

Article

Crowdsourcing Sexual Objectification

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Abstract: This paper analyzes the criminal offence of the non-consensual distribution of intimate images (what some call “revenge porn”). Focussing on the debate currently underway in Canada, it notes that such an offence would fill a grey area in that country’s criminal law. Arguing, more broadly, that the criminal law has an important expressive function, the paper posits that the offence targets the same general type of wrongdoing—sexual objectification—that undergirds sexual assault. While not all objectification merits criminal sanction, the paper explains why the non-consensual distribution of intimate images does and why a specific offence is legitimate.

Keywords: criminal law; revenge porn; sexual assault; criminal wrongdoing; consent; Canada; sexual objectification; distribution of intimate images; cybercrime; online harassment

1. Introduction

Rehtaeh Parsons [1,2]; Amanda Todd [3,4]; Steubenville [5–8]: these cases show how easily the online world can be co-opted to express hatred, contempt and misogyny. Online communication creates a reality where one can draw in many—crowd source [9,10]—to further a campaign of sexual objectification. Many countries are struggling to find ways to respond to this phenomenon. One of those countries is Canada. In 2013, the Canadian government introduced Bill C-13: *Protecting Canadians from Online Crime Act* [11]. The bill’s centerpiece is a crime of distributing a person’s intimate images without her consent [12–15].

This paper uses Canada’s example to explore the issues surrounding the appropriate state response to sexualized wrongs committed online. While it focuses on Canadian law, the discussion relates to broader principles of criminal law that apply beyond any particular jurisdiction.

The Criminal Code of Canada [16–18] already includes numerous offences that could respond to some instances of the non-consensual distribution of intimate images. One could, then, argue that Bill C-13 is an example of over-criminalization [19–21]. The proposed law could also be criticized for raising false hopes, when in all likelihood it will be under-enforced; and for reinforcing gender stereotypes [22].

In this paper, I suggest that the creation of the specific offence in Bill C-13 is a legitimate response to a grey area. The non-consensual distribution of intimate images evinces a particular kind of blameworthiness that is well suited to the special sanction and concern of criminal law. The argument offered here posits that an important function of criminal law is expressive—that it intends to guide people in their choices by setting out authoritative norms for behavior. The expressive function operates independent of the scope and predictability of any sanctions that may be imposed for breaching those norms (see [23]; and more generally, [24], p. 39). Within such a framework, the offence proposed in Bill C-13 is defensible regardless of the enforcement and resource challenges it will confront and despite the fact that it leaves untouched potentially problematic assumptions about (female) sexuality.

In Section 2, the paper first sets Bill C-13 against the context of online sexual predation. It briefly canvasses the debate that has occurred in the U.S. (one of the most prominent jurisdictions dealing with the issue and a close comparator to Canada). In Section 3, the paper considers the extent to which existing Canadian law already captures the activity. This statutory review supports my conclusion that there are sufficient legislative gaps to justify a specific legislative response. I then explain why targeted legislation is preferable to judicial expansion of existing offences. Finally, in Section 4, the paper examines the proposed offence on its own terms. I suggest that the wrongfulness of the behavior that it targets is akin to the wrongfulness inherent in more conventional sexual offences against the person. To be sure, the behavior is different in one key respect: it elides the traditional boundaries of assault, which generally involve physical interference with another person. Nonetheless, both activities engage in blameworthy sexual objectification. For this reason and given the context and reality of online communication, the non-consensual distribution of intimate images merits a criminal response.

2. The Internet’s “Brave New World”

It is difficult to overstate the degree to which social norms, interactions, mores and cultural cues, particularly in developed nations, are shaped by online communication. The statistics are simultaneously familiar and staggering: 200 million tweets [25], 300 million photos shared on Facebook [26] and 16 years of video uploaded to YouTube [27], every day. The Internet enables greater social engagement, community building and public dialogue. However, it carries risks, as well: to privacy, emotional well-being and physical security.

The Internet’s iterative nature, its capacity for endless permeation and its resistance to control produce a powerful tool for revenge [28]. Many people have either taken or allowed someone else to take their intimate images (see [29]; see also [30], pp. 409–10). Using the Internet to view such images seems to find the greatest purchase among young people; in one study, half of the male teenage respondents reported having viewed a nude photo of a female classmate [31]. When images fall into malicious or careless hands, the consequences are far-reaching [30]. The wrongful appropriation of the sexualized images of another is colloquially referred to as “revenge porn”. Some scholars also suggest the term “non-consensual pornography” [32]. Admittedly, the term “revenge porn” can be problematic

to the extent that it suggests an act attended by a specific motive that may not reflect all of the reasons for criminalizing such behavior. However, the term enjoys great currency, and, as discussed in Section 3, it evokes some of what society finds especially horrific about such activity. In this paper, then, I occasionally use both “revenge porn” and “non-consensual pornography” alongside “the (non-consensual) distribution of intimate images”.

The distribution of intimate images should be distinguished from cyberbullying, another phenomenon that has gained cultural prominence. Cyberbullying can describe all manner of electronic, targeted interactions that subject people to ridicule, humiliation, ostracism or exclusion [33]. While it certainly can include the distribution of intimate images, cyberbullying relates to a much broader range of behaviour. Used in this more general sense, cyberbullying is not presently a crime in Canada [34,35].

Most often, revenge porn is used to describe material that is electronically disseminated. Not all instances of it involve electronic media. However, consistent with the Internet’s role as the purveyor *par excellence* of pornography [36,37], revenge porn seems to find its greatest “utility” online [38].

Non-consensual pornography radiates outward in concentric circles. Images can be viewed by: family members, classmates, friends, coworkers and neighbours; by entire schools, workplaces or social groups; and by the world at large. It shares with all forms of Internet communication an unpredictable, essentially limitless reach. Its impact upon an affected individual is dramatic. Shame, guilt and embarrassment are common reactions. As one woman put it: “...I am not victimized one time. I am victimized every time someone types my name into the computer. The crime scene is right before everyone’s eyes, played out again and again” [39]. Others speak of an existence ripped open. Every venture into public space becomes fraught with anxiety, even paranoia. In some cases, the despair becomes intolerable [40,41].

Legal and other scholars, many located in the U.S., have turned their attention to this activity. Some advocate civil remedies based in privacy or copyright law [42,43]. Others speak of the need to undertake much deeper, albeit more difficult, cultural transformation [44]. Scholars also have considered criminal law remedies. Some resist the idea of crafting new criminal offences arguing that existing criminal laws can suffice [45]. Others think the required trade-offs in any resort to criminal prosecution are too great [46]. A few scholars advocate new criminal offences [32].

The United States and Canada share many features: popular culture, social organization, economic affluence and levels of online engagement. They diverge at the level of constitutional design, such as with respect to the distribution of legislative authority. In the United States, criminal law is largely the responsibility of the states [47,48]. In Canada, it falls under the jurisdiction of the federal government [49]. That means that U.S. jurisdictions may experiment, trying out a variety of approaches to criminal law problems with the benefits of diverse experience redounding to the several jurisdictions. In Canada, criminal law dons a “one size fits all” model, though with that comes the potential benefits of universality and predictability.

The two countries are also marked by a commitment to civil liberties, albeit manifested in different ways. With respect to the civil liberty most implicated by online distribution, freedom of speech/expression, the United States tends to be less tolerant than Canada of government regulation. This has led to very different regimes for the criminal prohibitions against hate speech [50,51], obscenity [52,53] and child pornography [54,55].

At present, ten American states specifically outlaw non-consensual pornography [56–65]. Over half of the states with such laws enacted them in 2013. The area, clearly, is an evolving one. Given space constraints, only a modest discussion is offered here.

New Jersey was the first state to enter the field. It makes it a third-degree crime [66] to disseminate without consent nude or partially nude images of another person:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer [67].

Punishment is set at between three and five years [68,69]. Despite being in force for several years, for reasons that are not entirely understood, the law has been used in very few cases ([32], p. 22).

Other states, like California, are more cautious. That state’s relevant statute provides:

[A]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress, is guilty of disorderly conduct [70].

Given the identification of both a specific intent requirement (“intent to cause serious emotional distress”) and a particular consequence (“the depicted person suffers serious emotional distress”), California’s law captures a much narrower range of behavior than New Jersey’s. Some commentators have criticized California’s additional *mens rea* element, because it excludes perpetrators who are motivated by greed or notoriety ([32], p. 24). Others suggest that stricter *mens rea* and *actus reus* elements will help such laws to survive inevitable First Amendment challenges [51,71,72].

Taking steps to curb the distribution of non-consensual pornography is clearly a priority for a number of jurisdictions. Events in Canada have similarly spurred a remarkable public mobilization leading to the federal response in Bill C-13. As will be seen in Section 4, Bill C-13 is closer to the New Jersey model than the California one in that it eschews the idea of an additional specific intent. Below, certain existing Canadian criminal offences are canvassed to evaluate the degree to which they already capture such behaviour.

3. The Gap in Existing Canadian Criminal Law

Non-consensual pornography embodies many wrongs: gross invasion of personal privacy; shame and humiliation produced by the dissemination; loss of personal autonomy; intensifying existing harassment or abuse ([32], p. 5); and, in some cases, significant risks to physical security.

A number of Canadian offences target one or more of the above-noted wrongs. To the extent that the criminal law already covers acts similar to non-consensual pornography, one could argue that Bill C-13 is unnecessary or, even, motivated by political rather than public policy concerns. This

section examines four offences that appear to be particularly targeted [73,74] at some of the wrongs that may animate the proposed distribution offence: voyeurism (s.162); criminal harassment (s.264); sending false messages (s.372); and making or distributing child pornography (s.163). As will be seen, while each of the above offences shares some similarities with the new crime, none applies to its paradigmatic case [75,76].

The first offence, voyeurism, captures what is commonly known as “peeping Tom” behaviour. Its first incarnation was the offence of “prowling at night” ([16], s.177; [77,78]). The latest version is found in section 162, which prohibits voyeurism without requiring proof of physical trespass:

- (1) Every one commits an offence who, surreptitiously, observes—including by mechanical or electronic means—or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
 - (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
 - (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
 - (c) the observation or recording is done for a sexual purpose...
- ...
- (4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available ([16], s.162; [79]).

The offence refers to the “surreptitious” observing or recording of another person. The circumstances must be ones in which a person would have a reasonable expectation of privacy. The offence further requires that the observation or recording: take place in specific locations; be of particular body parts; or be done for a sexual purpose. Subsection 4 extends voyeurism to situations where someone other than the initial voyeur disseminates the material. The law provides for a defence based on the public good [80].

Voyeurism clearly captures behavior that is similar to revenge porn. The voyeur invades the complainant’s privacy in a profound manner [81,82]. The law is limited to circumstances of a sexual nature. Section 162 includes within its ambit third parties who make the products of voyeurism more widely available, again, resembling some of what is particularly troubling about the online dissemination of intimate images. However, key to the offence is its surreptitious nature. Secrecy is essential to being a “voyeur” [83–85]. That aspect renders voyeurism unable on its face to capture many instances of revenge porn, where images often are either self-created or created with consent, but then distributed in violation of the victim’s trust [86]. Consider Amanda Todd [4], for example, who voluntarily bared her breasts online to someone she considered a friend. He betrayed the trust inherent in that act, outrageously. However, a trier of fact might form a reasonable doubt that the man had an honest belief that Todd knew he was capturing her image. If so, he would not have acted as a voyeur.

The second offence to be considered is criminal harassment, which sometimes is referred to as “stalking”. Stalking may seem to fall under the broader family of sexual harassment, and a number of scholars characterize non-consensual pornography as one species of it [32,87]. Sexual harassment is commonly associated with civil or human rights remedies [88]. In Canada, some kinds of sexual harassment also find criminal redress in section 264, which provides:

- (1) No person shall, without lawful authority and knowing that another person is harassed or is reckless as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
- (2) The conduct mentioned in subsection (1) consists of
 - (a) repeatedly following from place to place the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - (c) besetting or watching the dwelling house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
 - (d) engaging in threatening conduct directed at the other person or any member of their family [16,89].

Section 264 has a dual *mens rea*: (1) intention with respect to various specified activities and (2) knowledge or recklessness of the harassing impact upon the complainant. Its *actus reus* includes: repeated instances of following and communicating; besetting the complainant’s home; or engaging in threatening conduct to the complainant or his or her family. There is an additional *actus reus* component: the harassment must cause the target to reasonably fear for their safety or the safety of someone known to them.

Revenge porn victims often report feeling harassed or unsafe. Indeed, in at least some cases, that is exactly what the perpetrator wants. Criminal harassment thus shares, contingently, some of the elements of non-consensual distribution. Neither threatening behaviour nor fear, though, is necessarily present in all instances of such distribution.

The Amanda Todd case might have qualified as criminal harassment. Todd received numerous threatening messages from the man who ultimately disseminated her image. The man’s choice of language and manner of interaction could provide sufficient grounds for a trier of fact to draw the inference of, at least, recklessness to the risk that he was harassing her. It might also have been possible for the Crown to prove that Todd feared for her safety. However, Todd’s situation contained an important element clearly not present in all non-consensual pornography, namely, communication between the “pornographer” and unwilling subject. Communication provides one of the factors that support understanding criminal harassment as an offence against the person. Another is the act of creating a state of (reasonable) fear. Such factors are simply not present in all cases. Todd’s harasser was committed to maintaining direct contact with her. Other perpetrators, after coming into possession of the images, might have no further contact with the victim (assuming, of course, that contact was even required to obtain those images). Additionally, in discovering that one’s intimate images have been disseminated (say, to one’s classmates), the complainant may suffer acute embarrassment, yet not

fear for her safety. A trier of fact might also doubt that any fear was a reasonable response. Thus, while some distribution cases will qualify as criminal harassment [90], many others will not.

The third offence discussed here is sending false messages or making indecent or harassing phone calls, as set out in section 372:

- (1) Everyone who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- (2) Everyone who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.
- (3) Everyone who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction.

Section 372 is found in Part IX of the Code, “Rights of Property”. Specifically, it falls between the crimes of sending a telegram with a false message and drawing documents without authority. Rarely prosecuted [91], it has not been updated since 1970. Subsection 1 prescribes an open-ended list of communicative media that could conceivably incorporate electronic media; the other provisions would require more work to do so [92,93]. More significantly, subsection 1 requires that the messages be “false”. This requirement does not easily translate to visual representations. The inclusion of a standard of falsity implies that the provision is intended to apply to articulate, or verbal, expression. This is strengthened by the provision’s specific reference to “telephone calls” that are “indecent” or “harassing”. These elements make s.372 perhaps the least similar offence to revenge porn of those discussed in this section, although one could see it applying to, say, intimate images posted along with text that makes false representations about the victim (for example, that she is open to stranger contact).

The final offence, and the one which has attracted at least some prosecutorial attention in Canada and other jurisdictions [30,94], is child pornography. It is defined as follows in section 163.1 of the *Criminal Code*:

- (a) A photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
 - (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
 - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;
- (b) Any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;
- (c) Any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or
- (d) Any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Section 163.1 is very specific in its prohibited representations and expressive materials. It targets materials involving persons (real or fictitious) [95] under the age of 18. In 2001, the Supreme Court of Canada held that the freedom of expression protected by section 2(b) of the Canadian *Charter* required that two exceptions be read into the law: one for self-created materials held by the creator exclusively for personal use; and one for visual recordings of otherwise lawful activity, again held by the creator exclusively for personal use [55].

Section 163.1 makes it a crime to create, make available, possess and access child pornography. Sentences range from ten years where the offence is prosecuted by indictment, to more modest, but mandatory jail sentences on summary conviction. Originally, the law included defences for “artistic merit” and “public good”, but now allows a defence only for activities undertaken in relation to “the administration of justice or to science, medicine, education or art”, if such activities do not pose “an undue risk of harm” to young persons [96].

To the extent that non-consensual distribution involves images of persons under the age of 18, it could fall within section 163.1. Certainly, there may be instances where the activity simply is child pornography and should be prosecuted as such. However, if the state lays child pornography charges out of frustration at the lack of other avenues, it risks ensnaring young persons whose behaviour is not the law’s primary target. Additionally, distribution among young persons frequently has a gendered dimension. Bailey and Hanna argue that sexting, for example, “can be understood as a part of the exploration of sexuality and identity in a mass-mediated society that immerses children and youth in... pre-packaged conceptions of femininity and sexuality as keys to social success” ([30], pp. 414–15). As a result, young women may be particularly likely to engage in the initial creation of intimate images. Yet, it is they who tend to be most at risk from its dissemination. Thus, the enthusiastic use of child pornography laws is likely to redound to young women’s detriment at the same time that the dissemination wreaks havoc on their lives.

The above discussion points to a concern about the use of child pornography that is different from the other offences considered in this section. The concern involves the concept of “fair labeling”. Fair labeling requires that “offences [be] subdivided and labeled so as to represent fairly the nature and magnitude” of the unlawful act ([97], p. 88). It is linked to the idea that criminal law has an expressive function; that it is intended to guide people away from wrongful courses of action. As Michael Plaxton puts it, “In fulfilling its expressive function, the criminal law must, as far as possible, attempt to fairly capture differences in wrongdoing” [98–100]. Some criminal theorists go so far as to argue that fair labeling is “crucial for determining just punishment” [101].

Fair labeling is an especially important concern with child pornography because of the offence’s severe social stigma [102] and attendant legal consequences [103,104]. The routine prosecution of revenge porn situations could stretch the criminal law’s purpose in a way that is unfair. Much of the non-consensual pornography caught is likely to involve young perpetrators ([30], pp. 415–18). While such young persons are engaging in wrongful behavior, many persons will shrink from treating them like child pornographers [105,106].

At this point, an interlocutor might point out that the four offences just discussed share sufficient overlap with the proposed new offence to allow for at least some prosecutions of non-consensual distribution by other means. If so, would it not be sufficient to adopt a patchwork approach, *i.e.*, relying on different offences depending on the context? Is crafting an entirely separate response truly warranted?

There are two responses to this objection. The first, building on the fair labeling concern and the criminal law's expressive function, will be addressed in Section 4. The second is doctrinal. While there are situations in which revenge porn corresponds to the statutory parameters of other offences, its paradigmatic case does not. The paradigmatic case, I contend, involves a spurned lover who, having received or taken (with consent) intimate pictures of an adult partner, posts them on a public website knowing full well that there was no consent to that act. This situation would attract culpability under none of the foregoing offences (at least, not on their face). The element of initial consent takes it out of the realm of voyeurism; it would be difficult to characterize a single post as "harassment" [107,108], particularly if the Crown cannot prove fear; there is no articulate expression and no "telephone call"; and the participants are adults [109,110].

Enacted criminal law tends to lag behind public awareness of, and concern for, specific issues. The legislative agenda must balance diverse priorities, interests and considerations. The legislature finds it difficult to act quickly. This political reality can lead to frustration and a temptation to rely on judicial creativity. In a common law system, where courts tend to enjoy significant interpretative authority, it is not unknown for them to step into the breach [111]. Perhaps, my interlocutor might press on, this would be a way to ensure that the "patchwork" adequately addresses the paradigmatic case.

In some jurisdictions, courts have begun to step into perceived breaches to punish the non-consensual distribution of intimate images. In 2012, an Australian magistrate sentenced a man to prison for posting nude photos of his ex-girlfriend on Facebook. The Court relied on the crime of posting "indecent articles". It admitted that the issue was one of first impression, but noted the need to act in the following terms:

...Facebook as a social networking site has unlimited boundaries. Incalculable damage can be done to a person's reputation by the irresponsible positing of information through that medium. With its popularity and potential for real harm, there is a genuine need to ensure the use of this medium to commit offences of this type is deterred [112–114].

One hesitates to critique the courts too strongly here. Existing criminal laws target a number of overlapping wrongs that are represented in at least some instances of non-consensual distribution. The courts' interpretative authority is settled, and their motive to act in these situations would emanate out of a sense of responsibility and frustration. To many members of the public, such decisions will be highly laudable.

Nevertheless, such latitude is unwise. First, there is an important difference in the courts' authority to interpret the criminal law in relation to exculpatory *versus* inculpatory issues. In Canada, this difference can be seen in section 9 of the *Criminal Code*, which removes virtually all common law power to create criminal offences (save for the power to punish for contempt of court) [115], while section 8(3) preserves courts' jurisdiction to recognize and apply common law defences [116]. Criminal prohibitions, then, must be grounded in statutory sources.

Therefore, in Canada, sections 8(3) and 9 of the *Code* provide one reason to shun judicial creativity in this area. There are others. In the earlier discussion of voyeurism, reference was made to the offence of prowling at night (s.172). Section 172 was added to the Code after the 1950 decision in *Frey v Fedoruk* [77], in which the Supreme Court declined to recognize a common law offence of trespassing at night. There, Justice Cartwright stated:

I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the Criminal Law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action. If such a principle were admitted, it seems to me that many courses of conduct which it is well settled are not criminal could be made the subject of indictment...

I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts ([77], pp. 526, 530).

Frey, which was decided prior to the enactment of sections 8(3) and 9, draws on criminal law principles that run deeper than statutory will. Following the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the caution articulated in *Frey* has been further confirmed by constitutional protection against the retroactive application of criminal offences [117] and by the doctrine of vagueness [118]. Such principles reflect broader Anglo-American traditions [119] that are not limited to Canadian domestic law.

To be sure, the legislature may decide that a creative judicial decision is useful, or sound, or convenient. It may, in other words, permit such a decision to stand [120]. However, a *post facto* calculation of this kind cannot relieve the jurisprudential and normative concern. Relying on courts to remedy legislative gaps robs the community of the opportunity to deliberate on the proper boundaries of criminal law (even if the legislators themselves favour such reliance) [121,122]. It means that the law's development will depend on the vagaries of particular cases. It also risks drawing judges into areas they are ill-suited to settle [123,124]. A proper respect for the separation of powers, for fair notice to individuals and for the rule of law militates against such action.

If a community has determined that the non-consensual distribution of intimate images is worthy of criminal sanction, it is preferable for that decision to be made, expressly, by the legislature. The product of that decision will then be subject to judicial interpretation, and, in relevant cases, review. In terms of institutional responsibility, Bill C-13 is the most appropriate response to the desire to do something about non-consensual pornography. In the final section of this paper, I examine the parameters of the new proposed offence and offer a justification for manifesting that desire in criminal law terms.

4. The Wrongfulness of Objectification

The previous sections have examined the current political and societal context for legislative initiatives to deal with non-consensual distribution of intimate images; and current criminal laws that target similar behavior. There is increasing societal concern over the phenomenon and a growing sense that a targeted response is appropriate. In Canada, that response has taken the form of Bill C-13, the *Protecting Canadians from Online Crime Act*.

The Bill would amend a number of laws in a number of respects. As stated in Section 1, it has attracted significant controversy from privacy advocates. The bill's proposal to treat distribution as a free-standing offence has attracted less controversy [125,126]. Only the latter is discussed here.

Bill C-13 first amends the general definition section in Section 2 of the Coe to provide that any reference to "communication" shall, without more, be taken to include "electronic communication". It

then adds a new provision to be inserted immediately after the voyeurism offence. The offence, titled in the margin note as “Publication, *etc.*, of an intimate image without consent”, is defined as follows in a new provision—section 162.1—of the Code:

- (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty
 - (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
 - (b) of an offence punishable on summary conviction.
- (2) In this section, “intimate image” means a visual recording of a person made by any means including a photographic, film or video recording,
 - (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
 - (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
 - (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

The proposed crime has several elements. The *actus reus* requires the publication or similar treatment of an “intimate image”, defined in terms of sexual content and privacy-generating circumstances and expectations; it requires as well that the person depicted did not consent. The crime would have a dual, fully subjective *mens rea* requiring (1) knowledge of the publication and (2) knowledge or recklessness as to whether the person depicted gave their consent to that publication.

The proposed law also includes a public good defence:

- (3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.
- (4) For the purposes of subsection (3),
 - (a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and
 - (b) the motives of an accused are irrelevant.

In Canada, a defence referring to “the public good” is found in very few offences directed at expressive material: sections 162 (voyeurism), 163 (obscenity) and 611 (defamatory libel). Prior to 2005, it was a defence to child pornography. Considering the latter defence in 2001, the Supreme Court of Canada defined “public good” as “necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest” ([92], para. 70). In the context of child pornography, it gave as examples: criminal proceedings, research into the effects of exposure, and addressing the materials’ “political or philosophical aspects” ([92], para. 70).

The Court subsequently confirmed that the defence relies on objective factors and is unaffected by the accused's motivations ([127], paras. 42–46).

If the trier of law determines that the impugned actions could serve the public good, the trier of fact must acquit if they have a reasonable doubt that the activity did not extend beyond what was necessary for that good. It remains to be seen how such a defence will be interpreted with respect to the distribution of intimate images; whether, for example, broad values of expression and creativity will create a protected space for material that sits at the margins.

There are a number of ways to describe the new crime: as a morals offence; as a species of defamation; as a privacy-invasion offence; as a harm reduction measure; and as an offence against personal, psychological and sexual integrity. Adopting one of these descriptions need not entail rejecting the others. Privacy interests, for example, may be integrally linked to sexual integrity through the underlying value of personal autonomy. Viewing non-consensual distribution as a species of defamation, in contrast, might lead one to consider how to evaluate the harm resulting from such actions.

In my opinion, the offence captured by Bill C-13 is best conceptualized as a form of sexual wrongdoing against the person. I recognize that the proposed law is to be inserted into Part V of the Code, which is entitled “Sexual Offences, Public Morals and Disorderly Conduct” and includes offences, such as obscenity, that were once thought to corrupt morals [128]. (By contrast, offences against the person are mostly listed in Part VIII.) The distribution of intimate images is analytically linked to voyeurism, and it makes sense as a drafting matter to have the offences co-located. My argument thus also applies to voyeurism. Voyeurism's current placement in Part V of the Code derives from historical factors and does not reflect current social mores.

The non-consensual distribution of intimate images occupies a notional space between criminal harassment and sexual assault. As noted earlier, criminal harassment was deemed appropriate for inclusion alongside the traditional forms of offences against the person. The clearest link between criminal harassment and assault is that the former requires proof that the accused's action caused the complainant to fear for his or her safety, which is but a few steps away from actual physical interference [129].

The proposed new offence requires neither proof of fear, nor risk of physical harm. Of course, the uncontrollable nature of the Internet could cause a victim, reasonably, to fear for his or her safety. Some jurisdictions, such as California, have used a roughly cognate concept (“emotional distress”) to limit the scope of the offence [70]. As discussed above, the additional element might be thought necessary to safeguard such a law against a First Amendment challenge. However, in any claim arising under the Canadian *Charter*, it is unlikely that the lack of such elements would make the difference between validity and invalidity. The Supreme Court has already upheld both obscenity [53] and hate propaganda [50,130] laws, which do not have a causal element, against similar challenges.

The absence of a fear element, in a context where there is also unlikely to be physical interference with the complainant, may seem to weaken the conceptual link between the distribution of intimate images and assault. What is it that, nonetheless, suggests that the new proposed offence is closer to the wrong of sexual assault than it is to crimes of privacy invasion or the corruption of morals?

The answer lies in the title of this paper. The essence of the new offence is that it seeks to punish the same kind of objectification [131,132] that animates sexual assault.

In earlier work, I have argued [123] that sexual assault is best viewed as an offence that is concerned with preserving an essential feature of human autonomy: control over one's status and use as a sexual being. One must look beyond the crime's frequent physical and psychological harms to see this point. The analysis may be complicated by the fact that, in 1983, the Criminal Code replaced the language of "rape" with that of "sexual assault" [133]. This, it is believed, reflected the recognition that non-consensual sexual touching is a crime of violence. It might be thought that, in taking this step, Parliament was acknowledging an instinctive social revulsion towards violence because of the harm it causes. Thus, the 1983 reforms, while valuable and important, may contribute to an impression that sexual assault is wrong primarily, or even solely, because of the harm that it causes (see [134], para. 165).

That would be a false impression. While harm will often result from sexual assault, it is not the core of the offence. Consider John Gardner and Stephen Shute's famous scenario in which the victim of a sexual assault suffers no discernible physical or psychological injuries, because she is, and forever remains, unaware that the violation even took place (see [135]). Does the lack of discernible injury have any bearing on essential criminal culpability? Gardner and Shute suggest, persuasively in my view, that this is irrelevant. No right-thinking person would conclude that, merely because of the lack of such injury, the assailant engaged in either no wrongdoing or in wrongdoing that properly escapes the criminal law ([135]; but see [136], pp. 184–87).

The essence of sexual assault is objectification that is wrongful in a special way, a way that merits the imposition of criminal culpability. While all forms of assault supersede an individual's physical and psychological integrity, sexual assault is particularly marked by the perpetrator's "sheer use" ([135], p. 204; [137]) of another person. To borrow from Kant, the person is treated as a means to an end, entirely divorced from her own plans and purposes.

The intuition that when we sexually objectify people in certain ways we do something wrong, and not merely harmful, helps to explain why consent, a central element of all crimes of assault, is so crucial to sexual assault. Indeed, the Parliament of Canada has instituted a special set of rules directed at that offence that does not apply even to other forms of assault [138]. Canada's Supreme Court, too, has confirmed that sexual assault is not only about "having control over who touches one's body, and how" ([139], para. 28). For example, in *R. v. Ewanchuk*, the Supreme Court grounded an approach to fault in which a defendant, essentially, cannot rely upon objectifying attitudes and beliefs to excuse mistakes about consent ([139]; see also [140–142]).

The objectification model of sexual assault explains why, in Canada at least, proof of harm has never been a precondition to a conviction for the offence *simpliciter* [143]. It explains the centrality of consent to the offence as part of both the *actus reus* and *mens rea*. Objectification occurs when one person uses another without taking into account, or ignoring or being indifferent to, that person's desires. In the sexual assault context, it is crucial enough to warrant a special duty to take steps to ascertain whether consent is present [144].

Of course, the criminal sanction cannot apply to all of the ways that people objectify one another. Not even when those ways are sexual. Nor should it. That would not only expand the criminal law beyond all reason (because objectification is a pervasive part of the human condition), it would inhibit much behavior that is valuable, such as artistic endeavours or relationships in which one person assumes responsibility for another's welfare.

While not all objectification can or should be addressed criminally, the objectification in non-consensual pornography is of a particularly troubling kind [145]. Key to this argument is the role of consent. Under the proposed offence, the perpetrator acts either with the knowledge of the complainant's non-consent, or recklessness to the possibility. It is difficult (though not impossible) to argue that an honest mistake could lead an individual to disseminate intimate images of another person online, and even more difficult to argue that one believed that the putative victim was indifferent to or wanted such dissemination. Indeed, this seems to distinguish the activity from sexual assault itself. Very few of these cases will occupy the category occupied by many situations of alleged sexual assault: the vexed area of incomplete or inadequate communication around sexual desires, coupled with persons' tendency to believe that what they wish were true, is [146,147].

In contrast to the murky communication that occasionally attends human sexual interaction, it is an incredible proposition that an individual would form an honest but mistaken belief that a current or former partner wished to have her intimate images disseminated online [148]. The argument is not impossible. The subjective *mens rea* used in Bill C-13 vouchsafes an accused the opportunity to present it [149]. However, I suspect that it would take an extraordinary case for such an argument to succeed. Any trier of fact would regard such a claim with extreme skepticism [150]. And in this they would be entirely justified. Almost everyone can imagine, and empathize with, the experience of violation inherent in the dissemination of intimate images (indeed, the experience may be more relatable than sexual assault itself). It is very difficult to accept, at face value, an accused's assertion that he: did not consider consent; believed that vague or ambiguous statements by the complainant evinced her willingness to distribution; or assumed she was indifferent to the matter. Far more plausible is that the accused deliberately disregarded, or was utterly indifferent to, the complainant's wishes. Where those wishes relate to an aspect of control over one's status as a sexual being (representation via intimate images) in a medium (the Internet) where such control is virtually impossible, then, it seems to me, the accused has treated the complainant as a means to an end. The "end" may be revenge, notoriety or entertainment. However, the trading, by one person, in the sexual integrity of another is a "public wrong", whether the activity involves interference by physical means or interference through the endlessly iterative domain of online communication. Both deserve punishment.

5. Conclusions

To conclude, the criminal law plays an important expressive role in society. In so doing, it gives effect to broader intuitions about criminal wrongdoing, and it shapes and transmits crucial benchmarks by which citizens may guide their behavior [151–153]. Because the criminal law is one of the state's most powerful weapons, its reliance on what are essentially moral precepts must be carefully constrained. It must, for example, fit itself within constitutional norms. It should also cohere with the principle of fair labeling. In this paper, I have attempted to explain why, to the extent that a state wishes to respond to non-consensual pornography, it responds to a powerful and legitimate social concern. That concern is rooted in existing norms around wrongful sexual objectification. Those norms make the offence a valid legislative response. Fair labeling requires that such a crime be defined on its terms and not folded into existing prohibitions. However, it is the gross violation of sexual autonomy, consent norms and personal integrity that merits resort to the penal sanction.

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Conflicts of Interest

The author declares no conflict of interest.

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2. On 12 November 2011, 15-year-old Rehtaeh Parsons went to a house party where, she alleged, four teenage boys raped her. Cellphone photographs of the incident were later distributed to students at Parson's school; and she was the target of extensive online harassment and bullying. Police investigated, but did not lay charges. On 4 April 2013, Parsons attempted suicide, and was taken off life support three days later. Following a flood of criticism, the case was reopened, and in August 2013 two young men were charged with child pornography offences [1].
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4. While chatting on an online web forum, Amanda Todd bared her breasts. An individual she was chatting with captured the image and used it to blackmail her. The photos later began circulating on the Internet and were sent to Todd's classmates and teachers. On 7 September 2012, Todd posted a video to Youtube in which she described enduring two years of torment as the target of online sexual exploitation, stalking, bullying and harassment. On 10 October 2012, she was found dead of an apparent suicide in her Port Coquitlam, British Columbia home. In April 2014, the Royal Canadian Mounted Police confirmed that a Dutch man is facing extortion and child pornography charges in connection with Todd's case [3].
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7. “Steubenville ‘Rape Crew’ Probable Cause Transcript.” Trial Transcript. Available online: <http://www.scribd.com/doc/121842911/steubenville-rape-crew-probable-cause-transcript> (accessed on 4 July 2014).
 8. What has become known simply as “Steubenville” began in that small town in the state of Ohio. On 12 August 2012, an intoxicated 16-year-old girl who left a drinking party with four football players was sexually assaulted. Photos and videos of the incident were immediately circulated to the other students and posted to social media websites. Ohio investigators later analyzed hundreds of text messages from more than a dozen cellphones to create a real-time accounting of the assault. Two of the students were convicted of rape [5–7].
 9. Daren C. Brabham. “Crowdsourcing as a Model for Problem Solving: An Introduction and Cases.” *Convergence* 14 (2008): 75–90.
 10. Crowdsourcing is the method of obtaining information or input for a particular project by enlisting the services of a number of people, either paid or unpaid. It is usually conducted via the Internet. *See* [9].
 11. By May 2014, the bill had passed second reading and was being reviewed in committee. Given its introduction by a majority government committed to a strong “law and order” agenda, the Bill is expected to become law.
 12. Justin Ling. “How Federal Bill C-13 Could Give CSIS agents—Or even Rob Ford—Access to Your Personal Online Data.” *National Post*, 4 May 2014. Available online: <http://news.nationalpost.com/2014/05/04/how-a-new-federal-bill-c-13-could-give-csis-agents-or-even-rob-ford-access-to-your-personal-online-data/> (accessed on 4 July 2014).
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 14. Michael Geist. “The Privacy Threats in Bill C-13, Part Two: The Low Threshold for Metadata.” Available online: <http://www.michaelgeist.ca/content/view/7028/125/> (accessed on 4 July 2014).
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 16. *Criminal Code*, RSC 1985, c C-46.
 17. *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537.
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33. For a discussion of cyberbullying in the Canadian context with additional comparative references, see Canada, CCSO Cybercrime Working Group. *Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-consensual Distribution of Intimate Images*. Ottawa: Minister of Justice and Attorney General of Canada, 2013. Available online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf> (accessed on 4 July 2014).
34. *Cyber Safety Act*, SNS 2013, c 2.
35. In 2013, Nova Scotia became the first Canadian province to create a (non-criminal) law directed at cyberbullying. The *Cyber Safety Act* provides for civil redress (damages and orders) against incidences of cyber bullying, which it defines as "any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social net-works, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably to be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way." [34].

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47. U.S. Const. art I, § 8, cl 18.
48. The U.S. federal government enjoys the power to create offences in areas of specific federal jurisdiction, such as maritime law or crimes against federal officials. But it does not enjoy a general "police power"; that power, being unenumerated, falls to the States [47].
49. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s91(27), reprinted in RSC 1985, App II, No. 5.
50. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467.
51. *RAV v. City of St. Paul* 505 U.S. 377 (1992).
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54. *New York v Ferber*, 458 US 747 (1982)
55. *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.
56. Alaska Stat. § 11.61.120.

57. Tex. Pen. Code Ann. § 09.42.072 (1997).
58. N.J. Stat. § 2C:14-9 (1978).
59. U.S., SB 255, *An act to amend Section 647 of the Penal Code, relating to crimes, and declaring the urgency thereof, to take effect immediately*, 2013–14, Reg. Sess., Cal, 2013 (approved by Governor 01 October 2013).
60. U.S., HB 563, *An act relating to video voyeurism: amending Section 18-6609, Idaho Code, to revise provisions relating to the crime of video voyeurism and to provide that a certain section does not apply in certain circumstances*, 62nd Leg, 2nd Sess, Idaho, 2014 (signed by Governor on 19 March 2014).
61. U.S., HB 71, *This bill modifies Title 76, Utah Criminal Code, regarding distributing intimate images of a person without that person's permission*, 60th Leg, 2014 General Sess, Utah, 2014 (signed by Governor 29 March 2014).
62. U.S., HB 326, *An act to amend and reenact § 18.2-386.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-386.2, relating to unlawful dissemination or sale of images of another; penalty*, 2014 Reg Sess, Va, 2014 (approved by Governor 31 March 2014).
63. U.S., HB 838, *An Act to amend Article 3 of Chapter 11 of Title 16 of the Official Code of Georgia Annotated, relating to invasions of privacy, so as to prohibit the transmission of photography or video depicting nudity or sexually explicit conduct of an adult under certain circumstances; to provide for definitions; to provide for penalties; to provide for venue; to provide for exceptions; to provide for related matters; to repeal conflicting laws; and for other purposes*, 2013–2014 Reg Sess, Ga, 2014 (signed by Governor 15 April 2014).
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65. U.S., HB 2515, *An act amending Title 13, Chapter 14, Arizona Revised Statutes, by adding Section 13-1425; amending Section 13-3601, Arizona Revised Statutes; relating to sexual offenses*, 51st Leg, 2nd Reg Sess, Ariz, 2014 (sent to Governor 24 April 2014).
66. New Jersey classifies crimes in terms of degree, rather than by “felony” and “misdemeanour”. A third-degree crime is therefore less serious than crimes classified in the first or second degree. Canada uses neither classification.
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68. N.J. Stat § 2C: 43-6.a.(3).
69. Fines are also possible.
70. Cal. Pen. Code § 647(4)(A).
71. *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).
72. Because revenge porn laws are content-based, under U.S. constitutional law they are likely to trigger the highest form of judicial scrutiny. Judicial review of such laws generally will apply the so-called “strict scrutiny” test, requiring a compelling government interest for which the

applicable law is narrowly tailored and imposes the least restrictive means. There are exceptions, for example, if the speech falls into historically excluded categories like libel, or is considered “low value” [70,71].

73. *R v Maurer* 2014 SKPC 118 (available on CanLii).
74. Recently, a Canadian court considered a revenge porn case where charges were laid under section 342 which prohibits the theft of computer data. The Court held that the accused (who was given the victim’s computer on a temporary basis and appropriated the images) had not committed theft [73].
75. R. Antony Duff. “Rule-Violations and Wrongdoings.” In *Criminal Law Theory*. Edited by Andrew P. Simester and Stephen Shute. Oxford: Oxford University Press, 2002, pp. 47–74.
76. I describe that case in Section 3. The existence of these four offences does provide one response to those who argue that civil remedies are preferable to criminal ones. The offences make it plain that Parliament—and thus, Canadian society—regards the general behavior reflected in them as a “public wrong”, which is the essence of the criminal sanction. See ([75], p. 53).
77. *Frey v Fedoruk*, [1950] SCR 517 (CanLii).
78. Supreme Court of Canada refused to recognize a criminal offence in the absence of a statutory prohibition [77].
79. If prosecuted by indictment, voyeurism attracts a maximum five-year penalty. It may also be prosecuted by way of summary conviction.
80. “No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good”, ([16], s. 162(6)). The defence is discussed in Section 3 of the paper.
81. *R v Keough*, 2011 ABQB 48 (CanLii).
82. Accused videotaped two people having sex, one of whom was unaware of it [81].
83. *R v Lebenfish*, 2014 ONCJ 130 (CanLii).
84. See, for example, *R v Lebenfish* [83] here the Ontario Court of Justice ruled that a man openly taking pictures of nude sunbathers without their consent did not meet the requirements of voyeurism.
85. See also the discussion of the case at “Nude Beach Photography is not ‘Voyeurism’.” *Canadian IT Law Association*. Available online: <http://www.it-can.ca/2014/04/02/nude-beach-photography-voyeurism/> (accessed on 4 July 2014).
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88. *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352.
89. If prosecuted as an indictable offence, criminal harassment carries a maximum ten-year penalty. It may also be prosecuted by way of summary conviction.
90. *R v Korbut*, 2012 ONCJ 522 (available on CanLii).
91. *R v Manicke* (1992), 79 CCC (3d) 191, 107 Sask R 79 (Sask QB).
92. See *LSJPA—1338*, 2013 QCCQ 7354 (CanLii).
93. Text messages fall within meaning of “telephone call” [92].
94. Child pornography charges were laid in the Rehtaeh Parsons cases [2].
95. In this, Canada is different from the U.S. where child pornography may constitutionally apply only to images of actual children [54].

96. The artistic merit defence was considered in *Sharpe* [55]. Parliament eliminated it in 2005.
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100. For a critique of the concept, see [99].
101. Douglas Husak. "The Costs to Criminal Theory in Supposing that Intentions are Irrelevant to Permissibility." *Criminal Law and Philosophy* 3 (2009): 51–70.
102. Amy Adler. "The Perverse Law of Child Pornography." *Columbia Law Review* 101 (2001): 209–73.
103. *Sex Offender Information Registration Act*, SC 2004 c 10.
104. The *Sex Offender Information Registration Act* (SOIRA) established the National Sex Offender Registry, which contains information regarding persons convicted of offences of a sexual nature. The registry includes the following information regarding the offender: the person's name, date of birth, current address, current photograph, any identifying marks such as tattoos or scars, vehicle information, the person's *modus operandi*, and the offences committed. Pursuant to Section 490.012(1) of the *Criminal Code*, when a court imposes a sentence on a person for certain designated offences the court must make an order requiring the person to comply with the provisions of SOIRA for a period of 10 years or 20 years or for the remainder of the person's life. Failure to comply is itself an offence ([16], s. 490.012(1); [103]).
105. Amy F. Kimpel. "Using Laws Designed to Protect as a Weapon: Prosecuting Minors under Child Pornography Laws." *New York University Review of Law and Social Change* 34 (2010): 299–338.
106. Daniel Schwartz. "The Fine Line between 'Sexting' and Child Pornography." *CBC News*, 13 August 2013. Available online: <http://www.cbc.ca/news/canada/the-fine-line-between-sexting-and-child-pornography-1.1367613> (accessed on 4 July 2014).
107. *R. v. Kosikar* (1999), 178 DLR (4th) 238, 138 CCC (3d) 217 (ONCA)
108. But see *R. v. Kosikar*, holding that a single act is sufficient for conviction under s.264(1). The Supreme Court of Canada has not considered the matter. In my view, *Kosikar* represents an unwarranted judicial expansion of criminal harassment.
109. Bill C-273, *An Act to amend the Criminal Code (cyberbullying)*, 1st Sess, 41st Parl, 2011.
110. In 2012 and 2013, the Canadian Parliament considered *Bill C-273, An Act to amend the Criminal Code (cyberbullying)*, introduced as a private members bill. The bill proposed to amend sections 264 and 372 to clarify that the *actus reus* could be established by communications using a computer. Ultimately, the bill did not survive but it is noteworthy that some legislators thought that current criminal laws would require explicit change in order to apply effectively to cyberbullying [109].
111. *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454.
112. *Police v. Usmanov* [2011] NSWLC 40 (Austl.).
113. *Crimes Act 1961* (New Zealand).
114. The court cited with approval a similar case in New Zealand using the rarely-prosecuted offence of "Crimes against morality and decency" [113].

115. “9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
- (a) of an offence at common law,
 - (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
 - (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
- but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before 1 April 1955, to impose punishment for contempt of court” ([16], s.9).
116. “(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament” ([16], s.8(3)).
117. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(g).
118. *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36.
119. *R v Sedley* (1663), described in Edmund Curll, *Corbett’s Complete Collection of State Trials*, 1727, vol. 17, p. 155, as reproduced in *Learning Canadian Criminal Law*, 11th ed. Edited by Don Stuart, Steve Coughlan and Ron Delisle. Toronto: Thomson Reuters, 2009, p. 1.
120. Such was arguably the case when the Parliament of Canada never responded to the SCC majority decision, in *R. v. Jobidon*, which held that one cannot consent to a fistfight causing or intending to cause serious bodily harm [111]. The decision expanded the circumstances, articulated by Parliament in the existing assault provisions, in which consent to physical touching is considered void. The dissent strongly criticized the Court for ignoring section 9 of the *Code*.
121. Carissima Mathen. “Mutability and Method in the Marriage Reference.” *University of New Brunswick Law Journal* 43 (2005): 43–61.
122. For a criticism of the legislative tendency to shun these sorts of deliberations, see [121].
123. Carissima Mathen, and Michael Plaxton. “HIV, Consent and Criminal Wrongs.” *Criminal Law Quarterly* 57 (2011): 464–85. Available online: <http://ssrn.com/abstract=1927932> (accessed on 4 July 2014).
124. For a discussion of these dangers, albeit in a different context, see [123].
125. *House of Commons Debates*, 41st Parl, 2nd Sess, No. 075 (28 April 2014).
126. Both the Official Opposition New Democratic Party, and the Liberal Party of Canada have made statements in favour of the new offence, though they take issue with other parts of the Bill [125].
127. *R v Katigbak*, 2011 SCC 48, [2011] 3 SCR 326.
128. *R v Hicklin* (1868), LR 3 QB 360 [53].
129. Additionally, uttering threats can be a form of assault ([16], s. 265 (1)(b)).
130. *R v Keegstra*, [1995] 2 SCR 381, 124 DLR (4th) 289.
131. Martha Nussbaum. “Objectification.” *Philosophy and Public Affairs* 24 (1995): 249–90.

132. An excellent analysis of objectification, and the circumstances under which it is morally problematic, is offered by Martha Nussbaum [131].
133. *R v Chase*, [1987] 2 SCR 293, 45 DLR (4th) 98.
134. *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478.
135. John Gardner, and Stephen Shute. "The Wrongness of Rape." In *Oxford Essays in Jurisprudence, Fourth Series*. Edited by Jeremy Horder. Oxford: Oxford University Press, 2000, pp. 193–218.
136. Douglas Husak. "Gardner on the Philosophy of the Criminal Law." *Oxford Journal of Legal Studies* 29 (2009): 169–87.
137. Supreme Court Justice Cory famously acknowledged the offence's unique nature in *R v Osolin*, noting that it both assaults human dignity and denies gender equality [134].
138. Section 273.1 of the *Criminal Code* defines consent as "the voluntary agreement to engage in the (sexual) activity in question". The provision then elaborates a number of circumstances where consent does not obtain. In addition, section 273.2 states that an accused may not rely on an honest but mistaken belief in consent where he or she fails to take "reasonable steps, in the circumstances known to the accused at the time, to ascertain" that consent." These provisions apply only to sexual offences ([16], ss. 273.1, 273.2).
139. *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193.
140. *R v JA*, 2011 SCC 28, [2011] 2 SCR 440.
141. *R v Mabior*, 2012 SCC 47, [2012] 2 SCR 584.
142. *R v Hutchinson*, 2014 SCC 19 (available on CanLii).
143. Even in a case of fraud vitiating consent, proof of actual harm is not required [141,142].
144. Section 273.2 [134].
145. Because of the accompanying physical contact, one can usually draw a straightforward line around objectification in the sexual assault context. But the line has fuzzy edges. For example, some members of the Supreme Court of Canada have expressed concern that sexual assault law should not capture all manner of sexual wrongdoing [142].
146. *Sansregret v The Queen*, [1985] 1 SCR 570, 17 DLR (4th) 577.
147. *Pappajohn v The Queen*, [1980] 2 SCR 120, 111 DLR (3d) 1.
148. This leads to another point that is critical in the online context: the potential criminal liability for ISPs which provide the platforms by which such material is most likely to be disseminated, viewed and consumed. Though beyond the scope of this paper, I suggest that the use of subjective *mens rea* warrants especial caution in its application to such parties, especially those which are engaged in large-scale provision of Internet services as opposed to operating, say, sites devoted to revenge porn. In particular, care must be taken to not confuse the reference to "recklessness" with a negligence standard.
149. *R v Bulmer*, [1987] 1 SCR 782, 33 CCC (3d) 385.
150. *Per* Dickson CJC (dissenting but not this point): "Canadian juries, in my experience, display a high degree of common sense, and an uncanny ability to distinguish between the genuine and the specious" ([147], para. 156).
151. Carissima Mathen. "Reflecting Culture: Polygamy and the Charter." *Supreme Court Law Review* 57 (2012): 357–74.

152. John Rawls. *A Theory of Justice*. Cambridge, MA: Belknap, 1971.

153. See also [151]. My argument here borrows from the notion of “reflective equilibrium” as developed in John Rawls, *A Theory of Justice* [152].

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