Sexual Privacy

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ABSTRACT. Those who wish to control, expose, and damage the identities of individuals routinely do so by invading their privacy. People are secretly recorded in bedrooms and public bathrooms and "up their skirts." Such images are used to coerce people into sharing nude photographs and filming sex acts under the threat of public disclosure. 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.

Each of these abuses is an invasion of sexual privacy—the behaviors, expectations, and choices that manage access to and information about the human body, sex, sexuality, gender, and intimate activities. Most often, women, nonwhites, sexual minorities, and minors shoulder the abuse. Sexual privacy, this Article contends, is a distinct privacy interest that warrants recognition and protection. It serves as a cornerstone for sexual autonomy and consent. It is foundational to human dignity and intimacy, and its denial results in the subordination of marginalized communities.

Traditional privacy law is increasingly insufficient to protect this interest. Its efficacy is eroding just as digital technologies magnify the scale and scope of the harm. The Article suggests a new approach to protecting sexual privacy that focuses on law and markets. Law should provide federal and state penalties for all types of sexual-privacy invasions, remove the statutory immunity from liability for certain content platforms, and work in tandem with hate-crime laws. Market efforts should be pursued if they enhance the overall privacy interests of all involved.

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INTRODUCTION

The barriers that protect information about our intimate lives are under assault. Networked technologies are exploited to surveil and expose individuals' naked bodies and intimate activities. Home devices are used to spy on intimates and ex-intimates.[1] Hidden cameras film people in bedrooms and restrooms, and "up their skirts" without permission. People are coerced into sharing nude images and making sex videos under threat of public disclosure.[2] Sexually explicit images are posted online without their subjects' permission.[3] Technology enables the creation of hyper-realistic "deep fake" sex videos that insert people's faces into pornography.[4]

At the heart of each of these abuses is an invasion of sexual privacy—the social norms (behaviors, expectations, and decisions) that govern access to, and information about, individuals' intimate lives. Sexual privacy concerns the concealment of naked bodies and intimate activities including, but not limited to, sexual intercourse. It involves personal decisions about intimate life, such as whether to entrust others with information about one's sexuality or gender, or whether to expose one's body to others. As I am using the term, sexual privacy is both descriptive and normative. It concerns how the social norms surrounding individuals' intimate lives are currently experienced and how they should be experienced.

Sexual privacy sits at the apex of privacy values because of its importance to sexual agency, intimacy, and equality.[5] We are free only insofar as we can manage the boundaries around our bodies and intimate activities. With sexual privacy,

1. *See, e.g.*, Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools of Domestic Abuse*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html [https://perma.cc/8KCM-NACX].

2. *See* Benjamin Wittes et al., *Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault*, BROOKINGS (May 2016), https://www.brookings.edu/wp-content/uploads/2016/05/sextortion1-1.pdf [https://perma.cc/JT5H-MCJG].

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

4. *See* Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. (forthcoming 2019), https://ssrn.com/abstract=3213954.

5. *See* 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 policy makers can make meaningful decisions when privacy interests are in conflict).

we can experiment with our bodies, our sexuality, and our gender.[6] We can author our intimate lives and be seen as whole human beings rather than as just our intimate parts or innermost sexual fantasies.[7]

Without sexual privacy, we have difficulty forming intimate relationships. We develop relationships of love and caring through a process of mutual self-disclosure and vulnerability.[8] Partners reveal their innermost selves to one other with the expectation that they will protect each other's intimate information.[9] When a partner's confidence is betrayed, it can be difficult to trust others in the future.[10]

Equal opportunity is on the line as well. Women and individuals from marginalized communities shoulder the brunt of the abuse.[11] They suffer stigmatization in the wake of sexual-privacy invasions.[12] They lose their jobs and have difficulty finding new ones.[13] They feel humiliated and ashamed. Sexual-privacy violations deny them the ability to enjoy life's crucial opportunities.

Despite sexual privacy's importance, reforms have proceeded slowly. This is partly because we lack a clear conception of what sexual privacy is and the harms wrought by its invasion. Policy makers and companies have addressed particular abuses only in isolation. One day, the discussion centers on nonconsensual pornography; the next, it centers on sextortion; and so on. Because the full breadth of the harm is not in view, policy makers fail to realize the costs of these violations.

Social attitudes have also stymied reform efforts. Some contend that sexual privacy merits no attention because sexual-privacy invasions involve problems

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6. CHARLES FRIED, AN ANATOMY OF VALUES 140 (1970).

7. *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).

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

9. EDWARD J. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY 181 (1978). ("Lovers fashion intimacy by telling each other things about themselves that they would not share with anyone else.").

10. FRIED, *supra* note 6, at 140.

11. Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673 (2017) [hereinafter Skinner-Thompson, *Performative Privacy*]; Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051 (2018) (explaining that marginalized communities are disproportionately subject to unwanted surveillance) [hereinafter Skinner-Thompson, *Privacy's Double Standards*].

12. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 6 (2014).

13. *Id.*

of victims' making.[14] Others warn that efforts to protect sexual privacy reinforce outmoded views of sexual modesty and shame[15] or that sexual privacy would simply hide the abuse of the vulnerable.[16]

Yet sexual privacy need not work this way.[17] A comprehensive account of sexual privacy would bring into view the full breadth of the harm inflicted by its invasion. It would allow us to appreciate the true nature of social attitudes dismissing sexual privacy as unimportant. Saying that victims "asked for it" is just another way that society has long trivialized harms suffered by people from marginalized communities.[18] Far from re-inscribing shame, the identification and protection of sexual privacy would affirm people's ability to manage the boundaries of their intimate lives. It would convey respect for individuals' choices about whom they entrust with their bodies and intimate information.

But would the protection of sexual privacy inevitably conceal abuse of the vulnerable? Past need not be prologue. Courts once immunized male batterers

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14. *Id.* at 6-8; 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, such as domestic abuse, workplace sexual harassment, and cyber gender harassment); Citron & Franks, *supra* note 3.

15. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006). This critique has early tort-law bona fides. Late nineteenth-century privacy-tort judicial 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 (2016). This argument is one I consistently faced when presenting work coauthored with Mary Anne Franks on nonconsensual pornography. Some feminist scholars criticized 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 reinscribe 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.

16. 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 invocation to coerce silence or hide abuse, whether domestic abuse or sexual predation—as in the recent cases of Harvey Weinstein, Charlie Rose, and Matt Lauer. Instead, sexual privacy warrants protection when it affirms autonomy, enables intimacy, and secures equality for all involved. *See infra* Part I.

17. 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) [hereinafter ALLEN, UNEASY ACCESS]; 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," Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 760 (1999); *see also* McClain, *supra* note 7.

18. *See* Citron, *supra* note 14, at 392-95.

from assault law in the name of "family privacy."[19] Missing from this privacy calculus was the invasion of battered women's sexual privacy. In the home, battered women were subject to unwanted inspection, exhibition, and abuse. Their bodies were not their own[20]—society protected male batterers' privacy interests at the expense of battered women's sexual privacy.[21] Courts should have considered the sexual-privacy interests of *all* the parties involved—including women in the home. Today, law and society must take full account of all individuals' privacy interests, with a clear understanding of sexual privacy's distinct importance.

Now is the time to conceptualize sexual privacy clearly and to commit to protecting it explicitly. Traditional privacy law's efficacy is eroding 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.[22] Search engines make the fruits of privacy violations easily accessible,[23] and in some cases, the damage can be permanent.[24] But neither tort law nor criminal law has protected sexual privacy as clearly or as comprehensively as it should.[25] Some victims are left with little or no legal redress, while abusers are punished in an inconsistent manner. For instance, neither criminal laws nor the privacy torts are likely to cover up-skirt photos, and the criminal law's coverage of sextortion turns on the victim's age.[26]

This Article charts out the meaning of sexual privacy as a distinct concept and describes its value to individuals, groups, and society. It contends that sexual privacy warrants recognition and protection as a foundational privacy interest. The Article suggests a path for reform that would fill gaps in the existing protections that have enabled a culture of impunity. In particular, the Article focuses on sexual-privacy invasions at the hands of private individuals, leaving discussion of governmental and corporate sexual-privacy invasions for later work.[27]

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19. Siegel, *supra* note 16, at 2118.

20. ALLEN, UNEASY ACCESS, *supra* note 17, at 54-81.

21. *Id.* at 58-59; Siegel, *supra* note 16, at 2122-34.

22. 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 [https://perma.cc/D78D-KUJ8].

23. *Cf.* CITRON, *supra* note 12, at 67 (explaining that popular posts, even if inflammatory, increase web-page traffic).

24. *See* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1804, 1813-14 (2010).

25. *See infra* Part III.

26. Wittes et al., *supra* note 2, at 26.

27. However, this Article does refer to state invasions of sexual privacy in order to provide context for its focus on individual wrongdoing and law's role in addressing it. My future work will explore governmental and corporate practices affecting sexual privacy. For instance, it will

Why concentrate on interpersonal wrongdoing? Current laws already address some interpersonal sexual-privacy invasions—no doubt because the harm suffered is viscerally palpable—and so provide a foothold to assess the existing legal protections of and norms concerning sexual privacy.

The Article proceeds in three parts. Part I charts out the concept of sexual privacy—its descriptive meaning, normative significance, and interests protected. The values that sexual privacy protects—autonomy, intimacy, and equality—offer criteria for identifying sexual-privacy interests, thus allowing policy makers and courts to focus their efforts. This Part provides guidance for how to make inevitable trade-offs when sexual-privacy interests clash with other privacy interests.

Part II highlights sexual-privacy invasions in the past and the present. Women and marginalized communities have disproportionately experienced these invasions throughout history. In the past, law and norms forced the exposure of enslaved black men and women's bodies. Middle- and upper-class white women enjoyed little sexual privacy in the home. For far too long, sexual minorities could not expect privacy in bedrooms and public bathrooms. Today, in the digital age, sexual-privacy invasions have taken new forms, including video voyeurism, up-skirt and down-blouse photos, sextortion, nonconsensual pornography, and deep-fake sex videos. As this Part shows, sexual-privacy invasions inflict profound harm, impacting nearly every aspect of people's lives.

Part III considers possible legal and market responses to sexual-privacy invasions. Existing criminal and civil laws are deficient. Far too many sexual-privacy invasions are misdemeanors that law enforcement ignores or that are subject to no penalty. Some victims may bring civil suits against their attackers, but privacy law fails to provide meaningful redress when perpetrators are judgment proof. The parties best situated to minimize the harm—online platforms—have no legal incentives to intervene because they enjoy broad immunity from liability, even for sexual-privacy invasions that they enable and encourage. Federal and state law should instead prohibit all manner of sexual-privacy invasions, enhance penalties for bias-motivated invasions, and remove the immunities enjoyed by certain content platforms. Privacy-tort law should be interpreted to provide meaningful redress for sexual-privacy invasions. Of course, law can only

consider governmental outing of people's sexuality, gender identity, and HIV status; state laws requiring people to 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; and the use of automated predictions about our intimate lives among other issues. Scholars have already 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); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015); Kendra Albert, The Double Binds of Transgender Privacy (unpublished manuscript) (on file with author).

do so much, and legal overreach has costs. Market mechanisms therefore offer another avenue for reform. Some tech companies have come to see that sexual-privacy invasions are bad for business. Accordingly, they have implemented projects aimed at cabining the harm that victims suffer. The Part concludes by assessing the impact of those developments on individuals, groups, and society.

I. SEXUAL PRIVACY

A. Understanding the Concept of Sexual Privacy

In everyday interactions, we construct boundaries around our personal information, bodies, and activities.[28] We seclude some physical spaces but not others. We keep some conversations confidential and share others with third parties.[29] We make social-media posts visible to some and hide them from others.[30]

Sometimes, law protects the boundaries that free us from scrutiny and exposure. Consider a few well-known examples. Law restricts access to personal data held in certain government databases.[31] It limits the collection, use, and disclosure of financial information,[32] educational records,[33] social security numbers,[34] and driver's license numbers.[35] It protects the privacy of political activities—our votes are anonymous to prevent retaliation and relieve social pressure.[36]

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28. IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR: PRIVACY, PERSONAL SPACE, TERRITORY, AND CROWDING 50 (1975); Kirsty Hughes, *A Behavioural Understanding of Privacy and Its Implications for Privacy Law*, 75 MOD. L. REV. 806, 810-13 (2012).

29. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 104 (2008) (offering a taxonomy of sixteen types of privacy problems, including intrusion, disclosure, interrogation, use, and breach of confidentiality).

30. *See, e.g.*, Woodrow Hartzog & Frederic D. Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1 (2013) (stating that social-media users use privacy settings in order to attain their desired level of obscurity).

31. Privacy Act of 1974, 5 U.S.C. § 552a (2018); *see* PRISCILLA REGAN, LEGISLATING PRIVACY 71-90 (1995).

32. *Cf.* Daniel J. Solove & Danielle Keats Citron, *Risk & Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 748-53 (2018) (discussing the various harms that are cognizable in data breaches).

33. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2018); 34 C.F.R. § 99 (2018).

34. 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, 248-49, 255-57 (2007).

35. *See* Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2018).

36. Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, NEW YORKER, Oct. 13, 2008, at 90 (describing the historical development toward a "secret ballot"). In the landmark decision of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court struck down an Alabama

At other times, law does not protect privacy even though it should. Whether privacy is warranted depends upon the settings, contexts, and expectations in which boundaries are erected.[37] Those settings, contexts, and expectations may involve *sex*—the human body; intimate activities (including, but not limited to, sexual intercourse); personal information about sex, sexuality, and gender (including, but not limited to, thoughts, fantasies, and desires); and personal choices about the body and intimate information.[38]

Sexual privacy concerns the social norms governing the management of boundaries around intimate life. It involves the extent to which others have access to and information about people's naked bodies (notably the parts of the body associated with sex and gender); their sexual desires, fantasies, and thoughts; communications related to their sex, sexuality, and gender; and intimate activities (including, but not limited, to sexual intercourse).

Sexual privacy thus captures many things at once. It refers to expectations concerning the seclusion of physical spaces where people have sex and undress, such as bedrooms, dressing rooms, and restrooms. It concerns assumptions about the concealment of genitalia, buttocks, and female breasts in varied contexts, including the street and the home. It involves the presumed confidentiality of communications with intimates about sex, sexual orientation, gender, sexual fantasies, or sexual experiences. It concerns expectations about the decision to

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.

37. SOLOVE, *supra* note 29, at 44-46. Privacy has been studied from a wide range of perspectives, across disciplines. *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF (2012) (critiquing neoliberal approaches to privacy and copyright concerns and offering a theory of play and human flourishing to understand and address them); WOODROW HARTZOG, PRIVACY'S BLUEPRINT (2018) (evaluating privacy from a design perspective); ARTHUR R. MILLER, THE ASSAULT ON PRIVACY (1971) (exploring privacy from an individual-liberties perspective); REGAN, *supra* note 31; NEIL RICHARDS, INTELLECTUAL PRIVACY (2015); ARI EZRA WALDMAN, PRIVACY AS TRUST (2018) (putting forth a framework highlighting "trust" as the animating principle behind privacy protections); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609 (1999). Some scholars have searched for a common denominator for privacy. *See, e.g.*, ALAN F. WESTIN, PRIVACY AND FREEDOM (1967). Other scholars reject the notion that privacy has a singular purpose and instead focus on privacy's value in various contexts. *See* 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); SOLOVE, *supra* note 29 (arguing that privacy should be understood as a family of interrelated problems). In this Article, I take a "ground up" approach in exploring how sexual privacy is and should be experienced in particular contexts and settings.

38. *See, e.g.*, PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 57 (1996). In this book, Boling explores how privacy functions, focusing on the Supreme Court's decisional-privacy opinions, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Bowers v. Hardwick*, 478 U.S. 186 (1986).

share one's nude body with others. While sexual privacy involves various activities, decisions, communications, thoughts, and information, the concept's connective tissue and conceptual core is intimate life.

B. Highlighting Sexual Privacy's Value

Sexual privacy implicates a "different domain[] of value" from many other privacy interests.[39] In the hierarchy of privacy values, it is among the most significant to individuals, groups, and society. It therefore deserves recognition and protection, in the same way that health privacy, financial privacy, communications privacy, children's privacy, educational privacy, and intellectual privacy do.[40]

Scholars have already recognized that sexual privacy is a valuable category that deserves special protection.[41] Anita Allen has demonstrated the significance of sexual privacy for women[42] and LGBTQ individuals.[43] Linda McClain has highlighted the importance of women's liberty for making decisions about their

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39. Pozen, *supra* note 5, at 231.

40. *See* WILLIAM MCGEVERAN, PRIVACY AND DATA PROTECTION LAW 302-22, 731-883 (2016) (discussing cases and statutes providing special protection for children's personal information collected online, health data, financial records, credit reports, electronic communications, and educational records); Citron, *supra* note 34 (arguing that certain personal information like biometric data and Social Security numbers poses acute risks of identity theft and other forms of fraud and that its disclosure warrants strict liability akin to that for ultrahazardous activities); Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1153-54 (2015) (including sex in a list of the kinds of information that count as sensitive). Neil Richards powerfully and convincingly contends that our intellectual activities deserve special recognition and protection. *See* RICHARDS, *supra* note 37, at 95-108.

41. For my early thoughts on the issues at the heart of this piece, see Danielle Citron, *Protecting Sexual Privacy in the Information Age*, *in* PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS 46 (Marc Rotenberg et al. eds., 2015); and Danielle Citron, *Protecting Sexual Privacy with Law*, FORBES (Apr. 16, 2014, 10:42 AM), https://www.forbes.com/sites/daniellecitron/2014/04/16/protecting-sexual-privacy-with-law [https://perma.cc/6FB2-NZ4T].

42. *See, e.g.*, ALLEN, UNEASY ACCESS, *supra* note 17. 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, they invaded the employees' ability to keep their sexual identities in the background. *Id.* at 128-29. They pierced their sexual anonymity and forced the exhibition of their sexuality. *Id.*

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

bodies.[44] Khiara Bridges has shown that poor mothers need freedom from invasive state interrogations about their intimate histories in order to protect their dignity and equal citizenship.[45] Mary Anne Franks has explored the importance of privacy for marginalized communities and the disparate impact that nonconsensual pornography has on women, sexual minorities, and nonwhites.[46]

This Section underscores sexual privacy's value for sexual autonomy, identity development, and intimate relationships. It highlights the relationship between sexual privacy and equality and the intersectionality of sexual-privacy invasions.

1. *Sexual Privacy as Securing Autonomy*

Sexual privacy is foundational for the exercise of human agency and sexual autonomy. It enables individuals to set the boundaries of their intimate lives.[47] With sexual privacy, individuals determine the contexts in which their naked bodies are seen, recorded, photographed, or exhibited. They can decide if and to what extent their intimate information will be revealed, published, or disclosed. They can choose to tell another person about their sexual orientation, gender, or sexual history.

Consent facilitated by sexual privacy is contextual and nuanced—it does not operate like an on-off switch.[48] If a person rents an apartment, sexual privacy

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44. McClain, *supra* note 7, at 196.

45. BRIDGES, *supra* note 27, at 121, 149.

46. Citron & Franks, *supra* note 3, at 350-54; Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 464-73 (2017) [hereinafter Franks, *Democratic Surveillance*]; Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1261-70 (2017) [hereinafter Franks, *"Revenge Porn" Reform*]; Mary Anne Franks, *The Need for Sexual Privacy Laws*, BROOKINGS (Sept. 8, 2014), https://www.brookings.edu/blog/techtank/2014/09/08/the-need-for-sexual-privacy-laws [https://perma.cc/RV75-PAGW] (focusing on nonconsensual pornography).

47. McClain, *supra* note 7, at 241 ("The goal of restricting access is also about power, the power to control one's body . . . .").

48. Citron & Franks, *supra* note 3, at 348, 354-56. Consent is a deeply contested issue, especially in the context of sexual assault. *See* Taylor Carroll, *Defining Consent*, AM. L. INST. ADVISER (Dec. 18, 2017), http://www.thealiadviser.org/sexual-assault/defining-consent [https://perma.cc/CG7B-T9MK]. The American Law Institute is working on a model definition of consent for sexual assault cases. Jennifer Morinigo, *Updated "Consent" Definition*, AM. L. INST. ADVISER (Dec. 19, 2016), http://www.thealiadviser.org/sexual-assault/updated-consent-definition [https://perma.cc/WBS9-KGNS]. Among the contested issues are the ability to withdraw consent and consent by trickery. Thanks to Clare Huntington, Cynthia Godsoe, and Leigh Goodmark for discussing the issue with me. I leave detailed discussion of the complex-

means that she can let a handyman into her apartment to fix a leak without giving the handyman permission to hide a tiny camera in her bathroom. If a person shares her childhood sexual assault with an intimate partner, sexual privacy allows that person to ask the partner to keep that information confidential. If a person shares a nude photograph with an intimate partner, sexual privacy permits that person to insist on confidentiality and to expect that no one else will access the image. After a hacker stole her intimate photos from her iCloud account and posted them online, actress Gabrielle Union remarked that sharing the photos with her husband did not mean that anyone else had permission to see them.[49]

Sexual privacy secures the autonomy that is essential to self-development.[50] The human body serves as a "basic reference" for identity formation.[51] It influences how individuals understand, develop, and construct their gender identity or sexuality.[52] People develop a sense of individuality through their management

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ities of consent in the context of sexual-privacy invasions for my book project on sexual privacy. The key for this Article is that the context, settings, and expectations help us sort out whether a person's consent is narrow or broad. For instance, just because someone takes off her clothes in an intimate partner's bedroom does not mean that person has consented to the videotaping of what goes on in the bedroom unless the intimate partner has told her and asked her permission. Indeed, the reasonable expectation is that there is no video camera in the bedroom.

49. Abigail Pesta, *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 [https://perma.cc/B9LC-8UK8].

50. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 40 (1976) (arguing that the privacy accorded to intimate affairs conveys to individuals that their lives are their own).

51. MAURICE MERLEAU-PONTY, THE PHENOMENOLOGY OF PERCEPTION 67-74 (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 7, at 21-23, 188.

52. We perform and construct gender identity; it is not fixed or static. *See* Paulan Korenhof & Bert-Jaap Koops, *Gender Identity and Privacy: Could a Right to Be Forgotten Help ~~Andrew~~ Agnes Online?* (Tilburg Inst. for Law, Tech., & Soc'y, Working Paper No. 3, 2013), https://ssrn.com/abstract=2304190. Our gender identity may not match how culture perceives our bodies. *See* JUDITH BUTLER, GENDER TROUBLE 7 (1990) (explaining that culture and norms link some parts of our bodies—genitalia, female breasts, and buttocks—and not others to our person); *see also* Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1274-77 (2003) (exploring the treatment of genitalia and "states of undress" as matters of culture, threat, and risk).

of the boundaries around their bodies.[53] As Julie Cohen has written, one's sense of self is bound up in "performance and performativity."[54] Free from public inspection, individuals can experiment with their intimate identities[55] before revealing them to others.[56]

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 identity formation.[57] When the revelation of people's sexuality or gender is out of their hands at pivotal moments, it can shatter their sense of self.[58] For transgender people, being forced to reveal their former name (and wrong gender) can "trigger feelings of dysphoria and humiliation."[59] The psychic trauma produced by the unwanted exposure of one's gender or sexual orientation can alter a person's life plans.[60]

Sexual privacy therefore creates a space for individuals to figure out their *future selves*.[61] It secures the ability to make life-defining decisions,[62] giving individuals the necessary "breathing space away from familial or societal censure" to

53. Irwin Altman explains that "[w]hen the permeability of these boundaries [to the self] is under the control of a person, a sense of individuality develops." ALTMAN, *supra* note 28, at 50.

54. COHEN, *supra* note 37, at 129.

55. BRIDGES, *supra* note 27, at 197.

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

57. McClain, *supra* note 17, at 772.

58. Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, 22 HYPATIA 43, 50 (2007).

59. Anna Lauren Hoffmann, *Data, Technology, and Gender: Thinking About (and from) Trans Lives*, *in* SPACES FOR THE FUTURE: A COMPANION TO PHILOSOPHY OF TECHNOLOGY 3, 9 (Joseph C. Pitt & Ashley Shew eds., 2018).

60. *See id.*

61. *Cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean [petitioners'] existence or *control their destiny* by making their private sexual conduct a crime." (emphasis added)).

62. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973). 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.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984). Important scholarship has criticized *Roe* for failing to secure the right to privacy for the poor. *See, e.g.*, Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 123-24 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1424 (1991). I leave these concerns and the relationship between decisional privacy and informational privacy for my book project on sexual privacy.

make decisions about their intimate lives.[63] As the Court underscored in *Lawrence v. Texas*, 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."[64]

Sexual privacy's importance to autonomy and self-development is at the heart of Samuel Warren and Louis Brandeis's landmark article *The Right to Privacy*. Although Warren and Brandeis addressed a rarified problem—press coverage of upper-crust dinner parties[65]—their project had broad implications for sexual privacy.[66] They were concerned about "daily papers" broadcasting the "details of sexual relations,"[67] and they warned about "sordid spying" into the family home.[68] Both individuals and society suffer, Warren and Brandeis argued, when intimacies "whispered in the closet" are "proclaimed from the housetops."[69] Exposing the "fact" of a "domestic occurrence" without consent risked "spiritual" and emotional harm even greater than "material" and physical harm.[70]

Warren and Brandeis called for tort law to recognize a "right 'to be let alone'" in the "sacred precincts of private and domestic life."[71] Individuals needed to control how much others knew about "the domestic circle."[72] The power to determine the extent to which one's "thoughts, sentiments, and emotions shall be communicated to others" was crucial.[73] As Warren and Brandeis argued, a right

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63. 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.*

64. 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

65. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 97-98 (2012) (explaining how prominent Bostonian Samuel Warren convinced his law-school classmate and law-firm partner Louis Brandeis to coauthor *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).

66. A little-known reason behind Samuel Warren's interest in a right to privacy was his younger brother Ned's homosexuality. 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. Charles E. Colman, *About Ned*, 129 HARV. L. REV. F. 128, 135 (2016).

67. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

68. *Id.* at 202 n.1.

69. *Id.* at 195.

70. *Id.* at 197, 201.

71. *Id.* at 193-96.

72. *Id.* at 196.

73. *Id.* at 198.

to privacy would protect individuals' ability to develop their "inviolate personality."[74]

One aspect of the "inviolate personality" is human dignity—the recognition that individuals should determine the arc of their intimate lives.[75] Sexual privacy facilitates self-respect by affirming individual agency over one's intimate life. To see themselves as the authors of their intimate lives, people need the ability to manage the boundaries around physical spaces like the home.[76]

The ability to manage access to one's naked body and intimate information enables people to present themselves as dignified and whole.[77] It is integral to what Leslie Henry calls "personal integrity"—having the social bases of self-respect.[78] When intimate information is "removed from its original context and revealed to strangers, we are vulnerable" to being defined by that information.[79] For instance, when individuals' intimate habits are publicly exposed, they may be "reduced" to nothing more than those habits, their genitals, or a sexual act.[80] 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 . . . [b]eing trans would become the focus of my existence, and I would be forced to fight the images catalogued in people's minds about trans people."[81]

In particular, 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."[82] As Martha Nussbaum explains, "sexuality is an area of life in which disgust often

74. *Id.* at 205.

75. As Leslie Henry has explored in her important scholarship, dignity encompasses pluralistic values in the jurisprudence of the Supreme Court. *See* Leslie Meltzer 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 (emphasis omitted). Relying on the Court's opinions, Henry shows that "each conception of dignity has a particular 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.

76. JULIE C. INNES, PRIVACY, INTIMACY, AND ISOLATION 109 (1992).

77. *See id.*

78. Henry, *supra* note 75, at 215.

79. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 9 (2000).

80. *See id.*

81. MOCK, *supra* note 7, at 248.

82. *See* MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 363 (2013); *see also* Martha C. Nussbaum, *Objectification and Internet Misogyny*, *in* THE OFFENSIVE INTERNET 68, 73-74 (Saul Levmore & Martha C. Nussbaum eds., 2010) (discussing online posters' description of rape fantasies of female law students).

plays a role."[83] Sex signifies our animal nature because it "involves the exchange of bodily fluids."[84] 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)."[85] That identified group often includes 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.[86]

None of this is to suggest that sex, gender, and sexuality are the essence of individuals' identities.[87] 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.[88] Without intellectual privacy, individuals might feel pressured to conform to the uncontroversial.[89] Just as the recognition of intellectual

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

84. *Id.*

85. *Id.* There is a similar dynamic at work when the state interrogates poor black mothers about their intimate lives when they apply for Medicaid. *See* BRIDGES, *supra* note 27. 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 their fetuses. They 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 Right to Privacy: A Review*, 98 B.U. L. REV. 1139 (2018) (book review) (comparing Bridges's book to the work of Charles Reich in providing a theory of privacy for the marginalized).

86. NUSSBAUM, *supra* note 83, at 17-20 (explaining that the sexuality of women and LGBTQ individuals is often depicted as shameful and disgusting); *see also* Jimmie Manning & Danielle M. Stern, *Heteronormative Bodies, Queer Futures: Toward a Theory of Interpersonal Panopticism*, 21 INFO. COMM. & SOC'Y 208, 219 (2018) (arguing that sexuality is often used to shame individuals if it does not fall in line with heteronormativity, including punishing women for having more than one sex partner while men are not).

87. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 755 (1989) (contending that linking conceptions of privacy to self-definition risks essentialized identities—women as mothers—and offering an alternative view of privacy based on the prevention of totalitarian state control over citizens).

88. RICHARDS, *supra* note 37, at 186.

89. *Id.* at 101; *see* 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, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1428 (2000)

privacy does not mean that reading, writing, and speaking determine individuals' personhood, the recognition of sexual privacy does not mean that sex, gender, and sexuality exclusively define who individuals are. Rather, sexual privacy secures a source of autonomy that enables people to determine the shape of their identities.

2. *Sexual Privacy as Enabling Intimacy*

Another crucial aspect of sexual privacy is its role in fostering intimacy.[90] Sexual privacy lets people "giv[e] . . . themselves over" to each other physically and "be what they truly are — at least as bodies — intensely and together."[91] When this takes place in the context of caring, physical intimacy is an aspect and expression of love.[92]

Sexual privacy also provides an essential condition for the formation of intimate relationships. Charles Fried contends that

> [t]o respect, love, trust, or feel affection for others and to regard ourselves as the objects 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.[93]

Said another way, love has difficulty developing without sexual privacy.

As social-psychological research shows, sexual privacy enables the growth of intimate relationships, which develop through a process of reciprocal self-disclosure.[94] Intimate partners reveal "vulnerable, socially undesirable facets of the

(arguing that without privacy for intellectual activities, people shy away from unpopular ideas and embrace the bland and mainstream); Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 181 (2008) (examining "the relationship between privacy and visibility in the networked information age").

90. *See* Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978) (arguing that intimacy and intimate relationships could not exist without privacy); James Rachels, *Why Privacy Is Important*, 4 PHIL. & PUB. AFF. 323, 326 (1975) (same); Reiman, *supra* note 50, at 39 (same).

91. Reiman, *supra* note 50, at 34-35. Of course, mutual revelation of our bodies is not always egalitarian. Unwanted pressure to reveal one's body to an intimate partner can undermine meaningful identity development and intimacy. *See* Citron & Franks, *supra* note 3, at 351 (discussing how domestic abusers pressure partners to reveal intimate images).

92. Reiman, *supra* note 50, at 35.

93. FRIED, *supra* note 6, 138, 140.

94. *See* ALTMAN & TAYLOR, *supra* note 8, at 52-55. In *The Art of Loving*, Erich Fromm explains that love relationships allow a person to know himself, the other person, and humanity. ERICH

self."[95] They grow to trust one other with their innermost thoughts, feelings, and experiences because they believe that the other person will treat their information as they hope rather than as they fear.[96] Intimate relationships deepen as couples continue this process of mutual sharing.[97]

Falling in love depends upon partners treating one another's personal information with care.[98] Lovers "lay bare their innermost feelings to each other, they are lewd and foolish with each other, they stand naked before each other" on the premise that "what is shared so intimately will not be broadcast to the world at large."[99] People share their innermost thoughts, feelings, and beliefs when they believe intimate partners will not treat them as "inconsequential."[100] They will not hide or self-censor unappealing personal facts if they think their partners will be discreet with that information.[101] Privacy is thus an important condition for achieving intimacy.[102] Indeed, some scholars have argued that "relationships of love, liking, and caring" are the only reason why privacy matters.[103]

FROMM, THE ART OF LOVING 47 (1956). When people share innermost thoughts, values, and attitudes – what Fromm calls the core – they perceive their "identity, the fact of [their] brotherhood." *Id.*

95. ALTMAN & TAYLOR, *supra* note 8, at 169-72.

96. *Id.* at 54-58, 77; John G. Holmes & John K. Rempel, *Trust in Close Relationships*, *in* CLOSE RELATIONSHIPS 187, 190 (Clyde Hendrick ed., 1989).

97. *See* WALDMAN, *supra* note 37, at 67.

98. BLOUSTEIN, *supra* note 9, at 125-26.

99. *Id.* at 125.

100. Ferdinand Schoeman, *Privacy and Intimate Information*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 406 (Ferdinand David Schoeman ed., 1984).

101. Neil M. Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 453 (2016).

102. *Id.* at 453, 456.

103. *See, e.g.*, INNES, *supra* note 76, at 78 (contending that privacy only warrants protection if it involves decisions about and access to information about acts or matters that "draw[] their value and meaning from an agent's love, care, or liking"); Gerety, *supra* note 51, at 236, 263 (arguing that "intimacy" and the "intimacies of personal identity" are the "chief restricting concept in the definition of privacy"). Although I disagree with the premise that sexual privacy is the only privacy interest worth protecting, I have drawn considerable inspiration from the insights of scholars who underscore the importance of intimate privacy. It is also worth noting that seemingly innocuous information can reveal much about our intimate lives in our big-data age. As the Supreme Court has underscored in recent Fourth Amendment decisions, knowing where someone has traveled over the course of a week can reveal information about her intimate life, including who she loves and whether she visited a family-planning clinic. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217-18 (2018); United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

The Supreme Court has recognized the relationship between privacy and intimacy. In *Roberts v. U.S. Jaycees*, the Court acknowledged that people in highly personal relationships share a "special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[104] It attributed the constitutional shelter afforded highly personal relationships to the "realization that individuals draw much of their emotional enrichment from close ties with others."[105] "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."[106]

Although sexual privacy is essential for intimacy, it is important 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 be able to decide who knows about our gender identity or sexual preferences, even if such sharing has nothing to do with intimate relationships. 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 intimate relationships, but it deserves protection for other reasons as well.

3. Sexual Privacy as Protecting Equality

Sexual privacy's recognition would also draw attention to—and account for—its significance in combating subordination. This Section explains how sexual-privacy invasions often harm women and marginalized people more significantly than other groups. It argues that a prior era's invocation of privacy to justify subordination does not undermine sexual privacy's importance for equal opportunity today. Even if the forces of discrimination recede, sexual privacy still deserves protection.

a. Expressive Power

The relationship between sexual privacy and gender, racial, sexual, and economic equality is undeniable.[107] Protecting sexual privacy involves a recognition

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104. 468 U.S. 609, 620 (1984).

105. *Id.* at 619.

106. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); and Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

107. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 316 (1997) ("Governmental policies that perpetuate . . . subordination through the denial of procreative rights, which threaten both racial equality and privacy at

of the disproportionate impact that sexual-privacy invasions have on women, sexual minorities, and nonwhites, and on the lived experiences and suffering of these marginalized communities.[108] Adopting measures to protect sexual privacy would say that these invasions constitute unacceptable forms of subordination[109] and discrimination—conceptualized by Deborah Hellman as actions that degrade individuals and deprive them of material opportunities.[110]

Victims of sexual-privacy invasions lose their jobs.[111] They have difficulty finding work when their nude photos appear in searches of their names.[112] They feel humiliated and demeaned after cameras secretly videotape them in bedrooms, bathrooms, or showers, and the footage is posted online without authorization. Sexual-privacy invasions deprive individuals of their sense of belonging and the recognition of their equal citizenship.[113]

Sexual-privacy invasions impact women and individuals from marginalized communities in distinctly damaging ways. Consider the attacks on black actress Leslie Jones after the release of the movie *Ghostbusters*, in which Jones had a starring role. She reported that she received doctored photos depicting her with se-

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once, should be subject to the most intense scrutiny."); *see also* JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 74 (1997) ("Protection of privacy enhances and ensures the freedom from such scrutiny, pressure to conform, and exploitation . . . .").

108. *See infra* Part II.

109. CITRON, *supra* note 12, at 27, 197.

110. 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) the conduct might be a material put-down, an exercise of power over the person. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 7-8 (2011).

111. CITRON, *supra* note 12, at 7; Citron & Franks, *supra* note 3, at 352.

112. CITRON, *supra* note 12, at 8; Citron & Franks, *supra* note 3, at 352; Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 710 (2017); *see also* Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985) (finding no privacy-tort and constitutional law violations where plaintiff's employer *Christian Science Monitor* demanded to know her sexual orientation and then fired her after learning she was gay). Transgender people have faced violent attack and lost custody over their children after their gender identities were revealed. *See* Jennifer Finney Boylan, Opinion, *Britain's Appalling Transgender 'Debate,'* N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/opinion/britain-transgender-debate-caitlyn-jenner.html [https://perma.cc/P3ZN-PP3F].

113. Robin Lenhardt's powerful scholarship on belonging and inequality inform all aspects of my discussion of equality. *See* R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53 (2015); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

men on her face and that harassers compared her to an ape, with menacing photos to match.[114] Her website was hacked, and its contents were replaced by photographs of her license and passport, nude photographs, and a video tribute to a dead zoo gorilla.[115] Jones eventually departed Twitter in response to the harassment.

Kimberlé Crenshaw's "intersectionality" framework shows that the forces that marginalize individuals tend to operate on multiple levels.[116] People experience subordination differently based on their intersecting identities.[117] 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 experiences separately."[118] As Dorothy Roberts explains, poor women of color experience various forms of oppression "as a complex interaction of race, gender, and class."[119]

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114. Leslie Jones (@Lesdogg), TWITTER (July 18, 2016, 12:45 PM), https://twitter.com/lesdoggg/status/755126377691680768 [https://perma.cc/E6DV-3ZPT] ("Ok I have been called Apes, sent pics of their asses, even got a pic with semen on my face. I'm tryin to figure out what human means. I'm out.").

115. *See* Abby Ohlheiser, *Leslie Jones Was the Victim of a Hack, Reportedly Exposing Private Documents and Nude Photos*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/08/24/leslie-joness-website-goes-offline-after-reportedly-being-hacked [https://perma.cc/2PWV-3Y86]; *see also* Abby Ohlheiser, *The Leslie Jones Hack Used All the Scariest Tactics of Internet Warfare at Once*, WASH. POST (Aug. 26, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/08/26/the-leslie-jones-hack-used-all-the-scariest-tactics-of-internet-warfare-at-once [https://perma.cc/BUC7-DYTK] (explaining that women of color are subjected to racism and sexism online).

116. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; *see also* Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010) (exploring the relationship between dominance feminism and intersectionality).

117. Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 107-08 (2018). For an early discussion of the intersectional nature of workplace sexual harassment, see LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 96, 116-18 (1978).

118. Crenshaw, *Mapping the Margins*, *supra* note 116, at 1244.

119. Roberts, *supra* note 62, at 1424. 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. Athena D. Mutua, *Multidimensionality Is to Masculinities What Intersectionality Is to Feminism*, 13 NEV. L.J. 341, 345-49 (2013); *see also* Hutchinson, *supra*, at 312 (noting the "heterosexual stereotypes that inform the

Using this framework, Angela Onwuachi-Willig insightfully argues that Jones's experience should be viewed through an intersectional, multidimensional lens.[120] The invasions of Jones's sexual privacy were fraught with racism and misogyny.[121] Images posted on her own website exposed her racial and sexual identities in demeaning and humiliating ways. Doctored photographs reduced her to genitalia and breasts; she was depicted as less than human.

Relatedly, Mary Anne Franks has deployed this framework to explore what she calls "intersectional surveillance."[122] "Attentiveness to race, class, and gender," she has said, "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."[123]

Intersectional surveillance, in the way that Franks has conceptualized it, was evident when a novelist was secretly taped by her boyfriend in his bedroom. The novelist discovered videos of their sexual encounters on her boyfriend's computer in a folder labeled "Indian Research." As the novelist explained to me, she felt doubly shamed: as a woman and as an Indian-American.[124] She was nothing more than her naked body *and* her brown skin. She felt humiliated by her treatment as an "other"—a woman of color who could be reduced to a sex object, violated, and abused.[125]

Recognizing the novelist's experience as a sexual-privacy invasion would attest to the intersectional injury that she suffered. It would say that when someone's intersecting, marginalized identities are surveilled or exposed, the damage is multidimensional. It would make clear that sexual-privacy invasions suffused with gendered racism as in the novelist's case produce double the shame and double the subordination.

'sexualized racism' endured by all people of color"); Darren Lenard Hutchinson, *Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 641 (1997) (using "multidimensionality" to reflect "the inherent complexity and irreversibly multilayered nature of *everyone's* identities and of oppression").

120. Onwuachi-Willig, *supra* note 117, at 114.

121. *Id.*

122. Franks, *Democratic Surveillance*, *supra* note 46, at 464-73.

123. *Id*. at 464.

124. Interview with Jane Doe (Aug. 27, 2016). The man faced charges under a state video-voyeurism law for invading the privacy of several women. He eventually pleaded guilty.

125. The woman spoke to me in connection with my book *Hate Crimes in Cyberspace* with an understanding that I would keep her name confidential. I am honoring that promise here.

b. Concealment

Law and society have coerced "privacy" by forcing people to conceal their sexual orientation, gender, or bodies. This denies them the ability to manage the boundaries around their intimate lives, thus violating their sexual privacy and entrenching a sense of subordination.[126]

Consider the pressure to hide one's sexuality or gender identity in order to conform to a hegemonic heterosexual society.[127] As Kenji Yoshino has written, sexual minorities have felt compelled to "cover"—men felt pressure to perform stereotypical heterosexual male attributes, such as aggressiveness, while women felt "pressure to mute attributes stereotypically associated with women, such as compassion."[128] Even today, LGBTQ individuals hide their sexuality or gender identity to prevent bigoted abuse.[129] Writer Jennifer Boylan kept her female identity a secret until she was forty years old because she feared social rejection, violence, and discrimination.[130]

Law has undermined the sexual privacy of LGBTQ individuals. Military recruits must conceal their gender identities as a condition of service.[131] The Department of Health and Human Services plans to define sex as "immutable biological traits identifiable by or before birth" for the purposes of federal civil rights law.[132] This would eliminate the legal protections currently afforded transgender

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126. Thanks to Katharine Silbaugh for urging me to make this point explicit.

127. *See* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (2008); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

128. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 22, 143 (2006).

129. *See* Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. 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 [https://perma.cc/DLH6-9P78].

130. Jennifer Finney Boylan, Opinion, *How a Sliver of Glass Changed My Life*, N.Y. TIMES (Sept. 4, 2018), https://www.nytimes.com/2018/09/04/opinion/transgender-coming-out.html [https://perma.cc/FG4K-D6XD].

131. *Report and Recommendations on Service of Transgender Persons in the Military*, U.S. DEP'T DEF. 4 (Feb. 2018), https://assets.documentcloud.org/documents/4420622/226-3.pdf [https://perma.cc/3PQ8-LTZP] ("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 . . . .").

132. *See* Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html [https://perma.cc/YL7A-K8LE].

people, forcing them to hide their identities to prevent discrimination. 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 sexual orientation or gender identity denies LGBTQ individuals sexual privacy. It takes away their freedom to decide how much of their intimate lives to reveal to others. It relegates them to the status of "others" who should be ashamed about their sexual orientation or gender identity.

Along similar lines, nineteenth-century law forced some women to conceal their bodies "at a high cost to sexual choice and self-expression."[133] 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 whites, just as middle class white women were demanding social and economic equality, agitating for the right to vote, and quite literally asserting their 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.[134]

Many sumptuary laws explicitly banned cross-dressing,[135] and women were the target of most enforcement actions.[136] Courts relied on notions of modesty to deny these women sexual autonomy.[137] Sumptuary laws violated sexual privacy by denying women the choice of how much of their bodies to reveal to the public.

Society's treatment of the home as a secluded domain where men could abuse their wives without state intervention should be viewed as part of this phenomenon of coerced concealment. Late eighteenth- and early nineteenth-century courts invoked the concept of the private sphere to justify shielding spousal abusers from accountability.[138] Until the mid-to-late twentieth century,

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133. Allen, *supra* note 62, at 471.

134. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 8 (2008) (footnotes omitted).

135. *Id.* at 10.

136. Kapczynski, *supra* note 52, at 1285.

137. *Id.* at 1284.

138. *See* Siegel, *supra* note 16, at 2165-67. 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. *See* Citron, *supra* note 14, at 394. Law and norms

law recognized the privacy interests of male batterers while ignoring the privacy interests of battered women.[139] In the home, battered women rarely enjoyed opportunities for sexual privacy.[140] They had few moments of solitude and almost no sexual autonomy—their husbands often monitored and exerted control over their activities.[141] Behind this legal position was the view that women were properly subject to spousal discipline.[142] Domestic violence remained a private affair until the battered women's movement gave it a name and worked to ensure its criminalization.[143]

Some feminist scholars have viewed the invocation of "privacy" in the service of subordination as warranting its end. Catharine MacKinnon, for example, has claimed that privacy is inevitably a one-way ratchet to inequality.[144] However, other feminist scholars have argued that privacy's historical description does not dictate its normativity.[145] Anita Allen has written that while "[w]omen have had too much of the wrong kinds of privacy,"[146] subordinated individuals deserve "opportunities for privacy and the exercise of liberties that promote privacy."[147] Just as the harm that results from some exercises of liberty does not lead to the rejection of liberty, the harm that results from some ostensible protections of privacy should not warrant the rejection of privacy.[148]

have shifted, though not as completely as it was hoped. CITRON, *supra* note 12, 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.

139. *See* ALLEN, UNEASY ACCESS, *supra* note 17, at 79-80.

140. *Id.*

141. Siegel, *supra* note 16, at 2154.

142. LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 250-58 (1988); Siegel, *supra* note 16, at 2154.

143. CITRON, *supra* note 12, at 98-99. 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).

144. MACKINNON, *supra* note 16, at 93, 101-02. MacKinnon argued that privacy entrenched male hierarchy and power—privacy was a right "for men 'to be let alone' to oppress women one at a time." *Id.* at 102.

145. *See, e.g.*, Judith Wagner DeCew, *The Feminist Critique of Privacy: Past Arguments and New Social Understandings*, *in* SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES 85, 90 (Beate Roessler & Dorota Mokrosinska eds., 2015).

146. ALLEN, UNEASY ACCESS, *supra* note 17, at 37.

147. *Id.* at 36.

148. *Id.* at 37.

c. Beyond Equality

Would sexual privacy matter if bigoted attitudes and discrimination disappeared? What if the exposure of naked bodies was no longer viewed with shame and posting nude images did not damage people's reputations and careers? 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?[149]

In a sex-positive, bigotry-free world (one can dream!), we would still need sexual privacy. Regardless of whether anyone judges us, we should be able to manage the boundaries of our intimate lives.[150] Even if no one cares whether our nude photos are posted online or whether we are bisexual, lesbian, or trans, we need to retain the ability to manage how much of our intimate lives is shared with others. When social attitudes and law recognize the equal rights and dignity of LGBTQ individuals, sexual minorities should still be able to control the disclosure of information about their sexuality or gender.[151]

Further, the ability to share our naked bodies as we wish will still matter for sexual autonomy.[152] Crash Pad and other sites make pornography that celebrates lesbian, trans, and queer women.[153] Breast cancer survivors post photographs of their naked bodies to educate the public about the disease.[154] These activities matter for sexual expression and sexual autonomy.

Finally, even if bigotry recedes, the privacy accorded intimate relationships will remain important as well.[155] Hannah Arendt argued that love "is killed, or

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149. Skinner-Thompson, *supra* note 27, at 194-95.

150. In forthcoming work, I explore sexual privacy's role in fostering trust in intimate relationships. *See* Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. (forthcoming 2019).

151. Thanks to Bennett Capers and Joe Landau for helpful conversations about these issues.

152. Waldman, *supra* note 112, at 714-16.

153. Maya M, *The 16 Best Porn Sites for Queer Women*, DAILY DOT (Apr. 27, 2017, 5:00 AM), https://www.dailydot.com/irl/best-lesbian-porn-sites [https://perma.cc/S3YV-EPW6]. An actress posted pictures of herself after her hysterectomy to raise awareness about ovarian fibroids and the challenges of reproductive health. 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 [https://perma.cc/P666-QGGZ]. Crucially, she *chose* to be seen in a hospital gown and to share the fact of her hysterectomy.

154. *See, e.g.*, *Post Mastectomy Photo Gallery*, FORCE, https://www.facingourrisk.org/understanding-brca-and-hboc/post-mastectomy-photo-gallery.php [https://perma.cc/S6LY-2UTE].

155. HANNAH ARENDT, THE HUMAN CONDITION 51, 73 (1958).

rather extinguished, the moment it is displayed in public."[156] Human activities involving love, sex, and intimacy need protection from the public glare if they are to flourish.[157] Without sexual privacy, we may be unable to forge relationships of love and trust.

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 and nudity *are* discrediting and shameful. Intimate activities and naked bodies are not dirty. Because sexuality, gender, and the human body are central to identity formation and intimacy, we need the freedom to manage their boundaries.

Sexual privacy matters and will continue to matter even if hatred and subordination recede. And for now, because sexual-privacy invasions can lead to marginalization and discrimination, we must recognize, understand, and address their relationship to equality.

C. Identifying Sexual-Privacy Interests

Sexual-privacy interests can be identified by examining their proximity to the values that sexual privacy protects. Sexual privacy is concerned with sexual autonomy, self-determination, and dignity secured when people can manage the boundaries around their bodies, intimate information, and intimate activities. Autonomy-denying activities—such as the nonconsensual recording of a couple's sexual encounter—implicate sexual-privacy interests. Sexual privacy is also concerned with the intimacy and trust that develop when partners handle one another's intimate information with discretion. Trust-betraying conduct—such as the broadcasting of an ex-intimate's confidences about their transgender identity—involves sexual-privacy interests. Then too, sexual privacy is concerned with the subordinating impact on women and minorities that results from its denial. Shaming women and minorities for their nude bodies, sexuality, and gender—such as the posting of a deep-fake sex video depicting a woman being raped[158]—implicates sexual-privacy interests.

Acts that undermine these concerns to a significant enough degree, depending upon the context, settings, and actors involved, constitute sexual-privacy invasions.

Consider these illustrations. First, during graduate school, a woman shared sexually explicit photographs and videos with a man with whom she was in a

156. *Id.* at 51.

157. BOLING, *supra* note 38, at 68.

158. *See infra* Section II.B.5.

long-distance relationship. The man promised to keep the woman's photos and videos to himself. After the relationship ended, however, the man posted the woman's photos and videos online and emailed them to her parents and classmates.[159]

The man's exposure of his ex-girlfriend's naked body and his betrayal of her trust implicate sexual-privacy interests. The man hijacked the woman's sexual autonomy, forcing her naked body and sexual expression onto a virtual stage before an audience of family members, peers, and strangers; he damaged her social identity because the photos appear in searches of her name.[160] The man's actions also affected the woman's ability to trust future intimates. Mutual self-disclosure is difficult after ex-partners weaponize intimate communications.[161] Finally, subordination may be unavoidable. The woman will surely confront the gendered stereotype that she is a careless slut who brought the problem on herself. She may have difficulty finding and keeping work, as is often the case when a woman's nude photos appear in searches of her name. In sum, given their autonomy-denying, identity-destroying, intimacy-interfering, and equality-jeopardizing nature, the man's actions constitute a sexual-privacy invasion.

That said, even if the man was a casual hookup rather than an ex-intimate, his actions would still have invaded sexual-privacy interests. In that case, the woman's sexually explicit photos and videos warrant sexual-privacy protection not for their direct connection to intimacy, but for their importance to sexual autonomy. Being able to reveal one's naked body as one chooses is central to self-development and personal integrity. That would be true even if the man posted texts from the woman describing her sexual fantasies rather than her photos and videos. The public revelation of a person's sexual expression without consent interferes with that person's autonomy and self-respect.

Second, a hotel employee hid a video camera in a guest bathroom in order to tape people undressing and showering. He posted on a porn site a video of a female guest showering and included her name and address in the post. He then emailed the woman to say that unless she sent him nude photos, he would send

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159. I base this example on cases where revenge-porn victims have been represented by the Cyber Civil Rights Legal Project, a pro bono effort of K&L Gates. Those victims' real names deserve protection to prevent further harm. *See, e.g.*, Complaint, Doe v. Elam, No. CV 14-9788 (C.D. Cal. Dec. 22, 2014); *Civil Lawsuit on Revenge Porn*, N.Y. TIMES (Jan. 29, 2015), https://www.nytimes.com/interactive/2015/01/29/business/dealbook/document-civil-lawsuit-on-revenge-porn.html [https://perma.cc/YC6E-WJZQ]; Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN (Apr. 27, 2015), https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html [https://perma.cc/LWP4-VBDD].

160. Fink, *supra* note 159.

161. Citron, *supra* note 150, at 3.

the video to her colleagues.[162] The man followed through on his threat after the woman refused. The woman felt forced to show the video to her parents and employer—she did not want them to find out about it on their own.[163]

The hotel employee's actions constitute a profound sexual-privacy violation—first with the unauthorized taping of the woman's naked body, then with the posting of the video and attempt to extort more nude photos, and finally with the sharing of the video with the woman's colleagues. The hotel employee denied the woman agency over her body and sexual identity. The employee invaded a space where she assumed she could undress without anyone watching her, let alone videotaping her, and she had no power over who saw her naked body. As soon as she refused the demand for nude photos, the video was sent to her colleagues.

Every post and email violated the woman's personal integrity. She feared colleagues would see her as a naked body, not a whole person.[164] She worried the videos would affect her career, and she feared for her safety. That the woman never met the perpetrator (and thus no intimacy was invaded and no agreement of confidentiality was violated) does not remove this case from the heart of sexual privacy.

Third, a man secretly photographed a woman up her skirt while she was shopping at a store and posted the photo online. The woman never authorized the man to take the photo or to post it online. The man robbed the woman of her decision to cover her genitals from public exposure. He undermined her control over the extent to which her body parts were visible to the public.

What if the man never posted the up-skirt photo online? The denial of the woman's sexual autonomy and the attack on her personal integrity would remain. In taking the photo, the man denied the woman the ability to manage access to her body. Although there is nothing shameful about genitals, the fact that the man took the photo nonetheless instills a sense of embarrassment, shame, and fear.

Now suppose someone invades a coworker's privacy by publishing a letter he wrote to his intimate partner. For instance, suppose a man wrote a note to his husband, telling him that he had lunch with their son. He left the note on his desk at work. A colleague took a photo of the note and posted it on Facebook

162. This example stems from a young woman's experience. I am keeping her name and the specifics of her case private to honor her wishes. Telephone Interview with Jane Doe 2 (Oct. 15, 2018).

163. *Id.*

164. *Id.*

without asking for permission. In *The Right to Privacy*, Warren and Brandeis imagined a similar scenario—the nonconsensual publication of a benign letter between father and son—to illustrate a violation of the "right to be let alone."[165] For Warren and Brandeis, the "right to be let alone" meant that people had control over how much the public knew about domestic occurrences, even routine ones.[166]

Privacy is at issue because the man neither expected nor wanted his colleague to post the letter online. But the post does not invade sexual privacy. There has been no unauthorized disclosure of someone's naked body, intimate activities, or a violation of trust between intimates. The letter peripherally relates to sexual privacy because it involves the written communications of a gay couple, but nothing suggests that the letter writer hid his homosexuality from colleagues. The post did not reveal private intimate information because their marriage is matter of public record.

This scenario would implicate sexual-privacy interests if the letter included a description of the man's sexual desires.[167] Then, the photograph and post would undermine the man's control over intimate information. It would reduce him to his sexual fantasies in the eyes of colleagues and friends. The colleague would have invaded sexual-privacy interests even though he had not betrayed an intimate's trust or published a sexually explicit photograph.[168]

The values that sexual privacy protects help supply criteria for policy makers, courts, and law enforcers interested in protecting sexual-privacy interests. Sexual privacy involves sexual-autonomy-denying, intimacy-undermining, or equality-corroding privacy invasions concerning:

- nude bodies or simulated nude bodies (or parts of the body associated with sex and gender like the anus, buttocks, and female breasts);
- information about sex, sexual activity, sexual fantasies, sexual orientation, or gender;

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165. Warren & Brandeis, *supra* note 67, at 201.

166. *Id.*

167. The hack and leak of information posted to the website Ashley Madison—an online dating service for married people—comes to mind. *See, e.g.*, Danielle Keats Citron & Maram Salaheldin, Opinion, *Leave the Cheaters in Peace: If You Poke Around the Ashley Madison Data, You're Aiding and Abetting the Hackers*, N.Y. DAILY NEWS (Aug. 24, 2015), https://www.nydailynews.com/opinion/citron-salaheldin-leave-cheaters-peace-article-1.2333852 [https://perma.cc/ZH8A-W9K6] (arguing that alleged adulterers deserve privacy).

168. As Part III explores, existing law likely would not provide redress for this scenario, and current First Amendment doctrine may not permit its redress.

- sexual expression, including photos, videos, text, email, and other digital communications related to sex, sexuality, and gender; or
- physical spaces where individuals typically undress or engage in physical intimacy, such as bedrooms, bathrooms, and dressing rooms.

These criteria can help lawmakers, courts, and scholars identify sexual-privacy invasions worth protecting.[169] That is not to say that law should address those interests in the same manner. Not at all. Instead, these criteria contribute to the descriptive project of identifying sexual-privacy interests essential for policy makers. A related issue, to which we now turn, concerns the question of privacy-privacy trade-offs.

D. Privacy-Privacy Trade-offs

Once a sexual-privacy interest has been identified, it may be necessary to wrestle with competing privacy interests. As David Pozen describes, protecting "privacy along a certain axis may entail compromising privacy along another axis."[170] This task can be thought of as a "privacy-privacy tradeoff."[171]

Weighing competing privacy interests requires thoughtful analysis. Policy makers 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."[172] 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 trade-offs is an urgent task.[173]

We have already seen law's failure to recognize privacy-privacy trade-offs. Law once protected batterers' interests in family privacy without considering battered wives' sexual-privacy interests. The batterers' privacy interest was weak, as it was founded on the now-rejected view that spousal battering was

169. So long as doing so would comport with First Amendment commitments. I explore the First Amendment implications of legislative and common law efforts to address sexual-privacy invasions in Part III.

170. Pozen, *supra* note 5, at 222.

171. *Id.*

172. *Id.* at 243.

173. *Id.* In his project, Pozen builds a framework for understanding privacy-privacy trade-offs. His insightful work focuses on government surveillance efforts.

normal and expected, but courts never even gestured at battered wives' sexual-privacy interests.[174]

There are many contemporary examples of sexual-privacy interests that should be prioritized over competing privacy interests.[175] Let's return to the man who posted his ex-girlfriend's nude photos online and emailed them to her parents and classmates. Suppose the man used a pseudonym in the emails and posts. The woman would need to establish the identity of the person responsible for the posts and emails in order to bring a lawsuit. Obtaining the IP address associated with the post and the computer assigned to that address is essential to identifying the perpetrator. The man has a privacy interest at stake—the ability to speak online anonymously. Anonymity can constitute a weighty privacy value when the speaker is addressing political, religious, or cultural matters.[176] But not here. Rather than expressing views about politics or art, the man betrayed an intimate's trust and publicly disclosed her nude images. The woman's sexual-privacy interest has far greater normative weight than the poster's interest in anonymity.[177]

In *The Unwanted Gaze*, Jeffrey Rosen argues that employees have an interest in carving out private spaces at work where they can form friendships free from scrutiny.[178] What if employee *A* shows employee *B* a nude image of employee *C* while sitting in the break room? During an intimate relationship, *C* shared the nude photo with *A* on the understanding that *A* would keep the photo confidential. *C*'s interest in sexual privacy should be prioritized over *B*'s interest in the privacy of his conversations with work colleagues.[179]

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174. *See generally* Siegel, *supra* note 16 (chronicling how the state historically sanctioned domestic violence, both formally and tacitly).

175. Pozen, *supra* note 5, at 230 (discussing sexual privacy in the context of Don't Ask, Don't Tell).

176. CITRON, *supra* note 12, at 60-61.

177. *See* Jon Penney & Danielle Keats Citron, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. (forthcoming 2019) (exploring the silencing impact of online harassment and describing original empirical research showing that the existence of cyberharassment laws encourages victims to stay online rather than retreat in silence).

178. ROSEN, *supra* note 79, at 122-25.

179. Leslie Henry and I discuss a similar 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) (book review). We criticized Solove for failing to rank privacy interests and argued that policy makers need guidance when dealing with competing privacy claims. *Id*. at 1122-23.

Difficult issues will surely arise. There will be cases where sexual-privacy interests clash with each other and with similarly significant privacy interests.[180] Suppose a man asks his intimate partner for permission to tape their sexual encounters. Watching the tapes, the man explains, will help alleviate his pornography addiction. The man pledges to keep the tape to himself. Without permission, the man shows the sex tape to fellow participants in a group psychotherapy session. In disclosing the tape to others, the man invades his partner's sexual privacy. At the same time, investigating the man's actions would impinge upon another strong privacy interest—the confidentiality of therapy sessions. Where, as here, sexual privacy clashes with another important privacy interest, policy makers and courts should weigh the competing interests in a manner that minimizes the overall risks to privacy or that advances privacy for the most vulnerable groups.[181]

Some privacy scholars have declined to provide an 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.[182] But those ground-up assessments require normative inputs.[183]

II. SEXUAL-PRIVACY INVASIONS

This Part discusses sexual-privacy invasions and the harm that results from them. It begins with brief historical background and then shifts its focus to contemporary sexual-privacy invasions.

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180. *See* ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 173-94 (2011). Alice Ristrophe raised an interesting point to me: whether there is a clash of sexual-privacy interests when a sexual-privacy invader is imprisoned. To be sure, part of the carceral experience is an utter denial of privacy, including sexual privacy. For instance, prisoners have no privacy in bathrooms where they are forced to shower next to other inmates. Guards routinely search prisoners' undergarments and anal cavities for weapons. This is true for anyone incarcerated, not just sexual-privacy invaders. Thus, when a sexual-privacy invader is incarcerated, the person's punishment includes a denial of sexual privacy. The victim's sexual-privacy interest is better seen as incompatible, rather than as clashing, with a perpetrator's sexual-privacy interest (if sexual-privacy invasions warrant incarceration, which many should). Certainly, the perpetrator's sexual-privacy interest is less compelling than the victim's sexual-privacy interest.

181. *See* Pozen, *supra* note 5, at 243.

182. SOLOVE, *supra* note 29, at 40. 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. *Id*. at 68-70. As this Article argues, certain privacy interests, like sexual privacy, are more important than others.

183. *See* Citron & Henry, *supra* note 179, at 1122-24.

A. Brief Historical Background

In nineteenth-century America, enslaved individuals had no sexual privacy.[184] White masters forced enslaved men and women to disrobe in order to inspect their bodies.[185] Enslaved "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."[186] Their bodies were treated as "items of public (indeed pornographic) display."[187] White masters sexually assaulted enslaved women and forced them to bear their children.[188]

The situation was hardly better for free black women. In the northern states, employment agencies pushed black women into prostitution.[189] Gerda Lerner has noted that "the free availability [of black women] as sex objects to any white man was enshrined in tradition, upheld by the laws forbidding intermarriage, enforced by terror against black men and women[,] and . . . tolerated both in its clandestine and open manifestations."[190]

Black men and women, enslaved and free, were denied sexual privacy because they were deemed unworthy of it.[191] Dorothy Roberts has explained that black women were "exiled from the norm of true womanhood."[192] Racist mythology labeled the black woman as a "licentious temptress" and degenerate.[193] Black women, in other words, could not be trusted with privacy in their intimate affairs.[194]

In the postslavery era, black women in the segregated South remained "hypervisible and on display."[195] According to Patricia Hill Collins, black women working as domestic laborers in white-controlled private homes were subject to

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184. Franks, *Democratic Surveillance*, *supra* note 46, at 441-42.

185. *See id.*

186. Pesta, *supra* note 49.

187. McClain, *supra* note 17, at 770 (citing PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 163-80 (1991)).

188. ANGELA Y. DAVIS, WOMEN, RACE & CLASS 25-27 (1983).

189. MARY M. BROWNLEE & W. ELLIOTT BROWNLEE, WOMEN IN THE AMERICAN ECONOMY 244 (1976).

190. GERDA LERNER, BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 163-64 (1973).

191. ROBERTS, *supra* note 107, at 23.

192. *Id.* at 10.

193. *Id.* at 11.

194. *Id.*

195. PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE 20 (1998).

various techniques of surveillance, including close scrutiny, sexual harassment, assault, and violence.[196] "[W]ithin these labor conditions of hypervisibility," Simone Browne has observed, "black domestic workers needed to assume a certain invisibility" so that they would be perceived as "readily manageable and nonthreatening."[197]

The same conceptions of womanhood that led to the public exposure of black women's bodies[198] also led to the control of upper- and middle-class white women in the "family home,"[199] where they enjoyed little or no sexual privacy. These women had few opportunities to enjoy solitude and repose in the home.[200] John Stuart Mill wrote that husbands colonized wives' "sentiments" and bodies.[201] Wives were expected to bear children and care for their families, adhering to a "cult of domesticity."[202] The bourgeois ideal was the white woman working at home and the white man working in the community.[203] The public/private

196. *Id.* at 20-22.

197. 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.

198. *See* McClain, *supra* note 17, at 770; *see also* TONI MORRISON, RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (1992).

199. ALLEN, UNEASY ACCESS, *supra* note 17.

200. *Id.*

201. JOHN STUART MILL, *The Subjection of Woman*, *in* ON LIBERTY AND OTHER WRITINGS 117, 132 (Stefan Collini ed., Cambridge Univ. Press 1989) (1869).

202. *Cf.* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 375 (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. *See* Kathy Peiss, "*Charity Girls" and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 74, 74-75 (Ann Snitow et al. eds., 1983). Thanks to Linda McClain who helpfully discussed this history of the "sex wars" with me.

203. DEGLER, *supra* note 202, at 375. Sarah Josepha 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 "human affections and elevate [their] moral feelings." SARAH JOSEPHA HALE, WOMAN'S RECORD: OR, SKETCHES OF ALL DISTINGUISHED WOMEN, FROM "THE BEGINNING" TILL A.D. 1850. ARRANGED IN FOUR ERAS. WITH SELECTIONS FROM FEMALE WRITERS OF EVERY AGE, at xxxv-xxxvii (N.Y.C., Harper & Bros. 1853). The "True Woman was domestic, docile, and reproductive. The good bourgeois wife was to limit her fertility, [and] symbolize her husband's affluence." CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 225 (1985).

distinction reflected the differentiation of the male from the family, the family from the state and market, and the superior from the inferior.[204]

Meanwhile, for much of the twentieth century, workplace sexual harassment was rampant. It was acceptable to gawk at, ogle, and touch women.[205] Sexual harassment was viewed as a perk of men's employment rather than as invidious discrimination.[206] Law and social norms, however, began to shift in the late 1970s and early 1980s, though change has been slow.[207] In the wake of Anita Hill's testimony at Justice Thomas's confirmation hearings in 1991, African American women highlighted the racism and sexism that suffused workplace sexual harassment.[208]

Throughout the nineteenth and twentieth centuries, sexual minorities could not draw boundaries around their intimate affairs. State sodomy laws effectively criminalized their intimate interactions.[209] Until the Supreme Court's decision in *Lawrence v. Texas*,[210] the fear of state intrusion hung over intimate interactions of LGBTQ individuals. As Anita Allen explains, restroom stalls and bedrooms were "not reliably private for the LGBT community."[211] For instance, a gay man was arrested and charged with sodomy after someone spied on him in a store's bathroom. A Georgia appeals 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.[212] Similarly, after a woman's ex-husband secretly photographed her having sex with her female lover, the Mississippi Supreme Court found that the woman had no right

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204. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1873) ("Man is, or should be, woman's protector and 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 *Politics* between the *polis*, the political realm allocated exclusively to men, and the *oikos*, the domestic realm inhabited by women. *See* 2 ARISTOTLE, *Politics*, *in* THE COMPLETE WORKS OF ARISTOTLE 1986, 1999-2000, 2027 (Jonathan Barnes ed., B. Jowett trans., Princeton Univ. Press 1984) (c. 350 B.C.E.).

205. CITRON, *supra* note 12, at 22.

206. Citron, *supra* note 14, at 394.

207. CITRON, *supra* note 12, at 22-23.

208. *African American Women in Defense of Ourselves*, *in* DOCUMENTING INTIMATE MATTERS: PRIMARY SOURCES FOR A HISTORY OF SEXUALITY IN AMERICA 200, 201 (Thomas A. Foster ed., 2013).

209. *See* Bowers v. Hardwick, 478 U.S. 186, 192-94 & 192 n.5 (1986); JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 11-16 (2011).

210. 539 U.S. 558 (2003).

211. Allen, *supra* note 43, at 1721.

212. Elmore v. Atl. Zayre, Inc., 341 S.E.2d 905, 906 (Ga. Ct. App. 1986).

to be free from surveillance in her bedroom.[213] 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.[214]

These examples illustrate how sexual privacy was invaded and exploited in the past. The next Section focuses on contemporary sexual-privacy invasions and the injuries that they inflict.

B. Sexual Privacy in the Digital Age

Some sexual-privacy invasions from the past persist in the present.[215] Cultural attitudes about women and sexual minorities have not changed as quickly or as profoundly as one might have hoped.[216] For white women, women of color, LBT women, and girls, sexual-privacy invasions persist in different forms.[217] Gay men, trans men, and boys continue to have their intimate activities and identities surveilled and exposed in unwanted ways.[218]

This Section highlights contemporary sexual-privacy invasions, including: (1) digital voyeurism, (2) up-skirt photos, (3) sextortion, (4) nonconsensual pornography, and (5) deep-fake sex videos. Although heterosexual men also experience these sexual-privacy invasions, the brunt of the harm is suffered by women, marginalized communities, and minors.

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213. Plaxico v. Michael, 735 So. 2d 1036, 1040 (Miss. 1999).

214. *Id.*

215. *See* Franks, *Democratic Surveillance*, *supra* note 46, at 441 (explaining how privacy has been unequally distributed in society with the burden borne by traditionally subordinated groups); *see also* CITRON, *supra* note 12, at 13-17 (documenting particular targeting of women and minorities and the misogynistic, homophobic, racist, and anti-Semitic nature of abuse); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 67 (2009) (same); Citron, *supra* note 14, at 384-89 (same); Citron & Franks, *supra* note 3, at 347 (same); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657-58 (2012) (same).

216. Suffice it to say that the confirmation hearings of Judge Brett Kavanaugh to the Supreme Court demonstrated the way that sexual assault and gendered harms (including the shaming of women for alleged promiscuity) continue to be trivialized in public discourse.

217. As Khiara Bridges's scholarship has shown, poor mothers' privacy is virtually nonexistent. *See* BRIDGES, *supra* note 27, at 1-2, 116.

218. 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 27, at 18.

1. Digital Voyeurism

Observing, tracking, and recording bodies and intimate activities 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 facilitating remote and ubiquitous surveillance.

Video voyeurism violates people's sexual privacy by denying their autonomy. It effectively takes dominion over their bodies, intimate activities, and sexual interactions without permission. It hijacks their ability to decide who has access to their body, bedroom, or bathroom. It undermines people's sense that they control their intimate lives. When voyeurs are former intimates, the secret spying and surveillance undermines people's ability to develop in the future the trust necessary for relationships of love and caring.

Consider the secret audio and video recording of people at home. A quick online search yields an array of inexpensive coat hooks, clock radios, and smoke detectors with hidden cameras.[219] Perpetrators—often landlords, maintenance workers, roommates, and ex-intimates—place spy cameras in people's bedrooms and bathrooms.[220]

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219. *See, e.g.*, Todd Magel, *Man's Arrest Prompts Hidden Camera Concerns in Iowa*, KCCI DES MOINES (Apr. 6, 2018), https://www.kcci.com/article/mans-arrest-prompts-hidden-camera-concerns-in-central-iowa/19706016 [https://perma.cc/46XT-VG4Z].

220. *See* Welsh v. Martinez, 114 A.3d 1231, 1234 (Conn. App. Ct. 2015) (upholding an invasion-of-privacy claim against a man who gave the plaintiff gifts for her bedroom, including a clock radio, that contained hidden cameras). For news accounts, see Shelby Brown, *What This Landlord Allegedly Did to Spy on Tenant Will Creep You Out*, WTVR (Jan. 16, 2015, 11:10 AM), https://wtvr.com/2015/01/16/landlord-sued-over-spy-camera [https://perma.cc/4F7M-VPXB]; John Genovese, *Maintenance Man Hid Camera, Spied on Residents at Apartment Complex, Warren County Sheriff Says*, WCPO CIN. (May 26, 2016), https://www.wcpo.com/news/crime/maintenance-man-hid-camera-spied-on-residents-at-apartment-complex-warren-county-sheriff-says [https://perma.cc/QEG7-ZBDG]; Robert Hadley, *Chicago Tenant Accuses Landlord of Recording Intimate Moments via Hidden Camera*, COOK COUNTY REC. (Dec. 7, 2015), https://cookcountyrecord.com/stories/510651393-chicago-tenant-accuses-landlord-of-recording-intimate-moments-via-hidden-camera [https://perma.cc/K7UR-LYVU] (reporting on a lawsuit filed by a tenant against a landlord for secretly installing a camera in the 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 [https://perma.cc/UUN8-9Z2P] (explaining that a landlord was accused of planting hidden video cameras in tenants' bedrooms and bathrooms); and Erica Thompson, *Former Montauk Resident Sentenced After Illegally Spying on Tenants*, E. HAMPTON PRESS (Oct. 13, 2014, 8:20 AM), https://www.27east

For instance, a college professor who welcomed LGBT teenagers to live in his house after the teens had been kicked out of their homes for "coming out" hid a video camera in the guest bathroom.[221] Rutgers University student Dharun Ravi secretly filmed his roommate Tyler Clementi kissing a man and watched the live feed with six friends.[222] Ravi received just a thirty-day sentence for invading his roommate's privacy, far shorter than the ten-year sentence sought by prosecutors.[223]

The home is not the voyeur's only target. Secret recording devices are placed in locker rooms and even doctors' examination rooms.[224] A Maryland rabbi used a spy-camera clock radio to secretly videotape one hundred and fifty women while they undressed for the ritual bath known as the mikvah.[225] The rabbi received a jail sentence of seventy-eight months, even though prosecutors had requested seventeen years.[226] A Johns Hopkins gynecologist secretly photographed and videotaped his patients' naked bodies in the examination room with

.com/news/article.cfm/General-Interest-EH/83074/Former-Montauk-Resident-Sentenced-After-Illegally-Spying-On-Tenants [https://perma.cc/R8EN-QMJJ].

221. Ryan Collingwood, *North Idaho College Professor Charged with Felony Video Voyeurism, Under Investigation for Title IX Complaint*, SPOKESMAN-REVIEW (May 31, 2018, 9:43 PM), https://www.spokesman.com/stories/2018/may/31/north-idaho-college-professor-faces-charges-of-fel [https://perma.cc/S66X-SPBQ].

222. Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide [https://perma.cc/YE33-FZCK].

223. Mark Di Ionno, *After 6 Years, the End Comes Quickly for Ravi*, NJ.COM (Oct. 27, 2016, 12:28 PM), https://www.nj.com/news/index.ssf/2016/10/after_6_years_the_end_comes_quickly_for_ravi_di_io.html [https://perma.cc/UE42-4WVX].

224. *These Women Hunt Hi-Tech Peeping Toms in South Korea Where Secret Camera Porn Is Rampant*, S. CHINA MORNING POST (Oct. 18, 2016), https://www.scmp.com/news/asia/east-asia/article/2029041/these-women-hunt-high-tech-peeping-toms-south-korea-where-secret [https://perma.cc/Y3QJ-V6G4].

225. Keith L. Alexander & Michelle Boorstein, *Prosecutors Seek 17-Year Sentence for D.C. Rabbi Convicted of Voyeurism*, WASH. POST (May 8, 2015), https://www.washingtonpost.com/local/crime/prosecutors-seek-17-year-sentence-for-dc-rabbi-convicted-of-voyeurism/2015/05/08/975f5434-f464-11e4-84a6-6d7c67c50dbo_story.html [https://perma.cc/W2R6-X8PE]; Jessica Gresko, *Appeals Courts Hears Case of Rabbi Who Videotaped Nude Women*, BALT. SUN (June 21, 2016, 11:33 PM), https://www.baltimoresun.com/news/maryland/crime/bs-md-rabbi-arrested-20160621-story.html [https://perma.cc/4XJA-56QT]. The rabbi also hid a camera in the bedroom and bathroom of a safe house set up for a domestic-abuse victim and taped sexual encounters with women without their permission. Uriel Heilman, *New Details Show Mikvah-Peeping Rabbi Had Extramarital Sexual Encounters*, JEWISH TELEGRAPHIC AGENCY (May 12, 2015, 6:24 PM), https://www.jta.org/2015/05/12/united-states/new-details-show-mikvah-peeping-rabbi-had-extramarital-sexual-encounters [https://perma.cc/NH29-968A].

226. Gresko, *supra* note 225.

a pen-shaped camera.[227] After the doctor committed suicide, law enforcement declined to file criminal charges against anyone working at the hospital.[228] A class action suit brought on behalf of 8,000 patients against the hospital settled for $190 million.[229]

In some localities, law enforcement has issued warnings about spy cameras placed in women's public restrooms.[230] In countries like South Korea, hidden cameras in women's restrooms are rampant.[231]

Voyeurs also trick people into downloading malware (remote access Trojans or RATs) onto their laptops, which are often kept in bedrooms. They turn on laptops' cameras and microphones to spy on victims.[232] Online communities known as "ratters" share images of victims whom they refer to as their "slaves."[233] The victims are often young girls and boys.[234] According to the Digital Citizen Alliance, ratters sell "slaved devices" online—and girls' devices sell

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227. *Hopkins to Pay $190M to Patients of Gynecologist Who Secretly Videotaped Women*, CBS (July 21, 2014, 1:49 PM), https://www.cbsnews.com/news/johns-hopkins-agrees-to-pay-190-million-to-patients-of-gynecologist-who-secretly-videotaped-women [https://perma.cc/XNN7-PLCZ] [hereinafter *Hopkins to Pay $190M*] (explaining that investigators discovered 1,200 videos and 140 images on servers stored in his home).

228. *No Charges in Levy Case, Hopkins Doctor Suspected of Recording Patients*, CBS BALT. (Mar. 23, 2014), https://baltimore.cbslocal.com/2014/03/23/investigation-concluded-into-hopkins-gynecologist-suspected-of-recording-patients [https://perma.cc/6CPF-D9W8].

229. *Hopkins to Pay $190M*, *supra* note 227.

230. *See 'Spy Hooks' Raise Alarm About Secret Filming in Public Toilets*, STARTS 60 NEWS (Oct. 28, 2017), https://startsat60.com/news/spy-hooks-raise-alarm-about-secret-filming-in-public-toilets [https://perma.cc/JU57-CLT5].

231. Tiffany May & Su-Hyun Lee, *Is There a Spy Camera in That Bathroom? In Seoul, 8,000 Workers Will Check*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/world/asia/korea-toilet-camera.html [https://perma.cc/J25L-7FDH]. In South Korea, the number of such incidents jumped over fourfold from 2011 to 2017. Juwon Park & Isabella Steger, *South Korean Women Aren't Safe in Public Bathrooms—or Their Homes—Because of Spy-Cam Porn*, QUARTZ (Aug. 13, 2018) https://qz.com/1354304/south-korean-women-dread-public-bathrooms-because-of-spy-cam-porn [https://perma.cc/AQ5J-S43M].

232. 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 [https://perma.cc/3N8A-GN4A].

233. 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 [https://perma.cc/K8QE-6QKE].

234. *Selling "Slaving": Outing the Principal Enablers That Profit from Pushing Malware and Put Your Privacy at Risk*, DIGITAL CITIZENS ALLIANCE 3 (July 2015), https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/07027202-8151-4903-9c40-b6a8503743aa.pdf [https://perma.cc/NU9J-SXUM] [hereinafter *Selling "Slaving"*].

for more than boys' devices.[235] YouTube features thousands of tutorials on how to use and spread RAT malware,[236] and hackers generate revenue from advertisements featured next to those tutorials.[237] Although there have been prosecutions of ratters, law enforcement efforts have been dampened by a lack of training and resources.[238]

Smart-home technology provides another way to spy on, record, and monitor people in intimate spaces.[239] 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.[240] Networked home gadgets like the Amazon Echo and security cameras are often installed by men who use cell-phone apps to monitor them.[241] Many of the victims are women.[242]

Cyberstalking apps are another spying tool of choice. These apps enable people to monitor everything people do and say with their cell phones.[243] Perpetrators only need to access victims' phones for a few minutes to install the spying app, which leaves no trace of its presence.[244] They can then view victims' texts, photos, calendars, contacts, and browsing habits in real time.[245] As I have written elsewhere, "[t]argeted 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."[246] 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."[247]

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235. *Id.* at 4.

236. *Id.*

237. *Id.* at 4, 7, 18.

238. *Id.* at 12.

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

240. Bowles, *supra* note 1.

241. *Id.*

242. *Id.*

243. 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 cyberstalking apps and devices primarily useful for surreptitious interception of electronic communications).

244. *Id.* at 1243.

245. *Id.* at 1245.

246. *Id.* at 1246.

247. *Id.* at 1247-48 (quoting an online article that has since been taken down).

Nonetheless, law enforcement has done little to address the problem, despite the existence of laws criminalizing wiretapping of electronic communications. Federal criminal law and half of the states make it a crime to manufacture, sell, or advertise devices primarily used for covert electronic surveillance.[248] Yet only a handful of criminal cases have been brought against stalking-app providers.[249] Law enforcement's lackluster response is partly due to a lack of training on the relevant laws and technology necessary to investigate individual perpetrators and partly due to social attitudes trivializing domestic violence.[250]

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.[251] The site claimed that the videos involved straight men who had been tricked into sex.[252] Deneumostier posted Craigslist ads posing as a "bored housewife" interested in anonymous sex.[253] Men answering the ad were told to come to his home where he greeted them dressed as a housewife and told them to put on blacked-out goggles or blindfolds.[254] The men were never told that their sexual encounters were being taped and posted online.[255] Deneumostier was sentenced to three years in prison for secretly videotaping himself having sex with more than eighty men.[256]

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248. *Id.* at 1249-50, 1265.

249. *Id.* at 1266.

250. *Id.* at 1249, 1268.

251. Factual Proffer at 1, United States v. Deneumostier, No. 18-cr-20522-CMA (S.D. Fla. Sept. 20, 2018).

252. *Id.*

253. *See* Jennings Brown, *Men Looking for Anonymous Sex Reportedly Tricked into Being Filmed for Porn Site*, GIZMODO (July 18, 2018), https://gizmodo.com/men-looking-for-anonymous-sex-reportedly-tricked-into-b-1827690421 [https://perma.cc/CDP5-VM4J].

254. *See* David Ovalle, *These Men Were Promised Anonymous Sex. They Wound Up on a Porn Site Instead.*, MIAMI HERALD (July 18, 2018), https://www.miamiherald.com/news/local/community/miami-dade/homestead/article213869259.html [https://perma.cc/S68E-P2W5].

255. *Id.*

256. Jay Weaver, *Cross-Dresser Fooled Men, Posted Secret Sex Videos Online. Now, He's Going to Jail.*, MIAMI HERALD (Dec. 3, 2018), https://www.miamiherald.com/news/local/article222533760.html [https://perma.cc/H3MK-ZCCW].

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.[257] Some perpetrators use shoes with hidden cameras and wrist watches with micro lenses to film women's crotches and breasts.[258]

Much like video voyeurism, "up-skirt" and "down-blouse" photographs violate sexual privacy by denying victims' sexual freedom. The privacy invader undermines the victim's decision to shield her genitalia and breasts from the public—consent and sexual autonomy are no longer in victims' control. When the photographs are posted online, victims are reduced to their genitalia and breasts and their dignity is violated.

A famous example of "up-skirt" photos involves actress Emma Watson. A member of the paparazzi lay down on the floor and got a photograph up her skirt.[259] After actress Anne Hathaway experienced the same, then-television anchor Matt Lauer shamed her on television about it.[260]

Up-skirt photographs are not just experienced by celebrities. Every day, women are targeted on airplanes, the stairs of national monuments, coffee shops,

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257. *See* Clare McGlynn & Julia Downes, *We Need a New Law to Combat 'Upskirting' and 'Downblousing*,' INHERENTLY HUM. (Apr. 15, 2015), https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-and-downblousing [https://perma.cc/D4VH-USCZ].

258. *See, e.g.*, 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), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/10/even-at-a-national-memorial-no-one-is-safe-from-creepshots [https://perma.cc/LA86-42UJ]; *Police: Man Used Hidden Camera in Shoe to Take Upskirt Photos at Shop Rite*, CBS (June 2, 2017), https://philadelphia.cbslocal.com/2017/06/02/hamilton-upskirt-photos-shoprite [https://perma.cc/VH25-G62S].

259. *See* McGlynn & Downes, *supra* note 257.

260. *See* Joshua Gillin, *Anne Hathaway Embarrassed 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 [https://perma.cc/V9ZD-TEM9]; *'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, 2:20 PM), https://www.dailymail.co.uk/tvshowbiz/article-2247157/Anne-Hathaway-wardrobe-malfunction-Matt-Lauers-crude-quip-asks-pictured-underwear.html [https://perma.cc/9KJS-UT87].

and pools.[261] A Georgia man was caught taking up-skirt photos of a woman in a grocery store.[262] A Massachusetts man was arrested after he took up-skirt photos of female subway riders.[263] Both men, however, evaded legal sanction. Georgia and Massachusetts state appellate courts struck down the men's respective criminal convictions because state criminal laws did not cover up-skirt photos.[264]

Amidst this legal vacuum, the practice is thriving. Private online forums are dedicated to sharing up-skirt videos. When the publication *Motherboard* accessed one of the private forums, a popular site called *The Candid Forum*, it found thousands of up-skirt images of girls and women, including 4,300 individual threads in a section dedicated to up-skirt videos.[265]

3. Sextortion

Sextortion generally involves extortion or blackmail carried out online through a threat to release sexually explicit images of the victim if the victim does not engage in further sexual activity.[266] The scheme begins when perpetrators obtain victims' nude images either by tricking them into sharing the images[267] or by hacking into their computers.[268] Perpetrators then threaten to distribute the nude photos unless victims send more nude photos or perform sexual acts,

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261. *See* McGlynn & Downes, *supra* note 257; *see also* Clare McGlynn et al., *Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*, 25 FEM. LEGAL STUD. 25, 32 (2017) (explaining how current laws about "revenge porn" fail to address problems like up-skirting).

262. *Georgia Appeals Court Says "Upskirting" Is Legal*, CBS NEWS (July 25, 2016, 12:58 PM), https://www.cbsnews.com/news/georgia-appeals-court-upskirting-is-legal [https://perma.cc/GU8X-FPRM].

263. *"Upskirt" Photos Not Illegal, Mass. High Court Rules*, CBS NEWS (Mar. 6, 2014, 1:11 PM), https://www.cbsnews.com/news/upskirt-photos-not-illegal-massachusetts-high-court-rules [https://perma.cc/RA4V-A99R].

264. Gary v. State, 790 S.E.2d 150, 151 (Ga. Ct. App. 2016); Commonwealth v. Robertson, 5 N.E.3d 522, 523 (Mass. 2014).

265. *See* Joseph Cox, *Inside the Private Forums Where Men Illegally Trade Upskirt Photos*, MOTHERBOARD (May 8, 2018), https://motherboard.vice.com/en_us/article/gykxvm/upskirt-creepshot-site-the-candid-forum [https://perma.cc/VD6U-A9ZT].

266. *See* Wittes et al., *supra* note 2, at 11. 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 policy makers to consider proposals for a federal statute criminalizing sextortion, based on the statute proposed in the report.

267. *Id.* at 3.

268. *See, e.g.*, *id.* at 1-2. Jared Abrahams hijacked female victims' webcams, capturing them undressing in their bedrooms. *Selling "Slaving," supra* note 234, at 10-11. 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.*

often in front of webcams.[269] Coerced silence is another aspect of sextortion. Victims are threatened with further harm if they tell anyone.[270] Roughly half of victims do not disclose sextortion to family and friends.[271]

Sextortion involves the near-total destruction of sexual privacy. The privacy invader eliminates victims' control over their intimate activities and spaces. Perpetrators take authority over victims' bodies, instructing them to commit sexually degrading acts and to exhibit their genitalia on videocam. They interfere with victims' ability to retreat in safety to their bedrooms. Although perpetrators have no prior relationship with victims, their torment makes it difficult for victims to trust intimates in the future.

Perpetrators, who are almost always male, have dozens or even hundreds of victims.[272] Most of the victims are female,[273] including nearly all of the adult victims[274] and many underage victims.[275]

To get a sense of the damage inflicted, consider the following cases. Benjamin Jenkins demanded that victims — girls between the ages of 12 and 16 — record themselves drinking their urine and licking toilets.[276] He also ordered victims to watch him masturbate.[277] Luis Mijangos tricked hundreds of women and teenage girls into downloading malware onto their computers.[278] He turned on victims' webcams to record them undressing. Once Mijangos obtained victims'

269. *See What Is Sextortion?*, FBI, https://www.fbi.gov/video-repository/newss-what-is-sextortion/view [https://perma.cc/Q99D-84PZ].

270. *See* Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2017, 11:46 AM), https://www.lawfareblog.com/sextortion-online-harassment-and-violence-against-women [https://perma.cc/SZ9Q-EBQ6] ("[T]he sextortionist promises to keep the victim's images hidden in exchange for further photos or video.").

271. Janis Wolak & David Finkelhor, *Sextortion: Findings from a Survey of 1,631 Victims*, CRIMES AGAINST CHILD. RES. CTR. U.N.H. 79 (June 2016), https://rems.ed.gov/Docs/SextortionFindingsSurvey.pdf [https://perma.cc/2LHR-M2VW].

272. Wittes et al., *supra* note 2, at 4. Lucas Michael Chansler sextorted nearly 350 victims. *Id.* at 18.

273. *Id.* at 4.

274. Jurecic, *supra* note 270; Wittes et al., *supra* note 2, at 4.

275. Jurecic, *supra* note 270; Wittes et al., *supra* note 2, at 4.

276. U.S. Attorney's Office, N. Dist. of Ga., *Mableton Man Charged in Sextortion of Young Girls*, U.S. DEP'T JUST. (June 1, 2018), https://www.justice.gov/usao-ndga/pr/mableton-man-charged-sextortion-young-girls [https://perma.cc/6K7E-8K8V].

277. *Id.*

278. Wittes et al., *supra* note 2, at 1-2.

nude images, he emailed them demands for more. He coerced numerous victims into performing sex acts for him on camera and sending him nude images.[279]

The difference in the treatment of perpetrators who target minors and those who target adults is staggering. Anton Martynenko tricked 155 boys into sending him nude photos and then extorted more.[280] He received a thirty-eight-year sentence for producing and distributing child pornography.[281] Michael Ford hacked into the computers of hundreds of adult women to obtain sexually explicit images.[282] Via email, Ford ordered at least seventy-five victims to send him videos of "'sexy girls' undressing in changing rooms at pools, gyms and clothing stores."[283] He threatened to release the victims' nude photos unless they complied with his demands. When victims failed to comply, Ford escalated his threats, in one instance saying he would post the victim's contact information and photographs on an "escort/hooker website." Occasionally he followed through on his threats, sending victims' nude photos to their family members and friends.[284] Ford was sentenced to just fifty-seven months in prison.[285]

4. Nonconsensual Pornography

Nonconsensual pornography "involves the distribution of sexually graphic images of individuals without their consent."[286] Sometimes, perpetrators obtain

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279. Sara Ashley O'Brien, *Sextortion Is Scarily Common, New Study Finds*, CNN (May 11, 2016, 3:07 PM EST), https://money.cnn.com/2016/05/11/technology/brookings-institution-sextortion-study [https://perma.cc/U794-TMEP]. For an example of sextortion of a single victim, see Adam Duvernay, *NY Man Gets 16 Years for Sextortion of Sexual Images from Child in Delaware*, LAVOZ (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 [https://perma.cc/L6BR-ZZS4].

280. Derek Hawkins, *His Massive Sextortion Scheme Snared 155 Boys. Now He's Going to Prison for Decades.*, 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=.5876715fedeo [https://perma.cc/X6YW-WM5E].

281. *Id.*

282. *Former U.S. State Department Employee Sentenced to 57 Months in Extensive Computer Hacking, Cyberstalking, and "Sextortion" Scheme*, U.S. DEP'T JUST. (Mar. 21, 2016), https://www.justice.gov/opa/pr/former-us-state-department-employee-sentenced-57-months-extensive-computer-hacking [https://perma.cc/GD7X-RAC9].

283. *Id.*

284. *Id.*

285. *Id.*

286. Citron & Franks, *supra* note 3, at 346.

the nude images without subjects' permission.[287] Ford stole nude images from victims' computers and distributed the images after the victims refused to share more.[288] To take another example, a college student alleged she was secretly taped having sex with her boyfriend.[289] She said the boyfriend then showed the video at a fraternity meeting and texted it to his friends.[290] In yet another incident, a hacker obtained photographs of a hundred female actresses from their Apple iCloud accounts, including images of Gabrielle Union.[291]

In other cases, perpetrators obtain the nude images with consent, usually in the context of an intimate relationship. The images are then distributed without consent.[292] That practice is popularly referred to as "revenge porn."[293] In the college student's case, her boyfriend allegedly distributed the sex video he made without her permission and also distributed nude images she shared with him in confidence, also without her consent.[294] The boyfriend uploaded the nude images to a Facebook page called "Dog Pound," where members of his fraternity posted videos and images of sexual "conquests."[295]

Nonconsensual pornography invades sexual privacy by preventing victims from determining for themselves who sees them naked. Gabrielle Union described the hacker's theft and posting of her nude photo online as destroying her "power" over her body, much as the bodies of black women have long been "open for public consumption."[296] Nude photos, posted for the public to see, reduce people to their genitalia and breasts. When nonconsensual pornography is perpetrated by an ex-intimate, the betrayal of trust is profound.

Consider the experience of Holly Jacobs. Jacobs shared sexually explicit images and videos with her boyfriend.[297] The images and videos were for their eyes only.[298] After their break-up, her ex betrayed her trust, posting the photos and

287. *Id.*

288. *See supra* note 282 and accompanying text.

289. Daniel Victor, *Florida Fraternity Sued Over Intimate Videos Shared on Facebook*, N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/us/delta-sigma-phi-revenge-porn.html [https://perma.cc/6ZV2-3TTP].

290. Complaint ¶ 19, Novak v. Simpson, No. 6:18-cv-00922 (M.D. Fla. July 13, 2018).

291. Pesta, *supra* note 49.

292. Citron & Franks, *supra* note 3, at 346.

293. CITRON, *supra* note 12, at 45-46.

294. Complaint, *supra* note 290, ¶¶ 23, 25-26.

295. *Id.* ¶ 26.

296. Pesta, *supra* note 49.

297. CITRON, *supra* note 12, at 45.

298. *Id.*

videos on hundreds of revenge-porn sites, porn sites, and adult-finder sites.[299] He also sent her nude photos to her boss.[300]

For months, local law enforcement refused to help Jacobs, incorrectly claiming that harassment was a "civil" matter in her state.[301] At the urging of her Senator's office, the state attorney's office took up the case, charging her ex with misdemeanor harassment.[302] Nonetheless, the charges were dropped after her ex claimed that he had been hacked.[303] Prosecutors told Jacobs that they could not justify obtaining a warrant to investigate a misdemeanor.[304] The prosecutors simply did not think the abuse was serious enough to expend investigative resources.[305] At the time, Jacobs's home state did not have a law criminalizing the practice of nonconsensual pornography, something she helped changed after her criminal case was dropped.[306]

Nonconsensual porn affects women and girls far more frequently than it affects men and boys.[307] According to recent studies, the majority of victims are female,[308] and young women are particularly likely to experience threats to post

299. *Id.* at 45-46.

300. *Id.* at 46.

301. *Id.* at 139.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *See infra* note 497 and accompanying text (discussing the groundbreaking work of Jacobs and Mary Anne Franks, among others, to change social attitudes and law concerning nonconsensual porn).

307. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, CYBER C.R. INITIATIVE 12 (June 2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf [https://perma.cc/G3K2-C47R] ("Women were significantly more likely [about 1.7 times] to have been victims of [nonconsensual porn] or to have been threatened with [nonconsensual porn]"). Other studies confirm this finding. *See, e.g.*, Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50, 53 (2018) (finding that "victims of nonconsensual pornography are overwhelmingly women"). 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*, EVER LASTING STUDENT (Apr. 13, 2015), https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website [https://perma.cc/L2ND-SE5K] (finding that of 396 posts to a revenge porn website, 378 depicted women); Uhl et al., *supra*, at 50 ("[N]early 92% of victims featured on included websites were women.").

308. Eaton et al., *supra* note 307, at 12.

their nude images.[309] Nevertheless, men and boys are also victims of nonconsensual pornography.[310] Ari Waldman has conducted empirical studies about the prevalence of nonconsensual pornography among gay men.[311] Photos of men's genitalia have been posted online in cases involving revenge porn.[312]

Individuals who identify as sexual minorities are more likely than heterosexual individuals to experience threats of, or actual, nonconsensual pornography.[313] Research shows that 3% of Americans who use the internet have had someone threaten to post their nude photos, while 2% have had someone do it.[314] Those numbers jump considerably—to 15% and 7%, respectively—among lesbian, gay, and bisexual individuals.[315]

The perpetrators are often male, but not always. For instance, in 2016, Dani Mathers, a female model for Playboy, secretly took a photograph of a seventy-year-old woman while she was taking a shower in her health club's locker room.[316] She sent the photograph to her Snapchat followers, expressing her disgust for the elderly woman's aging body with the tagline, "If I can't unsee this then you can't either."[317] At that time, nonconsensual pornography was a mis-

309. Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* DATA & SOC'Y RES. INST. 5 (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [https://perma.cc/8WXC-Y8GX].

310. *Id.*

311. Ari Ezra Waldman, *Law, Privacy, and Online Dating: Nonconsensual Pornography in Queer Online Communities*, 44 LAW & SOC. INQUIRY (forthcoming 2019) (on file with author).

312. Manning & Stern, *supra* note 86, at 218 (discussing a shaming website called myex.com where ex-girlfriends have posted photos of their ex-boyfriends' genitalia).

313. Lenhart et al., *supra* note 309, at 5.

314. *Id.*

315. *Id.*

316. Rebecca Shapiro, *Former Playmate Dani Mathers Gets 3 Years Probation in Body-Shaming Case*, HUFFPOST (May 25, 2017, 12:58 AM ET), https://www.huffingtonpost.com/entry/playmate-dani-mathers-probation-body-shaming_us_59264afee4b0265790f501f1 [https://perma.cc/LYT9-5VPM]; Emily Shugerman, *Playboy Model Dani Mathers Faces Jail After Secretly Snapchatting Photo of Naked Woman at Gym*, INDEPENDENT, https://www.independent.co.uk/news/world/americas/playboy-dani-mathers-snapchat-jail-time-naked-woman-gym-prison-privacy-law-a7738986.html [https://perma.cc/ABK8-4E24].

317. Shapiro, *supra* note 316; Shugerman, *supra* note 316.

demeanor in her state.[318] Mathers was sentenced to community service and no jail time.[319]

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.[320] Deep-fake technology enables the creation of impersonations out of digital whole cloth.[321] The end result is realistic-looking video or audio that is increasingly difficult to debunk.[322]

Deep-fake sex videos are different from the nonconsensual disclosure of intimate images because they do not actually depict a victim's naked body. Yet even though deep-fake sex videos do not depict featured individuals' actual genitals, breasts, buttocks, and anuses, they hijack people's 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 anuses, creating a sexual identity not of the individual's own making. They are an affront to the sense that people's intimate identities are their own to share or to keep to themselves.

A Subreddit (since closed) featured deep-fake sex videos of female celebrities, amassing more than 100,000 users.[323] One such video featured Gal Gadot having sex with her stepbrother—but of course Gadot never made the video.[324]

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318. Shapiro, *supra* note 316; Shugerman, *supra* note 316. Mathers lived in California. In 2013, California made it a misdemeanor to publish someone's nude photograph without consent. CITRON, *supra* note 12, at 149.

319. Tyler McCarthy, *Playboy Playmate Dani Mathers Won't Face Jail Time for 2017 Body-Shaming Incident*, FOX NEWS (Jan. 17, 2018), https://www.foxnews.com/entertainment/playboy-playmate-dani-mathers-wont-face-jail-time-for-2017-body-shaming-incident [https://perma.cc/YRU2-H7QV].

320. Chesney & Citron, *supra* note 4 (manuscript at 2-4).

321. *Id.* (manuscript at 4). Robert Chesney and I are the first to document the looming threat of deep fakes to privacy, national security, and democracy. *Id.*

322. *Id.*

323. Adam Dodge & Erica Johnstone, *Using Fake Video to Perpetrate Intimate Partner Abuse, Domestic Violence Advisory*, DOC PLAYER, https://docplayer.net/76328364-Using-fake-video-technology-to-perpetrate-intimate-partner-abuse-domestic-violence-advisory.html [https://perma.cc/DC33-J5BM].

324. Samantha Cole, *AI-Assisted Fake Porn Is Here and We're All Fucked*, MOTHERBOARD (Dec. 11, 2017, 7:18 PM), https://motherboard.vice.com/en_us/article/gydydm/gal-gadot-fake-ai-porn [https://perma.cc/XF7F-JCT4].

Deep-fake sex videos have also featured the likenesses of Scarlett Johansson, Taylor Swift, and Maisie Williams.[325]

The capacity to generate deep fakes is spreading rapidly.[326] There are widely available desktop tools that anyone can access to create realistic face swapping videos, and easily-accessible tutorials that explain how to use these tools.[327] 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."[328] A Discord user explained that he made a "pretty good" video of a girl he went to high school with, using around 380 photos scraped from her Instagram and Facebook accounts.[329]

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.[330] The abuse began with tweets impersonating Ayyub, saying she supports child rape and hates Indians.[331] A two-minute fake pornographic video then appeared with Ayyub's face morphed onto another woman's body.[332] Thousands of people shared the deep-fake sex video on Twitter and Facebook and in WhatsApp groups.[333] Ayyub's social media notifications were filled with snippets of the video next to comments demanding

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325. *Id.*; *see* Robert Chesney & Danielle Keats Citron, *Deep Fakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics*, FOREIGN AFF. (Jan./Feb. 2019), https://www.foreignaffairs.com/articles/world/2018-12-11/deepfakes-and-new-disinformation-war [https://perma.cc/UPZ7-Q5N7] ("[D]eepfakes are especially dangerous to high-profile individuals, such as politicians and celebrities . . . .").

326. Cole, *supra* note 324.

327. *See, e.g.*, The Great Zasta, *How to Merge Faces with Fake App in 5 Minutes!! Quickest Tutorial*, YOUTUBE (Feb. 18, 2018), https://www.youtube.com/watch?v=i4bar4X7ghs; tech 4tress, *Deepfakes Guide: Fake App 2 2 Tutorial. Installation (Totally Simplified, Model Folder Included)*, YOUTUBE (Feb. 21, 2018), https://www.youtube.com/watch?v=Lsv38PkLsGU.

328. Dodge & Johnstone, *supra* note 323, at 6.

329. *Id.*

330. Rana Ayyub, Opinion, *In India, Journalists Face Slut-Shaming and Rape Threats*, N.Y. TIMES (May 22, 2018), https://www.nytimes.com/2018/05/22/opinion/india-journalists-slut-shaming-rape.html [https://perma.cc/A7WR-PF6L].

331. *Id.*

332. *Id.*

333. *'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

sex and threatening gang rape.[334] Tweets with her home address, phone number, and photograph circulated widely.[335] Most of the posters identified themselves as fans of the politicians she discussed in her reporting.[336] 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."[337]

Noelle Martin was an eighteen-year-old student in Australia when photos from her social-media profiles were inserted into images of people having sex. Soon, her face was swapped into porn videos featuring her being ejaculated on and having oral sex.[338] The photos and videos appeared next to her name and home address.[339] All could be easily found in searches of Martin's name.[340]

Martin went to law enforcement and was told that nothing could be done.[341] She could not afford to hire a lawyer.[342] She asked site operators to take down the videos. One site operator responded with a sextortion attempt, saying that he would take down the deep-fake sex video if she sent him nude photos.[343] Martin then worked with the New South Wales Attorney General's office to draft

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-rana-ayyub%E2%80%99s-horrific-social-media-ordeal-over-fake-tweet/ar-AAwnGHv [https://perma.cc/M9G2-N9C6].

334. Ayyub, *supra* note 330.

335. *Id.*

336. *Id.*

337. *Id.*

338. Cara Curtis, *Deepfakes Are Being Weaponized to Silence Women—but This Woman Is Fighting Back*, NEXT WEB (Oct. 5, 2018), https://thenextweb.com/code-word/2018/10/05/deepfakes-are-being-weaponized-to-silence-women-but-this-woman-is-fighting-back [https://perma.cc/BB4H-YL44]; TEDx Talks, *Sexual Predators Edited My Photos into Porn—How I Fought Back | Noelle Martin | TEDxPerth*, YOUTUBE (Mar. 6, 2018), https://www.youtube.com/watch?v=PctUS31px40.

339. Ally Foster, *Teen's Google Search Reveals Sickening Online Secret About Herself*, NEWS.COM.AU (June 30, 2018), https://www.news.com.au/technology/online/security/teens-google-search-reveals-sickening-online-secret-about-herself/news-story/ee9d26010989c4b9a5c6333013ebbef2 [https://perma.cc/T2DD-LEWV].

340. Curtis, *supra* note 338.

341. Foster, *supra* note 339.

342. TEDx Talks, *supra* note 338.

343. Jake Sturmer & Alison Branley, *Noelle Martin Fights to Have Harmless Selfie Removed from 'Parasite' Porn Sites*, ABC NEWS (Oct. 12, 2016), https://www.abc.net.au/news/2016-10-12/womans-fight-to-have-harmless-selfie-removed-from-porn-site/7924948 [https://perma.cc/HS4Q-HYJN].

a (now passed) criminal law prohibiting nonconsensual porn and deep-fake sex videos.[344]

These examples highlight the gendered dimension of deep-fake sex videos. Thus far, most, if not all, victims of deep-fake sex videos are female. One can imagine deep-fake videos featuring someone being raped. For women, the threat of rape is all too real.[345] Deep-fake sex videos bring that threat alive in a visceral way.

C. Harm

The harm of sexual-privacy invasions is profound. 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.[346] Like the silencing that domestic-violence victims have long endured, victims are forced to hide the abuse from people who could help them.[347]

Developing intimate relationships is difficult after one's sexual privacy has been 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."[348] 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."[349] Sports journalist Erin Andrews echoed these sentiments after a stalker secretly taped her undressing in a hotel room and then posted the video online.[350] Holly Jacobs was afraid to date for months after discovering the revenge porn posted by her ex-boyfriend.[351]

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344. *2019 WA Young Australian of the Year: Ms. Noelle Martin*, AUSTRALIAN YEAR AWARDS, https://www.australianoftheyear.org.au/honour-roll/?view=fullView&recipientID=2035 [https://perma.cc/D6QV-AM5T]; TEDx Talks, *supra* note 338.

345. For examples of online assaultive incidents and their effects on women, see Citron, *supra* note 215, at 64-65, 69-72, 75-76.

346. Jurecic, *supra* note 270; Wittes et al., *supra* note 2, at 1-5, 10-23.

347. Jurecic, *supra* note 270.

348. Welsh v. Martinez, 114 A.3d 1231, 1244 (Conn. App. Ct. 2015).

349. *Id.* at 1242.

350. Chad Finn, *No Matter the Verdict, Erin Andrews Cannot Undo the Pain*, BOS. 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 [https://perma.cc/Z37H-JNSS].

351. Telephone Interview with Holly Jacobs (Nov. 5, 2012).

Victims experience visceral fear. As one of Mijangos's victims explained, "He haunts me every time I use the computer."[352] A woman who was secretly videotaped by the Johns Hopkins gynecologist said, "I can't bring myself to go back. You're lying there, exposed. It's violating and it's horrible, and my trust is gone. Period."[353]

The posting of nude images without consent and deep-fake sex videos can lead to a single aspect of one's self eclipsing one's personhood.[354] Sex organs and sexuality stand in for the whole of one's identity,[355] without the self-determined boundaries that protect us from being simplified and judged out of context.[356] One of Deneumostier's victims told me: "[E]very day I walk outside my home with the experience in the back of mind, haunting me with every look I receive from a stranger passing by, thinking to myself if they recognize me. It frightens me like nothing else could."[357]

Sexual-privacy invasions reduce victims to sexual objects that can be exploited and exposed. Like Robin West's description of threats of sexual violence, sexual-privacy invasions are experienced like physical penetrations of the body.[358] Sextortion victims have described feeling like they were "virtually raped."[359]

Sometimes sexual-privacy invasions 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. She did.[360]

When the nude images of women and sexual minorities are posted online without consent, these individuals may be stigmatized. As Martha Nussbaum explains, the "universal human discomfort with bodily reality" often works to

352. Wittes et al., *supra* note 2, at 24.

353. *Hopkins to Pay $190M*, *supra* note 227.

354. ROSEN, *supra* note 79, 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).

355. *See id.*

356. *See id*.

357. E-mail from John Doe to Danielle Citron (Dec. 12, 2018) (on file with author).

358. ROBIN WEST, CARING FOR JUSTICE 103 (1997).

359. Wittes et al., *supra* note 2, at 23.

360. CITRON, *supra* note 12, at 48.

undermine women and minorities.[361] The "body of the gay man has been a central locus of disgust-anxiety—above all, for other men."[362] The same is often true of displays of women's nude bodies as well.[363] Misogyny, racism, and homophobia, often a toxic brew, underlie the stigmatization.[364]

Recall that the boyfriend's nonconsensual taping of his sexual encounter with the novelist made the woman feel deeply ashamed and embarrassed.[365] Ayyub experienced the deep-fake sex video as humiliating, shaming, and silencing.[366] She saw it as an effort to "break" her by defining her as a "'promiscuous,' 'immoral' woman."[367] Martin felt "physically sick, disgusted, angry, degraded, [and] dehumanized" after she discovered her face inserted into deep-fake pornography.[368]

The emotional harm is severe and lasting, and the psychological distress can be overwhelming.[369] Victims have difficulty concentrating, eating, and working.[370] They experience anxiety and depression. They contemplate suicide. As one of Deneumostier's victims said, there have been "times I wouldn't eat and days in which I would not leave my room."[371] Union explained that she "felt extreme anxiety, [and] a complete loss of control."[372] Ayyub wrote that she "wanted to vomit and fought tears" upon first seeing the fake pornographic image of herself.[373] Sextortion victims live in perpetual anxiety and describe feeling helpless.[374]

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361. NUSSBAUM, *supra* note 83, at xv.

362. *Id.* at 18.

363. *Id.* at 17-18.

364. *See id*.

365. *See* Interview with Jane Doe, *supra* note 124.

366. Ayyub, *supra* note 330.

367. *Id*.

368. Hannah-Rose Lee, *The Terrifying Rise of Deep Fake Porn*, WHIMN (July 11, 2018, 2:11 PM), https://www.whimn.com.au/talk/news/the-terrifying-rise-of-deepfake-porn/news-story/7c704c6ae3029ca71c3de2afb2ee9e52 [https://perma.cc/X5EF-B75D].

369. CITRON, *supra* note 12, at 10-11; Mudasir Kamal & William Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359 (2016); Eaton et al., *supra* note 307.

370. Interview with Jane Doe, *supra* note 124.

371. E-mail from John Doe, *supra* note 357.

372. Pesta, *supra* note 49.

373. Ayyub, *supra* note 330.

374. Wittes et al., *supra* note 2, at 23-25.

Minors are particularly vulnerable to depression and suicide. Two boys killed themselves in the Martynenko sextortion case.[375] Clementi killed himself.[376] Fifteen-year-old Audrie Pott hanged herself after a photo of her topless went viral.[377] 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.[378] 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.[379]

There is a significant risk to victims' job prospects. Search results matter to employers.[380] According to a Microsoft study, nearly eighty percent of employers use search results to make decisions about candidates, and in around seventy percent of cases, those results have a negative impact.[381] As another study explained, employers often decline to interview or hire people because their search results featured "unsuitable photos."[382] The reason for those results should be obvious. It is less risky and expensive to hire people who do not have damaged online reputations.[383] Because employers consult search results and because data

375. Hawkins, *supra* note 280.

376. Parker, *supra* note 222.

377. Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013, 6:20 PM), https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148 [https://perma.cc/M567-GTTL].

378. Michelle Dean, *The Story of Amanda Todd*, NEW YORKER (Oct. 18, 2012), https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd [https://perma.cc/U4SH-RT2H].

379. Brian Anthony Hernandez, *Bullied Teen Uploads Chilling Video Before Being Found Dead*, MASHABLE (Oct. 13, 2012), https://mashable.com/2012/10/13/amanda-todd-bullying [https://perma.cc/7T82-4KJZ].

380. *See Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study*, CAREERBUILDER (June 15, 2017), https://press.careerbuilder.com/2017-06-15-Number-of-Employers-Using-Social-Media-to-Screen-Candidates-at-All-Time-High-Finds-Latest-CareerBuilder-Study [https://perma.cc/VYT7-RDJX]; *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/#4MxjdIksVaqr [https://perma.cc/J25D-XL6Q].

381. *See* CITRON, *supra* note 12, at 8; Citron & Franks, *supra* note 3, at 352–53.

382. *Online Reputation in a Connected World*, CROSS-TAB 9 (Jan. 2010), https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf [https://perma.cc/F2SL-UUNW].

383. *See id.*

brokers integrate online posts into their dossiers, sexual-privacy invasions "become the basis for a probabilistic judgment about attributes, abilities, and aptitudes."[384]

Companies may refuse to interview or hire women and minorities because their search results include nude images or deep-fake sex videos.[385] 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—and especially nonwhite women—may be perceived as immoral sluts for engaging in sexual activity.[386] Nude images evoke the pernicious view of black women as sexually deviant.[387] Similarly, black men are subject to racist stereotypes about their sexuality, and LGBTQ individuals are subject to the stereotype of being "promiscuous, sex-driven, and predatory."[388] All of this "marginalizes and otherizes"[389] women and minorities, and raises the risk of unfair treatment.

Annie Seifullah's experience is illustrative. Seifullah was a school principal in New York City when her ex-boyfriend uploaded stolen sexually explicit photographs of her to a Department of Education laptop and sent them to the school superintendent and the *New York Post*.[390] The city initially demoted her and then suspended her for a year without pay.[391] 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-boyfriend.[392]

III. LAW AND MARKETS

Law and markets shape, and are shaped by, social norms. This Part lays out opportunities and challenges for law and markets to protect sexual privacy. It first suggests legal reforms for penalizing sexual-privacy invasions and enhancing penalties for bias-motivated abuse. Yet law cannot address all sexual-privacy

384. COHEN, *supra* note 37, at 144.

385. *See* CITRON, *supra* note 12, at 181-85.

386. Citron & Franks, *supra* note 3, at 353.

387. *See* BRIDGES, *supra* note 27, at 54; Roberts, *supra* note 62, at 1438-39.

388. Waldman, *supra* note 311 (manuscript at 19).

389. *Id.*

390. Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back*, JEZEBEL (July 18, 2018), https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768 [https://perma.cc/D9Y8-63WH].

391. *Id.*

392. *Id.*

invasions, nor would we want it to. With this in mind, the Part also explores the potential for market-based approaches to protecting sexual privacy.

A. Law's Role

Traditional privacy law is ill-equipped to address some of today's sexual-privacy invasions. This is hardly surprising. After all, privacy law's roots trace back to the nineteenth century and have been developed in an incremental way.[393] This Section sketches existing legal protections and gaps in the law, and suggests a legislative approach to sexual privacy.

1. Traditional Law

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

First, law cannot deter, redress, or punish perpetrators if they cannot be identified.[394] Attribution can be difficult, especially if perpetrators go to lengths to hide their digital tracks.[395] Moreover, 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.[396] However, with its investigative capacities and ability to seek extradition, law enforcement can make up for some of these deficiencies.[397]

Yet even if perpetrators can be identified and live in the United States, civil suits and criminal prosecutions require significant resources. For victims inter-

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393. *See* Citron, *supra* note 24 (exploring how privacy torts were stunted by William Prosser's articulation of privacy-tort law as four torts, which are not well designed for data-security problems). The privacy torts were conceptualized by nineteenth-century men of wealth and power. *See* Allen & Mack, *supra* note 17, at 441-42. Twentieth-century judicial decisions reflected "gendered notions of female modesty that suggested women were vulnerable and in need of protection." Skinner-Thompson, *Privacy's Double Standards*, *supra* note 11, at 2079.

394. Citron, *supra* note 215, at 117.

395. CITRON, *supra* note 12, at 165.

396. Chesney & Citron, *supra* note 4 (manuscript at 34).

397. *Id.* (manuscript at 42).

ested in suing perpetrators, this is frustrating—most, unfortunately, cannot afford to hire a lawyer.[398] Law enforcement may be unwilling to expend scarce resources on combating sexual-privacy invasions. Although some state attorneys general, local district attorneys, and federal prosecutors have devoted significant energy to prosecuting sexual-privacy invasions, far more have not.[399] Only extreme cases are likely to attract law enforcement's attention.

Another wrinkle is that plaintiffs in civil court generally have to proceed under their real names, and so victims may be reluctant to sue for fear of unleashing more unwanted publicity.[400] Courts often "disfavor pseudonymous litigation because it is assumed to interfere with the transparency of the judicial process."[401] Arguments in favor of Jane Doe lawsuits are considered against the presumption of public openness—a weighty presumption that often works against plaintiffs asserting privacy claims.[402]

Many victims decline to bring civil suits because they do not want to expose their lives to their attackers any further. As David Bateman and Elisa D'Amico (who represent victims of nonconsensual pornography on a pro bono basis) have

398. 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. *See* Matthew Goldstein, *Law Firm Founds Project to Fight 'Revenge Porn*,' N.Y. TIMES: DEALBOOK (Jan. 29, 2015, 7:47 PM), https://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn [https://perma.cc/4YQK-2CDY]; CYBER C.R. LEGAL PROJECT, https://www.cyberrightsproject.com [https://perma.cc/X9NV-RS67]. Then too, there are exceptional lawyers like Carrie Goldberg and Erica Johnstone who specialize in sexual-privacy invasions. *See* Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016) (profiling Carrie Goldberg), https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn [https://perma.cc/Y3SE-477S]. Yet these talented attorneys can take on only so many cases—they cannot handle the demand alone.

399. Former California Attorney General (now U.S. Senator and presidential candidate) Kamala Harris was a noted exception, *see* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 765-67 (2016), as is the U.S. Department of Justice's Computer Crimes and Intellectual Property Section in Washington, D.C., with Assistant U.S. Attorney Mona Sedky as a shining example, *see* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 407 n.52 (2017).

400. CITRON, *supra* note 12, at 122.

401. *Id.* at 162.

402. *Id.* The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act would permit 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 § 5(1) (UNIF. LAW COMM'N 2018).

explained, victims often dread the exposure that discovery inevitably entails.[403] They do not want their medical records revealed to their attackers.[404] They are anxious about sitting across from their abusers during a deposition.[405] It is not hard to see why individuals decline to sue sexual-privacy invaders. And even if victims are not deterred by litigation's privacy risks, they may find it hard to justify suing someone who is effectively judgment proof.

The other logical option for redress is to sue content platforms. Logical, yes; possible, no. Twenty years ago, Congress gave platforms a broad liability shield for user-generated content in the form of section 230 of the Communications Decency Act.[406] Thus, the parties in the best position to minimize potential harm—content platforms—have no legal incentive to intervene, and plaintiffs cannot sue these giant corporations to provide them with a legal reason to bother.[407]

These obstacles are significant, but they are not fatal. If an individual is able and willing to bring suit, or if law enforcement is ready to devote resources to the matter, the next question is whether existing law provides an effective means of redress.

a. Criminal Law

Criminal law can and should prevent and punish certain sexual-privacy invasions.[408] Criminal penalties would signal the significant harm that such invasions inflict.[409] The criminal law approach suggested below accords with the long-standing recognition that the coerced visibility of the human body can be as destructive as an assault on the body. As Justice Gray wrote in 1891, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."[410]

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403. David Bateman & Elisa D'Amico, Address at the Author's Information Privacy Law Class at Fordham Law School (Sept. 12, 2018).

404. *Id*.

405. *Id*.

406. 47 U.S.C. § 230(c) (2018). There are a few exceptions, including federal criminal law, intellectual property law, the Electronic Communications Privacy Act, and the Fight Online Sex Trafficking Act. *Id.* § 230(e).

407. Citron & Wittes, *supra* note 399, at 408-11.

408. As explored below, I would cabin criminal sanctions to certain image-based invasions of sexual privacy given their potential for ineradicable harm.

409. *See generally* Citron, *supra* note 14, at 404-14 (arguing that legal sanctions have an important role in detrivializing certain types of harm).

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

Before turning to suggestions for legislative reform, what existing state and federal laws can be invoked to tackle 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.[411] In New York, for example, it is a crime to record a person undressing or having sex without that person's consent if that person has a reasonable expectation of privacy.[412] The federal Video Voyeurism Prevention Act of 2004 penalizes a person who intentionally "capture[s] an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy."[413] The statute, however, only applies to images taken on federal property.[414] Most states and the federal government criminalize surreptitious wiretapping of private communications.[415]

The nonconsensual disclosure of intimate images has been the subject of recent legislation. Thanks to advocates and policy makers, forty-two states and the District of Columbia now ban the nonconsensual distribution of nude images.[416] And bills have been proposed in both the Senate and the House of Representatives that criminalize the disclosure of someone's intimate images without consent.[417] However, as I will explore below, many of these state laws are overly

411. Most states have video voyeurism laws. *See Video Voyeurism Laws*, NAT'L CTR. FOR VICTIMS CRIMES (Aug. 2009), https://victimsofcrime.org/docs/Policy/Vid%20Voy%20Aug%202009.pdf [https://perma.cc/A7MB-47WV].

412. N.Y. PENAL LAW §§ 250.45, .50 (McKinney 2014). The law is named for Stephanie Fuller, whose landlord placed a hidden camera in the smoke detector above her bed. Danielle Citron, *Nonconsensual Taping of Sex Partners Is a Crime*, FORBES (May 15, 2014, 5:11 PM), https://www.forbes.com/sites/daniellecitron/2014/05/15/nonconsensual-taping-of-sex-partners-is-a-crime [https://perma.cc/G5UC-9KB5].

413. 18 U.S.C. § 1801(a) (2018).

414. *See id.*; Citron & Franks, *supra* note 3, at 347 n.15.

415. Under federal law, 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. A majority of the states have adopted a version of the federal law. *See* Kristen Rasmussen et al., *Reporter's Recording Guide*, REPORTERS COMMITTEE FOR FREEDOM PRESS 2 (2012), https://www.rcfp.org/wp-content/uploads/imported/RECORDING.pdf [https://perma.cc/KRB4-3CAQ]. Twelve states, however, criminalize the interception of electronic communications unless all parties to the communication consent to the interceptions. *See* Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1486 n.379.

416. *See 42 States + DC Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws [https://perma.cc/J5Z8-Q7ZW].

417. *See, e.g.*, H.R. 4472, 115th Cong. (2017); S. 2162, 115th Cong. (2017). 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 prac-

narrow—something advocates working with lawmakers assiduously tried to avoid.[418]

Only two states criminalize the taking of up-skirt photos.[419] As the next Section shows, state courts have been reluctant to extend existing video-voyeurism laws to up-skirt practices. As for deep-fake sex videos, a handful of criminal statutes are potentially relevant. Several states make it a crime to knowingly and credibly impersonate another person online with intent to "harm[], intimidat[e], threaten[], or defraud[]" the person.[420] In certain jurisdictions, creators of deep-fake sex videos only face charges for criminal defamation if they knew the videos were fake when they posted them or if they were reckless as to the truth or falsity of the videos.[421]

b. Civil Law

Tort law could provide redress for sexual-privacy invasions, particularly if they involve spaces traditionally understood as private, like homes. The most relevant body of tort law is the privacy torts, including intrusion on seclusion, public disclosure of private fact, false light, and appropriation of identity.[422]

The intrusion tort applies to invasions of someone's "private place" or private affairs in a manner that is "offensive and objectionable" to the reasonable person.[423] In *Hamberger v. Eastman*, the New Hampshire Supreme Court upheld

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tice and proposed federal laws. For instance, when we first started writing about nonconsensual pornography, there were six laws criminalizing the practice. *See* Citron & Franks, *supra* note 3, at 371. Now, thanks to Franks's work, there are forty-three 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 that Franks authored.

418. *See infra* Section III.A.2.

419. *See* MASS. GEN. LAWS ANN. ch. 272, § 105(b) (West 2014); VA. CODE ANN. § 18.2-386.1(A)(ii) (2014). The Texas Court of Criminal Appeals struck down a poorly drafted, overbroad up-skirt statute, finding it "paternalistic" and unconstitutional. *Ex parte* Thompson, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014); *see* Callie Beusman, *'Paternalistic' Law Banning Upskirt Photos Thrown Out by Texas Court*, JEZEBEL (Sept. 18, 2014, 6:10 PM), https://jezebel.com/paternalistic-law-banning-upskirt-photos-thrown-out-by-1636505597 [https://perma.cc/5F95-EK8M].

420. *See, e.g.*, CAL. PENAL CODE § 528.5(a) (West 2018).

421. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 752-53 (2013) (discussing the possibility of defamation or libel charges for sexual harassment cases involving impersonation).

422. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

423. *Id.* at 395-96.

an intrusion claim against a peeping landlord who spied on a married couple in their bedroom.[424] The tort generally applies to the secret watching and recording of individuals at home and on their personal devices.[425] It protects against the coerced invasion of people's bedrooms and bodies, as in the case of sextortion and video voyeurism. However, because 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-fake sex videos and may not be useful in cases involving up-skirt photos, as discussed in the next Section.

The disclosure tort involves the publication of private, nonnewsworthy information that would highly offend the reasonable person. Nude photos published online without consent provide strong grounds for disclosure claims. We learn little newsworthy information from seeing a person's genitals, breasts, buttocks, or anus. Naked body parts do not teach us anything about culture, art, or politics. This is true whether the body parts belong to famous or nonfamous individuals.[426] For that reason, nude photos are widely understood as nonnewsworthy private facts whose disclosure would highly offend the reasonable person.[427]

Both the false-light tort—recklessly creating a harmful and false implication about someone—and defamation have potential purchase for deep-fake sex videos. The appropriation tort might apply as well, though many jurisdictions cabin

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424. 206 A.2d 239, 240-42 (N.H. 1964). However, we saw in the *Plaxico* case, *see supra* text accompanying notes 213-214, that a court overcame the default presumption that bedrooms are private spaces in admitting photographs taken of a woman and her lesbian lover in bed as evidence in a child-custody hearing. Plaxico v. Michael, 735 So. 2d 1036, 1039-40 (Miss. 1999). The majority went to great pains to say that it would have reached 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. *See* Allen, *supra* note 43, at 1725. The private home "is not a sanctuary for intimate sex for LGBT individuals where courts view homosexual relationships as illicit." *Id.*

425. *See, e.g.*, Welsh v. Martinez, 114 A.3d 1231 (Conn. App. Ct. 2015) (upholding a two-million-dollar jury award in a privacy-tort action where the defendant ex-boyfriend planted spying devices in the plaintiff's bedroom, including in clock radios and the television); *In re* Marriage of Tigges, 758 N.W.2d 824, 829 (Iowa 2008) (finding legally viable a claim against the defendant husband for surreptitiously filming his wife in their home); Lewis v. LeGrow, 670 N.W.2d 675 (Mich. Ct. App. 2003) (upholding a verdict for the plaintiffs where the defendant ex-boyfriend made secret videos of them having sex).

426. Citron & Franks, *supra* note 3, at 379-80; *see also* RICHARDS, *supra* note 37, at 58-64, 159. The tort likely would not apply to disclosures related to matters of public importance, such as a politician running for office who claims to have stopped sending nude photos to strangers. *See* CITRON, *supra* note 12, at 151.

427. *See* CITRON, *supra* note 12, at 121.

the tort to cases where people's images are being used for commercial purposes, and most perpetrators earn nothing from deep-fake sex videos or nonconsensual pornography. By contrast, some content platforms make a business out of them but are mostly immune from liability for their posting.[428]

Another tort that would be an effective tool against sexual-privacy invasions is intentional infliction of emotional distress. It requires proof of "extreme and outrageous conduct" by a defendant who intended to cause, or recklessly caused, the plaintiff's "severe" emotional distress.[429] Sexual-privacy invasions have supported emotional-distress claims. In a recent case involving nonconsensual pornography, the plaintiff, who was represented by Bateman and D'Amico of the Cyber Civil Rights Legal Project, was awarded $6.4 million, though the plaintiff is unlikely to recover much of it since the defendant is essentially judgment proof.[430]

In addition to torts, copyright law may also provide an effective tool in sexual-privacy cases involving the distribution of intimate images created by victims. Because § 230 does not immunize websites from federal intellectual property claims,[431] victims could file notice and takedown requests with content platforms after registering the copyright of their images. Content platforms would then have to take down the photographs promptly or face monetary damages under the Digital Millennium Copyright Act.[432] Some platforms, however, simply ignore victims' requests because they know that the victims lack the money to sue.[433]

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428. Chesney & Citron, *supra* note 4 (manuscript at 35).

429. CITRON, *supra* note 12, at 121.

430. Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case Is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html [https://perma.cc/66VU-8XQY]. Bateman and D'Amico discussed this aspect of the case with my information privacy law class at Fordham Law School in the fall of 2018. Bateman & D'Amico, *supra* note 403.

431. Citron & Franks, *supra* note 3, at 359-60. Some deep-fake sex videos exploit copyrighted content that the plaintiff created herself, but the harm isn't about property—it is 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 4 (manuscript at 35).

432. Citron & Franks, *supra* note 3, at 359-60.

433. CITRON, *supra* note 12, at 122.

c. First Amendment Concerns

First Amendment objections from perpetrators are most likely to arise in cases involving the nonconsensual disclosure of real or deep-fake nude images or sex videos. Such objections are weak, however—especially with a well-crafted statute like the one that Mary Anne Franks has proposed.[434] Nude images posted without consent involve the narrow set of circumstances when the publication of truthful information can be proscribed civilly and criminally.[435]

The Vermont Supreme Court recently upheld the state's statute criminalizing nonconsensual pornography, holding that the law survived strict scrutiny analysis.[436] The court emphasized that "[f]rom a 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 disclosure of other categories of nonpublic personal information," such as health data.[437] The court noted that the state's argument that the statute covered "extreme invasions of privacy" that are categorically unprotected speech was persuasive but declined to rest its holding on that basis.[438]

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434. *See* Mary Anne Franks, Drafting an Effective "Revenge Porn" Law: A Guide for Legislators (Aug. 17, 2015) (unpublished manuscript), https://ssrn.com/abstract=2468823. I—along with Franks—have written extensively about the First Amendment and free speech values implicated in regulating nonconsensual pornography. *See, e.g.*, CITRON, *supra* note 12, at 207-12; Citron & Franks, *supra* note 3, at 374-86; Franks, *"Revenge Porn" Reform*, *supra* note 46, at 1308-23 (carefully exploring all of the potential free speech concerns raised by the proscription of nonconsensual pornography); Danielle Citron, *More Thoughts on How to Write a Constitutional Revenge Porn Law*, FORBES (May 23, 2015, 12:34 PM), https://www.forbes.com/sites/daniellecitron/2015/05/23/more-thoughts-on-how-to-write-a-constitutional-revenge-porn-law [https://perma.cc/G7D3-83R2].

435. 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. *See, e.g.*, *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography*, CYBER C.R. INITIATIVE (Oct. 6, 2017), https://www.cybercivilrights.org/2017-cybercrime-symposium [https://perma.cc/3DGT-LUEV]; Neil M. Richards & Danielle Citron, *Regulating Revenge Porn Isn't Censorship*, AL JAZEERA AM. (Feb. 11, 2015), https://america.aljazeera.com/opinions/2015/2/why-regulating-revenge-porn-isnt-censorship.html [https://perma.cc/QXJ3-S6X3]; Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013), https://volokh.com/2013/04/10/florida-revenge-porn-bill [https://perma.cc/NZZ4-XSXB];

436. State v. VanBuren, No. 2016-253, 2018 WL 4177776 (Vt. Aug. 31, 2018).

437. *Id.* at *15.

438. *Id.* at *7. 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. *See* State v. Culver, 918 N.W.2d 103 (Wis. Ct. App 2018).

Now to the question of deep-fake sex videos. Under First Amendment doctrine, defamation law provides redress for reputation-harming falsehoods about private individuals circulated negligently.[439] Public officials and public figures like Gal Gadot[440] could sue for defamation if there is clear and convincing evidence of actual malice (that is, the defendant knew the deep-fake sex videos were false or recklessly disregarded the possibility that they were false).[441]

As I explain in my work on deep fakes with Robert Chesney, deliberate, harm-causing lies are unprotected under First Amendment doctrine.[442] Federal and state laws, for instance, punish the deliberate impersonation of government officials in a manner consistent with First Amendment commitments.[443] Such lies, Helen Norton observes, concern the "source of the speech."[444] Lies of this kind—that is, of who is actually speaking—can be proscribed because they threaten significant harm to listeners who rely on them as a proxy for reliability and credibility.[445] These laws "remain largely uncontroversial as a First Amendment matter in great part because they address real (if often intangible) harm to the public as well as to the individual target."[446] The regulation of deep-fake sex videos concerns whether someone actually engaged in pornography, an objectively verifiable determination.[447] This lessens concerns that the regulation of deep-fake sex videos would either chill valuable speech or invite partisan enforcement.[448]

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439. RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

440. *See supra* note 324 and accompanying text.

441. For an overview of the defamation tort, see CITRON, *supra* note 12, at 121. Defamation has no application to other sexual-privacy invasions because they involve truthful, private intimate information, not falsehoods.

442. *See* Chesney & Citron, *supra* note 4 (manuscript at 33) (discussing United States v. Alvarez, 567 U.S. 709 (2012)).

443. Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, *in* LAW AND LIES 143, 165-76 (Austin Sarat ed., 2015).

444. *Id.* at 165; *see also* Marc Jonathan Blitz, *Lies, Line Drawing, and (Deep) Fake News*, 71 OKLA. L. REV. 59, 110 (2018).

445. Norton, *supra* note 443, at 168.

446. *Id.* at 170-71.

447. *See id.* at 187-89 (discussing ways that legislatures can narrowly tailor proscriptions of lies so as to survive First Amendment scrutiny).

448. *See id.* Helen Norton helpfully talked with me about the First Amendment implications of regulating deep-fake sex videos.

Unauthorized recordings in private spaces like bedrooms also raise few concerns for free speech.[449] As courts have explained in the context of suits against the media, no one has the right to break into someone's home or business to gather the news.[450] Certainly, the First Amendment does not protect perpetrators from laws proscribing video voyeurism, giving them a right to spy on someone's computer, bedroom, or shower.[451]

Public spaces raise different concerns. Margot Kaminski has explored the nuance in free speech doctrine when laws proscribe unauthorized recording in public spaces.[452] Free speech challenges can be overcome if the privacy interest is strong and there is no legitimate public interest in the expression.[453] Up-skirt laws represent just such a scenario: they concern a strong governmental interest (the protection of sexual privacy) and the expression at issue (the recording of someone's genitals or underwear) lacks a legitimate public interest.

2. Shortcomings

Digital technologies enable sexual-privacy invasions that existing law is ill-suited to address. Sometimes, law's inadequacy stems from the fact that it has developed in an incremental fashion. At other times, it originates from outmoded assumptions. Both concerns apply to the regulation of sextortion, deepfake sex videos, up-skirt photos, and certain public disclosures of intimate images. When social conditions change in fundamental ways, law must adapt or become irrelevant in addressing contemporary problems.[454]

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449. *See* Bartnicki v. Vopper, 532 U.S. 514 (2001) (suggesting that the illegal recording of electronic communications can be regulated consistently with the First Amendment); *see also* RICHARDS, *supra* note 37, at 60-61.

450. RICHARDS, *supra* note 37, at 57-72; *see also* Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357, 361-65 (2011) (describing the origins of and justifications for laws protecting individuals from disclosures of private information).

451. *See* Richards, *supra* note 450, at 382-83 (discussing how such acts satisfy the common law tort of intrusion without implicating the First Amendment).

452. Margot Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 220-23 (2017).

453. *Id.* at 232-35.

454. Ryan Calo's scholarship offers an insightful exploration of how new technologies challenge law and legal structures. *See, e.g.*, Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513 (2015). Not all cyberproblems require new legal solutions. As Judge Frank 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. 207. I have argued that mainstream torts can be adapted to address certain privacy problems, such as leaking databases of sensitive personal information. Citron, *supra* note 34, at 278-80, 283-94 (analogizing insecure databases of sensitive personal information to reservoirs at the turn of

For sextortion, the criminal law offers a patchwork of tools that are insufficient when perpetrators target adults.[455] 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."[456] The sentence disparity stems from weak state laws and the dramatically different ways federal and state law treat minor and adult victims.[457] Under federal law, the sextortion of an adult is usually prosecuted as computer hacking, extortion, or stalking, and such laws carry light sentences compared with the child pornography laws that apply when sextortion involves minors.[458] As a Brookings study explains, the "severity of the sentence . . . is simply not directly related to either the number of victims or the depravity of the individual crime."[459]

Deep-fake sex videos are another area where current law falls short. No federal criminal law covers the practice, though a smattering of state statutes might apply, as discussed above. The most-recognized privacy torts—intrusion on seclusion and public disclosure of private fact—provide no redress for deep-fake sex videos.[460] Creation and dissemination of videos generated from publicly available images would not amount to an intrusion on seclusion since no private space or activity is intruded upon. Nor would deep-fake sex videos amount to a public disclosure of private fact since no truthful, private facts are revealed.[461]

Another shortcoming involves the recently adopted laws criminalizing nonconsensual pornography. Some such laws are woefully inadequate. Most make

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the twentieth century—activity crucial to the economy but also raising significant dangers—and advocating a *Rylands v. Fletcher*, [1868] 3 LRE & I. App. (HL) 330 (appeal taken from Eng.), strict-liability approach); *see also* Citron, *supra* note 24, at 1836-50 (exploring enablement tort, confidentiality law, and strict liability to address privacy problems ill-suited to the privacy torts).

455. Benjamin Wittes et al., *Closing the Sextortion Sentencing Gap: A Legislative Proposal*, BROOKINGS 4 (2016), https://www.brookings.edu/research/closing-the-sextortion-sentencing-gap-a-legislative-proposal [https://perma.cc/227C-R6K7].

456. *Id.* at 2.

457. *Id.* at 2-5.

458. *Id.* at 5.

459. *Id.* at 2.

460. Chesney & Citron, *supra* note 4 (manuscript at 36).

461. The appropriation tort is inapplicable because creators of deep-fake sex videos likely do not use people's faces or bodies for a commercial advantage. RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977); *see* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 220 (5th ed. 2015) (explaining that the appropriation tort protects against the commercial exploitation of one's name or likeness).

the practice a misdemeanor, which both discourages law enforcement from pursuing investigations as in the Jacobs case[462] and leads to light sentences or no jail time as in the Mathers case.[463] Another concern is that the laws are overly narrow. 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 Mary Anne Franks and me, this was as unsurprising as it was disappointing. Franks has worked closely with most state lawmakers interested in criminalizing nonconsensual pornography, yet far too many failed to follow her well-crafted proposed model statute.[464] In Franks's view, many of the recently adopted state laws criminalizing nonconsensual pornography are so narrow that they will do little to combat the problem.[465]

The legal recourse available to victims of up-skirt photos and disclosures of private intimate facts illustrates how cramped notions of privacy leave some invasions of sexual privacy without legal protection. Traditional privacy law fails to address certain sexual-privacy invasions because, as Ari Waldman explains, it relies on "under-inclusive bright line rules to determine the difference between public and private."[466] For instance, privacy law presumes that certain spaces—bedrooms, hotel rooms, and bathrooms—warrant privacy protection.[467] But once people leave those spaces, the presumption flips.[468] On the "street, or in any

462. *See supra* notes 297-306 and accompanying text.

463. *See supra* notes 316-319 and accompanying text.

464. Interview with Mary Anne Franks (Sept. 2, 2018).

465. *Id.*

466. WALDMAN, *supra* note 37, at 72.

467. *See supra* notes 450-451 and accompanying text.

468. *See* MCGEVERAN, *supra* note 40, at 105-09; SOLOVE & SCHWARTZ, *supra* note 461, at 50-51. 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. *See* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 85 (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.* at 67-68. In *United States v. Jones*, a majority of the Court made that point as to the placement of a GPS tracker on the defendant's car. *See* 565 U.S. 400, 413-14 (2012) (Sotomayor, J., concurring); *id.*at 430-31 (Alito, J., joined by Ginsburg, Breyer & Kagan, JJ., concurring in the judgment). In *Carpenter v. United States*, the Court held that the government's access to cell-site location data, held by a 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." 138 S. Ct. 2206, 2214, 2219

other public place, the plaintiff has no right to be alone."[469] This is true of both criminal and privacy-tort law.

Criminal convictions have been struck down in up-skirt cases because the defendants took the photos while in public. Let's return to the case of a Georgia man who took a video of a woman up her skirt at a local grocery store.[470] 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."[471] The majority reversed the conviction on the grounds that the law failed to "reach all of the disturbing conduct that has been made possible by ever-advancing technology."[472] Although the case turned on the legislative meaning of "private place," it implicitly reflected the broader fallacy in legal thinking that public spaces and privacy are incompatible.

The dissent noted that rather than the statute being outpaced by technology, it was an overly narrow interpretation of a "private place."[473] Sexual privacy is not an all-or-nothing proposition. There are degrees and nuances to the sort of privacy that society expects.[474] Even in public, there are boundaries—Robert Post calls them "information preserves"—that are integral to individuals and warrant respect.[475] This is so for parts of our bodies, such as the genitalia, anus, and female breasts, that we endeavor to conceal in public with shirts, pants, underwear, and bras.

Nevertheless, both federal and state courts routinely find that plaintiffs have no privacy rights in public.[476] For instance, in *Neff v. Time, Inc.*, a photographer

(2018). In both *Jones* and *Carpenter*, five Justices signaled that where digital technologies significantly alter the nature of surveillance, the presumption that we have no privacy in public may not apply.

469. Prosser, *supra* note 422, at 391. Scholars have explored the pitfalls of drawing a sharp line between what is public and what is private. *See, e.g.*, NISSENBAUM, *supra* note 37, at 113-125; Woodrow Hartzog, *The Public Information Fallacy*, 99 B.U. L. REV. 459 (2019); Skinner-Thompson, *Performative Privacy*, *supra* note 11; Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

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

471. *Id.* at 152.

472. *Id.* at 155.

473. *Id.* at 155 (Mercier, J., dissenting).

474. NISSENBAUM, *supra* note 37, at 144; SOLOVE, *supra* note 29, at 50-67.

475. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 73 (1995).

476. *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 up-skirt 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

captured a photo of the plaintiff cheering at a football game that showed his trousers' fly open and his underwear exposed.[477] The photo was subsequently published in *Sports Illustrated*. In addition to finding that the photograph was newsworthy, the federal district 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."[478] Similarly, a Texas state 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 were exposed because the photo was taken while he was playing soccer at a public event.[479]

Despite these cases, plaintiffs can look to *Daily Times Democrat v. Graham*,[480] decided in 1964, for support of the claim that they have a legally protected privacy interest "up their skirts." In *Graham*, the plaintiff took her children to a county fair. Her dress was "blown up by the air jets," and her body "exposed from the waist down" except for the "portion covered by her panties."[481] A newspaper photographer snapped a picture and put in on the front page.[482] The Alabama Supreme Court upheld the disclosure claim because being "involuntarily and instantaneously enmeshed in an embarrassing pose" in a "public scene" does not dispel one's privacy interest.[483] *Graham*, however, is an outlier.

Other aspects of traditional privacy law also do not accord with how we experience sexual-privacy invasions. To sue for public disclosure of private fact, the information must be disclosed to a wide audience.[484] This presumes that there

(1995); and Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1 (2008).

477. 406 F. Supp. 858, 860 (W.D. Pa. 1976).

478. *Id*. at 861.

479. McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904 (Tex. Ct. App. 1991).

480. 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).

481. 162 So. 2d at 476.

482. *Id.*

483. *Id.* at 478. 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 "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or 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 (AM. LAW INST. 1977).

484. Courts refuse to recognize disclosure claims if a private fact is not widely publicized. *See, e.g.*, 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

is little damage when intimate information is divulged to a small group of people. But the disclosure to such groups—employers, family, and colleagues—is often the most damaging for victims. When Jacobs's ex-boyfriend revealed her nude photos to her employer, her sense of self-worth and confidence was destroyed.

Consider *Bilbrey v. Myers*.[485] There, a Florida court rejected a disclosure claim on the grounds that there was no widespread publicity of the private fact. 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 terms. Even though the pastor did not disclose the information online, the damage was profound because the audience included the plaintiff's family members.[486] The widespread publicity rule does not accord with how intimate information is shared and can be exploited to people's detriment.

Lastly, a crucial shortcoming is the broad immunity afforded to user-generated content platforms. Having written about § 230 elsewhere, I will not belabor the point.[487] However, it is worth noting that the overbroad interpretation of § 230 has given content platforms a free pass to ignore destructive sexual-privacy invasions, to repost illegal material knowingly and deliberately, and to solicit sexual-privacy invasions while ensuring that abusers cannot be identified.[488] The overbroad interpretation of § 230 makes life even more difficult for victims.

For example, Grindr was notified over fifty times that someone was impersonating a man on the app, sharing his nude images, claiming he had rape fantasies, and providing his home address.[489] Over a *thousand* strangers came to his door demanding sex.[490] Grindr ignored the man's complaints and refused to do

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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.

485. 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

486. 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, *supra* note 12, at 216-18 (exploring intentional infliction of emotional distress in the context of cyberstalking).

487. *Id.* at 167-81; Citron, *supra* note 215, at 114-25; Citron & Wittes, *supra* note 399; Danielle Citron & Quinta Jurecic, *Platform Justice: Content Moderation at an Inflection Point*, HOOVER INSTITUTION (2018), https://www.hoover.org/sites/default/files/research/docs/citron-jurecic_webreadypdf.pdf [https://perma.cc/V7T4-X8Y4].

488. Citron & Wittes, *supra* note 399, at 406-14.

489. Herrick v. Grindr, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018).

490. Sara Ashley O'Brien, *1,100 Strangers Showed Up at His Home for Sex. He Blames Grindr*, CNN (Apr. 14, 2017, 1:02 PM ET), https://money.cnn.com/2017/04/14/technology/grindr-lawsuit/index.html [https://perma.cc/5ABS-RMTZ].

anything about the imposter.[491] Given the breadth of judicial interpretations of § 230, the law can do little about the app.[492]

3. Comprehensive Response

Invasions of sexual privacy should be addressed in a comprehensive manner.[493] A comprehensive approach would include legislation penalizing sexual-privacy invasions with enhanced penalties for bias-motivated privacy invasions. It would allow individuals to sue certain content platforms. And it would call for the privacy torts to evolve so that sexual-privacy invasions can be meaningfully redressed.

Why not, however, continue along the path of adopting specific statutes as problems capture lawmakers' attention? We could pass legislation as specific issues arise. Today, it is sextortion, deep fakes, and up-skirt photos. Tomorrow, sexual-privacy invasions may involve robots and drones. States have criminalized nonconsensual porn, often with separate statutes.[494] Congress is considering a federal statute to do the same.[495]

An incremental approach has merit. It enables an assessment of whether a particular legislative approach is working and should be extended to other areas. But it would require updating as new sexual-privacy invasions arise.[496] 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 first had to name domestic violence and workplace sexual harassment to capture the public's attention, advocates and scholars had to educate

491. *Herrick*, 306 F. Supp. 3d at 593.

492. *See id.* at 588-92.

493. Sextortion may warrant higher penalties than other sexual-privacy invasions. A federal statute can consider aggravating factors as sentence enhancements.

494. Franks, *Democratic Surveillance*, *supra* note 46, at 482-83.

495. *See* Chris Morris, *Revenge Porn Law Could Make It a Federal Crime to Post Explicit Photos Without Permission*, FORTUNE (Nov. 28, 2017), http://fortune.com/2017/11/28/revenge-porn-law [https://perma.cc/QA7Z-58GL].

496. We have seen law struggle in the related area of stalking and harassment, with states passing laws to deal with telephone abuse, email abuse, and cyberstalking. *See* CITRON, *supra* note 12, at 103-04.

the public about nonconsensual pornography and the harm it inflicted.[497] In 2013, when Mary Anne Franks wrote the first model revenge-porn statute,[498] and in 2014, when we wrote the first law review article on the topic,[499] 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. At the time, calling for law to combat sexual-privacy invasions—with revenge porn as an illustration—might not have captured lawmakers' attention in the way that framing the issue as revenge porn did.

Now, however, 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. Digital voyeurism, up-skirt photos, sextortion, nonconsensual porn, and deep-fake sex videos are all sexual-privacy invasions, and they all should be treated and penalized as such. In this moment, we need to make clear that sexual-privacy invasions undermine equality if they are motivated by bias.

There is much to be said for making an explicit legislative commitment to combat sexual-privacy invasions and to enhance penalties for bias-motivated abuse. Law is our teacher.[500] It shapes attitudes, beliefs, and behavior through its messages and lessons.[501] It educates society about what behavior is harmful

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497. That work was undertaken by a group of advocates and scholars. Without My Consent, founded by Erica Johnstone and Colette Vogel, was 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. Holly Jacobs cofounded the Cyber Civil Rights Initiative (CCRI) with Mary Anne Franks to combat the problem of nonconsensual pornography. They named the organization after my article *Cyber Civil Rights*, *supra* note 215, which made the case for conceptualizing cyberstalking as a civil rights problem. I currently serve as Vice President, Secretary, and member of CCRI's Board of Directors. Mary Anne Franks serves as President and Legislative Director of CCRI; Jason Walta serves as CCRI's Treasurer. Holly Jacobs is a member of CCRI's Board of Directors.

498. 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 [https://perma.cc/8SR5-VXVW].

499. Citron & Franks, *supra* note 3.

500. 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 and penalizing online stalking as a civil rights violation served a crucial expressive purpose. CITRON, *supra* note 12, at 126-27; Citron, *supra* note 14, at 407-14; *see also* Citron, *supra* note 215.

501. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); *see also* Citron, *supra* note 14, at 399.

and what behavior is unacceptable.[502] Legal penalties demonstrate societal intensity around a social value.[503] Moreover, law serves as a focal point for social change.[504] When public sentiment about specific behavior is unclear, law provides expressive clarity, channeling shifts in beliefs, attitudes, and behaviors.[505]

Legislation penalizing sexual-privacy invasions would say that improper access to, spying on, and nonconsensual exposure of our naked bodies and sexual activities produce a corrosive injury. It would say that publicly exposing a single aspect of one's intimate life does not mean that all aspects are meant for public consumption. It would make clear that confidences shared in intimate relationships deserve respect and protection.

Another benefit of legal reform would be its salutary effect on victims' engagement.[506] Comprehensive sexual-privacy legislation would signal broader public support for sexual-privacy victims and the value of their sexual expression and sexual autonomy. Individuals and groups that previously experienced sexual-privacy violations or abuses — most likely women and minorities — could infer that their expression is valued.[507] They may therefore be more likely to engage in sexual expression with future intimate partners.

Penalty enhancements for bias-motivated privacy invasions would also draw attention to the structural impact of such abuse. They would make clear that the

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502. *See* CITRON, *supra* note 12, at 126-29.

503. *See, e.g.*, Yuval Feldman, *Expressive Function of Trade Secret Law: Legality, Cost, Intrinsic Motivation, and Consensus*, 6 J. EMPIRICAL LEGAL STUD. 177, 184-85 (2009).

504. *See* Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 45-49 (2002).

505. *Id.* at 64-65.

506. *See* Penney & Citron, *supra* note 177 (manuscript at 15-19).

507. *Id.* (manuscript at 21). For our coauthored work, Jon Penney conducted an original study that supports the supposition that law can encourage cyberharassment victims to speak and engage online. The study involved an online survey of over 1,200 American internet users. *Id.* (manuscript at 14). It examined participants' responses to various hypothetical "regulatory" scenarios, including one where the participant learns that the government has enacted a new law introducing "tough civil and criminal penalties for posting information or other content online, with the intent to harass or intimidate another person." *Id.* (manuscript at 14-15). The results offered a number of insights, such as that cyberharassment laws would have more salutary than chilling effects on online engagement. For example,

> 87% of respondents indicated a cyber harassment law would have "no impact" or render them "somewhat" or "much more" likely to "spend time on the internet;" 62% indicated law would have "no impact" or render them "more likely" to "speak or write about certain topics online;" 67% indicated the law would have no impact or would render them somewhat or much more likely to share personally created content online; and 56% indicated the law would either have no impact or would render them more likely to contribute to social networks online.

Id. (manuscript at 15-16).

eradication of subordination is a central legislative goal.[508] They would teach us about "the stigmatization and humiliation [that individuals] endure[] when [they] are targeted . . . due to their gender, race, national origin, [and/]or sexual orientation."[509] They would recognize the way that stigma, especially with regard to sex and sexuality, collaterally impacts the job market for women, nonwhites, and sexual minorities.[510]

a. Legislative Suggestions

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 sexual-privacy invasions. Not only does legislation have to give fair warning to potential perpetrators—defendants must have clear notice of the precise activity that is prohibited—but it must also not be so broad as to criminalize or impose civil penalties on innocuous behavior.

A sexual-privacy statute should have a number of features. It should focus on image-based sexual-privacy invasions because images have a lasting impact on our memories and, when posted online, can be difficult—or impossible—to forget.[511] 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 images" of a person whose "private area" is exposed or partially exposed, who is engaged in sexually explicit conduct or a "sexual act," or whose nude image is digitally manufactured. It should require proof that the person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of the intimate information. It

508. *See* CITRON, *supra* note 12, at 126-29.

509. *Id.* at 126.

510. The connection between privacy and equality is at the heart of European data-protection law. *See* ALLEN, *supra* note 180, at 144-45, 148. As European lawmakers recognized, 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. *See* EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

511. *See* Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. HUMAN. 1, 1-4 (1998). Thank you to Jennifer Mnookin and Jessica Silbey who discussed with me the power of the image. I will take up this theme in my book project on sexual privacy.

also should require proof that the photographing, filming, recording, digital fabrication, or disclosure involved circumstances where a reasonable person would have expected privacy.[512]

Clear and specific definitions of key terms are vital. The definitions in certain voyeurism and nonconsensual pornography laws are helpful guides. For instance, Franks's model nonconsensual-pornography statute 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."[513] The federal Video Voyeurism Prevention Act of 2004 defines "private area" as "the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual."[514] Any legislation, though, should exempt disclosures concerning matters of legitimate public concern.[515] This would help guard against the chilling of protected speech.[516]

Criminal penalties should be calibrated to the wrongful conduct. As a start, sexual-privacy invasions should be treated as felonies, rather than as misdemeanors.[517] This would be a change to existing law. For instance, most states

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512. For instance, the statute could read, in part:

> Whoever knowingly [using any means affecting interstate or foreign commerce, including by computer] engaged in, or knowingly coerced another person to engage in, the photographing, filming, recording, digitally fabrication, or disclosure of an intimate image:
>
> (1) when the person did not consent to the photographing, filming, recording, digital fabrication, or disclosure of intimate information; and
> (2) in circumstances where a reasonable person would have expected privacy in the intimate image
>
> shall be fined under this title or imprisoned for not more than five (or ten) years, or both.

I include this just by way of suggestion. In this Article, I aim to provide a way to think about potential reform rather than providing a specific legislative path. My book project will think through this issue with greater care, especially as my work with federal lawmakers evolves. The key goal of this Article is to provide a conceptual map for sexual privacy.

513. Mary Anne Franks, *CCRI Model State Law*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/model-state-law [https://perma.cc/YH32-4476].

514. 18 U.S.C. § 1801(b)(3) (2018).

515. *See* Citron & Franks, *supra* note 3, at 388.

516. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 459-60 (2011).

517. Citron & Franks, *supra* note 3, at 366 n.121, 389-90; Franks, *"Revenge Porn" Reform*, *supra* note 46, at 1281, 1278; Kaimipono D. Wenger, *Legal Developments in Revenge Porn: An Interview with Mary Anne Franks*, CONCURRING OPINIONS (Oct. 10, 2013), https://concurringopinions.com/archives/2013/10/legal-developments-in-revenge-porn-an-interview-with-mary-anne-franks.html [https://perma.cc/T3FM-KHJF].

treat sexual-privacy invasions involving nonconsensual porn as misdemeanors.[518] As we have seen, perpetrators like Mathers receive negligible sentences.[519] The possibility of significant prison time would be a more effective deterrent, and it would have a more powerful expressive impact.

As noted above, there should be penalty enhancements for bias-motivated sexual-privacy invasions. Law should recognize that some circumstances deserve higher penalties. Sextortion is particularly harmful and particularly reprehensible conduct—it may therefore warrant stiffer penalties than other sexual-privacy invasions. Legislation should include aggravating circumstances that would enhance the penalties, such as where an actor engages in both nonconsensual taping and disclosure.[520]

Civil penalties should be included as well. Along these lines, the National Conference of Commissioners on Uniform State Laws recently proposed a statute providing civil remedies for the authorized disclosure of intimate images.[521] The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act permits plaintiffs to bring suits under pseudonyms to protect their identities and private lives from further harm.[522] Plaintiffs are allowed to recover economic and noneconomic damages for injuries proximately caused by defendants or statutory damages not to exceed $10,000 against a defendant.[523] Punitive damages, reasonable attorneys' fees and costs, and injunctive relief are also allowed.[524] That statute should extend to all sexual-privacy invasions, not just to the disclosure of intimate images without consent.

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518. *42 States + DC Now Have Revenge Porn Laws*, *supra* note 416; Aaron Minc, *Revenge Porn: How to Fight Back [50 State Interactive Map]*, MINC (Sept. 12, 2017), https://www.minclaw.com/fighting-back-revenge-porn [https://perma.cc/6G9E-TXB5] (showing that twenty-eight of the fifty states and the District of Columbia treat nonconsensual pornography as a misdemeanor).

519. *See supra* notes 316-319 and accompanying text.

520. *See* Richards, *supra* note 450, at 360-61, 381-82 (suggesting that a hybrid intrusion-disclosure tort may help resolve some of the First Amendment problems with the disclosure tort); Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 302 (2002).

521. *See* UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT § 3 (UNIF. LAW COMM'N 2018). Franks served as the reporter for this project.

522. *Id.* § 5; *see also* CITRON, *supra* note 12, at 25 (arguing for recognition of pseudonymous litigation on behalf of plaintiffs in privacy suits).

523. UNIFORM CIVIL REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT § 6(a)(1)(B).

524. *Id.* § 6(a)(3).

b. Privacy Torts

The privacy torts should evolve[525] even though their practical import may be limited if section 230 of the Communications Decency Act stands.[526] The origin of these 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.[527] In *De May 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.[528] The doctor brought a friend with him but never explained that the friend was not a medical professional.[529] The doctor's friend watched the plaintiff as she gave birth.[530] The court held that the plaintiff had a "right to . . . privacy"—in the court's view, the right to decide who sees one's exposed laboring body.[531]

Historian Jessica Lake unearthed the stories behind the early privacy cases and found that female plaintiffs often used privacy-tort law to object to unwanted "optical violation of their exposed bodies."[532] Female plaintiffs brought suit to "protest" being reduced to "objects of consumption" or shameful "hookers or divorcees."[533] 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.[534] Complaints and other litigation documents show that plaintiffs sought to "claim ownership over their life experiences and to protest against the appropriation and exploitation of those experiences."[535]

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525. *See generally* CITRON, *supra* note 12.

526. As explored above, individuals are unlikely to have the resources required to sue privacy invaders. *See supra* text accompanying note 398.

527. LAKE, *supra* note 15, at 224-25.

528. 9 N.W. 146, 146 (Mich. 1881).

529. *Id.* at 147.

530. *Id.*

531. *Id.* at 148-49; *see also* LAKE, *supra* note 15, at 95. Lake studied primary court documents, including affidavits, pleadings, records of testimony, and exhibits of important early cases, including *Kunz v. Allen*, 172 P. 532 (Kan. 1918); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902); *Feeney v. Young*, 181 N.Y.S. 481 (App. Div. 1920); and *De May*, 9 N.W. 146. *See* LAKE, *supra* note 15, at 57-69, 94-95, 97-107, 126-27.

532. LAKE, *supra* note 15, at 116.

533. *Id.* at 90, 106, 118, 221.

534. *Id.* at 225.

535. *Id.* at 221.

This history is instructive. The privacy torts could have evolved in a way that provided robust protection of the ability to determine for oneself how much of one's naked body, intimate information, or intimate activities are exposed to others, as the earliest plaintiffs imagined. Privacy-tort law might have developed to recognize the wrongs of unauthorized surveillance and exposure of the naked body and certain intimate activities.[536] Instead, the privacy torts ossified into four torts with cramped meanings, in large part due to William Prosser's categorization of them in 1960 and his integration of those categories into the *Restatement (Second) of Torts*.[537] Courts can and should protect what the early privacy plaintiffs sought: the protection of their bodies and sexual activities from unwanted exposure.[538]

This goal might enable courts to eliminate some of the rigidity that has prevented privacy torts from tackling disclosures of intimate information to small groups of people or intrusions of information preserves in public.[539] The existing privacy torts can be interpreted broadly to protect sexual privacy.[540] It is crucial to recognize that privacy harms can be equally, if not more, profound when private facts like nude images are exhibited to a smaller group of people who matter to us—for instance, friends, colleagues, or family members—as when they are disclosed to the broader public. The rigid publicity rule does not accord with the lived reality of victims of sexual-privacy invasions. And, in public, our bodies should not be unwittingly and unreasonably exposed to others. Developing technologies surely will be used in ways that make our bodies vulnerable to surveillance in public. Tort law should treat those developments as wrongful and compensable rather than inevitable and acceptable.

Another way that the privacy torts could evolve is to redress breaches of confidentiality between intimates. A rich literature supports this view.[541] This would

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536. An important way to think about tort law is as the redress of wrongs, an approach that is both pragmatic and morally grounded. *See, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (forthcoming 2019).

537. *See* Citron, *supra* note 24, at 1809; Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1903 (2010).

538. Prosser, *supra* note 422, at 397. Benjamin Zipursky and I are collaborating on a project that will flesh out the contours of such a development in privacy-tort law.

539. *See* Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2010-11 (2010).

540. *See* CITRON, *supra* note 12, at 142-53.

541. *See, e.g.*, WALDMAN, *supra* note 37; Richards & Hartzog, *supra* note 101; Daniel J. Solove & Neil M. Richards, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007); Waldman, *supra* note 112; *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (attempting to reconcile the tensions between information-privacy rights and First Amendment rights through the concept of an "information fiduciary").

provide redress for a person whose intimate information—whether the fact of gender transition or a nude image—is shared in violation of a promise of confidentiality.

c. Section 230 Reform

Enhanced legal liability of perpetrators is insufficient. Content platforms are essential to protecting sexual privacy in the digital age. For instance, the call for a more regulated internet is no longer considered outlandish.[542] Congress recently amended § 230 to exempt from immunity platforms that facilitate online sex trafficking.[543] As one of the drafters of § 230 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.[544]

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

Modest adjustments to § 230 could maintain free and robust online speech 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 free speech scholar Geoffrey Stone would be to deny the safe harbor to bad actors. Specifically, the exemption would apply to online service providers that "knowingly and intentionally leave up unambiguously unlawful content that clearly creates a serious harm to others."[545] This would ensure that bad actors could not claim immunity if they knowingly and intentionally leave up content like nonconsensual pornography or up-skirt photos.

A variant on this theme would deny the immunity to online service providers that intentionally solicit or induce illegal behavior or unlawful content. This approach takes a page from intermediary trademark-liability rules. As Stacey

542. *See* Citron & Jurecic, *supra* note 487, at 2.

543. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 3, 132 Stat. 1253, 1253-54 (2018).

544. *See* Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018, 5:11 AM ET), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change [https://perma.cc/2JWB-H6WZ] (citing former Rep. Christopher Cox, R-California).

545. E-mail from Geoffrey Stone, Professor of Law, Univ. of Chi., to Danielle Citron (Apr. 8, 2018, 3:38 PM EDT) (on file with author).

Dogan urges in that context, the key is the normative values behind the approach.[546] Providers that profit from illegality—which surely can be said of sites that solicit unlawful content—should not enjoy immunity from liability. Such an approach would incentivize these providers to take down harmful, illegal content, or else risk potential lawsuits. At the same time, other online service providers would not have a reason broadly to block or filter lawful speech in order to preserve the immunity. In other words, the approach targets the harmful conduct while providing breathing space for protected expression.[547]

Yet another approach would be to amend § 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.[548] The immunity would hinge on the reasonableness of providers' content moderation practices as a whole—rather than whether specific content was removed or allowed to remain in any single instance. The determination of what constitutes a reasonable standard of care would consider differences among online entities. For example, internet service providers and social networks with millions of postings a day cannot plausibly respond to complaints of abuse immediately, let alone within a day or two. However, 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 approach would reduce opportunities for abuses without interfering with the further development of a vibrant internet and without 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—for setting different rules for large social networks connecting millions of people versus websites designed to facilitate mob attacks or to enable illegal discrimination.[549]

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546. Stacey Dogan, *Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J.L. & ARTS 503, 507-08 (2014).

547. *Id.* at 508-09.

548. Citron & Wittes, *supra* note 399, at 419. A better revision to § 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.*

549. *Id.* at 423.

B. Markets

Finally, market forces have the potential to play a crucial role in protecting sexual privacy. Whether these efforts do more harm than good is worth careful study. Information technologies are doubled-edged—they collect, analyze, and share personal data even as they afford new opportunities for privacy.[550]

Consider this example. 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.[551] Because it was embarrassing to be seen purchasing such reading material, many declined to do so. In the digital age, however, there are no clerks to give us sideways looks when we purchase *Fifty Shades of Grey* or *Hustler* magazine online.[552]

The privacy calculus has morphed, but it is not necessarily a win for individuals. Ordinary members of the public have no idea what we are reading, but online behavioral advertisers and e-book sellers certainly do. Indeed, a vast array of companies track our online purchases, and information about those purchases may end up in many parties' hands depending upon the sites' privacy policies.[553]

David Pozen's typology of privacy-privacy trade-offs can help us evaluate market efforts to protect sexual privacy. One type of privacy trade-off—a "distributional tradeoff"—shifts privacy burdens or benefits from one group in the population to another.[554] A "directional tradeoff" shifts the burdens or benefits from groups suffering harm to groups inflicting privacy harm.[555] A "dynamic tradeoff" shifts the privacy risk across time periods.[556] In a "dimensional tradeoff," the risk is shifted across different privacy interests.[557] With this typology in mind, this Section assesses the impact of emerging trends that are and may be invoked to protect sexual privacy.

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550. *See id.* at 412-413; Benjamin Wittes & Jodie C. Liu, *The Privacy Paradox: The Privacy Benefits of Privacy Threats*, BROOKINGS 1-2 (May 2015), https://www.brookings.edu/wp-content/uploads/2016/06/Wittes-and-Liu_Privacy-paradox_v10.pdf [https://perma.cc/2MXH-GXEW].

551. Wittes & Liu, supra note 550, at 1-2.

552. *See generally* Benjamin Wittes & Emma Kohse, *The Privacy Paradox II: Measuring the Privacy Benefits of Privacy Threats*, BROOKINGS (Jan. 2017), https://www.brookings.edu/wp-content/uploads/2017/01/privacy-paper.pdf [https://perma.cc/C57M-KAVP] (finding that consumers have active privacy interests in dealing with data-collecting companies).

553. *Id.*

554. Pozen, *supra* note 5, at 229.

555. *Id.*

556. *Id.* at 229-30.

557. *Id.* at 230.

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.

To address this problem, Facebook has spearheaded technical strategies that have garnered different public reactions. Let us consider the effort that has obvious upsides and few downsides for privacy. 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.[558] 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.[559]

In essence, hashes are unique digital fingerprints. At Facebook, photo-matching technology would block hashed images from reappearing on any of its platforms. This strategy is one that Franks, as legislative director of the Cyber Civil Rights Initiative, had long urged tech companies to adopt.[560]

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558. 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 [https://perma.cc/5YAC-Z4WQ].

559. 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 [https://perma.cc/EUQ9-KSAP]. Computer scientist Hany Farid, in conjunction with Microsoft, has developed PhotoDNA hash technology that enables the blocking of content before it appears. Kaveh Waddell, *A Tool to Delete Beheading Videos Before They Even Appear Online*, ATLANTIC (June 22, 2016), https://www.theatlantic.com/technology/archive/2016/06/a-tool-to-delete-beheading-videos-before-they-even-appear-online/488105 [https://perma.cc/EX35-YGS9].

560. Interview with Mary Anne Franks, Professor of Law, Univ. of Miami Sch. of Law (Sept. 1, 2018) (explaining that as early as 2014, Franks urged tech companies to adopt hash strategies to filter and block content constituting nonconsensual pornography).

Facebook's 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.[561] 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 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, garnered significant pushback from privacy advocates and journalists. In November 2017, the platform announced a pilot program that would allow victims of nonconsensual porn to send it images that they worried might be posted without their consent.[562] 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 to prevent their posting. The hashing program was incredibly helpful, but it could not prevent the initial publication. There was still harm—mitigated, to be sure, but nevertheless significant.

Facebook's technologists and policy leaders have partnered with Australia's e-safety commissioner on a pilot program that lets individuals send in intimate photos that they fear will be posted on Facebook without permission.[563] Users first have to notify the e-safety commissioner's office about the problem.[564] Once the office notifies Facebook, individuals are sent a one-time link they can use to send an intimate image to Facebook. Facebook's operations obtain the image and

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

562. 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 (including myself and Mary Anne Franks) and the National Network to End Domestic Violence. *See* Facebook Safety, *People Shouldn't Be Able to Share Intimate Images to Hurt Others*, FACEBOOK (May 22, 2018), https://www.facebook.com/fbsafety/posts/1666174480087050 [https://perma.cc/4NMC-C5ZC] (announcing the working group). I am not paid for any of my consulting work with Facebook.

563. Olivia Solon, *Facebook Asks Users for Nude Photos in Project to Combat 'Revenge Porn*,*'* GUARDIAN (Nov. 7, 2017, 5:16 PM), https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos [https://perma.cc/3TRC-4LHW].

564. Louise Matsakis, *To Fight Revenge Porn, Facebook Is Asking to See Your Nudes*, MOTHERBOARD (Nov. 7, 2017, 9:26 PM), https://motherboard.vice.com/en_us/article/7x478b/facebook-revenge-porn-nudes [https://perma.cc/76GZ-ZAL8].

then hash it to prevent its future posting on the site.[565] Facebook is planning on extending the program to the United States and the United Kingdom.

The reaction to the proposal was swift, and much of it was negative. Some criticism was warranted. Journalists asked why anyone should trust Facebook after the Cambridge Analytica fiasco.[566] Information-security experts noted that transmitting intimate images to Facebook entailed security risks.[567] Civil-liberties groups were quick to criticize the initiative, mocking it as a privacy disaster.[568]

There is indeed risk to sexual privacy—a dynamic one, to use Pozen's term. If Facebook fails to secure the transmission of nude images and does not delete those images after hashing them, hackers could later obtain the images and post them all over the internet. The image submission process could be attacked by phishing schemes that would put intimate images into the hands of criminals.[569] All signs, however, do not point in that direction. Facebook is immediately deleting the nude images after hashing them, and again, it is difficult to reengineer images from hashes.

The hash program also 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 are attuned to privacy concerns.[570] In short, these are precisely the sort of careful efforts that companies should engage in as they adopt privacy-enhancing technologies that also carry risks.

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565. Davis, *supra* note 558.

566. *See, e.g.*, David Bloom, *Facebook Wants Your Nude Photos; What Could Possibly Go Wrong?*, FORBES (May 24, 2018, 9:03 PM), https://www.forbes.com/sites/dbloom/2018/05/24/facebook-wants-your-nude-photos-what-could-possibly-go-wrong [https://perma.cc/495D-UGPW].

567. Matsakis, *supra* note 564.

568. *See, e.g.*, Fight for the Future (@fightfortheftr), TWITTER (May 24, 2018, 11:34 AM), https://twitter.com/fightfortheftr/status/999720271484350464 [https://perma.cc/Y5GN-8TJZ] (parodying Facebook's position: "Facebook: We didn't protect your data and we are sorry. We will do better. Also Facebook: Yo, send us your nudes").

569. For a thoughtful analysis of the potential risks, see the take of computer scientist and tech-policy expert Steven Bellovin in *Facebook's Initiative Against "Revenge Porn,"* SMBLOG (Sept. 16, 2017), https://www.cs.columbia.edu/~smb/blog/2017-11/2017-11-16.html [https://perma.cc/QH8F-FPRH]. Bellovin thoughtfully discusses concerns about Facebook's pilot program with an emphasis on the possibility that there could be phishing scams but notes his "guarded approval" for the overall plan.

570. I have been invited to speak at these training sessions.

The Facebook pilot program would be equally available to women and marginalized communities as to heterosexual white men. Access to Facebook's properties is effectively purchased with personal data—thus, wealthy or poor, white or nonwhite, male or female, anyone with a Facebook or Instagram account can take advantage of it. It is a program worth trying in the United States, one in which privacy risks do not outweigh the privacy benefits.

2. Immutable Life Logs

The development of hard-to-debunk deep-fake sex videos 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 service that warrants careful study: "[I]mmutable 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."[571]

"From a technical perspective," we write, "such services will be made possible by advances in a variety of technologies including wearable tech; encryption; remote sensing; data compression, transmission, and storage; and blockchain-based record-keeping."[572] That last element may be important because 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—such as politicians, celebrities, and others whose fortunes depend to an 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 "twelve states criminalize the interception of electronic communications unless both parties to the communication consent to the interception."[573])

Should we encourage the emergence of such services? We need to examine the privacy calculus in total. At issue are dimensional and distributional privacy-privacy trade-offs.

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571. Chesney & Citron, *supra* note 4 (manuscript at 54).

572. *Id.*

573. Citron, *supra* note 243, at 1263 n.123. So long as one party to communications consents to interception, federal law and the remaining thirty-eight states' laws permit the practice. *See* Ohm, *supra* note 415, at 1486.

First to the dimensional aspect of the trade-off. Individuals' privacy and reputations would be protected by giving enormous power over every detail of their lives to life-logging companies. There are, however, serious social costs to privacy should such services emerge and prove popular. Proliferation of comprehensive life-logging services would have tremendous spillover effects on privacy in general. It risks what has been called the "unraveling of privacy"[574]—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 remaining people who have not done so increasingly risk being subject to the inference that they have something to hide.[575] 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.

The supplier of life-logging services would have extraordinary power over people using their services.[576] The personal data amassed would be a treasure trove for advertisers interested in exploiting our weaknesses and desires. Paul Ohm has presciently called a variant of this possibility a "database of ruin."[577] Some perils could be tempered by clear, enforceable commitments of confidentiality. Others, including the potential for data breach, would be difficult to eliminate.

To be sure, life logging would have its upside in terms of identifying deep-fake sex videos and all other manners of using video to fabricate the past. But this upside would not be enjoyed by all. At least in its initial adoption, it would only be practically available to the wealthy and powerful. Herein lies the distributional privacy-privacy trade-off. The privacy upsides of such services would not be available to the average person whose privacy is invaded. Such services would likely be expensive and thus out of the reach of many women and marginalized individuals. And in any event, it would be ineffective to address jobs that victims never know that they do not get because a deep-fake sex video appeared in a search of their names.

A world with widespread life logging 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

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574. Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153 (2011).

575. *Id.* at 1192.

576. Chesney & Citron, *supra* note 4 (manuscript at 55).

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

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.

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Of course, these are just two examples of market responses to sexual-privacy invasions. More are surely on the horizon.[578] That is a good thing. Law cannot deter and redress all manner of sexual-privacy invasions. Market solutions are crucial for reform efforts. As market solutions emerge, however, we must not adopt them without a careful assessment of the privacy risks and trade-offs.

CONCLUSION

Sexual privacy is undergoing transformative change in our digital age. Networked tools create new opportunities for sexual expression and sexual privacy. Today's intimate partners routinely share nude images to foster intimacy, the same reason people once sent hand-written love letters. Encrypted communications are far less vulnerable to theft than letters in the mailbox are.

At the same time, networked tools can be easily and cheaply exploited to undermine sexual expression and sexual privacy. The denial of sexual privacy is closely tied to subordination and discrimination. Digital voyeurism, up-skirt photos, sextortion, nonconsensual porn, and deep-fake sex videos are all sexual-privacy invasions—and marginalized and subordinated communities most often shoulder the abuse.

Sexual privacy deserves special recognition and protection given its foundational relationship with sexual autonomy, intimacy, and equal opportunity. Law and markets can secure sexual privacy. We must leverage both with care and imagination for the good of individuals, groups, and society.

578. One possibility, suggested to me by Jeanine Morris-Rush, is for email services to include a disclaimer that intimate material should not be shared without explicit consent of the sender. That disclaimer could be manually erased by the person sending the email. This design would express the person's wishes either to keep the intimate image confidential or to change that default and permit sharing. It would also serve as a reminder to the recipient to respect the sexual privacy of the person sending intimate photos or videos.