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Sexual Privacy

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DANIELLE KEATS CITRON*

Sexual Privacy

ABSTRACT. *Those who wish to control and expose the identities of women and people from marginalized communities routinely do so by invading their privacy. People are secretly recorded in bedrooms and public bathrooms, and "up their skirts." They are coerced into sharing nude photographs and filming sex acts under the threat of public disclosure of their nude images. People's nude images are posted online without permission. Machine-learning technology is used to create digitally manipulated "deep fake" sex videos that swap people's faces into pornography.*

At the heart of these abuses is an invasion of sexual privacy—the behaviors and expectations that manage access to, and information about, the human body; gender identity and sexuality; intimate activities; and personal choices. More often, women and marginalized communities shoulder the abuse.

Sexual privacy is a distinct privacy interest that warrants recognition and protection. It serves as a cornerstone for sexual autonomy and consent. It is foundational to intimacy. Its recognition would acknowledge the subordinating impact of invasions of sexual privacy. Traditional privacy law's efficacy, however,

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is eroding just as digital technologies magnify the scale and scope of the harm. Comprehensive legislation is essential to address all manner of sexual privacy invasions. This Article proposes a uniform approach to sexual privacy that includes federal and state penalties for privacy invaders, removes the statutory immunity from liability for certain content platforms, and works in tandem with hate crime laws.

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INTRODUCTION

The barriers that protect information about our intimate lives are under assault. Networked technologies are being exploited to surveil and expose individuals' naked bodies and intimate activities. Home devices are hijacked to spy on intimates and ex-intimates.[1] Hidden cameras are used to film people in bedrooms and restrooms, and "up their skirts." People are coerced into sharing nude images and making sex videos under threat of public disclosure.[2] They are ordered to tell no one, pairing forced exhibition with coerced silence.[3] Sexually explicit images are posted online without subjects' permission.[4] Technology enables the creation of hyper-realistic "deep fake" sex videos that insert people's faces into pornography.[5]

At the heart of all of these abuses is an invasion of sexual privacy. Sexual privacy involves the social norms that manage access to, and information about, individuals' intimate lives. Far more than sex is involved. Sexual privacy concerns the parts of the human body associated with sex and gender. It involves information about sexual orientation and gender identity. It includes intimate activities and the zones in which those activities occur. It involves personal decisions about one's intimate life. Sexual privacy, as I am using the term, is both descriptive and normative. It concerns how sexual privacy is currently experienced and how it should be experienced.

Sexual privacy is a distinct privacy interest that sits at the apex of the hierarchy of privacy interests.[6] It warrants special protection given its importance to sexual autonomy, self-development, intimacy, and equality. Sexual privacy enables individuals to determine who has access to their bodies and intimate information. It gives them breathing room to experiment with their bodies, sexuality, and gender before going "on stage" with them.[7] It facilitates self-respect and secures the social bases for respect. Sexual privacy allows individuals to see themselves as authors of their

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[1]Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES, June 24, 2018, at A1.

[2] BENJAMIN WITTES, CODY POPLIN, QUINTA JURECIC & CLARA SPERA, BROOKINGS INSTITUTE, SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT (2016).

[3] *Id.*

[4] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

[5] Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, CALIF. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213954.

[6] David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221 (2016) (calling for scholars to distinguish the value of different privacy interests so that policymakers can make meaningful decisions when privacy interests are in conflict).

[7] CHARLES FRIED, AN ANATOMY OF VALUES 140 (1970).

intimate lives and for others to see them as human beings rather than as just their genitalia or sexuality.[8]

Intimate relationships have difficulty forming in the absence of sexual privacy. Intimate relationships develop through a process of mutual self-disclosure and mutual vulnerability.[9] Over time, partners grow to trust one another with their innermost thoughts and feelings.[10] If that trust has been betrayed, individuals have difficulty letting their guard down in future relationships.[11]

Equal opportunity is on the line as well. In the present, as in the past, individuals from marginalized communities shoulder the brunt of the abuse.[12] Invasions of sexual privacy make it difficult for targeted individuals to enjoy all of life's crucial opportunities. Victims suffer stigmatization after their naked bodies are exhibited online. They lose their jobs and have difficulty finding new ones. They experience feelings of humiliation and shame.

Despite sexual privacy's importance, reform efforts have proceeded slowly. This is partially because policymakers have dealt with particular invasions of sexual privacy in isolation. One day, they address nonconsensual pornography and the next they tackle sextortion or "up skirt" photos. Because the full breadth of the harm is not in view, any given setback appears to have low stakes.

Social attitudes have stymied reform efforts as well. Some contend that no attention is warranted because invasions of sexual privacy involve problems of victims' making.[13] Some worry that efforts to protect sexual

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[8] *See, e.g.*, JANET MOCK, REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE (2014); JENNIFER FINNEY BOYLAN, SHE'S NOT THERE: A LIFE IN TWO GENDERS (2003); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMAN. 195, 241 (1995).

[9] IRWIN ALTMAN & DALMAS TAYLOR, SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS (1973).

[10] EDWARD J. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY 181 (1978). As Edward Bloustein explains, "[l]overs fashion intimacy by telling each other things about themselves that they would not share with anyone else."

[11] CHARLES FRIED, THE ANATOMY OF VALUES 140 (1980).

[12] Scott Skinner-Thompson, *Privacy's Double Standards*, WASH. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134500 (explaining that marginalized communities are disproportionately subject to unwanted surveillance); Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673 (2017).

[13] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Citron & Franks, *supra* note, at; Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392–95 (2009) (exploring recurring patterns animating society's trivialization of harms disproportionately impacting women like domestic abuse, workplace sexual harassment, and cyber gender harassment).

privacy reinforce outmoded views of sexual modesty and shame.[14] Others warn that sexual privacy would simply hide abuse of the vulnerable.[15]

But sexual privacy need not work this way.[16] If we recognized invasions of sexual privacy as a uniform phenomenon, we would be able to see the full breadth of the fallout. Dismissing sexual privacy because victims "asked for it" is just another way to trivialize harms of people from marginalized communities.[17] Rather than re-inscribing shame, the protection of sexual privacy conveys respect for individuals' sexual autonomy and choices about their intimate lives, and it affirms the importance of trust in intimate relationships. Efforts to hide abuse or coercion under the guise of "privacy" deserve no protection, let alone sexual privacy.

This Article focuses on invasions of sexual privacy at the hands of private individuals, leaving extensive discussion of governmental and

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[14] JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006). This critique has early tort bona fides. For instance, late nineteenth-century privacy tort decisions reflected "paternalistic attempts to keep 'ladies' out of the public gaze." JESSICA LAKE, THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY 225, 10 (2016). This argument is one I consistently faced when presenting work on nonconsensual pornography that I coauthored with Mary Anne Franks. Some feminist scholars pushed back on our call to criminalize the nonconsensual posting of a person's nude images as affirming the view that women should be ashamed of their nude bodies. But the punishment of nonconsensual pornography would not re-inscribe shame. Instead, it would make clear that each and every one of us should be able to decide who gets to view our naked bodies. As Part I argues, sexuality—including our nude bodies—is crucial to human agency and identity development. It is bound up in the ability to forge relationships of love and trust. The nonconsensual posting of people's nude images undermines respect for their choices about their sexual selves, and it corrodes their sense of trust. It does not say that they ought to be ashamed of their sexuality.

[15] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW 93, 101–02 (1987); Reva B. Siegel, *'The Rule of Love:' Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Sexual privacy should not be abandoned for fear of its distortion to hide abuse or coerce silence, whether it is domestic abuse or sexual predation as in the cases of Harvey Weinstein, Charlie Rose, and Matt Lauer. Instead, sexual privacy, understood correctly, should be recognized and protected when it affirms autonomy, enables intimacy, and secures equality.

[16] In this Article, I emulate the spirit of Anita Allen's scholarship, which has sought to identify beneficial forms of privacy and private choice to which women and minorities can lay claim, *see, e.g.*, ANITA L. ALLEN, UNEASY ACCESS (1988); Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000); Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 442 (1990), as well as Linda McClain's scholarship, which has called for an "egalitarian, liberal feminist conception of privacy." *See, e.g.*, Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995).

[17] Citron, *Law's Expressive Value*, *supra* note, at 392–95.

corporate invasions of sexual privacy for later work.[18] Why concentrate on interpersonal wrongdoing? Law addresses some invasions of sexual privacy, no doubt because the harm suffered is viscerally palpable. This provides a foothold to assess existing law and norms concerning sexual privacy.

Neither tort law nor criminal law has protected sexual privacy as clearly or as comprehensively as it should.[19] Some victims are left with little or no legal redress; some abusers are punished in an inconsistent manner. For instance, neither criminal law nor the privacy torts are likely to cover up-skirt photos, and a grab bag of criminal laws cover sextortion but result in the disparate treatment of perpetrators depending on the victims' age.[20]

This is the time to develop a comprehensive understanding of sexual privacy and to make an explicit commitment to protect it. Traditional privacy law's efficacy is eroding just as digital technologies magnify the scale and scope of the harm. Thanks to networked technologies, sexual privacy can be invaded at scale and from across the globe.[21] Search engines ensure the prominence of posts far into the future.[22] In some cases, the damage can be permanent.[23]

Comprehensive federal and state legislation is essential to address all manner of sexual privacy invasions. It would fill gaps in existing legal frameworks that currently enable a culture of impunity for bigoted abuse. It should be paired with hate crime provisions that enhance penalties for bias-motivated invasions of sexual privacy. Content platforms should not be immune from legal liability if they knowingly enable invasions of sexual privacy. This approach would allow us to take a full account of the structural impact of sexual privacy invasions.

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[18] Although this Article focuses on individual wrongdoing and law's role addressing it, it refers to state action invading sexual privacy to provide context for my piece. My future work will explore governmental and corporate practices impacting sexual privacy. For instance, it will consider governmental outing of people's sexuality, gender identity, and HIV status; state laws requiring that people frequent bathrooms that accord with the sex assigned on their birth certificates; state denial of services to transgender individuals; the mandatory collection of intimate information to obtain government services; the use of automated predictions about our intimate lives among other issues. Scholars have drawn attention to these issues, and my later work will build on their important insights. *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); Kendra Albert, *The Double Binds of Transgender Privacy* (on file with author); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015).

[19] *See* Part III.

[20] WITTES ET AL., *supra* note, at.

[21] Brian Krebs, *Sextortion Scam Uses Recipient's Hacked Passwords*, KREBS ON SECURITY (July 18, 2018), https://krebsonsecurity.com/2018/07/sextortion-scam-uses-recipients-hacked-passwords/.

[22] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

[23] Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1804 (2010).

Although it would likely have a modest impact, the privacy torts should be expanded to reflect the lived realties of women and minorities. Meaningful protection for sexual privacy would include tort remedies for certain disclosures of intimate information in violation of another's trust and confidence. Another important task is to identify market efforts that valuably advance the project of sexual project without risking too much of it.

I. SEXUAL PRIVACY

A. *CONCEPT*

In everyday interactions, we erect boundaries around our personal information, bodies, and activities.[24] We seclude some physical spaces and not others; we keep some conversations confidential and share others with third parties.[25] We make social media posts visible to some friends and hide them from others.[26]

Sometimes, law protects the boundaries that free us from scrutiny and exposure. To take a few well-known examples, law restricts the handling of personal data in government databases.[27] It limits the collection, use, and disclosure of financial information,[28] educational records,[29] social security numbers,[30] and driver's license numbers.[31] It protects the privacy of political activities—for instance, our votes are anonymous to prevent retaliation and reduce social pressure.[32] At other times, law does not protect privacy but it should.

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[24] IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, AND CROWDING 50 (1975); Kirsty Hughes, *A Behavioral Understanding of Privacy and its Implications for Privacy Law*, 75 MODERN L. REV. 806, 810–13 (2012).

[25] SOLOVE, UNDERSTANDING PRIVACY, *supra* note, at (offering a taxonomy of sixteen types of privacy problems, including intrusion, disclosure, collection, interrogation, use, anonymity, and invasion).

[26] Woodrow Hartzog & Frederic D. Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1 (2013).

[27] Privacy Act of 1974, 5 U.S.C. § 552(a); *see* PRISCILLA REGAN, LEGISLATING PRIVACY (1995).

[28] Daniel J. Solove & Danielle Keats Citron, *Risk & Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737 (2018).

[29] Family Educational Rights & Privacy Act, 20 U.S.C. § 1232(g); 34 C.F.R. pt. 99.

[30] Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241 (2007).

[31] Citron, *Mainstreaming Privacy Torts*, *supra* note.

[32] Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER (Oct. 13, 2008). In the landmark decision of *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court struck down an Alabama law requiring the disclosure of members of the civil rights group on First Amendment grounds. Thanks to Nestor Davidson for urging me to include this point.

Whether privacy is warranted depends upon the settings, contexts, and expectations in which those boundaries are erected.[33] Crucial to those settings, contexts, and expectations is *sex*—the human body, gender identity, sexual orientation, intimate activities, and personal decisions.[34]

We have certain expectations about the seclusion of bedrooms, dressing rooms, and public restrooms. We make assumptions about who, if anyone, gets to see us naked, having sex, or taking a shower. We have certain expectations about the knowledge that others have about our sex lives, sexual orientation, or transgender identity.

Consider these examples of the experience of sexual privacy. A man takes off his clothing in a gym locker room assuming that there are no hidden cameras there. Transgender teenagers try on clothing that matches their gender once family members leave their homes—the solitude frees them to be themselves.[35] A couple has sex in their bedroom, believing that no one is watching them there. A man shares nude images with his boyfriend on the understanding that the photos are for their eyes only. A woman walks into a store, assuming that employees cannot see, let alone videotape her, up her skirt.

B. VALUE

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[33] DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 44-46 (2008). Privacy has been studied from a wide range of perspectives, across disciplines. *See, e.g.*, ARI WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR THE INFORMATION AGE (2018); WOODROW HARTZOG, PRIVACY'S BLUEPRINT (2017); NEIL RICHARDS, INTELLECTUAL PRIVACY (2015); JULIE COHEN, CONFIGURING THE NETWORKED SELF (2010); PRISCILLA REGAN, LEGISLATING PRIVACY (1995); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY (1971); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607 (1999). Some scholars have searched for a common denominator for privacy. *See, e.g.*, ALAN WESTIN, PRIVACY AND FREEDOM (1970). Other scholars reject the notion that privacy has a singular value and instead focus on privacy's operation in context. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008) (arguing that privacy should be understood as a family of interrelated problems); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2009) (offering a theory of "contextual integrity" in which contextual norms shape privacy protection). I take a "ground up" approach in exploring how sexual privacy is and should be experienced.

[34] PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 57 (1996). In her book PRIVACY AND THE POLITICS OF INTIMATE LIFE, published in 1996, Patricia Boling explored how privacy functions, focusing on the Supreme Court's decisional privacy opinions such as *Griswold*, *Roe*, and *Bowers*.

[35] See BOYLAN, *supra* note, at 32 (recalling her teenage years before her transition when she would try on her mother's clothes after everyone left the house); MOCK, *supra* note, at (discussing trying on her best friend's skirts and sweaters in her friend's bedroom). As Jennifer Finney Boylan explains: "Dressing up was a start; it enabled me to use the only external cues I had to mirror how I felt inside. Yet it was the thing inside that I wanted to express. . . . the nights when I was alone . . . 'being female' were always a great relief for me." *Id.* at 31–32.

Sexual privacy should be recognized as a distinct privacy interest that implicates a "different domain of value" than other privacy interests.[36] It sits at the apex of the hierarchy of privacy values and should be protected as such.[37] Scholars have provided important analytical building blocks for recognizing sexual privacy as a category of privacy deserving special protection. Anita Allen has shown the significance of sexual privacy for women and LGBTQ individuals.[38] Linda McClain has highlighted the importance of women's liberty to make decisions about their bodies.[39] As Khiara Bridges has shown, poor nonwhite mothers need freedom from invasive state interrogations about their intimate histories to protect their dignity and equal citizenship.[40]

The section explains why sexual privacy deserves special protection. It explores sexual privacy's centrality to sexual autonomy, identity development, and intimacy. It highlights sexual privacy's significance to anti-subordination efforts.

1. *Autonomy Securing*

Sexual privacy provides the foundation for sexual autonomy and consent. It enables individuals to set boundaries around their intimate lives.[41] It lets them determine the contexts in which their naked bodies can be seen, recorded, photographed, or exhibited. It permits them to decide if and to what extent their intimate information will be revealed, shared, or disclosed to others. It allows them to decide if their sexual identities can be used in sex videos.

The consent that sexual privacy facilitates is contextual—it does not operate as an on-off switch.[42] If a person allows an intimate partner to take her nude photograph, sexual privacy enables the person to ask the partner to delete the photograph or not to share it with anyone else. If a person shares her childhood sexual assault with an intimate partner, sexual privacy allows that person to ask the partner to keep the information confidential.

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[36] *Id.*
[37] Pozen, *supra* note, at 231.
[38] *See, e.g.*, ALLEN, UNEASY ACCESS, *supra* note, at. For instance, Allen described workplace sexual harassment as a matter of sexual privacy. When male supervisors stared at female employees' breasts and tried to grope them at work, they invaded women's ability to keep their sexual identities in the background. *Id.* They pierced women's sexual anonymity and forced the exhibition of their sexuality. *Id.*
[39] McClain, *supra* note, at.
[40] Bridges, *supra* note, at.
[41] Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMAN. 195, 241 (1995).
[42] Citron & Franks, *supra* note, at.

If a person rents an apartment, sexual privacy enables that person to let the handyman into her apartment to fix a leak without suggesting that the handyman has permission to install a coat hook camera in her bathroom.

The autonomy that sexual privacy secures is essential to self-development.[43] The human body serves as a "basic reference" for identity formation.[44] It influences how individuals understand, develop, and construct their gender identity or sexuality.[45] As Julie Cohen thoughtfully explains, one's sense of self is bound up in "performance and performativity."[46] Free from the public's glare and inspection, individuals can experiment with their intimate identities.[47] They can explore their sexual orientation or gender identity before "going on stage" with them.[48] Sexual privacy shapes the performance of "social identity."[49]

Being able to reveal one's naked body, gender identity, or sexual orientation at the pace and in the way of one's choosing is crucial to self-development.[50] When the revelation of one's sexuality or gender is out of one's hands at pivotal moments, it can be shattering to identity formation.[51] As Anna Lauren Hoffmann insightfully explains, "being forced to reveal or go by the wrong gender or the wrong name triggers feelings of dysphoria

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[43] Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 40 (1977) (arguing that privacy accorded intimate affairs conveys to individuals that their lives are their own).

[44] MAURICE MERLEAU-PONTY, THE PHENOMENOLOGY OF PERCEPTION (2013); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L L. REV. 233, 266 (1977). The body can be a source of empowerment, but it also can be a source of deep anxiety when it does not match one's experience of gender. Janet Mock writes movingly about how her genitals taunted her—she felt like a girl from a tender age and her genitals served as a rebuke to that feeling. MOCK, *supra* note, at.

[45] We perform and construct gender identity; gender identity is not fixed or static. Paula Korenhof & Bert-Jaap Koops, *Gender Identity and Privacy: Could a Right to Be Forgotten Help ~~Andrew~~ Agnes Online?* SSRN Electronic Journal (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304190. Our gender identity may not match how culture understands our bodies. JUDITH BUTLER, GENDER TROUBLE 7 (1990) (explaining that culture and norms link some parts of our bodies—genitalia, female breasts, and buttocks—to our person in a way that other body parts are not); *see* Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 5, 1257, 1273–77 (2003) (exploring treatment of genitalia and "states of undress" as matter of culture, threat, and risk).

[46] JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 130 (2012).

[47] KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 197 (2017).

[48] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). Irwin Altman explains that "when the permeability of these boundaries [to the self] is under the control of a person a sense of individuality develops." IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, CROWDING 49–50 (1975).

[49] ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

[50] McClain, *Reconstructive Tasks*, *supra* note, at 772.

[51] Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, HYPATIA, Summer 2007, at 43, 50.

and humiliation."[52] The psychic trauma produced by the unwanted exposure of one's gender or sexual orientation can alter a person's life plans.[53]

Sexual privacy allows individuals to figure out their *future selves*.[54] It secures the ability to make life-defining decisions.[55] It gives individuals "breathing space away from familial or societal censure necessary for decisional privacy—e.g., to choose whether to have an abortion."[56] As the Court underscored in *Lawrence*, personal decisions related to sexual intimacy permit individuals to define their "concept of existence, of meaning, of the universe, and of the mystery of human life."[57]

Sexual privacy's importance to sexual autonomy and self-development was at the heart of Samuel Warren and Louis Brandeis's landmark article *The Right to Privacy*. Although Warren and Brandeis seemed to address a rarified problem—press coverage of upper crust dinner parties[58]—their project had broad implications for sexual privacy.[59] Warren and Brandeis tackled the harm wrought by journalists' "sordid spying" into the "home of a family."[60] They warned of "daily papers" broadcasting the "details of

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[52] Anna Lauren Hoffmann, *Data, Technology, and Gender: Thinking About (and From) Trans Lives*, *in* SPACES FOR THE FUTURE: A COMPANION TO PHILOSOPHY OF TECHNOLOGY (Joseph C. Pitt & Ashley Shew eds., 2017).

[53] *Id.*

[54] Lawrence v. Texas, 539 U.S. 558 (2003).

[55] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). A robust literature challenges the Court's decision in *Roe v. Wade* to base the right to make important intimate decisions on privacy. *See, e.g.*, Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 1020 (1984); John Hart Ely, *The Wages for Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 930 (1973). Important scholarship has criticized *Roe* for failing to secure the right to privacy for the poor. *See, e.g.,* Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 123 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1424 (1991); Anita Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987). I leave these concerns and the relationship between decisional privacy and informational privacy for my book project on sexual privacy.

[56] Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203–04 (1998). Privacy in reproductive decisions protects an individual from having to tell the state about her reasons for exercising the choice to terminate a pregnancy. *Id.*

[57] *Lawrence*, 539 U.S. at 573–74 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[58] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 98 (2009) (explaining how prominent Bostonian Samuel Warren convinced his law school classmate and law firm partner Louis Brandeis to coauthor the *The Right to Privacy* because he was displeased with the attention that the press paid to his social life, in particular the dinner parties hosted by his wife Mabel, the daughter of a U.S. Senator).

[59] A little-known reason behind Samuel Warren's interest in a right to privacy was his younger brother Ned's homosexuality. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128 (2016). As Charles Colman argues, Warren might have viewed the article as a way to protect his family from public scrutiny of his brother's sexuality. *Id.*

[60] *Id.* at 202 n.1.

sexual relations."[61] Warren and Brandeis argued that individuals and society suffer when intimacies "whisper[ed] in the closet" are "declared from the rooftops."[62] In their estimation, exposing the "fact" of a "domestic occurrence" without consent risked "spiritual" harm even greater than "material" harm.[63]

Warren and Brandeis called for tort law to recognize a "right to be let alone" in the "sacred precincts of private and domestic life."[64] Individuals needed to control how much others knew about the "domestic circle."[65] They needed to "determine the extent to which [their] thoughts, sentiments, and emotions shall be communicated to others."[66] As Warren and Brandeis argued, a "right to privacy" was essential to developing the "inviolate personality."[67]

An aspect of the "inviolate personality" is human dignity—the recognition that individuals determine the arc of their intimate lives.[68] Sexual privacy enables self-respect by affirming that individuals have agency over their intimate identities. Julie Innes described the absence of privacy in this way: "[i]f people can freely go into individuals' homes" and "learn[] all matters about [them], without saying yes, it is difficult to imagine how [anyone] would ever recognize" themselves as the authors of their intimate lives.[69]

The ability to manage access to one's naked body and intimate information enables individuals to present themselves as dignified and whole.[70] It is integral to what Leslie Henry calls "dignity as personal integrity"—having the social bases of self-respect.[71] When intimate information is "removed from its original context and revealed to strangers, individuals are vulnerable to being misjudged" on the basis of their tastes,

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[61] Samuel L. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).
[62] *Id.* at 197.
[63] *Id.* at 197, 205.
[64] Id. at 195.
[65] *Id.* at 205.
[66] *Id.* at 198.
[67] *Id.* at 205.
[68] As Leslie Henry explores in her important scholarship, dignity encompasses pluralistic values in the jurisprudence of the Supreme Court. Leslie Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011). The Court has used the term dignity in five distinct yet complementary ways—institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity. *Id.* at 177. Relying on the Court's opinions, Henry shows that "each conception of dignity has a judicial function oriented toward safeguarding substantive interests against dignitary harm." *Id.* I rely on Henry's insights to underscore dignitary harms that accompany sexual privacy invasions.
[69] INNES, *supra* note, at 109.
[70] *Id.*
[71] Henry, *supra* note.

preferences, or activities.[72] When individuals' private sexual reading material or intimate habits are exposed to strangers, they may be "reduced, in the public eye, to nothing more than the most salacious book [they] once read" or sexual activity.[73]

For instance, when individuals' transgender identity or sexuality is subject to unwanted exposure, they risk being viewed as *just* their transgender identity or sexuality. Janet Mock explained her reluctance to tell colleagues about her trans womanhood in this way: "I felt that if I told people I was trans . . . being trans would become the focus on my existence, and I would be forced to fight the image catalogued in people's minds about trans people."[74]

The unwanted exposure of people's nude bodies can give them a "diminished status," which is often internalized "as a lack of full self-esteem."[75] Of course, undressed bodies appear in advertising, films, and television shows—but what violates human dignity in some contexts is unremarkable in others.[76] As Martha Nussbaum explains, "sexuality is an area of life in which disgust often plays a role."[77] Sex signifies our animal nature because it involves the exchange of bodily fluids.[78] In nearly all societies, "people identify a group of sexual actors as disgusting or pathological, contrasting them with 'normal' or 'pure' sexual actors (prominently including the people themselves and their own group)."[79]

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[72] Rosen, *supra* note, at 9.

[73] *Id.* at 9.

[74] MOCK, *supra* note, at.

[75] *See* Martha C. Nussbaum, *Objectification and Internet Misogyny*, *in* THE OFFENSIVE INTERNET 68 (Saul Levmore & Martha C. Nussbaum eds., 2010) (discussing online posters' description of rape fantasies of female law students); *see also* MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 363 (2013).

[76] As Roisin Kiberd noted of celebrities who appeared nude on film but who suffered deep embarrassment after the theft and posting of nude images, "with a stolen image, the value is doubled: The woman is naked and the viewer isn't supposed to be seeing what they are seeing." Roisin Kiberd, *Why the Fappening Keeps Happening*, VICE (Apr. 12, 2017).

[77] MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 17 (2010).

[78] *Id.*

[79] *Id.* There is a similar dynamic at work when the State interrogates poor black mothers about their intimate lives when they apply for Medicaid. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017). As Bridges documents in her scholarship, the State demands to know about poor mothers' intimate activities, which have no bearing on their physical health or the well-being of the fetus. Poor mothers are asked whether their pregnancies were planned, how many sexual partners they have had, whether they are sexually adventurous, whether they have experienced sexual assault, and if they have ever exchanged sex for money or gifts. *Id.* at 111. By forcing poor mothers to reveal their histories with abortion, sexual assault, and prostitution, the State reduces them to those experiences. Poor mothers cannot present authentic identities—they are sexual assault victims, prostitutes, or sexual deviants. The State's interrogations violate human dignity by saying that poor mothers are the *type* of people who are unworthy of privacy. *See* Danielle Keats Citron, *A Poor Mother's*

Those groups often include those who do not fall in line with heteronormativity—women who have had more than one sexual partner, LGBTQ individuals, and individuals in multiple sexual relationships.[80]

None of this is to suggest that sex, gender, or sexuality are the essence of individuals' identities.[81] Other aspects of people's lives are profoundly important to identity formation. As Neil Richards argues, being able to manage boundaries around one's intellectual activities like reading, writing, and speaking is crucial to self-development.[82] Without intellectual privacy, individuals might feel pressured to conform to the bland and uncontroversial.[83] Just as the recognition of intellectual privacy does not mean that reading, writing, and speaking determine individuals' personhood, the recognition of sexual privacy does not mean sex, gender, and sexuality exclusively define who individuals are.

2. *Intimacy Enabling*

Another crucial aspect of sexual privacy is its role in fostering intimacy.[84] Intimate interactions need protection from the public glare to flourish.[85] Sexual privacy frees individuals to experience physical intimacy.[86] It lets intimate partners "give themselves over" to each other

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Right to Privacy: A Review, 98 B.U. L. REV. (forthcoming 2018) (reviewing *The Poverty of Privacy Rights* and comparing the work of Bridges to that of Charles Reich in providing a theory of privacy for the marginalized).

[80] Nussbaum, *supra* note, at (explaining that the sexuality of women and LGBTQ individuals are often shamed as disgusting); Of course, mutual revelation, so crucial to identity development, is not always egalitarian. Jimmie Manning & Danielle M. Stern, *Heteronormative Bodies, Queer Futures: Toward a Theory of Interpersonal Panopticism*, 21 INFO., COMM. & SOCIETY 208, 219 (2018) (arguing that sexuality is often shamed if it does not fall in line with heteronormativity, including women who are punished for having more than one sex partners whereas men are not).

[81] Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 752 (1989) (contending that conceptions of privacy linked to self-determination risks embracing essentialized identities—women as mothers—and offering a view of privacy based on the prevention of totalitarian state control over citizens).

[82] RICHARDS, *supra* note, at.

[83] *Id.*; Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008); *see also* Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181 (2008); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425–26 (2000).

[84] WALDMAN, *supra* note, at; *see also* Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978) (arguing that intimacy and intimate relationships could not exist without privacy); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1977) (same); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 326 (1975) (same).

[85] Boling, *supra* note, at 68.

[86] Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 20 (1998). Of course, mutual revelation of our bodies is not always egalitarian. Manning & Stern, *supra* note, at 217. Unwanted pressure to reveal one's body to an intimate partner can undermine

physically and "to be who they are—at least as bodies—intensely and together."[87] When this takes place in the context of caring, physical intimacy is an aspect and expression of love.[88]

Sexual privacy not only enables physical intimacy, but it also provides an essential condition for the formation of intimate relationships.[89] Charles Fried contends that, "[t]o respect, love, trust, or feel affection for others and to regard ourselves as the object of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion."[90] Said another way, love is "inconceivable" without sexual privacy.[91]

Social psychological research shows the importance of sexual privacy to intimate relationships. Intimacy develops through a social process.[92] Crucial to intimate relationships is reciprocal self-disclosure.[93] As relationships develop, intimate partners share "vulnerable, socially undesirable facets of the self" on the expectation that that they will be discreet with each other's confidences.[94] Intimate partners grow to trust each other with their innermost thoughts and feelings.[95] Intimate relationships deepen as couples continue the process of mutual sharing and mutual discretion.[96]

The Supreme Court has recognized the relationship between privacy and intimacy. In *Roberts v. Jaycees*, the Court acknowledged that people in highly personal relationships share "special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[97] The Court attributed the constitutional shelter afforded highly personal relationships to the "realization that individuals draw much of

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meaningful identity development and intimacy. See Citron & Franks, *supra* note, at (discussing how domestic abusers pressure partners to reveal intimate images).

[87] Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 35 (1977) (arguing that the context of caring makes the sharing of personal information significant).

[88] *Id.*

[89] CHARLES FRIED, AN ANATOMY OF VALUES 137, 140 (1970).

[90] *Id.* at 140.

[91] IRWIN ALTMAN & DALMAS TAYLOR, SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS 6 (1973).

[92] *Id.* at 136.

[93] *Id.* at 150. In *The Art of Loving*, Erich Fromm explains that love relationships allow a person to know himself, the other person, and humanity. ERICH FROMM, THE ART OF LOVING 47 (1956). When people share innermost thoughts, values, and attitudes—what Fromm calls the core—then they perceive their "identity, the fact of [their] brotherhood." *Id.*

[94] *Id.* at 169.

[95] *Id.* at 77.

[96] See WALDMAN, *supra* note, at 67.

[97] *Id.*

their emotional enrichment from close ties with others."[98] "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[99]

Scholars have argued that "relationships of love, liking, and caring" are the only reason that we should care about privacy.[100] Although sexual privacy is indispensable for intimacy, it matters even when intimate relationships are not involved. We need privacy when we try on clothing in a store, take a shower at the gym, or visit a public restroom. We need to decide for ourselves who knows about our transgender identity or sexual preferences even if such sharing has nothing to do with intimate relationships and even if we are out to certain friends. We need sexual privacy in our nude photos regardless of whether we created them in the context of an intimate relationship. Sexual privacy is indispensable to the development of intimate relationships but it is not the only reason why it deserves protection.

3. *Equality Protecting*

The connection between sexual privacy and the quest for gender, racial, sexual, and economic equality is undeniable.[101] Invasions of sexual privacy disproportionately impact individuals from marginalized communities. It

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[98] Roberts v. United States Jaycees, 468 U.S. 618 (1984).

[99] *Id.* at 619 (citing dissent of Justice Brandeis in *Olmstead v. United States* and *Stanley v. Georgia*).

[100] *See, e.g.*, JULIE C. INNES, PRIVACY, INTIMACY, AND ISOLATION (1992) (contending that privacy only warrants protection if it involves decisions about and access to information about acts or matters that "draw value and meaning" from an agent's "love, caring, or liking"); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) (arguing that "intimacy" and the "intimacies of personal identity" are the "chief restricting concept in the definition of privacy"). This literature reinforces my argument that sexual privacy is distinctly worthy of protection, but I am not arguing that sexual privacy is the only kind of privacy that matters. American law rightly protects privacy interests in other arenas, from financial privacy to health privacy to constraints on government surveillance. It is also worth noting that in the age of Big Data, even seemingly innocuous information can reveal much about our intimate lives. As the Supreme Court has underscored in its recent Fourth Amendment decisions, knowing where someone has traveled over the course of a week can reveal information about their intimate lives, including who they love and whether they are seeking the advice of a family planning clinic. *See* Carpenter v. United States, 138 S. Ct. 2206 (2018); *Jones*, 565 U.S. 400, 413, 415 (2012) (Sotomayor, J., concurring).

[101] *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 308 (1997) ("Governmental policies that perpetuate . . . subordination through the denial of procreative rights, which threaten both racial equality and privacy at once, should be subject to the most intense scrutiny."); *see also* JUDITH W. DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY (1997) ("Protection of privacy enhances and ensures the freedom from such scrutiny, pressure to conform, and exploitation").

can lead to invidious discrimination.[102] Victims of sexual privacy invasions have lost jobs and have had trouble finding new ones after the nonconsensual posting of their nude images online.[103] They experience humiliation and fear after deep fake sex videos posted online depict them having sex.

As this section explores, the recognition of sexual privacy would acknowledge the devastating impact that sexual privacy invasions have on marginalized communities. It would draw attention to the importance of sexual privacy for the most vulnerable among us. It should not be deterred by a prior era's invocation of privacy to justify subordination.

a. Expressive Meaning

The recognition and protection of sexual privacy would reinforce efforts to combat subordination. It would help change the social meaning of practices like video voyeurism, up-skirt photos, nonconsensual pornography, sextortion, and deep fake sex videos, which are more often targeted at women and marginalized communities.[104] It would illuminate the historic realities and lived suffering of women, sexual minorities, and nonwhites.

The harms of sexual privacy invasions cannot be understood without accounting for race, gender, or sexual orientation. Privacy invasions often involve intersecting modes of subordination that compound the harm suffered. The "intersectionality" framework, theorized by Kimberlé Crenshaw, shows that the forces marginalizing individuals operate on multiple levels.[105] People experience subordination differently based on

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[102] Discrimination is a contested term with various meanings. I borrow from Deborah Hellman's account of discrimination unless otherwise noted in this piece. Hellman explains that discrimination is wrongful if it is demeaning, which has two criteria: (1) the conduct shows disrespect for another by debasing or degrading the person, and (2) conduct might be a material put-down, an exercise of power over the person. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2011).

[103] Franks & Citron, *supra* note, at; Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709 (2017). *See also* Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985) (finding no privacy tort and constitutional law claims where plaintiff's employer Christian Science Monitor demanded to know her sexual orientation and then fired her after learning she was gay because right of religious freedom allowed the defendant to discharge the plaintiff). Transgender people have faced violent attack and lost custody over their children after their transgender identities were revealed. Jennifer Finney Boylan, *Britain's Appalling Transgender 'Debate,'* N.Y. TIMES (May 9, 2018).

[104] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

[105] Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010).

intersecting identities.[106] Race, gender identity, sexual orientation, religion, and class may combine as bases for oppression. The "intersection of racism and sexism factors into [women of color's] lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experienced separately."[107] As Dorothy Roberts explains, poor women of color experience various forms of oppression "as a complex interaction of race, gender, and class."[108]

Mary Anne Franks has insightfully explored what she calls "intersectional surveillance."[109] As she explains, "Attentiveness to race, class, and gender is vital to understanding the true scope of the surveillance threat. Marginalized populations, especially those who experience the intersection of multiple forms of subordination, also often find themselves at the intersection of multiple forms of surveillance: high-tech and low-tech, virtual and physical."[110]

Sexual privacy invasions involving intersectional marginalization inflict profound harm. Consider the attacks on black actress Leslie Jones after the release of the movie *Ghostbusters* in which Jones had a starring role.[111] Tweets featured doctored photos of Jones with semen on her face. Harassers compared Jones to an ape with menacing photos to match. Jones's website was hacked; its contents replaced by photographs of her license and passport, fake nude photographs of Jones, and a video tribute to a dead zoo gorilla. [112] Jones eventually departed Twitter in response to the harassment.

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[106] Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. FORUM 105, 107–08 (2018), https://www.yalelawjournal.org/forum/what-about-ustoo. For an early discussion of the intersectional nature of workplace sexual harassment, see LIN FARLEY'S SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 63 (1978).

[107] Crenshaw, *Mapping the Margins*, *supra* note, at 1244.

[108] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and Privacy*, 104 HARV. L. REV. 1419, 1424 (1991). People with identities that meet at the intersection of privilege and disadvantage face unique forms of discrimination and subordination. Darren Lenard Hutchinson, *Identity Crisis: 'Intersectionality,' 'Multidimensionality,' and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 312 (2001). Black maleness—in the context of racial profiling, police brutality, and employment—is not a privileged identity, even though being male is generally viewed as a privilege in our society. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Queer Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997); Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 344–58 (2013).

[109] Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 465-64 (2017).

[110] *Id.* at 464.

[111] Adam Howard, *Why Was Leslie Jones Targeted by Trolls?*, NBC NEWS (Aug. 26, 2016), https://www.nbcnews.com/news/us-news/why-was-leslie-jones-targeted-trolls-n638291.

[112] Abby Ohlheiser, *The Leslie Jones Hack Used All the Scariest Tactics of Internet Warfare All at Once*, WASH. POST (Aug. 26, 2016) (explaining that women of color are subjected to racism

As Angela Onwuachi-Willig insightfully argues, Jones's experience should be viewed through an intersectional, multidimensional lens.[113] The invasions of Jones's sexual privacy were fraught with racism and misogyny.[114] Tweets exposed her racial and sexual identities in demeaning and humiliating ways. Doctored photographs reduced her to her genitalia and breasts; she was depicted as less than human—a gorilla. Posts revealed Jones's home address and confidential driver's license number and passport number.

We can see the intersectional nature of sexual privacy in the case of an author who I interviewed about her experience being secretly taped while having sex. The author's boyfriend hid a camera in his bedroom. The author discovered the secret sex videos in a computer folder labeled "Indian Research." As the author explained to me, she felt doubly shamed—she was not only reduced to a sex object but she was even more worthless due to her Indian heritage.[115] She felt demeaned as a woman and as an Indian American—an "other" who could be reduced to a sex object, violated, and abused.[116]

b. Coerced Concealment

An aspect of subordination involves norms that coerce concealment of people's intimate identities or bodies. Those norms do not involve sexual privacy, at least not in the autonomy-affirming, intimacy-enabling, and equality-protecting way that it should be conceptualized. They involve autonomy violations that demean people and deny them crucial life opportunities.[117]

Consider the pressure to hide one's homosexuality or trans identity to conform to hegemonic heterosexual society.[118] For far too long, sexual minorities could either hide their sexuality and pass as heterosexuals or face discrimination and the loss of jobs, contracts, and other interests.[119] As Kenji

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and sexism online); Sandra Laville et al., *The Women Abandoned to Their Online Abusers*, GUARDIAN (Apr. 11, 2016) (explaining that comments on Black Lives Matter Facebook pages contain "racism, sexism, and homophobia").

[113] Onwuachi-Willig, *supra* note, at 114.

[114] *Id.*

[115] Interview with Jane Doe (notes on file with author). The man faced charges under state video voyeurism law for invading the privacy of several women and eventually pleaded guilty.

[116] The woman spoke to me with an understanding that I would keep her name confidential. I am honoring that promise here.

[117] Thanks to Katharine Silbaugh for urging me to make this point explicit.

[118] EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1990); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

[119] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 22, 144 (2006).

Yoshino writes in *Covering: The Hidden Assault on Our Civil Rights*, sexual minorities felt compelled to "cover"—men felt pressure to perform stereotypical heterosexual male attributes, such as aggressiveness, while women felt pressured to perform stereotypically female attributes, such as compassion.[120] LGBTQ individuals continue to hide their sexuality or gender identity to prevent bigoted abuse.[121] Writer Jennifer Boylan kept her female identity a secret until she was forty years old because she feared social rejection, violence, and discrimination.[122]

The pressure to cover or hide one's sexuality or gender identity stems not just from social norms but from law as well. Today, military recruits are told to hide their trans identities as a condition of service.[123] The Department of Health and Human Services is leading an effort to define sex under federal civil rights law as determined by one's "immutable biological traits identifiable by birth," an effort to eradicate the recognition of the gender status of trans individuals.[124] The now-terminated "Don't Ask, Don't Tell" policy required gay military members to hide their sexuality from colleagues and superiors.

Being forced to hide one's sexuality or gender identity undermines sexual privacy. It denies people agency over their intimate identities. It violates a commitment to equality because it tells sexual minorities that they are "others" who should feel ashamed about their sexual orientation or transgender identities.

Along similar lines, nineteenth-century law coerced the concealment of some women's bodies "at high cost to sexual choice and self-expression."[125] As I. Bennett Capers explains, "Between 1850 and 1870, just as the abolitionist movement, then the Civil War, and then Reconstruction were disrupting the subordinate/superordinate balance between blacks and white, just as middle class women were demanding social and economic

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[120] *Id.*

[121] Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Significant Ways*, AMERICAN PROGRESS (May 2, 2017), https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.

[122] Jennifer Finney Boylan, *How a Sliver of Glass Changed My Life*, N.Y. TIMES (Sept. 4, 2018).

[123] U.S. DEP'T OF DEFENSE, REPORT AND RECOMMENDATION ON SERVICE OF TRANSGENDER PERSONS IN THE MILITARY (Feb. 2018), https://assets.documentcloud.org/documents/4420622/226-3.pdf ("Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service.").

[124] Erica L. Green, Katie Benner & Robert Pear, *Trump Administration Eyes Defining Transgender Out of Existence*, N.Y. TIMES (October 21, 2018).

[125] Allen, *Taking Liberties*, *supra* note, at 471.

equality, agitating for the right to vote, and quite literally the right to wear pants, and just as lesbian and gay subcultures were emerging in large cities, jurisdictions began passing sumptuary legislation which had the effect of reifying sex and gender distinctions."[126] Many sumptuary laws explicitly banned cross dressing.[127] Sumptuary laws were enforced overwhelmingly against white women.[128] Courts treated white women's bodies differently than white men's bodies, relying on notions of modesty to deny them sexual autonomy.[129] Sumptuary laws violated sexual privacy, denying white women the ability to manage for themselves the boundaries around their bodies.

Another illustration was society's treatment of the home as a secluded domain where men were free to batter their wives. Courts invoked the concept of the "private sphere" of family life to justify immunizing spousal abuse from criminal liability.[130] Law, norms, and culture overlooked and trivialized women's battering because women were perceived as properly subject to their husbands' discipline in the home.[131] Domestic violence remained hidden until the battered women's movement gave it a name and worked to ensure its criminalization.[132] Again, law and society condoned violations of sexual privacy under the guise of "privacy." Women had no ability to draw boundaries around their body—indeed, they could not escape to safety and seclusion, but rather were exhibited and beaten.

Feminist scholars have viewed privacy's distortion in the service of subordination as warranting its end.[133] In the view of Catharine MacKinnon, privacy is inevitably a one-way ratchet to inequality.[134] For

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[126] I. Bennett Capers, "Cross Dressing and the Criminal," 20 YALE J. L. & HUMAN. 8 (2008).
[127] *Id.* at 10.
[128] Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1285 (2003).
[129] *Id.* at 1284.
[130] Reva B. Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2166 (1966) (quoting Drake v. Drake, 177 N.W. 624, 625 (Minn. 1920)). In the late twentieth century, battered women's advocates got the attention of lawmakers, courts, and law enforcement, discrediting the reasons behind society's protection of domestic violence. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009). Law and norms have shifted, though not as completely as it was hoped. CITRON, HATE CRIMES, *supra* note, at 98–99. Although domestic violence remains a serious problem, the notion of "family privacy" as a shield to immunize domestic abusers no longer has the persuasive power it once enjoyed.
[131] Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1178 (1990).
[132] *Id.* Leigh Goodmark has explored the downside to this trend in her important work. See, e.g., LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018).
[133] CATHARINE MACKINNON, FEMINISM UNMODIFIED 93, 101–02 (1987).
[134] MacKinnon argued that privacy entrenched male hierarchy and power—privacy was a right "for men to be left alone to oppress women." Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 102 (1987).

other feminist scholars, sexual privacy's historical distortion did not dictate its normativity.[135] As Anita Allen has powerfully explained, while "the traditional predicament was . . . too much of the wrong kind of privacy," subordinated individuals deserved "privacy in the sense of adequate opportunities for privacy and private choice."[136] Just as the harm that results from some exercises of liberty does not lead to the rejection of liberty, the harm that results from the mischaracterization of privacy does not warrant the rejection of privacy.[137]

c. Beyond Equality

Would sexual privacy matter if bigoted attitudes and discrimination disappeared? What if naked bodies were no longer viewed with shame so posting someone's nude images or sex videos would not damage reputations and risk unemployment? Would we still need sexual privacy if information about people's sexual orientation or transgender identity would not be held against them? In other words, as Scott Skinner-Thompson asks in *Outing Privacy*, does our interest in sexual privacy have a limited shelf life?

In a sex-positive, bigotry-free world (one can dream!), we would still need sexual privacy. Even if no one cares if people's nude photos are posted online or if they are bisexual, lesbian, trans, or straight, they must retain the ability to manage for themselves how much of their intimate lives are shared with others. The ability to disclose intimate information as individuals wish is crucial to individuality, intimacy, and trust.[138] Whether or not anyone would judge individuals for what they do, each and every one of us needs to manage the boundaries around intimate activities and interactions. Sexual privacy lays the foundation for trust essential for intimacy and intimate relationships.[139]

According to Hannah Arendt, the private world of intimate relationships is crucial to human existence and the ability to participate in public life.[140] She argued that "there are very relevant matters which can survive only in the realm of the private. For instance, love, in distinction

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[135] Judith Wagner Decew, *The Feminist Critique of Privacy: Past Arguments and New Social Understandings*, *in* SOCIAL DIMENSIONS OF PRIVACY 90 (Beate Rosessler & Dorota Mokroskinska eds., 2015).
[136] ALLEN, UNEASY ACCESS, *supra* note, at 40.
[137] *Id.*
[138] Waldman, *supra* note, at.
[139] In forthcoming work, I am exploring sexual privacy's role in fostering trust in intimate relationships. *See* Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, WASH. U. L. REV. (forthcoming 2019).
[140] HANNAH ARENDT, THE HUMAN CONDITION 51, 73 (1958)

from friendship, is killed, or rather extinguished, the moment it is displayed in public."[141] In other words, human activities involving love, sex, and intimacy need protection from the public glare if they are to flourish.[142]

The recognition that intimate activity and nudity can be viewed as discrediting and shameful—and result in discrimination—is not to suggest that intimate behaviors are discrediting and shameful. Intimate activities and identities are not dirty. They are not undesirable. Quite the contrary. Because sex, sexuality, and gender are central to identity formation and intimacy, we need to manage the physical and informational boundaries around them.

Individuals must be able to decide for themselves the extent to which aspects of their intimate lives are shared with others. Actress Lena Dunham posted pictures of herself after her hysterectomy to raise awareness about ovarian fibroids and the challenges of reproductive health.[143] Crucial was that she chose to be seen in a hospital gown and to share the fact of her hysterectomy.[144]

Without sexual privacy, individuals may be unable to see themselves as the authors of their identities. They may be unable to forge relationships of love and trust. Sexual privacy matters and will continue to matter even as the forces of discrimination and subordination recede. But for now, because invasions of sexual privacy can lead to marginalization and subordination, we must recognize, understand, and address those harms.

C. Sexual Privacy's Core and Potential Tradeoffs

A meaningful understanding of sexual privacy entails discerning core sexual privacy interests from peripheral ones. Sexual privacy interests are especially strong if they implicate sexual agency and intimacy. Consider the nonconsensual posting of someone's nude photograph by an ex-partner. The victim has been denied sexual agency and choice as well as self-respect and the social bases of respect. To the public, the victim is just genitalia or breasts. The sexual privacy invasion has also breached the victim's trust, undermining the possibility of future intimacy.

Imagine that a hotel employee places a hidden camera in a guest bathroom and tapes guests undressing and taking showers. The hotel employee posts videos of a female guest on PornHub along with her names

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[141] *Id.* at 53.

[142] Boling, *supra* note, at 68.

[143] Lena Dunham, *In Her Own Words: Why Lena Dunham Chose to Have a Hysterectomy at 31*, VOGUE (Feb. 14, 2018), https://www.vogue.com/article/lena-dunham-hysterectomy-vogue-march-2018-issue.

[144] Thanks to Clare Huntington for discussing this issue with me.

and addresses. The employee contacts the victim to extract more nude photos—the person threatens to keep posting the videos unless the victim agrees to his demands.[145] Here again, the victim was denied autonomy over her naked body. She was deprived of the ability to take a shower without being recorded. The harm compounded when the employee posted the video online. Of course, the victim had no relationship with employee and thus there was no betrayal of trust. Nonetheless, autonomy violation is grave and the harm compounded with its revelation online.

What about a stranger's taking secret photos of someone up their skirt? The victim has been denied sexual agency—she did not permit the stranger to take a photo up her skirt to capture her underwear and possibly a glimpse of her vagina. The stranger, however, did not breach the trust of an intimate partner. The sexual privacy interest is not as strong as the case of nonconsensual pornography or the case of video voyeurism and sextortion.

Once the strength of the sexual privacy interest is assessed, it may be necessary to wrestle with its normative significance in light of competing privacy interests. David Pozen describes this task as a "privacy-privacy tradeoff."[146] Protecting "privacy along a certain axis may entail compromising privacy along another axis."[147]

Weighing competing privacy interests requires thoughtful analysis. Policymakers and courts need "guidance on how to weigh—or in cases of incommensurability, how to order—various privacy interests when hard choices must be made among them."[148] They must wrestle with competing privacy values in a careful and comprehensive way, lest decisions about those conflicts be left to whimsy. Developing an analytical framework for evaluating privacy-privacy tradeoffs is an urgent task.[149]

Consider illustrations of sexual privacy interests that should be prioritized over competing privacy interests.[150] Writing under a

[145] I am basing this example on a real case on which I am serving as an adviser. I am keeping the victim's name and more specifics confidential.
[146] Pozen, *supra* note, at 224.
[147] *Id.*
[148] *Id.* at 243.
[149] *Id.* In his project, Pozen builds a framework for understanding privacy-privacy tradeoffs. *Id*. His insightful work focuses on government surveillance efforts.
[150] *Id*. at 230. Pozen creates an astute typology of privacy-privacy tradeoffs. First, a policy may shift privacy burdens or benefits from one group in the population to another, which Pozen describes as a "distributional tradeoff." *Id*. at 229. Second, risk may be shifted not only among groups that suffer harm but also on groups that cause harm to a certain privacy interest—among privacy invaders as well as victims, which Pozen describes as a "directional tradeoff." Id. Third, a policy may shift privacy risk across time periods, which Pozen calls a "dynamic tradeoff." *Id.* at 230. Last, a policy may shift risk across different privacy interests, which Pozen calls a "dimensional tradeoff." *Id.* In other words, targeting one privacy risk creates a new, countervailing risk. *Id.*

pseudonym, a man posts his ex-girlfriend's nude image on Twitter without permission. The woman wants to sue the man, but she needs to trace the post to him to hold him legally responsible. Her attorney issues a subpoena to Twitter to obtain the pseudonymous poster's IP address. The disclosure of the plaintiff's nude image is at the core of sexual privacy—it involves her nude body and a communication between intimate partners. The plaintiff's sexual privacy interest has greater normative weight than the poster's interest in pseudonymous posting online.

In *The Unwanted Gaze*, Jeffrey Rosen argues that employees have an interest in carving out private spaces where they can joke, let down their hair, and form friendships free from scrutiny.[151] What if employee A shows employee B a nude image of employee C in the break room? Suppose that C shared the photo with A during an intimate relationship. C's interest in sexual privacy should be prioritized over B's interest in the privacy of his backstage conversations with colleagues.[152]

There will be difficult issues to sort out in cases involving competing sexual privacy interests or where sexual privacy clashes with privacy interests with similarly significant normative weight, such as intellectual privacy[153] or children's privacy.[154] In such cases, policymakers and courts should consider weighing the competing interests in a manner that would minimize the overall risks to privacy or advance privacy for the most vulnerable groups.[155]

Some privacy scholars have declined to provide a lexical ordering of privacy values. That task, however, is unavoidable. Daniel Solove argues that privacy encompasses related, overlapping dimensions whose value must be assessed from the ground up.[156] Those ground-up assessments require normative inputs.[157] This Article aims to provide guidance when sexual privacy is at stake.

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[151] Rosen, *supra* note, at 122-25.

[152] Leslie Henry and I discuss this example in our review of Daniel Solove's book Understanding Privacy. Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1122 (2010). In our review, we criticized Solove for failing to rank privacy interests. We argued that policymakers need guidance when dealing with competing privacy claims. *Id.*

[153] Richards, *supra* note; Cohen.

[154] ALLEN, UNPOPULAR PRIVACY, *supra* note, at.

[155] *See* Pozen, *supra* note, at 243.

[156] Daniel Solove has argued that because aggregations of innocuous data may allow inferences about sensitive matters, it is unhelpful to designate particular personal data as worthy of special protection. Recent drafts of the American Law Institute's Information Privacy Principles reflect that view. As an adviser to that project (which Solove and Paul Schwartz server as the Reporters), I have objected to dropping the notion of sensitive information. Neil Richards joins me in that objection.

[157] Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107 (2010).

II. INVASIONS OF SEXUAL PRIVACY

This Part explores different types of sexual privacy invasions and the harm that results. It begins with brief historical background and turns its focus to contemporary invasions of sexual privacy.

A. Brief Historical Background

In nineteenth-century America, sexual privacy was denied enslaved individuals.[158] Enslaved men and women had to disrobe on command so white masters could assess their bodies.[159] Enslaved women's bodies were treated as "items of public (indeed pornographic) display."[160] In the days of slavery, "black women were taken into the town square to be sold. They were paraded around naked, to be inspected and critiqued for future sale and sure abuse."[161] White masters sexually assaulted enslaved women and forced them to bear their children.[162]

The situation was hardly better for free black women. In the North, employment agencies pushed black women into prostitution.[163] In *Black Women in White America*, Gerda Lerner notes that, "the free availability [of black women] as sex objects to any white man was enshrined in tradition, upheld by the laws forbidding inter-marriage, enforced by terror against black men and women and . . . tolerated both in its clandestine and open manifestations."[164]

Black men and women, enslaved and free, were denied sexual privacy because they were deemed unworthy of it.[165] Dorothy Roberts explains that black women were "exiled from the norms of true womanhood."[166] Racist mythology labeled the black woman as a "lascivious temptress" and a

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[158] ROBERTS, KILLING THE BLACK BODY, *supra* note, at 10.
[159] Franks, *supra* note, at 442.
[160] McClain, *Reconstructive Tasks*, *supra* note, at 770 (citing PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 163–80 (1991)).
[161] Gabrielle Union, *My Nude Photos Were Stolen, and I'm Fighting Back*, COSMOPOLITAN (Nov. 5, 2014), http://www.cosmopolitan.com/entertainment/celebs/news/a32589/gabrielle-union-my-nude-photos-were-stolen/.
[162] ANGELA Y. DAVIS, WOMEN, RACE & CLASS 25–27 (1981).
[163] MARY M. BROWNLEE & W. ELLIOTT BROWNLEE, WOMEN IN THE AMERICAN ECONOMY 244 (1976).
[164] GERDA LERNER, BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 163–64 (1973).
[165] ROBERTS, KILLING THE BLACK BODY, *supra* note, at 10.
[166] *Id.*

"degenerate."[167] Black women could not be trusted with privacy over their intimate affairs.[168]

In the post-slavery era, black women in the segregated South remained "hypervisible and on display." As Patricia Hill Collins explains in *Fighting Words: Black Women and the Search for Justice*, black women working as domestic laborers in white-controlled private homes were subject to various techniques of surveillance, including close scrutiny, sexual harassment, assault, and violence.[169] In *Dark Matters: On the Surveillance of Blackness*, Simone Browne observes that "within these labor conditions of hypervisibility, black domestic workers needed to assume a certain invisibility" so that they would be perceived as "readily manageable and nonthreatening."[170]

Conceptions of womanhood that led to the public exposure of black women's bodies[171] led to the control of upper- and middle-class white women in the "family home" where they enjoyed little sexual privacy.[172] Upper- and middle-class white women had few opportunities to enjoy solitude and repose in the home.[173] As John Stuart Mill observed, husbands colonized wives' sentiments and bodies.[174] Wives were expected to bear children and care for their families, adhering to a "cult of domesticity."[175] The bourgeois ideal was the white woman working at home and the white man working in the community.[176] The public-private distinction reflected

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[167] *Id.* (quoting historian Gerda Lerner).

[168] Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, *in* READING RODNEY KING/READING URBAN UPRISING 15–22 (Robert Gooding-Williams ed., 1992). Black women were demeaned as unchaste, immodest, and undeserving of protection. Cheryl Harris, *Whiteness as Property*. 106 HARV. L. REV. 1709, 1768 (1993). During slavery, the rape of black women was not viewed as a crime. *Id.*; ANGELA DAVIS, WOMEN, RACE, AND CLASS (1981).

[169] PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE (1998).

[170] SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 57 (2015). Browne's book is a tour de force on how contemporary surveillance technologies and practices are informed by the methods of policing black life under slavery.

[171] ROBERTS, KILLING THE BLACK BODY, *supra* note, at 11. *See also* Toni Morrison, RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (1992).

[172] PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE (1996).

[173] ALLEN, UNWANTED ACCESS, *supra* note, at.

[174] JOHN STUART MILL, THE SUBJECTION OF WOMEN 26–27 (2d ed. 1869).

[175] CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980). Working class women did not fit this model of domesticity given their need to work. Nineteenth-century feminists held views about social purity that led to concerns about prostitution and the erosion of female virtue. Kathy Peiss, *Charity Girls and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY (Ann Barr Snitow, Christine Stansell & Sharon Thompson eds., 1983). Thanks to Linda McClain who helpfully discussed this history of "sex wars" with me.

[176] *Id.* Sarah Joseph Hale, a journalist in the 1830s, described women as "God's appointed agent of morality" with a responsibility to use their power within the family to refine men's

the differentiation of the male from the family, family from the state and market, and the superior from the inferior.[177]

As workplaces changed in the twentieth century with white women and women of color working alongside men, sexual harassment was rampant. Until the late 1970s, it was acceptable to gawk at, ogle, and touch women in the workplace.[178] Sexual harassment was viewed as a perk of the workplace rather than invidious, illegal discrimination.[179]

Throughout these periods, sexual minorities were denied seclusion in their intimate affairs. State sodomy laws effectively criminalized their intimate interactions.[180] Until the Supreme Court decision in *Lawrence v. Texas*,[181] the fear of state intrusion hung over intimate interactions of LGBT individuals. As Anita Allen explains, restroom stalls and bedrooms "were not reliably private for the LGBT community."[182] A gay man was arrested and charged with sodomy after someone spied on him in a store's bathroom. A court explained that the man had no right to privacy in the bathroom stall, even though he was simply going to the restroom, because the store had an interest in securing restrooms free of crime.[183] Similarly, after a woman's ex-husband secretly photographed her having sex with her female lover, a court found that the woman had no right to be free from surveillance in her bedroom.[184] According to the court, the man was justified in spying on his ex-wife and her lover because her lesbian affair was relevant to a child custody battle.[185]

These are just a few illustrations of the ways that sexual privacy was invaded and exploited in the past. In the next section, I turn to the focus on

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"human affections and elevate [their] moral feelings." *Id.* The "True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility to symbolize her husband's affluence." C. SMITH-ROSENBERG, DISORDERLY CONDUCT 225 (1983).

[177] Bradwell v. Illinois, 83 U.S. 130 (1873) (explaining that man is, or should be, woman's protector or defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."). American attitudes reflected Aristotle's distinction in *The Politics* between the *polis*, the political realm allocated to men, and the *okios*, the domestic realm allocated to women. Aristotle, *The Politics*, *in* THE BASIC WORKS OF ARISTOTLE 1127 (Richard McKeon ed., 1941).

[178] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

[179] Citron, *Law's Expressive Value*, supra note, at 392.

[180] JOEY J. MOGUL, ANDREA J. RITCHIE, AND KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 11-16 (2011); Bowers v. Hardwick, 478 U.S. 186 (1986).

[181] 539 U.S. 558 (2003).

[182] Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1721 (2010).

[183] Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 906 (Ga. Ct. App. 1986).

[184] Plaxico v. Michael, 735 So. 2d 1036, 1038 (Miss. 1999).

[185] *Id.*

this Article—contemporary invasions of sexual privacy and the injuries that they inflict.

B. *Sexual Privacy in the Digital Age*

Some of these invasions of sexual privacy persist to this day.[186] Cultural attitudes about women and sexual minorities have not changed as quickly or as profoundly as one might have hoped.[187] For white women, women of color, LBT women, and girls, invasions of sexual privacy persist in different forms.[188] Gay men, trans men, and boys continue to have their intimate activities and identities exposed in unwanted ways.[189] Heterosexual men and men of color do experience invasions of sexual privacy, as this section will highlight, but, according to the most current evidence, individuals from marginalized communities and minors suffer the brunt of invasions of sexual privacy.

This section highlights the ways that sexual privacy is being invaded with the advent of networked technologies, including: (1) digital voyeurism, (2) up-skirt photos, (3) sextortion, (4) nonconsensual pornography, and (5) deep fake sex videos.

1. *Digital Voyeurism*

Observing, tracking, and recording intimate activities and bodies is not new. Individuals have long used technology to watch and record others in places and zones where being watched and recorded is neither welcome nor expected. But digital technologies have extended the voyeur's reach by enabling remote and ubiquitous surveillance.

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[186] Franks, *supra* note, at 441 (explaining how privacy has been unequally distributed in society with the burden borne by traditionally subordinated groups). *See also* CITRON, HATE CRIMES, *supra* note, at (documenting particular targeting of women and minorities and misogynistic, homophobic, racist, and anti-Semitic nature of abuse); Citron & Franks, *supra* note, at; Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

[187] Suffice it to say that the confirmation hearings of Judge Brett Kavanaugh to the Supreme Court have demonstrated the way that sexual assault as well as other gendered harms (including the shaming of women for alleged promiscuity) continues to be trivialized in the offices of some Senators and in our broader public discourse.

[188] As Khiara Bridges's scholarship has shown, poor mothers' privacy is virtually non-existent. *See* BRIDGES, *supra* note, at.

[189] Kendra Albert explains that trans individuals may feel "pressed to perform gender in ultra-feminine or ultra-masculine ways" to be considered feminine or masculine enough to obtain publicly funded hormone therapy or other government services. Albert, *supra* note, at.

Consider the secret audio and video recording of people at home. A considerable market exists for wireless spy cameras. A quick search yields an array of inexpensive coat hooks, clock radios, and smoke detectors with hidden cameras.[190] Perpetrators—often landlords, maintenance workers, roommates, and ex-intimates—place spy cameras in people's bedrooms and bathrooms.[191] For instance, a professor welcomed LGBT teenagers to live in his house after the teens had been kicked out of their homes for "coming out."[192] He hid a video camera in the guest bathroom.[193] Rutgers University student Dharun Ravi secretly filmed his roommate Tyler Clementi kissing a man and watched the live feed with six friends.[194]

The home is not the voyeur's only target. Secret recording devices are placed in public restrooms and locker rooms.[195] A Maryland rabbi used a spy camera clock radio to secretly videotape a hundred women while they undressed for the ritual bath known as the mikvah.[196] In some localities, law enforcement has issued warnings about spy cameras placed in women's

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[190] Todd Magel, *Man's Arrest Prompts Hidden Camera Concerns in Iowa*, KCCI (Apr. 6, 2018), https://www.kcci.com/article/mans-arrest-prompts-hidden-camera-concerns-in-central-iowa/19706016.

[191] Welsh v. Martinez, 114 A.3d 1231 (Conn. App. Ct. 2015) (upholding invasion of privacy claim against man who gave the plaintiffs gifts for her bedroom, including a clock radio, that contained spy cameras). For news accounts, see John Genovese, *Maintenance Man Hid Camera, Spied on Residents at Apartment Complex*, *Warren County Sheriff Says*, WCPO (May 26, 2016), https://www.wcpo.com/news/crime/maintenance-man-hid-camera-spied-on-residents-at-apartment-complex-warren-county-sheriff-says; Robert Hadley, *Chicago Tenant Accuses Landlord of Recording Intimate Moments*, COOK COUNTY RECORD (Dec. 7, 2015), https://cookcountyrecord.com/stories/510651393-chicago-tenant-accuses-landlord-of-recording-intimate-moments-via-hidden-camera (reporting on lawsuit filed by tenant against landlord for secretly installing camera in smoke detector above his bed); Michelle Pekarsky, *Landlord Faces 42 Counts of Invasion of Privacy for Cameras found in KC Woman's Midtown Apartment*, FOX4KC (Aug. 18, 2015, 3:37 PM), https://fox4kc.com/2015/08/18/landlord-faces-42-counts-of-invasion-of-privacy-for-cameras-found-in-kc-womans-midtown-apartment/ (explaining that landlord was accused of planting hidden video cameras in tenants' bedrooms and bathrooms); Shelby Brown, *What This Landlord Allegedly Did To Spy on Tenant Will Creep You Out*, WTVR (CBS NEWS) (Jan. 16, 2015, 12:35 PM), https://wtvr.com/2015/01/16/landlord-sued-over-spy-camera/; Erica Thompson, *Former Montauk Resident Sentenced After Illegally Spying on Tenants*, SOUTHHAMPTON PRESS, Oct. 13, 2014.

[192] Ryan Collingwood, *North Idaho College Professor Charged With Felony Video Voyeurism*, SPOKESMAN-REVIEW, May 31, 2018.

[193] *Id*.

[194] Ian Parker, *The Story of a Suicide*, THE NEW YORKER (Feb. 6, 2012), https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide.

[195] *These Women Hunt Hi-Tech Peeping Toms in South Korea Where Secret Camera Porn is Rampant*, AGENCE FRANCE-PRESSE (Oct. 18, 2016).

[196] Keith L. Alexander & Michelle Boorstein, *Prosecutors Seek 17-Year Sentence for D.C. Rabbi Convicted of Voyeurism*, WASH. POST (May 8, 2015).

public restrooms.[197] In countries like South Korea, hidden cameras in women's restrooms are rampant.[198]

Voyeurs trick people into downloading malware (remote access trojans or RAT) onto their laptops, which are often kept in bedrooms. They turn on laptops' cameras and microphones to spy on victims.[199] Online communities known as "Ratters" share images of victims whom they refer to as their "slaves."[200] More often, the victims are young girls and boys.[201] According to the Digital Citizen Alliance, Ratters sell "slaved devices" online—girls' devices sell for more than boys' devices.[202]

Smart-home technology provides another way to spy on, record, and monitor people in intimate spaces.[203] According to Erica Olsen, Director of the National Network to End Domestic Violence's Safety Net Project, domestic abusers are using home technologies to watch, listen to, and torment their exes.[204] Networked home gadgets like Amazon Echo and security cameras are usually installed by men who use cellphone apps to monitor them.[205] The majority of victims are women.[206]

Cyber stalking apps are another spying tool of choice. These apps enable people to monitor everything people do and say with their cellphones.[207] Perpetrators need to have access to victims' phones for just a few minutes to install the spying app, which leaves no trace of its presence.[208] They can then view victims' texts, photos, calendars, contacts,

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197 "*Spy Hooks" Raise Alarm About Secret Filming in Public Toilets*, 60 STARTS AT 60 NEWS (Oct. 28, 2017), https://startsat60.com/news/spy-hooks-raise-alarm-about-secret-filming-in-public-toilets.

198 *Id.* In South Korea, the number of such incidents jumped six-fold from 2010 to 2014. *Id.*

199 David Bisson, *Attackers Using RATs to "Slave" Victims' Computers, Sextort Children*, TRIPWIRE (Aug. 5, 2015), https://www.tripwire.com/state-of-security/security-data-protection/cyber-security/attackers-using-rats-to-slave-victims-computers-sextort-children/.

200 Nate Anderson, *Meet the Men Who Spy on Women Through Their Webcams*, ARS TECHNICA (Mar. 10, 2013, 8:30 PM), https://arstechnica.com/tech-policy/2013/03/rat-breeders-meet-the-men-who-spy-on-women-through-their-webcams/.

201 *Id.*

202 DIGITAL CITIZENS ALLIANCE, SELLING "SLAVING:" OUTING THE PRINCIPAL ENABLERS THAT PROFIT FROM PUSHING MALWARE AND PUT YOUR PRIVACY AT RISK 4 (July 2015), https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/07027202-8151-4903-9c40-b6a8503743aa.pdf.

203 *See* Karen E.C. Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679 (2015).

204 Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES, June 24, 2018, at A1.

205 *Id.*

206 *Id.*

207 Danielle Keats Citron, *Spying Inc.*, 72 WASH. & LEE L. REV. 1243, 1248 (2015) (exploring the federal and state criminal laws that punish and deter businesses trafficking in cyber stalking apps and devices primarily useful for surreptitious interception of electronic communications).

208 *Id.*

and browsing habits in real time.[209] Targeted phones can be turned into bugging devices; conversations within a fifteen-foot radius of a phone are recorded and uploaded to the app's portal.[210] As cyberstalking app provider FlexiSPY tells subscribers, "[b]ug their room: listen in on their phone's surroundings and listen in on what is really going on behind closed doors."[211]

It requires very little digging to discover that the goal is stealth surveillance of intimates and ex-intimates. Stalking apps are hailed as the "spy in a [cheating spouse's] pocket."[212] Advertisements prominently feature a photo of a couple next to the message: "many spouses cheat. They all use cell phones. Their phones will tell you what they won't."[213] The advertisement continues, "Women who do cheat usually do so in a well-planned and discrete fashion, making it exceedingly difficult for their man to know they're being cuckolded . . . . Women are much more capable of looking you straight in the eye and lying."

Although video voyeurism targeting women, girls, and boys is more common, men are targeted as well. From 2014 to early 2018, Bryan Deneumostier ran a subscription-based website called "Straightboyz," which showed videos of him having sex with men.[214] The site claimed that the videos involved straight men who had been tricked into sex.[215] Deneumostier posted Craigslist ads posing as a "bored housewife" interested in anonymous sex.[216] Men answering the ad were told to come to Deneumostier's home where he greeted them dressed as a housewife and told them to put on blacked-out goggles or blindfolds.[217] The men were never told that their sexual encounters were being taped and posted online.[218]

Video voyeurism, from hidden cameras in the home and laptop to cyber stalking apps, undermines sexual privacy by taking unwanted dominion over people's bodies, intimate spaces, and intimate information. It hijacks their ability to control access that others have to their intimate

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[209] *Id.*
[210] *Id.*
[211] FLEXISPY, http://www.flexispy.com (last visited July 29, 2018).
[212] Citron, *Spying Inc.*, *supra* note, at 1249.
[213] *5 Apps for Spying on Your Spouse*, MOBIESPY, http://www.mobiespy.com/blog/5-apps-for-spying-on-your-spouse/
[214] Factual Proffer, United States v. Bryan Deneumostier, Case No. 18-CR-20522 (D. Fla. Sept. 2018).
[215] Id.
[216] https://gizmodo.com/men-looking-for-anonymous-sex-reportedly-tricked-into-b-1827690421.
[217] https://www.miamiherald.com/news/local/community/miami-dade/homestead/article213869259.html.
[218] *Id.*

environments. In cases of privacy invaders who are former intimates, video voyeurism undermines the trust essential for future relationships.

2. Up-Skirt Photos

A related development involves the secret recording of women's breasts and genitals while they are in public spaces. People, usually men, surreptitiously take photographs of women "up their skirts" or "down their blouses."[219] Some perpetrators use shoes with hidden cameras and wrist watches with micro lenses to film women's crotches and breasts.[220]

A famous example involves actress Emma Watson—a member of the paparazzi lay down on the floor and got a photograph up her skirt.[221] After actress Anne Hathaway experienced the same, then-television anchor Matt Lauer shamed her on television about it.[222] Up-skirt photographs are not limited to the well-known. Everyday women are targeted on subways, airplanes, stairs of national monuments, stores, coffee shops, and pools.[223]

Private online forums are dedicated to sharing up-skirt videos. Motherboard accessed one of the private forums and found thousands of up-skirt images of girls and women. One popular private site called *The Candid Forum* contains 4,300 individual threads in a section dedicated to up-skirt videos.[224]

Much like video voyeurism, the practice of "up skirt" and "down blouse" photographs violate sexual privacy in denying victims' autonomy over their sexual anatomy. The privacy invader undermines the victim's

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[219] Clare McGlynn & Julia Downes, *We Need A New Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015), https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-and-downblousing/.

[220] Alisdair A. Gillespie, *"Up-Skirts" and "Down-Blouses:" Voyeurism and the Law*, 2008 CRIM. L. REV. 370; Caitlin Dewey, *Even at a National Memorial, No One is Safe from Creepshots*, WASH. POST, Oct. 10, 2014.

[221] Clare McGlynn, *We Need a Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015).

[222] Joshua Gillin, *Anne Hathaway Embarrassed About Upskirt Photo, Slams Door in Matt Lauer's Face*, TAMPA BAY TIMES (Dec. 12, 2012), https://www.tampabay.com/content/anne-hathaway-embarrassed-about-upskirt-photo-slams-door-matt-lauers-face/2101303; *'Seen a lot of you lately': Matt Lauer's Crude Quip to Anne Hathaway as He Quizzes Her About Being Pictured Without Her Underwear*, DAILY MAIL (Dec. 12, 2012), http://www.dailymail.co.uk/tvshowbiz/article-2247157/Anne-Hathaway-wardrobe-malfunction-Matt-Lauers-crude-quip-asks-pictured-underwear.html.

[223] Clare McGlynn & Julia Downes, *We Need a New Law to Combat 'Upskirting' and 'Downblousing,'* INHERENTLY HUMAN (Apr. 15, 2015); *see also* Clare McGlynn, Erika Rackley & Ruth Houghton, *Beyond Revenge Porn: The Continuum of Image-Based Sexual Abuse*, 25 FEM. LEGAL STUD. 25, 32 (2017).

[224] Joseph Cox, *Inside the Private Forums Where Men Illegally Trade Upskirt Photos*, MOTHERBOARD, May 8, 2018.

decision to shield her genitalia and breasts from the public—consent and sexual autonomy are no longer in the control of the victims. Because strangers are the perpetrators, the "up skirt" and "down blouse" practice does not undermine intimacy.

3. *Sextortion*

According to a groundbreaking study by the Brookings Institute, sextortion involves extortion or blackmail carried out online involving a threat to release sexually-explicit images of the victim if the victim does not engage in further sexual activity.[225] The scheme begins when perpetrators obtain victims' nude images either by tricking them into sharing them[226] or by hacking into their computers.[227] Perpetrators then threaten to distribute the nude photos unless victims send more nude photos or perform degrading sex acts in front of webcams.[228] Benjamin Jenkins demanded that victims—girls between the ages of 12 and 16—record themselves inserting objects into their vaginas, drinking their urine, and licking toilets.[229] He ordered victims to watch him masturbate.[230]

The abuse does not just involve the coerced invasion and exposure of victims' bodies. Coerced silencing is another aspect of sextortion. Victims are threatened with further harm if they tell anyone. The abuse thrives as victims keep silent.[231] One in three victims tell no one about the sextortion.[232]

Perpetrators, who are universally male, have dozens and even hundreds of victims.[233] The vast majority of victims are female.[234] Of the

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[225] WITTES ET AL., SEXTORTION, *supra* note. The Brookings report was the first in the nation to study the phenomenon of sextortion. It has played a crucial role not only in raising awareness about the problem but also in moving policymakers to consider proposals for a federal statute criminalizing sextortion, based on the statute proposed in the report.
[226] *Id.*
[227] Krebs, *supra* note. Jared Abrahams hijacked female victims' webcams, capturing them undressing in their bedrooms. Digital Citizens Alliance, *supra* note, at 10. One of his victims was Cassidy Wolf, Miss Teen USA 2013. *Id.* Abrahams threatened to post Wolf's nude photos unless she made sexually explicit videos for him. *Id.*
[228] *What is Sextortion?*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/video-repository/newss-what-is-sextortion/view (last visited July 29, 2018).
[229] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, Northern District of Georgia, Mableton Man Charged in Sextortion of Young Girls (June 1, 2018).
[230] *Id.*
[231] Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2017).
[232] JANIS WOLAK & DAVID FINKELHOR, SEXTORTION: FINDINGS FROM AN ONLINE SURVEY ABOUT THREATS TO EXPOSE SEXUAL IMAGES (June 2016), https://rems.ed.gov/Docs/SextortionFindingsSurvey.pdf.
[233] WITTES ET AL., *supra* note, at. Lucas Michael Chansler sextorted over 350 victims. *Id.*
[234] *Id.*

adult victims, nearly all are female.[235] The majority of underage victims are girls.[236] Boys are also victimized as well. Take Anton Martynenko who tricked 155 boys into sending him nude photos and then extorted more.[237]

To get a sense of the scale and the damage, consider the following cases. Luis Mijangos tricked hundreds of women and teenage girls into downloading malware onto their computers.[238] He turned on victims' webcams to record them undressing. Once Mijangos obtained victims' nude images, he emailed them his demand for more. He coerced 230 women and girls into performing sex acts for him on camera and sending nude images.[239]

Michael Ford followed a similar playbook, hacking into the computers of 75 female college students to obtain sexually-explicit images.[240] Via email, Ford ordered young women, including college students, to take videos of "sexy girls" undressing in changing rooms at pools, gyms, and stores.[241] He threatened to post their nude photos and contact information on "escort/hooker websites" unless they complied with his demands. When victims failed to comply, Ford sent the nude photos to victims' family members and friends.[242]

Sextortion involves the total destruction of sexual privacy. The privacy invader destroys the victim's ability to control her intimate information or body. Perpetrators exercise complete dominion over the victims' bodies, instructing them to commit sexually degrading acts and to exhibit their genitalia on videocam. They effectively extinguish victims' sexual autonomy and deny victims' the ability to go backstage in their bedrooms and experiment with their sexual or gender identities. Although

[235] Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2016), https://www.lawfareblog.com/sextortion-online-harassment-and-violence-against-women.
[236] WITTES ET AL., *supra* note, at.
[237] Derek Hawkins, *His Massive Sextortion Scheme Snared 155 Boys*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm_term=.5876715fede0.
[238] *Id.*
[239] Sara Ashley O'Brien, *Sextortion is Scarily Common, New Study Finds*, CNN TECH (May 11, 2016), https://money.cnn.com/2016/05/11/technology/brookings-institution-sextortion-study/; Adam Duvernay, *NY Man Gets 16 Years for Sextortion of Sexual Images from Child in Delaware*, THE NEWS J. (May 30, 2018, 9:36 AM), https://www.lavozarizona.com/story/news/crime/2018/05/30/ny-man-gets-16-years-coercing-sexual-images-de-child/655772002/.
[240] Press Release, Department of Justice, Former U.S. State Department Employee Sentenced to 57 Months in Extensive Computer Hacking, Cyberstalking, an 'Sextortion' Scheme (Mar. 21, 2016).
[241] *Id.*
[242] *Id.*

perpetrators have no prior relationship with victims and thus have no intimacy and trust to undermine, they may it difficult for victims to trust others in the future.

4. *Nonconsensual Pornography*

Nonconsensual pornography involves the distribution of sexually graphic images of individuals without their consent.[243] Sometimes, perpetrators obtain the nude images without subjects' permission.[244] Recall that Ford stole nude images from victims' computers and published the images after the victims refused to share more.[245] To take another example, a college student was secretly taped having sex with her boyfriend.[246] The boyfriend then showed the video at a fraternity meeting and texted it to his friends.[247]

In other cases, perpetrators obtain the nude images with consent, usually in the context of an intimate relationship. Then, the images are distributed without consent.[248] That practice is what is popularly referred to as "revenge porn."[249] For instance, Holly Jacobs shared sexually explicit images and videos with her boyfriend.[250] The images and videos were for their eyes only.[251] After their break up, her ex betrayed her trust, posting the photos and videos on hundreds of revenge porn sites, porn sites, and adult finder sites.[252] Her nude photos were also sent to her boss.[253]

Sometimes, perpetrators distribute nude images obtained with consent and ones obtained without consent. In the college student's case, the boyfriend not only distributed the sex video he made without her permission, but he also distributed nude images she shared with him in confidence.[254] The boyfriend uploaded the nude images on a Facebook page

[243] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).
[244] *Id.*
[245] *See infra* note.
[246] Daniel Victor, *Florida Fraternity Sued Over Intimate Videos Shared on Facebook*, N.Y. TIMES (June 14, 2018).
[247] Complaint at ¶ 19, Kathryn Novak v. Brandon Simpson et al., No. 6:18-cv-00922 (M.D. Fla. filed July 13, 2018).
[248] Citron & Franks, *supra* note, at.
[249] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 145–46.
[250] *Id.* at 45.
[251] *Id.*
[252] *Id.*
[253] *Id.* at 47.
[254] Complaint at ¶ 26, Kathryn Novak v. Brandon Simpson et al., No. 6:18-cv-00922 (M.D. Fla. filed July 13, 2018).

called "Dog Pound" where members of his fraternity posted videos and images of sexual "conquests."[255]

Nonconsensual porn impacts women and girls far more frequently than men and boys.[256] According to recent studies, the majority of victims are female.[257] Young women are particularly likely to face threats to post their nude images.[258] Men and boys do experience nonconsensual porn. Ari Waldman has conducted empirical studies about the prevalence of nonconsensual pornography among gay men.[259] Also consider the case of the woman who posted a photo of her ex-boyfriend's penis to insult his masculinity on a revenge porn site.[260]

Individuals who identify as sexual minorities are more likely than individuals who identify as heterosexual to experience threats of, or actual, nonconsensual pornography.[261] Research shows that three percent of Americans who use the internet have had someone threaten to post their nude photos while two percent have had someone do it. Those numbers jumped considerably—to 15 percent and 7 percent respectively—among lesbian, gay, and bisexual individuals.[262]

The perpetrators are often—but not always—male.[263] Women and girls are perpetrators as well. For instance, Dani Mathers, a model for Playboy, secretly took a photograph of a 70-year-old woman while she was taking a

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[255] *Id.*

[256] ASIA EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NON-CONSENSUAL PORN VICTIMIZATION AND PERPETRATION 12 (June 2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf ("Women were significantly more likely [1.7 times] to have been victims of [non-consensual porn] or to have been threatened with [non-consensual porn]). The study is published by the Cyber Civil Rights Initiative. Other studies confirm these findings. Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50 (2018) (finding that 93 percent of victims of nonconsensual pornography are female). When it comes to revenge porn sites, women are the majority of people depicted. *See* Abby Whitmarsh, *Analysis of 28 Days of Data Scraped from a Revenge Pornography Website*, ABBY WHITMARSH (Apr. 13, 2015), https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website/ (finding that of 396 posts to a revenge porn website, 378 depicted women versus 18 men); Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50–68 (2018) "nearly 92% of victims featured on included websites were women").

[257] Eaton, *supra* note.

[258] Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* DATA AND SOCIETY RESEARCH INSTITUTE (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

[259] Ari Waldman, *Law, Privacy, and Online Dating: Nonconsensual Pornography in Queer Online Communities*, L. & SOC. INQUIRY (forthcoming) (on file with author).

[260] Manning & Stern, *supra* note, at 218.

[261] Fifteen percent of LGB internet users in the United States say someone threatened to post their explicit image and seven percent say someone has actually posted such an image. *Id.*

[262] *Id.*

[263] *Id.*

shower in her health club's locker room.[264] She sent the photograph of the nude woman to her Snapchat followers, expressing her disgust for the elderly woman's naked body with the tagline, "If I can't unsee this, then you can't either."[265]

Nonconsensual pornography involves a core sexual privacy invasion. Perpetrators undermine victims' choice about who is permitted to see their nude photos or sex videos. They deny victims the ability to exercise control over their sexual identities. The shame is profound.

5. *Deep Fake Sex Videos*

Machine-learning technologies are being used to create "deep fake" sex videos—where people's faces and voices are inserted into real pornography.[266] Deep fake technology enables the creation of impersonations out of digital whole cloth.[267] The end result is realistic-looking video or audio that is increasingly difficult to debunk.[268]

A subreddit (now closed) featured deep fake sex videos of female celebrities, amassing more than 100,000 users.[269] One video featured Gal Gadot having sex with her stepbrother—but of course Gadot never made the video.[270] Deep fake sex videos have featured Scarlett Johansson, Taylor Swift, and Maisie Williams.[271]

The capacity to generate deep fake sex videos is diffusing rapidly.[272] Now available for download is Fake App, a "desktop tool for creating realistic face swapping videos with machine learning."[273] The technology is now in the hands of all manner of people who want to exploit and distort others' sexual identities.

Ex-intimates have seized upon the deep fake trend. As one Reddit user asked, "I want to make a porn video with my ex-girlfriend. But I don't have any high-quality video with her, but I have lots of good photos."[274] A Discord user explained that he made a "pretty good" video of a girl he went

[264] Rebecca Shapiro, *Former Playmate Dani Mathers Gets 3 Years Probation in Body-Shaming Case*, HUFFINGTON POST (May 25, 2017).
[265] *Id.*
[266] *Id.*
[267] Chesney & Citron, *supra* note, at. Robert Chesney and I are the first to document the looming threat of deep fakes to privacy, national security, and democracy. *Id.*
[268] *Id.*
[269] Dodge & Johnstone, *supra* note, at 7.
[270] Samantha Cole, *AI Assisted Fake Porn Is Here and We're All Fucked*, MOTHERBOARD (Dec. 11, 2017).
[271] *Id.*
[272] *Id.*
[273] FAKEAPP, https://www.fakeapp.org (last visited Aug. 3, 2018).
[274] Dodge & Johnstone, *supra* note, at 7.

to high school with, using around 380 photos scraped from her Instagram and Facebook accounts.[275]

Female journalists have been targeted with deep fake sex videos. A deep fake of Indian investigative journalist Rana Ayyub went viral after she wrote about corruption in Hindu nationalist politics.[276] The abuse began with tweets impersonating Ayyub saying she supported child rape and hates Indians.[277] A two-minute fake pornographic video then appeared with Ayyub's face morphed onto another woman's body.[278] Thousands of people shared the deep sex fake on Twitter, Facebook, and in WhatsApp groups.[279] Ayyub's social media notifications were filled with snippets of the video next to comments demanding sex and threatening gang rape.[280] Tweets with her home address, phone number, and photograph circulated widely.[281] Most of the posters identified themselves as fans of the politicians she discussed in her reporting.[282] As one poster wrote, "See, Rana, what we spread about you; this is what happens when you write lies about Modi and Hindus in India."[283]

These examples highlight the gendered dimension of deep sex fake exploitation. Thus far, most, if not all, victims of deep sex fakes are female. One can imagine deep fake videos featuring someone being raped. For women, the threat of rape is all too real.[284] Deep sex fakes bring that threat alive in a visceral way.

Of course, deep fake sex videos do not actually depict a person's naked body. This distinguishes deep sex fakes from the nonconsensual disclosure of intimate images. Even though deep fake sex videos do not depict featured individuals' actual genitals, breasts, buttocks, and anus, they hijack their sexual and intimate identities. Much like nonconsensual pornography, deep fake sex videos exercise dominion over people's sexuality, exhibiting it to others without consent. They reduce individuals to genitalia, breasts, buttocks, and anus, creating a sexual identity not of

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[275] *Id.*
[276] Rana Ayyub, *In India, Journalists Face Slut-Shaming and Rape Threats*, N.Y. TIMES, May 22, 2018.
[277] *Id.*
[278] *Id.*
[279] "*I Couldn't Talk or Sleep for Three Days:" Journalist Rana Ayyub's Horrific Social Media Ordeal over Fake Tweet*, MSN (Apr. 28, 2018), https://www.msn.com/en-in/news/newsindia/%E2%80%98i-couldn%E2%80%99t-talk-or-sleep-for-three-days%E2%80%99-journalist-rana-ayyub%E2%80%99s-horrific-social-media-ordeal-over-fake-tweet/ar-AAwnGHv.
[280] Ayyub, *supra* note, at.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] Citron, *Cyber Civil Rights*, *supra* note, at.

their own making. They are an affront to the sense that people's intimate lives are their own to share or to keep to themselves.

C. *Harm*

The harm of sexual privacy invasions is profound. Consider the way that sexual privacy invasions interfere with identity development. Victims are denied agency over their intimate lives. Sextortion victims are forced to insert objects into their orifices, masturbate on command, and create sexually explicit images.[285] Reminiscent of the silencing that domestic violence victims have long endured, victims are forced to hide the abuse from people who could help them.[286]

Feeling free to develop intimate identities and relationships is difficult after one's sexual privacy is invaded. After realizing that her ex's gifts contained recording devices, a woman had "recurrent and intrusive thoughts of being exposed and violated, interference with her personal relationships, and feelings of vulnerability and mistrust."[287] She explained that she "lives in a perpetual state of fear that someone is watching or spying on her and does not feel safe anywhere."[288] Sports journalist Erin Andrews echoed these sentiments after a stalker secretly taped her undressing in a hotel room and then posted the video online.[289] Jacobs was afraid to date for months after discovering the revenge porn.[290] Sextortion victims experience visceral fear. As one of Mijangos' victims explained, "He haunts me every time I use the computer."[291]

Posting nude images without consent and deep fake sex videos allow a single aspect of one's self to eclipse all other aspects.[292] It reduces people to their genitalia. Sex organs and sexuality stand in for the whole of one's

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[285] Jurecic, *supra* note, at; WITTES ET AL., *supra* note, at.
[286] Jurecic, *supra* note, at.
[287] Welsh v. Martinez, 114 A.3d 1231, 1244 (Conn. App. Ct. 2015).
[288] *Id.* at 1242.
[289] Chad Finn, *No Matter the Verdict, Erin Andrews Cannot Undo the Pain*, BOSTON GLOBE (Mar. 4, 2016), https://www.bostonglobe.com/sports/2016/03/03/matter-verdict-erin-andrews-living-through-unrelenting-pain-from-stalker-and-skepticism/PTKAHHHmx3fulKlzAZFJJO/story.html.
[290] CITRON, HATE CRIMES, *supra* note, at. I serve on the Board of Directors of the Cyber Civil Rights Initiative, which Jacobs co-founded with Mary Anne Franks to combat non-consensual pornography.
[291] WITTES ET AL., *supra* note, at.
[292] Rosen, *supra* note, at 20 (arguing that the exposure of the fact that Monica Lewinsky sent President Clinton a book about phone sex allowed her to be defined by a single aspect of herself—her sexuality—and let her be judged out of context, amounting to an invasion of her privacy).

identity.[293] Gone are the boundaries that protect us from being simplified and judged out of context.[294]

Sexual privacy invasions reduce victims to sexual objects that can be exploited and exposed. As Robin West astutely described threats of sexual violence, there is a "literal[], albeit not physical[], penetrat[ion of] women's bodies."[295] So it is with some sexual privacy invasions. Sextortion victims have described feeling like they were "virtually raped."[296]

Sometimes, invasions of sexual privacy are so destructive to identity that individuals have to change their names. After Jacobs's sexually graphic photos and videos appeared prominently in searches of her name, her supervisor urged her to change her name—and she did.[297]

When the nude images of women and sexual minorities are posted online without consent, they may be stigmatized and treated as "lesser than." The "universal human discomfort with bodily reality" often works to undermine women and minorities.[298] Martha Nussbaum explains that the "body of the gay man has been the central locus of disgust-anxiety, above all for other men."[299] The same is often true of displays of women's nude bodies.[300] Misogyny, racism, and homophobia, often a toxic brew, underlie the stigmatization.[301]

Recall the boyfriend's nonconsensual taping of his sexual encounter with the novelist—it made her feel deeply ashamed and embarrassed.[302] Ayyub similarly understood the deep sex fake as designed to humiliate, shame, and silence her.[303] She saw it as an effort to "break" her by defining her as a "'promiscuous,' 'immoral' woman."[304]

The emotional harm is severe and lasting. Individuals suffer immense psychological distress.[305] They have difficulty concentrating, eating, and working.[306] They experience anxiety and depression. They contemplate suicide. Ayyub described her anxiety as crushing—she could not eat or talk

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[293] *Id.*

[294] *Id.* at 20.

[295] ROBIN WEST, CARING FOR JUSTICE 102–03 (1997).

[296] WITTES ET AL., *supra* note, at.

[297] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 48.

[298] MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW, at xv (2010).

[299] *Id.*

[300] *Id.*

[301] *Id.* at 18.

[302] Interview with Jane Doe (notes on file with author).

[303] *Id.*

[304] *Id.*

[305] McGlynn, *supra* note; WITTES ET AL., *supra* note, at. For instance, data shows that eighty percent of victims of nonconsensual pornography experience severe emotional distress and anxiety.

[306] Interview with Jane Doe, *supra* note.

for days, and she felt numb and traumatized.[307] Sextortion victims live in perpetual anxiety and describe feeling helpless.[308]

Minors are particularly vulnerable to depression and suicide. Two boys killed themselves in the Martynenko sextortion case.[309] Clementi killed himself.[310] Fourteen-year-old Jill Naber hanged herself after a photo of her topless went viral.[311] Fifteen-year-old Amanda Todd took her own life after a stranger convinced her to reveal her breasts on a webcam and created a Facebook page with the picture.[312] Just before killing herself, she posted a video on YouTube explaining her devastation that the photograph is "out there forever" and she can never get it back.[313]

There is a significant risk to victims' job prospects. Search results matter to employers.[314] According to a Microsoft study, more than 90 percent of employers use search results to make decisions about candidates, and in more than 77 percent of cases, those results have a negative result.[315] As the study explained, employers often decline to interview or hire people because their search results featured "inappropriate photos."[316] The reason for those results should be obvious. It is less risky and expensive to hire people who do not have the baggage of damaged online reputations.[317] Because employers consult search results in hiring endeavors and because data brokers include online posts in their dossiers, sexual privacy invasions "become the basis for a probabilistic judgment about attributes, abilities, and aptitudes."[318]

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[307] Ayyub, *supra* note, at.
[308] Wittes, *supra* note, at.
[309] Derek Hawkins, *His Massive Sextortion Scheme Snared 155 Boys*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/30/his-massive-sextortion-scheme-snared-155-teen-boys-now-hes-going-to-prison-for-decades/?utm_term=.5876715fede0.
[310] Parker, *supra* note, at.
[311] *Sexting, Shame, and Suicide*, ROLLING STONE (SEPT. 17, 2013), https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148/
[312] Michelle Dean, *The Story of Amanda Todd*, THE NEW YORKER (Oct. 18, 2012), https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd.
[313] *Id.*
[314] CAREERBUILDER: PRESS ROOM, NUMBER OF EMPLOYERS USING SOCIAL MEDIA TO SCREEN CANDIDATES AT ALL-TIME HIGH, FINDS LATEST CAREERBUILDER STUDY (June 15, 2017); *see also* Erica Swallow, *How Recruiters Use Social Networks to Screen Candidates*, MASHABLE (Oct. 23, 2011), https://mashable.com/2011/10/23/how-recruiters-use-social-networks-to-screen-candidates-infographic/#p.RPip3oYaqI.
[315] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 8; *see* Citron & Franks, *supra* note, at 352–53.
[316] CROSS-TAB, ONLINE REPUTATION IN A CONNECTED WORLD 9 (2010), https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.
[317] *Id.*
[318] Cohen, *supra* note, at 144.

Companies may refuse to interview or hire women and minorities because their search results include nude images or deep sex fakes.[319] Social norms about sexual modesty and gender stereotypes explain why women and minorities are more likely to suffer harm in the job market than heterosexual white men. Women would be seen as immoral sluts for engaging in sexual activity.[320] Exponentially so for nonwhite women. Nude images evoke the pernicious view of black women as sexually deviant.[321] Black men are similarly subject to racist stereotypes about their sexuality. Along these lines, LGBT individuals are subject to the stereotype of being "promiscuous, sex driven, and predatory."[322] All of this "marginalizes and otherizes" women and minorities and raises the risk of unfair treatment.[323]

Annie Seifullah's experience is illustrative. Seifullah was a school principal in New York when her ex-boyfriend gave ten-year-old photographs of her having sex to her boss, the superintendent, and the *New York Post*.[324] Her ex obtained the photographs from her work computer.[325] He posted the photographs online next to lies that she had sex at school with parents, educators, and a student.[326] The school district initially demoted her and then suspended her for a year without pay.[327] The explanation was that she brought "widespread negative publicity, ridicule, and notoriety" to the school system and failed to safeguard her work computer from her abusive ex.[328]

III. LAW AND MARKETS

Law and markets shape, and are shaped by, social norms about sexual privacy. As this Part explores, civil and criminal law address some invasions of sexual privacy. Market efforts have played a role as well, supplementing law and filling in gaps in legal protection. This Part lays out law's opportunities and challenges. It urges a comprehensive approach that considers the role of perpetrators, platforms, and markets.

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[319] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).
[320] Citron & Franks, *supra* note, at 353.
[321] *See* BRIDGES, *supra* note, at; Roberts, *supra* note, at.
[322] Ari Waldman, *Law, Privacy, and Online Dating: Nonconsensual Pornography in Queer Online Communities*, L. & SOC. INQUIRY (forthcoming) (on file with author).
[323] *Id.*
[324] Annie Seifullah, *Revenge Porn Took My Career, The Law Couldn't Get It Back*, JEZEBEL (July 18, 2018).
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.*

A. *LAW'S ROLE*

Traditional privacy law is ill-equipped to address some of today's invasions of sexual privacy. This is hardly surprising. After all, privacy law's roots trace back to the nineteenth century and have been developed in an incremental way.[329] This Part sketches existing legal protections and gaps in the law. It makes the case for a unified legal approach to sexual privacy.

1. *Traditional Law*

Before reviewing the prospects for traditional theories of liability, it is important to acknowledge some threshold problems involving the identification of perpetrators, jurisdiction over foreign defendants, resource constraints of victims, privacy risks of civil suits, and the immunity afforded content platforms.

First, law cannot deter, redress, or punish perpetrators if they cannot be identified.[330] Attribution can be difficult, especially if perpetrators go to lengths to hide their digital tracks.[331] Some perpetrators live outside the United States and thus are beyond the reach of U.S. process. Private plaintiffs will have great difficulty suing foreign defendants.[332] With its investigative capacities and ability to seek extradition, law enforcement has an advantage there.[333]

Even if perpetrators can be identified and live in the U.S., civil suits and criminal prosecutions require significant resources. For victims interested in suing perpetrators, this is frustrating as most cannot afford to hire a lawyer.[334] Law enforcement may be unwilling to expend scarce resources

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[329] Citron, *Mainstreaming Privacy Torts*, *supra* note, at (exploring how privacy torts were stunted by William Prosser's articulation of privacy tort law as four torts and not well designed for data security problems). The privacy torts were conceptualized by nineteenth-century men of wealth and power. Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 442 (1990). Twentieth-century judicial decisions reflected "gendered notions of female modesty that suggested women were vulnerable and in need of protection." Skinner-Thompson, *supra* note.

[330] Citron, *Cyber Civil Rights*, *supra* note, at.

[331] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 165.

[332] Chesney & Citron, *supra* note, at.

[333] *Id*.

[334] There are some bright spots for plaintiffs—law firms like K&L Gates devote significant pro bono resources to seeking redress for victims of nonconsensual pornography. Partners David Bateman and Elisa D'Amico are spearheading this effort. CYBER CIVIL RIGHTS LEGAL PROJECT, https://www.cyberrightsproject.com/. Then too, there are exceptional lawyers like Carrie Goldberg who specialize in invasions of sexual privacy. Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn.

on combating sexual privacy invasions. Although some state attorneys general, local district attorneys, and federal prosecutors have devoted resources to prosecuting sexual privacy invasions, far more have not.[335] Only extreme cases are likely to attract the law enforcement's attention.

Another wrinkle is that since plaintiffs in civil court generally have to proceed under their real names, victims may be reluctant to sue for fear of unleashing more unwanted publicity.[336] Generally, courts disfavor pseudonymous litigation because it is assumed to interfere with the transparency of the judicial process.[337] Arguments in favor of Jane Doe lawsuits are considered against the presumption of public openness—a heavy presumption that often works against plaintiffs asserting privacy claims.[338]

Many victims decline to bring civil suits because they do not want to expose their lives to their attackers any more than they already have. As David Bateman and Elisa D'Amico (who represent victims of nonconsensual pornography on a pro bono basis) have explained, victims often dread the exposure that discovery inevitably entails.[339] They do not want their medical records revealed to their attackers.[340] They are anxious about sitting across from their abusers during a deposition.[341] It is not hard to see why individuals do not sue privacy invaders.

Even if victims are not deterred by litigation's privacy risks, they may find it hard to justify spending resources suing someone who is effectively judgment proof. The other logical option for redress is content platforms. Logical, yes, possible, no. Twenty years ago, Congress provided platforms with a broad liability shield for user-generated content in the form of Section 230 of the Communications Decency Act.[342] Thus, the parties in the best position to minimize potential harm—content platforms—have no

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[335] Then-California Attorney General (now U.S. Senator) Kamala Harris is a noted exception, *see* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2016), as is the DOJ's Computer Crimes and Intellectual Property Section in Washington, D.C., with Assistant U.S. Attorney Mona Sedky as a shining example. Citron & Wittes, *supra* note, at.
[336] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.
[337] *Id*.
[338] *Id*. The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act permits plaintiffs to bring suits under pseudonyms to protect their identity and privacy from further harm. Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).
[339] Remarks at Fordham Law School (Sept. 12, 2018). David Bateman and Elisa D'Amico generously came and spoke to my privacy class at Fordham Law school.
[340] *Id*.
[341] *Id*.
[342] 47 U.S.C. § 230(c)(1)(2). There are a few exceptions, including federal criminal law, intellectual property law, Electronic Communications Privacy Act, and FOSTA (Fight Online Sex Trafficking Act). 47 U.S.C. § 230(e)(2).

legal incentive to intervene, and for plaintiffs, there is no deep pocket to sue.[343]

These obstacles are significant, but they are not fatal. If someone is able and willing to sue over invasion of sexual privacy or if law enforcement is ready to devote resources to the matter, the next question is whether current laws provide effective causes of action.

a. Criminal Law

Criminal law is crucial to preventing and punishing invasions of sexual privacy. Criminal penalties signal the significant individual and societal harm that such invasions inflict.[344] There is a long-standing recognition that the coerced visibility of our bodies can be as destructive as an assault on the body. As Supreme Court Justice Horace Gray wrote in 1891, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."[345]

Sexual privacy invasions deserve criminal penalties, but state and federal laws tackle only part of the problem. State video voyeurism laws punish the nonconsensual recording of individuals in a state of undress in places where they can reasonably expect privacy.[346] In New York, for example, it is a crime to secretly record a person undressing or having sex if the person has a reasonable expectation of privacy.[347] The federal Video Voyeurism Prevention Act of 2004 penalizes a person who "intentionally captures an image of a private area of an individual without their consent and knowingly do so under circumstances in which an individual has a reasonable expectation of privacy." The statute, however, only applies to images captured on federal property.[348] Most states and federal law criminalize surreptitious wiretapping of private communications.[349]

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[343] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 408–10 (2017).

[344] *See generally* Citron, *Law's Expressive Value*, *supra* note, at.

[345] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891).

[346] *See, e.g.*, 18 U.S.C. § 1801.

[347] The law is named for Stephanie Fuller whose landlord placed a hidden camera in the smoke detector above her bed. Danielle Keats Citron, *Nonconsensual Taping of Sex Is a Crime*, FORBES (May 15, 2014), https://www.forbes.com/sites/daniellecitron/2014/05/15/nonconsensual-taping-of-sex-partners-is-a-crime/#7708a2c86ce0.

[348] *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

[349] Under Title III, it is a felony to intercept electronic communications unless one of the parties to a communication consented to the interception. 18 U.S.C. § 2511 (2012). Most states follow this approach, though twelve states criminalize the interception of electronic communications unless both parties to the communication consent to the interceptions. Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1485.

The nonconsensual disclosure of intimate images has been the subject of recent legislation. Thanks to advocates and policymakers, 40 states and the District of Columbia now ban the nonconsensual distribution of nude images.[350] Both the Senate and the House of Representatives have proposed bills criminalizing the disclosure of someone's intimate images without consent.[351]

Only two states criminalize the taking of up-skirt photos.[352] As the next section shows, state courts have been reluctant to extend video voyeurism laws to up-skirting practices. A few criminal statutes are potentially relevant to deep sex fakes. Several states make it a crime to knowingly and credibly impersonate another person online with intent to "harm, intimidate, threaten, or defraud" the person.[353] In certain jurisdictions, creators of deep sex fakes could face charges for criminal defamation if they posted videos knowing they were fake or if they were reckless as to their truth or falsity.[354]

b. *Civil Law*

Tort law could provide redress for sexual privacy invasions, particularly if they involve spaces traditionally understood as private like homes. But this may not be the case for up-skirt photos and the disclosure of nude photos to small groups rather than to the public at large.

The most pertinent body of tort law is the privacy torts: intrusion on seclusion; public disclosure of private fact; false light; and appropriation of identity.[355] The intrusion tort applies to invasions into someone's "private place" or private affairs in a manner that is "highly offensive to the

[350] *See* Franks, *supra* note, at.

[351] The original House Bill was conceptualized and drafted by Mary Anne Franks, who authored the first model statute and whose tireless work and advocacy has led to the wave of state laws criminalizing the practice and proposed federal laws. For instance, when we first started writing about nonconsensual pornography, there were two or three laws criminalizing the practice. *See* Citron & Franks, *supra* note, at. Now, thanks to Franks' work, there are forty laws on the books and proposed federal statutes. I have been working with Senator Kamala Harris's office on the Senate version of the bill as well as with Congresswoman Jackie Speier's office on the House version, which Franks authored.

[352] MASS. GEN. LAWS ANN. ch. 272, § 105 (West 2014); VA. CODE ANN. 18.2-386.1 (West 2014). The Texas Court of Appeals struck down a poorly drafted, overbroad up-skirt statute, finding it "paternalistic" and unconstitutional. Callie Beusman, *"Paternalistic" Law Banning Upskirt Photos Thrown Out by Texas Court*, JEZEBEL (Sept. 18, 2014), https://jezebel.com/paternalistic-law-banning-upskirt-photos-thrown-out-by-1636505597.

[353] *See, e.g.*, CAL. PENAL CODE § 528.5 (West 2009).

[354] Eugene Volokh, *One to One Speech Versus One-to-Many Speech*, 107 NW. U. L. REV. 731 (2013).

[355] William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

reasonable person."[356] In *Hamberger v. Eastman*, the Supreme Court of New Hampshire upheld an intrusion claim against a peeping landlord who spied on a married couple in their bedroom.[357]

The intrusion tort generally applies to secret watching and recording of individuals at home and on their personal devices.[358] It protects against the coerced invasion of people's bedrooms and bodies, as in the case of sextortion. In both instances, the intrusions involve physical spaces recognized as private and whose invasion would highly offend the reasonable person. The intrusion tort has no application to deep sex fakes and may not be useful in cases involving up-skirt photos, as discussed in the next section.

Now to the disclosure tort, which involves the publication of private, non-newsworthy information that would highly offend the reasonable person. Nude photos published online without consent provide strong grounds for disclosure claims because they are roundly understood as non-newsworthy.[359]

As for deep fake sex videos, the false light tort—recklessly creating a harmful and false implication about someone—and defamation have potential purchase. The appropriation tort also might apply, but many jurisdictions cabin the tort to cases where people's images are being used for commercial purposes. Most perpetrators earn nothing from deep fake sex videos or nonconsensual pornography.[360]

Intentional infliction of emotional distress tort would be an effective tool against invasions of sexual privacy. The tort requires proof of "extreme and outrageous conduct" by a defendant who intended to cause, or recklessly caused, the plaintiff's "extreme" emotional distress.[361] Invasions of sexual privacy have supported emotional distress claims—in a recent

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[356] *Id.*

[357] Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964). We saw in the *Plaxico* case that that a man's desire to show the court proof of his ex-wife's lesbian affair overcame that default presumption that bedrooms are private spaces. Plaxico v. Michael, 735 So. 2d 1036, 1040 (Miss. 1999). The majority went to great pains to say that it would have come to the same conclusion if the ex-wife had been engaged in sex with a man. *Id.* Reading between the lines, however, it was clear that the majority thought that gay sex did not deserve privacy because it could have endangered the child. Allen, *supra* note, at 1725. The private home "is not a sanctuary for intimate sex for LGBT individuals where courts view homosexual relationships as illicit." Allen, *Unreliable Remedies*, *supra* note, at 1725.

[358] *See, e.g.*, Welsh v. Martinez, 114 A.3d 1231 (Conn. App. Ct. 2015) (upholding two million-dollar jury award in privacy tort action where defendant ex-boyfriend planted spying devices in plaintiff's bedroom, including radio clock and television); *In re* Marriage of Tigges, 758 N.W.2d 824, 829 (Iowa 2008); Lewis v. LeGrow, 670 N.W.2d 175 (Mich. Ct. App. 2003) (upholding verdict for plaintiff where ex-boyfriend made secret videos of them having sex).

[359] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 121.

[360] Chesney & Citron, supra note.

[361] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at 121.

case involving nonconsensual pornography, the plaintiff was awarded 6.4 million dollars, though the defendant is essentially judgment proof.[362]

Copyright law could provide avenues of redress for sexual privacy cases involving the distribution of intimate images created by victims because Section 230 does not immunize websites from federal intellectual property claims.[363] Victims could file a Section 512 notice after registering the copyright. Site owners would have to take down the photographs promptly or face monetary damages under the Digital Millennium Copyright Act.[364]

c. First Amendment Concerns

First Amendment objections are most likely to arise in cases involving the nonconsensual disclosure of real or manufactured nude images or sex videos. As my previous scholarship has explored in detail, the criminalization of nonconsensual pornography can be reconciled with the First Amendment.[365] Nude images posted without consent involve the narrow set of circumstances when the publication of truthful information can be proscribed civilly and criminally.[366]

The Vermont Supreme Court recently upheld the state's criminal statute penalizing nonconsensual pornography, finding that the law survived strict scrutiny because the government's interest was compelling and the statute was narrowly tailored.[367] The court emphasized that "[f]rom a

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[362] https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html.

[363] Citron & Franks, *supra* note, at 360. Some deep sex fakes exploit copyrighted content that the plaintiff created herself but the harm isn't about property but about sexual privacy. Moreover, the prospects for success are uncertain because defendants will surely argue that the fake is a "fair use" of the copyrighted material and sufficiently transformed from the original so as to elude copyright protection. Chesney & Citron, *supra* note, at.

[364] *Id*.

[365] I—along with my colleague Mary Anne Franks—have written extensively about the First Amendment and free speech values implicated in regulating nonconsensual pornography. See, e.g., *Id.* at 208-212; Mary Anne Franks, '*Revenge Porn' Reform: A View from the Front Lines*, 69 FLA. L. REV. 1252, 1308–23 (2017); Citron & Franks, *supra* note, at 374–86; Danielle Citron, *More Thoughts on How to Write a Constitutional Revenge Porn Law*, FORBES (May 23, 2015), https://www.forbes.com/sites/daniellecitron/2015/05/23/more-thoughts-on-how-to-write-a-constitutional-revenge-porn-law/#3d7033664a34.

[366] Mary Anne Franks and I are not alone in this position—we are joined by Erwin Chemerinsky, Neil Richards, and Eugene Volokh in arguing that nonconsensual porn can be proscribed consistent with First Amendment doctrine and free speech values. *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, CYBER CIVIL RIGHTS INITIATIVE (Oct. 6, 2017), https://www.cybercivilrights.org/2017-cybercrime-symposium/; Eugene Volokh, *Florida Revenge Porn Bill*, THE VOLOKH CONSPIRACY (Apr. 4, 2013), http://volokh.com/2013/04/10/florida-revenge-porn-bill/.

[367] Vermont v. VanBuren, No. 2016-253, 2018 WL 4177776 (Vt. Aug. 31, 2018).

constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting the disclosure of other categories of nonpublic personal information," such as health data.[368] The court noted that the State's argument that the statute covered "extreme privacy invasions" that are categorically unprotected speech was persuasive but declined to base its holding on that basis.[369]

Now to the question of deep fake sex videos. Under First Amendment doctrine, private individuals can sue for defamation for falsehoods circulated negligently.[370] Public officials and public figures like Gadot could sue for defamation if clear and convincing evidence exists of actual malice (that is, defendant knew the deep sex fakes were false or recklessly disregarded the possibility that they were false).[371]

As I explore in my work on deep fakes with Robert Chesney, deliberate harm-causing lies have historically been treated as unprotected under the First Amendment.[372] Federal and state laws punish identity theft as well as the deliberate impersonation of government officials. As Helen Norton explains, such lies concern the "source of the speech."[373] Lies about the source of speech—that is, who is actually speaking—are proscribable because they threaten significant harm to listeners who rely on them as a proxy for reliability and credibility. Such laws "remain largely uncontroversial as a First Amendment matter in great part because they address real (if often tangible) harm to the public as well as to the individual target."[374] The regulation of deep fake sex videos concerns whether someone actually engaged in pornography, an objectively verifiable determination.[375] This lessens concerns that the regulation of deep fake sex videos will chill valuable speech or invite partisan enforcement.[376]

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[368] *Id.*

[369] *Id.* The court extensively cited the article that Franks and I wrote about the criminalization of revenge porn in its findings. An appellate court in Wisconsin similarly upheld its criminal statute.

[370] RESTATEMENT (SECOND) OF TORTS 559 (1969).

[371] For an overview of the defamation tort, see CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at. Defamation has no application to other sexual privacy invasions because they involve truthful, private intimate information, not falsehoods.

[372] See Chesney & Citron, supra note (discussing United States v. Alvarez).

[373] Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in LAW AND LIES 143, 167 (Austin Sarat, ed. 2017); Marc J. Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 110 (2018).

[374] Norton, supra note, at 147, 167.

[375] *Id.* at 168-173

[376] *Id.* Helen Norton helpfully talked with me about the First Amendment implications of regulating deep fake sex videos.

2. *Shortcomings*

Digital technologies enable invasions of sexual privacy that existing law is ill-suited to address. Sometimes, law's inadequacy stems from the fact that it has been developed in an incremental fashion and thus certain problems fall outside law's reach. At other times, it stems from outmoded assumptions—the misuse of new technologies simply highlights that problem. Both concerns apply to the regulation of sextortion, deep fake sex videos, up-skirt photos, and certain public disclosures of intimate images. When social conditions change in fundamental ways, law must adapt or fade into irrelevance.[377]

For sextortion, the criminal law offers a patchwork of tools, which are insufficient when perpetrators target adults.[378] Different federal and state criminal charges have been used to prosecute sextortion but they produce disparate sentences with "no clear association between prison time meted out and the egregiousness of the crime committed."[379] The sentence disparity stems from weak state laws and the dramatically different way federal and state law treats minor and adult victims.[380] Under federal law, the sextortion of an adult is usually prosecuted as computer hacking, extortion, or stalking, all have comparatively light sentences compared to the child pornography laws that apply when sextortion involves minors.[381] As the Brookings study explains, the "severity of the sentence is not directly related to either the number of victims or the depravity of the individual crime."[382]

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[377] For insightful exploration of how new technologies challenge law and legal structures, see the scholarship of Ryan Calo. *See, e.g.*, Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513 (2015). Not all cyber problems require new legal solutions. As Judge Easterbrook argued long ago, existing law can tackle many harms caused by digital technologies. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 206. I have argued that mainstream torts can be adapted to address certain privacy problems, such as leaking databases of sensitive personal information. Citron, *Reservoirs of Danger*, *supra* note, at (analogizing insecure databases of sensitive personal information to reservoirs at the turn of the twentieth century—activity crucial to the economy but also raising significant dangers—and a *Rylands v. Fletcher* strict liability approach); Citron, *Mainstreaming Privacy Torts*, *supra* note, at (exploring enablement tort, confidentiality law, and strict liability to address privacy problems ill-suited to the privacy torts).

[378] *Id.*

[379] BENJAMIN WITTES, CODY POPLIN, QUINTA JURECIC & CLARA SPERA, BROOKINGS INSTITUTE, CLOSING THE SEXTORTION SENTENCING GAP: A LEGISLATIVE PROPOSAL (2016), https://www.brookings.edu/research/closing-the-sextortion-sentencing-gap-a-legislative-proposal/.

[380] *Id.*

[381] *Id.*

[382] *Id.*

There is no federal criminal response to deep fake sex videos, though a smattering of state statutes might cover the practice. The most-recognized privacy torts—intrusion on seclusion and public disclosure of private face—provide no redress for deep fake sex videos even though they constitute invasions of sexual privacy.[383] Although using a person's face in a deep fake sex video would highly offend the reasonable person, it would not amount to disclosure of private information if the source image was generated from publicly available content.[384] Nor would it amount to an intrusion on seclusion, since there has been no intrusion into a private space or activity. Although the false light tort would apply to deep fake sex videos, many jurisdictions refuse to recognize it.[385] If one can find the creator of the deep fake sex video, intentional infliction of emotional distress may be the only avenue of civil redress.

Now to discuss up-skirt photos and some disclosures of private intimate facts. Traditional privacy law embraces cramped notions of privacy that leave some sexual privacy invasions without redress or penalty. It does not address certain invasions of sexual privacy because, as Ari Waldman explains, it relies on "under-inclusive bright line rules to determine the difference between public and private."[386] For instance, privacy law presumes that certain spaces—bedrooms, hotel rooms, and bathrooms—warrant privacy protection.[387] But once people leave those spaces, the presumption flips.[388] On the "street, or in any other public place, the

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[383] Chesney & Citron, *supra* note, at.

[384] The appropriation tort is inapplicable because creators of deep sex fakes likely do not use people's faces or bodies for a commercial advantage. RESTATEMENT (SECOND) OF TORTS 652C (1977); *see* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 218 (5th ed. 2018) (explaining that the appropriation tort protects against the commercial exploitation of one's name or likeness).

[385] DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 218 (5th ed. 2018).

[386] WALDMAN, PRIVACY AS TRUST, *supra* note, at 72.

[387] *See infra* text and note 300.

[388] WILLIAM MCGEVERAN, INFORMATION PRIVACY LAW (2017); DANIEL J. SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW (2018 ed.). This presumption extends beyond the privacy torts and criminal law. Under Fourth Amendment doctrine, the general assumption is that we have no reasonable expectation of privacy in our public travels. David Gray & Danielle Keats Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013). Recent Supreme Court decisions have suggested that digital technologies enabling continuous and indiscriminate surveillance of one's public travels may amount to a search, thus implicating the crucible of Fourth Amendment protection. *Id.* Five concurring Justices in *United States v. Jones* made that point as to the placement of a GPS tracker on the defendant's car. *Id.* In *Carpenter v. United States*, the Court held that the government's access to cell site location data, held by third party provider, amounted to a search requiring a warrant based on probable cause. Chief Justice Roberts, writing for the majority, explained that the Fourth Amendment was implicated because the technology enabled "too permeating police surveillance" and enabled the tracking of the "whole of one's physical movements." In *Jones*

plaintiff has no right to be alone."[389] This is true of criminal and privacy tort law.

Criminal convictions have been struck down in up-skirt cases because the defendants took the photos while in a public place. Consider the case of a Georgia man who took a photograph of a woman up her skirt at a local grocery store.[390] The Georgia statute banned the use of any device, without consent, to photograph or record the activities of another occurring in "any private place and out of public view."[391] The majority struck down the conviction on the grounds that the law failed to "reach destructive conduct made possible by ever-advancing technology." Although the case turned on legislative meaning of "private place," it reflected the fallacy that public spaces and privacy are incompatible.[392]

Up-skirt photos should be actionable as intrusions on seclusion and as public disclosures of private fact if posted online, but the fact that the photos are taken in public may present a problem. Courts routinely find that plaintiffs have no privacy rights in public.[393] For instance, in *Neff v. Time*, a photographer captured a photo of the plaintiff cheering at a football game.[394] The plaintiff's fly was open and a photograph showing the

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and *Carpenter*, five Justices have signaled that where digital technologies significantly alter the nature of surveillance, the presumption that we have no privacy in public may not apply.

[389] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 391 (1960). Scholars have explored the pitfalls of drawing a sharp line between what is public and what is private. *See, e.g.*, HELEN NISSENBAUM, PRIVACY IN CONTEXT (2010); Woodrow Hartzog, *The Public Information Fallacy*, 98 B.U. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084102; Skinner-Thompson, *supra* note, at; Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

[390] Gary v. State, 790 S.E.2d 150 (Ga. Ct. App. 2016).

[391] *Id.*

[392] The dissent noted that rather than the statute being outpaced by technology, it was an overly narrow interpretation of a "private place." *Id.* Sexual privacy isn't an all nothing proposition. At least it should not be. There are degrees and nuances to the sort of privacy that society expects. In her book *Privacy in Context*, Helen Nissenbaum disputes the notion that privacy is a binary concept. HELEN NISSENBAUM, PRIVACY IN CONTEXT 144 (2010). Content and social norms determine the question. Daniel Solove's pragmatic conception of privacy envisions context as central to understanding and addressing contemporary privacy problems. Solove, *supra* note, at. Even in public, there are boundaries—Robert Post calls them "information preserves"—that are integral to individuals and warrant respect. This is so for the parts of our bodies, such as our genitalia and breasts, that we endeavor to conceal in public with shirts, pants, underwear, and bras. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 73 (1995).

[393] *See, e.g.*, Cefalu v. Globe Newspaper Co., 391 N.E.2d 935 (Mass. App. Ct. 1979). For thoughtful scholarship on the intrusion tort in upskirt cases, see Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory for Intrusions in Public Places*, 73 N.C. L. REV. 990 (1995); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & LAW 1, 4 (2008).

[394] Neff v. Time, Inc., 406 F. Supp. 858, 860 (W.D Pa. 1976).

plaintiff's exposed underwear appeared in *Sports Illustrated*.[395] In addition to finding that the photograph was newsworthy, the court held that the plaintiff had no expectation of privacy because the photograph was "taken at a public event" with the "knowledge and implied consent of the subject."[396] Similarly, a court found that a high school soccer player had no expectation of privacy (and thus no actionable privacy tort claim) in a photograph of him while his genitalia was exposed because it was taken while he was playing soccer at a public event.[397]

That is not to say that no decisions would support the notion that individuals have privacy up their skirts even though they are in public. *Daily Times Democrat v. Graham*,[398] decided in 1964, points in that direction. The plaintiff took her children to a county fair. Her dress was "blown up by the air jets" and her body was "exposed from the waist down" except for the "portion covered by her panties."[399] A newspaper photographer snapped a picture and put in on the front page.[400] The court upheld the disclosure claim because being "involuntarily enmeshed in an embarrassing pose" in a "public scene" does not dispel one's privacy interest.[401] Unfortunately for plaintiffs, however, *Graham* is an outlier.

Other aspects of traditional privacy law do not accord with how we experience invasions of sexual privacy. To sue for public disclosure of private fact, the information must be disclosed to a wide audience.[402] This presumes that there is little damage when intimate information is disclosed to a small group of people. But it is often those small groups of people—employers, family, and colleagues—to whom the disclosure is most damaging for victims. When Jacobs' ex-boyfriend revealed her nude photos to her employer, her sense of self-worth and confidence were destroyed.

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[395] *Id*.
[396] *Id*. at 861.
[397] McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904 (Ct. App. Tex. 1991).
[398] Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964). Clay Calvert wisely describes Flora Bell Graham's case as the "original upskirt" litigation. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 203 (2004).
[399] *Id.* at 381.
[400] *Id.* at 382.
[401] *Id.* at 382–83. The drafters of the *Restatement (Second) of Torts* provide support for the *Graham* decision. A comment to the section on the intrusion tort notes that "even in a public place, however, there may be some matters about the plaintiff, such as his underwear or his lack of it, that are not exhibited to the public gaze; and there may still be an invasion of privacy when there is intrusion upon these matters." RESTATEMENT (SECOND) OF TORTS 652B cmt. c (1977).
[402] Courts refuse to recognize disclosure claims if a private fact is not widely publicized. Swinton Creek Nursey v. Edisto Farm Credit, 514 S.E.2d 126, 132 (S.C. 1999). As the *Restatement (Second) of Torts* notes, it is "not an invasion of the right to privacy . . . to communicate a fact concerning a plaintiff's private life to a single person or to even a small group of people." RESTATEMENT (SECOND) OF TORTS 652D cmt. a (1977).

Consider *Bilbrey v. Myers*. There, a court struck down a disclosure claim on the grounds that there was no widespread publicity of the private fact. In that case, a pastor broadcast the plaintiff's homosexuality to a church congregation, which included his fiancée's father. The disclosure undermined the man's ability to construct his sexual identity on his own time; the damage was profound because the audience included his family members.[403] The harm was significant even though the pastor did not disclose the information online.[404] The widespread publicity rule does not accord with how intimate information is shared and can be exploited to people's detriment.

Another shortcoming involves the recently adopted laws criminalizing nonconsensual pornography. Some states have adopted inadequate laws, ignoring the advice of Franks and myself. For instance, Franks and I worked with the Maryland ACLU to draft a state law, but an overly narrow bill emerged from committee. The Maryland revenge porn law only applies to intimate images posted on the "Internet," excluding nude imagery sent to colleagues, friends, and family via email or text. For Franks, this is as unsurprising as it is disappointing. Most of the states with laws criminalizing nonconsensual pornography have worked closely with Franks. Nonetheless, many of those states failed to follow her well-crafted proposed model statute. In Franks's view, some of those laws are so narrow that will do little to combat the problem.[405]

Lastly, a crucial shortcoming in the law is the broad sweeping immunity afforded platforms for user-generated content. Having written about Section 230 elsewhere, I will not belabor the point.[406] It is worth noting that the overbroad interpretation of Section 230 has given content platforms a free pass to ignore destructive invasions of sexual privacy, to deliberately repost illegal material, and to solicit invasions of sexual privacy while ensuring that abusers cannot be identified.[407] The overbroad interpretation of Section 230 makes life even more difficult for victims of sexual privacy invasions.

For instance, Grindr was notified over fifty times that someone was impersonating a man on the app, sharing his nude images, claiming he had

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[403] Bilbrey v. Myers, 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

[404] Victims might be able to sue for intentional infliction of emotional distress because the conduct is severe and outrageous and causes severe emotional distress. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at (exploring intentional infliction of emotional distress in the context of cyber stalking).

[405] Interview with Mary Anne Franks (Sept. 2, 2018) (notes on file with author).

[406] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at; Danielle Keats Citron & Quinta Jurecic, *Platform Justice: Content Moderation at an Inflection Point* (forthcoming Hoover Institution); Citron & Wittes, *supra* note, at; Citron, *Cyber Civil Rights*, *supra* note, at.

[407] Citron & Wittes, *supra* note, at.

rape fantasies, and providing his home address.[408] Over a *thousand* strangers came to his door demanding sex.[409] Grindr ignored the man's complaints and refused to do anything about the imposter.[410] Given the breadth of judicial interpretations of Section 230, law can do little vis-à-vis the app.[411]

3. *Unified Approach to Sexual Privacy*

A comprehensive approach to invasions of sexual privacy is warranted.[412] Federal and state law should provide civil and criminal penalties for certain sexual privacy invasions. Individuals should be able to pursue claims against perpetrators and, in some circumstances, platforms. The privacy torts should evolve to reflect an explicit commitment to sexual privacy.

Why not continue along the path of adopting specific statutes and common law rules as problems arise? We could pass legislation as issues arise. Today, it is sextortion, deep fakes, and up skirt photos. Tomorrow, sexual privacy invasions may involve robots and drones.[413] States have criminalized nonconsensual porn, often with separate statutes.[414] Congress is considering a federal statute to do the same.[415]

An incremental approach has merit. It enables an assessment of whether an approach is working and should be extended to other areas. But it would require updating as new invasions of sexual privacy arise.[416] Practically speaking, it is difficult to capture the interest of lawmakers on any given topic. An approach that requires constant updating likely would not be updated in a timely manner.

To be sure, an incremental approach can be precisely the right approach when society is wrestling with changing attitudes. Consider efforts to criminalize nonconsensual pornography. Much as the women's rights movement of the 1960s and 1970s had to first name domestic violence and

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[408] Herrick v. Grindr, No. 17-CV-932 (VEC), 2017 WL 744605, at *1 (S.D.N.Y. Feb. 24, 2017).

[409] Sarah Ashley O'Brien, *1,100 Strangers Showed Up at His Home for Sex. He Blames Grindr*, CNN (Apr. 14, 2017), https://money.cnn.com/2017/04/14/technology/grindr-lawsuit/index.html.

[410] *Id.*

[411] *Herrick*, 2017 WL 744605, at *3.

[412] Sextortion may warrant higher penalties than other invasions of sexual privacy. A federal statute can consider aggravating factors as sentence enhancements.

[413] For all matters involving robots, see the scholarship of Ryan Calo.

[414] Franks, *supra* note, at.

[415] *See* note 266.

[416] We have seen law struggle in the related area of stalking and harassment, with states passing laws to deal with telephone abuse, others to address email abuse, and still yet others addressing cyber stalking. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

workplace sexual harassment to capture the public's attention, advocates and scholars had to educate the public about nonconsensual pornography and the harm it inflicted.[417] In 2013, when Mary Anne Franks wrote the first model revenge porn statute,[418] and in 2014, when together we wrote the first law review article on the topic,[419] a crucial part of our task was expressive. We had to convince lawmakers and the public why it was not the fault of victims who trusted exes with their nude photos. Then, calling for law to combat invasions of sexual privacy—with revenge porn as an illustration—might not have captured lawmakers' attention in the way that framing the issue as revenge porn did.

We are at a pivotal moment. Having convinced lawmakers of the seriousness of nonconsensual pornography in just a few short years, we can make the case for seeing the constellation of sexual privacy invasions as a single problem requiring a comprehensive solution. Digital voyeurism, up-skirt photos, sextortion, nonconsensual porn, and deep sex fakes are all invasions of sexual privacy, and they all should be treated as such.

There is much to be said for making an explicit commitment to addressing sexual privacy in a comprehensive way.[420] It would say that improper access to, spying on, and exposure of our intimate lives produces corrosive harm. In protecting sexual privacy, it would make clear that our bodies and intimate lives are our own. The protection of sexual privacy serves a crucial role in facilitating sexual autonomy and consent, enabling intimacy, and securing equality.

A comprehensive approach would not mean that sexual privacy deserves absolute protection. Sexual privacy would be weighed against other competing values depending on the context. For instance, sexual privacy's protection may give way to free speech concerns, such as the

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[417] That work was undertaken by a group of advocates and scholars. *Without My Consent*, founded by Erica Johnstone and Colette Vogel, formed to educate the public about laws that would enable victims of privacy invasions to sue as Jane or John Does and grew to cover nonconsensual pornography. Jacobs co-founded the *Cyber Civil Rights Initiative* (CCRI) with Franks to combat the problem of nonconsensual pornography. They named the organization after my article *Cyber Civil Rights*, which made the case for conceptualizing cyber stalking as a civil rights problem. I serve on CCRI's Board of Directors along with its President, Mary Anne Franks, co-founder Jacobs, Carrie Goldberg, Jason Walta, and Michelle Gonzalez.

[418] Mary Anne Franks, *Why We Need a Federal Criminal Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), https://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html.

[419] Citron & Franks, *supra* note, at.

[420] In my book *Hate Crimes in Cyberspace* and a law review article entitled *Law's Expressive Value in Combating Cyber Gender Harassment*, I argued that naming cyber gender harassment served a crucial expressive purpose. CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at; Citron, *Law's Expressive Value*, *supra* note, at.

posting of a politician's crotch shots sent to strangers.[421] Nonetheless, it would permit a fulsome understanding of the costs to individuals and society before weighing those costs against competing interests.

A comprehensive approach allows us to see the structural impact of these invasions of sexual privacy. The harm inflicted to identity formation is not borne equally. Marginalized and vulnerable communities shoulder a disproportionate amount of the abuse. Given the way that stigma works and its collateral impact on the job market, especially around sex and sexuality, the harm compounds for women and minorities.[422] Another component would be to include certain content platforms into the liability calculus, as explored below.

a. Statutory Protections

The drafting of a sexual privacy statute should be informed by First Amendment doctrine, due process concerns, and the goal of encouraging the passage of laws that will deter invasions of sexual privacy.[423] Careful and precise drafting is essential to any effort. Defendants must have clear notice of the precise activity that is prohibited. Not only does legislation have to give fair warning to potential perpetrators, it must not be so broad as to criminalize or accord civil penalties for innocuous behavior.

An invasion of sexual privacy statute should have a number of features. It should require proof that the defendant knowingly engaged in, or knowingly coerced another person to engage in, the photographing, filming, recording, digital fabrication, or disclosure of "intimate information," defined as images of a person whose "private area" is exposed or partially exposed, who is engaged in sexually explicit conduct or "sexual act," or whose nude image is digitally manufactured. Second, it should require proof that the defendant knew the person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of the intimate information and knew that the intimate information was meant

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[421] Consider Anthony Weiner who sent photos of his genitalia to strangers during his New York City mayoral run even though he swore to the public he was no longer engaged in such activity. Citron & Franks, *supra* note, at (discussing the free speech concerns of prosecuting the women who exposed Weiner's texts).

[422] The connection between privacy and equality are at the heart of European data protection law. ALLEN, UNPOPULAR PRIVACY, *supra* note, at. As European lawmakers recognized, Hitler's Final Solution—and the genocide of six million Jews and six million others—was only possible due to the Nazis' access to personal data about people's religion and race. EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

[423] See text and footnotes 395-410.

to be private.[424] The statute should include exemptions for disclosures concerning matters of legitimate public concern or pertaining to legitimate law enforcement efforts.[425]

A sexual privacy statute must provide clear and specific definitions of key terms. A crucial task would be defining "intimate information." Definitions in certain voyeurism and nonconsensual pornography laws are helpful guides. For instance, the model nonconsensual pornography statute drafted by Franks provides well-crafted definitions of terms like "sexual act," which "includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person's body."[426] The federal Video Voyeurism Act defines "private area" as "the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual."[427] The exemption of matters involving legitimate public concern would help guard against the chilling of protected speech though it would not eliminate those concerns.[428] Where the disclosure involves a private individual, free speech concerns are muted.[429]

Crucially, the uniform statute should be paired with hate crime legislation that increases the sentences of perpetrators with biased motives. Akin to the arguments that I made in my book *Hate Crimes in Cyberspace*, prosecutors should seek to enhance sentences based on bias motivation and acknowledge the compounded harm for intersectional harms.

Because a uniform statute would cover the landscape of sexual privacy invasions, criminal punishment should be calibrated to the wrongful conduct. No doubt, some circumstances deserve higher penalties. Sextortion is particularly harmful and particularly reprehensible conduct—it may warrant stiffer penalties than other sexual privacy invasions. A uniform statute should include aggravating circumstances that would

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424 For instance, the statute could read, in part: Whoever knowingly [using any means affecting interstate or foreign commerce by any means, including by computer] engaged in, or knowingly coerced another person to engage in, the photographing, filming, recording, digitally fabrication, or disclosure of intimate information:

(1) knowing that person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of intimate information; and
knowing a reasonable person would have expected privacy in the intimate information

shall be fined under this title or imprisoned for not more than five (or ten) years, or both.

425 Citron & Franks, *supra* note, at 388.

426 CCRI Model State Statute, https://www.cybercivilrights.org/wp-content/uploads/2016/06/CCRI-Model-State-Law-for-NCP_6-8-16.pdf; *see also* Franks, *supra* note, at.

427 18 U.S.C. § 1801.

428 Snyder v. Phelps, 562 U.S. 443 (2011).

429 *Id.*

enhance the penalties, such as where an actor engages in both nonconsensual taping and disclosure or where minors have been targeted.[430]

A uniform statute should include civil penalties. Along these lines, the National Conference of Commissioners on Uniform State Laws, with Franks as the Reporter, recently proposed a statute providing civil remedies for the authorized disclosure of intimate images.[431] The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act permits plaintiffs to bring suits under pseudonyms to protect their identity and privacy from further harm.[432] Plaintiffs are allowed to recover economic and noneconomic damages proximately caused by defendants or statutory damages not to exceed $10,000 against a defendant.[433] Punitive damages, reasonable attorney's fees and costs, and injunctive relief are also allowed.[434] That statute should extend to all invasions of sexual privacy, not just the disclosure of intimate images without consent.

b. Privacy Torts

The privacy torts should evolve as well,[435] even though their practical import may be more limited than government funded prosecutions.[436] The origin story of the privacy torts provides interesting insights for a path forward. The majority of the early privacy plaintiffs were women whose images had been used in advertisements and films without permission or whose nude bodies were viewed without consent.[437] In *DeMay v. Roberts*, the first privacy case, a doctor went to the plaintiff's house in the middle of the night to help her deliver her child.[438] The doctor brought a friend with him but never explained that the friend was not a medical professional.[439] The doctor's friend watched the plaintiff as she gave birth. After finding out

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[430] Rod Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA. L. REV. 289, 302 (2002); Neil Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357 (2011) (suggesting that a hybrid intrusion/disclosure tort may help resolve some of the First Amendment problems with disclosure tort).
[431] Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).
[432] *Id.*; *see* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at (arguing for recognition of pseudonymous litigation on behalf of plaintiffs in privacy suits).
[433] Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (June 14, 2018).
[434] *Id.*
[435] *See generally* Citron, *Mainstreaming Privacy Torts*, *supra* note, at.
[436] As explored above, individuals are unlikely to have the resources required to sue privacy invaders.
[437] Lake, *supra* note, at 232.
[438] DeMay v. Roberts, 46 Mich. 160 (1881).
[439] *Id.*

that the friend was not a doctor, the plaintiff brought a suit.[440] The court recognized that the plaintiff had a "right to privacy," understood as having the right to decide who sees one's exposed laboring body.[441]

Historian Jessica Lake unearthed the stories behind those cases and found that female plaintiffs often used privacy tort law to object to unwanted "optical violation of their bodies."[442] Female plaintiffs sought to "protest" being reduced to "objects of consumption" or shameful "hookers or divorcees."[443] Although court decisions tended to attribute privacy redress to the preservation of female "modesty" and "reserve," the plaintiffs themselves did not frame their cases that way.[444] As complaints and litigation documents showed, plaintiffs sought to "claim ownership over their life experiences and to protest against the appropriation and exploitation of those experiences."[445]

That history is instructive. The privacy torts could have evolved in a way that provided robust protection of sexual privacy—the ability to determine for oneself how much of one's sexual life is shared with others as the earliest plaintiffs imagined. The privacy torts have ossified into four torts with cramped meanings.[446] But courts can and should protect what the early privacy plaintiffs sought—protection for the "inviolate personality" rather than being hampered by the restrictive elements of the four privacy torts.[447] This goal might enable courts to shed some of the rigidity that has prevented privacy torts from recognizing privacy injuries involving disclosures of intimate information to small groups of people or intrusions of seclusion in public.[448]

The privacy torts should grow to protect sexual privacy.[449] Crucial would be the recognition that privacy harm is as profound when private facts like nude images, sexual orientation, or gender transition are disclosed to smaller groups of people who matter to us—whether it is one's church congregation or employer—than it is to the broader public. The rigid

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[440] *Id.*

[441] Lake, *supra* note, at 95. Lake studied primary court documents, including affidavits, pleadings, records of testimony, and exhibits of important early cases including Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902), DeMay v. Roberts, 9 N.W. 146 (Mich. 1881), Feeny v. Young, 181 N.Y.S. 481 (App. Div. 1920), and Kunz v. Allen, 172 P. 532 (Kan. 1918). *See* Lake, *supra* note, at.

[442] *Id.* at 227.

[443] Lake, *supra* note, at 106, 221.

[444] Lake, *supra* note, at 224–25.

[445] *Id.* at 222.

[446] Citron, *Mainstreaming Privacy Torts*, supra note, at; Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887 (2010).

[447] Prosser, *supra* note, at.

[448] *See* Lior Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. (2010).

[449] *See* Citron, *Mainstreaming Privacy Torts*, *supra* note, at 1850–51.

publicity rule does not accord with the lived reality of invasions of sexual privacy. As we saw in *Brilbey v. Myers*, the unauthorized disclosure of information about someone's sexual orientation or gender can be deeply damaging to identity development.[450] Providing redress for the unauthorized disclosure of someone's sex, gender, or sexuality raises free speech concerns, especially if the person is a public figure or public official. Then too, courts should recognize that even if plaintiffs are in public, they have a right to privacy up their skirts.

c. *Section 230 Reform*

Suing perpetrators is insufficient—content platforms are essential to protecting sexual privacy in the digital age. The call for a more regulated internet is no longer considered outlandish.[451] Congress recently amended Section 230 to exempt from the immunity platforms that facilitate online sex trafficking.[452] As one of the drafters of Section 230 (now-U.S. Senator Ron Wyden) recently acknowledged, the law's safe harbor was meant to incentivize efforts to clean up the internet—not to provide a free pass for ignoring or encouraging illegality.[453]

We find ourselves at a very different moment now than we were in five or ten years ago, let alone twenty years ago when Section 230 was passed. The pressing question now is not whether the safe harbor will be altered, but to what extent. That is astounding, to say the least.

Modest adjustments to Section 230 could maintain a robust culture of free speech online without extending the safe harbor to bad actors or, more broadly, to platforms that do not respond to illegality in a reasonable manner. One possibility suggested by noted free speech scholar Geoffrey Stone would be to deny the safe harbor to bad actors. Specifically, that exemption would apply to online service providers that "knowingly and intentionally leave up unambiguously unlawful content that clearly creates a serious harm to others."[454] This would ensure that bad actors could not claim immunity if they knowingly and intentionally leave up illegality causing serious harm, such as nonconsensual pornography or up-skirt photos.

A variant on this theme would deny the immunity to online service providers that intentionally solicit or induce illegality or unlawful content.

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[450] *See infra* note.
[451] Citron & Jurecic, *supra* note, at.
[452] H.R. 1865, 115th Cong. (2017-2018).
[453] Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018).
[454] Email of Geoffrey Stone, Prof. of Law, U. Chi. School of Law to Danielle Citron, Prof. of Law, U. Md. Carey School of Law (Apr. 8, 2018) (on file with author).

This approach takes a page from trademark intermediary liability rules. As Stacey Dogan urges in that context, the key is the normative values behind the approach.[455] Providers that profit from illegality—which surely can be said of sites that solicit illegality—should not enjoy immunity from liability. It behooves them to keep up harmful, illegal content and risk potential lawsuits. At the same time, other online service providers would not have a reason to broadly block or filter lawful speech in order to preserve the immunity. In other words, the approach provides broad breathing space for protected expression.[456]

Still yet another approach would amend Section 230 in a more comprehensive manner. As Benjamin Wittes and I have argued, platforms should enjoy immunity from liability only if they can show that their response to unlawful uses of their services is reasonable.[457] The immunity would hinge on the reasonableness of providers' (or users') content moderation practices as a whole — rather than whether specific content was removed or allowed to remain in any specific instance. The determination of what constitutes a reasonable standard of care would consider differences among online entities. Internet service providers (ISPs) and social networks with millions of postings a day cannot plausibly respond to complaints of abuse immediately, let alone within a day or two. On the other hand, they may be able to deploy technologies to detect content previously deemed unlawful. The duty of care will evolve as technology improves.

A reasonable standard of care would reduce opportunities for abuses without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem as one of setting an appropriate standard of care more readily allows for differentiating among various kinds of online actors, setting different rules for large ISPs linking millions to the internet versus websites designed to facilitate mob attacks or enable illegal discrimination.[458]

B. Markets

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[455] Stacey Dogan, *Principled Standards vs. Boundless Discretion: Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J. L. & ARTS 502, 508 (2014).
[456] *Id.*
[457] Citron & Wittes, *supra* note. A better revision to Section 230(c)(1) would read (revised language is italicized): "No provider or user of an interactive computer service that *takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider." Id.*
[458] *Id.*

As law has struggled to address invasions of sexual privacy, market forces have endeavored to mitigate some of the harm of invasions of sexual privacy. There may be other efforts on the horizon. Those developments should be viewed through Pozen's typology of privacy-privacy tradeoffs. First, a policy may involve a "distributional tradeoff," that is, it shifts privacy burdens or benefits from one group in the population to another.[459] Second, a policy may involve a "directional tradeoff" in what it shifts the burden not only among groups that suffer harm but also on groups that cause harm to a certain privacy interest—among privacy invaders as well as victims. Third, a policy may involve a "dynamic tradeoff," which shifts the privacy risk across time periods.[460] Last, a policy may shift risk across different privacy interests, which Pozen calls a "dimensional tradeoff."

The privacy-privacy tradeoff calculus is particularly important because whenever a new information technology emerges, the typical reaction is to overestimate the privacy costs of the new technology without taking a meaningful account of its privacy benefits.[461] Debates over privacy "keep score very badly and in a fashion gravely biased towards overstating the negative privacy impacts of new technologies relative to their privacy benefits."[462]

Information technologies are doubled-edged—they collect personal data even as they afford new opportunities for privacy.[463] In the analog age, if people wanted access to racy literature, they had to go into a store and buy it, revealing their reading habits to clerks.[464] Because it was embarrassing to be seen purchasing it, many declined to do so. In the digital age, there are no clerks to give us sideways looks if we purchase *Fifty Shades of Grey*.[465] To be sure, online behavioral advertisers are tracking our purchases as are Amazon and other e-book sellers.[466]

This Part takes a look at emerging trends to ensure that we do not cast aside valuable private efforts without a careful look at the overall impact on sexual privacy and competing privacy interests.

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[459] Pozen, *supra* note, at 229.
[460] *Id.* at 230.
[461] BENJAMIN WITTES & JODIE LIU, BROOKINGS INSTITUTE, THE PRIVACY PARADOX: THE PRIVACY BENEFITS OF PRIVACY THREATS (2015), https://www.brookings.edu/research/the-privacy-paradox-the-privacy-benefits-of-privacy-threats/.
[462] *Id.*
[463] *Id.*
[464] WITTES & LIU, *supra* note.
[465] BENJAMIN WITTES & EMMA KOHSE, BROOKINGS INSTITUTE, PRIVACY PARADOX II: MEASURING THE PRIVACY BENEFITS OF PRIVACY RISKS (2017), https://www.brookings.edu/research/the-privacy-paradox-ii-measuring-the-privacy-benefits-of-privacy-threats/.
[466] *Id.*

1. *Facebook Hashes*

Since 2014, Facebook has banned nonconsensual pornography in its terms of service (TOS) agreement. At the start, users would report images as TOS violations, and the company would react to those requests, removing images where appropriate. Yet abusers would routinely repost the material once it had been removed, leading to a game of whack-a-mole.

Facebook has spearheaded technical strategies to address this problem that have garnered very different public reactions. Let's take the effort that has obvious upsides for privacy and little downsides. In April 2017, Facebook announced its adoption of hash techniques to prevent the cycle of reposting: users would report images as nonconsensual pornography as before, but now, the company's "specially trained representative[s]" would determine if the images violate the company's terms of service and then designate the images for hashing.[467] Photo-matching technology would block hashed images from reappearing on any of the platforms owned by Facebook. This strategy is one that Franks, as legislative director of the Cyber Civil Rights Initiative, had long urged tech companies to adopt.[468]

Hashing is "a mathematical operation that takes a long stream of data of arbitrary length, like a video clip or string of DNA, and assigns it a specific value of a fixed length, known as a hash. The same files or DNA strings will be given the same hash, allowing computers to quickly and easily spot duplicates."[469] In essence, hashes are unique digital fingerprints.

This program has great promise to mitigate the damage suffered by victims of nonconsensual pornography. Preventing the reappearance of nonconsensual pornography is a relief to victims, who can rest easy knowing that at least on Facebook and its properties, friends, family, and coworkers will not see their nude images without their consent.[470] Storing the hashed images poses little risk to privacy—since the images have already been posted without consent and removed, the hashes would be the

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[467] Antigone Davis, *The Facts: Non-Consensual Intimate Image Pilot*, FACEBOOK NEWSROOM (Nov. 9, 2017), https://newsroom.fb.com/news/h/non-consensual-intimate-image-pilot-the-facts/.

[468] Interview with Mary Anne Franks (Sept. 1, 2018) (on file with author) (explaining that as early as 2014, Franks urged tech companies to adopt hash strategies to filter and block content constituting nonconsensual pornography).

[469] Jamie Condliffe, *Facebook and Google May Be Fighting Terrorist Videos with Algorithms*, MIT TECH. REV. (June 27, 2016), https://www.technologyreview.com/s/601778/facebook-and-google-may-be-fighting-terrorist-videos-with-algorithms/. Computer scientist Hany Farid, in conjunction with Microsoft, developed PhotoDNA hash technology that enables the blocking of content before it appears. *Id.*

[470] Of course, this solution is confined to Facebook—but its success might portend wider adoption, as in the case of child pornography moderation efforts.

only remnant of that process and would be difficult to reverse engineer back to the original image.

The next step in Facebook's efforts, however, has garnered significant outrage from privacy advocates and journalists. In November 2017, Facebook announced a pilot program that would allow victims of nonconsensual porn to send to Facebook images that they worried might be posted without their consent.[471] The effort grew out of discussions with Facebook about the concerns of women whose abusers had threatened to post their nude images online. The question posed to Facebook was whether the company could do anything *before* intimate images were posted without their consent. The hashing program was incredibly helpful but it could not prevent the initial publication. There was still harm—mitigated, to be sure, but still significant.

Facebook's technologists and policy leaders partnered with Australia's e-safety commissioner to roll out a program that would enable individuals to send in intimate photos that they feared would be posted on Facebook without their permission.[472] Users have to notify the e-safety commissioner's office about the problem.[473] Once the e-safety office notifies Facebook, individuals are sent a one-time link so that they can send intimate images to Facebook. Facebook's operations access the image and hash it to prevent its future posting on the site.[474] Facebook is extending the program to the United States and the United Kingdom.

The reaction to the proposal was swift, and much of it negative. Some criticism was warranted. Journalists asked why anyone should trust Facebook after the Cambridge Analytica fiasco.[475] Information security experts noted that transmitting intimate images to Facebook entailed

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[471] I am a member of a small group of advisers working with Facebook on the issue. Our Non-Consensual Intimate Image Working Group includes members of CCRI and the National Network to End Domestic Violence. See announcement of working group and effort here. *Facebook Safety*, FACEBOOK, https://www.facebook.com/fbsafety/posts/1666174480087050. I am not paid for any of my consulting work with Facebook.

[472] Olivia Solon, *Facebook Asks Users for Nude Photos in Project to Combat Revenge Porn*, GUARDIAN (Nov. 7, 2017), https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos.

[473] Louise Matsakis, *To Fight Revenge Porn, Facebook Is Asking to See Your Nudes*, MOTHERBOARD (Nov. 7, 2017).

[474] Davis, *supra* note, at.

[475] David Bloom, *Facebook Wants Your Nude Photos, What Could Possibly Go Wrong?*, FORBES (May 24, 2018), https://www.forbes.com/sites/dbloom/2018/05/24/facebook-wants-your-nude-photos-what-could-possibly-go-wrong/.

security risks.[476] Civil liberties groups were quick to criticize the initiative, mocking it as a privacy disaster.[477]

There are indeed risks to sexual privacy—a dynamic one, as Pozen describes it—if Facebook fails to secure the transmission of nude images and does not delete those images after hashing them. All signs suggest that Facebook is immediately deleting the nude images after hashing them and it is difficult to reengineer images from hashes. On the other hand, the hash program offers meaningful upsides for sexual privacy. The pilot program is an experiment, one that could end up protecting far more sexual privacy than it endangers. Crucially, Facebook safety officials, notably Antigone Davis and Karuna Nain, are monitoring the project to ensure that the privacy calculus makes sense. Facebook is hosting in-house training sessions with experts so that staff is attuned to privacy concerns.[478] In short, this is precisely the sort of careful efforts that companies should engage in as they adopt privacy-enhancing technologies that also carry risks.

2. *Immutable Life Logs*

The development of hard to debunk deep sex fakes raises the possibility of a market response that would enable people to have credible alibis. As Robert Chesney and I discuss in a project about the national security, privacy, and democracy implications of deep fakes, there may soon emerge a market response that warrants careful study: immutable life logs or authentication trails that make it possible for a victim of a deep fake to produce a certified alibi credibly proving that he or she did not do or say the thing depicted.[479]

From a technical perspective, such services will be made possible by advances in technologies including wearable tech; encryption; remote sensing; data compression, transmission, and storage; and blockchain-based record-keeping. That last element will be particularly important, for a vendor hoping to provide such services could not succeed without earning a strong reputation for the immutability and comprehensiveness of its data.

Obviously, not everyone would want such a service even if it could work reasonably effectively as a deep-fake defense mechanism. But some individuals (politicians, celebrities, and others whose fortunes depend to an

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[476] *Id.*
[477] For a sample, see tweets directed at Facebook's Chief Security Officer Alex Stamos. https://twitter.com/alexstamos/status/999745140108378112;
https://twitter.com/fightfortheftr/status/999720271484350464.
[478] I have been speaking at those training sessions.
[479] Chesney & Citron, *supra* note, at.

unusual degree on fragile reputations) will have sufficient fear of suffering irreparable harm from deep fakes that they may be willing to agree to—and pay for—a service that comprehensively tracks and preserves their movements, surrounding visual circumstances, and perhaps in-person and electronic communications (though providers may be reluctant to include audio-recording capacity because some states criminalize the interception of electronic communications unless all parties to a communication consent to the interception).[480]

Should we encourage the emergence of such services? We need to examine the privacy calculus in total. The privacy tradeoff is dimensional—it protects privacy and reputation by giving enormous power over every detail of our lives to lifelogging companies. There are serious social costs should such services emerge and prove popular. Proliferation of comprehensive life logging would have tremendous spillover impacts on privacy in general. It risks what has been called the "unraveling of privacy"[481]—the outright functional collapse of privacy via social consent despite legal protections intended to preserve it. Scott Peppet has warned that, as more people relinquish their privacy voluntarily, the remainder increasingly risks being subject to the inference that they have something to hide.[482] This dynamic might overcome the reluctance of some holdouts. Worse, the holdouts in any event will lose much of their lingering privacy, as they find themselves increasingly surrounded by people engaged in life-logging.

Note the position of power in which this places the supplier of these services. The scale and nature of the data they would host would be extraordinary, both as to individual clients and more broadly across segments of society or even society as a whole. A given company might commit not to exploit that data for commercial or research purposes, hoping instead to draw revenue solely from customer subscriptions. But the temptation to engage in predictive marketing, or to sell access to the various slices of the data, would be considerable. The company would possess a database of human behavior of unprecedented depth and breadth, after all, or what Paul Ohm has called a "database of ruin."[483] The Cambridge

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[480] *See* Danielle Keats Citron, *Spying, Inc.*, 72 WASH. & LEE L. REV. 1243, 1262 (2014) (explaining that twelve states criminalize the interception of electronic communications unless all parties to the communication consent to the interception); Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1485. So long as one party to communications consent to interception, the remaining state laws—38—and federal law permit the practice.

[481] Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full Disclosure Future*, 105 NW. U. L. REV. 1153 (2015).

[482] *Id.* at 1181.

[483] Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization,* 57 UCLA L. REV. 1701, 1748 (2010).

Analytica/Facebook scandal might pale in comparison to the possibilities unleashed by such a database.

At the same time, this would have its upsides in terms of identifying deep sex fakes and all other manner of using video to manufacture the past. Ultimately, a world with widespread lifelogging of this kind might produce more benefits than costs (particularly if there is legislation well-tailored to regulate access to such a new state of affairs). But it might not. Enterprising businesses may seek to meet the pressing demand to counter deep fakes in this way, but it does not follow that society should welcome—or wholly accept—that development. Careful reflection is essential now, before *either* deep fakes *or* responsive services get too far ahead of us.

CONCLUSION

Digital voyeurism, up-skirt photos, sextortion, deep sex fakes, and nonconsensual porn are all invasions of sexual privacy—and more often, marginalized and subordinated communities shoulder the abuse. Sexual privacy should be understood as a distinct category of privacy interest, one that deserves special recognition and protection. Sexual privacy requires careful assessment and vigorous protection given its importance to sexual autonomy, intimacy, and equal opportunity.

Traditional privacy law's efficacy is eroding just as digital technologies magnify the scale and scope of the harm. We need a comprehensive approach that protects the positive potential of sexual privacy.