994) 4 *UCLA Women’s Law Journal* 133, 143; Nick Brancazio, ‘Being Perceived and Being “Seen”: Interpersonal Affordances, Agency, and Selfhood’ (2020) 11 *Frontiers in Psychology* 1, 9; on pornography Karen Boyle, ‘The Implications of Pornification’ in Nancy Lombard (ed), *The Routledge Handbook of Gender and Violence* (Routledge 2018); Rae Langton, ‘Subordination, Silence, and Pornography’s Authority’ in R Post (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Oxford University Press 1998); Catharine A MacKinnon, ‘Pornography, Civil Rights, and Speech’ (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1; Catharine A MacKinnon, *Only Words* (Harvard University Press 1996).

frequency of victimisation'.⁵¹ However, it also found that while men and women may be subjected to ibsa in equal measure, the effects of ibsa *are* very different across gender and other social identities.⁵² That can be explained through the differences in a person's (or rather: a social group's) continuum of violence experiences. Straight, white, cis-gender men, are in general much more privileged in the context of sexual violence, and do not live in a continuum of sexual violence in the way that women do. Henry et al. argue that this helps explain why such men are typically less affected by ibsa than women and people with minoritised identities.⁵³ For women, ibsa adds to the continuum of violence that is part of their everyday life.⁵⁴

'Continuum thinking' shows that what is done to women when they are subjected to ibsa adds to a greater body of violence that straight white cis-gender men are typically not subjected to.⁵⁵ The continuous violence suffered by minoritised groups — in various forms, for example gender-based discrimination, racism, or ableism — should be regarded as an infringement of those minoritised persons' interest in an equal moral

⁵¹ Henry et al. (n 43), 11. Henry et al. note that their findings reflect the victimisation of *known* victim-survivors of ibsa. The victimisation of people who do not know that they have been victimised is not reflected in these numbers. At least regarding deepfakes that is likely to shift the gendered numbers significantly, as deepfake pornification algorithms are typically developed to only work on women, see e.g. a 2019 report finding that 96% of deepfakes are pornographic, and of those pornographic deepfakes 100% are of women, Henry Ajder et al., *The State of Deepfakes 2019 Landscape, Threats, and Impact* (Sensity 2019).

⁵² Henry et al. (n 43), 34-5.

⁵³ *ibid*, 38.

⁵⁴ Kelly (n 47), 76. Within the same social group violence need not be experienced the same by all members, Fiona Vera-Gray, 'Girlhood, Agency, and Embodied Space for Action' in Bodil Formark, Heta Mulari and Myry Voipio (eds), *Nordic Girlhoods : New Perspectives and Outlooks* (Palgrave Macmillan 2017), 128.

⁵⁵ Boyle (n 42), 20.

status. Their equal moral status is not *actually* affected: people who are subjected to violence because of minoritised identities are not worth less because of the inequality message sent through the violence they are subjected to. Rather, their equality is not properly being respected. They have equal moral status to any other person, yet are consistently subjected to a stream of infringements of varying degrees of severity that members of more privileged social groups are subjected to in much lower measure. That is what is presented here as the wrong of ibsa as reinforcing and being reinforced by inequality.

6.3.3 Ibsa and reinforcing and being reinforced by inequality

The moral wrong of reinforcing and being reinforced by inequality is that the very notion of personhood is that all who have that status are equal. If some groups of people experience more violence because of their social identity, that is an infringement of that group's equality interest. Equality rights are meant to remedy the disadvantages of social groups, which can materialise in treatment of individual representatives of (minoritised) groups. Henry et al. locate ibsa 'within a broader discursive sociocultural system whereby coercive sexuality and gender inequality, particularly in intimate relationships, is the norm'.⁵⁶ This is a social wrong of ibsa, referred to here as 'reinforcing and being reinforced by inequality'.

When considering ibsa as part of the continuum of sexual violence that reinforced and is reinforced by inequality, the discussion moves beyond individual defendants and victims. Ibsa *reinforces* and is *reinforced by* (draws from) existing inequalities, which

⁵⁶ Henry et al. (n 43), 42.

affects all members of the victim's social group (even if it does so in different measure).⁵⁷ That is due to the effect that living in a continuum of violence can have: knowing what has happened to other people with your social identity can make someone worry the same will happen to them. Even if it does not happen, it affects that person's life.⁵⁸ Ibsa that victimises a woman contributes to the messages that women receive throughout everyday life — as part of the continuum of violence against women ibsa joins things such as everyday sexism, catcalling, sexual harassment, sexual violence, domestic violence, or unequal pay as a tool by which patriarchal structures are maintained. This can, for example, affect women's behaviour, trust, and liberty. As such, patriarchal structures increase the impact ibsa has on V and V's entire social group, and ibsa also reinforces those patriarchal structures.

Ibsa, for the most privileged (i.e. white, cis-gender, heterosexual men), contributes less to denigrating attitudes to that social group generally.⁵⁹ In other words: cis-gender, straight, white men suffer less degeneration of their status as 'equal to others' than others when one of their group is subjected to ibsa. In patriarchal societies it is generally seen as

⁵⁷ Vera-Gray (n 54), 128. See on minoritised groups being treated unequally and with less respect for their personhood than others e.g. the case on degrading treatment of throwing people of restricted growth, which was held to be wrongful despite the consent of the people who were actually being thrown: *Commune de Morsang-sur-Orge et Ville d'Aix-en-Provence* ECLI:FR:CEASS:1995:136727.19951027; ECLI:FR:CEASS:1995:143578.19951027 (27 October 1995).

⁵⁸ See e.g. women adapting their behaviour so as to not have to walk alone after dark, minimising risks, etc. see e.g. Linda Sandberg and Malin Rönnblom, 'Afraid and Restricted vs Bold and Equal: Women's Fear of Violence and Gender Equality Discourses in Sweden' (2013) 20 *The European Journal of Women's Studies* 189; Carol W Runyan et al., 'US Women's Choices of Strategies to Protect Themselves from Violence' (2007) 13 *Injury Prevention* 270.

⁵⁹ See e.g. Liza Zvi, 'The Double Standard toward Female and Male Victims of Non-Consensual dissemination of Intimate Images' (2021) 37 *Journal of Interpersonal Violence* NP20146.

a positive quality for members of that group to ‘publicly be perceived as sexual’. Men, in those societies, are encouraged to be sexually engaged, and when they are this tends to be applauded (for example: men are labelled ‘studs’, with a positive connotation, if they have many sexual partners).⁶⁰ That is the opposite of what happens to women who are perceived as doing the same: for women, ‘publicly being perceived as sexual’ detracts from what it means to be ‘good’ (e.g. ‘modest’), and commonly leads to slut-shaming. Images used in ibsa may be perceived as confirming stereotypes about men that are socially seen as positive, while it does the opposite for women where it may be perceived as confirming negative stereotypes. That is the other side of patriarchal reinforcement of ibsa: that the public (not just people who view images of ibsa, but people generally) regards ibsa through a patriarchal gaze, in which women are both sexualised and criticised for being sexual. The viewer of the ibsa sees it in the context of patriarchy which sustains the message and meaning of it. The average person speaking about ibsa speaks of it in the context of patriarchy and sustains the message and meaning of it. Undoing patriarchal learning takes time and effort. While a slight shift in the ways in which ibsa is written about in the media can sometimes be observed when comparing 2022 reports to pre-2014 reports, it is still common that victims are subjected to victim-blaming, suggesting that within the structures as they know them to be their options for ‘safe’ conduct are limited.⁶¹ That puts responsibility for victimisation on the depicted

⁶⁰ See for persisting gender stereotypes in this regard e.g. Joyce J. Endendijk, Anneloes L. van Baar and Maja Deković, ‘He is a Stud, She is a Slut! A Meta-Analysis on the Continued Existence of Sexual Double Standards’ (2020) 24 *Personality and Social Psychology Review* 163.

⁶¹ Around 2008, ibsa was regularly reported in popular media as a ‘scandal’, ‘leaks’, and presented as something the depicted person could be ‘sorry for’, see e.g., ‘Vanessa Hudgens ‘Embarrassed,’ Apologizes for Nude Photo’ *People* (8 September 2007); ‘Audrina Patridge Nude Photos Scandal’ *Chicago Tribune* (25 March 2008). Around 2014, some papers shifted their approach to covering ibsa by letting victim-survivors speak, e.g. Ella Alexander, ‘Victoria Justice ‘Angry’ at ‘Massive Invasion of Privacy’ and pursuing Legal Action after Nude Photos Leak Online’ *The Independent* (4 September 2014);

person, ignoring the role of the defendant and the structural inequality in which victimisation occurs. The ‘male gaze’ that sexualises women and blames women for being sexual beings reinforces the way ibsa is regarded, and is also reinforced by ibsa.⁶² The way in which ibsa is regarded — both in terms of ‘viewing’ as well as of ‘discussed’ — is informed by the patriarchal structures in which it occurs and reinforces those structures.

6.3.4 Why consent cannot remedy a wrong on the continuum of violence against women

The moral wrong of ibsa of being reinforced by and reinforcing inequality cannot be justified by the depicted person’s consent. That is because it does not just affect the consenting person, but everyone who shares (parts of) their social identity.⁶³ I considered that ibsa may be understood as sending the message of pornography.⁶⁴ Understood in the context of this section it may be that pornography — even if it is consensual — adds to the continuum of violence against women by reinforcing the message that women are sexual objects. As such, even consensual pornography may be part of the continuum of

‘Jennifer Lawrence Calls Photo Hacking a “Sex Crime”’ *Vanity Fair* (8 October 2014); and in 2022 publications are increasingly adopting the language of ibsa (though often in combination with the term ‘revenge porn’) and are more consciously avoiding victim-blaming, e.g. Ali Pantony, *As Stephen Bear is found Guilty of disclosing Private, Sexual Images featuring his Ex-Girlfriend, we investigate the Rise of Image-Based Sexual Abuse* (2022); Shiona McCallum, ‘Calls for Downblousing to be made a Criminal Offence in England and Wales’ *BBC* (7 July 2022).

⁶² On the ‘male gaze’ and pornification see Bernadette Barton, *The Pornification of America : How Raunch Culture Is Ruining Our Society* (New York University Press 2021), 29–54.

⁶³ See e.g. *Commune de Morsang-sur-Orge et Ville d’Aix-en-Provence* ECLI:FR:CEASS:1995:136727.19951027; ECLI:FR:CEASS:1995:143578.19951027 (27 October 1995).

⁶⁴ See chapter 5, text at (n 143).

violence and reinforce gender inequality.⁶⁵ I considered in my discussion of denial of subjectivity in relation with objectification that, on an individual level, objectification may be justifiable if the subject consents and the person who objectifies them does so only because the subject consented.⁶⁶ In other words: pornographic materials might be reconcilable with respect for subjectivity, but only if there are efforts to ensure that the depicted person has consented to such use. If the pornography user fails to make such effort they might be said to deny the depicted person's subjectivity. The difficulty there is that it is practically virtually impossible — without D's testimony — to determine whether D objectified V in pornographic materials because V consented, or whether D would have done so anyway and as such actually denies V's subjectivity. Objectification would only be permissible if it was done for reasons grounded in V's subjectivity.⁶⁷ But that was the individualised assessment of the wrong of objectification. Here I hold that if a woman is objectified in something such as pornography, that sends the message that persons belonging to that social group (women) can be treated as sexual objects. That feeds into the continuum of sexual violence against all women, and so it may be questionable whether one person consenting to pornography can thereby justify it. This wrong can be specified further if the person who is being objectified is, for example, a black transgender woman. All members of that social group are then particularly affected by the reinforcement of inequality, and all people who share aspects of that social

⁶⁵ The argument that pornography is part of the continuum of violence against women has been well-developed, see e.g. Boyle (n 50); Andrea Dworkin, *Pornography : Men Possessing Women* (Plume 1991); Langton, (n 50); MacKinnon 1985 (n 50); MacKinnon 1996 (n 50). The inherent wrongfulness of pornography is not an argument explored in this thesis.

⁶⁶ See chapter 4, text at (n 29).

⁶⁷ See Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 23.

identity (i.e. ‘women’, ‘black people’, ‘transgender people’) are affected to some extent. Where there is an equality wrong, the consent of the individuals subjected to that wrong cannot justify it completely.⁶⁸

(A performance of) objectification is not in itself necessarily problematic, dependent on the message it sends: if an audience is invited to objectify actors in a comedy that seems very different from inviting to objectify actors in a porno. The message sent by pornography particularly reinforces systemic inequality.⁶⁹ Catherine MacKinnon holds that ‘to be sexually objectified means having a social meaning imposed on your being that defines you as to be sexually used.’⁷⁰ It may be that non-sexual objectification does not send that particular message. One way in which this might be explained is that pornography sends a message about all women, whereas non-sexual objectification may only be perceived as sending a message about that particular actor. Objectification, sexual or otherwise, can send the message that it is a person’s purpose to be used. The qualification of ‘sexual objectification’ is a more severe wrong because of the additional infringement it includes on sexuality (see chapter 5, on sexual integrity).⁷¹ As such, I consider its infringement, for instance through unwanted sexual objectification, a type of infringement that infringes the self: it is particularly wrong

⁶⁸ See also *ibid*, 16: B’s consent can only justify a wrong between A and B, not between A and C.

⁶⁹ See on the message sent by pornography generally Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); Timo Jütten, ‘Sexual Objectification’ (2016) 127 *Ethics*; Dworkin (n 65); Rae Langton, *Sexual Solipsism : Philosophical Essays on Pornography and Objectification* (Oxford University Press 2009). See also chapter 5, text at (n 143).

⁷⁰ MacKinnon (n 69), 140. See on the message sent by conduct Sally Haslanger, ‘Social Meaning and Philosophical Method’ (2013) *American Philosophical Association 110th Eastern Division Annual Meeting*.

⁷¹ Chapter 5, section 5.3.

when a person's sexuality is not treated as part of them as a person, but rather as a tool or object for others to use without regard for the person who is subjected to that use. Non-sexual objectification seems to have fewer negative implications and is less reinforcing of, and less reinforced by, systemic inequality.

Even if a person consents to being subjected to conduct that sends the message that this person is worth less than others, they may be wronged by it. Note here that it is not relevant to my consideration whether the person *feels* wronged. For example: a woman may accept a lower pay than her male colleagues and not feel wronged. I would hold that she is nevertheless wronged — as are all others who are in the same social group as that person, that is, all women, or all women of colour, or all women with children, and so on. Even if conduct that reinforces and is reinforced by inequality is consensual, everyone with that social identity is affected because of the message that it is acceptable to treat the people in that social group as worth less than more privileged people. As personhood is inherently concerned with equality between persons, conduct that sends the message that persons are not equal is an infringement of personhood. As consent can only work between the consenter and the actor, conduct that affects an entire social group cannot be justified through consent.

6.3.5 Framing the wrong in a legal context

Equality between people is a core principle of personhood and a fundamental notion in the law of liberal democracies. The prohibition of violence against women has been recognised as a principle of public international law.⁷² That means that states not only

⁷² *General Recommendation No. 35 (2017) on Gender-Based Violence against Women, updating General Recommendation No. 19 (1992)* CEDAW/C/GC/35, §2; CEDAW

have a duty towards their citizens to protect their equality, but on gender inequality specifically have additional duties to prevent and remedy gender-based violence towards other states. The case law of the ECtHR highlights the duties states have regarding addressing gender-based violence particularly in light of domestic abuse. In that context the Court has regularly pointed at the duty of providing and upholding a legal framework, including criminalisation and enforcement with which violence against women can be addressed.⁷³ In its decisions the Court explains these duties as being derived from an obligation to address gender-based violence. As such, it seems that a duty of criminalisation and enforcement of existing laws may be found on other forms of violence on the continuum of violence against women too. Where ibsa can be recognised as reinforcing and being reinforced by gender inequality, it can be recognised as an infringement of the legal right to be free from inequality. State parties to the ECHR seem to have that duty as part of that treaty, under article 14 ECHR.

Ibsa affects people with a less privileged position more severely than people with a more privileged position. An appropriate legal framework for addressing ibsa needs adopted and upheld.⁷⁴ Otherwise, all the rights that are involved in ibsa are protected less

General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38, §6.

⁷³ The ECtHR has regularly found that states had not fulfilled their article 14 ECHR obligations to provide and/or uphold a legal framework within which violence against women could be addressed, see e.g. *Opuz v Turkey* Application no 33401/02 (ECHR, 9 June 2009); *Case of Volodina v Russia* Application no 41261/17 (ECHR, 4 November 2019); *Case of Talpis v Italy* Application no 41237/14 (ECHR, 2 March 2017); *Tunikova and Others v Russia* Application nos 55974/16, 53118/17, 27484/18, 28011/19 (ECHR, 14 December 2021); *Eremia v the Republic of Moldova* Application no 3564/11 (ECHR, 28 May 2013); *Case of Bălșan v Romania* Application no 49645/09 (ECHR, 23 May 2017). See also *Case of Rumor v Italy* Application no 72964/10 (ECHR, 27 May 2014), where the Court found that Italy had fulfilled the duty of providing and upholding a legal framework to address violence against women.

⁷⁴ Positive obligations on states may involve ensuring that rights are respected even between individuals, see Council of Europe and European Court of Human Rights, *Guide on Article*

well for those people more at risk of being harmed through ibsa (e.g. women, women of colour, and people in the LGBTQ+ community) than they are for cis-gender, heterosexual, white men. That could amount to an article 14 ECHR infringement.⁷⁵ The rights of those people who are at greater risk of ibsa are less well protected by ‘doing nothing’ than the rights of those at lower risk of ibsa.

6.3.6 Ibsa as reinforcing and being reinforced by inequality

In this section I considered ibsa as reinforcing and reinforced by systemic inequality. I find that this is a social wrong that is not committed just against the individual victim, but against all persons in the same social group as the victim. I hold that ibsa is a form of gender-based violence that affects women in particular. I also find that ibsa reinforces the message that people may be objectified and used as tools for sexual gratification, without regard for their subjectivity. I noted that even if there is regard for subjectivity (in the sense that consent is a relevant factor for D choosing to objectify V) there may be an equality wrong as the reinforcement of inequality affects all people in the same social group as V. Those people may be wronged in terms of equality even if V does not consider themselves to have been wronged.

8 of the European Convention on Human Rights : Right to Respect for Private Life, Home and Correspondence (2020), 8. For ECtHR case law on requiring criminalisation of severe human rights infringements in the context of domestic violence see for instance *Valiulienė v Lithuania Case of Valiulienė v Lithuania* Application no 33234/07 (ECHR, 26 March 2013). See Laurens Lavrysen, ‘Positive Obligations and the Criminal Law : A Bird’s-Eye View on the Case Law of the European Court of Human Rights’ in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights : Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020), 35-44.

⁷⁵ Note that the right contained in article 14 ECHR does not work independently but is always assessed as a question regarding the unequal protection of other rights in the ECHR.

6.4 Chapter conclusion

In this chapter I considered the wrongs of ibsa of failing to minimally respect personhood and of contributing to the continuum of violence, as such being reinforced by and reinforcing inequality. These are wrongs that cannot be remedied or justified by individual people's consent. For a failure to minimally respect personhood that is because it cannot be justified through any means: it is such a blatant disregard for someone's personhood status that it can never be justified. I held that, on a relational approach to personhood, ibsa can be interpreted as such a severe infringement that it would amount to a failure to minimally respect personhood. I find this conclusion less likely on atomistic personhood.

An infringement of equality could be justified, but not by consent. It is beyond the scope of this thesis to consider what might justify drawing from and reinforcing inequality. That is because consent can only justify wrongs against the consentor: if A consents to B subjecting them to treatment that wrongs not just A, but all members of A's social group, then A's consent cannot justify (that part of) the wrong. I noted that ibsa is part of the continuum of sexual violence, and as such is experienced as more severely harmful by women and people with minoritised identities. For that reason I consider that in addition to a wrong done to individual victims (being treated as though one is not equal to others), ibsa wrongs those minoritised persons who are not depicted but who are members of the same social group as the depicted person.

The wrongs discussed in this chapter are to some extent constructed out of the wrongs discussed in the previous chapter, and show in particular that for a good appreciation of the nature of the wrong of ibsa, a contextualised approach is essential. I

hold that atomistic personhood is inherently unsuited for such an approach, and again note that the full scope of ibsa's wrongness is much better appreciated on a relational foundation.

CHAPTER 7: CONCLUDING REMARKS

7.1 Introduction to the conclusion

In this chapter, I draw together findings of the thesis by considering the answer to the main question and noting the implications of the presented research for various aspects of criminalisation theory and legislation on ibsa. I further point at some topics for further research that this thesis has touched upon.

7.2 The main question: what is the nature of the wrong of ibsa?

The main question this thesis sought to answer is ‘what is the nature of the wrong of ibsa?’. I have addressed this question because of its relevance to criminalisation theory both regarding justifying criminalisation and ensuring that the criminal law is fair. I found that the notion of personhood that underpins the assessment and interpretation of wrongs against persons substantially affects what wrongs are found and to what extent. I noted that consent, or rather the lack thereof, is not relevant for determining the *prima facie* wrong of Φ -ing. That means that all forms of ibsa share the same *prima facie* wrong regardless of what the depicted person consented to. The answer to the question ‘what is the nature of the wrong of ibsa?’ is substantially affected by the personhood approach that grounds the interpretation of wrongness. It should be unsurprising that the nature of the wrong depends on the approach to personhood used as a basis for that assessment: a conclusion is likely to change if the premises are modified. However, the effect of personhood approaches on the demarcation of the justified scope of criminal law is not usually explored. Part of the relevance of the findings in this thesis is that personhood is found to be a much more important tool for the

law than is typically recognised.¹ I hold that personhood is highly relevant for criminalisation theory as it affects what wrongs are found and to what extent, and should more commonly be part of conversations regarding the justification of criminalisation.

On an atomistic approach to personhood, ibsa is moderately wrongful. This is the typical approach in liberal democracies. It is based on the idea that persons are individually defined by their mental capacities. On atomistic personhood, the nature of the wrong of ibsa is that it is a moderate infringement of autonomy and therefore possibly also a moderate infringement of sexual integrity. Ibsa is an infringement of privacy insofar as privacy also sees to information about a person and not just to direct infringements of the person. Furthermore, ibsa can be understood as an infringement of a person's freedom of expression insofar as a victim's genuine options for speech are limited as a result of ibsa. The (social) wrong of reinforcing and being reinforced by inequality can be found on atomistic personhood, though not in an atomistic way: this is because 'equality' is a comparison to others and cannot be assessed in isolation. The wrong of failing to minimally respect personhood could, in theory, be made out through a denial of personhood interests. However, this wrong depends on the severity of personhood infringements and, for ibsa, these are generally moderate on atomistic personhood. Therefore, it is unlikely that ibsa would be understood as such a serious wrong on atomistic personhood.

'Infringing negative freedom of expression' and 'breaching trust' are not part of ibsa's wrongness on an atomistic approach to personhood. Additionally, failing to minimally respect personhood through a denial of subjectivity with objectification cannot be part of the

¹ Further concluding comments on this issue are presented in sections 7.3 and 7.4.

nature of ibsa's wrongness on an atomistic approach. That route to the wrong of failing to minimally respect personhood cannot be made out on atomistic personhood because images are understood as separate from the person on an atomistic approach. Therefore, objectification of an image is *not* objectification of a person on this account. The separation of images from persons is also why ibsa constitutes only a moderate infringement of personhood interests on atomistic personhood.

On a relational approach to personhood, the nature of ibsa's wrongness is much more substantial. On relational personhood, ibsa is a serious infringement of autonomy, sexual integrity, privacy, negative and positive freedom of expression, and a wrongful breach of trust. A further wrong of ibsa is that it reinforces and is reinforced by inequality as part of the continuum of violence against women. Finally, ibsa can amount to the wrong of failing to minimally respect personhood both through denial of subjectivity with objectification as well as through denial of personhood interests. One reason why ibsa is considered so much more wrongful on a relational approach than on an atomistic approach to personhood, is that images are understood as an inherent part of the depicted person. Anything that reflects someone to others can affect their relationships and so is part of them as a person. Not only are personhood interests much more severely infringed on a relational approach, but the absolute wrong of failing to minimally respect personhood can also more readily be identified. One reason for this is that a denial of personhood interests can be informed by a very severe infringement of those personhood interests. As ibsa gives rise to much more serious personhood interest infringements on a relational approach, it is also much more likely that those interests will be considered so severely infringed that it amounts to a denial of those interests. Finally, because images are part of a person, objectification through an image is considered genuine objectification of the person. A denial of subjectivity through

objectification can be effected by using an image of a person without taking care to ensure that the depicted person wants to be used thus. That might be done by many people who use ibsa as pornography. Even if it is not something those individual users can be held accountable for through law, it is something that the depicted person should be protected against.

The answer to the main question of this thesis depends on one's approach to personhood. I have found that ibsa is seriously wrongful on a relational approach to personhood. It can be seen to infringe the very thing that makes beings into persons: (mis)use of an image affects a person's relations, and where those are caring relations, abuse through images infringes personhood and personhood interests. Ibsa is much less severely wrongful on an atomistic understanding of personhood, because, on that account, the defining characteristic of personhood (mental capacities) is not seriously affected by the conduct that constitutes ibsa.

7.3 The relevance of personhood for criminalisation theory

This thesis has shown that the severity of the wrong of ibsa can be captured much more fully on a relational account than on an atomistic account. As the atomistic approach is the one traditionally used in law, that means that the severity of the wrongfulness of ibsa tends to be obscured. (Re)considering the foundation upon which wrongness is determined can strengthen the case for criminalisation, and can help identify what label can fairly be applied to the offence. It is an important part of the findings of this thesis that one's understanding of personhood substantially affects what conduct is found to be within the scope of justified criminalisation and to what extent. As personhood approaches have such a substantial impact on assessing the justified scope of criminal law, personhood should be clearly defined in

criminalisation debates. I argued in this thesis that atomistic personhood is a misguided understanding of how those beings we identify as persons (regardless of whether that matches the theory) exist in the world. Relational personhood more helpfully theorises how persons exist in the world and defines persons through caring relations, which are quite widely recognised as morally valuable. The wrongs that can be identified using a relational approach to personhood are likely to better reflect what actually affects people.²

In chapter 2, I considered that wrongfulness is a requirement of justified criminalisation. From there, I turned to personhood to consider how wrongfulness is determined and interpreted. I recognise that this is unusual: in the legal theory of liberal democracies, ‘what is a person’ is usually presumed rather than explicated, and that extends to the theoretical foundation upon which wrongfulness is determined. As a result, determining whether the wrongfulness requirement of justified criminalisation is fulfilled tends to be an implication and assumption, rather than a substantiated claim. So: personhood is not a concept that is commonly explored in relation to wrongness. However, that causes blind spots within criminalisation theory and law: by not addressing the theoretical foundation of wrongs, it is not clear *why* something is a wrong, nor is it clear why — if it is deemed to be wrongful — something is a *moral* wrong. Failing to address the foundation that is used to assess and determine what can justifiably be criminalised obscures the way in which the justified scope of the criminal law is demarcated.

² This claim is supported too by harm gauging scales based on relationality versus based on atomism: a relational approach better reflects what actually harms people than an atomistic approach. See chapter 2, section 2.2.2.4.

I have offered a discussion of personhood to show that it can serve as a foundation upon which to base and interpret wrongs against persons. It is a mistake to think that moral wrongfulness in liberal democracies is a value-free statement: just because the moral foundation is not explicated does not mean it is not there. The moral foundation of personhood cannot be avoided by focusing on ‘harmfulness’ instead of ‘wrongfulness’. That is because assessment of harmfulness, like wrongfulness, is grounded in an understanding of what a person is. Where the law makes claims about what is generally harmful and/or wrongful to persons, it does so with an implied understanding of what a person is, and personhood is a moral concept.

The law treats persons as beings with the highest moral status, and so personhood is a moral concept. That is true on the traditional liberal approach of atomistic personhood as well as on the alternative of relational personhood that I subscribe to: on both approaches an underlying claim of personhood is that all persons are persons *equally*, and all persons have equal moral value. Any claim about what is wrongful and/or harmful to persons is rooted in a moral foundation and so the law cannot usefully escape moral claims contained in personhood. As such, it is informed by morality. Because the law cannot be value neutral, it is prudent to explicate the values it adheres to so that claims about concepts such as wrongs become verifiable. That would also clarify how it can be assessed what is wrongful and what could justifiably be criminalised.

Where criminalisation theory indicates that moral wrongs could be within the scope of justified criminalisation, there needs to be a tool by which moral wrongness can be assessed in a way that does not interfere with the law’s objectivity, equal application, and verifiability. One of the findings of this thesis is that personhood can offer such a tool for clarification, and

should be a substantial part of criminalisation theory. The claim that is most relevant in the context of personhood is the answer to the question ‘what makes persons most morally valuable?’. Because personhood is a moral status, its infringement is a moral wrong. Because moral wrongs are a type of wrong that can justifiably be criminalised, assessing that ibsa results in an infringement of persons, is a way to establish that it meets the requirement of wrongfulness for justified criminalisation.³

By clarifying and explicating the moral claims that the law makes and adheres to, the law’s moral foundation need not stand in the way of its objectivity and fairness: so long as it is clarified what the theoretical foundation for its wrongfulness assessments is, those claims can be verifiable and objective. Personhood theory offers tools for such clarification. Using an explicit and clear definition of personhood would benefit the objectivity of the law and verifiability of the justified scope of the criminal law.

7.4 The necessity of criminalising ibsa and notes for further research

In this thesis, I found that a relational foundation to identifying the wrongness of ibsa results in a much more severe set of wrongs than an atomistic foundation does. This means that on a relational approach to personhood, the criminalisation of ibsa sits more firmly within the scope of justified criminalisation, and could more readily warrant criminalisation as a serious offence. In this thesis, I have suggested that ibsa could be an infringement of article 3 ECHR, as well as of articles 8, 10 and 14 ECHR. That ibsa is severely wrong to the extent that it could amount to torture matches how ibsa is sometimes experienced: victim-survivors have equated ibsa to torture, and on a relational approach to personhood it can be shown that the

³ See chapter 2, section 2.2.3.3.

wrong of ibsa can indeed amount to that.⁴ Further research on the legal wrongness of ibsa is warranted to draw out exactly how and to what extent ibsa can be recognised as an existing legal wrong. I have shown that ibsa is a serious moral wrong, which can correspond to severe legal wrongness.

If ibsa is indeed found to give rise to the human rights infringements I have pointed at, that means that the wrongness of ibsa could be so severe that criminalisation is not optional but an international human rights obligation.⁵ For instance, in the case law of the ECtHR it is recognised that some human rights infringements are so serious that states *must* criminalise them or be found to be in breach of protecting human rights.⁶ Using a relational approach to identifying the wrongness of ibsa uncovers a very severe set of wrongs. Criminalisation of ibsa could then be understood as a requirement in human rights law, where criminalisation can be a minimal, though not sufficient, condition of offering a legal framework in which rights and persons can be protected. A relational approach points at this conclusion. An atomistic approach supports this conclusion to a lesser extent. That again points at the importance of adopting a relational approach to personhood in law: not only are the identified wrongs different compared to the wrongs identified on an atomistic approach, but it is also possible to find a difference in the obligations of states regarding addressing those wrongs.

⁴ See *ibid*, 17.

⁵ See Laurens Lavrysen, ‘Positive Obligations and the Criminal Law : A Bird’s-Eye View on the Case Law of the European Court of Human Rights’ in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights : Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020), 35-44.

⁶ *Case of Volodina v Russia* Application no 41261/17 (ECHR, 4 November 2019), §128, and separate opinion of Judge Pinto de Albuquerque, joined by Judge Dedov §20.

7.5 A fair label for offences addressing ibsa

Ibsa constitutes an infringement of sexual integrity. It does so very firmly on a relational approach, and — while more moderately so — on an atomistic approach the wrong can be found too. The principle of fair labelling holds that a fair label reflects the defendant's moral wrongdoing. That means that, for ibsa, the label ought to reflect the sexual nature of the infringement. One thing this includes is that the label ought to identify the sexual nature *as* an infringement, meaning: ibsa is not merely something that happens to be sexual *and* wrong, but rather the wrongness is (partly) contained in ibsa's sexual nature. One reason why terms such as 'revenge pornography' and 'non-consensual pornography' are less appropriate than 'image-based sexual abuse' or 'intimate image abuse' is that they obscure the sexual nature of the *wrong*. In terms such as 'revenge porn', the wrongness that is reflected in the label points at the defendant's motive, rather than the fact that the defendant infringed the depicted person's sexual integrity.

A second implication of the principle of fair labelling in the context of the sexual nature of the wrong of ibsa, is that a fair criminal law criminalises ibsa as a sexual offence. The nature of the wrong should inform the label that it is attached to an offence. If conduct constitutes an infringement of sexual integrity, it would be fair to label an offence addressing that conduct a 'sexual offence'.⁷ While all wrongs identified in this thesis are moral wrongs (and so could be reflected in the label attached to an offence addressing ibsa), in liberal democracies only sexual wrongs tend to have a special status to the extent that they are classified differently and explicitly labelled as sexual offences. Those offences are often treated differently than non-sexual offences: some states keep track of sex offenders via a

⁷ See for a conceptual analysis of what constitutes sexual offences Stuart P Green, *Criminalizing Sex : A Unified Liberal Theory* (Oxford University Press 2020), 7.

registry, in some countries victims are granted anonymity only if they are victims of a sexual offence, and in yet other countries specially trained police officers will handle sexual offences, which lowers the risk of things such as secondary victimisation through the legal process. These measures are a recognition of the severity of sexual offences. It is particularly important to correctly identify what conduct — when criminalised — should constitute a sexual offence so that the protective measures on sexual offences can be used by the appropriate group of people.

The principle of fair labelling warrants criminalising ibsa as a sexual offence. In most sexual offences, both D's conduct and the wrong it constitutes are of a sexual nature. For example, in rape, the act of penetration is a sexual act, making the nature of the conduct 'sexual', and this act infringes the victim's sexual integrity, meaning that it also constitutes a sexual wrong. However, it is not necessary that both the nature of the conduct and the nature of the wrong are sexual in order for that conduct to be justifiably classified as a sexual offence.⁸ The guiding criterion for labelling an offence as 'sexual' is that the nature of the wrong is sexual. In ibsa, the nature of the wrong is sexual, but the nature of the conduct need not necessarily be.⁹

Although conduct can be criminalised as a sexual offence if only the nature of the wrong is sexual, it is uncommon to do so if the nature of the act is not also inherently sexual. That means that victims are not as thoroughly protected as they could be. That it is not (yet)

⁸ *ibid*, 4.

⁹ It may be the case that a person taking, making, and/or sharing intimate images finds this a sexual act or does this in the course of a sexual act so that it is because of its circumstances sexual, but it need not necessarily be the case that the conduct establishing ibsa is of a sexual nature.

common to criminalise ‘sexual wrongs’ that are not part of ‘inherently sexual conduct’ as sexual offences might be an explanation for why the sexual nature of the offence of ibsa often gets overlooked, even when the act is criminalised. For instance, the Sheriff Appeal Court in Scotland held that a man convicted of ibsa was wrongly included on the sex offender registry. The Court found that ‘the offence nor the motivation for the offending involves a significant sexual element even though there was a sexual element to the method chosen by the appellant to inflict harm and distress on his ex-partner.’¹⁰ Here, the Court recognised the sexual nature of the wrong and still rejected that it should be treated as a sexual offence. By focusing on the method used to infringe the right to sexual autonomy, the Court overlooked that the nature of the wrong could, in itself, be reason to consider ibsa a sexual offence (regardless of whether the nature of the offender’s conduct was sexual). This thesis has drawn focus to the importance of wrongness for criminalisation, and I hold that the nature of the wrong is much more central to informing criminalisation than the nature of the act. That should be reflected both in law as well as its application. It is at the core of criminalisation theory in liberal democracies that only conduct that infringes on *others* should be criminalised. On that basis, it would be odd and counterproductive to take the defendant’s intentions and motives as primarily guiding the nature of the offence, rather than the infringement D causes to another person that justifies criminalising D’s conduct. Yet, that is what happens where the sexual nature of the wrong of ibsa is recognised and nevertheless not deemed sufficient to place D on a sex offender registry.

This thesis has shown that the method of infringement is not relevant in the context of wrongness. That means that is also irrelevant for labelling offences: whether someone is

¹⁰ Opinion of the Court delivered by Sheriff Principal Mhairi M Stephen QC in appeal against sentence: *Sorrell v Procurator Fiscal*, Greenock [2019] SAC (Crim) 2 [14].

stabbed to death or shot and killed does not usually matter for a homicide charge. Similarly, whether or not the defendant gained sexual pleasure from infringing the victim's sexual autonomy should not matter for the classification of that wrong. The method used to infringe a right does not affect the nature of the wrong and therefore should not affect classifying and labelling that wrong.

Based on the finding in this thesis, I hold that ibsa should be criminalised as a sexual offence, and it does not matter for that conclusion that D's conduct may not have been sexual: where ibsa can be recognised as an infringement of sexual integrity, its criminalisation ought to reflect that. On an atomistic approach to personhood this will not typically be the case, but on a relational approach to personhood ibsa should certainly be criminalised as a sexual offence. It does not matter that D's conduct was not sexual in nature, which is something the law could reflect more firmly than it typically does. In this thesis, I have discussed the wrongs of ibsa extensively and have shown that the wrong is of a sexual nature. Where a sexual wrong is criminalised, but not as a sexual offence, that breaches the principle of fair labelling. That means that the law is not as fair as it ought to be. To be as fair as possible, the law should criminalise ibsa as a sexual offence.

7.6 Appropriate *mentes reae* of laws criminalising ibsa

In this thesis, I found that the wrongness of ibsa exists quite separately from D's motive. Some laws criminalising ibsa have explicitly defined the offence based on the defendant's motive. However, ibsa that does not have a harmful motive such as 'revenge' or 'intending to cause distress' still sits comfortably within the justified scope of the criminal law. That is because nor harm, nor wrong, nor publicness are dependent on D's motive. There is no reason to exclude ibsa without a harmful motive from criminalisation, and failing to

criminalise such cases of ibsa leaves a vast number of wrongs unaddressed and without legal remedies. Ibsa very often does not happen for a particular motive, such as revenge. The Law Commission of England and Wales in its 2022 report on intimate image abuse suggests that ibsa with a harmful motive could be criminalised as an aggravated form of ibsa. Such a construction means acknowledging that ibsa inherently meets the requirements for justified criminalisation even if there is no revenge-like motive, and to take such motives as an aggravating factor because it is considered an *additional* wrong to want to cause another person distress.

As I have shown in this thesis, ibsa's wrongness does not rely on a harm-motive, and so the justifiability of its criminalisation can readily be met without it. That also means that a criminal offence addressing ibsa need not specify a *mens rea* of 'intending to cause distress'. Instead, an appropriate *mens rea* may be 'intending to take, make, and/or share *and* being negligent as to consent'. This is a double-barrelled *mens rea* similar to the ones in the English and Welsh Sexual Offences Act 2003. The stronger *mens rea* (intent) is *to intend the actus reus*. The lesser *mens rea* (negligence) sees to the lack of care taken regarding assuring that doing the *actus reus* was justified. In chapter 6, I noted that negligence is not usually thought of as a *mens rea* requirement that is sufficient to justify liability in very serious offences.¹¹ However, when it comes to treating another person without regard for their personhood or without sufficient respect for their personhood, then negligence, above all, shows an utter disregard and lack of care for other persons. Negligence, then, may be a much more serious state of mind than is typically assumed. Moreover, I am not suggesting that ibsa offences should be entirely negligence based. I am suggesting instead that they need to *intend* to

¹¹ See section 6.2.2.3.

submit another person to taking, making, and/or sharing intimate images, and be negligent as to whether the depicted person wanted to be thus subjected. That is a very strong demand on their mental state indeed. As such, I believe that an offence addressing ibsa that has the *mens rea* requirement of intending the *actus reus*, and being negligent as to whether doing the *actus reus* is justified, would be appropriate.

7.7 Appropriate *actus rei* of laws criminalising ibsa

In this thesis, I have noted that lack of consent is not relevant for finding the wrong of ibsa. That affects what could appropriately be part of the *actus reus* of offences addressing ibsa. The *prima facie* wrong of ibsa exists regardless of the depicted person's consent. As noted in chapter 4, lack of consent is the absence of something and is not part of what constitutes a wrong. Rather, the wrong pre-exists any justification. Consent could be a justification for most of the wrongs of ibsa, namely those wrongs that infringe personhood interests. That means that lack of consent should not be part of the *actus reus* but instead, the presence of consent should be a defence. That helps move focus away from the conduct of the depicted person to the conduct of the defendant. It also acknowledges the inherent wrongful nature of ibsa. Avoiding the inclusion of 'lack of consent' in the *actus reus* prevents that the prosecution is burdened with proving that there was no consent. Proving the absence of something is much more challenging than proving its presence. Where there was consent, therefore, it could be appropriate for the defendant to prove its presence, which would give them a defence and avoids undue pressure on the victim.¹² Lack of consent does not inform

¹² See on the pressure on victims during trials e.g. Sue Lees, 'Judicial Rape' (1993) 16 *Women's Studies International Forum* 11.

the nature of the wrong of ibsa, and it should not inform the nature of an offence addressing ibsa.

7.8 Topics for further research

In this section I point at some additional topics for further research, namely exploring the impact of personhood approach on concerns of over- and undercriminalisation, the wrongness of profiting off of ibsa, the implications of relational personhood on criminal liability and victimhood, the publicness of ibsa, the distinction between personhood and selfhood, the remaining concerns of relational personhood, and defining relational consent.

7.8.1 Further research exploring the impact of personhood approach on concerns of over- and undercriminalisation

A first topic for further research is connected to (re)considering personhood in law.

Approaches to personhood affect what is considered wrongful, and, as such, affect the demarcation of the justified scope of the criminal law. Here, I point at this issue as a topic for further research, particularly regarding over- and undercriminalisation concerns.

On ‘overcriminalisation’ the challenge is that too much is criminalised, which impedes on people’s general liberty.¹³ Similarly, concerns of *undercriminalisation* have been raised regarding issues that wrong and harm specific social groups, such as women.¹⁴ An atomistic

¹³ RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007).

¹⁴ On undercriminalisation see Andrew Ashworth and Lucia Zedner, ‘Preventive Orders: A Problem of Undercriminalization?’ in Lucia Zedner and Andrew Ashworth (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010), on under-criminalisation of women’s harms: Clare McGlynn, ‘Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking’ (2022) 93 *Women’s Studies International Forum* 102614;

approach to personhood identifies different wrongs as being at the core of justified criminalisation than relational personhood, and something that could be justifiably criminalised on one approach to personhood might not be considered so on another. As I have shown in this thesis, many wrongs appear less severe if they are taken out of context, and an atomistic approach to personhood typically does not leave much room for taking context into consideration. That could mean that wrongs and harms that are informed by their context, such as for example wrongs to a specific social group, are not recognised or minimised on an atomistic approach, while their gravity is much more prominent on a relational approach. The reverse, namely that wrongs appear more severe on an atomistic approach to personhood and less so on a relational approach, is also possible. It might for instance be the case in property offences. It is a question for further research whether changing from an atomistic to a relational approach to personhood could help remedy concerns where overcriminalisation is found, while simultaneously highlighting areas where there currently is *undercriminalisation* (such as on ibsa and conduct that is harmful to women and minoritised groups). Based on the findings in this thesis it is my expectation that a different understanding of personhood can help identify why concerns of overcriminalisation may be justified, namely because a different understanding of personhood shifts what is considered to be at the core of justified criminalisation. It could be found that some of the offences that are mentioned in the context of ‘overcriminalisation’ fall outside the scope of justified criminalisation when interpreted based on relational personhood, and that conduct that is barely — if at all — deemed wrongful on an atomistic approach to personhood could be considered at the core of justified criminalisation on a relational approach.

Mary Anne Franks, “‘Revenge Porn’ Reform: A View from the Front Lines’ (2017) 69 *Florida Law Review* 1251.

The research presented in this thesis shows that there are different conclusions regarding wrongness dependent on personhood approaches. Those considerations could help explain why in some areas of law there is overcriminalisation, while in others there is undercriminalisation: using an atomistic approach to personhood for the interpretation of wrongs means that some things appear more seriously wrongful than they would when a relational approach is used, while others are minimised.¹⁵ Using relational personhood as a guide for determining wrongfulness and as a foundation for justifying criminalisation, shifts understanding of what can justifiably be criminalised and what cannot. That warrants further exploration, particularly in those contexts where the law is criticised for missing, minimising, or over-emphasising wrongs, that is, where there are concerns regarding under- and overcriminalisation.

7.8.2 The wrongness of profiting off of ibsa

If someone other than the depicted person profits from ibsa, that may be a form of sexual exploitation that could be a wrongful way in which to *use* ibsa. I have not addressed the wrong of sexual exploitation in this thesis, because it is not an *inherent* wrong of ibsa. Rather, profiting off of ibsa is a particular use of ibsa. It might occur where ibsa is sold for profit and D makes money off of V's abuse, but it is not at the core of the wrongness of ibsa itself. The issue of sexual exploitation in connection to ibsa is a topic that warrants further research. It could be particularly relevant in discussions on platform regulation and legitimate restrictions on hosting and publication to show that the commercial use of ibsa is an additional serious wrong.

¹⁵ See by analogy holistic appreciation of harms in Clare McGlynn et al., 'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2020) *Social & Legal Studies* 541, 552.

7.8.3 The implications of relational personhood on criminal liability and victimhood

Relational personhood can have implications for how criminal liability and victimhood are understood. A relational understanding of personhood need not stand in the way of the law seeking to implement additional requirements in a more individualised sense of subjectivity to impose liability, or recognise victims of crime.¹⁶ However, the law may have a need to distinguish between persons based on whether or not they have an individual sense of subjectivity, for example, for reasons of liability or victimisation. Relationally defining persons can affect who is regarded ‘an actor (D)’ and who is regarded ‘subjected to an act (V)’. That might have wide-ranging implications for the attribution of criminal liability.¹⁷ It could be part of future research to consider topics of joint liability and responsibility for crimes in the context of relational personhood. Equally, widening the scope of the concept victims of crime may affect our understanding of who ought to be offered recourses and support in light of their own victimisation.¹⁸

¹⁶ See on the difficulties regarding attribution of liability to defendants who did not commit the *actus reus* the concept on accessorial liability: on derivative liability see Rebecca Williams in Beatrice Krebs (ed), *Accessorial Liability after Jogee* (Hart Publishing 2019), 31; and on determining complicity Catarina Sjölin, ‘A Step Away from Liability’ in Beatrice Krebs (ed), *Accessorial Liability after Jogee* (Hart Publishing 2019), 77. The law’s individualisation of persons identifies e.g. a ‘primary’ victim, but that does not mean that the persons who the victim is in (close) relationships with could not also be wronged through the conduct that the other was subjected to.

¹⁷ See on law and the relational self in criminal law Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019), 167-95.

¹⁸ For example, parents of victims of child sexual abuse may be considered victims in their own right on a relational approach. On the harm to parents of victims of child sexual abuse see Rosaleen McElvaney and Elizabeth Nixon, ‘Parents’ Experiences of Their Child’s Disclosure of Child Sexual Abuse’ (2020) 59 *Family Process* 1773.

7.8.4 The publicness of ibsa

In chapter 2, I noted that more work is needed to define ibsa's publicness. Further research should identify whether and when states could legitimately consider something its business. For example, a state might argue that undisclosed non-consensual deepfakes are not legitimately its concern, meaning that such conduct does not meet the requirement of 'publicness'. It is a point for further research to draw out how the various forms of ibsa meet the publicness requirement of justified criminalisation. Such a project could be connected to drawing out the human rights infringements of ibsa, but it need not necessarily be. The question that is identified here for further research is how it can be determined when something is legitimately the state's business. That addresses the third requirement of justified criminalisation as presented in chapter 2 of this thesis.

7.8.5 The distinction between personhood and selfhood

In chapter 3, I considered that there may be a conceptual difference between personhood and selfhood, but that they are usually treated as the same concepts in legal writing. It might be useful to distinguish between personhood as the highest moral status, and selfhood as a lower status. Such distinction could help explain that, for example, infringing in a person's abusive relationships infringes their selfhood but benefits their personhood. Further research is needed to define selfhood as separate from personhood and to explain the relationship of personhood and selfhood in legal theory.

7.8.6 The remaining concerns of relational personhood

More work is needed to explore remedies for the remaining concerns of relational personhood, as discussed in chapter 3.¹⁹ I noted that human beings who are not engaged in caring relations may not as readily be considered ‘persons’ on a relational understanding of personhood, which jars with how personhood is normally attributed. I further noted that there may be some difficulties explaining the equal moral value of all persons if some persons have more caring relations than others in combination with the intrinsic nature of relationships to persons. These two concerns could be considered further in future research to determine whether or not there are appropriate remedies for them.

7.8.7 Defining relational consent

Finally, I noted in chapter 4 that more work should be done to draw out and define the full meaning and function of consent on a relational approach to personhood. That could include considering relational duties as impacting the validity of consent as a justification for wrongs. It might also include considering whether there are relevant differences on the moral power of consent between consent that focuses on the question whether an act is consensual (on relational consent) versus consent that focuses on the question whether individuals consent to an act (atomistic consent).

7.9 Final concluding comments

This thesis has shown that ibsa is very seriously wrongful. It has presented arguments towards reconsidering the theoretical foundation upon which to interpret wrongs, rights, and harms, and held that a relational approach to personhood much better reflects persons’

¹⁹ See chapter 3, section 3.5.5.

inherent nature than an atomistic approach to personhood does. That affects how the gravity of ibsa may be considered. This thesis sought to fill a gap in knowledge regarding wrongness of ibsa. The findings in this thesis may be of use for future academic and legislative work on how best to address ibsa. They can also be useful towards reconsidering the theoretical foundation upon which the law is developed and interpreted.

I have shown that the wrong of ibsa is substantial. Because ibsa is also shown to be harmful and can be understood as public — for instance as human rights infringements — I hold that it comfortably meets the requirements for justified criminalisation. I further hold that it may be necessary to criminalise ibsa, at the very least in its more severe forms. The findings of this thesis can impact the extent to which states are understood to have obligations to act against ibsa. Furthermore, this thesis has shown that ibsa may need to be criminalised in a particular way, namely as a sexual offence, in order to meet the requirements of the principle of fair labelling. It is not the aim of this thesis to set out a draft of an ‘ideal’ law on ibsa. Nevertheless, the conclusions I have drawn based on the findings in this thesis affect what a good law on ibsa could entail.

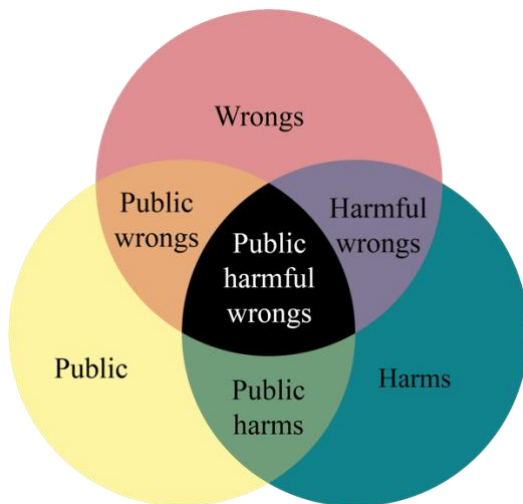
In conclusion, I understand image-based sexual abuse as a serious infringement of persons. There are good reasons to criminalise it. I have set out that the theoretical foundation used to determine the wrongfulness has a substantial effect on the finding of wrongness. Where an atomistic approach to personhood is used, blind spots regarding wrongs against persons exist and persist. I have argued that relational personhood is preferable to atomistic personhood because it theorises persons more in line with how people actually exist, and identifies persons based on a characteristic that is widely understood as morally valuable. One’s understanding of personhood can shift what is demarcated as the justified scope of the

criminal law: ibsa sits at the outskirts of justified criminalisation on an atomistic approach (although there too it sits *within* the scope of justified criminalisation), but it sits at the very heart of the justified scope of the criminal law on a relational approach. This thesis offers preparatory arguments for reconsidering and explicating the foundation upon which wrongs in criminal law are determined. I subscribe to a relational approach to personhood and as such recognise the severe wrongness of ibsa. Criminalisation of ibsa is a necessary step to ensure that persons are protected from these serious infringements of their personhood and to create a safer and more equal society.

APPENDICES

Appendix A: The justified scope of the criminal law

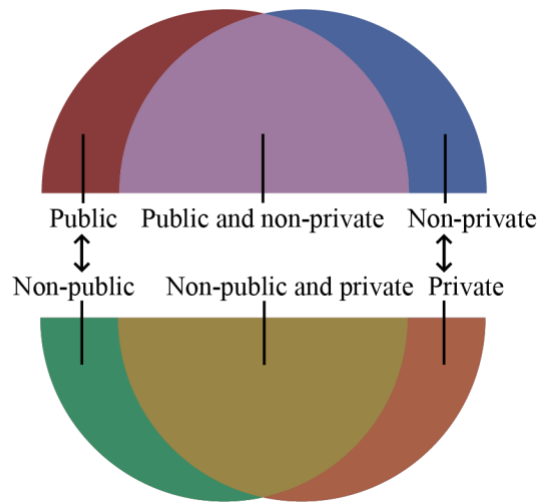
A demarcation of the justified scope of the criminal law



- Public harmful wrongs are exemplified in crimes, for example rape, battery, and theft
- Public harms may be, for example, social isolation of elderly people, but also for example a flood: they are not necessarily a wrong, but it is harmful and could be for the state to offer remedies
- Harmful wrongs that are not public are, for example, cheating on a partner, or bringing a recovering alcoholic a drink. That may not be for the state to regulate.
- Public wrongs that are not harmful can be exemplified by non-harmful trespassing
- Public is that which is the state's business
- Wrong is that which is, for example, an infringement of personhood
- Harm is what is experienced as such, in line with the objective definition.¹

¹ Oxford English Dictionary, "harm, n." (Oxford University Press 2022).

Appendix B: A diagram on the overlap of publicness and privateness



The relations between publicness and privateness. The opposite of public is non-public. The opposite of private is non-private. In many cases what is private may overlap with what is non-public, and in many cases what is public may overlap with what is non-private, but these need not necessarily overlap. That means there can be privacy in public, publicness in private, etc. These are relevant considerations regarding protection of for example issues such as coercive control, which are sometimes presented as non-public because they happen in a private setting. The considerations are also relevant for issues such as breast-feeding in public, upskirting and down-blousing, which are sometimes presented as no privacy infringement because they happen in a public place.

Appendix C: Socially distanced theatre installation



Still from theatre installation during social distancing measures in 2021, on finding connection in times of isolation: *Laf me / Lief me*, concept and direction Eva Goudsmit, 15-18 July 2021, Podium Mozaïek Amsterdam.

BIBLIOGRAPHY

- Ajder H et al., *The State of Deepfakes 2019 Landscape, Threats, and Impact* (Sensity 2019)
- Alexander E, 'Victoria Justice 'Angry' at 'Massive Invasion of Privacy' and pursuing Legal Action after Nude Photos Leak Online' *The Independent* (4 September 2014)
- Alexander L, *Is there a Right of Freedom of Expression?* (Cambridge University Press 2005)
- Altman A and Watson L, *Debating Pornography* (Oxford University Press 2019)
- Amable B, 'Morals and Politics in the Ideology of Neo-Liberalism' (2011) 9 *Socio-Economic Review* 3
- Antonsdóttir HF, "'A Witness in My Own Case': Victim–Survivors' Views on the Criminal Justice Process in Iceland' (2018) 26 *Feminist Legal Studies* 307
- Aquinas T, *Summa Theologiae* (Aquinas Institute for the Study of Sacred Doctrine 2012)
- Arai-Yokoi Y, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21 *Netherlands Quarterly of Human Rights* 385
- Arendt H, *The Human Condition, Second Edition* (The University of Chicago Press 1958)
- 'Audrina Patridge Nude Photos Scandal' *Chicago Tribune* (25 March 2008)
- Ashworth A and Horder J, *Principles of Criminal Law* (7 edn, Oxford University Press 2013)
- Ashworth A and Zedner L, 'Preventive Orders: A Problem of Undercriminalization?' in Zedner L and Ashworth A (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010)
- Ashworth A, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225
- Ashworth A, 'The Elasticity of Mens Rea' in Tapper C (ed), *Crime, Proof & Punishment : Essays in Memory of Sir Rupert Cross* (Butterworths 1981)
- Ashworth A, *Principles of Criminal Law* (6th edn, Oxford University Press 2009)
- Babbitt SE, 'Feminism and Objective Interests: The Role of Transformation Experiences in Rational Deliberation' in Alcoff LM and Potter E (eds), *Feminist Epistemologies* (Routledge 1993)
- Baier AC, 'Cartesian Persons' (1981) 10 *Philosophia* 169
- Barber B, *The Logic and Limits of Trust* (Rutgers University Press 1983)
- Barendt E, *Freedom of Speech* (Oxford University Press 2005)
- Barton B, *The Pornification of America : How Raunch Culture Is Ruining Our Society* (New York University Press 2021)

- Bates E, 'Language about Me and You: Pronominal Reference and the Emerging Concept of Self' in Cicchetti D and Beeghly M (eds), *The Self in Transition : Infancy to Childhood* (University of Chicago Press 1990)
- Bauer J and Gradus R, *Hot Girls Wanted* (Netflix 2015)
- Bentham J, Burns JH and Hart HLA, *A Comment on the Commentaries and A Fragment on Government* (Clarendon Press 1977)
- Bergelson V, 'Consent to Harm' in Miller F and Wertheimer A (eds), *The Ethics of Consent* (Oxford University Press 2009)
- Bergelson V, 'The Right to be Hurt: Testing the Boundaries of Consent' (2007) 75 *The George Washington Law Review* 165
- Berlin I, *Two Concepts of Liberty* (Oxford University Press 1958)
- Bhattacharyya G, *Sexuality and Society : An Introduction* (Routledge 2002)
- Binford W et al., 'Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad' (2015) 35 *Children's Legal Rights Journal* 46
- Bingham TH, *The Rule of Law* (Penguin 2011)
- Blackstone W and Jones GH, *The Sovereignty of the Law : Selections from Blackstone's Commentaries on the Laws of England* (Macmillan 1973)
- Bloor D, Wittgenstein, *Rules and Institutions* (Routledge 1997)
- Boellstorff T, 'The Ability of Place: Digital Topographies of the Virtual Human on Ethnographia Island' in Gelsthorpe L, Mody P and Sloan B (eds), *Spaces of Care* (Hart 2020)
- Bogaert AF, 'Asexuality and Autochorissexualism (Identity-Less Sexuality)' (2012) 41 *Archives of Sexual Behavior* 1513
- Boon SD and Holmes JG, 'The Dynamics of Interpersonal Trust: Resolving Uncertainty in the Face of Risk' in Hinde RA and Groebel J (eds), *Cooperation and Prosocial Behaviour* (Cambridge University Press 1991)
- Boroditsky L, 'How Language Shapes Thought' (2011) 304 *Scientific American* 62
- Boyle K, 'The Implications of Pornification' in Lombard N (ed), *The Routledge Handbook of Gender and Violence* (Routledge 2018)
- Boyle K, 'What's in a Name? Theorising the Inter-Relationships of Gender and Violence' (2019) 20 *Feminist Theory* 19
- Brancazio N, 'Being Perceived and Being "Seen": Interpersonal Affordances, Agency, and Selfhood' (2020) 11 *Frontiers in Psychology* 1
- Brink D, 'Mill's Moral and Political Philosophy' in Zalta EN and Nodelman U (eds), *The Stanford Encyclopedia of Philosophy* (Fall edn, Stanford University 2022)
- Brownlee K, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford University Press 2020)
- Burgin R and Flynn A, 'Women's Behavior as Implied Consent: Male "Reasonableness" in Australian Rape Law' (2021) 21 *Criminology & Criminal Justice* 334

- Burke AS, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552
- Cambridge Dictionary*, Cambridge University Press 2022
- Cane P, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *The Journal of Ethics* 21
- Caplan P, *The Cultural Construction of Sexuality* (Psychology Press 1987)
- Chalmers J and Leverick F, 'Fair Labelling in Criminal Law' (2008) 71 *The Modern Law Review* 29
- Chesney R and Citron D, 'Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics' (2019) 98 *Foreign Affairs* 8
- Chiarini A, 'I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This' *The Guardian* (19 November 2013)
- Choudhry S and Herring J, 'Righting Domestic Violence' (2006) 20 *International Journal of Law, Policy and the Family* 95
- Citron DK and Franks MA, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345
- Citron DK, 'Sexual Privacy' (2019) 128 *Yale Law Journal* 1870
- Committee on Equal Opportunities for Women and Men, Olga Keltošová, *Domestic Violence* Doc. 9525 17 July 2002
- Committee on the Elimination of Discrimination against Women, CEDAW *General Recommendations Nos. 19 and 20*, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38
- Committee on the Elimination of Discrimination against Women, *General Recommendation No. 35 (2017) on Gender-Based Violence against Women, updating General Recommendation No. 19 (1992)* CEDAW/C/GC/35
- Cudd AE, *Analyzing Oppression* (Oxford University Press 2006)
- Davis D, 'The Harm that has no Name: Street Harassment, Embodiment, and African American Women' (1994) 4 *UCLA Women's Law Journal* 133
- Davis KE and Todd MJ, 'Friendship and Love Relationships' in Davis KE and Mitchell T (eds), *Advances in Descriptive Psychology*, vol 2 (JAI Press 1982)
- De Jong Gierveld J, Van Tilburg T and Dykstra PA, 'Loneliness and Social Isolation' in Vangelisti AL and Perlman D (eds), *The Cambridge Handbook of Personal Relationships* (Cambridge University Press 2006)
- DeCew JW, *In Pursuit of Privacy : Law, Ethics, and the Rise of Technology* (Cornell University Press 1997)
- Dempsey MM and Herring J, 'Why Sexual Penetration Requires Justification' (2007) 27 *Oxford Journal of Legal Studies* 25
- Dempsey MM, 'Public Wrongs and the 'Criminal Law's Business': When Victims Won't Share' in Cruft R, Kramer MH and Reiff MR (eds), *Crime, Punishment, and Responsibility : The Jurisprudence of Antony Duff* (Oxford University Press 2011)

-
- Dempsey MM, 'Sharing Reasons for Criminalization? No Thanks ... Already Got 'Em!' in Robinson PH, Garvey S and Ferzan KK (eds), *Criminal Law Conversations* (Oxford University Press 2011)
- Dempsey MM, 'Towards a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) 70 *Modern Law Review* 28
- Dempsey MM, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 16
- Dempsey MM, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009)
- Descartes R, *Discourse on Method, and Meditations on First Philosophy* (Fourth edn, Hackett Publishing Company 1998)
- Deutsch M, 'Trust and Suspicion' (1958) 2 *The Journal of Conflict Resolution* 265
- DeWitt R, 'Critical Thinking and Sexing Chickens' (1992) 10 *Inquiry: Critical Thinking Across the Disciplines* 8
- Diehl J, 'Scarlett Johansson on those Nude Photos She Sent to Ryan Reynolds: "I Know my Best Angles"' *Vanity Fair* (1 November 2011)
- Dombrowski SC et al., 'Feral Children' in Dombrowski SC, Gischlar KL and Mrazik M (eds), *Assessing and Treating Low Incidence/High Severity Psychological Disorders of Childhood* (Springer 2011)
- Dougherty T, 'Affirmative Consent and Due Diligence' (2018) 46 *Philosophy & Public Affairs* 90
- Dougherty T, 'Informed Consent, Disclosure, and Understanding' (2020) 48 *Philosophy & Public Affairs* 119
- Douglas BJ, 'Love and Human Rights' (2023) forthcoming *Oxford Journal of Legal Studies*
- Drouin M, Coupe M and Temple JR, 'Is Sexting Good for your Relationship? It Depends' (2017) 75 *Computers in Human Behavior* 749
- Duff R et al., *The Boundaries of the Criminal Law* (Oxford University Press 2010)
- Duff R, *Answering for Crime : Responsibility and Liability in the Criminal Law* (Hart 2007)
- Duff R, *The Realm of Criminal Law* (Oxford University Press 2018)
- Dworkin A, 'Against the Male Flood: Censorship, Pornography, and Equality' (1985) 8 *Harvard Women's Law Journal* 30
- Dworkin A, *Pornography : Men Possessing Women* (Plume 1991)
- Dworkin G, 'Acting Freely' (1970) 4 *Noûs* 367
- Dworkin R, *Taking Rights Seriously* (Duckworth 1977)
- Dymock A and van der Westhuizen C, 'A Dish Served Cold: Targeting Revenge in Revenge Pornography' (2019) 39 *Legal Studies* 361
- Eekelaar J, *Family Law and Personal Life* (Oxford University Press 2006)

- Eisenberger NI, 'Why Rejection Hurts: What Social Neuroscience has Revealed about the Brain's Response to Social Rejection' in Decety J and Cacioppo J (eds), *The Oxford Handbook of Social Neuroscience* (Oxford University Press 2011)
- Eldar S and Laist E, 'The Irrelevance of Motive and the Rule of Law' (2017) 20 *New Criminal Law Review* 433
- Endendijk JJ, van Baar AL and Deković M, 'He is a Stud, She is a Slut! A Meta-Analysis on the Continued Existence of Sexual Double Standards' (2020) 24 *Personality and Social Psychology Review* 163
- European Commission on Human Rights and the European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights : Freedom of Expression* (2020)
- European Commission on Human Rights and the European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights : Right to Respect for Private Life, Home and Correspondence* (2020)
- Farmer L, 'Definitions of Crime' in Cane P and Conaghan J (eds), *The New Oxford Companion to Law* (Oxford University Press 2008)
- Farmer L, *Making the Modern Criminal Law : Criminalization and Civil Order* (Oxford University Press 2016)
- Feder Kittay E, 'The Moral Significance of Being Human' (2017) 91 *Proceedings and addresses of the American Philosophical Association* 22
- Feinberg J, *The Moral Limits of the Criminal Law: Harm to Others*, vol 1 (Oxford University Press 1987)
- Feinberg J, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, vol 4 (Oxford University Press 1988)
- Feinberg J, *The Moral Limits of the Criminal Law: Offense to Others*, vol 2 (Oxford University Press 1985)
- Ferenc T, 'Nudity, Sexuality, Photography. Visual Redefinition of the Body' (2018) 14 *Qualitative Sociology Review* 96
- Ferraz OLM, *Health as a Human Right : The Politics and Judicialization of Health in Brazil* (Cambridge Studies in Law and Society, Cambridge University Press 2021)
- Fineman M, *The Autonomy Myth : A Theory of Dependency* (The New Press 2005)
- Fineman MA, "'Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71
- Finnis J, 'Natural Law Theories' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy* (Summer edn, Stanford University 2020)
- Finnis J, 'The Fragile Case for Euthanasia: a Reply to John Harris' in John Keown (ed), *Euthanasia Examined : Ethical, Clinical and Legal Perspectives* (Cambridge University Press 1995),
- Follingstad DR, Neckerman AP and Vormbrock J, 'Reactions to Victimization and Coping Strategies of Battered Women: The Ties that Bind' (1988) 8 *Clinical Psychology Review* 373
- Foster C and Herring J, *Identity, Personhood and the Law* (Springer 2017)

-
- Foster C, *Human Dignity in Bioethics and Law* (Hart Publishing 2011)
- Fox M, Thomson M and Warburton J, 'Embodied Integrity, Shaping Surgeries and the Profoundly Disabled Child' in Dietz C, Travis M and Thomson M (eds), *A Jurisprudence of the Body* (Palgrave Macmillan 2020)
- Franks MA, "'Revenge Porn' Reform: A View from the Front Lines' (2017) 69 *Florida Law Review* 1251
- Franks MA, 'The Crime of "Revenge Porn"' in Alexander L and Kessler Ferzan K (eds), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (Palgrave Macmillan 2019)
- Gaakeer J, "'Sua cuique Persona?" A Note on the Fiction of Legal Personhood and a Reflection on Interdisciplinary Consequences' (2016) 28 *Law and Literature* 287
- Gardner J and Shute S, 'The Wrongness of Rape' in Horder J (ed), *Oxford Essays in Jurisprudence*, vol 4 (Oxford University Press 2000)
- Gardner J, 'Prohibiting Immoralities' (2007) 28 *Cardozo Law Review* 2613
- Gavey N, *Just Sex? : The Cultural Scaffolding of Rape* (Routledge 2005)
- Gavison R, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1
- Gergen KJ, *An Invitation to Social Construction* (SAGE 1999)
- Gergen KJ, *An Invitation to Social Construction* (Third Edition edn, SAGE 2015)
- Gergen KJ, *Relational Being : Beyond Self and Community* (Oxford University Press 2015)
- Geuss R, 'Liberalism and its Discontents' (2002) 30 *Political Theory* 320
- Gill MB, 'Presumed Consent, Autonomy, and Organ Donation' (2004) 29 *Journal of Medicine and Philosophy* 37
- Gilligan C, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993)
- Goudsmit AL, *Towards a Negative Understanding of Psychotherapy* (Rijksuniversiteit Groningen 1998)
- Goudsmit E, *Laf me/Lief me* (Podium Mozaiek 2021)
- Greasley K, *Arguments about Abortion : Personhood, Morality, and Law* (Oxford University Press 2017)
- Green L and Adams T, 'Legal Positivism' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy* (Winter edn, Stanford University 2019)
- Green SP, *Criminalizing Sex : A Unified Liberal Theory* (Oxford University Press 2020)
- Gross H, 'Rape, Moralism, and Human Rights' [2007] *Criminal Law Review* 220
- Guenther L, *Solitary Confinement: Social Death and its Afterlives* (University of Minnesota Press 2013)
- Hall J, 'Nulla Poena Sine Lege' (1937) 47 *The Yale Law Journal* 165
- Hampshire S, *The Age of Reason : The 17th Century Philosophers* (Mentor Books 1956)

-
- Hansbury T, *The Relational Self and Human Rights : Paul Ricoeur's Hermeneutics of Suspicion* (Birkbeck Law Press 2022)
- Harris J, *The Value of Life* (Routledge 1989)
- Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 36
- Hart HLA, *The Concept of Law* (Oxford University Press 1963)
- Haslanger S, 'Social Meaning and Philosophical Method' (2013) *American Philosophical Association 110th Eastern Division Annual Meeting*
- Heinze EA, *Sexual Orientation: A Human Right : An Essay on International Human Rights Law* (Martinus Nijhoff 1995)
- Henry N and Flynn A, 'Image-Based Sexual Abuse: Online Distribution Channels and Illicit Communities of Support' (2019) 25 *Violence Against Women* 1932
- Henry N et al., *Image-Based Sexual Abuse : A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge 2020)
- Henry N and Powell A, 'Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence' (2015) 21 *Violence Against Women* 758
- Henry N and Powell A, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 *Social & Legal Studies* 21
- Henry N, Flynn A and Powell A, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19 *Police Practice & Research* 565
- Herring J and Chau P-L, 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34
- Herring J and Dempsey MM, 'Rethinking the Criminal Law's Response to Sexual Penetration: on Theory and Context' in McGlynn C and Munro V (eds), *Rethinking Rape Law : International and Comparative Perspectives* (Abingdon : Routledge 2010)
- Herring J and Foster C, "'Please Don't Tell Me": The Right Not to Know' (2012) 21 *Cambridge Quarterly of Healthcare Ethics* 20
- Herring J et al., *'Proposing a Definition of Consent'* (Conversations on Consent, 2021)
- Herring J and Wall J, 'Capacity to Consent to Sex' (2014) 22 *Medical Law Review* 620
- Herring J and Wall J, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76 *The Cambridge Law Journal* 566
- Herring J, 'Consent in the Criminal Law: The Importance of Relationality and Responsibility' in Reed A and Bohlander M (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2015)
- Herring J, *'Conversion Practice and Coercive Control'* (Society of Legal Scholars Conference, London 7 September 2022)
- Herring J, 'Health as Vulnerability; Interdependence and Relationality' (2016) 22 *The New Bioethics* 18
- Herring J, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] *Criminal Law Review*

- Herring J, 'Implied Consent and Vaginal Examination in Pregnancy' in Pickles C and Herring J (eds), *Women's Birthing Bodies and the Law* (Hart Publishing 2020)
- Herring J, 'Mental Disability and Capacity to Consent to Sex: A Local Authority v H [2012] EWHC 49 (COP)' (2012) 34 *The Journal of Social Welfare & Family Law* 471
- Herring J, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' in Gilmore S, Herring J and Probert R (eds), *Landmark Cases in Family Law* (Hart 2011)
- Herring J, 'Rape and the Definition of Consent' (2014) 26 *National Law School of India Review* 62
- Herring J, 'Relational Autonomy and Rape' in Sclater SD et al. (eds), *Regulating Autonomy Sex, Reproduction and Family* (Hart Publishing 2009)
- Herring J, 'Relational Personhood' (2020) 1 *Keele Law Review* 24
- Herring J, 'The Meaning of Domestic Violence: Yemshaw v London Borough of Hounslow [2011] UKSC 3' (2011) 33 *Journal of Social Welfare and Family Law* 7
- Herring J, 'The Severity of Domestic Abuse' (2018) 30 *National Law School of India Review* 13
- Herring J, *Caring and the Law* (Hart Publishing 2013)
- Herring J, *Criminal Law: Texts, Cases and Materials* (10 edn, Oxford University Press 2022)
- Herring J, *Domestic Abuse and Human Rights* (Intersentia 2020)
- Herring J, *Law and the Relational Self* (Cambridge University Press 2019)
- Herring J, *Medical Law and Ethics* (Oxford University Press 2018)
- Herring J, *Vulnerability, Childhood and the Law* (Springer 2018)
- Herring J, *Vulnerable Adults and the Law* (Oxford University Press 2016)
- Heyman SJ, *Free Speech and Human Dignity* (Yale University Press 2008)
- Hill TE, *Autonomy and Self-Respect* (Cambridge University Press 1991)
- Holten E, 'Someone Stole Naked Pictures of Me. This is What I Did About It - Video' *The Guardian* (21 Januari 2015)
- Horder J, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *Oxford Journal of Legal Studies* 16
- Horder J, 'The Irrelevance of Motive in Criminal Law' in Horder J (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 2000)
- Horder J, *Ashworth's Principles of Criminal Law* (9 edn, Oxford University Press 2019)
- Hurd HM, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 25
- Husak D, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007)
- Husak DN, 'Motive and Criminal Liability' (1989) 8 *Criminal Justice Ethics* 3
- Ireni-Saban L and Sherman M, 'Cyborg Ethics and Regulation: Ethical Issues of Human Enhancement' (2021) 49 *Science and Public Policy* 42

- James W, *The Principles of Psychology* (Harvard University Press 1983)
- 'Jennifer Lawrence Calls Photo Hacking a "Sex Crime"' *Vanity Fair* (8 October 2014)
- Jeunet J-P, *Le Fabuleux Destin d'Amélie Poulain* (UGC-Fox Distribution 2001)
- Johnson M, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 *Journal of Marriage and the Family* 283
- Johnson MP, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Northeastern University Press 2008)
- Jütten T, 'Sexual Objectification' (2016) 127 *Ethics* 27
- Kabasakal Arat ZF, 'Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property, and Discrimination' (2008) 30 *Human Rights Quarterly* 906
- Kant I, *Critique of Practical Reason* (Cambridge University Press 2015)
- Kant I, Gregor MJ and Sullivan RJ, *The Metaphysics of Morals* (Cambridge University Press 1991)
- Kateb G, *Human Dignity* (Harvard University Press 2011)
- Keats Citron D and Franks MA, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 46
- Kelly L, *Surviving Sexual Violence* (Polity Press 1988)
- Kenny PD, 'The Meaning of Torture' (2009) 42 *Polity* 131
- Kenyon AT, 'Assuming Free Speech' (2014) 77 *Modern Law Review* 379
- Khodyakov D, 'Trust as a Process: A Three-Dimensional Approach' (2007) 41 *Sociology* 17
- Kierkegaard S, *Fear and Trembling; Repetition* (Princeton University Press 1983)
- Killmister S, 'Dignity: Not such a useless Concept' (2010) 36 *Journal of Medical Ethics* 160
- Kittay EF, 'The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person sends Notes from the Battlefield' (2009) 40 *Metaphilosophy* 606
- Knapp ML, 'Lying and Deception in Close Relationships' in Vangelisti AL and Perlman D (eds), *The Cambridge Handbook of Personal Relationships* (Cambridge University Press 2006)
- Koss M, 'Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes' in Ptacek J (ed), *Restorative Justice and Violence Against Women* (Oxford University Press 2009)
- Kuflik A, 'Liberalism, Legal Moralism and Moral Disagreement' (2005) 22 *Journal of Applied Philosophy* 185
- Kuhse H and Singer P, *Should the Baby Live? : The Problem of Handicapped Infants* (Oxford University Press 1985)
- Kumar R, 'Permissible Killing and the Irrelevance of Being Human' (2008) 12 *The Journal of Ethics* 57

-
- Kyselo M, 'More than our Body: Minimal and Enactive Selfhood in Global Paralysis' (2019) 13 *Neuroethics*
- Kyselo M, 'The Body Social: An Enactive Approach to the Self' (2014) 5 *Frontiers in Psychology*
- Lacey N, 'Beset by Boundaries: The Home Office Review of Sex Offences' [2001] *Criminal Law Review* 3
- Lacey N, 'Community, Culture, and Criminalization' in Kymlicka W, Lernerstedt C and Matravers M (eds), *Criminal Law and Cultural Diversity* (Oxford University Press 2014)
- Lacey N, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing 1998)
- Lamond G, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 23
- Langlois G and Slane A, 'Economies of Reputation: The Case of Revenge Porn' (2017) 14 *Communication and Critical/Cultural Studies* 120
- Langton R, 'Speech Acts and Unspeakable Acts' (1993) 22 *Philosophy & Public Affairs* 293
- Langton R, 'Subordination, Silence, and Pornography's Authority' in Post R (ed), *Censorship and Silencing: Practices of Cultural Regulation* (Oxford University Press 1998)
- Langton R, *Sexual Solipsism : Philosophical Essays on Pornography and Objectification* (Oxford University Press 2009)
- Lavrysen L and Mavronicola N, 'Coercive Human Rights: Introducing the Sharp Edge of the European Convention on Human Rights' in Lavrysen L and Mavronicola N (eds), *Coercive Human Rights : Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020)
- Lavrysen L, 'Positive Obligations and the Criminal Law : A Bird's-Eye View on the Case Law of the European Court of Human Rights' in Lavrysen L and Mavronicola N (eds), *Coercive Human Rights : Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020)
- Law Commission of England and Wales, *Intimate Image Abuse : A Consultation Paper* (Law Commission Consultation Paper No 253 2021)
- Law Commission of England and Wales, *Modernising Communications Offences : A Final Report* (Law Com No 399 2021)
- Law Commission of England and Wales, *Intimate Image Abuse : A Final Report* (Law Com No 407 2022)
- Lee P and George RP, 'The Nature and Basis of Human Dignity' (2008) 21 *Ratio Juris* 173
- Lees S, 'Judicial Rape' (1993) 16 *Women's Studies International Forum* 11
- Lefkowitz D, 'Blame and the Criminal Law' (2015) 6 *Jurisprudence* 18
- Lever A, *On Privacy* (Routledge 2012)
- Levy T, 'The Relational Self and the Right to Give Care' (2006) 28 *New Political Science* 547

-
- Lewis JD and Weigert A, 'Trust as a Social Reality' (1985) 63 *Social Forces* 967
- Lindemann H, *Holding and Letting Go : The Social Practice of Personal Identities* (Oxford University Press 2014)
- Lindroos-Hovinheimo S, *Private Selves : Legal Personhood in European Privacy Protection* (Cambridge Studies in European Law and Policy, Cambridge University Press 2021)
- Locke J and van Leyden W, *Essays on the Law of Nature* (Clarendon Press 1954)
- Luhmann N, *Trust and Power* (English edn, Polity 2017)
- Lupyan G, 'The Centrality of Language in Human Cognition' (2016) 66 *Language Learning* 516
- Mack K, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 *Criminal Law Forum* 327
- Mackenzie C and Stoljar N, *Relational Autonomy : Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000)
- Mackenzie C, 'Relational Autonomy, Normative Authority and Perfectionism' (2008) 39 *Journal of Social Philosophy* 512
- MacKinnon CA, 'On Torture: A Feminist Perspective on Human Rights' in Mahoney KE and Mahoney P (eds), *Human Rights in the Twenty-First Century : A Global Challenge* (Martinus Nijhoff 1993)
- MacKinnon CA, 'Pornography, Civil Rights, and Speech' (1985) 20 *Harvard Civil Rights-Civil Liberties Law Review* 1
- MacKinnon CA, 'Rape Redefined' (2016) 10 *Harvard Law & Policy Review* 431
- MacKinnon CA, *Only Words* (Harvard University Press 1996)
- MacKinnon CA, *Toward a Feminist Theory of the State* (Harvard University Press 1989)
- Macklin R, 'Personhood in the Bioethics Literature' (1983) 61 *The Milbank Memorial Fund Quarterly Health and Society* 35
- Madigan L and Gamble NC, *The Second Rape: Society's continued betrayal of the Victim* (Macmillan Publishing Company 1991)
- Maiese M, 'Embodiment, Sociality, and the Life Shaping Thesis' (2019) 18 *Phenomenology and the Cognitive Sciences* 353
- Mallik R, 'Bodily Integrity and Freedoms: A Cross-Movement Perspective' (2017) 60 *Development* 40
- Manent P, *An Intellectual History of Liberalism* (Princeton University Press 1994)
- Marcel G, *Being and Having* (Dacre Press 1949)
- Marmor A, 'What Is the Right to Privacy?' (2015) 43 *Philosophy & Public Affairs* 3
- Marshall S and Duff R, 'Criminalization and Sharing Wrongs' in Robinson PH, Garvey S and Ferzan KK (eds), *Criminal Law Conversations* (Oxford University Press 2011)
- Marshall S and Duff R, 'Public and Private Wrongs' in Chalmers J and Leverick F (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010)

-
- Marshall S and Duff R, 'Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7
- Martin AM (ed), *The Routledge Handbook of Love in Philosophy* (Routledge 2019)
- Martin N, 'Image-Based Sexual Abuse and Deepfakes: A Survivor Turned Activist's Perspective' in Powell A, Flynn A and Sugiura L (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Springer 2021)
- Mason E, *Ways to be Blameworthy : Rightness, Wrongness, and Responsibility* (Oxford University Press 2019)
- Mazor J, 'On the Child's Right to Bodily Integrity: When is the Right Infringed?' (2021) 46 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 451
- McCall CC, *Concepts of Person : An Analysis of Concepts of Person, Self and Human Being* (Avebury 1990)
- McCallum S, 'Calls for Downblousing to be made a Criminal Offence in England and Wales' *BBC* (7 July 2022)
- McClain LC, "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence' (1992) 65 *Southern California Law Review* 1171
- McClintock A, *Imperial Leather* (Routledge 1995)
- McCrudden C, *Understanding Human Dignity* (Oxford University Press 2013)
- McElvaney R and Nixon E, 'Parents' Experiences of Their Child's Disclosure of Child Sexual Abuse' (2020) 59 *Family Process* 1773
- McGlynn C et al., "'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2020) *Social & Legal Studies* 541
- McGlynn C and Rackley E, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 28
- McGlynn C and Rackley E, 'More than 'Revenge Porn': Image-Based Sexual Abuse and the Reform of Irish Law' (2017) 14 *Irish Probation Journal* 14
- McGlynn C and Rackley E, 'Not 'Revenge Porn', but Abuse: Let's Call It Image-Based Sexual Abuse' *Inherently Human* (15 February 2016)
- McGlynn C and Rackley E, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' [2007] *Criminal Law Review* 677
- McGlynn C, 'Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking' (2022) 93 *Women's Studies International Forum* 102614
- McGlynn C, 'Cyberflashing: Consent, Reform and the Criminal Law' (2022) 86 *The Journal of Criminal Law* 336
- McGlynn C, 'Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy' (2008) 16 *Feminist Legal Studies* 71
- McGlynn C, Rackley E and Houghton R, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' (2017) *Feminist Legal Studies* 22
- McGlynn C, Rackley E and Johnson K, *Shattering Lives and Myths : A Report on Image-Based Sexual Abuse* (Durham University; University of Kent 2019)

-
- McKinlay T and Lavis T, 'Why Did She Send it in the first Place? Victim Blame in the Context of 'Revenge Porn'' (2020) 27 *Psychiatry, Psychology and Law* 386
- McMahan J, 'Challenges to Human Equality' (2008) 12 *The Journal of Ethics* 81
- McMahan J, *The Ethics of Killing* (Oxford Ethics Series, New York: Oxford University Press 2002)
- Mead GH, *Mind, Self, & Society : From the Standpoint of a Social Behaviorist* (University of Chicago Press 1934)
- Mehta S, 'Katie Hill ordered to pay \$220,000 in Attorneys' fees in Revenge Porn Case' *Los Angeles Times* (Los Angeles 2 June 2021)
- Merleau-Ponty M, *Phenomenology of Perception* (The Humanities Press 1965)
- Mill JS, 'On Liberty' in Warnock M (ed), *Utilitarianism and On Liberty : Including Mill's 'Essays on Bentham' and selections from the writings of Jeremy Bentham and John Austin* (Blackwell Publishing 1962)
- Mill JS, *On Liberty* (JW Parker and Son 1859)
- Ministry of Justice, *Revenge Porn: Sharing Private Sexual Materials with Intent to Cause Distress* (United Kingdom Government 2015)
- Mitchell B, 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 64 *Modern Law Review* 19
- Möllering G, 'The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension' (2001) 35 *Sociology* 403
- Moore M, 'Liberalism and the Ideal of the Good Life' (1991) 53 *The Review of Politics* 672
- Moore MS, *Placing Blame : A General Theory of the Criminal Law* (Oxford University Press 2010)
- Moran LJ, *Sexuality and Identity* (Ashgate 2006)
- Mortreux C et al., *Understanding the Attitudes and Motivations of Adults who engage in Image-Based Abuse* (Australian Government eSafety Commissioner 2019)
- Muller D, *Journalism and the Future of Democracy* (Palgrave Macmillan 2021)
- Munro V, 'Sexual Autonomy' in Dubber MD and Hörnle T (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014)
- Murray CD, 'An interpretative phenomenological Analysis of the Embodiment of artificial Limbs' (2004) 26 *Disability and Rehabilitation* 963
- Naffine N, *Being Relational: Reflections on Relational Theory and Health Law* (University of Calgary 2014)
- Naffine N, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019)
- Naffine N, *Law's Meaning of Life : Philosophy, Religion, Darwin, and the Legal Person* (Hart Publishing 2009)
- Nagel T, *Equality and Partiality* (Oxford University Press 1995)
- Narayan U, 'Minds Of Their Own: Choices, Autonomy, Cultural Practices and Other Women' in Antony LM and Witt C (eds), *A Mind of one's Own : Feminist Essays on Reason and Objectivity* (Westview 1992)

-
- Nead L, 'The Female Nude: Pornography, Art, and Sexuality' (1990) 15 *Signs: Journal of Women in Culture and Society* 323
- Nedelsky J, *Law's Relations : A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press 2012)
- Nussbaum MC, 'Objectification' (1995) 24 *Philosophy & Public Affairs* 249
- O'Malley RL, Holt K and Holt TJ, 'An Exploration of the Involuntary Celibate (Incel) Subculture Online' (2022) 37 *Journal of Interpersonal Violence* NP4981
- Okin SM, *Justice, Gender, and the Family* (Basic Books 1989)
- Ormerod D and Laird K, *Smith, Hogan, & Ormerod's Text, Cases, & Materials on Criminal Law* (Oxford University Press 2020)
- Oxford English Dictionary*, Oxford University Press 2022
- Pancani L et al., 'Forced Social Isolation and Mental Health: A Study on 1,006 Italians Under COVID-19 Lockdown' (2021) 12 *Frontiers in Psychology* 663799
- Pantony A, 'As Stephen Bear is found Guilty of disclosing Private, Sexual Images featuring his Ex-Girlfriend, we investigate the Rise of Image-Based Sexual Abuse', *Glamour Magazine* (23 December 2022)
- Parker D, *Class and State in Ancien Régime France : The Road to Modernity?* (Routledge 1996)
- Parker MG and Yau MK, 'Sexuality, Identity and Women with Spinal Cord Injury' (2012) 30 *Sexuality and Disability* 15
- Pegg S, 'A matter of Privacy or Abuse?: Revenge Porn in the Law' [2018] *Criminal Law Review* 512
- Perry MJ, *The Political Morality of Liberal Democracy* (Cambridge University Press 2010)
- Pickles C, 'When 'Battery' is not Enough: Exposing the Gaps in Unauthorised Vaginal Examinations During Labour as a Crime of Battery' in Pickles C and Herring J (eds), *Women's Birthing Bodies and the Law* (Hart Publishing 2020)
- Powell A and Sugiura L, 'Resisting Rape Culture in Digital Society', *The Routledge International Handbook of Violence Studies* (Routledge 2018)
- Quine WVO, *Ontological Relativity and other Essays* (Columbia University Press 1969)
- Rader S, 'The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements Comments' (2019) 3 *The Business, Entrepreneurship & Tax Law Review* 329
- Rawls J, *A Theory of Justice* (Harvard University Press 1971)
- Raz J, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303
- Raz J, *The Authority of Law : Essays on Law and Morality* (Clarendon Press 1979)
- Raz J, *The Morality of Freedom* (Oxford University Press 1986)
- Regan T, *The Case for Animal Rights* (University of California Press 2004)

-
- Reidy A, *The Prohibition of Torture : A Guide to the Implementation of Article 3 of the European Convention on Human Rights* (Human Rights Handbooks, Council of Europe 2002)
- Richardson M, *The Right to Privacy : Origins and Influence of a Nineteenth-Century Idea* (Cambridge University Press 2017)
- Rubinfeld J, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *The Yale Law Journal* 1372
- Runyan CW et al., 'US Women's Choices of Strategies to Protect Themselves from Violence' (2007) 13 *Injury Prevention* 270
- Sakellariou D, 'If not the Disability, then what? Barriers to Reclaiming Sexuality Following Spinal Cord Injury' (2006) 24 *Sexuality and Disability* 101
- Samaritter R and Paine H, 'Kinaesthetic Intersubjectivity: A Dance Informed Contribution to Self-Other Relatedness and Shared Experience in Non-Verbal Psychotherapy with an Example from Autism' (2013) 40 *The Arts in Psychotherapy* 7
- Samaritter R, 'Danstherapie en de Behandeling van Autisme : De Shared Movement Approach' in Samaritter R and Wenthof N (eds), *Danstherapie* (Acco Uitgeverij 2021)
- Sandberg L and Rönnblom M, 'Afraid and Restricted vs Bold and Equal: Women's Fear of Violence and Gender Equality Discourses in Sweden' (2013) 20 *The European Journal of Women's Studies* 189
- Sandel MJ, *Democracy's Discontent : America in Search of a Public Philosophy* (Belknap Press of Harvard University Press 1996)
- Sartre J-P, *Being and Nothingness* (Methuen&Co LTD 1957)
- Scanlon T, *What we Owe to Each Other* (Belknap Press of Harvard University Press 1998)
- Scheffler S, 'The Appeal of Political Liberalism' (1994) 105 *Ethics* 4
- Schlenker B, Helm B and Tedeschi J, 'The Effects of Personality and Situational Variables on Behavioral Trust' (1973) 25 *Journal of Personality and Social Psychology* 419
- Schneider EM, 'The Violence of Privacy' (1991) 23 *Connecticut Law Review* 27
- Schonsheck J, *On Criminalization : An Essay in the Philosophy of Criminal Law* (Kluwer Academic 1994)
- Schroeder D, 'Dignity: Two Riddles and Four Concepts' (2008) 17 *Cambridge Quarterly of Healthcare Ethics* 230
- Selden S, 'The Practice of Domestic Violence' (2001) 12 *UCLA Women's Law Journal* 1
- Sen A, 'The Standard of Living: Lecture II, Lives and Capabilities' in Sen A, Muellbauer J and Hawthorn G (eds), *The Standard of Living* (Cambridge University Press 1987)
- Shah N, 'Sexuality, Identity, and the Uses of History' in Eng A (ed), *Q & A Queer And Asian: Queer & Asian In America* (Temple University Press 1998)

-
- Sharratt E, *Intimate image abuse in adults and under 18s : A comparative analysis of cases dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline* (University of Exeter; Economic and Social Research Council, 2019)
- Shoemaker D, 'Blame and Punishment' in Coates DJ and Tognazzini NA (eds), *Blame: Its Nature and Norms* (Oxford University Press 2012)
- Shotter J, *Social Accountability and Selfhood* (Basil Blackwell 1984)
- Shute S and Horder J, 'Thieving and Deceiving: What Is the Difference?' (1993) 56 *The Modern Law Review* 548
- Simester A and Von Hirsch A, *Crimes, Harms, and Wrongs : On the Principles of Criminalisation* (Hart 2011)
- Simester A, 'On Justifications and Excuses' in Zedner L and Roberts JV (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012)
- Simmel G, *The Philosophy of Money* (Routledge 2011)
- Singer P, *Practical Ethics* (Cambridge University Press 2011)
- Sjölin C, 'A Step Away from Liability' in Krebs B (ed), *Accessorial Liability after Jogee* (Hart Publishing 2019)
- Smith A, 'Not an Indian Tradition: The Sexual Colonization of Native Peoples' (2003) 18 *Hypatia* 70
- St Vil NM, Carter T and Johnson S, 'Betrayal Trauma and Barriers to Forming New Intimate Relationships Among Survivors of Intimate Partner Violence' (2018) *Journal of Interpersonal Violence* 0886260518779596
- Stark E, 'Coercive Control' in Lombard N and McMillan L (eds), *Violence Against Women : Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers 2013)
- Stark E, 'Rethinking Coercive Control' (2009) 15 *Violence Against Women* 1509
- Stark E, *Coercive Control : The Entrapment of Women in Personal Life* (Oxford University Press 2007)
- Starr TS and Lavis T, 'Perceptions of Revenge Pornography and Victim Blame' (2018) 12 *International Journal of Cyber Criminology* 427
- Steelman SM and Hertlein KM, 'Underexplored Identities: Attending to Asexuality in Therapeutic Contexts' (2016) 27 *Journal of Family Psychotherapy* 85
- Stoljar N, 'Feminist Perspectives on Autonomy' in Zalta EN and Nodelman U (eds), *The Stanford Encyclopedia of Philosophy* (Winter edn, Stanford University 2018)
- Stoljar N, 'Informed Consent and Relational Conceptions of Autonomy' (2011) 36 *Journal of Medicine and Philosophy* 375
- Tadros V, 'Fair Labelling and Social Solidarity' in Zedner L and Roberts J (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012)
- Tadros V, *Wrongs and Crimes* (Oxford University Press 2016)
- Talbot M, 'The Attorney Fighting Revenge Porn' *The New Yorker* (5 December 2016)

-
- Taylor C, *Philosophy and the Human Sciences* (Cambridge University Press 1985)
- Taylor JS, 'Introduction' in Taylor JS (ed), *Personal Autonomy : New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge University Press 2005)
- Tooley M, 'Abortion and Infanticide' (1983) 2 *Philosophy & Public Affairs* 37
- Trispiotis I and Purshouse C, '“Conversion Therapy” As Degrading Treatment' (2022) 42 *Oxford Journal of Legal Studies* 104
- Tuerkheimer D, 'Recognizing and Remediating the Harm to Battering: A Call to Criminalize Domestic Violence' (2004) 94 *Journal of Criminal Law and Criminology* 959
- 'Vanessa Hudgens 'Embarrassed,' Apologizes for Nude Photo' *People* (8 September 2007)
- Vehmas S, 'Discriminative Assumptions of Utilitarian Bioethics Regarding Individuals with Intellectual Disabilities' (1999) 14 *Disability & Society* 37
- Vera-Gray F, 'Girlhood, Agency, and Embodied Space for Action' in Formark B, Mulari H and Voipio M (eds), *Nordic Girlhoods : New Perspectives and Outlooks* (Palgrave Macmillan 2017)
- Vera-Gray F, *Men's Intrusion, Women's Embodiment : A Critical Analysis of Street Harassment* (Routledge 2017)
- Voas RB et al., 'Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes' (2009) 40 *Journal of Safety Research* 77
- Von Hirsch A and Jareborg N, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 38
- von Hirsch A, 'Injury and Exasperation: An Examination of Harm to Others and Offense to Others' (1986) 84 *Michigan Law Review* 700
- Waldron J, *One another's Equals : The Basis of Human Equality* (The Belknap Press of Harvard University Press 2017)
- Waldron J, *The Harm in Hate Speech* (Harvard University Press 2012)
- Warren MA, 'On the Moral and Legal Status of Abortion' (1973) 57 *Monist* 43
- Warren SD and Brandeis LD, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193
- Wasserman D et al., 'Cognitive Disability and Moral Status' in Zalta EN (ed), *Stanford Encyclopaedia of Philosophy* (Fall edn, Stanford University 2017)
- Weeks J, 'Sexuality and History Revisited' in Jamieson L and Corr H (eds), *State, Private Life and Political Change* (Springer 1990)
- Weinstein J, *Hate Speech, Pornography, and the Radical attack on Free Speech Doctrine* (Westview Press 1999)
- Wertheimer A, 'Consent to Sexual Relations' in Miller F and Wertheimer A (eds), *The Ethics of Consent* (Oxford University Press 2009)
- Westen P, *The Logic of Consent : The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Routledge 2016)

-
- Weston MA, 'Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era' (2021) *University of Illinois Law Review* 507
- Wicks E, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart 2016)
- Williams B, 'The Human Prejudice' in Williams B and Moore A (eds), *Philosophy as a Humanistic Discipline* (Princeton University Press 2006)
- Williams G, 'Convictions and Fair Labelling' (1983) 42 *The Cambridge Law Journal* 11
- Williams R in Krebs B (ed), *Accessorial Liability after Jogee* (Hart Publishing 2019)
- Williams R, 'Deception, Mistake and Vitiating of the Victim's Consent' (2008) 124 *Law Quarterly Review* 132
- Wittgenstein L et al., *Philosophische Untersuchungen : Philosophical Investigations* (Wiley-Blackwell 2009)
- Wolterstorff N and Cuneo T, *Understanding Liberal Democracy : Essays in Political Philosophy* (Oxford University Press 2012)
- Worchel P, 'Trust and Distrust' in Austin WG and Worchel S (eds), *The Social Psychology of Intergroup Relations* (Brooks/Cole Publishing Company 1979)
- Zahavi D, *Subjectivity and Selfhood: Investigating the First-Person Perspective* (MIT Press 2005)
- Zand DE, 'Trust and Managerial Problem Solving' (1972) 17 *Administrative Science Quarterly* 229
- Zvi L, 'The Double Standard toward Female and Male Victims of Non-Consensual dissemination of Intimate Images' (2021) 37 *Journal of Interpersonal Violence* NP20146