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Why Sexual Privacy Matters for Trust

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.

Honest self-disclosure, however, is difficult after one's confidences and 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 private responses, however, require a healthy dose of skepticism as they over-promise and under-deliver for sexual privacy.

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.¹ But that is precisely what he did.² Smith's ex had a copy of the key to her house in case one of their kids had an emergency.³ She never gave her ex permission to enter her

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¹ Telephone Interview with Jane Smith (Oct. 3, 2018).

² *Id.*

³ *Id.*

bedroom, let alone to videotape her there.⁴ 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."⁵ Sexual privacy refers to the behaviors and expectations that mark the boundaries around intimate life. It concerns the ability to conceal the naked body. It concerns the seclusion afforded sexual intercourse and other intimate activities. It concerns the 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.⁶

Sexual privacy should be recognized as a foundational privacy interest.⁷ 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.⁸ It deserves special protection, much as do other crucial privacy interests like health privacy, financial privacy, communications privacy, children's privacy, and intellectual privacy.⁹

⁴ *Id.*

⁵ Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. (forthcoming 2019).

⁶ *Id.* (manuscript at 10).

⁷ *Id.* (manuscript at 10).

⁸ *Id.* (manuscript at 4).

⁹ 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

This Article drills down on 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.¹⁰ Self-revelation, however, is only possible when partners can be trusted to handle intimate information with care.¹¹ Revealing intimate information is difficult after an ex-partner has been indiscreet with our confidences.¹² 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.¹³

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 privacy to trust in intimate relationships. It distinguishes invocations of “privacy” that shield sexual-privacy invasions from accountability rather than promote sexual autonomy, protect equality, and enhance 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

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 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.

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 shows how 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.¹⁴ We cover genitals with clothing and leave hands

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).

bare. We share certain thoughts with long-term partners but not coworkers.¹⁵ We keep some personal history to ourselves.¹⁶ At certain times, we close bedroom and bathroom doors and leave open office doors.

Whether privacy is warranted is determined by the settings, contexts, and expectations in which we set those boundaries.¹⁷ 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.¹⁸

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

Consider these illustrations of sexual privacy. A teenager 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

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).

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 (manuscript at 4).

²⁰ *Id.*

²¹ *Id.*

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

As I have argued, sexual privacy is crucial to sexual agency and self-development.²⁷ 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.²⁸

Being able to reveal one’s body in the way that one chooses is central to self-development.²⁹ The human body serves as a “basic reference” for identity formation.³⁰ It influences how people understand, develop, and construct gender

²² Citron, *supra* note 5 (manuscript at 4).

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).

²⁷ Citron, *supra* note 5 (manuscript at 30–31) (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 (manuscript at 11–12).

²⁹ *Id.* at 12.

³⁰ MAURICE MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* (2013); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977). The body can be a source of empowerment, but it also can be a source of deep anxiety when it does not match one’s experience of gender. Janet Mock writes movingly about how her genitals taunted her—she felt like a girl from a

identity and sexuality.³¹ Sexual privacy gives people freedom to experiment with their bodies, sexuality, and gender before revealing them to others.³² 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.³³

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.³⁴ In nineteenth-century America, enslaved individuals had no sexual privacy.³⁵ 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.”³⁶ Their bodies were treated as “items of public (indeed pornographic) display.”³⁷ White masters sexually assaulted enslaved women and forced them to bear their children.³⁸ The

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

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).

³⁶ Abigail Pesta, *Gabrielle Union: “My Nude Photos Were Stolen, and I’m Fighting Back”*, *COSMOPOLITAN* (Nov. 5, 2014), <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).

situation was hardly better for free black women.³⁹ Black men and women, enslaved and free, were denied sexual privacy because they were deemed unworthy of it.⁴⁰

Conceptions of womanhood that led to the public exposure of black women's bodies⁴¹ led to the control of upper- and middle-class white women in the "family home" where they enjoyed little sexual privacy.⁴² Upper- and middle-class white women had few opportunities to enjoy solitude and repose in the home.⁴³ As John Stuart Mill observed, husbands colonized wives' sentiments and bodies.⁴⁴

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.⁴⁵ Sexual harassment was viewed as a perk of men's employment rather than as invidious discrimination.⁴⁶ 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 racism- and sexism-suffused workplace harassment, a legacy of the long-standing trivialization of black women's sexual abuse.⁴⁷

³⁹ MARY M. BROWNLEE & W. ELLIOTT BROWNLEE, *WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY, 1675 TO 1929*, at 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, *KILLING THE BLACK BODY*, *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, *Reconstructive Tasks*, *supra* note, 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).

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).

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).

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.⁴⁸ Until the Supreme Court decision in *Lawrence v. Texas*,⁴⁹ 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.”⁵⁰

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

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.⁵⁵

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

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>]; Noelle Martin, TEDx Talks, *Sexual Predators Edited My Photos into Porn—How I Fought Back* TEDxPerth, YOUTUBE (Mar. 6, 2018), <https://www.youtube.com/watch?v=PctUS31px40> [<https://perma.cc/44EX-BAYH>].

⁵⁴ CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note.

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).

Through intimate relationships, people come to know themselves, their partners, and humanity.⁵⁶ Intimate relationships inform “our notion of ourselves as persons among persons”⁵⁷ They provide emotional sustenance, which in turn enables civic and political engagement.⁵⁸

Philosopher Martin Buber argued that intimate relationships allow people to experience meaning and to glimpse the divine.⁵⁹ 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.”⁶⁰

That is not to dismiss the value of non-intimate relationships. People hold dear their relationships with doctors, therapists, lawyers, and financial advisers.⁶¹ In professional relationships, personal information tends to flow in one direction—from individuals to expert advisers—as does the expectation of trust.⁶² OBGYNs, for instance, know highly sensitive personal information about their patients, but patients know comparatively little about them.⁶³ 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.

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 32, 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* 151 (Walter Kaufman trans., 1970); MARTIN BUBER, *BETWEEN MAN AND MAN* 30–31, 204–05 (Roland Gregor Smith trans., 1947).

⁶⁰ MARTIN BUBER, *BETWEEN MAN AND MAN* 30 (1947).

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*.

Professionals are expected to protect the confidentiality of that personal information.⁶⁴

In intimate relationships, the information flow is not one-sided. To the contrary—a defining feature of intimate relationships is mutual knowledge.⁶⁵ Intimate relationships emerge from a “relational process in which we come to know the innermost, subjective aspects of another, and are known in a like manner.”⁶⁶ In addition to mutual knowledge, intimate partners have strong feelings of care and affection for one another.⁶⁷ 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).⁶⁸ They see themselves as an “‘us’—a new system with its own unique properties.”⁶⁹

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.”⁷⁰ Trust grows from the belief that partners will treat one another’s personal information as they hope rather than as they fear.⁷¹ Intimate partners reveal their innermost thoughts, feelings, and experiences because they believe that the other person will be discreet with their information.⁷² The

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).

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, 187, 190.

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

“increased vulnerability which arises with intimacy is tolerable only if accompanied by the belief that the partner will not exploit it.”⁷³ 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.⁷⁴ As Altman and Taylor explain, intimate relationships develop through a social process.⁷⁵ At first, individuals tend to meet in public spaces and exchange favorable “nonintimate information” about themselves.⁷⁶ Over time, intimates reveal more personal information to one another in public and private settings.⁷⁷ This is what Altman and Taylor called the “social penetration process.”⁷⁸

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

⁷³ Chelune et al., *supra* note 66, at 31 (quoting 1 R.A. HINDE, *PERSONAL RELATIONSHIPS* 14 (1981)). 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 BY NIKLAS LUHMANN* 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 Tamar Frankel & Wendy J. Gordon, *Introduction: Symposium on Trust Relationships*, 81 B.U. L. REV. 321 (2001).

⁷⁴ IRWIN ALTMAN & DALMAS TAYLOR, *SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS* 6 (1973).

⁷⁵ *Id.* at 136.

⁷⁶ *Id.*

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 EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 181 (1978).

⁸² Altman & Taylor, *supra* note 74, at 77.

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

Sexual privacy is crucial to the "success and integrity" of intimate relationships.⁸⁷ 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.⁸⁸ They engage in physical intimacy without concern that others are watching and judging them. They are spontaneous in their interactions.⁸⁹ They "lose [their] inhibitions and expose [them]selves to one another."⁹⁰ Sexual privacy lets partners "be what they truly are—at least as bodies—intensely and together."⁹¹ In these and other ways, privacy serves as a precondition for achieving intimacy.⁹²

⁸³ BLOUSTEIN, *supra* note 81, 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 Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 453 (2016).

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

⁸⁸ 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.

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

⁹¹ Reiman, *supra* note 55, at 34–35.

⁹² Fried, *supra* note, 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

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

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.⁹⁵

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.⁹⁶ According to reports, the button "afforded him the assurance of privacy. It allowed him to welcome female

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 32, 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*, LEXIA, vol. 4 (2016), <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1049&context=lexia>; Ari Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, LAW & SOC. INQUIRY (forthcoming 2019); Rusi Jaspal, *Gay Men's Construction and Management of Identity on Grindr*, 21 SEXUALITY & CULTURE 187 (2017); Courtney Blackwell, Jeremy Birnholz & Charles Abbott, *Seeing and Being Seen: Co-Situation and Impression Formation Using Grindr, a Location-Aware Gay Dating App*, 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://perma.cc/7ZUM-3XD7>.

employees and initiate inappropriate contact while knowing nobody could walk in on him, according to two women who were sexually harassed by Lauer.”⁹⁷

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.⁹⁸ Female employees were told to go to the hotel rooms of television personality Charlie Rose—there, he exposed his genitals and demanded sex.⁹⁹ Comedian Louis C.K. masturbated in front of shocked and scared female comedians behind locked doors.¹⁰⁰ Sexual harassers have obtained confidentiality agreements that shield their abuse from public reckoning.¹⁰¹

The invocation of “privacy” to undermine sexual privacy has a long legacy. Law protected batterers’ interest in privacy without considering battered wives’ privacy interests.¹⁰² Society’s treatment of the home as a secluded domain where men could abuse their wives without state intervention is part of this phenomenon.¹⁰³ Late eighteenth- and early nineteenth- century courts invoked the concept of the “private sphere” to justify concealing spousal abuse from any accountability.¹⁰⁴ Law

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.

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.

¹⁰⁰ Camila Domonoske, *Multiple Women Say Louis C.K. Masturbated in Front of Them*, *New York Times’ Reports*, NPR (Nov. 9, 2017), <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://perma.cc/7GCB-AHSV>.

¹⁰² ALLEN, *supra* note, at 63.

¹⁰³ *Id.*

¹⁰⁴ 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. Citron, *supra* note 46. Law and norms have shifted, though not as completely as it was hoped. CITRON, *supra* note 45, at 98–99.

recognized the privacy interests of male batterers while ignoring the privacy interests of battered women.¹⁰⁵ In the home, battered women had scant opportunities for sexual privacy.¹⁰⁶ They had few moments of solitude and little sexual autonomy.¹⁰⁷

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.¹⁰⁸ 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.”¹⁰⁹

Sexual privacy deserves recognition and protection when it protects autonomy, fosters intimacy, and secures equality *for all involved*.¹¹⁰ Properly understood, sexual privacy frees people to set boundaries around their intimate lives.¹¹¹ 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 trans gender 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.¹¹²

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 Siegel, *supra* note 104, at. *Cf.* CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 375 (1980).

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, *UNEASY ACCESS*, *supra* note, at 180.

¹¹⁰ Citron, *supra* note 5, (manuscript at 6).

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*

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

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.¹¹⁵ He brought his laptop to women's homes to tape their sexual encounters.¹¹⁶ The videos captured him setting up the camera and angling it to focus on the bed.¹¹⁷ 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.¹¹⁸

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.

¹¹³ Todd Magel, *Man's Arrest Prompts Hidden Camera Concerns in Iowa*, KCCI (Apr. 6, 2018), <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://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 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/>.

¹¹⁸ *Id.*

People invade sexual privacy by distributing their intimate partners' sexually graphic images without consent, a practice called nonconsensual pornography.¹¹⁹ Alexandra Waterbury experienced a double betrayal of trust in 2018: her boyfriend secretly made recordings of her naked body and showed them to colleagues.¹²⁰ When Waterbury was a student at the American Ballet School, she dated Chase Finlay, a principal dancer with the New York City Ballet (NYCB).¹²¹ Over a year's time, Finlay took nude and sexually-explicit photographs and videos of her without permission.¹²² He texted the photos and videos to two colleagues and a ballet donor.¹²³ In a similar case, Carlo Dellverson secretly videotaped his sexual encounters with his girlfriend and posted the videos to a porn site.¹²⁴ In 2015, a judge sentenced him to community service and court-ordered therapy.¹²⁵

Some individuals obtain their intimate partners' nude images with consent and betray their partners trust by distributing the images without consent.¹²⁶ In 2009, Holly Jacobs shared sexually-explicit images and videos with her boyfriend.¹²⁷ The

¹¹⁹ Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 710 (2017); Citron & Franks, *supra* note 11, at 346. 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://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) <https://perma.cc/GN8D-LCDJ>.

¹²¹ *Id.* at 14.

¹²² Snejana 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://perma.cc/D82X-R5PD>.

¹²³ Complaint, *supra* note 120, at 15. *See* Joan Acocella, *What Went Wrong at New York City Ballet*, THE NEW YORKER (Feb. 18 & 25, 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 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 New 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 11, at 346.

¹²⁷ *Id.* at 45.

images were meant for their eyes only.¹²⁸ 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.¹²⁹ Her nude photos were sent to her boss.¹³⁰

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

College student Kathryn Novak had a long-distance relationship with Brandon Simpson who attended a university in another state.¹³⁶ 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.¹³⁷ She never told Simpson that he could share the images with anyone else.¹³⁸ Simpson violated Novak’s trust along several dimensions. He posted her nude photos on his

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 47.

¹³¹ CITRON, *supra* note, 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 changed after her criminal case was dropped. *See* Citron, *Sexual Privacy*, *supra* note, at.

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>.

¹³⁷ *Id.* at 5.

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>.

fraternity's private Facebook page, secretly videotaped their sexual encounters, and showed the sex videos to members of his fraternity.¹³⁹

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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² After the release of the videos,

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://perma.cc/2C5U-G.5RX>.

¹⁴² *Id.*

much of the nation began looking for some variation on “Erin Andrews peephole video.”¹⁴³ The man was sentenced to two-and-a-half years in prison.¹⁴⁴

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 tend to target non-intimates.¹⁴⁵ Luis Mijangos tricked hundreds of women and teenage girls into downloading malware onto their computers.¹⁴⁶ 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.¹⁴⁷

Michael Ford hacked into the computers of hundreds of women to obtain sexually-explicit images.¹⁴⁸ 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.”¹⁴⁹ He escalated his threats when victims refused his demands. Ford told one victim that he would post her contact

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>.

¹⁴⁵ BENJAMIN WITTES ET AL., *SEXTORTION: CYBERSECURITY, TEENAGERS AND REMOTE SEXUAL ASSAULT 2* (May 11, 2016), <https://www.brookings.edu/research/sextortion-cybersecurity-teenagers-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://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://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.*

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.¹⁵⁰ Ford was sentenced to fifty-seven months in prison.¹⁵¹

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.

C. Harm

For victims, the psychological damage can be profound. Victims suffer anxiety and fear.¹⁵² They describe feeling helpless.¹⁵³ Waterbury explained that she could not eat or sleep when she first found out about Finley’s betrayal of her trust.¹⁵⁴ Her initial “shock and denial” turned into “anger and embarrassment.”¹⁵⁵ She was “depressed” and “overwhelmed.”¹⁵⁶ She put her life on hold and was hospitalized.¹⁵⁷ Waterbury explained that her “body was violated, taken advantage of . . . I had no control over

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

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

¹⁵⁴ Jennifer Stahl, *Should Aspiring Ballet Dancers “Run in the Other Direction”?*, DANCE MAG. (Sept. 11, 2018), <https://perma.cc/56YR-TPBR>.

¹⁵⁵ Cooper & Pogrebin, *supra* note **Error! Bookmark not defined.**

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://perma.cc/S5WP-Z3R2>.

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.”¹⁵⁸

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.¹⁵⁹ A victim of sextortion has explained that the perpetrator “haunts me every time I use the computer.”¹⁶⁰

Feelings of distrust are hard to dislodge after one’s sexual privacy has been invaded.¹⁶¹ Vulnerability is “painful, and trust difficult to sustain in an inhospitable and uncertain universe.”¹⁶² 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.”¹⁶³

People who experience betrayal in intimate relationships tend to adopt a “risk aversive strategy” in future ones.¹⁶⁴ They interpret the actions of others negatively, impacting their ability to forge intimate relationships.¹⁶⁵ 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,

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

¹⁵⁹ Finn, *supra* note 141.

¹⁶⁰ WITTES ET AL., *supra* note, 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.*

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

¹⁶⁵ *Id.*

[and] feelings of vulnerability and mistrust”¹⁶⁶ 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.”¹⁶⁷

In my interviews with people whose partners invaded their sexual privacy, this point was made time and again.¹⁶⁸ Jacobs was afraid to date for months after discovering that her ex posted her nude images all over the internet.¹⁶⁹ 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.¹⁷⁰ She has not gotten serious with anyone since that time and cannot imagine letting down her guard with anyone else.¹⁷¹ She swears that she will never get married again.¹⁷²

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

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 invasions of sexual privacy 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 on Sexual Privacy 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 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 Director.

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

¹⁷¹ *Id.*

¹⁷² *Id.*

women and minorities are more often targeted, sexual-privacy invasions entrench subordination and marginalization.

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.¹⁷³ They objected to “daily papers” that revealed “details of sexual relations” and family members’ correspondence.¹⁷⁴ They warned that when intimacies “whispered in the closet” are “proclaimed from the house-tops,” individuals and society suffer.¹⁷⁵ In their view, the nonconsensual revelation of the

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.

“fact” of a “domestic occurrence” risked “spiritual” harm even greater than “material” harm.¹⁷⁶

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.”¹⁷⁷ In their view, individuals should control what others know about their “domestic circle.”¹⁷⁸ Crucial was the ability to determine “to what extent [one’s] thoughts, sentiments, and emotions shall be communicated to others.”¹⁷⁹ 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 followed the call for privacy torts.¹⁸⁰ Privacy tort law now provides redress for intrusions on seclusion, public disclosures of private facts, depictions in false light, and misappropriation of one’s identity (often for commercial purposes).¹⁸¹ It has not evolved beyond these four claims.¹⁸² Concepts of confidentiality have not been integrated into the privacy torts, a missed opportunity that should be seized.¹⁸³

Contemporary privacy scholarship has highlighted privacy law’s potential to protect trust in information relationships.¹⁸⁴ In a series of articles, Neil Richards and Woodrow Hartzog argue that privacy law’s next stage of development should focus on trust.¹⁸⁵ Taking trust seriously would result in people sharing more information,

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).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 174 (2007).

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).

resulting in more “sustainable, profitable relationships” with public and private entities.¹⁸⁶ 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.¹⁸⁷

Drawing upon legal developments in the United Kingdom, Neil Richards and Daniel Solove call for privacy tort law to recognize breach of confidence claims.¹⁸⁸ They point to the common law’s protection of the exchange of information in professional relationships.¹⁸⁹ 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.¹⁹⁰

A breach of confidence tort would be useful in protecting sexual privacy in the array of contexts where the privacy torts provide no protection.¹⁹¹ 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.”¹⁹²

Consider the tort of public disclosure of private fact. To make out a claim, the plaintiff’s personal information must be disclosed to a wide audience.¹⁹³ In *Bilbrey v. Myers*,¹⁹⁴ a pastor announced at a church service that the plaintiff was gay.

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

¹⁸⁷ See WALDMAN, *supra* note 94, at 71.

¹⁸⁸ Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 174 (2007).

¹⁸⁹ *Id.* at 134–40.

¹⁹⁰ *Id.* at 174.

¹⁹¹ Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010) (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 94, at 72.

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).

Plaintiff's family members, including his fiancée's father, were in the audience.¹⁹⁵

The court struck down the public disclosure of private fact claim because the defendant never conveyed the information to the public at large.¹⁹⁶ 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.¹⁹⁷

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, would have no application.¹⁹⁸ 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' 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, a breach of confidence tort would provide the possibility of redress because the perpetrators shared the nude images in violation of intimate partners' trust.¹⁹⁹

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

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

¹⁹⁸ In my forthcoming article *Sexual Privacy*, I argue that the disclosure of private information to small groups—employers, family, and colleagues—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, *Sexual Privacy*, *supra* note, at.

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 *supra* notes. The victims in Kelly's case did not, in part because they hoped to avoid invasive tort suit and because they hoped that prosecutors would vigorously pursue his case, which they did not. Interview with Jane Doe (Aug. 27, 2016) (notes on file with author).

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 guide.²⁰⁰ It shapes attitudes, beliefs, and behavior through its messages and lessons.²⁰¹ It tells us what behavior is harmful and wrongful.²⁰² Legal penalties demonstrate societal intensity around a social value.²⁰³ Besides signaling how people should act (by signaling the social costs of conduct), law provides a “focal point” around which individuals organize their behavior.²⁰⁴ When public sentiment about specific behavior is unclear, law provides expressive clarity, channeling shifts in beliefs, attitudes, and behaviors.²⁰⁵

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.²⁰⁶ Breach of trust

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, at 126–27; Citron, *Law’s Expressive Value*, *supra* note, at 407–14; see also Citron, *Cyber Civil Rights*, *supra* note **Error! Bookmark not defined.**

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

²⁰² See CITRON, *supra* note, 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 *Id.* at 64–65.

²⁰⁶ On law’s potential to encourage victims of sexual privacy to engage in sexual expression, see Jonathon W. Penney & Danielle Keats Citron, *When Law Frees Us to Speak*, *FORDHAM L. REV.* (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309227.

claims would say society values the trust that intimate partners place in one another, and that partners are not foolish to engage in reciprocal disclosure of their bodies, sexual fantasies, and intimate experiences.

Yet because it requires the existence of a relationship to which duties of confidentiality attach, breach of confidence claims would not apply to sexual privacy invaders who do not have pre-existing relationships with victims. It would not apply to Andrews's stalker. It would not apply 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 Ribstein raised concerns about laws that enforce trust where parties enter into those relationships voluntarily on the basis of trust.²⁰⁷ In such contexts, policymakers and courts should consider whether law risked unintended negative consequences?²⁰⁸ After all, as Ribstein explained, law did not seem to be necessary to nudge the parties to enter into the relationship.

In the spirit of Ribstein's work, 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, sexual-privacy invasions do indeed undermine this assumption. They corrode the very project of intimacy. Invasions of sexual privacy shake victims' confidence and trust in future relationships. 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.²⁰⁹

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 35-54.

Breach of confidentiality claims would have an upside with little evident downside. It would redress breaches of confidence in contexts where parties developed mutual knowledge, interdependence, love, respect, and trust and where that trust is 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, Finley, 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 intimate relationships. 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.²¹⁰ It is hard to justify spending scarce resources if defendants are essentially judgment proof.²¹¹ Litigation invites invasive discovery, and victims may not want to reveal their medical history or sit for a deposition across from their tormentors.²¹²

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.²¹³ Today, criminal law addresses certain sexual-privacy invasions, but, as the cases discussed

²¹⁰ Citron, *Sexual Privacy*, *supra* note, at.

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 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 *Id.*

²¹³ *Id.*

above show, it has hardly fulfilled its potential to deter invasions of sexual privacy.²¹⁴ Law enforcement lacks sufficient training in the law and technology, ending investigations before they even begin.²¹⁵ Criminal law treats many sexual-privacy invasions as misdemeanors.²¹⁶ Perpetrators then receive light sentences. Recall Kelly's ten-days of community service for invading the sexual privacy of three 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.²¹⁷ As I argue elsewhere, "invasions of sexual privacy should be addressed in a comprehensive manner."²¹⁸ A comprehensive approach would include legislation penalizing core invasions of sexual privacy with enhanced penalties for bias-motivated privacy invasions.²¹⁹

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.

²¹⁴ See Citron, *Sexual Privacy*, *supra* note, at.

²¹⁵ *Id.* See also CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

²¹⁶ See Citron, *Sexual Privacy*, *supra* note, at.

²¹⁷ See Citron, *Sexual Privacy*, *supra* note, at.

²¹⁸ *Id.* at 68.

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.²²⁰ Prominent recent examples include We-Consent, Consent Amour, uConsent, and Yes to Sex.²²¹

The LegalFling app, for instance, promises to let users “set out which practices they are and are not comfortable with.”²²² 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.”²²³ The app will allow users to assign a penalty if nude footage is shared in violation of the agreement.²²⁴ Users can change their mind and withdraw consent.²²⁵

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.”²²⁶ 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.”²²⁷

²²⁰ Emily Simonsen, *Sexual Consent Apps Aim to Start Conversations, Prevent Assaults*, NBC.COM (May 10, 2018, 7:46 AM), <https://perma.cc/DRC7-2DB4>.

²²¹ Helena Horton, *Rise of ‘Consent Apps’ as Millennials Sign Contracts Before Sex*, TELEGRAPH (UK) (May 2, 2018), <https://perma.cc/28CL-67AN>.

²²² Emma Batha, *After #MeToo, Phone App Allows You to Legally Consent to Sex*, REUTERS (Jan. 18, 2018), <https://perma.cc/Q2P4-Y42L>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *What Is Consent Amour?*, 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!” *Id.*

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

Others underscore the perhaps more believable claim that consent apps facilitate communication and understanding.²²⁸ Yes to Sex founder Wendy Mandell Geller hopes the app will “make it easier to talk about sexually transmitted diseases, protection, and boundaries.”²²⁹ Cody Swann, founder of the uConsent app, says that his software will get people to talk, enhancing intimacy.²³⁰ He describes the app as forging a “digital handshake.”²³¹

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 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.”²³² 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.²³³ 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

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.*

²³⁰ Gil Smart, *Martin County Native Develops ‘Consent’ App for Safer Sex*, TC PALM (May 10, 2018), <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 11, at 348.

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 fix to difficult questions. The “there is an app for that” response usually overpromises and underdelivers. 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. 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. Surely, one might heard said, there is an app with security in the Blockchain that could protect sexual privacy?²³⁴ Not really. Unless every intimate interaction is recorded for posterity (a

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.

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.²³⁵

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