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## WHY SEXUAL PRIVACY MATTERS FOR TRUST

DANIELLE KEATS CITRON\*

### ABSTRACT

*Every generation has preferred modes of self-disclosure. Not long ago, lovers revealed their thoughts, desires, and secrets over the phone and in letters. Today, they exchange personal histories and nude photos via text and online chats. Yet no matter the era's chosen mode of communication, the success of intimate relationships depends upon sexual privacy. Intimacy can develop only if partners trust each other to treat their self-revelations with discretion and care.*

*Self-disclosure, however, is difficult after one's nude photos have been posted online or one's intimate encounters have been videotaped without permission. Individuals refrain from dating for fear that their intimate revelations will again be surveilled and exposed in unwanted ways. Sexual-privacy invasions thus undermine the possibility of intimate relationships.*

*Law should punish intimacy-destroying invasions of sexual privacy, and market efforts should be trained on their prevention and mitigation. Some*

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*private responses, however, require a healthy dose of skepticism as they over-promise and under-deliver for sexual privacy.*

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## INTRODUCTION

When Jane Smith began dating after her divorce, she never imagined that her ex-husband would sneak into her house and hide a video camera in her bedroom.<sup>1</sup> But that is precisely what he did.<sup>2</sup> Smith's ex had a copy of the key to her house in case one of their kids had an emergency.<sup>3</sup> She never gave her ex permission to enter her bedroom, let alone to videotape her there.<sup>4</sup> Her ex sent footage of Smith's intimate activities with another man to her parents and members of her church.

Much like Smith, we set boundaries around our intimate lives, and, much like Smith, we expect that those boundaries will be respected. We presume that no one is videotaping us in the bedroom unless invited to do so. And we assume that our sexually explicit photographs will not end up in family members' inboxes without our say so.

These sorts of social norms are essential building blocks of what I have called "sexual privacy."<sup>5</sup> Sexual privacy refers to the behaviors, expectations, and attitudes that mark the boundaries around intimate life. It concerns the ability to conceal the naked body and the seclusion afforded sexual intercourse and other intimate activities. It concerns the

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1. Telephone Interview with Jane Smith (Oct. 3, 2018).  
2. *Id.*  
3. *Id.*  
4. *Id.*  
5. See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019).

confidentiality of thoughts, digital communications, and online searches about sex, sexuality, and gender. It concerns personal decisions about the revelation of our naked bodies and intimate information.<sup>6</sup>

Sexual privacy should be recognized as a foundational privacy interest.<sup>7</sup> Sexual privacy is an essential precondition for sexual agency, self-determination, and intimacy, and its denial risks entrenching the subordination of women and marginalized communities.<sup>8</sup> It deserves special protection, much as do other crucial privacy interests like health privacy, financial privacy, communications privacy, children's privacy, and intellectual privacy.<sup>9</sup>

This Article explores a central reason for recognizing sexual privacy as a distinct privacy interest—its importance to intimacy. The protection of sexual privacy is essential for intimate relationships to thrive. Intimate relationships develop through a process of mutual self-disclosure and vulnerability.<sup>10</sup> Self-revelation, however, is only possible when partners can be trusted to handle intimate information with care.<sup>11</sup> Revealing intimate information is difficult after an ex-partner has been indiscreet with our confidences.<sup>12</sup> As Smith told me, intimacy can seem unattainable, and trust foolhardy, after being secretly recorded in the bedroom and that recording exposed to family and friends.<sup>13</sup>

Law should stand behind obligations of confidentiality assumed in intimate relationships. It should punish sexual-privacy invasions that sow distrust in the project of intimacy. Beyond law, private efforts should reinforce norms of sexual privacy. At the same time, we should be wary of market responses that over-promise and under-deliver for sexual privacy.

This Article has three parts. Part I explores the connection between sexual privacy, intimacy, and trust. It highlights the centrality of sexual

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6. *Id.* at 1879–80.

7. *Id.* at 1881.

8. *Id.* at 1881–82.

9. 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); Danielle Keats Citron, *Reservoirs of Danger*, 80 S. CAL. L. REV. 241 (2007) (arguing that certain personal information like biometric data and Social Security numbers pose acute risks of identity theft and other forms of fraud and warrant strict liability akin to 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 NEIL RICHARDS, *INTELLECTUAL PRIVACY* 95–108 (2015).

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

11. EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 125 (1978).

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

13. See, e.g., Telephone Interview with Jane Smith, *supra* note 1.

privacy to trust in intimate relationships. It distinguishes invocations of “privacy” that shield sexual-privacy invasions from accountability and undermine sexual autonomy, equality, and intimacy.

As Part II explores, sexual-privacy invasions sow distrust. Victims find it difficult to forge new relationships after ex-intimates secretly record their naked bodies and exhibit their intimate information without consent. They feel unsafe in their bedrooms and in their relationships after strangers invade their sexual privacy. Part II lays out the costs to intimacy, emotional health, and professional life.

Part III evaluates an encouraging development in privacy law—the growing scholarly emphasis on trust in relationships. It considers the potential role for trust in remedying and preventing sexual-privacy invasions. It also assesses market efforts that trend in this direction. It ends with a note of caution about private-sector developments that claim to protect sexual privacy and trust but may risk both.

#### I. SEXUAL PRIVACY: AN ESSENTIAL CONDITION FOR TRUST IN INTIMATE RELATIONSHIPS

This Part starts with a brief overview of sexual privacy’s significance to autonomy, identity, and equality. Then, it turns to the heart of the matter: sexual privacy’s importance to intimate relationships. It describes relationships that count as intimate and their importance for human flourishing. It shows how sexual privacy serves as an essential precondition to the development of intimate relationships. It argues that the coerced revelation or concealment of intimate life is the conceptual antithesis of sexual privacy.

##### A. *Sexual Privacy*

Managing the boundaries around our bodies, thoughts, activities, and personal information is a part of daily life.<sup>14</sup> We cover genitals with clothing and leave hands bare. We share certain thoughts with long-term partners but not with coworkers.<sup>15</sup> We keep some personal history to ourselves.<sup>16</sup> At

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14. 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).

15. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 101–06 (2008) (offering a taxonomy of sixteen types of privacy problems, including intrusion, disclosure, collection, interrogation, use, anonymity, and invasion).

16. Hugh Lazenby & Iason Gabriel, *Permissible Secrets*, 68 *PHIL. Q.* 265, 265–66 (2018).

certain times, we close bedroom and bathroom doors, and we open them at other times.

Whether privacy is warranted is determined by the settings, contexts, and expectations in which we set those boundaries.<sup>17</sup> Crucial to those settings, contexts, and expectations is *sex*—the human body; intimate activities; personal information about sex, sexuality, and gender; and personal choices about the body and intimate activities.<sup>18</sup>

I use the term “sexual privacy” to refer to the social norms that manage the boundaries around our intimate lives.<sup>19</sup> Sexual privacy concerns the visibility of the naked body and the parts of the body closely associated with sex and gender.<sup>20</sup> It involves the solitude afforded intimate activities, including but not limited to sex. It addresses the confidentiality of thoughts, communications, and online searches about sex, sexuality, and gender. It concerns decisions about the concealment of our sexual preferences, transgender status, or naked body.<sup>21</sup>

Consider these illustrations of sexual privacy. A man takes off his clothing in a hotel room, expecting no hidden cameras there. A couple has sex in their bedroom, uninhibited in their interactions because they believe that they are alone. A woman reveals her childhood sexual assault to her lover, assuming that he will be discreet with that information. A man texts nude photographs to his boyfriend on the understanding that the photos are for their eyes only. A woman walks into a store, assuming that employees cannot see, let alone videotape her, up her skirt.

The concept of sexual privacy has descriptive and normative dimensions.<sup>22</sup> The term captures how sexual privacy is currently experienced and how it should be experienced.<sup>23</sup> Sexual privacy, as I am using the term, secures “opportunities for . . . privacy and private choice” that individuals expect and deserve.<sup>24</sup> Sometimes, law protects the boundaries that manage access to our bodies, intimate information, activities, and decisions.<sup>25</sup> At other times, it provides little to no protection, though it should.<sup>26</sup>

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17. SOLOVE, *supra* note 15, at 44–46.

18. PATRICIA BOLING, *PRIVACY AND THE POLITICS OF INTIMATE LIFE* 57 (1996).

19. *See* Citron, *supra* note 5, at 1880.

20. *Id.*

21. *Id.*

22. *Id.* at 1880–81.

23. *Id.*

24. ANITA L. ALLEN, *UNEASY ACCESS* 180 (1988). The scholarship of Linda McClain and Mary Anne Franks have also served as important inspiration for my thinking.

25. *Id.*

26. BOLING, *supra* note 18, at 57; FERDINAND DAVID SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* 14 (1992).

As I have argued, sexual privacy is crucial to sexual agency and self-development.<sup>27</sup> Individuals are free only insofar as they can determine the boundaries around their bodies and intimate lives. Sexual privacy allows people to decide whether their bodies are seen or taped; whether their thoughts, fantasies, and dreams are revealed; and whether their sexual preferences, gender, and sexual history are disclosed.<sup>28</sup>

Being able to reveal one's body in the way that one chooses is central to self-development.<sup>29</sup> The human body serves as a "basic reference" for identity formation.<sup>30</sup> It influences how people understand, develop, and construct gender identity and sexuality.<sup>31</sup> Sexual privacy gives people freedom to experiment with their bodies, sexuality, and gender before revealing them to others.<sup>32</sup> It gives them breathing room to explore sexual fantasies, thoughts, and wishes. It enables them to see themselves as the authors of their intimate lives, and it lets others see them as fully integrated human beings rather than as just intimate parts.<sup>33</sup>

Equality is at stake as well. In the present, as in the past, women and marginalized communities shoulder the brunt of invasions of sexual privacy.<sup>34</sup> In nineteenth-century America, enslaved individuals had no sexual privacy.<sup>35</sup> Enslaved "black women were taken into the town square

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27. Citron, *supra* note 5, at 1902 (discussing David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 222–24 (2016), which called for scholars to distinguish the value of different privacy interests so that policymakers can make meaningful decisions when privacy interests are in conflict).

28. Citron, *supra* note 5, at 1880.

29. *Id.* at 1883.

30. See MAURICE MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* (2013); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.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. JANET MOCK, *REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE & SO MUCH MORE* (2014).

31. We perform and construct gender identity; gender identity is not fixed or static. Paulan Korenhof & Bert-Jaap Koops, *Gender Identity and Privacy: Could a Right to Be Forgotten Help Andrew Agnes Online?* 3–5 (Tilburg Inst. for Law, Tech. & Soc'y, Working Paper No. 3/2013, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304190](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304190). Our gender identity may not match how culture perceives our bodies. JUDITH BUTLER, *GENDER TROUBLE* 7 (1990) (explaining that culture and norms link some parts of our bodies—genitalia, female breasts, and buttocks—to our person in a way that other body parts are not); see Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1273–77 (2003) (exploring treatment of genitalia and "states of undress" as matter of culture, threat, and risk).

32. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); FRIED, *supra* note 12, at 140.

33. See, e.g., MOCK, *supra* note 30; 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).

34. Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2055 (2018) (explaining that marginalized communities are disproportionately subject to unwanted surveillance); Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1678 (2017).

35. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 10 (1997).



to be sold. They were paraded around naked, to be inspected and critiqued for future sale and sure abuse.”<sup>36</sup> Their bodies were treated as “items of public (indeed pornographic) display.”<sup>37</sup> White masters sexually assaulted enslaved women and forced them to bear their children.<sup>38</sup> The situation was hardly better for free black women.<sup>39</sup> Black men and women, enslaved and free, were denied sexual privacy because they were deemed unworthy of it.<sup>40</sup>

Conceptions of womanhood that led to the public exposure of black women’s bodies<sup>41</sup> led to the control of upper- and middle-class white women in the “family home” where they enjoyed little sexual privacy.<sup>42</sup> Upper- and middle-class white women had few opportunities to enjoy solitude and repose in the home.<sup>43</sup> As John Stuart Mill observed, husbands colonized wives’ sentiments and bodies.<sup>44</sup>

In the twentieth century, workplace sexual harassment was rampant. Until the late 1970s, it was acceptable to gawk at, ogle, and touch women in the workplace.<sup>45</sup> Sexual harassment was viewed as a perk of men’s employment rather than as invidious discrimination.<sup>46</sup> In the wake of Anita Hill’s testimony at the Clarence Thomas hearings in 1991, African American women called attention to society’s refusal to address racist and

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36. Abigail Pesta, *Gabrielle Union: “My Nude Photos Were Stolen, and I’m Fighting Back”*, COSMOPOLITAN (Nov. 5, 2014), <https://www.cosmopolitan.com/entertainment/celebs/news/a32589/gabrielle-union-my-nude-photos-were-stolen/> [<https://perma.cc/VM2W-DGJL>].

37. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 770 (1999) (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 163–80 (1991)).

38. ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 25–27 (1981).

39. MARY M. BROWNLEE & W. ELLIOTT BROWNLEE, *WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY, 1675 TO 1929* 244 (1976). Gerda Lerner notes that the “free availability [of black women] as sex objects to any white man was enshrined in tradition, upheld by the laws forbidding inter-marriage, enforced by terror against black men and women and . . . tolerated both in its clandestine and open manifestations.” GERDA LERNER, *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* 149–50 (1973).

40. ROBERTS, *supra* note 35, at 10. Black women were “exiled from the norms of true womanhood.” *Id.* In the post-slavery era, black women in the segregated South remained “hypervisible and on display.” SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 57 (2015). Black women working as domestic laborers in white-controlled private homes were subject to various techniques of surveillance, including close scrutiny, sexual harassment, assault, and violence. PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* (1998).

41. McClain, *supra* note 37, at 770; *see also* TONI MORRISON, *RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (1992).

42. ALLEN, *supra* note 24, at 54–56.

43. *Id.*

44. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 26–27 (2d ed. 1869).

45. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 96–98 (2014).

46. Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 394 (2009).

sexist workplace harassment, a legacy of the long-standing trivialization of black women's sexual abuse.<sup>47</sup>

Throughout the nineteenth and twentieth centuries, sexual minorities were denied the ability to draw boundaries around their intimate affairs. State sodomy laws effectively criminalized their intimate interactions.<sup>48</sup> Until the Supreme Court decision in *Lawrence v. Texas*,<sup>49</sup> the fear of state intrusion hung over intimate interactions of LGBT individuals. As Anita Allen explains, restroom stalls and bedrooms were “not reliably private for the LGBT community.”<sup>50</sup>

In the twenty-first century, women and marginalized communities have continued to be disproportionately targeted with invasions of sexual privacy. They suffer acute stigmatization when their nude photos or sexual activities are exposed online.<sup>51</sup> They lose jobs and have difficulty finding new ones.<sup>52</sup> They feel humiliated and ashamed.<sup>53</sup> Invasions of sexual privacy make it difficult to enjoy all of life's crucial opportunities.<sup>54</sup>

### B. Intimacy & Trust

Sexual privacy enables the development of intimate relationships whose societal importance is undeniable. As philosophers, psychologists, legal scholars, and religious thinkers agree, intimate relationships are central to human existence.<sup>55</sup> Through intimate relationships, people come to know

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47. “*African American Women in Defense of Ourselves*” (1991), in DOCUMENTING INTIMATE MATTERS: PRIMARY SOURCES FOR A HISTORY OF SEXUALITY IN AMERICA 200, 201 (Thomas A. Foster ed., 2013).

48. See JOEY J. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 11–16 (2011); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

49. 539 U.S. 558 (2003).

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

51. CITRON, *supra* note 45, at 6–7.

52. *Id.* at 6.

53. See, e.g., ‘*I Couldn’t Talk or Sleep for Three Days*’: Journalist Rana Ayyub’s Horrific Social Media Ordeal over Fake Tweet, MSN (Apr. 28, 2018), <https://www.msn.com/en-in/news/newsindia/%E2%80%98i-couldn%E2%80%99t-talk-or-sleep-for-three-days%E2%80%99-journalist-rana-ayyub%E2%80%99s-horrific-social-media-ordeal-over-fake-tweet/ar-AAwnGHv> [<https://perma.cc/M9G2-N9C6>]; TEDx Talks, *Sexual Predators Edited My Photos into Porn—How I Fought Back* | Noelle Martin | TEXxPerth, YOUTUBE (Mar. 6, 2018), <https://www.youtube.com/watch?v=PctUS31px40> [<https://perma.cc/44EX-BAYH>].

54. See CITRON, *supra* note 45.

55. BOLING, *supra* note 18, at 67, 102; Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathan Glover eds., 1995); JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 88–90 (1992); HANNAH ARENDT, THE HUMAN CONDITION 51, 73 (1958); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 31 (1976).

themselves, their partners, and humanity.<sup>56</sup> Intimate relationships inform “our notion of ourselves as persons among persons.”<sup>57</sup> They provide emotional sustenance, which in turn enables civic and political engagement.<sup>58</sup>

Philosopher Martin Buber argued that intimate relationships allow people to experience meaning and to glimpse the divine.<sup>59</sup> He described intimacy in this way: “Only he who himself turns to the other human being and opens himself to him receives the world in him. Only the being whose otherness, accepted by my being, lives and faces me in the whole compression of existence, brings the radiance of eternity to me.”<sup>60</sup>

That is not to dismiss the importance of a wide variety of non-intimate relationships. For instance, people hold dear their relationships with doctors, therapists, lawyers, and financial advisers.<sup>61</sup> In professional relationships, personal information tends to flow in one direction—from individuals to expert advisers—as does the expectation of trust.<sup>62</sup> OBGYNs know highly sensitive personal information about their patients, but patients know comparatively little about them.<sup>63</sup> Lawyers learn everything they can about their clients’ troubles, but their clients know little about theirs. Financial advisers study their clients’ income and assets, but their clients are not privy to theirs. Professionals are expected to protect the confidentiality of that personal information.<sup>64</sup>

In intimate relationships, the information flow is not one-sided. To the contrary—a defining feature of intimate relationships is mutual knowledge.<sup>65</sup> Intimate relationships emerge from a “relational process in which we come to know the innermost, subjective aspects of another, and

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56. ERICH FROMM, *THE ART OF LOVING* 47 (1957). When people share innermost thoughts, values, and attitudes—what Fromm called the core of themselves, they perceive their “identity, the fact of [their] brotherhood.” *Id.*

57. FRIED, *supra* note 12, at 137, 140.

58. ARENDT, *supra* note 55, at 51, 73. Arendt warns against a sole focus on familial, intimate relationships to the exclusion of the collective good. *Id.* at 68–73. Burrowing into private life to the exclusion of the public led to the mindless execution of Hitler’s Final solution. *Id.*

59. MARTIN BUBER, *I AND THOU* (WITH PROLOGUE AND NOTES BY WALTER KAUFMAN) 151 (1970 Trans.); MARTIN BUBER, *BETWEEN MAN AND MAN* 30–31, 204–05 (1947).

60. BUBER, *BETWEEN MAN AND MAN*, *supra* note 59, at 30.

61. See Reiman, *supra* note 55, at 33.

62. See, e.g., *id.*

63. This is obvious from the exemplary work of Dr. Jeanine Morris-Rush and her partner Melissa Oppenheim in *Preferred Women’s Health*.

64. Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 174 (2007).

65. John G. Holmes & John K. Rempel, *Trust in Close Relationships*, in *CLOSE RELATIONSHIPS* 187, 190 (Clyde Hendrick ed., 1989); see also INNESS, *supra* note 55, at 88–90 (describing intimacy as acts or matters that “draw value and meaning” from an agent’s “love, caring, or liking” and formed in relationships characterized by norms of consent, fairness, and mutuality).

are known in a like manner.”<sup>66</sup> In addition to mutual knowledge, intimate partners have strong feelings of care and affection for one another.<sup>67</sup> They have a shared sense of mutuality (that they are engaged in a joint enterprise), interdependence (that they can depend upon one another for support), and commitment (that they want the relationship to continue).<sup>68</sup> They see themselves as an “us”—a new system with its own unique properties.”<sup>69</sup>

Mutual trust is a crucial feature of intimate relationships. Intimate partners engage in reciprocal self-disclosure because they “trust . . . that no undue harm will be associated with the relationship.”<sup>70</sup> Trust grows from the belief that partners will treat one another’s personal information as they hope rather than as they fear.<sup>71</sup> Intimate partners reveal their innermost thoughts, feelings, and experiences because they believe that the other person will be discreet with their information.<sup>72</sup> The “increased vulnerability which arises with intimacy is tolerable only if accompanied by the belief that the partner will not exploit it.”<sup>73</sup> In intimate relationships, personal information flows in both directions as does the expectation of discretion.

Social psychologists Irwin Altman and Dalman Taylor highlight the importance of privacy to trust in intimate relationships.<sup>74</sup> As Altman and Taylor explain, intimate relationships develop through a social process.<sup>75</sup> At first, individuals tend to meet in public spaces and exchange favorable “nonintimate information” about themselves.<sup>76</sup> Over time, intimates reveal

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66. Gordon J. Chelune, Joan T. Robison & Martin J. Kommor, *A Cognitive Interactional Model of Intimate Relationships*, in COMMUNICATION, INTIMACY, AND CLOSE RELATIONSHIPS 11, 14 (Valerian J. Derlega ed., 1984) (emphasis omitted).

67. *Id.* at 33.

68. *Id.* at 29–32.

69. *Id.* at 26.

70. *Id.* at 31. Social science accounts of intimate relationships mirror philosophical work. For instance, the cognitive interactive model of intimate relationships of Chelune and his coauthors is familiar to readers of Erich Fromm, whose theory of love is premised on knowledge, care, responsibility, and respect. FROMM, *supra* note 56, at 26–33.

71. Holmes & Rempel, *supra* note 65, at 187, 190.

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

73. Chelune et al., *supra* note 66, at 31 (quoting R.A. HINDE, PERSONAL RELATIONSHIPS 14 (VOL. 1)). Of course, trust is crucial for all sorts of relationships. Helen Nissenbaum, *Securing Trust Online: Wisdom or Oxymoron?*, 81 B.U. L. REV. 635, 639–44 (2001). There is a rich literature on the role of trust in various relationships and contexts. *See, e.g.*, NIKLAS LUHMANN, *Defining the Problem: Social Complexity*, in TRUST AND POWER: TWO WORKS 8 (1979); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 7 (1995); Russell Hardin, *Trustworthiness*, 107 ETHICS 26, 33 (1996). *Boston University Law Review* put together a superb issue on various issues involving trust relationships. *See Symposium on Trust Relationships*, 81 B.U. L. REV. 321 (2001).

74. ALTMAN & TAYLOR, *supra* note 10, at 6.

75. *Id.* at 136.

76. *Id.*

more personal information to one another in public and private settings.<sup>77</sup> This is what Altman and Taylor called the “social penetration process.”<sup>78</sup>

At the heart of the “social penetration process” is the exchange of “vulnerable, socially undesirable facets of the self.”<sup>79</sup> People are forthright about their desires and secrets if partners are forthright about theirs.<sup>80</sup> They reveal painful past experiences if their partners tell them about theirs.<sup>81</sup> Reciprocal vulnerability generates “trust and a growing confidence that intimates will not hurt each other intentionally.”<sup>82</sup>

Intimacy thus depends upon partners treating one another’s personal information with care.<sup>83</sup> 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.”<sup>84</sup> People reveal their intimate selves on the assumption that their partners will not treat them as “inconsequential.”<sup>85</sup> They do not hide or self-censor unappealing personal facts because they believe their partners will be discreet with the information.<sup>86</sup>

Sexual privacy is crucial to the “success and integrity” of intimate relationships.<sup>87</sup> It enables partners to know one another and to be known to one another. Revealing one’s history with sexual assault is difficult, but it is unthinkable if one’s partner cannot be trusted to handle that information with care.

With sexual privacy, intimate partners feel free to engage in sexual expression, which opens them up to new experiences.<sup>88</sup> They engage in physical intimacy without concern that others are watching and judging them. They are spontaneous in their interactions.<sup>89</sup> They “lose [their]

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77. *Id.* at 139, 150.

78. *See id.* at 52–55, 136–39, 150, 169–72 (describing the stages of the social penetration process).

79. *Id.* at 136–39.

80. *Id.* at 199.

81. BLOUSTEIN, *supra* note 11, at 181.

82. ALTMAN & TAYLOR, *supra* note 10, at 77.

83. BLOUSTEIN, *supra* note 11, at 125–26.

84. *Id.* at 125.

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

86. Richards & Hartzog, *supra* note 72, at 453.

87. *Id.*; Irwin Altman, *Reciprocity of Interpersonal Exchange*, 3 *J. THEORY SOC. BEHAV.* 249 (1973); Dalmas A. Taylor, *The Development of Interpersonal Relationships: Social Penetration Processes*, 75 *J. SOC. PSYCHOL.* 79 (1968).

88. *See* GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY* 342–43 (2017) (discussing importance of sexual expression).

89. BOLING, *supra* note 18, at 78.

inhibitions and expose [them]selves to one another.”<sup>90</sup> Sexual privacy lets partners “be what they truly are—at least as bodies—intensely and together.”<sup>91</sup> In these and other ways, privacy serves as a precondition for achieving intimacy.<sup>92</sup>

A few caveats are in order. I am not suggesting that sexual privacy’s absence makes intimacy impossible. Consider prison life.<sup>93</sup> Incarcerated individuals do forge intimate relationships though they are under constant scrutiny. Yet constant surveillance undeniably impedes intimacy. Indeed, the denial of sexual privacy constitutes an aspect of the state’s punishment.<sup>94</sup>

Nor am I saying that sexual relationships inevitably involve intimate relationships. Casual hook-ups do not entail the sort of mutual knowledge, caring, interdependence, and trust characteristic of intimate relationships. Nonetheless, they warrant sexual privacy because of their centrality to autonomy and self-development. Intimacy is not part of the calculus.<sup>95</sup>

Also, I am not suggesting that seclusion and confidentiality inevitably enhance intimacy. Not at all. The powerful have long abused the powerless from behind closed doors. Physical spaces have hidden privacy-invading sexual harassment and sexual assault. Television show host Matt Lauer had a button installed at his desk so he could lock his office door when female staffers entered.<sup>96</sup> According to reports, the button “afforded him the assurance of privacy. It allowed him to welcome female employees and initiate inappropriate contact while knowing nobody could walk in on him, according to two women who were sexually harassed by Lauer.”<sup>97</sup>

90. Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 5 (1998).

91. Reiman, *supra* note 55, at 34–35.

92. See FRIED, *supra* note 12, at 140; see also ARI EZRA WALDMAN, PRIVACY AS TRUST 67 (2018) (arguing that privacy is constructed to “foster, encourage, and protect” sharing and disclosure); 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 (1975).

93. Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 287 (1974).

94. FRIED, *supra* note 12, at 138–39.

95. There is a significant literature on the social structure and norms of hook-up culture. See Sandra Webb, *Communication in the Modern Hook-Up Culture: A Literature Review*, 4 LEXIA (2015–16), <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1049&context=lexia> [<https://perma.cc/HVH9-X7ZY>]; Rusi Jaspal, *Gay Men’s Construction and Management of Identity on Grindr*, 21 SEXUALITY & CULTURE 187 (2017); Courtney Blackwell, Jeremy Birnholtz & Charles Abbott, *Seeing and Being See: Co-Situation and Impression Formation Using Grindr*, 17 NEW MEDIA & SOC’Y 1117 (2015). Thanks to symposium co-organizer Ari Waldman for talking to me about that literature.

96. Cale Guthrie Weissman, *Matt Lauer Had a Secret Button Under his Desk to Auto-Lock his Office Door: Report*, FAST COMPANY (Nov. 29, 2017), <https://www.fastcompany.com/40502001/matt-lauer-had-a-secret-button-under-his-desk-to-auto-lock-his-office-door-report> [<https://perma.cc/7ZUM-3XD7>].

97. Eric Wemple, *Just How Did Matt Lauer’s Desk Button Work?*, WASH. POST (May 11, 2018), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/05/11/just-how-did-matt-lauers-famous-desk-button-work/?noredirect=on&utm\\_term=.9fd211ffdec4](https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/05/11/just-how-did-matt-lauers-famous-desk-button-work/?noredirect=on&utm_term=.9fd211ffdec4).

Movie mogul Harvey Weinstein had employees guard his hotel rooms and offices from entry except actresses whose sexual privacy he invaded and whose bodies he assaulted.<sup>98</sup> Female employees were told to go to the hotel rooms of television personality Charlie Rose—there, he exposed his genitals and demanded sex.<sup>99</sup> Comedian Louis C.K. masturbated in front of shocked and scared female comedians behind locked doors.<sup>100</sup> Sexual harassers have obtained confidentiality agreements that shield their abuse from public reckoning.<sup>101</sup>

The invocation of “privacy” to undermine sexual privacy has a long legacy. Law protected batterers’ interest in privacy without considering battered wives’ privacy interests.<sup>102</sup> Society’s treatment of the home as a secluded domain where men could abuse their wives without state intervention is part of this phenomenon.<sup>103</sup> Late eighteenth- and early nineteenth- century courts invoked the concept of the “private sphere” to justify concealing spousal abuse from any accountability.<sup>104</sup> Law recognized the privacy interests of male batterers while ignoring the privacy interests of battered women.<sup>105</sup> In the home, battered women had scant opportunities for sexual privacy.<sup>106</sup> They had few moments of solitude and little sexual autonomy.<sup>107</sup>

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98. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

99. Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping, and Lewd Calls*, WASH. POST (Nov. 20, 2017), [https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d\\_story.html?utm\\_term=.c380c2eaf97a](https://www.washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them--with-nudity-groping-and-lewd-calls/2017/11/20/9b168de8-caec-11e7-8321-481fd63f174d_story.html?utm_term=.c380c2eaf97a).

100. Camila Domonoske, *Multiple Women Say Louis C.K. Masturbated in Front of Them*, ‘New York Times’ Reports, NPR (Nov. 9, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/09/563116374> [<https://perma.cc/4BGU-P3MD>].

101. Emily Steel, *How Bill O’Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html>; Bradford J. Kelley & Chase Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUS. L. TODAY (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/> [<https://perma.cc/7GCB-AHSV>].

102. ALLEN, *supra* note 24, at 63.

103. *Id.*

104. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2166 (1996) (quoting *Drake v. Drake*, 177 N.W. 624, 625 (Minn. 1920)). In the late twentieth century, battered women’s advocates got the attention of lawmakers, courts, and law enforcement, discrediting the reasons behind society’s protection of domestic violence. See Citron, *supra* note 46. Law and norms have shifted, though not as completely as it was hoped. CITRON, *supra* note 45, 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.

105. ALLEN, *supra* note 24, at 63.

106. *Id.*

107. See Siegel, *supra* note 104, at 2130–40; cf. CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 375 (1980).

Sexual privacy should not be abandoned for fear of the possibility that “privacy” can be invoked in service of its invasion. It should not be rejected because privacy has previously been coopted to hide abuse and to coerce silence.<sup>108</sup> As Anita Allen has powerfully explained, while “the traditional predicament was . . . too much of the wrong kind of privacy,” subordinated individuals deserved “privacy in the sense of adequate opportunities for privacy and private choice.”<sup>109</sup>

Sexual privacy deserves recognition and protection when it protects autonomy, fosters intimacy, and secures equality *for all involved*.<sup>110</sup> Properly understood, sexual privacy frees people to set boundaries around their intimate lives.<sup>111</sup> It allows them to decide who has access to their naked bodies, intimate information, and sexual desires. With sexual privacy, people can determine if their sexually explicit images are shared with others. They can reveal their transgender identity and bisexuality at their own time, in their own way, and under their own conditions. Sexual privacy protects individuals from being watched, exhibited, and shamed for their naked bodies, sexual preferences, gender identity, and intimate selves.<sup>112</sup>

## II. SOWING DISTRUST

This Part highlights how sexual-privacy invasions undermine trust necessary for intimacy. Section A provides illustrations of perpetrators who invade the sexual privacy of former intimates. Section B gives examples of perpetrators who target non-intimates. Section C discusses the individual and societal harm inflicted.

### A. *Betraying the Trust of Intimate Partners*

Sexual-privacy invaders betray intimate partners’ trust in various ways. Perpetrators, for instance, secretly photograph and videotape intimate

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108. Feminist scholars have viewed the invocation of “privacy” in the service of subordination as warranting its end. CATHARINE MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 93, 101–02 (1987). MacKinnon argued that privacy entrenched male hierarchy and power—privacy was a right “of men ‘to be let alone’ to oppress women.” *Id.* at 102.

109. ALLEN, *supra* note 24, at 180.

110. See Citron, *supra* note 5, at 1882.

111. McClain, *supra* note 33, at 241 (“The goal of restricting access is also about power, the power to control one’s body . . .”).

112. Martha Nussbaum explains that the “universal human discomfort with bodily reality” often works to undermine and stigmatize women and sexual minorities. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* at xv (2010). Men often view the bodies of gay men with disgust and anxiety. *Id.* at 18.



partners undressing or having sex.<sup>113</sup> They give gifts with hidden cameras so they can spy on their partners in the bedroom and bathroom.<sup>114</sup>

Consider the case of New York financial adviser John Kelly who used a “doggy cam” in his bedroom to secretly tape his sexual liaisons with romantic partners.<sup>115</sup> He brought his laptop to women’s homes and hid a camera in his bedroom in order to tape their sexual encounters.<sup>116</sup> The videos captured him setting up the camera and angling it to focus on the bed.<sup>117</sup> Kelly showed some of the secret sex videos to a friend. Although charged with several felonies, Kelly plead guilty to a single misdemeanor. He was sentenced to ten days of community service and no prison time.<sup>118</sup>

People invade sexual privacy by distributing their intimate partners’ sexually graphic images without consent, a practice called nonconsensual pornography.<sup>119</sup> Alexandra Waterbury experienced a double betrayal of trust in 2018: her boyfriend secretly made recordings of her naked body and showed them to colleagues.<sup>120</sup> When Waterbury was a student at the American Ballet School, she dated Chase Finlay, a principal dancer with the New York City Ballet (NYCB).<sup>121</sup> Over a year’s time, Finlay took nude and sexually explicit photographs and videos of her without permission.<sup>122</sup> He texted the photos and videos to two colleagues and a ballet donor.<sup>123</sup> In a

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113. Todd Magel, *Man’s Arrest Prompts Hidden Camera Concerns in Iowa*, KCCI (Apr. 6, 2018), <https://www.kcci.com/article/mans-arrest-prompts-hidden-camera-concerns-in-central-iowa/19706016> [<https://perma.cc/4QMV-J657>].

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

115. Rebecca Rosenberg, *Banker Filming Trysts: Sex Cams Were to Watch Dog*, N.Y. POST (Jan. 16, 2014), <https://nypost.com/2014/01/16/money-manager-says-sex-cams-were-for-his-dog/> [<https://perma.cc/PHY3-QFZZ>].

116. Rebecca Rosenberg, *Banker Getting Sweetheart Deal*, N.Y. Post (Aug. 29, 2016), <https://nypost.com/2016/08/29/banker-accused-of-filming-romps-is-getting-a-sweetheart-deal/>.

117. *Id.*

118. *Id.*

119. Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 710 (2017); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014). Nonconsensual pornography targeting an intimate partner is often called “revenge porn.” *Id.* But perpetrators may not be motivated by revenge; rather, they may be driven by cruelty, a desire to impress others, or arousal from knowing others are viewing the images. ASIA EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NON-CONSENSUAL PORN VICTIMIZATION AND PERPETRATION 19–20 (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/4T5J-YZ8P>]. See generally Mary Anne Franks, *‘Revenge Porn’ Reform: A View from the Front Lines*, 69 FLA. L. REV. 1252, 1308–23 (2017).

120. Complaint, *Alexandra Waterbury v. New York City Ballet & Chase Finlay* (N.Y. Sup. Ct. 2018) (No. 158220/2018), <https://perma.cc/GN8D-LCDJ>.

121. *Id.* at 14.

122. Snezana Farberov, *New York City Ballet’s Male Stars Swapped Naked Photos of Ballerinas and Joked They Should Be ‘Abused Like Farm Animals,’ Lawsuit Claims*, DAILY MAIL (Sept. 5, 2018), <https://www.dailymail.co.uk/news/article-6136217> [<https://perma.cc/D82X-R5PD>].

123. Complaint, *supra* note 120, at 15; see Joan Acocella, *What Went Wrong At New York City Ballet*, NEW YORKER (Feb. 18, 2019), <https://www.newyorker.com/magazine/2019/02/18/what-went-wrong-at-new-york-city-ballet>; Michael Cooper & Robin Pogrebin, *City Ballet and Chase Finlay Sued*

similar case, Carlo Dellverson secretly videotaped his sexual encounters with his girlfriend and posted the videos to a porn site.<sup>124</sup> In 2015, a judge sentenced him to community service and court-ordered therapy.<sup>125</sup>

Some individuals obtain their intimate partners' nude images with consent and betray their partners' trust by distributing the images without consent.<sup>126</sup> In 2009, Holly Jacobs shared sexually-explicit images and videos with her boyfriend.<sup>127</sup> The images were meant for their eyes only.<sup>128</sup> After their relationship ended, her ex betrayed her trust and posted the photos and videos on hundreds of revenge porn sites, porn sites, and adult finder sites.<sup>129</sup> Her nude photos were sent to her boss.<sup>130</sup>

Law enforcement initially refused to help Jacobs, incorrectly claiming that harassment was a "civil" matter in her state.<sup>131</sup> At the urging of her Senator's office, the state attorney's office took up the case, charging her ex with misdemeanor harassment.<sup>132</sup> Nonetheless, the charges were dropped after her ex claimed that he had been hacked.<sup>133</sup> Prosecutors said that they could not justify obtaining a warrant to investigate a misdemeanor.<sup>134</sup> The abuse was not serious enough to expend investigative resources.<sup>135</sup>

College student Kathryn Novak had a long-distance relationship with Brandon Simpson who attended a university in another state.<sup>136</sup> Novak and Simpson visited one another a few times a month. During the relationship, Simpson asked Novak to send him intimate images and videos. Novak did so on the explicit understanding that the photos and videos would be kept private and confidential.<sup>137</sup> She never told Simpson that he could share the

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by *Woman Who Says Nude Photos of Her Were Shared*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/arts/dance/nyc-ballet-alexandra-waterbury.html>.

124. Shayna Jacobs, *NBC News Producer Pleads Guilty to Secretly Filming Sex With Girlfriend, Posting It Online*, N.Y. DAILY NEWS (May 13, 2015), <https://www.nydailynews.com/new-york/nyc-crime/nbc-news-producer-pleads-guilty-secretly-filming-sex-article-1.2220318>.

125. *Id.*

126. Citron & Franks, *supra* note, 119 at 346.

127. *Id.* at 45.

128. *Id.*

129. *Id.*

130. *Id.* at 47.

131. CITRON, *supra* note 45, at 139.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* At the time, Jacobs's home state did not have a law criminalizing the practice of nonconsensual pornography, something she helped change after her criminal case was dropped. See Citron, *supra* note 5, at 1919–20.

136. Complaint at 4, *Kathryn Novak v. Brandon Simpson et al.*, (M.D. Fla. 2018) (No. 6:18-cv-00922), <https://www.dropbox.com/s/exf6ldu57ig87d4/NComplaint.pdf?dl=0> [<https://perma.cc/BFB8-YKF4>].

137. *Id.* at 5.

images with anyone else.<sup>138</sup> Simpson violated Novak's trust along several dimensions. He posted her nude photos on his fraternity's private Facebook page, secretly videotaped their sexual encounters, and showed the sex videos to members of his fraternity.<sup>139</sup>

These practices undermine sexual privacy by denying individuals' agency over their intimate lives. They hijack victims' ability to decide who has access to their bodies, bedrooms, or nude images. They betray victims' trust by treating them as sex objects warranting exhibition and mockery rather than as partners deserving respect and confidentiality. They make it hard for victims to entrust their bodies and intimate information to others in the future.

### *B. Corroding the Project of Intimacy with Sexual-Privacy Invasions*

What about sexual-privacy invasions that do not involve a betrayal of trust? Privacy invaders target strangers, tenants, co-workers, and other non-intimates. These privacy invasions damage the project of intimacy by undermining victims' sense of safety and ability to trust others in the future.<sup>140</sup> This Section provides several illustrations.

Consider the experience of renowned sports reporter Erin Andrews. A man who Andrews did not know booked a hotel room next to the room she occupied.<sup>141</sup> He altered the peephole of her hotel door so he could film her as she undressed. The man later posted online the videos of her undressing.<sup>142</sup> After the release of the videos, much of the nation began looking for some variation on "Erin Andrews peephole video."<sup>143</sup> The man was sentenced to two-and-a-half years in prison.<sup>144</sup>

Sextortion—extortion or blackmail involving a threat to release sexually explicit images of the victim if the victim does not engage in further sexual activity—is another sexual-privacy invasion involving perpetrators who

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138. 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>.

139. *Id.*

140. I develop more fully a discussion of the harm suffered, including the impact on trust, in the following section.

141. Chad Finn, *No Matter the Verdict, Erin 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>.

142. *Id.*

143. Steve Johnson, *Web Spins Hypocrisy on Erin Andrews Video*, CHI. TRIB. (July 23, 2009), <https://www.chicagotribune.com/news/ct-xpm-2009-07-23-0907220636-story.html>.

144. *Erin Andrews Stalker Sentenced to More than Two Years in Prison*, FOX NEWS (Mar. 15, 2010), <https://www.foxnews.com/entertainment/erin-andrews-stalker-sentenced-to-more-than-2-years-in-prison>.

tend to target non-intimates.<sup>145</sup> Luis Mijangos tricked hundreds of women and teenage girls into downloading malware onto their computers.<sup>146</sup> He turned on victims' webcams to record them undressing. Once Mijangos obtained their nude images, he threatened to post their nude photos unless they complied with his demands. He coerced 230 women and girls into performing sex acts for him on camera and sending him nude images.<sup>147</sup>

Michael Ford hacked into the computers of hundreds of women to obtain sexually explicit images.<sup>148</sup> Ford sent the women emails in which he threatened to disclose their nude images unless they sent him videos of "“sexy girls’ undressing in changing rooms at pools, gyms and clothing stores.”<sup>149</sup> He escalated his threats when victims refused his demands. Ford told one victim that he would post her contact information and photographs on an “escort/hooker website.” In a few cases, he made good on the threats and sent the victims’ nude photos to their family members and friends.<sup>150</sup> Ford was sentenced to fifty-seven months in prison.<sup>151</sup>

These practices eliminate victims’ autonomy over intimate activities and spaces. Perpetrators take control over victims’ bodies, instructing them to commit sexually degrading acts and to exhibit their genitalia on videocam. They interfere with their ability to retreat in safety to their bedrooms. These practices say to individuals that their intimate spaces are not safe from prying eyes. Although perpetrators have no prior relationship with victims, their torment makes it difficult for victims to trust intimates in the future. They suggest that any intimate activity risks invasions of sexual privacy.

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145. BENJAMIN WITTES ET AL., *SEXTORTION: CYBERSECURITY, TEENAGERS AND REMOTE SEXUAL ASSAULT 2* (May 11, 2016), <https://www.brookings.edu/research/sextortion-cybersecurity-teen-agers-and-remote-sexual-assault/>. The scheme begins when perpetrators obtain victims’ nude images either by tricking them into sharing them or by theft, such as hacking into their computers. *Id.* Perpetrators threaten to distribute the nude photos unless victims send more nude photos or perform degrading sex acts in front of webcams. *Id.*

146. *Id.*

147. Sara Ashley O’Brien, *Sextortion is Scarily Common, New Study Finds*, CNN TECH (May 11, 2016), <https://money.cnn.com/2016/05/11/technology/brookings-institution-sextortion-study/> [<https://perma.cc/6QVP-6SS2>]; Adam Duvernay, *NY Man Gets 16 Years for ‘Sextortion’ of Sexual Images from Child in Delaware*, NEWS J. (May 30, 2018, 9:36 AM), <https://www.lavozarizona.com/story/news/crime/2018/05/30/ny-man-gets-16-years-coercing-sexual-images-de-child/655772002/> [<https://perma.cc/693W-VXN6>].

148. Press Release, U.S. Dep’t of Justice, *Former U.S. State Department Employee Sentenced to 57 Months in Extensive Computer Hacking, Cyberstalking, and “Sextortion” Scheme* (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>].

149. *Id.*

150. *Id.*

151. *Id.*

### C. Harm

For victims, the psychological damage can be profound. Victims suffer anxiety and fear.<sup>152</sup> They describe feeling helpless.<sup>153</sup> Waterbury explained that she could not eat or sleep when she first found out about Finlay's betrayal of her trust.<sup>154</sup> Her initial "shock and denial" turned into "anger and embarrassment."<sup>155</sup> She was "depressed" and "overwhelmed."<sup>156</sup> She put her life on hold and was hospitalized.<sup>157</sup> Waterbury explained that her "body was violated, taken advantage of . . . I had no control over any of this. And for these men to think that they could take that away and ruin that and degrade me, everything that I am, was disgusting."<sup>158</sup>

Victims have difficulty putting the abuse behind them. Years after a stalker secretly recorded her undressing and posted the videos online, Andrews still felt terrified.<sup>159</sup> A victim of sextortion has explained that the perpetrator "haunts me every time I use the computer."<sup>160</sup>

Feelings of distrust are hard to dislodge after one's sexual privacy has been invaded.<sup>161</sup> Vulnerability is "painful, and trust difficult to sustain in an inhospitable and uncertain universe."<sup>162</sup> We saw this in Andrews's case. The stalker's privacy invasions made it difficult for Andrews to trust then-boyfriend Jarret Stoll. Andrews explained: "[Stoll] didn't know me before this happened [so it was hard to] try to explain to someone who has questions about why I have trust issues, why I am insecure, why I am humiliated, embarrassed, obsessive about checking the Internet, he doesn't understand."<sup>163</sup>

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152. *Id.*

153. WITTES ET AL., *supra* note 145, at 23–25.

154. Jennifer Stahl, *Should Aspiring Ballet Dancers "Run in the Other Direction"?*, DANCE MAG. (Sept. 11, 2018), <https://www.dancemagazine.com/alexandra-waterbury-2602545003.html> [<https://perma.cc/56YR-TPBR>].

155. Cooper & Pogrebin, *supra* note 123.

156. Stahl, *supra* note 154.

157. Jorge Fitz-Gibbon, 'A Hunting Ground': New Details, New Defendants in NYC Ballet Sex Scandal Lawsuit, LOHUD (Sept. 19, 2018), <https://www.lohud.com/story/news/local/westchester/2018/09/19/nyc-ballet-sex-scandal-lawsuit-new-details/1349505002/> [<https://perma.cc/S5WP-Z3R2>].

158. ABC News, *Ballerina Speaks Out on Lawsuit over Alleged Sharing of Nude Photos*, YOUTUBE (Sept. 7, 2018), <https://www.youtube.com/watch?v=cXWxT-sBfNQ>.

159. Finn, *supra* note 141.

160. WITTES ET AL., *supra* note 145, at 24.

161. ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW CAN DO ABOUT IT 119 (2011); Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 463 n.18 (2001).

162. Martha C. Nussbaum, *Emotions and Women's Capabilities*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 360, 394 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

163. *Id.*

People who experience betrayal in intimate relationships tend to adopt a “risk aversive strategy” in future ones.<sup>164</sup> They interpret the actions of others negatively, impacting their ability to forge intimate relationships.<sup>165</sup> After a woman discovered that her ex’s gifts contained recording devices, she had “recurrent and intrusive thoughts of being exposed and violated, interference with her personal relationships, [and] feelings of vulnerability and mistrust.”<sup>166</sup> She explained that “[s]he lives in a perpetual state of fear that someone is watching or spying on her and she does not feel safe anywhere.”<sup>167</sup>

In my interviews with people whose partners invaded their sexual privacy, this point was made time and again.<sup>168</sup> Jacobs was afraid to date for months after discovering that her ex posted her nude images all over the internet.<sup>169</sup> Smith talked to me about her feelings of distrust after her ex-husband secretly taped her being intimate with a new partner and shared the video with her parents and members of her church.<sup>170</sup> She has not gotten serious with anyone since that time and cannot imagine letting down her guard with anyone else.<sup>171</sup> She swears that she will never get married again.<sup>172</sup>

The societal costs are undeniable. Sexual-privacy invasions undermine the development of relationships that are central to human flourishing. When victims withdraw from daily activities in the aftermath of sexual-privacy invasions, the public is denied their artistic, scholarly, and civic contributions. Waterbury, for instance, stopped dancing for an extended period of time after she discovered Finlay’s invasion of her sexual privacy. As my work has explored elsewhere, because women and minorities are more often targeted, sexual-privacy invasions entrench subordination and marginalization.

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164. Holmes & Rempel, *supra* note 65, at 212.

165. *Id.*

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

167. *Id.* at 1242.

168. For this project, which is connected to my book project on sexual privacy, I have conducted semi-structured interviews of eight individuals. Those individuals have allowed me to write about their experiences but have requested that I protect their anonymity. For my book HATE CRIMES IN CYBERSPACE, I interviewed sixty individuals—approximately half of those individuals suspected that former intimate partners were responsible for posting their nude photos online or secretly taping them in the nude or having sex. I write this piece at the beginning of my book project and hence I have not finished the qualitative part of my work.

169. CITRON, *supra* note 45, at 45. I serve as the Vice President and a member of the Board of Directors of the Cyber Civil Rights Initiative (CCRI), which Jacobs founded with Professor Mary Anne Franks to combat non-consensual pornography. *Id.* at 49. Mary Anne Franks is CCRI’s President and the organization’s long-standing Legislative and Tech Policy Director.

170. Telephone Interview with Jane Smith (Oct. 3, 2018).

171. *Id.*

172. *Id.*

### III. ASSESSING THE TURN TO TRUST

This Part considers the turn to trust in the law and marketplace. It explores trust-based legal principles that can be leveraged to protect sexual privacy. At the same time, it recognizes the shortcomings of a trust-based legal approach. This Part then considers private-sector developments. It assesses a recent market trend—the consent app—and its implications for sexual privacy. Although supporters emphasize the app’s potential to secure sexual agency and trust, the reverse is more likely.

#### A. *Enforcing Legal Commitments of Trust*

From its earliest days, legal scholarship has focused on the importance of privacy for intimate relationships. In their landmark article *The Right to Privacy*, published in 1890, Samuel Warren and Louis Brandeis criticized journalists for “spying” on the family home.<sup>173</sup> They objected to “daily papers” that revealed “details of sexual relations” and family members’ correspondence.<sup>174</sup> They warned that when intimacies “whispered in the closet” are “proclaimed from the house-tops,” individuals and society suffer.<sup>175</sup> In their view, the nonconsensual revelation of the “fact” of a “domestic occurrence” risked “spiritual” harm even greater than “material” harm.<sup>176</sup>

Warren and Brandeis argued in favor of tort law’s recognition of a “right ‘to be let alone’” in the “sacred precincts of private and domestic life.”<sup>177</sup> In their view, individuals should control what others know about their “domestic circle.”<sup>178</sup> Crucial was the ability to determine “to what extent [one’s] thoughts, sentiments, and emotions shall be communicated to others.”<sup>179</sup> Although the legal literature does not often emphasize this point, Warren and Brandeis constructed the right to privacy out of concern for the development of intimate relationships.

Over time, and under the influence of torts scholar William Prosser, courts heeded the call for privacy torts.<sup>180</sup> Privacy tort law now provides redress for intrusions on seclusion, public disclosures of private facts,

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173. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 202 n.1 (1890).

174. *Id.* at 196.

175. *Id.* at 195.

176. *Id.* at 197, 201.

177. *Id.* at 195.

178. *Id.* at 196.

179. *Id.* at 198.

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

depictions in false light, and misappropriation of one's identity (often for commercial purposes).<sup>181</sup> It has not evolved beyond these four claims.<sup>182</sup> Concepts of confidentiality have not been integrated into the privacy torts, a missed opportunity that should be seized.<sup>183</sup>

Contemporary privacy scholarship has highlighted privacy law's potential to protect trust in information relationships.<sup>184</sup> In a series of articles, Neil Richards and Woodrow Hartzog argue that privacy law's next stage of development should focus on trust.<sup>185</sup> Taking trust seriously would result in people sharing more information, resulting in more "sustainable, profitable relationships" with public and private entities.<sup>186</sup> Under Ari Waldman's theory of "privacy as trust," privacy protects, fosters, and repairs trust essential for information sharing among individuals and between individuals and companies.<sup>187</sup>

Drawing upon legal developments in the United Kingdom, Neil Richards and Daniel Solove call for privacy tort law to recognize breach of confidence claims.<sup>188</sup> They point to the common law's protection of the exchange of information in professional relationships.<sup>189</sup> As Richards and Solove propose, liability would hinge upon the nature of the relationship between the parties and the norms governing the handling of such personal information.<sup>190</sup>

A breach of confidence tort would be useful in protecting sexual privacy in the array of contexts where the privacy torts provide no protection.<sup>191</sup> Cramped notions of privacy have left some invasions of sexual privacy without legal protection. Traditional privacy law fails to address certain sexual-privacy invasions due to its reliance on "underinclusive bright line rules to determine the difference between public and private."<sup>192</sup>

Consider the tort of public disclosure of private fact. To make out a claim, the plaintiff's personal information typically must be disclosed to a

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181. *Id.*

182. *Id.*

183. Richards & Solove, *supra* note 64, at 174.

184. See, e.g., Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 919–20 (2005) (explaining that people tend to share information with trusted networks).

185. See, e.g., Richards & Hartzog, *supra* note 86; Neil M. Richards & Woodrow Hartzog, *Privacy's Trust Gap: A Review*, 126 YALE L.J. 1180 (2017).

186. Richards & Hartzog, *supra* note 86, at 435.

187. See WALDMAN, *supra* note 92, at 71.

188. Richards & Solove, *supra* note 64, at 174.

189. *Id.* at 134–40.

190. *Id.* at 174.

191. See Citron, *supra* note 180 (arguing that privacy tort law should turn to mainstream tort doctrine like the breach of confidence approach proposed by Neil Richards and Daniel Solove).

192. WALDMAN, *supra* note 92, at 72.



wide audience.<sup>193</sup> In *Bilbrey v. Myers*,<sup>194</sup> a pastor announced at a church service that the plaintiff was gay. Plaintiff's family members, including his fiancée's father, were in the audience.<sup>195</sup> The court struck down the public disclosure of private fact claim because the defendant did not convey the information to the public at large.<sup>196</sup> This presumes that when intimate information is disclosed to a small group of people, there is little damage suffered. But it is often precisely those small groups of people—employers, family, and colleagues—to whom disclosure is most damaging.<sup>197</sup>

Let's return to Waterbury's case. She was devastated to learn that her ex-boyfriend had sent her sexually explicit photos and videos to NYCB principal dancers who also were her former ballet teachers. Because her ex never revealed the photos and videos to the public at large, the disclosure tort, as currently interpreted in the majority of jurisdictions, would have no application.<sup>198</sup> Kelly's victims faced the same problem—he allegedly only showed his former girlfriends' sex videos to one other person. The public disclosure tort would not apply to Jacobs's ex-boyfriend's emailing her nude photos to her employer or to Simpson's showing of the sex tape to his fraternity brothers. In these cases, if a breach of confidence tort were recognized, it would provide the possibility of redress because the perpetrators shared the nude images in violation of intimate partners' trust.<sup>199</sup>

Building on trust concepts to develop privacy tort law would be valuable. Breach of confidence claims would redress harm, to be sure. But it also would have an important expressive function. Law is our teacher and

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193. *Swinton Creek Nursery 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 of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

194. 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

195. *Id.* at 889.

196. *Id.* at 892.

197. Waldman, *supra* note 119, at 721.

198. In my article *Sexual Privacy*, I argue that the disclosure of private information to small groups can be profoundly damaging to victims. In some cases, as in Waterbury's case, such disclosures are even more damaging than public ones. Showing one's nude photos and videos to former teachers and colleagues is excruciating. The very people who you want to see you as a whole person—as a ballerina in Waterbury's case—now see you as a vagina and breasts. I argue that the disclosure tort should evolve and apply to disclosures to small groups that matter to victims. Citron, *supra* note 5, at 1942–43.

199. Under existing privacy tort law, Novak, Waterbury, and Kelly's victims could have sued for intrusion of seclusion because their former intimate partners secretly recorded them during sex in the bedroom where one reasonably expects privacy. Novak and Waterbury have brought suit. *See* Complaint, *supra* note 136; Fitz-Gibbon, *supra* note 157. The victims in Kelly's case did not, in part because they hoped to avoid invasive discovery, inevitable in a tort suit, and because they believed that prosecutors would vigorously pursue his case. They were deeply disappointed in the decisions of the Manhattan District Attorney's Office. Kelly barely got a slap on the wrist. Interview with Jane Doe (Aug. 27, 2016) (notes on file with author).

guide.<sup>200</sup> It shapes attitudes, beliefs, and behavior through its messages and lessons.<sup>201</sup> It tells us what behavior is harmful and wrongful.<sup>202</sup> Legal penalties demonstrate societal intensity around a social value.<sup>203</sup>

Besides signaling how people should act by highlighting the social costs of conduct, law provides a “focal point” around which individuals can organize their behavior.<sup>204</sup> When public sentiment about specific behavior is unclear, law provides expressive clarity, channeling shifts in beliefs, attitudes, and behaviors.<sup>205</sup>

Breach of confidence claims would send the message that confidentiality in intimate relationships matter. They would say that breaches of trust damage individuals and undermine relationships essential for social cohesion. Potential perpetrators would have a choice: to respect the boundaries that intimates set around their bodies or to provide redress for wrongful breaches of confidence.

Breach of trust claims would reinforce obligations of confidentiality in intimate relationships. Individuals would come to see themselves as stewards of their partners’ intimate information. They would recognize that partners’ confidences related to sex, sexuality, and gender warrant discretion and care.<sup>206</sup> Breach of trust claims would say society values the trust that intimate partners place in one another. They would make clear that partners are not being foolish if they engage in reciprocal disclosure of their bodies, sexual fantasies, and intimate experiences.

Yet breach of confidence claims would not address all invasions of sexual privacy. They would not apply to sexual privacy invaders who do not have pre-existing relationships with victims. It would not apply to Andrews’s stalker. Nor to Mijangos or Ford, who invaded the sexual privacy of hundreds of strangers.

A question worth asking is whether importing trust concepts into privacy law would cause unanticipated problems? Nearly twenty years ago, Larry

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200. In my book *HATE CRIMES IN CYBERSPACE* and a law review article entitled *Law’s Expressive Value in Combating Cyber Gender Harassment*, I looked to law’s expressive role in calling for the recognition of online stalking as a civil rights violation. CITRON, *supra* note 45, at 126–27; Citron, *supra* note 46, at 407–14; *see also* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

201. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

202. *See* CITRON, *supra* note 45, at 126–29.

203. *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).

204. RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 22 (2015); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

205. McADAMS, *supra* note 204, at 64–65.

206. On law’s potential to encourage victims of sexual privacy to engage in sexual expression, *see* Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317 (2019).

Ribstein raised concerns about laws enforcing trust in contexts where parties enter into those relationships voluntarily without any legal protection of trust.<sup>207</sup> In such contexts, policymakers and courts should consider law's potential unintended negative consequences.<sup>208</sup> After all, as Ribstein explained, there was no need for law to encourage the parties to enter into the relationship in the first place.

Would breach of trust claims do more harm than good in the context of intimate relationships? To be sure, Americans forge intimate partnerships without the benefit of breach of confidence protections. But, as we have seen, contemporary sexual-privacy invasions jeopardize this state of affairs. They corrode the very project of intimacy by shaking victims' confidence that future partners can be trusted. They also occur at a time of significant peril. Not only are sexual-privacy invasions easier to accomplish in the digital age, but they are exponentially more damaging than sexual-privacy invasions in the analog age.<sup>209</sup>

Breach of confidentiality claims would have an upside with little evident downside. It would redress breaches of confidence in contexts where parties have developed mutual knowledge, interdependence, love, respect, and trust, and where that trust has been betrayed. It would express society's view that trust is valuable and worth protecting in intimate relationships.

Law should redress and deter invasions of sexual privacy involving betrayals of trust, as in the case of Jacobs's ex-boyfriend. It should intervene in cases where individuals like Kelly, Finlay, and Simpson violate a shared understanding that intimate information would not be shared outside the relationship.

Law can prevent concerns about over-deterrence by cabining the definition of what is considered a protected intimate relationship. The shared characteristics of intimate relationships explored above provide a helpful start. With clear and narrow definitions, people would be far less likely to be chilled from sharing information obtained in ordinary interactions.

Although this approach would be fruitful, we must recognize the limitations of tort redress. Victims need resources to sue defendants.<sup>210</sup> It is hard to justify spending scarce resources if defendants are essentially judgment proof.<sup>211</sup> Litigation invites invasive discovery, and victims may

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207. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 558 (2001).

208. *Id.* at 555 (citing Tamar Frankel, *Trusting and Non-Trusting: Comparing Benefits, Cost and Risk* (Boston University School of Law Working Paper No. 99-12, 1999)).

209. Citron, *supra* note 5, at 1954.

210. Citron, *supra* note 5, at 1929–30.

211. *Id.* Thanks to Section 230 of the federal Communications Decency Act, there is no deep pocket to sue. Online platforms enjoy immunity from liability for user-generated content. *Id.*; *see*

not want to reveal their medical history or to sit for a deposition across from their tormentors.<sup>212</sup>

If civil suits are not pursued, then criminal law should be invoked to deter sexual-privacy invasions. Warren and Brandeis recognized criminal law's potential and urged lawmakers to consider criminalizing invasions of privacy.<sup>213</sup> Today, criminal law addresses certain sexual-privacy invasions, but, as the cases discussed above show, it has hardly fulfilled its potential to deter invasions of sexual privacy.<sup>214</sup> Law enforcement lacks sufficient training in the law and technology, ending investigations before they even begin.<sup>215</sup> Criminal law treats many sexual-privacy invasions as misdemeanors.<sup>216</sup> Perpetrators then receive light sentences. Recall Kelly's ten days of community service for invading the sexual privacy of two former intimate partners.

Other problems plague existing criminal law. Some sexual-privacy invasions like up-skirt photos are not covered by criminal statutes; others like sextortion are addressed in an inconsistent manner depending upon the age of the victims.<sup>217</sup> As I argue elsewhere, "[i]nvasions of sexual privacy should be addressed in a comprehensive manner."<sup>218</sup> A comprehensive approach would include legislation penalizing core invasions of sexual privacy with enhanced penalties for bias-motivated privacy invasions.<sup>219</sup>

In short, we need to improve both the civil and criminal responses to trust-undermining sexual-privacy invasions. There has been sub-optimal enforcement in both arenas, and there are crucial gaps in the law. We need a liability regime that includes breach of confidence claims and criminal laws that address all types of invasions of sexual privacy.

Yet even with those suggested improvements, law cannot do it all. Law is a notoriously blunt instrument. Market efforts provide an important supplement to legal solutions. The next Section evaluates some current developments.

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generally Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017) (exploring the broad immunity provided platforms under Section 230).

212. Citron, *supra* note 5, at 1930.

213. *Id.* at 1885.

214. *See* Citron, *supra* note 5, at 1931.

215. *Id.*; *see also* CITRON, *supra* note 45, at 83–85.

216. *See* Citron, *supra* note 5, at 1877.

217. *Id.*

218. *Id.* at 1944.

219. *Id.*

### B. *Veneer of Trust*

Market efforts claim to address concerns about sexual privacy, but their positive potential is less than clear. Consider the emergence of “consent apps.” Creators of consent apps argue that the apps will facilitate meaningful consent to sexual interactions, including the exchange of nude images.<sup>220</sup> Prominent recent examples include We-Consent, Consent Amour, uConsent, and Yes to Sex.<sup>221</sup>

The LegalFling app, for instance, promises to let users “set out which practices they are and are not comfortable with.”<sup>222</sup> Users can “stipulate sexual dos and don’ts as well as rules on the use of condoms, disclosure of sexually transmitted diseases, and the taking of photos and videos.”<sup>223</sup> The app will allow users to assign a penalty if nude footage is shared in violation of the agreement.<sup>224</sup> Users can change their mind and withdraw consent.<sup>225</sup>

For supporters, consent apps can clear up confusion surrounding sexual encounters. According to Consent Amour, the app ends “he-said-she-said” disputes and “false claims of rape.”<sup>226</sup> Consent Amour’s advertising says, “false accusations . . . are [made] against innocent guys everyday . . . . That’s where Consent Amour comes in. Just a few clicks away, the Consent Amour App is there when you need it. . . . When your girl accepts your request, you have proof of mutual consent.”<sup>227</sup>

Others underscore the perhaps more believable claim that consent apps facilitate communication and understanding.<sup>228</sup> Yes to Sex founder Wendy Mandell Geller hopes the app will “make it easier to talk about sexually transmitted diseases, protection, and boundaries.”<sup>229</sup> Cody Swann, founder

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220. Emily Simonsen, *Sexual Consent Apps Aim to Start Conversations, Prevent Assaults*, NBC (May 10, 2018, 7:46 AM), <https://www.nbcwashington.com/news/local/Sexual-Consent-Apps-Aim-to-Start-Conversations-Prevent-Assaults-482203251.html> [<https://perma.cc/DRC7-2DB4>].

221. Helena Horton, *Rise of ‘Consent Apps’ as Millennials Sign Contracts Before Sex*, TELEGRAPH (UK) (May 2, 2018), <https://www.telegraph.co.uk/news/2018/05/02/tap-yes-can-tap-millennials-sign-consent-apps/> [<https://perma.cc/28CL-67AN>].

222. Emma Batha, *After #MeToo, Phone App Allows You to Legally Consent to Sex*, REUTERS (Jan. 18, 2018), <https://www.reuters.com/article/us-netherlands-tech-sex-apps/after-metoo-phone-app-allows-you-to-legally-consent-to-sex-idUSKBN1F72F0> [<https://perma.cc/Q2P4-Y42L>].

223. *Id.*

224. *Id.*

225. *Id.*

226. *What Is Consent Amour?*, CONSENT AMOUR, <https://consentamour.com/whats-consent-amour/> [<https://perma.cc/S7UU-J4PE>]. The site says, “Today’s single guy needs proof.” It warns that “Up to about 200,000 college males (in the United States alone) will be falsely accused of sexual assault!” *Men*, CONSENT AMOUR, <https://consentamour.com/men/> [<https://perma.cc/T5WP-LABB>].

227. *Today’s Single Guy Needs Proof*, CONSENT AMOUR, <https://perma.cc/2U87-WGUC>.

228. Maya Salam, *Consent in the Digital Age: Can Apps Solve a Very Human Problem?*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/technology/consent-apps.html>.

229. Simonsen, *supra* note 220. The Yes to Sex app allows parties to create an audio recording where parties say “yes” to sex and say a randomly generated safe word that appears on the screen. *Id.*

of the uConsent app, says that his software will get people to talk, enhancing intimacy.<sup>230</sup> He describes the app as forging a “digital handshake.”<sup>231</sup>

To be sure, consent apps bring issues of sexual choice to the fore. They have potential to encourage discussions about people’s expectations about sex and sexual expression, including the taking and distribution of nude images. Yet there is no guarantee that meaningful, coercion-free discussions are likely to occur. Quite the contrary. As Mary Anne Franks warns, “[i]f you can coerce someone into having sex with you, there is nothing to stop you from being able to coerce somebody into using an application that makes it seem that you consented.”<sup>232</sup> Consent apps do very little to dispel concerns about coercion.

Even in the absence of coercion, consent does not operate like an on-off switch.<sup>233</sup> Consent is contextual and nuanced. If an app memorializes a person’s permission that her nude photo can be taken, that does not imply consent to the photo’s sharing or distribution. Nor does it necessarily capture the person’s withdrawal of consent.

Consent apps provide a veneer of sexual agency and trust without securing either. They imply that sexual interactions are consensual from start to finish, but there is no reason to think so. They suggest that a “digital handshake” is made with clear eyes, but with no contextual support for that inference.

We should be wary of technical solutions that offer quick fixes to difficult questions. The “there is an app for that” response usually overpromises and under-delivers. This is especially true when it comes to sexual privacy. To be sure, we ought to consider all potential tools to foster sexual privacy and trust in intimate relationships. But in considering various options including technical ones, we have to ask ourselves whether those options in fact enhance sexual privacy and trust rather than undermine them.

#### CONCLUSION

Intimacy has difficulty flourishing without sexual privacy. When individuals are treated as sex objects that can be videotaped and exhibited rather than as human beings whose sexual privacy should be respected, they have difficulty trusting others. Fear undermines the prospect of intimacy.

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230. Gil Smart, *Martin County Native Develops ‘Consent’ App for Safer Sex*, TC PALM (May 10, 2018), <https://www.tcpalm.com/story/opinion/columnists/gil-smart/2018/05/10/consent-app-martin-county-lesser-sex-assaults/594093002/> [<https://perma.cc/G7JV-9BVQ>].

231. *Id.*

232. Jason Tashea, *Legal Technology: Tech Companies Are Creating Apps to Combat Sexual Assault*, 104 A.B.A. J. 34, 34 (2018).

233. Citron & Franks, *supra* note 119, at 348.

When people are secretly watched and recorded in bedrooms and hotel showers, they lose their sense of safety. They become distrustful of others. Women and marginalized communities disproportionately shoulder this burden.

Protecting the intimacy-enhancing role of sexual privacy will be challenging. Technological solutionism pervades some of our thinking. In talks, people have suggested to me that someone should develop an app with security in the Blockchain that would protect sexual privacy.<sup>234</sup> Unless every intimate interaction is recorded for posterity (a terrifying prospect), a consent app, for instance, can do little to prevent someone from coercing a partner's consent to the taking and distribution of their nude images. Apps can be spoofed, giving the illusion but not the reality of agreement on the ground rules for sexual privacy.

This is not to doubt the possibility of effective market responses, but rather to urge skepticism about some recent proposals. Then too, law has an important role in the deterrence and redress of invasions of sexual privacy. But a careful and modest approach is essential. Society is not better off if law overreaches.

Regrettably, there is no silver bullet solution to intimacy-destroying invasions of sexual privacy. We need to think imaginatively about how we can protect sexual privacy for the good of individuals, groups, and society. This work aims to contribute to thinking about potential legal, technical, and social responses to sexual-privacy invasions. A far longer and more sustained conversation is required, one that my future work will address.<sup>235</sup>

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234. Popular discourse around privacy and data security invokes Blockchain as a cure-all for many contemporary problems. Yet it is surely is not. Thanks to colleagues Ryan Calo, Robert Chesney, Neil Richards, Woody Hartzog, and Ari Waldman for always bringing good cheer to the Blockchain refrain.

235. I am currently at work on a book project entitled *Sexual Privacy*.