

DELETING REVENGE PORN

JONATHON W. PENNEY

Governments are starting to criminalize the act of posting intimate photos and video of ex-partners online. But the new laws may be more about symbolism than justice.

Les gouvernements veulent criminaliser la diffusion non consentuelle de photos et de vidéos intimes sur Internet. Mais la nouvelle législation risque d'être peu adéquate.

The Internet never forgets. And that permanent digital record, a blessing when it summons a moment we want to recall with the click of a mouse, can be a weapon in more sinister hands when it preserves ones we would like to forget. Controlling the distribution of the acts we want back, from mere silly poses for a camera to the most intimate deeds, has become a fact of life in the digital age, taking us into uncharted legal and ethical territory. And few expressions of this exploitative power are as disturbing as what is known as revenge porn, the posting online of sexually explicit photos or videos by a former partner seeking retribution.

Most victims of revenge porn are women, and until recently, they have felt largely helpless to counter this malicious uploading of their past. But taking a cue from a few American states, Prime Minister Stephen Harper's Conservative government has signalled its readiness to plunge into this legal vacuum, promising in the Throne Speech that opened this session of Parliament to bring in a law banning the "non-consensual distribution of intimate images." His government now promises to provide police and prosecutors with "new tools to address cyber-bullying that involves criminal invasion of privacy, intimidation and personal abuse."

The Conservatives' legislative impulses are driven by a few high-profile cases of cyberbullying, notably the tragic suicides of teenagers Amanda Todd and Rehtaeh Parsons, who took their lives in the wake of intimate and exploitative videos going viral on the web. These cases are the tip

of a deeper phenomenon, in which naked images or videos of consensual sex are uploaded to pornographic Web sites by one ex-partner in a deliberate attempt to embarrass the other. Conventional wisdom holds that the victims have no laws on their side, and can only petition a host site to take the offending videos down. Even so, the easily replicated nature of digital media means the victims are often condemned to living with the exposure.

That is the weakness that the Harper government and others now purport to address. The proposed legislation is an outcome of a recent federally sponsored Cybercrime Working Group, struck to investigate cyberbullying and involuntary intimate sharing, which recommended criminalizing "non-consensual distribution of intimate materials" with some complementary new legal powers for courts to control, or order removed, intimate content in question if it happens to be hosted on Canadian servers (which is not that common). It is part of a broader legislative impulse to "fix" this unforeseen by-product of digital media.

But the first tentative legal steps have so far been less than impressive, offering more false hope and comfort than justice, for victims. None have found a way to address the most serious aspect to revenge porn: the quick, expansive and often permanent distribution of the intimate photos or videos across the Internet. And, unfortunately, there are no easy solutions.

California offers the most recent reforms targeting revenge porn. The new law makes distributing identifiable intimate recordings, with the intention to cause serious emotional distress, a misdemeanor criminal offence. The law might be notable more for what it excludes than for what it covers — for example, it does not cover "selfies," that is, any intimate content originally created by the victim (like a self-photo).

Jonathon W. Penney teaches law at Dalhousie University. He is also a research fellow at the Citizen Lab, Munk School of Global Affairs, University of Toronto, and research affiliate at the Berkman Center for Internet and Society, Harvard University.

This is a major oversight given that a typical revenge porn case involves self-pics or videos initially created by the victim, then later shared with her spouse. The new law also covers only those cases where parties “agree or understand” that the intimate material is to remain private, which means it precludes cases where such an understanding can be disputed, such as where there was no clear or explicit discussion or agreement.

California is not alone. New York and Wisconsin are both proposing similar criminal laws, broad enough to catch self-created intimate content. And New Jersey, the first to enact a revenge porn law, has also criminalized nonconsensual distribution of intimate content.

These laws are, of course, well-meaning. But, like all attempts at centralized criminal enforcement online, they face difficulties. In some cases, while trying to empower victims, the laws impose new regulatory burdens for online service providers, content portals or users that threaten Internet freedoms. This is not a moot concern. Nova Scotia’s recent *Cyber Safety Act* defines cyberbullying so broadly that it likely covers harsh insults and other constitutionally protected speech. Balance is needed.

There are also questions about whether giving police new legal powers

will lead to more effective enforcement. University of Maryland’s Danielle Citron, a leading scholar on information privacy and civil rights, has persuasively shown that governments and police do not always take crime online seriously, particularly in cases of revenge porn. The Rehtaeh Parsons case is a great example of this. Little progress was made on the investigation until the case made national and international headlines courtesy of the hacker group Anonymous. It is a sign that budgetary constraints and resource limitations make revenge porn an unlikely police priority unless a case becomes high-profile.

All of this can mean inconsistent or weak enforcement.

Criminal laws punish a perpetrator, seeking to deter the offender from breaking the law again, hopefully deterring others from committing similar crimes. But any punishment comes after the fact. The crime is already done. And in the context of revenge porn, the “crime” of nonconsensual distribution of intimate materials continues long after the original offender has acted. Indeed, as the content “goes viral,” spreading across the Web with shocking speed, the target is repeatedly revictimized.

Yet prohibiting every act of dissemination or sharing online is no solution either. A survey released in August indicated that over half of Canadian teens surveyed engaged in “sexting,” the act of sending or forwarding sexually suggestive electronic messages or images. Another recent survey conducted by child abuse agencies in Britain found that up to 40 percent of teens had created a sexually suggestive image or video, and that a quarter of them sent such an image or video by text (15 percent to a total stranger). A third of the respondents who engaged in sexting had no idea if their intimate content was subsequently shared.

That kind of distribution is far too difficult for state actors to police alone. Even if they could, a criminal ban could threaten legitimate kinds of free sharing and expression while criminalizing other, innocent activities of millions of young people. This reality is likely why California placed important limits on its new revenge porn criminal law, covering only those acts done with malicious intent and resulting in deliberate emotional harm. But victims still face the same problem: if criminal laws are either too broad to enforce or too narrow to stem harmful dissemination, how is justice even possible?

Unfortunately, there is no easy answer, especially when such content inevitably ends up on Web sites or servers located abroad. The US has broad civil immunity for Web sites that host such content. An American Web site could ignore the plight of a Canadian revenge porn victim without consequence. This is less likely to happen with popular sites like Google or Facebook who care about their brand. But even in this league, options are lacking for victims to get servers to take down their private, intimate content.

At the very least, we should ensure that revenge porn victims are aware of their existing legal rights to pursue offenders or Web sites hosting their intimate content and ensure they have the tools and support to use them. Existing laws, in some cases with minor changes, can be effective at tackling revenge porn. Copyright law is a good example. Since the vast majority of revenge porn cases involve self-pics or videos initially created by the victim, the victims own the copyright to the intimate content. They can enforce those rights against the harassers who post or distribute the content online without permission, including sending a copyright notice to Internet service providers hosting infringing content.

Privacy torts — the right to sue for invasions of privacy — could also be legislatively created or modified to better cover revenge porn. The tort of appropriation of personality, which confers the right to sue someone for using your image or likeness for commercial purposes without permission (such as to sell a product), could be changed to catch forms of noncommercial but privacy-invading uses. And, for more effective enforcement, new incentives could be offered to Web sites and online service providers to remove intimate content when put on notice by victims, provided there are mechanisms to prevent illegitimate forms of censorship (we would want to avoid a situation where, for example, a politician like former US Congressman Anthony Weiner could use such laws to suppress news stories about his own sexting scandal).

Criminal statutes alone will not provide a solution to the scourge of revenge porn. But we already have laws to protect privacy. Empowering victims with tools and the opportunity to enforce them is a key step toward more just outcomes that revenge porn victims have long awaited and deserve. Otherwise, our politicians are offering these victims a solution that is more about symbolism than about justice. ■

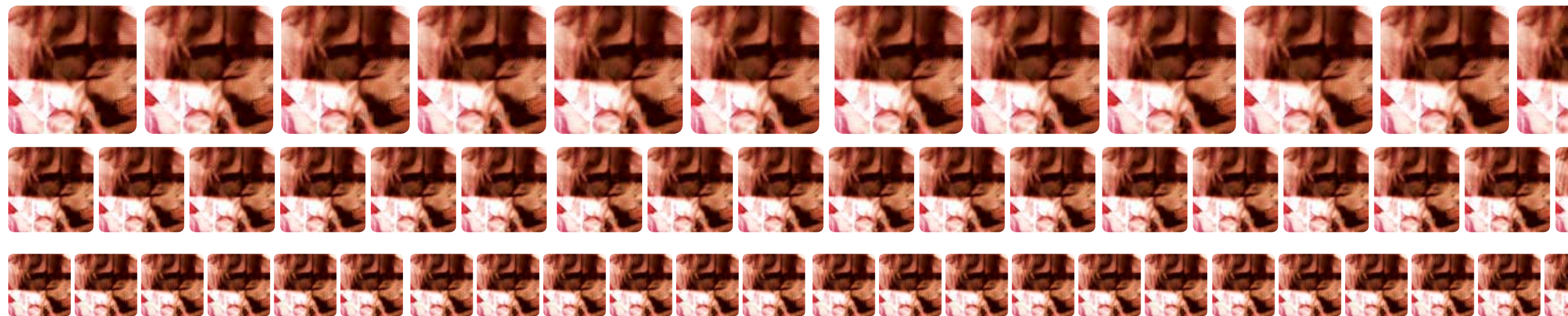


PHOTO: SHUTTERSTOCK



The weld —

A spark.

A connection.

Designed to assemble.

To manufacture. To build.

Cars, boats, buildings, cities,
economies, livelihoods.

The weld. Simple.

Yet so essential.

The Northern Gateway
Education and Training
program is helping to provide
the skills needed for pipeline
and other construction jobs.

By the end of 2013, the program
will have impacted the lives
of over 1,800 people in
British Columbia and Alberta.

Find out more at gatewayfacts.ca

