IMAGE-BASED SEXUAL ABUSE AND THE REQUIREMENT OF MOTIVE UNDER THE FILMS AND PUBLICATIONS AMENDMENT ACT: A CRITICAL ASSESSMENT*

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SUMMARY

Section 18F(1) of the Films and Publications Amendment Act (FAPAA) prohibits the commission of image-based sexual abuse (IBSA). This contribution critically assesses the requirement "with the intention of causing that individual harm" contained in section 18F(1)(*b*) of the FAPAA. It is demonstrated that the requirement "with the intention of causing that individual harm" cannot be understood as indicating intention in the legal sense (that is, *dolus*). Rather, section 18F(1)(*b*) refers to motive, or the reason for the perpetrator's conduct. Section 18F(1)(*b*) should thus more accurately read (to avoid confusion with *dolus*) "with the 'motive' of causing that individual harm". In the determination of criminal liability, motive has been repeatedly affirmed as irrelevant. The author supports this conclusion. In addition, the underlying reasons motivating the perpetration of IBSA vary substantially. Thus, requiring proof of motive in this respect is ill considered.

However, motive is relevant to the process of sentencing. Some motives for the perpetration of IBSA may be considered by the sentencing court as "aggravating", and, accordingly, attract a harsher sentence. Section 56A(2)(*a*) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act indicates several motives (for the commission of sexual offences) that might be considered "aggravating". These include where a sexual offence is committed with the motive "to gain financially, or receive any favour, benefit, reward, compensation or any other advantage". Many of these motives are witnessable in cases of IBSA, and being a sexual offence that should be located in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, should (in terms of section 56A(2)(*a*)) be considered "aggravating". It is also shown that other aggravating motives listed in 56A(2)(*a*), such as to receive any "benefit" or "reward", may apply when IBSA is committed for purposes of revenge.

* This article has been adapted from the author's PhD thesis – Supervisor: Associate Professor Emile Zitzke.

1 INTRODUCTION

"Revenge porn", more comprehensively defined as image-based sexual abuse,[1] is quickly becoming a global menace.[2] In response to the threat of image-based sexual abuse (IBSA), many jurisdictions have recently enacted laws[3] criminalising the "non-consensual creation and/or distribution of private sexual images".[4] Fortunately, the South African legislature has timeously responded to this threat with the promulgation of two new laws: section 16 of the Cybercrimes Act[5] and section 18F of the Films and Publications Amendment Act (FAPAA).[6] While the inefficiency of having two pieces of legislation responding to the same issue is acknowledged, this contribution is focused on assessing the requirement of motive in section 18F(1)(*b*) of the FAPAA.[7] The author begins by analysing the requirement in section 18F(1)(*b*) of the FAPAA "with the intention of causing that individual harm" and asks whether the use of the word "intention" can be understood to denote intention in the legal sense (that is, *dolus*). Next is a discussion of the irrelevance of motive as it pertains to the establishment of criminal liability, both internationally and in the South African context. Lastly, the article considers the value of motive (outside of the establishment of criminal liability) as it pertains to sentencing. The author asks whether the varying motivations for the commission of IBSA could be considered "aggravating" for the purposes of sentencing.

2 A CRITIQUE OF THE REQUIREMENT "WITH THE INTENTION OF CAUSING THAT INDIVIDUAL HARM" IN SECTION 18F(1)(*b*) OF THE FAPAA

Mens rea, or fault, is a requirement for all crimes and must be established in the form of either intention or negligence.[8] Intention, or *dolus*, is defined by Snyman as the "will to commit the act … set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act … unlawful".[9] There are three principal types of *dolus*:[10] *Dolus directus*; *dolus*

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1 McGlynn and Rackley "Image-Based Sexual Abuse" 2017 37(3) *Oxford Journal of Legal Studies* 1 2–5.

2 Henry, McGlynn, Flynn, Johnson, Powell and Scott *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (2021) 1–2; Souza "'FOR HIS EYES ONLY': Why Federal Legislation Is Needed to Combat Revenge Porn" 2016 23(2) *UCLA Journal of Gender and Law* 101 103–105.

3 Henry *et al Image-Based Sexual Abuse* 135; Phippen and Brennan *Sexting and Revenge Pornography: Legislative and Social Dimensions of a Modern Digital Phenomenon* (2021) 20–21, 85.

4 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 3.

5 The Cybercrimes Act 19 of 2020 came into operation on 1 December 2021.

6 The Films and Publications Amendment Act 11 of 2019 (FAPAA) came into operation on 1 March 2022. Also see Papadopoulos and Snail *Cyberlaw@ZA* (2022) 423.

7 Martin "Mixing Old and New Wisdom for the Protection of Image-Based Sexual Abuse Victims" 2022 35(3*) South African Journal of Criminal Justice* 307 312.

8 See Burchell *Principles of Criminal Law* 5ed (2016) 341.

9 Snyman *Criminal Law* 7ed (2020) 159.

10 Burchell *Principles of Criminal Law* 349.

indirectus; and *dolus eventualis* — the last of which is the least arduous type of *dolus* to establish.[11] Deliberately bringing about or willing a particular outcome (required for proof of *dolus directus*) comes closest to the ordinary meaning of "actual intention" but is more difficult to prove.[12] The adoption and recognition of the concept of *dolus eventualis* into South African law[13] entails that not only deliberate conduct but also subjectively foreseen conduct be sufficient to satisfy the requirement of fault in the form of *dolus*.[14] Intention, in the form of *dolus eventualis*, is defined by Burchell as follows:

> "*Dolus eventualis* exists where the accused foresees the possibility that the unlawful consequence might occur … or the unlawful circumstance might exist and he or she accepts this possibility into the bargain (i.e., is reckless as regards to this possibility)."[15]

Since its inception into South African law, the concept of *dolus eventualis* has met with significant approval,[16] finally emerging as the "most important form of intention in practice in South African criminal law".[17] Thus, this contribution focuses solely on *dolus eventualis* for proof of fault in the form of *dolus*.

Motive is different from intention.[18] Motive is the *reason* that a perpetrator deliberately brings about a certain outcome.[19] For example, by reason of hoping to inherit money from his father's estate, X deliberately or wilfully kills his father. This example illustrates the difference between the concepts of motive and *dolus*. "Hoping to inherit money" is the motivation or motive for the killing of X's father. The act of deliberately or wilfully bringing about his father's death is *dolus*. Though distinct, the concepts of motive and *dolus* are confused in some legal responses to IBSA.

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11 *Dolus directus* necessarily entails more than proof of subjective foresight of the unlawful result ensuing, since the perpetrator must purposefully direct their will to the causing of the unlawful consequence. This level of deliberateness does not need to be established for *dolus eventualis.* Proof of *dolus eventualis* only requires foresight of a possibility – a possibility that does not, arguably, need to be qualified by degree. See Hoctor "The Degree of Foresight in Dolus Eventualis" 2013 26(2) *South African Journal of Criminal Justice* 131 and Snyman *Criminal Law* 162–164. For similar reasons, *dolus indirectus* is more difficult to prove, since *dolus indirectus* requires that the unlawful consequence be foreseen as "virtually" or "substantially" certain. See Burchell *Principles of Criminal Law* 350.

12 Burchell *Principles of Criminal Law* 356.

13 See Hoctor "The Concept of Dolus Eventualis in South African Law: An Historical Perspective" 2008 14(2) *Fundamina* 14 for a detailed unfolding of the acceptance of the concept of *dolus eventualis* into South African law.

14 Burchell *Principles of Criminal Law* 348 355–356. *Dolus eventualis* has met with significant approval since 1945.

15 Burchell *Principles of Criminal Law* 357. Also see *S v Sigwahla* 1967 (4) SA 566 (A).

16 See Burchell *Principles of Criminal Law* 356, where Burchell notes the Constitutional Court judgments of *Coetzee* 1997 (3) SA 527 (CC) par 162 and *Thebus* 2003 (6) SA 505 (CC) par 50.

17 See Hoctor 2008 *Fundamina* 14. Also see Hoctor 2013 *South African Journal of Criminal Justice* 131.

18 Cook "Act Intention and Motive in the Criminal Law" 1916–1917 26(8) *Yale Law Journal* 645 658–659.

19 Chiu "The Challenge of Motive in the Criminal Law" 2005 8(2*) Buffalo Criminal Law Review* 653 664. Also see Burchell *Principles of Criminal Law* 353.

Some legislative responses to IBSA require, as a basis for liability, that the offence be committed intentionally.[20] Less commonly, legislative responses also require that a perpetrator must have intended to cause a victim harm in order for liability to ensue.[21] This is the case with the FAPAA, which requires that the prohibited conduct of section 18F(1) be committed "with the intention of causing that individual harm".[22] Contributing to the uncertainty of what should be accepted in South African law, the Cybercrimes Act contains no such requirement.[23] Section 18F(1) of the FAPAA reads:

> "No person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made–
> (*a*) without the consent of the individual or individuals who appear in the photograph or film; *and*
> (*b*) *with the intention of causing that individual harm*."[24]

In respect of section 18F(1), an offence is committed not when or if the victim is harmed but at the precise moment when the "private sexual photograph or film"[25] is exposed with the intention (on behalf of the perpetrator) to cause harm. "With the intention to harm"[26] is describing the motivation for the crime – to cause harm. This is the reason for the perpetrator's conduct or motive[27] and, as is argued, cannot be taken to constitute intention in the legal sense – that is *dolus*.

If the present use of the word "intention" in section 18F(1)(*b*) is made to denote *dolus*, it would produce illogical results. For example, the first leg of *dolus eventualis* (foresight of a possibility)[28] would amount to foresight of the possibility of the motivation of harm, not foresight of the possibility of an unlawful circumstance or result, (since section 18F(1)(*b*) does not require that the victim actually be harmed). In terms of the second leg of *dolus eventualis* (the volitional component), the perpetrator would need to proceed recklessly, or take into the bargain[29] the foreseen motivation of the crime (to cause the individual harm), and not the unlawful circumstance or result. In

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20 For e.g., The State of California, Senate Bill No. 1255, ch 863 s 647(4)(*a*) requires that revenge porn be committed intentionally. In New South Wales, s 91Q(1) of the Crimes Act 1900 No 40 requires that "a person … intentionally distributes an intimate image of another person".

21 In England and Wales, s 33(1) of the Criminal Justice and Courts Act 2015 makes it "an offence for a person to disclose a private sexual photograph or film if the disclosure is made" (at (b)) "with the intention of causing that individual distress". In Malta, s 208E of the Maltese Criminal Code prohibits the disclosure of a "private sexual photograph or film" that is done "with an intent to cause distress, emotional harm or harm of any nature".

22 S 18F(1)(*b*) of the FAPAA.

23 S 16(1) of the Cybercrimes Act reads: Any person ("A") who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person ("B"), without the consent of B, is guilty of an offence.

24 Italicised for emphasis.

25 S 18F(1) of the FAPAA.

26 S 18F(1)(*b*) of the FAPAA.

27 "Motive", as defined in the Mirriam-Webster online dictionary, is "something (such as a need or desire) that causes a person to act".

28 Snyman *Criminal Law* 162–164 and *S v Sigwahla supra* 435.

29 Snyman *Criminal Law* 164–167. Also see *S v Humphreys* 2013 (2) SA 1 (SCA) 17.

light of this illogicality, section 18F(1)(*b*) clearly signals motive. Motive is sometimes conflated with *dolus*.[30] Burchell explains, "motive is thus the explanation for a person's conduct" and "is something separate and distinct from intention".[31] Being something separate and distinct from intention, the reading of section 18F(1)(*b*) should more accurately read (in an effort to avoid confusion with *dolus*) "no person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made with the motive to cause the person harm".[32] Thus, for clarity, when referring to the requirements of section 18F(1)(*b*), the word "motive" will be used as the correct substitute for the word "intention" – thus, "with the 'motive' of causing that individual harm".

In the determination of criminal liability, proof of motive has been determined to be irrelevant.[33] This is the general rule. There are, however, exceptions.[34] In American law, certain offences require proof of motive – witnessable in the framing of some hate crimes.[35] South Africa is on track to follow similarly with the proposed Prevention and Combatting of Hate Crimes and Hate Speech Act.[36] Some commentators propound that motive is necessary as a requirement for liability for the proof of certain crimes (such as hate crimes).[37] Other commentators argue that the requirement of motive for these crimes should be removed in order to alleviate the prosecutorial burden of having to prove motive, which is acknowledged as a difficult undertaking.[38] Crimes that require motive are an exception to the general rule[39] – which is that motive is irrelevant to the determination of criminal liability.

Criminal-law writers in South Africa have asserted their position on whether motive should constitute a requirement for criminal liability. Snyman writes that in the determination of intention, "the motive behind the act is immaterial".[40] Burchell, despite indicating the relevance of motive to the unlawfulness of conduct, asserts that "a person's motives, whether good or

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30 Snyman *Criminal Law* 169.

31 Burchell *Principles of Criminal Law* 353. Also see Rosenberg "The Continued Relevance of the Irrelevance-of-Motive Maxim" 2008 57(4) *Duke Law Journal* 1143 1146–1158.

32 Adaption of s 18F(1)(*b*) of the FAPAA.

33 Burchell *Principles of Criminal Law* 353–355. Also see Kaufman "Motive, Intention, and Morality in the Criminal Law" 2003 28(2) *Criminal Justice Review* 317 333–334.

34 Robinson "Hate Crimes: Crimes of Motive, Character, or Group Terror?" 1993 *Annual Survey of American Law* 605 606–607.

35 For e.g., see Title I of the Civil Rights Act of 1968, enacted 18 U.S.C. § 245(b)(2) Federally protected activities and Morsch "The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation" 1991 82(3*) Journal of Criminal Law and Criminology* 659 660–661.

36 Prevention and Combatting of Hate Crimes and Hate Speech Bill B 9–2018.

37 Naidoo "Reconsidering Motive's Irrelevance and Secondary Role in Criminal Law" 2017 2 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 337 349–350; Rosenberg 2008 *Duke Law Journal* 1145.

38 Morsch 1991 *Journal of Criminal Law and Criminology* 664. In some cases, this may deter prosecutors from charging offenders with hate crimes that require proof of motive. See Morsch 1991 *Journal of Criminal Law and Criminology* 872.

39 Naidoo 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 337–338.

40 Snyman *Criminal Law* 169.

bad, are irrelevant to criminal intent".[41] Therefore, if tried in a South African courtroom, Robin Hood, despite his altruistic motivation to benefit the poor by stealing from the rich, would still satisfy the requirements for incurring liability for theft.[42] This is true for most criminal-law systems.[43] American legal scholar and academic Professor Jerome Hall writes that "hardly any part of penal law is more definitely settled than that motive is irrelevant".[44] This assertion is premised on the postulation that an individual's reasons for committing a crime, lest the reasons not be immediately plain, hinder the course of justice.[45] Thus, motive has no bearing on the establishment of criminal liability, and will at most, be influential during the process of sentencing, which is addressed later.[46] Overall, including motive as a requirement for the determination of criminal liability, as submitted by section 18F(1)(*b*), is superfluous and must be precluded.

Even if a motive to harm is argued to be rightfully imbedded in the text (as is the case with some exceptional crimes, such as hate crimes), requiring proof of "the 'motive' of causing that individual harm" is an overly stringent threshold that may be difficult to establish, since a motivation to harm is not a feature in many cases of IBSA.

The recent preference for more inclusive terms, such as "image-based sexual abuse" (as opposed to "revenge porn") has been justified on the basis that not every "non-consensual creation and/or distribution of private sexual images" is motivated by revenge.[47] Motivations may include financial gain, entertainment, notoriety or acting "for a laugh" or "prank" among other things.[48] Where IBSA is committed for these reasons, it may be difficult to draw the inference of motivation to cause harm.[49] For example, among the interview findings in "Image-based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery", one victim, reflecting on her own IBSA experience, states that "I think [they did it] because they thought it was funny and they don't think about things from other people's perspectives, and probably don't think about the long term consequences of things either".[50] Similarly, one participant in a study, whose

41 Burchell *Principles of Criminal Law* 353–355.

42 The crime of theft requires proof of *dolus*. In Burchell *Principles of Criminal Law* 689, "[t]heft consists in an unlawful appropriation with intent to steal of a thing capable of being stolen." As discussed later, Robin Hood's motive would be likely to impact the sentence he is handed down.

43 Burchell *Principles of Criminal Law* 353; Naidoo 2017 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 344.

44 Hall *General Principles of Criminal Law* 2ed (1960) 88.

45 Burchell *Principles of Criminal Law* 354.

46 Snyman *Criminal Law* 169.

47 Henry *et al Image-Based Sexual Abuse* 67 and 71. There are convincing reasons to replace the term "revenge porn" with the term "image-based sexual abuse". See McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 2–6.

48 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 5; Franks "Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators" 2015 SSRN 1 2; and Henry *et al Image-Based Sexual Abuse* 79.

49 See Phippen and Brennan *Sexting and Revenge Pornography* 77, where the authors note the challenges of proving a motive to harm.

50 Henry *et al Image-Based Sexual Abuse* 81.

intimate images were shared by her partner to a group of his friends, remarked that "it was never really revenge. Showing his friends, he just wanted to brag and be like, 'look this … is who I'm getting to sleep with' to his mates".[51] In these cases of IBSA, the motivation to cause harm may be a difficult inference to draw. Moreover, it may be equally difficult to draw such an inference in circumstances where an accused makes use of deepfake technology[52] to paste the face of a victim onto the body of a pornographic image. Sending such an image to another person is likely to cause the victim significant harm[53] despite the accused potentially interpreting the incident as a joke. An accused might contend "the 'motive' to cause that individual harm" is absent, since the pornographic portion of the image was fictitious and not in reality the victim. Thus, the accused would not be prosecutable in terms of section 18F(1). On these same facts, even in cases where the accused did harbour the motive to cause harm, ascertaining the accused's subjective motive, and proving it beyond reasonable doubt (as would be required in a criminal prosecution) would be a burdensome obstacle for the prosecution.

The motivation of monetary gain may also be difficult to equate with "motivation to cause harm".[54] Before it was shut down by law enforcement, the infamous revenge porn hosting site "IsAnyBodyUp" was generating an estimated 10 000 US dollars in advertising revenue monthly from over 30 million page views.[55] Many similar instances are primarily motivated by financial gain.[56] Site operator for revenge porn site "IsAnyBodyDown", Craig Brittan, revealed that he was earning 3 000 US dollars per month in advertising revenue, avowing that "we don't want anyone shamed or hurt. We just want the pictures there for entertainment purposes and business."[57]

Additional difficulties – if "the 'motive' to cause that individual harm" remains a requirement under the FAPAA – may also arise when IBSA is perpetrated within the confines of an instant-messaging or email group that

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51 Henry *et al Image-Based Sexual Abuse* 83.

52 Mashinini "The Impact of Deepfakes on the Right to Identity: A South African Perspective" 2020 32 *South African Mercantile Law Journal* 407 408; Citron *The Fight for Privacy* (2022) 37. Also see Papadopoulos and Snail *Cyberlaw@ZA* 424, where it is stated that "deep-fake technology uses real images and videos and edits them to make it appear as if someone had said or done something completely differently to what actually happened."

53 Harris "Deepfakes: False Pornography Is Here and the Law Cannot Protect You" 2019 17 *Duke Law & Technology Review* 99 106.

54 See Henry *et al Image-Based Sexual Abuse* 84, where a victim, who was victimised by a sextortion scam, states that "[i]t wasn't a revenge thing. It was just a simple money thing. They wanted money. They clearly found what they thought was a good gig and scam."

55 Mullen "New Lawsuit Against 'Revenge Porn' Site Also Targets GoDaddy" (22 January 2013) https://arstechnica.com/tech-policy/2013/01/new-lawsuit-against-revenge-porn-site-also-targets-godaddy/ (accessed 2022-04-14).

56 See Phippen and Brennan *Sexting and Revenge Pornography* 58.

57 Peterson "'It's Only Entertainment:' Creator of 'Revenge Porn' Site Shrugs Off Potential Lawsuits and Says His Number One Goal Is Making Money" (5 February 2013) https://www.dailymail.co.uk/news/article-2273963/I-entertainment-Creator-revenge-porn-site-shrugs-potential-lawsuits-says-number-goal-making-money.html (accessed 2022-04-14). Revenge porn site owners may also offer a corresponding take-down service, also motivated by profit, where victims would be required to pay a fee to have their intimate images removed. See Phippen and Brennan *Sexting and Revenge Pornography* 58.

purposefully excludes those subjects depicted in the images. Since the intimate images (which are likely to cause the victim harm) were never intended to be discovered by the victim, "the 'motive' to cause that individual harm" cannot be inferred.

Lastly, in light of these arguments, the difficulty in proving motive might wholly deter prosecutors[58] from charging offenders under section 18F(1) of the FAPAA, as they are likely to deem the provision too cumbersome to employ. Prosecutors are more likely to charge offenders under section 16 of the Cybercrimes Act (which, while still requiring *dolus*, does not require proof of motive) or with the common-law crime of *crimen injuria*[59] or defamation.[60]

Overall, since varying motives exist for the exposure of a victim's intimate images, and since motive is not required for criminal liability, the requirement that the exposure of a victim's "private sexual photograph or film" be made "with the 'motive' of causing that individual harm" should be severed from section 18F(1) of the FAPAA. For further confirmation of this pronouncement, Citron and Franks (in their critique of the requirement to prove motive in IBSA laws) assert that "whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant".[61] Whether section 18F(1)(*b*) is kept or severed (since the motive of harm in section 18F(1)(*b*) is guised as *dolus*), we have or will be left with a statutory offence void of any indication of fault.[62] To remedy this undesirable state of affairs, one could, hesitantly, posit that the inclusion of the words "with the intention of causing that individual harm" indicates that the legislature envisaged a blameworthy state of mind commensurate with *dolus*. This has been done before in respect of other ambiguous statutes.[63] Alternatively, but not ideally, it can be presumed that the formulators of section 18F(1)(*b*) envisioned the prerequisite of fault, since it is preferable that fault, as a requirement for

58 Morsch 1991 *Journal of Criminal Law and Criminology* 872.

59 See Snyman *Criminal Law* 407, where *crimen injuria* is defined as "the unlawful, intentional and serious violation of the dignity or privacy of another."

60 As stipulated in section 34(1) of the Judicial Matters Amendment Act 15 of 2023, the crime of defamation is abolished in South Africa. Section 34(2) of the same act, however, clarifies that the repeal "does not affect civil liability in terms of the common law based on defamation". Thus, in South Africa, defamation in terms of the law of delict remains viable. Defamation law has been effectively used in IBSA cases. See Citron and Franks 2014 *Wake Forest Law Review* 357–358 and Pangaro "Hell Hath No Fury: Why First Amendment Scrutiny Has Led to Ineffective Revenge Porn Laws, and How to Change the Analytical Argument to Overcome This Issue" 2015 88(1) *Temple Law Review* 185 192. However, these authors are critical of the financial implications of civil defamation.

61 Citron and Franks 2014 *Wake Forest Law Review* 387. Furthermore, the authors note that motive, as is the case in South Africa, is not a constitutional requirement. The authors stress that motive, as a constitutional requirement, would "create an unprincipled and indefensible hierarchy of perpetrators".

62 There can be no criminal liability without establishing fault. Fault may either be established as *dolus* (intention) or *culpa* (negligence). See Burchell *Principles of Criminal Law* 341.

63 For e.g., Burchell notes that South African courts have interpreted words such as "'maliciously', 'knowingly', 'corruptly', 'fraudulently' and so on" as indicating *mens rea*. See Burchell *Principles of Criminal Law* 397.

liability, should feature in South African statutory offences.[64] Nevertheless, to avoid the application of strict liability and promote legal certainty, it is preferable to have laws that clearly indicate fault requirements.[65]

3 THE ROLE OF MOTIVE IN SENTENCING

While motive is not a requirement for criminal liability, it should not be sidelined as irrelevant.[66] Some writers argue for better recognition of motive and the important role that it plays in sentencing.[67] In South Africa, the role of motive is already recognised in this regard. South Africa's approach to sentencing rests on three overarching considerations as set out in *S v Zinn*[68] – collectively referred to as the "Triad in Zinn".[69] In seeking an appropriate sentence, the sentencing court must consider: (1) the crime; (2) the offender; and (3) the interests of society.[70] These factors should be carefully balanced to achieve an equitable result.[71]

In respect of motive, "the offender" factor is relevant. This may include the personal circumstances of the offender, and, as Snyman writes, "the personal reasons which drove [the offender] to crime".[72] The more sinister the reason for the crime, the harsher the punishment.[73] Furthermore, the motive for committing a crime may be regarded as either an aggravating or mitigating factor during sentencing, and, thus, serve an important role in arriving at a fair punishment.

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64 See Burchell *Principles of Criminal Law* 396–397, where Burchell quotes the words of Botha JA from *S v Arnstein* 1964 (1) SA 361 (A) 365B–D, where it is stated that "[t]he general rule is that *actus non facit reum nisi mens sit rea*, [the act is not wrongful unless the mind is guilty (see Burchell *Principles of Criminal Law* 341)] and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable."

65 See Burchell *Principles of Criminal Law* 443. This is also a fundamental tenet of the principle of legality, which is a requirement for criminal liability. In respect of the *ius certum* principle, laws must be formulated with clear requirements in order for society to know what is expected of them.

66 Xie "Utterly at Odds: Criminal Intention, Motive, and the Rule of Law" 2014 *Oxford University Undergraduate Law Journal* 80 86–88.

67 See Hessick "Motive's Role in Criminal Punishment" 2006 80(89) *Southern California Law Review* 89 90–91, 101–104, where Hessick argues for motive to play a more prominent role in sentencing for the assurance of appropriate moral condemnation and proportionate punishments.

68 1969 (2) SA 537 (A).

69 Snyman *Criminal Law* 16 and *S v Zinn supra* 540.

70 Emerging more recently in case law is the consideration of victim impact, which has been recognised as a fourth consideration; see *S v Matyityi* 2011 (1) SACR 40 (SCA). All factors, as emphasised in *S v Smith* 2017 (1) SACR 520 (WCC) 107, should be imbued with the principle of mercy.

71 Snyman *Criminal Law* 17.

72 *Ibid*.

73 Theophilopoulos *Criminal Procedure* (2019) 363–365.

Varying motives for the commission of sexual offences are listed as aggravating factors in section 56A(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[74] (Sexual Offences Act):

> "If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person–
> *(a)* Committed the offence with the intent[75] to gain financially, or to receive any favour, benefit, reward, compensation or any other advantage; or
> *(b)* Gained financially, or received any favour, benefit, reward, compensation, or any other advantage."

Some have argued for IBSA to be treated as a sexual offence – and consequently, that its regulation not be located in the FAPAA or Cybercrimes Act, but in the Sexual Offences Act.[76] The authors of the term "image-based sexual abuse" argue that the "non-consensual creation and/or distribution of private sexual images" be treated as a sexual offence.[77] The term admirably redirects focus from the perpetrator's motive of revenge to the victim impact of the crime: sexual abuse.[78] Should the crime of IBSA rightfully be regulated in the Sexual Offences Act, the motives listed in section 56A(2)(*a*) would be applicable to IBSA. The motive "to gain financially" or to receive "compensation" would thus, in light of arguments already made, be considered aggravating factors for purposes of sentencing.[79] Other motives commonly witnessed in IBSA cases, such as to entertain or for notoriety, could (depending on the facts of the case) be considered as an "advantage" also in terms of section 56A(2)(*a*).[80] However, it is important to note that the varying motives of section 56A(2)(*a*) are subject to the sentencing court's discretion and are not to be automatically considered "aggravating".[81]

The possible spectrum of the varying motives in section 56A(2)(*a*), such as "to receive any … benefit [or] reward", is potentially wide-ranging. Thus, it is possible to appropriately classify other motives under "to receive any … benefit [or] reward" without stretching the meaning of the words.[82] The motive "to receive any … benefit [or] reward" could be inclusive of the

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74 32 of 2007.

75 While the word "intent" is used in this section, its use (for the same reasons already mentioned) cannot be understood as constituting *dolus* or intention in the legal sense.

76 See Digital Law Company submission in Parliamentary Monitoring Group "Cybercrimes and Cybersecurity Bill: Public Hearings Day 1" (13 September 2017) https://pmg.org.za/committee-meeting/25008/ (accessed 2023-03-17) ; Martin 2022 *South African Journal of Criminal Justice* 313; Phippen and Brennan *Sexting and Revenge Pornography* 110.

77 McGlynn and Rackley 2017 *Oxford Journal of Legal Studies* 3–4.

78 *Ibid.*

79 S 56A(2)(*a*)(*a*) of the Sexual Offences Act.

80 Considering the definition of "advantage" (defined by the Mirriam-Webster online dictionary as "a factor or circumstance of benefit to its possessor") the term can be interpreted widely. Whether the "advantage" obtained by the perpetrator be considered "aggravating" will be governed by judicial discretion.

81 Theophilopoulos *Criminal Procedure* 363–365.

82 The principle of legality, specifically in terms of the *ius strictum* principle, requires that the sentencing court not unnaturally stretch the meaning of particular words in a statute to the detriment of the accused. See Snyman *Criminal Law* 37–39.

traditional reason for the commission of IBSA – that is, revenge[83] – and the "benefit" or "reward" of revenge could be considered psychological.

The reason that individuals exact revenge on others has been explained as a type of "emotional catharsis"; according to psychoanalytic theory, this a process of releasing intense emotions such as anger or frustration in order to feel better or more in control of a situation.[84] The reason that revenge might be construed as appealing (despite the high potential for personal cost) is explained by Dutch psychologist Dr Nico Henri Frijda:[85] "Revenge precisely achieves in the individual's emotion what a social or societal analysis of vengeance indicates might be its purpose: power equalization."[86] Through revenge, the avenger, psychologically, attempts to restore their self-esteem.[87] Frijda's "comparative suffering hypothesis" proposes that when a wrong is committed, an imbalance between the eventual avenger and victim arises.[88] Revenge is used, in the mind of the avenger, as a means to correct this imbalance. Neuroscience supports this hypothesis.[89] Seeing the victim of your revenge suffer for what they have done to you is enough to invoke satisfaction.[90] Revenge will be satisfied when the avenger supposes the amount of suffering inflicted upon the victim to be equal to their own.[91] The "comparative suffering hypothesis" is evident in cases of IBSA that are motivated by revenge.[92] Taken from a study conducted in Zimbabwe, one victim's encounter with IBSA is relevant:[93]

> "I was 16 years old at that time and I felt like I wanted a boyfriend. I met this guy and I was happy that someone showed interest in me and we started hanging out. Within a few weeks, he was asking for my nude pictures. I asked if he would send them to anyone and he said no. Even though I knew that it

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83 Henry *et al Image-Based Sexual Abuse* 1–2.

84 Liao and Wang "Development of a Scale Measuring Emotional Catharsis Through Illness Narratives" 2021 18(16): 8267 *International Journal of Environmental Research and Public Health* 1 1–2; Jaffe "The Complicated Psychology of Revenge" 2011 *Observer* 1 2–3.

85 Mesquita "The Legacy of Nico H. Frijda (1927–2015)" 2016 30(4) *Cognition and Emotion* 603 606.

86 Frijda "The Lex Talionis: On Vengeance" in Van Goozen, Van de Poll and Sergeant (eds) *Emotions: Essays on Emotion Theory* (1994) 275.

87 Mesquita 2016 *Cognition and Emotion* 606.

88 Gollwitzer and Denzler "What Makes Revenge Satisfactory: Seeing the Offender Suffer or Delivering a Message?" 2009 *Journal of Experimental Social Psychology* 1 3.

89 When an individual is provoked, an imbalance in the brain arises, which, according to Chester and DeWall, may motivate an individual "to seek out sources of hedonic reward to regain affective homeostasis" or, in other words, to restore a state of balance. This is achieved through retaliation or aggression. See Chester and DeWall "The Pleasure of Revenge: Retaliatory Aggression Arises From a Neural Imbalance Toward Reward" 2016 11(7) *Social Cognitive and Affective Neuroscience* 1173 1179.

90 Gollwitzer and Denzler 2009 *Journal of Experimental Social Psychology* 2.

91 Barnoux and Gannon "A New Conceptual Framework for Revenge Firesetting" 2013 *Psychology, Crime & Law* 1 3.

92 See Mafa, Kang'ethe and Chikadzi "'Revenge Porn' and Women Empowerment Issues: Implications for Human Rights and Social Work Practice in Zimbabwe" 2020 5 *Journal of Human Rights and Social Work* 118 123. In the same study, one cultural and religious expert observes that "Zimbabwe as an African country to a larger extent still upholds a patriarchal belief system. So a man who is rejected or dumped by a woman may be enraged and want to get back at her, or should I say to fix her … it's an ego thing".

93 Mafa *et al* 2020 *Journal of Human Rights and Social Work* 122.

> was wrong, I did it anyway to make him happy, just my breasts and face. That did not satisfy him and he asked for pictures of my private part. I kept making excuses because I honestly did not want to. As the pressure was getting too much I told him I did not want to be with him anymore and that sort of pissed him off. All hell broke loose. He started sending me messages like 'hee [sic] who do you think you are … what is so special about your private part you slut … I always get what I want and no girl rejects me like that and gets away with it …' After 3 days, he posted nude pictures of me on Facebook and to everyone at my school."

In the account above, the avenger (in light of the "comparative suffering hypothesis" and with reference to section 56A(2)(*a*)) is rewarded and/or benefited with the satisfaction of knowing that the victim is suffering for their actions and has been put into a position where they can feel the same pain that was caused to the avenger by refusing to accede to the demands made. The avenger is rewarded and/or benefited for other psychological reasons explained by the "comparative suffering hypothesis", including "power equalization"; to feel better or more in control of a situation; and restoration of self-esteem. This conclusion is further supported by neuroscience. Chester and DeWall, in their study on the science behind retaliation, "propose that provoked people respond aggressively because doing so is hedonically rewarding".[94] When an individual is provoked, retaliatory aggression from that individual is a rewarding experience.[95]

The aggravating nature of the motive of revenge (in respect of IBSA) is evident in the Australian case of *Wilson v Ferguson*.[96] The plaintiff and the defendant, upon entering into a romantic relationship, had shared intimate images with each other on condition that the images would not be shared with anybody else.[97] Less than 10 months later, the relationship between the defendant and the plaintiff began to deteriorate. Soon after the termination of the relationship, the defendant vengefully posted 16 intimate images and two videos of the plaintiff (one of which showed the plaintiff masturbating) onto the Facebook page of the defendant.[98] Some of the intimate images were taken without the plaintiff's knowledge and consent. A note was also posted to the plaintiff's Facebook page indicating the defendant's motivation for his actions: "Let this b a fkn lesson. I will shit on anyone that tries to fk me ova. That is all!"[99] Following this note, several other messages (further affirming the vengeful motive of the defendant) were also sent to the plaintiff on the same day.

1. At 5:20 pm: "All in fb so fk u n the fkd up shit u represent. Hahaa."[100]
2. At 5:21 pm: "Fkn photos will b out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r."[101]

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94 Chester and DeWall 2016 *Social Cognitive and Affective Neuroscience* 1173.
95 Chester and DeWall 2016 *Social Cognitive and Affective Neuroscience* 1178.
96 [2015] WASC (Western Australia Supreme Court) 15.
97 *Wilson v Ferguson supra* 22–23.
98 *Wilson v Ferguson supra* 27–29.
99 *Wilson v Ferguson supra* 27.
100 *Wilson v Ferguson supra* 30.
101 *Wilson v Ferguson supra* 30.

3. At 6.08 pm: "There's 2 vids so hopefully the lesson us learnt."[102]

The Supreme Court of Western Australia inferred, in light of the timing and content of the above Facebook posts and messages, that the defendant's reason for committing IBSA was that "he was angry at her decision to terminate their relationship and because he wanted to cause her extreme embarrassment and distress".[103] In pursuit of an equitable order, Justice Mitchell stressed:

> "[T]he compensation award should take account of the fact that the impact of the disclosure on the plaintiff was aggravated by the fact that the release of the images was an act of retribution by the defendant, and intended to cause harm to the plaintiff."[104]

Thus, an examination of the defendant's motive in *Wilson v Ferguson* was important in arriving at a just and equitable sentencing decision.

4 CONCLUSION

Burchell writes: "[T]he reason for ignoring motive in the matter of determining criminal liability is that individual motives are too complex and obscure to provide a reliable basis for determining liability for punishment."[105] Considering the multifaceted motivations for the commission of IBSA, the irrelevance of proof of motive is particularly cogent. Furthermore, requiring proof of motive is an overly stringent requirement, which, in many cases of IBSA, will be overly burdensome for prosecutors. It is therefore submitted that the requirement "with the intention of causing that individual harm" should be severed from section 18F(1) of the FAPAA.

An examination of motive, however, is useful during the process of sentencing. Sinister motivations for the commission of IBSA, such as "to gain financially, or to receive any favour, benefit, reward, compensation or any other advantage" should be considered aggravating by the sentencing court.[106] The "comparative suffering hypothesis" and developments in neuroscience explain how the motive of revenge does constitute a "reward" or "benefit",[107] and thus, could find application under section 56A(2)(*a*) of the Sexual Offencs Act. Alternatively, sentencing courts may (as in the case of *Wilson v Ferguson*) recognise the motive of revenge as an aggravating factor, irrespective of sentencing guidelines. Sentencing guidelines, indicating aggravating factors (such as in section 56A(2)(*a*) of the Sexual Offences Act) can be followed without the requirement "with the intention of causing that individual harm" imbedded in the statutory text.

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102 *Wilson v Ferguson supra* 31.

103 *Wilson v Ferguson supra* 31. The court also notes (at 58) that "[a]ny disclosure of the images to third parties would be likely to cause immense embarrassment and distress to a person in the plaintiff's position. The defendant appreciated this and was in fact motivated by the embarrassment and distress which publication of the photographs would cause to the plaintiff."

104 *Wilson v Ferguson supra* 85.

105 Burchell *Principles of Criminal Law* 354.

106 S 56A(2)(*a*) of the Sexual Offences Act.

107 S 56A(2)(*a*)of the Sexual Offences Act.

It is hoped that the issues highlighted in this article and the solutions provided will be considered in the ongoing quest for robust and capable laws, and in the context of a worldwide call for effective IBSA laws,[108] that South Africa's response to IBSA will help pioneer the way.

[108] See Phippen and Brennan *Sexting and Revenge Pornography* 109–110; Mania "The Legal Implications and Remedies Concerning Revenge Porn and Fake Porn: A Common Law Perspective' 2020 24(1) *Sexuality and Culture* 2079 2091–2092.