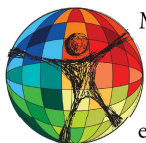


Martine Roy Colloquium Working Paper Series

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MARTINE ROY COLLOQUIUM | WORKING PAPER SERIES*



McGill Centre for Human
Rights and Legal Pluralism

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Thank you to B.C.L./J.D. student Shona Moreau for organising and editing this series.

THE PAPERS

Family is a Drag: Extra-Legal Formations of the White-Picket Dream

by Andie Hoàng-Lefranc

Sexual Privacy, Cyber-Harassment, and the New Playground for Abusers: Privacy Infringements on LGBTQ Dating Apps

by Seth Gordon

The Unspeakable Crime: Examining the Implications of Legislative Silence in Criminalizing Homosexuality in Canada

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Care, Not Punishment: Informing COVID-19 Policy with Lessons from the AIDS Crisis

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Article

Digital Sexual Privacy

Seth Gordon

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ABSTRACT

This article primarily focuses on individual invasions of digital sexual privacy, leaving discussion of the role of intermediary platforms and governmental and corporate bodies for later work. The authors main focus is not to provide concrete legislative or judicial solutions. Rather, they argue why we should address this issue in the greater assemblage of privacy and human rights literature and enshrine digital sexual privacy as a right worthy of legal protection. By understanding the problem better, more of us can work to remedy it.

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Introduction

My friend grew up in a conservative household in rural Quebec. He entered his adolescence in the mid-aughts, around the boom of Facebook. His experience as a closeted queer kid in that environment meant that opportunities for in-person romantic and sexual exploration were slim. The internet provided a way out. In high school, he explored his queerness through anonymous online video and messaging chatrooms. The sites matched him with strangers with whom he could message, trade pictures, and talk via webcam. He also discovered cybersex.¹ He could safely explore his sexual identity from his bedroom by acting out his fantasies and desires away from his immediate community and homophobic family.

My friend's Facebook account linked him with his real-life friends, family members, and colleagues. At the time, his profile presented a closeted heterosexual version of himself. It was the self he diligently constructed and controlled to maintain his privacy, on and offline. In contrast, his anonymous accounts reflected the unique dichotomy of online intimacy: he could share the most profound pieces of information about himself with total strangers. They didn't know anything identifiable about him unless he told them, and vice versa.

For several weeks, he webcammed with two men. They convinced him to undress and hang out on camera. Then they convinced him to act out certain fantasies and masturbate with them virtually. Unbeknownst to my friend, the two men were recording everything.

Then my friend made the mistake of trusting two strangers with another one of his most fundamental pieces of personal information: his name.

He was Antoine.²

The men tracked down Antoine's Facebook account and posted the pictures they had covertly taken of him on his virtual public "wall," accompanied by the words "die faggot." Within moments, not only did every person in his life know deeply personal information about Antoine against his will, but they could also see him in the most intimate setting imaginable. The men had hijacked his private information in order to eviscerate his privacy and perpetrate a hate crime against him. They turned Antoine's life upside down.

¹ Erin Leigh Courtice & Krystelle Shaughnessy, "Technology-mediated sexual interaction and relationships: a systematic review of the literature" (2017) 32:3-4 *Sexual and Relationship Therapy J*, 269 at 269-290 (discussing cybersex as a subtype of technology-mediated sexual interactions).

² Name has been changed to protect anonymity.

How might we conceptualize what these men did to Antoine? Which of his legal rights did they violate? Many scholars approach the issue from a practical, rather than theoretical lens. They define the issue through his aggressors' actions, rather than their effect. This endeavour is vital and a growing area of legal activism.³ There are a litany of names for it, from the antiquated "cyber-harassment" and "sexual cyberbullying"⁴ to the more precise "technology-facilitated sexual violence" and "technology-facilitated gender-based violence." In this paper, I employ the term technology-facilitated sexuality and gender-based violence (TFSGBV) to capture the "continuum of violence, abuse, and harassment" women and sexual and gender minorities (SGM) face in particular in a world where the "false dichotomy between 'online' and 'offline' worlds" dissipates.⁵

³ See generally Cynthia Khoo, "Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence" (2021) Women's Legal Action Fund Report; Clare McGlynn, Erika Rackley & Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25:1 Fem Leg Stud 25;

⁴ For further discussion of this term, see note 198 and accompanying text, *below*.

⁵ In her report, Khoo uses the term "technology-facilitated gender-based violence" (*supra* note 3 at 15). For this paper, I have coined the term "technology-facilitated sexuality and gender-based violence" (TFSGBV) as an amalgam of Khoo's term and several others common throughout the literature, such as technology-facilitated violence against women and girls, technology-facilitated sexual violence, and sexual cybercrimes. TFSGBV is the most useful term for the purposes of my argument for several reasons: Firstly, as Khoo argues, "technology-facilitated" crime more accurately describes the behaviours that fall under this phenomenon than terms with the prefix "cyber" (such as cyberharassment, cyberstalking, cybermisogyny, etc.) because the site of violence occurs in the real world, whether or not its origin is solely virtual. By qualifying pre-existing forms of abuse as such, not only do we minimize the extent to which they cause physical damage, we fail to capture "technology's ability to efficiently amplify and automate abuse [causing] greater harm than if the same act were not technology-facilitated," (at 29) such as in-person stalking facilitated by GPS pinpoint-tracking technologies.

With respect to the use of "sexual and gender-based" violence as opposed to "sexual violence," "gender-based violence," or "violence against women and girls," I provide the following explanation: much of the literature on this subject highlights the gendered nature of these acts, and the ways in which they compound with patriarchal and misogynist social and legal structures. While I highlight this consideration in my paper, I also focus on sexual and gender minorities (SGM) through a queer theory lens. In common academic parlance, the term SGM does not encompass cisgender women. However, as I use SGM throughout this report and in the context of TFSGBV, I seek to encompass the feminization of technology-facilitated abuse against all women as a minority status (including in this conception cisgender women) as well as the disproportionate impact on LGBTQIA2S+ groups. I alternately use "women and SGM" to achieve this effect, though SGM should be taken to include all women, including cis and transwomen as well as non-binary people.

Moreover, I use "sexuality and gender-based violence" to include behaviours not necessarily sexual in nature (as opposed to the implication in "technology-facilitated sexual violence"), although they can be. Rather, the common denominator is violence rooted in bigotry towards non-hegemonic sexuality and gender and the subordinating exercise of power. This distinction is important, as technology-facilitated violence targets individuals who engage in non-heteronormative sexual behaviour, including cisgender heterosexual men (for example, those who "queer heterosexuality"), and has racial, class-based, and other marginalities. They are not the focus of this term, though their inclusion supports the argument that digital sexual privacy benefits everyone and that this endeavour is intersectional.

There is a dearth of research exploring the legal principles undergirding this advocacy—discussions highlighting not what Antoine’s aggressors did, but what Antoine *experienced*. Danielle Keats Citron has theorized what lies at the heart of these abuses: invasions of sexual privacy. In her article “Sexual Privacy,” Citron argues for recognizing sexual privacy as a “distinct privacy interest that sits at the apex of the hierarchy of privacy interests.”⁶ She says:

Sexual privacy [...] warrants recognition and protection. It serves as a cornerstone for sexual autonomy and consent. It is foundational to intimacy. Its recognition would acknowledge the subordinating impact of invasions of sexual privacy. Traditional privacy law’s efficacy, however, is eroding just as digital technologies magnify the scale and scope of the harm.⁷

Citron is a pioneer in privacy law.⁸ In addition, feminist scholarship deconstructing TFSGVB is crucial to bringing the law into the digital age. However, there is a gap between these two disciplines. By identifying relevant actors, legislation, and jurisprudence, we can more effectively prevent digital sexual privacy violations from occurring and satisfactorily remedy victims when they do. But many individuals with the capacity to make change do not adequately understand *what* is at stake for *whom*. We cannot understand privacy violations without first adequately conceptualizing privacy.

In the following pages, I use Citron’s paper as a point of departure to explore what I call digital sexual privacy. I argue that reverse-engineering TFSGVB through privacy typologies comprehensively defines these violations and the consequent rights violated. Privacy law situates TFSGVB within the greater realm of digital sexual identity. Technology-facilitated abuse is the most extreme—yet pervasive—form of digital sexual privacy violations. However, this right is threatened in all areas of society. Through the lens of queer legal theory, I focus on the disproportionate impact sexual privacy violations and technology-facilitated abuse have on sexual and gender minorities. By expanding the

Finally, “violence” is the appropriate term in this case as it refers to the “intentional use of physical force or power, or actual or threatened power, against oneself, another person, or against a group or community,” in physical, psychological, emotional, sexual, professional, and economic forms (see Maria Cecilia de Souza Minayo, “Conceitos, teorias e tipologias de violência: a violência faz mal à saúde,” eds. K. Njaine, S. G. Assis, P. Constantino, & J. Q., *Impactos da Violência na Saúde* (Rio de Janeiro: Fiocruz, 2020) at 19). I use “violence” in the term TFSGVB as a stand-in for all forms violence, abuse, and harassment, and I mention all three words throughout this paper. By using TFSGVB, I cast as wide a net as possible in discussing both relevant victims (highlighting queer and other marginalized identities especially) and behaviours.

⁶ Danielle Keats Citron, “Sexual Privacy” (2018) 128 Yale LJ 1870 at 4 [Citron, “Sexual Privacy”].

⁷ *Ibid.*

⁸ See also Citron, “The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life” (2019) 42 Colum JL & Arts 383; Citron & Robert Chesney, “Deep Fakes: A Looming Crisis for Privacy, Democracy, and National Security” (2019) 107 Cal Law Rev 1753; Citron, “Why Sexual Privacy Matters for Trust” (2019) 96 Wash L Rev 1189.

conversation to include these and other minority groups, we can fully appreciate the problem at hand: core social values are under attack.

I proceed through my paper accordingly:

In Part I, I ask: *what is sexual privacy?* I canvas various legal conceptions of privacy and determine how they connect to sexual privacy. I use three typologies: informational, negative freedom-based, and positive freedom-based privacy. I also discuss the nuance of secrecy as both a counter and a complement to privacy for marginalized sexualities.

In Part II, I ask: *how has digitization affected sexual privacy?* First, I discuss how the rise of technology-facilitated sexuality and gender-based violence disproportionately infringes the negative freedom-based privacy rights of women and SGM. Then I discuss the values embedded in positive freedom-based conceptions of digital sexual privacy.

This article primarily focuses on individual invasions of digital sexual privacy, leaving discussion of the role of intermediary platforms and governmental and corporate bodies for later work.⁹ My main focus is not to provide concrete legislative or judicial solutions. Rather, I argue why we should address this issue in the greater assemblage of privacy and human rights literature and enshrine digital sexual privacy as a right worthy of legal protection. By understanding the problem better, more of us can work to remedy it.

I. *What is sexual privacy?*

Conceptualizing Privacy

Here are three statements about privacy: Privacy is a universal human right.¹⁰ It has both individual and collective components.¹¹ It protects the self and information about the self.¹² None of these statements directly defines privacy. Rather, each tells us something vital about its purview. Privacy is difficult to define largely due to its multifarious nature. Consider the intersections between privacy and, *inter alia*, personhood, bodily integrity, property, control, security, and freedom of expression. Many philosophers and legal theorists have typically

⁹ I have previously canvassed intermediary liability in “Sexual Privacy, Cyber-Harassment, and the New Playground for Abusers: Privacy Infringements on LGBTQ Dating Apps,” (Martine Roy Inaugural Student Colloquium delivered at the Faculty of Law, McGill University, 15 March 2022) [unpublished]; see also Khoo, *supra* note 3 at 97-129 (platform liability in Canadian law).

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at Art 13.

¹¹ See Leslie P. Francis & John G. Francis, *Privacy: What Everyone Needs to Know* (New York: Oxford University Press, 2017) at 190-200.

¹² See N.A. Moreham, “Beyond Information: Physical Privacy in English Law” (2014) 73:2 Cambridge LJ 350.

conceived of privacy either through unitary definitions or descriptive typologies.¹³ Proponents of the first methodology advocate for a “common denominator” to highlight one or more common “core” characteristics of privacy.¹⁴ Proponents of the second describe it in relation to the public-private spectrum.¹⁵

Daniel J. Solove, an advocate of the pluralist approach, opines, “The most prevalent problem with the conceptions [of privacy] is that they are either too narrow or too broad. The conceptions are often too narrow because they fail to include the aspects of life that we typically view as private, and are often too broad because they fail to exclude matters that we do not deem private.”¹⁶ Instead of identifying a single common characteristic, Solove describes a “common pool of similar elements” of privacy.¹⁷ Helen Nissenbaum’s “contextual integrity” theory offers a flexible approach to privacy expectations based on structured social settings.¹⁸ Contextual integrity posits that privacy is determined by flows of information, contextual informational norms, and ethical concerns.¹⁹

Given the difficulty in defining privacy generally, sexual privacy is even more enigmatic. It comprises the “social norms (behaviours and expectations) that govern access to, and information about, individuals' intimate lives.”²⁰ Citron takes a “ground up’ approach in exploring how sexual privacy is and should be experienced.”²¹ In this paper, I dissect digital sexual privacy by proposing both a set of typologies and its essential values.

Typologies of Sexual Privacy

In “A Typology of Privacy,” Bert-Jaap Koops et al define eight ideal types of privacy along two axes: zones of life and aspects of freedom.²² The first axis delineates gradations of the public-private divide into four zones: the private

¹³ See for example Adam Moore, “Privacy Rights: Moral and Legal Foundations” (2011) 37:3 Soc Theory & Prac 510 (for a unitary conception of privacy); cf for example Rachel L. Finn, David Wright, & Michael Friedewald, “Seven Types of Privacy,” in Serge Gutwirth, Ronald Leenes, Paul de Hert & Yves Poullet, eds, *European Data Protection: Coming of Age* (Berlin: Springer Dordrech, 2013).

¹⁴ Alan F. Westin, *Privacy and Freedom*, (1968) 25 Wash & Lee L Rev 166.

¹⁵ Further analysis of this approach found at 7-8, *below*.

¹⁶ Daniel J. Solove, “Conceptualizing Privacy” (2002) 90:4 Cal LR 1087 at 1094.

¹⁷ *Ibid*.

¹⁸ Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Redwood City: Stanford University Press, 2011) [Nissenbaum, *Privacy in Context*].

¹⁹ Contextual integrity is especially relevant to digitization. See for example Pan Shi, Heng Xu & Yunan Chen, “Using contextual integrity to examine interpersonal information boundary on social network sites” (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, ACM, 2013).

²⁰ Citron, “Sexual Privacy”, *supra* note 6 at 4.

²¹ *Ibid* at 9, n 33.

²² Bert-Jaap Koops et al, “A Typology of Privacy” 38:2 U Pa J Intl L 483 at 566.

zone, relating to forms of total solitude; the intimate zone, relating to small units of privacy; the semi-private zone, relating to secrecy and reputation; and the public zone, relating to inconspicuousness in the public sphere.²³ While these checkpoints form a useful construction, it is a construction nonetheless. Zones overlap, especially online.²⁴

The second axis organizes types of privacy by negative freedoms (freedom *from* something) and positive freedoms (freedom *to* something).²⁵ Scholars generally invoke negative freedom-based privacy to discuss privacy as the right to be let alone.²⁶ Negative freedoms include physical/bodily (controlling access to the body), spatial (access to private spaces), communicational (restricting communications and the flow of information), and proprietary (property-based interests as exclusion) privacy. Positive freedom-based privacy emphasizes self-development and self-determination. It includes intellectual (privacy of thought and mind, identity development), decisional (intimate decisions, typically protected from state interference), associational (freedom to be with whomever), and behavioural (relating to privacy and being oneself in public) privacy.²⁷ The boundaries between these typologies and their alignment along this axis are also not set in stone.²⁸

Scholars have struggled to reconcile privacy's "two sides of the same coin:"²⁹ the more or less "physical" types of privacy and information. Koops et al conceptualize informational privacy as an overarching aspect of the other eight underlying types.³⁰ This approach is imperative to understanding both digital sexual privacy and TFSGBV. As I discuss below, the body is a site of information. When we prevent physical access, we also shield others from the information the body holds. Similarly, TFSGBV affects victims' 'cyber' and 'real-life' privacies. Therefore, digital sexual privacy protects both sexual personal information and physical sexual privacy interests aggravated by technology.

1. Informational Privacy

²³ *Ibid* at 545-554.

²⁴ See Nissenbaum, *Privacy in Context*, *supra* note 18 (Nissenbaum's notion of context-relative informational norms is a nuanced expression of the public-private spectrum).

²⁵ Koops et al, *supra* note 22.

²⁶ See Samuel D. Warren & Louis Brandeis, "The Right to Privacy" (1890) 4 Harvard LR 193.

²⁷ Koops et al, *supra* note 22 at 568.

²⁸ *Ibid* (To provide two examples of the inverse relationship between negative and positive freedom-based privacy: the natural corollary to the ability to exclude others from access to the body is the freedom to give access; privacy in associating with some entails exercising the control to dissociate from others).

²⁹ Peter Blok, *Het recht op privacy: een onderzoek naar de betekenis van het begrip 'privacy' in het Nederlandse en Amerikaanse recht* (Hague: Boom Juridische uitgevers, 2002) at 280-281.

³⁰ *Ibid* at 566.

Under the *Personal Information Protection and Electronic Documents Act* (PIPEDA), personal information is any information that can be used to identify an individual.³¹ Personal information has privacy interests, though some categories demand more privacy than others. In order to successfully navigate the public sphere, we must make concessions to our personal informational privacy. When we meet new people at parties or in business meetings, the first piece of information we typically knowingly reveal about ourselves is our names. Introducing oneself to strangers is such an ingrained mode of social connection that many of us take for granted its impact on context-relative informational norms.³²

A name in the abstract is not necessarily identifiable, thus not necessarily personal. Names are identifiable when combined with other information about individuals, like addresses, age, education, ethnicity, sex, gender, sexual orientation, or medical history.³³ Marginalized individuals' names can be weaponized against them. In Antoine's case, his name led to personally identifiable information about his social media presence, his sexuality, his age, and other members of his community. Many sex workers and individuals requesting HIV screening decline to provide their surnames or use pseudonyms at sexual health clinics to protect their privacy.³⁴

Earlier, I wrote that when we meet new people, the first piece of information we typically *knowingly* reveal about ourselves is our names. Before this occurs, we have already revealed countless other personal information types, or "attributes."³⁵ Information about our physical appearances, including the face, height, colour, voice, and body type, bare clues about other categories: race, ethnicity, class, sex, gender, sexuality, religion, origin, age, and ability. Some examples include: religious garb (religion, ethnicity); androgyny (sex, gender, medical history); speech patterns (class, ethnicity, origin, sexuality). Indirect indexicality describes the ways in which language implicitly catalogues sexuality (juxtapose the "gay voice" with "brospeak").³⁶ This concept aptly extends to all symbols of personal information. Accordingly, physical privacy as a negative freedom is one of informational privacy's guardians.

Sexual privacy has the same direct and indirect indexicality. The United Nations International Organization for Migration and other groups use the term "sexual orientation, gender identity, gender expression and sex characteristics"

³¹ SC 2000, c 5, s 2(1).

³² Nissenbaum, *Privacy in Context*, *supra* note 18 at 140.

³³ Information and Privacy Commissioner of Ontario, *What is Personal Information?*, fact sheet (Toronto: Information and Privacy Commissioner, October 2016) at 3.

³⁴ Heidi C. Spillane et al, "Who declines to give a name at a sexual health service?" (2007) 83:2 *Sex Transm Infect J* 160 at 162.

³⁵ Nissenbaum, *Privacy in Context*, *supra* note 18 at 143.

³⁶ Scott F. Kiesling, "The 'Gay Voice' and 'Brospeak': Towards a Systematic Model of Stance," in *The Oxford Handbook of Language and Sexuality* (New York: Oxford University Press, 2019).

(SOGIESC) to identify sexual information types.³⁷ All individuals have SOGIESC. People with diverse SOGIESC, more commonly referred to as sexual and gender minorities, fall “outside culturally mainstream categories.”³⁸ SOGIESC explicitly describes sexual identity information, and implicitly many aspects of sexual behaviour. However, the focus in both SOGIESC and SGM on self-identification neglects the privacy-engaging feature of sexual behaviour as it relates to preference, not orientation.

Instead, an ideal vision of digital sexual privacy is anti-essentialist and sex-positive. It protects all individuals and behaviours who do not subscribe to hetero- and cisnormativity, such as men who have sex with men (MSM)³⁹ regardless of how they self-identify, cisgendered heterosexual polyamorists, the BDSM community, sex-radical feminists, and couples who have extramarital sex. In all societies, “people identify a group of sexual actors as disgusting or pathological, contrasting them with ‘normal’ or ‘pure’ sexual actors.”⁴⁰ Digital sexual privacy protects both groups, though only if organized around the former.⁴¹

Sexual health information also warrants privacy. It identifies an individual’s sexual wellbeing and the presence of disease or infection, such as HIV, sexually transmitted infections, reproductive tract infections, and comorbidities.⁴² It also

³⁷ See Dodo Karsay et al, “Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review,” ARC International in collaboration with the International Bar Association’s Human Rights Institute (IBAHRI) and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (November 2016) (According to the United Nations International Organization for Migration, “the language used to describe sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) varies greatly across the world and is dependent on such factors as location, language, age and cultural references”); Immigration and Refugee Board of Canada, “Guideline 9: Proceedings Before the IRB Involving Sexual Orientation, Gender Identity and Expression, and Sex Characteristics,” Guidelines issued by the Chairperson pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act* (17 December 2021) (Many terms used in SOGIESC contexts are Western-centric and do not fully capture the breadth of cultural and individual concepts of identity); International Organization of Migration, “SOGIESC: Full Glossary of Terms,” ed Jenn Rumbach (November 2020), online (pdf): *International Organization of Migration* <<https://www.iom.int/sites/g/files/tmzxbd486/files/documents/IOM-SOGIESC-Glossary-of-Terms.pdf>>.

³⁸ International Organization of Migration, *supra* note 37 at 1.

³⁹ For further discussion of men who have sex with men (MSM) as a social and epidemiological designation with specific health-related, sexual, and legal challenges, see notes 42 and 75 and accompanying text.

⁴⁰ Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010) at 17.

⁴¹ Heteronormativity already tacitly entrenches sexual informational privacy within its social structures, though only for those who adhere to them. For instance, that it is considered transgressive to pry into the heterosexual marital bedroom is undisputed. Enshrining the right to digital sexual privacy would further protect these individuals, though marginalized individuals have a greater need for it.

⁴² World Health Organization, “Sexual Health” (2020), online: *World Health Organization* <https://www.who.int/health-topics/sexual-health-tab=tab_1> (Cervical cancer, infertility, and impotence are adverse outcomes of sexual diseases and illnesses). Moreover, one’s sexual behaviour preferences may determine or be determinative of their sexual health. For example,

describes function and experience: pregnancy, fertility, abortion, sexual dysfunction, experience with sexual violence, and exposure to adverse sex and sexuality-related practices (such as female genital mutilation or gay conversion therapy) are all health- and privacy-related. Finally, it encompasses gender and sex identity information, including related sexual healthcare.⁴³

2. Negative Freedom-Based Privacy

The freedom to be let alone affords us privacy of the body, home, communication, and property. Some legal theorists make no distinction between physical, or bodily,⁴⁴ and spatial privacy. Indeed, the two are interrelated. Spatial privacy concerns physical space and the “protection of spatial boundaries.”⁴⁵ Like security, spatial privacy shields locations from unwanted entry.⁴⁶ Given their similarities, why differentiate between physical/bodily and spatial privacy? Imagine a pair of concentric circles. Spatial privacy occupies the outer ring, enveloping bodily privacy. Spatial privacy protects both physical and virtual spaces. A perpetrator could gain unauthorized access to one’s private space without ultimately breaching their physical privacy. A robber who breaks into a woman’s home has violated her spatial privacy. If he then peers into her bedroom and leers at her while she sleeps, he has also violated her bodily privacy. Differentiating between these two privacy types illustrates the process of exclusion more clearly.

Physical Privacy and Security

MSM are statistically at a greater risk of contracting HIV. A trans person’s trans identity is heavily linked to their sexual health information and experience accessing sexual healthcare. Individuals may also identify with their disease or disability, such as the HIV+ “poz” and queer crip communities.

⁴³ Sexual health information is a distinct subcategory worthy of recognition for two reasons: First, stigma associated with sexual identity and behavioural information compounds with ableism and disease discrimination. HIV+ individuals face prejudice within the healthcare system and larger society, and for this reason may be inclined to keep their seropositive status private. Second, healthcare information privacy is a developed area of law with extensive federal and provincial legislation. Laws concerning healthcare provider confidentiality are robust compared with private entities handling similarly sensitive information. See generally Nick Gorton & Hilary Maia Grubb, “General, Sexual, and Reproductive health” in L. Erickson-Schoth, ed, *Trans Bodies, Trans Selves: A Resource for the transgender community* (New York: Oxford University Press, 2014) at 215-240; William Leonard & Rosemary Mann, *The everyday experiences of lesbian, gay, bisexual, transgender and intersex (LGBTI) people living with disability* (Melbourne: La Trobe University Press, 2018); Anne C. Wagner, “A focus group qualitative study of HIV stigma in the Canadian healthcare system” 25:1 *CJ Hum Sex* 61; Leeann R. Donnelly et al, “Stigma Experiences in Marginalized People Living With HIV Seeking Health Services and Resources in Canada” 27:6 *JA Nurses in AIDS Care* 768.

⁴⁴ These terms are often used interchangeably.

⁴⁵ Roger J. R. Levesque, *Adolescents, Privacy, and the Law: A Developmental Science Perspective* (New York: Oxford University Press, 2016) at 232.

⁴⁶ Francis & Francis, *supra* note 11 at 6.

Physical privacy prevents “intrusions into one’s physical space or solitude.”⁴⁷ Legal theorist Anita Allen defines it as a “restriction on the ability of others to experience a person through one or more of the five senses.”⁴⁸ When relating directly to the body, it is commonly called bodily privacy. For instance, clothes block visual and tactile access to our bodies when walk in public spaces. The Muslim hijab is an object designed explicitly with privacy and modesty in mind.⁴⁹ Section 8 of the *Charter* protects individuals from the unreasonable invasion of their physical privacy, as in the case of unconstitutional police detentions.⁵⁰

Security partially overlaps with privacy, though they are not synonymous. Security does not relate solely to the individual or the body. For instance, governments, corporations, and data repositories all rely on forms of security. Security is protection from external danger or threats, though it is not necessarily privacy-ensuring.⁵¹ This definition delineates two requirements: the possibility of harm and a relationship between different individuals or groups. Thus, security’s necessary relational aspect distinguishes it from privacy. Trans people rely on physical privacy to escape violence rooted in the hatred of their bodies. In turn, this physical privacy provides some assurance of security. The inverse is also true: security begets privacy. Protection of the home grants privacy to the individuals within it. Therefore, physical security is “protection of the body against unwanted physical access.”⁵²

Two common law torts in particular describe harms to physical security: the property tort of trespass to the person (assault, battery, and false imprisonment) and the dignitary tort of intrusion upon seclusion. In *Jones v. Tsige*, the Ontario Court of Appeal unanimously recognized this privacy tort. The Court outlined three constituent elements:

1. The defendant’s conduct must be intentional and reckless;
2. The defendant has unlawfully invaded the plaintiff’s private affairs or concerns; and
3. A reasonable person would regard the invasion as highly offensive causing distress, humiliation, and anguish.⁵³

⁴⁷ H. Jeff Smith, *Managing Privacy: Information Technology and Corporate America* (Chapel Hill: University of North Carolina Press, 1994).

⁴⁸ Anita L. Allen, “Coercing Privacy” (1999) 40 *Wm & Mary L Rev* 723 at 723 [Allen, “Coercing Privacy”].

⁴⁹ See Fadwa El-Guindi, *Veil: Modesty, Privacy, and Resistance* (New York: Berg, 1999).

⁵⁰ *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

⁵¹ “Origin and meaning of secure” (last modified 6 April 2022), online: *Online Etymology Dictionary* <www.etymonline.com/word/secure>.

⁵² Francis & Francis, *supra* note 11 at 5.

⁵³ *Jones v. Tsige*, 2012 ONCA 32 (CanLII) at para 71 [Jones v. Tsige].

Sexual assault is a severe example of intrusion upon seclusion. However, very few plaintiffs have argued sexual assault cases under this cause of action, although in such a case they could very likely prove all three criteria. Different causes of action are also not mutually exclusive; sexual assault can simultaneously constitute trespass to the person and an invasion of privacy.⁵⁴ In 1995, the Superior Court of Connecticut judged in favour of an invasion of privacy claim in a case involving sexual abuse and harassment, arguing that the defendant, by committing sexual assault, “physically intruded on the solitude of the plaintiff in a highly offensive manner.”⁵⁵ If freedom from intrusion is the negative right, then the positive right can be expressed as follows: maintaining physical privacy and security ensures sexual integrity.⁵⁶

Spatial Privacy

Sexual and gender minorities rely on spatial privacy to develop and share their identities without outside intrusions.⁵⁷ Spatial privacy in the home also gives them respite from the homophobia and transphobia they experience from their families and/or public life.⁵⁸ All children, whether queer or not, use their bedrooms as physical enclaves of intellectual privacy to explore their sexualities and genders alone, like Antoine. The security of our own homes also affords us breathing space to make profound decisions about our present *and* future sexual identities, such as whether to have an abortion.⁵⁹

Spatial privacy extends beyond the home. We frequently establish private spaces within the public sphere, such as changing rooms, strip clubs, and therapists’ offices. Moderated public spaces can also provide LGBTQ+ youth with privacy from unwanted stressors, especially for those who are out to their friends but not their families. Participants in a 2020 American study of LGBTQ+ youths’ experiences during COVID-19 stay-at-home orders reported feelings of grief over the loss of “safe spaces” at their schools and other community locations while “stuck at home with homophobic parents.”⁶⁰ Public-cum-private spaces also have a temporal aspect. In *R. v. Sloan*, the Ontario Court of Appeal overturned a woman’s conviction for performing an indecent act in public after a police officer caught her performing fellatio in a parked car in a dark, empty parking lot after

⁵⁴ See also *Caplan v. Atas*, 2021 ONSC 670 (Sexual assault claimants have also brought civil claims against their aggressors by arguing other dignitary torts such as the intentional infliction of mental suffering in conjunction with privacy torts).

⁵⁵ *Fields v. Kichar*, WL 276114 at 7 (Conn Sup 1995).

⁵⁶ See *R. v. Chase*, [1987] 2 SCR 293 at para 11.

⁵⁷ Jessica N. Fish et al, “I’m Kinda Stuck at Home With Unsupportive Parents Right Now”: LGBTQ Youths’ Experiences With COVID-19 and the Importance of Online Support” (2020) 67:3 J Adolesc Health 450 at 451.

⁵⁸ *Ibid.*

⁵⁹ Jerry Kang, “Information Privacy in Cyberspace Transactions” (1998) 50 Stan L Rev 1193 at 1203-1204.

⁶⁰ Fish et al, *supra* note 57.

midnight. The Court cited both the seclusion of the car and the time at which the act took place as evidence of the defendant's reasonable expectation of inconspicuousness.⁶¹

Spatial privacy can be exploited, however. Governments can cite the need for spatial privacy when excluding marginalized groups from public spaces. "Bathroom bill" legislation restricting trans individuals' access to public restrooms has often paradoxically invoked the need to protect women's privacy from male predators.⁶² Anti-discrimination activists have countered that such legislation is actually an invasion of privacy for transgender people.⁶³ Spatial privacy can also invisibilize vulnerable individuals behind closed doors, giving cover to their abusers.⁶⁴ For instance, privacy in the home can conceal family and domestic abuse. COVID-19 lockdowns fuelled a spike in both intimate partner violence and migrant care worker exploitation.⁶⁵ Spatial privacy is a double-edged sword: it is

⁶¹ *R. v. Sloan*, 1994 CanLII 1721 (ONCA).

⁶² See for example US, HB 2, *Public Facilities Privacy & Security Act (An Act to Provide for Single-sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations)*, 2d Extra Sess, NC, 2016 (repealed 30 March 2017).

⁶³ See for example *Carcaño v. Cooper* (formerly *Carcaño v. McCrory*) 350 at 416 F Sup 3d 388 (MDNC 2018) (Factum of the Appellant).

⁶⁴ See Carol Pateman, "Feminist Critiques of the Public/Private Dichotomy" in Anne Phillips, ed, *Feminism and Equality* (Oxford: Basil Blackman, 1987) at 103–26.

⁶⁵ See generally Amber Peterman et al, "Pandemics and violence against women and children" (2020) Centre for Global Development Working Paper No 528; Violence Against Women Learning Network, "COVID-19 & Gender-Based Violence in Canada: Key Issues and Recommendations" (2022), online (pdf): [University of Western Centre for Research & Education on Violence Against Women & Children <yawlearningnetwork.ca/docs/COVID-gbv-canada-recommendations.pdf>](https://www.yawlearningnetwork.ca/docs/COVID-gbv-canada-recommendations.pdf) (Highlights the various "cross-cutting risks for all types of VAW/C that the COVID-19 pandemic may produce for individuals in 2SLGBTQ+, Indigenous, Black, and ethnic minority communities, as well as older adults, people with disabilities, and the working class; the second section of this document outlines key recommendations for responding to gender-based violence in Canada during this pandemic" at 1); Anuj Kapilashrmi & Olena Hankivsky, "Beyond sex and gender analysis: an intersectional view of the COVID-19 pandemic outbreak and response" (31 March 2020), online (pdf): [University of Melbourne School of Population and Global Health and Centre for Global Public <mspgh.unimelb.edu.au/news-and-events/beyond-sex-and-gender-analysis-an-intersectional-view-of-the-covid-19-pandemic-outbreak-and-response>](https://www.mspgh.unimelb.edu.au/news-and-events/beyond-sex-and-gender-analysis-an-intersectional-view-of-the-covid-19-pandemic-outbreak-and-response); Avis Favaro, "'Shadow pandemic': Advocates worry lockdowns have fuelled surge in partner violence" *CTV News* (23 January 2022), online: [ctvnews.ca/health/coronavirus/shadow-pandemic-advocates-worry-lockdowns-have-fuelled-surge-in-partner-violence-1.5751727](https://www.ctvnews.ca/health/coronavirus/shadow-pandemic-advocates-worry-lockdowns-have-fuelled-surge-in-partner-violence-1.5751727); Josh Pringle, "Ottawa Hospital encourages survivors of sexual assault, partner violence to seek ER treatment during pandemic," *CTV News* (20 April 2020), online: [ottawa.ctvnews.ca/ottawa-hospital-encourages-survivors-of-sexual-assault-partner-violence-to-seek-er-treatment-during-pandemic-1.4903698](https://www.ottawa.ctvnews.ca/ottawa-hospital-encourages-survivors-of-sexual-assault-partner-violence-to-seek-er-treatment-during-pandemic-1.4903698); see also Caregivers Action Centre et. al., "Behind Closed Doors: Exposing Migrant Care Worker Exploitation During COVID-19," (October 2020), online (pdf): [migrantrights.ca/wp-content/uploads/2020/10/Behind-Closed-Doors-Exposing-Migrant-Care-Worker-Exploitation-During-COVID19.pdf](https://www.migrantrights.ca/wp-content/uploads/2020/10/Behind-Closed-Doors-Exposing-Migrant-Care-Worker-Exploitation-During-COVID19.pdf) ("Workers reported increased surveillance with cameras to ensure workers are not leaving the house without "permission". In many cases, workers are already denied privacy - many don't have their own bedrooms, sometimes sleeping in an open basement used by other family members. Some workers reported the locks being removed from their bedroom doors and even washrooms. Many workers complained of constant surveillance" at 23).

essential to identity development but can be equally constructive of coercive control.

3. Positive Freedom-Based Privacy

Positive conceptions of privacy incorporate intellectual, decisional, associational, and behavioural freedoms.⁶⁶ Many legal scholars define decisional privacy as the ability to make decisions without government interference,⁶⁷ typically over fundamental areas of life like reproductive health,⁶⁸ gender identity,⁶⁹ and consensual sexual intercourse.⁷⁰ In *R. v. Plant*, the Supreme Court of Canada held that the privacy interest embedded in Section 8 of the *Charter* protects the values of dignity, integrity, and autonomy.⁷¹ The Court has also been sympathetic, albeit reticently, to exploring corollary privacy interests provided by the Section 7 rights to “liberty” and “security of the person.”⁷² It has also “repeatedly recognized that human dignity is at the heart of the *Charter*,”⁷³ with privacy as one of its central guardians.

The Canadian government and its deputized agencies actively police sexual privacy, especially for women and SGM. In the aftermath of the 1985 Tainted Blood Scandal, the Canadian Red Cross (the predecessor to Canadian Blood Services and Héma-Québec) began screening all blood products for HIV and introduced a lifetime ban on blood donations from men who have sex with men (MSM). In 2013, CBS and Héma-Québec, adjusted its lifetime ban on MSM to a deferral period for those who would remain celibate for five years prior to

⁶⁶ Koops et al, *supra* note 22 at 568.

⁶⁷ See for example Levesque, *supra* note 45.

⁶⁸ See *R. v. Morgentaler*, [1988] 1 SCR 30 [*Morgentaler* 1988] (bodily integrity includes autonomy over the choice to have an abortion).

⁶⁹ Ontario, Human Rights Commission, *Policy on preventing discrimination because of Gender Identity and Gender Expression*, (OHRC: 31 January 2014) (“Respect for dignity: Human dignity involves many factors, including respect for trans people and other gender non-conforming individuals and their self-worth as well as their physical and psychological integrity and empowerment. It is also about privacy, confidentiality, comfort, autonomy, individuality and self-esteem” at 24).

⁷⁰ Brenda Cossman, “Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms” (2002) 40:3/4 Osgoode Hall LJ 223 (sexual autonomy for sexual minorities); Mary Bernstein, “Liberalism and Social Movement Success: The Case of United States Sodomy Statutes” in Elizabeth Bernstein & Laurie Schaffner, eds, *Regulating Sex: The Politics of Intimacy and Identity* (New York: Routledge, 2005) at 3 (regulating sexual behaviour).

⁷¹ *R. v. Plant*, [1993] 3 S.C.R. 281 at para 292.

⁷² Eric H. Reiter, (2009) “Privacy and the Charter: Protection of People or Places?” 88:1 Can Bar Rev 119 at 133.

⁷³ *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SC 44 at para 77; see also *Morgentaler* 1988, *supra* note 62 (“To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated” at 178); *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 241.

donation.⁷⁴ After years of public campaigning, on September 30, 2022, CBS will end its eligibility criteria specific to MSM.⁷⁵ Activists had long decried the ban as unconstitutional discrimination on the basis of sexual orientation, though had never argued an infringement of privacy contrary to Section 7 or 8 of the *Charter*.⁷⁶ In many instances of sexual privacy invasions against SGM, while discrimination is the animating factor, the right to privacy is collateral damage.

Skeptics often present a false dichotomy between privacy and freedom of expression.⁷⁷ On the contrary, without a reasonable expectation of privacy, individuals cannot fully realize the freedom of expression. When the most confidential and secret parts of people's lives "are exposed to the possibility of intrusion [they] begin to be afraid that their thoughts, words, and relationships will be the subject of interception and analysis."⁷⁸ Corporations who enable privacy-infringing hate speech and sexual violence often invoke vague bromides of free expression when justifying their failure to protect vulnerable groups.⁷⁹ Critics of campus or office "speech codes" claim that administrative overreach curtails protected speech. However, these actors neglect to fully acknowledge how privacy-infringing discriminatory harassment (outing closeted individuals, doxing)⁸⁰ deprives marginalized groups of equitable access.⁸¹ The tension between these competing—yet complementary—interests lies at the heart of sexual privacy: the freedom of heterodox self-expression and the contextual protection from privacy-infringing expression.⁸²

Secrecy: Conflicts and Complements

Anti-essentialist sexual privacy challenges normative descriptions of the two intermediate zones of the public-private spectrum, the intimate and semi-private (secret).⁸³ Secrecy is a unique form of "the exercise of control over the

⁷⁴ See generally "The History", online: *All Blood Is Equal* <allbloodisequal.ca/the-history>.

⁷⁵ "Men who have sex with men" (updated 28 April 2022), online: *Canadian Blood Services* <blood.ca/en/blood/am-i-eligible-donate-blood/men-who-have-sex-men>.

⁷⁶ See *Canada (Attorney General) v Karas*, [2021] FCJ No 582, 2021 FC 594, [2021] ACF No 582; see also *Soulli re c Soci t  canadienne du sang*, [2016] ACF no 1499, 2016 CF 1346, [2016] FCJ No 1499; *Canadian Blood Services v Freeman*, [2010] OJ No 3811; M-516, *Blood and Organ Donations*, 2d Sess, 41st Parl, 2014 (placed on notice 5 June 2014).

⁷⁷ Carly Nyst, "Two sides of the same coin – the right to privacy and freedom of expression" (2 February 2018), online: *Privacy International Organization* <privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression>.

⁷⁸ *Ibid.*

⁷⁹ Elena Debr , "The Independent Facebook Oversight Board Has Made Its First Rulings" (28 January 2021), online: *Slate* <slate.com/technology/2021/01/facebook-oversight-boards-content-moderation-rulings.html>.

⁸⁰ A definition of doxing will be found at 30-31, *below*.

⁸¹ See Brett A. Sokolow, Daniel Kast & Timothy J. Dunn, "The Intersection of Free Speech and Harassment Rules" (2011) 38:4 ABA J 19.

⁸² For further discussion of this topic, see note 135 and accompanying text.

⁸³ Koops et al, *supra* note 22 at 548-551.

person, or intentional concealment.”⁸⁴ Some scholars differentiate between privacy and secrecy by claiming that privacy is consensual, whereas secrecy is not.⁸⁵ Others distinguish them by their points of reference: secrecy equates to hiding, and privacy to being unobserved.⁸⁶ James Grubman contends that all secrets involve private information, but “what makes them secrets is that the withheld personal information is important to actions in the relationship.”⁸⁷ However, because privacy and secrecy both involve setting boundaries and controlling access, it can be difficult to differentiate between the two in reality.⁸⁸

Secrecy and intimacy act as interesting foils to one another. Both are relational, though to sometimes antithetical ends. A reductionist framework goes like this: intimacy builds trust; secrecy erodes it. Koops et al say otherwise: in the intimate zone, individuals act within small units; in the semi-private (secret) zone, individuals hold information from or disclose it to others.⁸⁹ Painting secrecy as an irredeemable social ill fails to consider its potential to safeguard individuals from shame, violence, and rejection.⁹⁰ Queer youth rely on a right to privacy in the home in order to develop their identities alone, but this effort does not automatically require secrecy. However, some also need secrecy to build intimacy *outside* the home. A fairer reading of secrecy acknowledges its potential to both ensure and impair security, consent, and autonomy.

Real life examples expose this fraught dynamic: In 2014, a man and a woman met and briefly dated. The woman told the man that she was taking birth control and did not intend to get pregnant. With this in mind, the two decided to have unprotected sex. Several weeks after their sexual relationship ended, the woman told the man that she was ten weeks pregnant with his child. He sued her for fraud vitiating consent to sexual intercourse, battery, and negligent misrepresentation. The Ontario Court of Appeal heard *PP v. DD* in 2017.⁹¹

In its decision, the Court outlined two criteria for consent vitiated by fraud: (1) dishonesty, which can include the non-disclosure of important facts; and (2) a deprivation or risk of deprivation in the form of serious bodily harm that results from the dishonesty.⁹² After satisfying the first requirement, the Court compared the second with facts from similar cases. In *R. v. Cuerrier*, the accused knowingly had sexual intercourse with two women without revealing his positive (and

⁸⁴ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Pantheon Books, 1983) at 11.

⁸⁵ *Ibid* at 49.

⁸⁶ Kelsey Yandura, “The Difference Between Privacy and Secrecy,” online: *Rewire* <rewire.org/the-difference-between-privacy-and-secrecy/>.

⁸⁷ James Grubman, “Privacy vs. Secrecy” (2001) 28 *More Than Money J* 12 at 12.

⁸⁸ Carol Warren & Barbara Laslett, “Privacy and Secrecy: A Conceptual Comparison” (2010) 33:3 *J Soc Iss* 43.

⁸⁹ Koops et al, *supra* note 22 at 548-552.

⁹⁰ Clare Birchall, “Transparency, Interrupted: Secrets of the Left” (2011) 28 *Theory Cult Soc* 7.

⁹¹ 2017 ONCA 180 (CanLII) [*PP v. DD*].

⁹² *Ibid* at para 79

potentially transmissible) HIV status.⁹³ In *R. v. Hutchinson*, unbeknownst to his partner, the accused punctured holes in his condoms before they had sexual intercourse, exposing her to “a significant risk of serious bodily harm, namely becoming pregnant with all of its attendant risks.”⁹⁴ Both defendants were found guilty of the criminal offense of fraud vitiating consent.

In *PP v. DD*, the Court dismissed the plaintiff’s suit, deciding that his risk of bodily harm did not meet the level established in either *Cuerrier* or *Huthinson*.⁹⁵ Justice Perell, writing for the Court, considered whether to grant PP leave to amend his pleading to add a cause of action that would better support his emotional harm claim,⁹⁶ although in his reasons he did not consider the tort of intrusion upon seclusion. How might the Court have decided this case had PP argued under his privacy interests? Returning to the *Jones v. Tsige* criteria, PP could have satisfied the Court that DD’s behaviour was intentional and reckless, invaded his “private affairs or concerns,” and caused him distress.⁹⁷

On the other hand, this decision reinforced DD’s privacy rights. The Court’s ruling ostensibly strengthened common law protections of secrecy in intimate relationships. From the facts at hand, I concede DD is not a sympathetic character. Her actions demonstrate that secrets (and lies) can undermine consent regardless of whether they meet the legal standard for fraud. However, secrecy can also protect vulnerable individuals from violence and coercion. Consider wives in financially abusive marriages who keep secret “rainy day” funds for emergencies, or HIV-positive men with undetectable viral loads who do not disclose their statuses on dates for fear of abuse. *PP v. DD* suggests that secrets are only actionable when they put those not privy to them at serious risk of bodily, not non-pathological emotional harm.⁹⁸

In *Intimate Lies and the Law*, Jill Elain Hasday encourages us to facilitate “privacy-friendly” investigations into our intimates’ lives in order to uncover

⁹³ *R. v. Cuerrier*, 1998 CanLII 796 (SCC), [1998] 2 SCR 371; See also Chinyere Okoli et al, “Undetectable equals untransmittable (U = U): awareness and associations with health outcomes among people living with HIV in 25 countries” (2021) 97 Sex Transm Infect 18 (I use “potentially transmissible” in contradistinction to undetectable equals untransmittable (U=U)).

⁹⁴ *PP v. DD*, *supra* note 91 at para 80, citing *R. v. Hutchinson*, 2014 SCC 19 (CanLII), [2014] 1 S.C.R. 346.

⁹⁵ *Ibid* at para 57 (The Court also struck down PP’s claim on the basis that Ontario’s legislative scheme for family law disputes was a more apt arena than a fault-based context for emotional harm arising from unplanned parenthood).

⁹⁶ *Ibid* at para 27 (Justice Perell considered the “conventional legal tools” of sexual battery, negligence, and intentional infliction of mental suffering).

⁹⁷ *Supra* note 53 at para 71 (The *Jones* distress requirement, which operates pursuant to a reasonability standard and need not be pathological, is a much lower bar to clear than the risk of serious bodily harm. I note, however, that for this hypothetical cause of action to have been successful, the Court must have also decided that the case could be resolved through a fault-based, rather than family law, scheme).

⁹⁸ Robin Brown, “Involuntary Parenthood: The Court of Appeal for Ontario’s decision in *PP v. DD*” (Paper delivered at the 37th Annual Canadian Civil Litigation Conference, 18 November 2017), (2017) 10D CanLIIDocs 3801 at 3.

deception, and courts to provide wider redress to the deceived.⁹⁹ Patrick Keeler describes Hasday's recommendations as a "hunt and punish" regime.¹⁰⁰ In her book, Hasday discusses cases of individuals concealing their sexuality, gender, and HIV status. She catalogues different kinds of deception, including deception for personal gain, legal protection, and to maintain an existing façade.¹⁰¹ Each of these types suggests a simplistic deceiver-deceived dichotomy that dissolves when we inject it with nuance and understand contributing systemic reasons for deception. In intimate relationships, "lying about sex has evolved as one way that well-meaning people from all walks of life cope with the interplay of conflicting physical, emotional, and social imperatives."¹⁰²

Hasday presents a portrait of queer men with purely selfish motivations who deceive their wives into believing they are heterosexual.¹⁰³ What other factors lead individuals to hide their sexualities, even if the result could hurt their intimates? Studies indicate numerous fears that inhibit disclosure: potentially negative emotional reactions; changes in relationships; rejection; stigmatizing attitudes towards homo- and bisexuality; prior negative experiences with disclosure; professional and personal needs to maintain others' perceptions of them; and the concern that disclosure to some will necessitate a broader coming out.¹⁰⁴ In Canada, LGBT people are nearly three times more likely than heterosexual people to report being victims of a violent crime.¹⁰⁵ As such, closeted queer individuals have well-founded anxieties over the possible

⁹⁹ Jill Elain Hasday, *Intimate Lies and the Law* (New York: Oxford University Press, 2019) at 199.

¹⁰⁰ Patrick Keeler, "The Truth at All Costs: A Privacy-Focused Critique of Intimate Lies and the Law" (2021) McGill University Faculty of Law Working Paper No 2021/1.

¹⁰¹ Hasday, *supra* note 99 at 48 (Hasday details her taxonomy: linchpin deception, when a deceiver deceives to continue benefiting from a relationship; gateway deception, when deception allows the deceiver intimacy as a route to gain otherwise unattainable legal rights of privileges; deception for mastery and control; those who deceive in order to free themselves from subordination; and deception to maintain an ongoing façade).

¹⁰² Allen, "Lying to Protect Privacy" (1999) 44:2 U Pa L Rev 161 at 162.

¹⁰³ Hasday, *supra* note 99 at 87.

¹⁰⁴ Eric W. Schrimshaw, Martin J. Downing, Jr. & Daniel J. Cohn, "Reasons for Non-Disclosure of Sexual Orientation among Behaviorally-Bisexual Men: Non-disclosure as Stigma Management" (2016) 47:1 Arch Sex Behav 219 at 221.

¹⁰⁵ Statistics Canada, *Sexual minority people almost three times more likely to experience violent victimization than heterosexual people*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 9 September 2020) ("Gay, lesbian, bisexual and other sexual minority people in Canada were almost three times more likely than heterosexual Canadians to report that they had been physically or sexually assaulted in the previous 12 months in 2018 and more than twice as likely to report having been violently victimized since the age of 15. Sexual minority Canadians were also more than twice as likely as heterosexual Canadians to experience inappropriate sexual behaviours in public, online or at work in the previous 12 months, according to a new study"); see also Statistics Canada, *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018*, by Brianna Jaffray, Catalogue No 85-002-X202000100009 (Ottawa: Statistics Canada, 2020); cf Williams Institute, Press Release, "LGBT people nearly four times more likely than non-LGBT people to be victims of violent crime" (2 October 2020), online: [UCLA <williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/>](http://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/) (in comparison, in the USA, this rate is even higher).

professional, emotional, psychological, and physical damages coming out could entail.

These risks are ubiquitous to trans individuals, yet Hasday makes the same argument regarding trans “gender fraud.” Hasday invokes ingrained cultural attitudes that synonymize transgenderism with danger and deceit. Scores of media depictions—from *The Crying Game* to *Ace Ventura: Pet Detective*—have reinforced this narrative.¹⁰⁶ Statistically, the opposite is true: trans people are much more likely to be the victims rather than the perpetrators of violence, especially of the kind directly related to gender disclosure. As a response, “passing”¹⁰⁷ for cisgender has become a form of stigma management. In defense of voluntary non-disclosure, Alex Sharpe argues that “secrecy is central, indeed indispensable, to human well-being ... privacy is essential to the formation of relationships, including those of love and friendship. For relationships between the self and others are based on an individual's ability to share and control personal information.”¹⁰⁸

In 2013, the English and Wales Court of Appeals affirmed a lower court's conviction of 18-year-old Justine McNally for “rape by deception” relating to “gender fraud.”¹⁰⁹ McNally met the complainant, M, in an online chatroom when they were 13 and 12 years old, respectively. McNally presented as a boy named Scott Hill. They developed a virtual intimate relationship.¹¹⁰ When the two met in person several years later, M “discovered” McNally's sex and gender history, claiming to feel physically sick in response. She alleged McNally's “active deception” (as opposed to non-disclosure) regarding their gender identity vitiated her consent. This instance is one of several in which courts across different jurisdictions have upheld convictions for “gender deception” in fraud vitiating consent cases.¹¹¹

Some jurists have wondered whether *R v. McNally* is the ‘right’ case to use when discussing the discriminatory effect of gender deception laws:

¹⁰⁶ See Jackson Taylor McLaren, “Recognize Me: An Analysis of Transgender Media Representation” (2018) 45 Windsor Rev Legal Soc Issues 1; see also Emma Reynolds, “Books and movies keep creating transgender aggressors. But trans people are far more likely to be victims of violence” (25 September 2020), online: [CNN <cnn.com/2020/09/25/entertainment/transgender-ik-rowling-media-intl/index.html>](http://cnn.com/2020/09/25/entertainment/transgender-ik-rowling-media-intl/index.html).

¹⁰⁷ See Thomas J Billard, ““Passing” and the Politics of Deception: Transgender Bodies, Cisgender Aesthetics, and the Policing of Inconspicuous Marginal Identities,” in Tony Docan-Morgan, ed, *The Palgrave Handbook of Deceptive Communication* (New York: Palgrave Macmillan, 2019), 463 at 465. This term has its origins in racial passing in the United States (see generally Allyson Hobbs, *A Chosen Exile: A History of Racial Passing in American Life* (Cambridge, MA: Harvard University Press, 2014)).

¹⁰⁸ Alex Sharpe, “Transgender Marriage and the Legal Obligation to Disclose Gender History” (2012) 75:1 Mod L Rev 33 at 51.

¹⁰⁹ *McNally v R* [Crim 1051 (2013)].

¹¹⁰ For further discussion of the roles of secrecy and intimacy in the development of digital sexual privacy, see Part II, *below*.

¹¹¹ See for example, *Israel v Alkobi*, [2003] IsrDC 3341(3) (Haifa District Court, Israel).

McNally's prosecution is complex because they attested to identifying as male prior to and during the alleged offences (and indicated their intent to undergo gender reassignment surgery), although they subsequently identified as female, their gender assigned at birth, at trial.¹¹² Other academics have suggested that such a case highlights an important element of trans non-disclosure in consent cases. Florence Ashley uses the term "(trans)gender" to resist the "binary imposed between trans deceivers and cisgender victims."¹¹³ A superior framework encompasses gender non-conforming and transmasculine individuals in order to "transcend neat social categorisation schemes, refuse to exclude others who cannot provide us with palatable narratives, and delve into the underlying material conditions faced by people who are accused of (trans)gender fraud."¹¹⁴

By extending sexual privacy rights to those who do not normatively present as men or women, we ensure protection for those trans people who do. Ashley's critique suggests that equality-centric arguments against gender fraud frame the issue too narrowly as one with identifiable marginalized groups who need extra protections, when privacy is already co-constitutive with equality.¹¹⁵ As Ashley argues, "(Trans)gender fraud should be opposed not because transgender men are men, but rather because gender and gender history are a private matter."¹¹⁶ Rejecting "gender fraud" as a viable cause of action subverts the heteronormative binary of gender performance. Accordingly, in Canadian law post-*PP v. DD* and *Cuerrier*, "gender fraud" would not give rise to a risk of serious bodily harm in either a civil or criminal context. If it did, partners would then have to worry about every step they take outside the traditional expectations of gender, even in the private and intimate zones.

Hasday's final example discusses "[d]eception [that] can facilitate the transmission of venereal disease ... someone who knows he has a sexually transmitted disease can deceive his sexual partner by falsely denying the infection or by deliberately remaining silent with the intent to mislead his partner into believing that he is uninfected."¹¹⁷ Hasday cites several studies finding that some HIV-positive individuals do not disclose their statuses to their primary or casual sexual partners, yet none of these studies discusses the risk or actual rate of virus transmission.¹¹⁸ Hasday does not consider HIV-positive individuals whose viral loads are undetectable, therefore untransmittable. HIV is arguably the most stigmatized disease in history,¹¹⁹ and Hasday's deceiver-deceived

¹¹² For this reason, I have used the gender-neutral third-person pronoun to refer to McNally.

¹¹³ Florence Ashley, "Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities" (2018) 41:2 Dal LJ 339 at 342.

¹¹⁴ *Ibid.*

¹¹⁵ For further discussion of the intersection between privacy and equality, see 32-34, *below*.

¹¹⁶ Ashley, *supra* note 113.

¹¹⁷ Hasday, *supra* note 99 at 82.

¹¹⁸ *Ibid* at 15.

¹¹⁹ Anish P. Mahajan et al, "Stigma in the HIV/AIDS epidemic: A review of the literature and recommendations for the way forward" (2010) 22:2 AIDS 67 at 77.

binary encourages further stigmatization and legal forms of violence against seropositive individuals. It robs them of informational control over sensitive personal information.¹²⁰

Each of these examples also reinforces a patronizing and essentialist view of the “deceived” as having no agency in mutually engaging in sexual intercourse with one’s “deceiver.”¹²¹ In the intimate zone, we are entitled to a reasonable measure of secrecy in proportion to our partner’s knowledge of risk.¹²² At the same time, we have the right *and* the responsibility to ask questions in order to ascertain knowledge of this risk. Why is the burden solely on HIV-positive individuals to disclose their statuses, with no onus on their sexual partners to ask first? Privacy is not inflexible. We modulate our flows of information based on our levels of comfort within context-relative informational norms.¹²³ Intimacy is no different: we develop “relationships of love and caring through a process of mutual self-disclosure and vulnerability.”¹²⁴ Contrary to Hasday’s presumption, reinforcing the reasonable right to privacy between intimates—and destigmatizing secrecy—is ultimately a more effective way to encourage honesty.

II. *How has digitization affected sexual privacy?*

In the digital age, we have personal digital sexual identities. Privacy skeptics who can only conceive of this for tech-saturated groups—from pornographic film actors to online dating application users—fail to reconcile with the extent of our digital immersion. Even the most extreme luddite’s passport lists their name, photo, and sex. All new Canadian passports contain data chips that store this information.¹²⁵ Many people unknowingly demonstrate the “privacy paradox”: their attitudes towards protecting their privacy do not reflect their actual behaviours to this effect.¹²⁶ Anyone who has ever even posed for a picture is a potential victim of a digital sexual privacy violation. An estimated 96% of all deepfakes, a form of image impersonation using artificial intelligence, found online are pornographic in nature.¹²⁷ Technology has taken hold of our personal sexual information regardless of our consent.

¹²⁰ Allen, “Coercing Privacy”, *supra* note 48 at 745-746.

¹²¹ Alana Klein, “Feminism and the Criminalisation of HIV Non-Disclosure” in Catherine Stanton & Hannah Quirk, eds, *Criminalising Contagion* (New York: Cambridge University Press, 2016) at 185.

¹²² Matthew J. Weait, “Harm, consent and the limits of privacy” (2005) 13:1 *Fem Leg Stud* 106, citing Jennifer Nedelsky, “Reconceiving autonomy: sources, thoughts and possibilities” (1989) 1:7 *Yale JL & Feminism* 7 at 36.

¹²³ Nissenbaum, “Privacy as Contextual Integrity” (2004) 79:1 *Wash L Rev* 119 at 128.

¹²⁴ Citron, “Sexual Privacy”, *supra* note 6 at 1875.

¹²⁵ Canada, Travel and Tourism, *About your Canadian Passport: Canadian passports and other travel documents: Applying in Canada* (8 January 2020) (“All new Canadian passports are 36-page books that have a data chip in them. They are called ePassports”).

¹²⁶ Francis & Francis, *supra* note 11 at 46-47.

¹²⁷ Henry Ajder et al, “The State of Deepfakes: Landscapes, Threats, and Impact” (2019) at 1, online (pdf): *Deeptrace* <regmedia.co.uk/2019/10/08/deepfake_report.pdf>; see also note 158

However, technology has also revolutionized our positive freedom-based privacy rights to self-development. Thus, to sufficiently answer the question of how digitization has affected sexual privacy, I divide the following section in two: what risks to sexual privacy has digitization produced? And what benefits? I answer the first part by describing technology-facilitated sexuality and gender-based violence through the lens of privacy typologies. I answer the second by discussing the values digital sexual privacy ensures. Both the risks of violations and the benefits of protections disproportionately impact the wellbeings of women and sexual and gender minorities.

Digital sexual privacy violations collapse the binary between informational and “physical” forms of privacy. Just as physical privacy is a guardian of informational privacy, the reverse is true. Breaches of victims’ personal sexual information impinge on their negative freedoms to exclude others from physical and spatial access and positive freedoms make decisions and associate with the individuals of their choice. While detailing these two conceptions of privacy, informational privacy’s overarching status should be borne in mind.¹²⁸

1. Negative Freedom-Based Privacy

Technology-Facilitated Sexuality and Gender-Based Violence

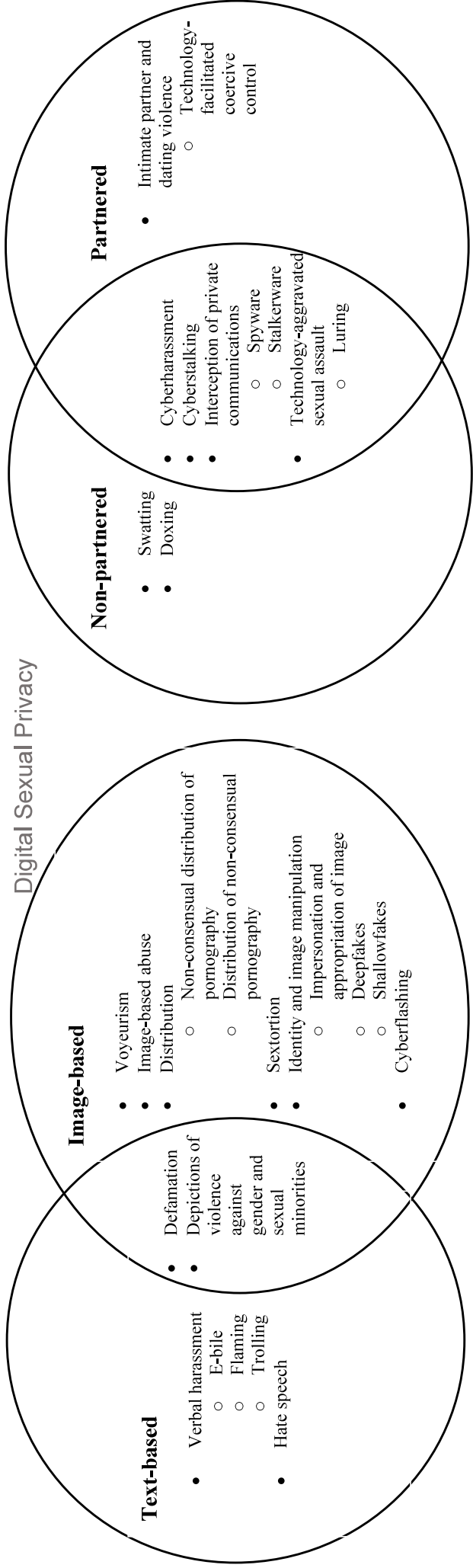
A developed body of literature comprehensively documents growing forms of technology-facilitated sexuality and gender-based violence.¹²⁹ TFSGBV constitutes a violation of negative freedom-based privacy: our rights to exclude others from access to our bodies, private spaces, communications, and property. In order to properly situate TFSGBV within digital sexual privacy, I have categorized its constituent behaviours through descriptions of their modalities (text, image), their focuses on online activity versus in-person abuse aggravated by technologies, and the zones of privacy they typically implicate (group versus individual, intimate versus public). The list of TFSGBV types is not exhaustive, though I illustrate the predominant ones in the figure below:

and accompanying text for further discussion of deepfakes and other image impersonation techniques.

¹²⁸ Koops et al, *supra* note 24 at 484.

¹²⁹ See Khoo *supra* note 3; McGlynn, Rackley & Houghton, *supra* note 3; Suzie Dunn, “Technology-Facilitated Gender-Based Violence: An Overview” (26 January 2021), online: *Centre for International Governance Innovation: Supporting a Safer Internet Paper No. 1* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3772042>. ; Jane Bailey & Valerie Steeves, “Defamation Law in the Age of the Internet: Young People’s Perspectives” (15 June 2017), online (pdf): *Law Commission of Ontario* <lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf>; Moira Aikenhead, “A ‘Reasonable’ Expectation of Sexual Privacy in the Digital Age” (2018) 41:2 Dal LJ 273.

Digital Sexual Privacy

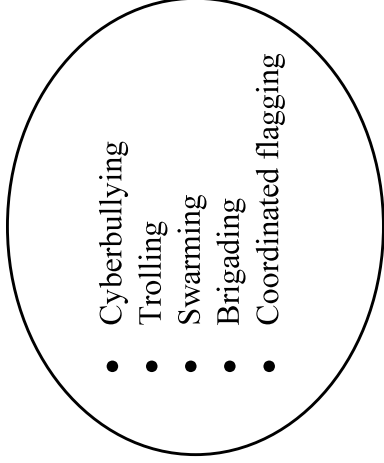


Text and image-based categories

Individual

Technology-Facilitated Sexuality and Gender-Based Violence

Group



Residual categories



Figure 1: Taxonomies of Technology-Facilitated Sexuality and Gender-Based Violence

First, I categorize TFSGBV into group versus individual activities. All group activities have individual analogues. However, group behaviours have distinct effects on victims for two main reasons: (1) often the full effect of abuse may only be felt through a critical mass of perpetrators and (2) the abuse from the group is much greater than the sum of its parts. Within individual behaviours, I distinguish between primarily text- and image-based activities, which are the most recognized forms of TFSGBV. I then discuss residual forms, like behaviours enabling oneself or encouraging others to perpetuate further (typically offline) abuse. Amongst these behaviours, I identify typical partner and ex-partner abuse tactics.

Group Behaviours

Brigading¹³⁰ refers to a number of organized activities manipulating online platforms into either boosting harmful content (such as graphic depictions of sexual violence) or suppressing undesired expression. Coordinated flagging campaigns occur when groups of abusers exploit a platform's abuse-reporting mechanism by falsely reporting or 'flagging' content for violating community guidelines or terms of use as a method of silencing certain individuals.¹³¹ Groups of flaggers commonly use this tool to marginalize women and religious, racial, and sexual minorities. Because platforms often only respond to mass take-down requests, flagging only achieves its full potential in groups. Other forms include review bombing, in which large numbers of people (or, in some cases, a few people with multiple or "bot" accounts) leave negative user reviews online,¹³² and mass down-voting used to silence individual users.¹³³

¹³⁰ See Phoenix CS Andrews, "Social Media Futures: What is Brigading?" (10 March 2021), online: *Tony Blair Institute for Global Change* <institute.global/policy/social-media-futures-what-brigading>.

¹³¹ See Kate Crawford & Tarleton Gillespie, "What is a flag for? Social media reporting tools and the vocabulary of complaint" (2014) 18:3 *New Media & Soc* 410 at 421.

¹³² See generally, Ben Kuchera, "The Anatomy of a Review Bombing Campaign" (4 October 2017), online: *Polygon* <polygon.com/2017/10/4/16418832/pubg-firewatch-steam-review-bomb>; see also Damien McFerran, "Random: AI: The Somnium Files Got Review-Bombed By Someone Obsessed With One Of Its Characters" (12 February 2020), online: *Nintendo Life* <nintendolife.com/news/2020/02/random-ai-the-somnium-files-got-review-bombed-by-someone-obsessed-with-one-of-its-characters> (the use of artificial intelligence to coordinate mass review bombing campaigns); see for example Stephanie Merry, "People hate the 'Ghostbusters' trailer, and yes, it's because it stars women" (4 March 2016), online: *The Washington Post* <washingtonpost.com/news/arts-and-entertainment/wp/2016/03/04/people-are-hating-the-ghostbusters-trailer-guess-why/> (review bombing as a gendered phenomenon).

¹³³ *House of Commons FEWO Committee Meeting*, 42nd Parl, 1st Sess, No 37 (5 December 2016) (Matthew Johnson) ("Manipulating algorithms in this way can also be used to essentially silence victims of [TFGBV], especially in platforms that allow for downvoting content as well as upvoting" at 1535).

Groups participate in “online mobbing” or “swarming” when they synchronize attacks against an individual. Trolling, comprising a large set of disruptive and violence-inciting behaviours, may be done individually or in groups. Several websites are “online compendium[s] of troll humor and troll lore” in which groups can coalesce and identify mutual victims.¹³⁴ Trolling as a group activity is particularly effective as users can post inflammatory content anonymously, simultaneously amplifying their abuse while evading personal repercussions.

Individual acts can also trigger group-based violence. In 2013, Australian journalist Tabitha Stone publicly criticized music artist Tyler, the Creator’s lyrics on Twitter for their promotions of sexual violence against women, mass violence, and slurs.¹³⁵ In response, Tyler, the Creator, who was due to perform in Australia, retweeted Stone’s tweet to his 1.7 million Twitter followers and encouraged concertgoers to perpetrate sexual violence against her at his concert.¹³⁶ A horde of his followers answered the call by tweeting hate speech and threats of sexual abuse and death at Stone, which the artist encouraged online. Many users alleged that Stone, as the one who initiated the interaction on Twitter, had duly opened herself up to public backlash.

Individuals engaging in confrontational or even vituperative behaviour online is an inherent consequence of the internet’s “marketplace of ideas.”¹³⁷ However, the power of groups to focus this vituperation on a single victim—especially a young woman compared to an influential celebrity—creates an offline risk to sexual privacy in the public zone. For women and SGM who engage in any kind of knowledge or creative based work, “the Internet is [their] home, a way to contribute [their] work to the wider public discourse. For

¹³⁴ Mattathias Schwartz, “The Trolls Among Us,” *The New York Times* (3 August 2008), online: <nytimes.com/2008/08/03/magazine/03trolls-t.html>.

¹³⁵ Talitha Stone, “Tyler the Creator shouldn’t be allowed to verbally abuse me,” *The Guardian* (7 June 2013), online: <theguardian.com/commentisfree/2013/jun/07/tyler-the-creator-rape-abuse> (Examples of misogyny in Tyler, the Creator’s lyrics Stone raised include, “I just wanna drag your lifeless body to the forest and fornicate with it” (“She”), “Rape a pregnant bitch and tell my friends I had a threesome” (Tron Cat), “You call this shit rape but I think that rape’s fun” (“Blow”), and “Punches to the stomach where that bastard kid supposed to be” (“Sandwiches”). Several songs feature homophobic and misogynistic slurs (“faggot,” “pussy”) including “Rusty” and “Fall”); see also Matthew Strauss and Quinn Moreland, “Tyler, the Creator Lyrics Lead to Terroristic Threat Charge for College Student,” *Pitchfork* (17 September 2019), online: <pitchfork.com/news/tyler-the-creator-lyrics-lead-to-terroristic-threat-charge-for-college-student/> (In 2019, a university student in Alabama was charged with making a public terroristic threat after writing the Tyler, the Creator lyrics “Kill People / Burn Shit / Fuck School” (“Radicals”) on school property).

¹³⁶ Stone, *supra* note 135 (Tyler, the Creator allegedly dedicated the song “Bitch Suck Dick” to Stone, which includes the lyrics “You dead bitch... Punch a bitch in her mouth just for talkin’ shit,” then said to the crowd, “Fucking bitch, I wish she could hear me call her a bitch, too, fucking whore. Yeah, I got a sold-out show right now, bitch. Hey, this fucking song is dedicated to you, you fucking cunt”).

¹³⁷ Vincent F. Hendricks, “The Marketplace of Ideas in the Age of Information” (15 February 2022), online: *The Forum Network* <oecd-forum.org/posts/the-marketplace-of-ideas-in-the-age-of-information>.

journalists, activists, artists, and academics, [their] IRL [in-real-life] identity and our digital identities are becoming increasingly wed together.”¹³⁸ In an era of increasing hypervisibility, marginalized groups must often choose between self-censoring as ex-ante protection or accepting the possibly disproportionate consequences of digital expression.¹³⁹

Individual Behaviours

Individual text-based activities include online verbal harassment and hate speech, as well as public threats of offline sexual violence and murder.¹⁴⁰ Flaming is the act of posting or sending offensive messages (“flames”) online, typically via live chat.¹⁴¹ E-bile is the digital version of hate mail, and is overwhelmingly gendered, repetitive, and inflamed by victim response.¹⁴² Defamation and misrepresentation, which I discuss below, can be both visual (sexual images falsely attributed to an individual or taken out of context) and verbal (false and public descriptions of an individual’s sexual characteristics or behaviours).¹⁴³

Image-based abuse can include: non-consensually accessing, using, and distributing someone else’s images; manipulating a victim’s image, either through impersonation or misappropriation; and sending another person unsolicited obscene pictures. An example of the latter is cyberflashing, the unsolicited distribution of intimate, obscene, or violent images to a person.¹⁴⁴ Perpetrators typically utilize proprietary wireless ad hoc services like AirDrop and Bluetooth to make connections with other devices in their vicinity, hacking their built-in automatic pairing function.¹⁴⁵ No offence in the *Criminal Code* penalizes

¹³⁸ Abigail Curlew, “People will try to find where you live’: On doxxing and the social media surveillance monster” (22 March 2019), online: *Medium* <medium.com/@abigail.curlew/people-will-try-to-find-where-you-live-on-doxxing-and-the-social-media-surveillance-monster-b05bab5438fd>.

¹³⁹ See also Brogan Driscoll, “Caroline Criado Perez Says Twitter Rape Threat Campaign ‘Isn’t A Feminist Issue’”, *The Huffington Post* (29 July 2013), online: <huffingtonpost.co.uk/2013/07/29/caroline-criado-perez-twitter-rape-threats-feminist_n_3671001.html> (“Men get attacked because they’ve said or done something someone doesn’t like, whereas women get attacked because they’re visible”).

¹⁴⁰ See for example “Two jailed for Twitter abuse of feminist campaigner”, *The Guardian* (24 January 2014), online: <theguardian.com/uk-news/2014/jan/24/two-jailed-twitter-abuse-feminist-campaigner>.

¹⁴¹ Emma Jane, “Flaming? What flaming? The pitfalls and potentials of researching online hostility” (2015) 17:1 *Ethics Inf Technol* 65.

¹⁴² *Ibid* at 80.

¹⁴³ See note 190 and accompanying text for an example of the latter, *below*, in which an underage girl was the subject of a false Facebook profile in her name depicting her sexual preferences and experiences.

¹⁴⁴ Clare McGlynn, “Cyberflashing: Consent, Reform and the Criminal Law” (2022) 0:0 *J Crim L* 1 (the majority of cyberflashing cases are “unsolicited dick pics” at 2).

¹⁴⁵ Sophie Gallagher, “New ‘Cyber-Flashing’ Trend Going Unreported Because Victims Aren’t Coming Forward”, *The Huffington Post* (15 August 2017), online:

cyberflashing or similar behaviour.¹⁴⁶ Currently, Singapore is the only jurisdiction to have criminalized the act.¹⁴⁷

Two forms of image-based abuse, voyeurism and NCDII, are listed in the *Code*.¹⁴⁸ Individuals commit technology-facilitated voyeurism when they surreptitiously observe or make a visual recording of another person who is in “circumstances that give rise to a reasonable expectation of privacy.”¹⁴⁹ NCDII involves “circulating intimate or sexual images or recordings of someone without their consent, such as where the person is nude, partially clothed, or engaged in sexual activity, often ‘with the purpose of shaming, stigmatizing or harming the victim.’”¹⁵⁰ Non-consensual distribution of intimate images can apply in both cases in which victims consented to the image being taken but not its distribution, and to when they consented to neither (in which case they are de facto victims of voyeurism as well).¹⁵¹ Sextortion is abuse in which a perpetrator captures intimate images or videos of an individual (whether consensually or otherwise) and threatens to distribute them unless the victim pays the perpetrator.¹⁵²

Many commonly refer to NCDII as “revenge porn.” However, activists have criticized both words in this term. The word “revenge” implies that the victim has done something to provoke their aggressor’s ire and deserve their abuse.¹⁵³

huffingtonpost.co.uk/entry/cyber-flashing-uk-reports-hidden-problem_uk_5992d291e4b08a24727728fe>.

¹⁴⁶ *Criminal Code*, RSC 1985, c C-46, s162.1(1) [*Code*] (“Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty.” To be guilty of this offence, the defendant would have to distribute an intimate image of another, to which the person depicted in the image did not give consent).

¹⁴⁷ James Griffiths, “‘Cyber flashers’ in Singapore could now get two years in prison”, *CNN* (7 May 2019), online: <edition.cnn.com/2019/05/07/asia/singapore-cyber-flashing-intl/index.html>.

¹⁴⁸ *Code*, *supra* note 146 at ss 162(1), 162.1(1).

¹⁴⁹ *R v Jarvis*, 2019 SCC 10 at para 1; see also Rick Sarre, “What is ‘upskirting’ and what are your rights to privacy under the law?”, *The Conversation* (29 March 2021), online:

<theconversation.com/what-is-upskirting-and-what-are-your-rights-to-privacy-under-the-law-158060> (taking non-consensual photographs, specifically of women’s genitalia in public, is commonly termed “upskirting”).

¹⁵⁰ Khoo, *supra* note 3 at 17, citing Dubravka Šimonović, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UNHRC, 38th Sess, UN Doc A/HRC/38/47 (2018) at 37.

¹⁵¹ *Code*, *supra* note 146 at s 162(4) (“Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available).

¹⁵² Jessica West, “Cyber-Violence Against Women” (May 2014) at 10, online (pdf): *Battered Women’s Support Services* <bwss.org/wp-content/uploads/2014/05/CyberVAWRReportJessicaWest.pdf> (perpetrators may force victims to commit sexual acts with or for them on camera, or have captured the images through acts of voyeurism).

¹⁵³ Josh Taylor, “Don’t call it ‘revenge porn’, victims’ groups say”, *Crikey* (15 January 2016), online: <crikey.com.au/2016/01/15/dont-call-it-revenge-porn-victims-groups-say/>.

“Revenge” also suggests a relationship between perpetrator and victim, when many individuals (especially public figures) may be complete strangers to their aggressors. For example, the 2014 celebrity nude photo leak, popularly dubbed “The Fappening” and “Celebgate,” occurred when anonymous hackers posted a collection of almost 500 private images, many containing nudity, of mostly women celebrities to the imageboard website 4chan. The images subsequently shared widely across the internet.¹⁵⁴ This example illustrates the third major critique of the term “revenge porn”: not all non-consensually distributed images are pornographic, and using this term embeds the notion that only pornographic ones constitute criminally actionable invasions of digital sexual privacy.¹⁵⁵

In the wake of the 2014 photo leak, many celebrities issued public statements either confirming or denying the authenticity of the photos. Because of the leak’s anonymous source and the fact that so many of the victims confirmed the images were real, those who claimed to be the victims of doctored images faced incredulity from the public. Actress Victoria Justice wrote on Twitter, “Shortly after I tweeted about certain pics of me being fake, I was faced with a serious violation of privacy. There have always been fake photos of me on the internet, but I will not be put in the position to defend myself as to what is real or what is fake.”¹⁵⁶ Celebrities like Justice were victims of sexual deepfakes, artificial intelligence-generated false but hyper-realistic depictions of various subjects.¹⁵⁷ Aggressors can achieve similar effects with cheap fakes, or shallow fakes, a form of image manipulation using basic audio, video, or image editing software.¹⁵⁸

The 2014 leak points to another interest: privacy as property. From a Lockean perspective, privacy begins with a fundamental control over the self,

¹⁵⁴ See for example Terrence McCoy “4chan: The ‘shock post’ site that hosted the private Jennifer Lawrence photos” (2 September 2014), *The Washington Post*.

¹⁵⁵ Sophie Gallagher, “‘Revenge Porn’ Is Not The Right Term To Describe Our Experiences, Say Victims”, *Huffington Post* (3 August 2020), online: <https://www.huffingtonpost.co.uk/entry/why-are-we-still-calling-it-revenge-porn-victims-explain-change-in-the-laws-needed_uk_5d3594c2e4b020cd99465a99?>; see also Nik Cubrilovic, “Notes on Celebrity Data Theft” (2 September 2014), online: *New Web Order* <<https://web.archive.org/web/20141006070133/https://www.nikcub.com/posts/notes-on-the-celebrity-data-theft/>> (according to data security expert Nik Cubrilovic, many celebrities were also victims to leaks and theft of other forms of personal data, such as text messages, calendars, address books, phone logs, and documents).

¹⁵⁶ Ella Alexander, “Victoria Justice ‘angry’ at ‘massive invasion of privacy’ and pursuing legal action after nude photos leak online,” *Independent* (4 September 2014), online: <<https://www.independent.co.uk/news/people/victoria-justice-angry-at-massive-invasion-of-privacy-after-nude-photos-leak-9709021.html>>.

¹⁵⁷ Citron & Chesney, *supra* note 8 at 1753.

¹⁵⁸ Britt Paris & Joan Donovan, “Deepfakes and Cheap Fakes: The Manipulation of Audio and Visual Evidence” (2019), online (pdf): *Data & Society* <https://datasociety.net/wp-content/uploads/2019/09/DS_Deepfakes_Cheap_FakesFinal-1-1.pdf>.

including information about the self.¹⁵⁹ Reconsider the preceding sentence: do we have the right to control information *about* ourselves, or rather to control “our” information? Pure ownership models of digital information are patently infeasible, so common concessions include prior notice and choice.¹⁶⁰ If we cannot outright own our information as a form of currency, we should at least retain autonomy over what third parties can do with it. When individuals send naked pictures of their bodies to their intimate partners, they usually do so with the implicit understanding that that this property is for the recipient’s eyes only, not for public distribution. Proprietary freedoms prevent others from manipulating, publicizing, or misrepresenting others’ sexual information.

Property law underlies civil remedies for image-based abuse. Whether victims can successfully prove certain torts depends on if a piece of personal sexual information truly “belongs” to them, and who its author is. Copyright infringement is the most obviously property-related cause of action, as approximately 80 percent of all non-consensually distributed intimate images are “selfies” (the subject is also the author).¹⁶¹ Some other torts have secondary property-related reputational interests, such as defamation, publication of embarrassing or private facts, and misappropriation of personality. While the clearest breach of a plaintiff’s property rights concerns information of which they are both author and subject, one’s broader privacy rights are impacted anytime they constitute the latter.

Canadian courts have described misappropriation of personality as a cause of action that is “proprietary in nature and the interest protected is that of

¹⁵⁹ Sevon DaCosta, “Privacy-as-Property: A New Fundamental Approach to The Right to Privacy and The Impact This Will Have on the Law and Corporations” (2021) at 12, online: *Claremont Graduate University CMC Senior Theses* <scholarship.claremont.edu/cmctheses/2635>.

¹⁶⁰ Francis & Francis, *supra* note 11 (“What would an ownership model look like? If you had property rights to all of the information about you that goes out into the world, you could negotiate for its sale... No market like this has emerged, possibly because the costs of setting it up and managing all of the deals would overwhelm the value created ... or because the data collectors have market power over the means of collection and individual data sources don’t have any bargaining power... data sources are also so diverse that it might be difficult for them to find common ground” at 33-34).

¹⁶¹ *Copyright Act*, RSC 1985, c C-42, ss 38.1(1)(a)&(b) [*Copyright Act*]; see also Amanda Levendowski, “Using copyright to combat revenge porn” (2014) 3:2 NYU JIPEL 422. Copyright law provides several other benefits to victims seeking recourse against TFSGBV: see *Copyright Act*, *supra* note 161 at ss 27 (2.3), (2.4), (3.3) (The federal *Copyright Act* provides for statutory damages in both commercial and non-commercial contexts, as well as models of liability for direct perpetrators and intermediary platforms that facilitate abuse); *ibid* at s 41.25 (Canadian Internet service providers are required under the Act to forward copyright notifications to users who have infringed copyright); see also Taylor Comerford, “Pornography Isn’t the Problem: A Feminist Theoretical Perspective on the War Against Pornhub” (2022) 63 BC L Rev 1177 (While many perpetrators publish intimate images on personal sites, many do so on commercial pornography websites like Pornhub); Andrea Slane, Ganaele Langlois, “Debunking the Myth of “Not My Bad”: Sexual Images, Consent, and Online Host Responsibilities in Canada” (2018) 30:1 CJWL 42 (Websites like the defunct *Is Anyone Up?* that traffic non-consensual intimate images can also be held liable under the Act for enabling copyright infringement).

the individual in the exclusive use of his own identity in so far as it is represented by his name, reputation, likeness or other value.”¹⁶² The Supreme Court of Canada has cast a wide net in connecting personally identifiable images to one’s reputational interests, reasoning the following:

Since the right to one’s image is included in the right to respect for one’s private life, it is axiomatic that every person possesses a protected right to his or her image. This right arises when the subject is recognizable. There is, thus, an infringement of the person’s right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified.¹⁶³

Thus, misappropriation concerns the publication of true, decontextualized private information (including images) that misrepresents a person.¹⁶⁴ In contrast, defamation is the publication of false information causing reputational harm. The lines between these two harms is not always clear. Online attackers often publish a mix of both types of information to cause harm.¹⁶⁵ Moreover, at what point does a piece of information become so exaggerated or decontextualized as to be fallacious?

While defamation and misappropriation torts provide additional avenues of recourse against digital sexual privacy violations, reputation only describes a facet of privacy. An abuser can violate an individual’s privacy without affecting their reputation; this is the essential distinction between defamation and publicity placing a person in false light. In *Yenovkian v. Gulian*, the court explains, “The wrong [of false light] is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person’s privacy right to control the way they present themselves to the world.”¹⁶⁶ Moreover, all reputational incursions are ipso facto intrusions upon the seclusion of their victims.¹⁶⁷ Victims of pornographic deepfakes suffer privacy infringements because, despite any public denial, their aggressors have created a public perception of their sexual personal information over which they lack control.¹⁶⁸

¹⁶² *Joseph v. Daniels*, 1986 CanLII 1106 (BC SC) at para 14.

¹⁶³ *Field v. United Amusement Corp.*, [1971] C.S. 283.

¹⁶⁴ Dunn, *supra* note 129 at 20.

¹⁶⁵ Bailey & Steeves, *supra* note 129 at 36-38.

¹⁶⁶ *Yenovkian v. Gulian*, 2019 ONSC 7279 (CanLII) at para 171.

¹⁶⁷ Stephen Aylward, “The Idea of Privacy Law: Jones v Tsige and the Limits of the Common Law” (2013) 71:1 UT Fac L Rev 61 at 71.

¹⁶⁸ For further discussion of the relationship between privacy and integrity concerning NCDII and deepfakes, see note 158 and accompanying text, *above*.

One answer to these reputational and privacy concerns is the right to be forgotten.¹⁶⁹ Its proponents argue that individuals should be able to “determine the development of their life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past.”¹⁷⁰ On search engines, this right includes de-linking and de-indexing content (making it unsearchable) and outright deleting it from the source. Attorneys representing victims of NCDII file take-down requests in order to expunge it, if temporarily, from the web.¹⁷¹ The right to be forgotten is a digital concomitant of the right to be let alone.

Residual Categories

“Doxing” means “publicly disclosing someone’s personal information online, such as their full name, home address, and social insurance number.”¹⁷² Doxing drives online and real-world sexual harassment and intimidation against its victims, particularly against sexually marginalized groups.¹⁷³ The case of Tabitha Stone, the journalist who criticized Tyler, the Creator, illustrated this dynamic. Another example of doxing occurred during the COVID-19 lockdown, when Moroccan social media influencer Sofia Talouni encouraged her followers to download Grindr and collectively out closeted and discreet users by releasing their photos online.¹⁷⁴ Because homosexuality is criminalized in Morocco, some of her victims were arrested. In several cases, men were kicked out of their houses after being outed, and at least one victim died by suicide as a result.¹⁷⁵

Technology-aggravated sexual assault includes using technology to lure victims into positions of exploitation or assault,¹⁷⁶ filming oneself perpetrating

¹⁶⁹ Jeffrey Rosen, “The Right To Be Forgotten” (2012) 64 *Stan L Rev* 88; see also *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, 25 June 25 2013 (ECJ) (Opinion of the Advocate General).

¹⁷⁰ Alessandro Mantelero, “The EU Proposal for a General Data Protection Regulation and the roots of the ‘right to be forgotten’” (2013) 29:3 *Comp L & Sec Rev* 229 at 235.

¹⁷¹ See Carrie Goldberg & Jeannine Amber, *Nobody’s Victim: Fighting Psychos, Stalkers, Pervs, and Trolls* (New York: Plume, 2019).

¹⁷² Khoo, *supra* note 3 at 18.

¹⁷³ See for example Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014) at 254 (Perpetrators disproportionately use doxing as a means to out sex workers to their friends and family).

¹⁷⁴ Aida Alami, “Dozens of Gay Men Are Outed in Morocco as Photos Are Spread Online,” *The New York Times* (26 April 2020), online: <[nytimes.com/2020/04/26/world/middleeast/gay-morocco-outing.html](https://www.nytimes.com/2020/04/26/world/middleeast/gay-morocco-outing.html)> (To make matters more complicated, Talouni is a trans woman).

¹⁷⁵ *Ibid.*

¹⁷⁶ House of Commons, Standing Committee on the Status of Women, *Taking Action to End Violence against Young Women and Girls in Canada: Report of the Standing Committee on the Status of Women* (March 2017) (Chair: Marilyn Gladu) (“Another form of [TFGBV] is the luring and online exploitation of minors by adults. In these cases, adults share existing or self-produced sexual images of children (also referred to as child pornography) or communicate with children over the Internet for the purpose of committing a sexual offence or trafficking” at 34).

sexual assault, and/or publicly distributing the documentation.¹⁷⁷ Swatting, named after police Special Weapons Tactics (SWAT) teams, involves “calling 911 and lying about someone doing something really bad, like holding a hostage, to get dispatchers to send police officers—and particularly a SWAT team—to a victim's location.”¹⁷⁸ Abusers also file frivolous lawsuits in order to drain their victims' resources and force intimate information to come to light via the court process.¹⁷⁹

TFGSBV regularly occurs in intimate partner and dating violence, including as a means of technology-facilitated coercive control during a relationship,¹⁸⁰ and as a revenge tactic once a relationship ends.¹⁸¹ Perpetrators can now use social media and other tools to “intimidate, isolate, and control their partners or former partners, including leveraging their own social networks to target the victim/survivor, while threatening, co-opting, and undermining the victim/survivor's own social networks as a means of further control and isolation.”¹⁸² Spyware, or stalkerware, is technology allowing abusers to systematically monitor their current or former intimate partners' virtual and data-tracked activity, including their text messages, phone calls, emails, browser history, and real-time GPS locations.¹⁸³ As important as technology has become

¹⁷⁷ Jessica West, “Cyber-Violence Against Women” (May 2014), online (pdf): *Battered Women's Support Services* <<http://www.bwss.org/wp-content/uploads/2014/05/CyberVAWReportJessicaWest.pdf>> (footnotes omitted) (“There have been a number of other stories of boys sexually assaulting unconscious girls and recording the assault on cell phones, through picture and video. We can list them off: in November 2011, 15 year old Rehtaeh Parsons was gang-raped by 4 classmates who took pictures and distributed them to her classmates in Nova Scotia; in January 2012, 14 year old Daisy Coleman was raped by a senior on the high school football team, Matthew Barnett, in Maryville, Missouri, while another boy filmed it; also in 2012, 15 year old Audrie Pott was sexually assaulted by three boys who took pictures and distributed them to their peers in Saratoga, California; Savannah Dietrich of Louisville, Kentucky, was 16 years old when she was sexually assaulted by two boys who also took pictures that she didn't find out about until a month later; and in June 2013, a 21 year old woman went on a date and was gang-raped by 4 football players who captured the assault on cell phone cameras, in a dorm room at Vanderbilt University in Nashville, Tennessee” at 5-6).

¹⁷⁸ See German Lopez, “Swatting, the horrible ‘prank’ that's hit gamers, Justin Bieber, and many more, explained”, *Vox* (11 March 2016), online: <vox.com/2016/3/11/1196282/what-is-swatting-video>.

¹⁷⁹ See generally Goldberg & Amber, *supra* note 171.

¹⁸⁰ See Molly Dragiewicz et al, “Technology facilitated coercive control: domestic violence and the competing roles of digital media platforms” (2008) 18:4 *Feminist Media Studies* 609 (inline citations omitted) (“A recent survey on online harassment in the United States found that the most common perpetrators of digital abuse and stalking are current and former partners” at 613).

¹⁸¹ See for example *Herrick v. Grindr*, 306 F Sup 3d 579 (2018) (the plaintiff's ex-boyfriend created a fake “catfish” account in his name using his likeness on the MSM app Grindr, subsequently directing hundreds of strangers to the victim's home and work addresses under the false pretence of looking for rough, unprotected, anonymous sexual encounters advertised as part of a rape fantasy and a desire to actively contract HIV).

¹⁸² Khoo, *supra* note 3 at 23, citing Dragiewicz et al, *supra* note 180 at 610.

¹⁸³ See Khoo, Kate Robertson & Ronald Deibert, “Installing Fear: A Canadian Legal and Policy Analysis of Using, Developing and Selling Smartphone Spyware and Stalkerware Applications” (June 2019), online (pdf): *Citizen Lab* <<https://citizenlab.ca/docs/stalkerware-legal.pdf>>; see also Christopher Parsons et al, “Predator in Your Pocket: A Multidisciplinary Assessment of the

to enabling intimacy, we must remain vigilant to the new risks it poses to our digital sexual privacies.¹⁸⁴

2. Positive Freedom-Based Privacy

In her paper, Citron identifies sexual privacy through the values it upholds.¹⁸⁵ She underscores three facets of sexual anti-subordination: equality, intimacy, and identity development, linked to autonomy.¹⁸⁶ These values are co-constitutive of our positive freedom-based privacy rights: the right to intellectual exploration, to make decisions in private, to freely associate with others in private, and to act as ourselves. We have a right to these freedoms in cyberspace.

Equality

Digital sexual privacy violations overwhelmingly constitute discrimination by targeting intersectional marginalized groups.¹⁸⁷ Recognizing a digital sexual privacy right would combat the subordination of women and sexual and gender minorities in particular.¹⁸⁸ Over the past decade, Canadian courts have begun to implicitly read equality into the right to digital sexual privacy, though not in these terms. In *A.B. v. Bragg Communications Inc.*, the applicant was a young girl victim to sexual cyber-harassment in the form of a fake and sexually defamatory Facebook profile.¹⁸⁹ Through her father as guardian, she sought an order for the Internet provider of the IP address used to conduct the harassment to disclose the identity of the user in order to identify potential defendants in a defamation

Stalkerware Application Industry” (June 2019), online (pdf): *Citizen Lab* <citizenlab.ca/2019/06/the-predator-in-your-pocket-amultidisciplinary-assessment-of-the-stalkerware-application-industry/>.

¹⁸⁴ Further discussion of the positive freedom-based digital privacy benefits to intimacy at 34, *below*.

¹⁸⁵ Citron, “Sexual Privacy” *supra* note 6 at 10.

¹⁸⁶ *Ibid.*

¹⁸⁷ See for example House of Commons, Standing Committee on the Status of Women, *Taking Action to End Violence against Young Women and Girls in Canada: Report of the Standing Committee on the Status of Women* (March 2017) at 34 (Chair: Marilyn Gladu); Dunn, *supra* note 135 at 7; Ari Ezra Waldman, “Amplifying Abuse: The Fusion of Cyberharassment and Discrimination” (2015) BUL Rev Annex; Ariadna Matamoros-Fernández, “Platformed racism: the mediation and circulation of an Australian race-based controversy on Twitter, Facebook and YouTube” (2017) 20:6 Inf Commun Soc 930 at 936; Adrienne Massanari, “#Gamergate and The Fapping: How Reddit’s algorithm, governance, and culture support toxic technocultures” (2017) 19:3 New Med & Soc 329 at 346; T.E. Mortensen, “Anger, fear and games: The long event of #GamerGate” (2016) 13:8 Games Cult 787.

¹⁸⁸ Citron, “Sexual Privacy” *supra* note 6 at 18; See also Kimberlé W. Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan L Rev 1241, 1244 (the introduction of the intersectional analytical framework).

¹⁸⁹ *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 (CanLII), [2012] 2 SCR 567 [*Bragg*].

suit. She also petitioned the court to proceed anonymously and for a publication ban on the content of the profile.

The courts of first instance and appeal granted the first request but denied the latter two. The Supreme Court of Canada granted leave to appeal. The Court unanimously approved A.B.'s request for anonymity but denied a publication ban.¹⁹⁰ This decision highlighted the Court's nascent yet evolving understanding of technology-facilitated sexuality and gender-based violence. Abella J, writing for the Court, noted that A.B.'s privacy interests were "tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying."¹⁹¹ Abella J underscored the "inherent vulnerability of children"¹⁹² throughout her reasons, especially in cases of cyberbullying and sexual abuse. However, she stopped short of fusing these two issues together to fully identify the "structural underpinnings of violence facilitated against women and girls through digital technologies."¹⁹³ While *Bragg* removed the previously formidable obstacle of self-identification to victims of TFSGBV in seeking redress, the Court would have benefited from a more robust equality analysis to understand the crime itself.¹⁹⁴

Which groups are digital sexual privacy's typical violators? Which are its victims? More broadly, how does structural discrimination impact marginalized groups' access to the internet? These questions can guide lawmakers in drafting equitable legislation and judges in rendering decisions. While many victims of digital sexual privacy violations pursue private recourse over pressing criminal charges against their abusers, courts have affirmed that the common law must also reflect *Charter* values. In *M. (A.) v. Ryan*, a civil suit concerning sexual assault, the Supreme Court drew an explicit connection between the Section 8

¹⁹⁰ Media publications lobbied vociferously against a publication ban. Abella J, citing the public's right to open courts, determined that once A.B.'s anonymity was protected, there was little justification for a publication ban on the non-identifying content of the fake Facebook profile. Ironically, there is no evidence that the media ever published the information protected by the open courts principle, calling into question the Court's long-time deference to competing interests over privacy rights.

¹⁹¹ *Bragg*, *supra* note 189 at para 14.

¹⁹² *Ibid* at para 17.

¹⁹³ Jane Bailey, Valerie Steeves & Suzie Dunn, *Submission to the Special Rapporteur on Violence Against Women Re: Regulating Online Violence and Harassment Against Women*, UNHRC (27 September 2017) at 3.

¹⁹⁴ See Jane Bailey, "'Sexualized Online Bullying' Through an Equality Lens: A Missed Opportunity in *AB v Bragg*" (2014) 59:3 McGill Law Journal 711 (Indeed, Abella J's inclination towards the term "cyberbullying" implies the erroneous a distinction between the cyber and 'real life.' Conceiving of separate spheres too often leads to "unrealistic and paternalistic advice that targeted women and girls should just 'go offline' to avoid violence, which in many ways emulates the all-too-familiar victim-blaming approaches to [violence against women and girls] that shift responsibility away from perpetrators and the community, toward survivors themselves" at 730). For further discussion of the term "cyberbullying," see note 4 and accompanying text.

privacy and Section equality protections.¹⁹⁵ Firmly upholding equality in concert with digital sexual privacy should be the next step in the jurisprudence.

Intimacy

Citron argues that sexual privacy is an “essential condition for the formation of intimate relationships.”¹⁹⁶ Without sexual privacy between our partners, we would not be able to access many other social goods, such as love, trust, affection, and emotional security. Intimacy is also interlinked with sexual integrity and consent.¹⁹⁷ Establishing contextual integrity within intimate partnerships—from casual encounters to spousal cohabitation—allows individuals to reasonably moderate the boundaries of their sexual consent.¹⁹⁸

Sexual intimacy and consent translate directly to the cyberspace. Social networking sites mediate and sustain many types of intimate relationships.¹⁹⁹ Some individuals access the internet to gain greater insight into their identities and desires in non-judgmental spaces. Members of the kink community may struggle to find likeminded people in their everyday lives and worry about encountering stigma or public shame.²⁰⁰ Couples rely on foundations of trust to ensure that nude or sexually explicit pictures and videos they share with one another will stay private. When a person non-consensually distributes their current or former partner’s intimate images, they have violated not only their victim’s consent, but also their “most intimate physical spaces, such as their home or bedroom.”²⁰¹

In queer communities, intimacy is a survival tactic. Common vulnerability creates an “opportunity to embrace a sense of interdependence through mutual precarity.”²⁰² In the face of systemic violence and discrimination, these communities develop and self-regulate patchworks of intimate dynamics that do not conform to heteronormative demarcations of sexual and platonic affection.²⁰³ While the internet is a large source of victimization for sexual and gender minorities, it also provides safe platforms for them to find mutual support and

¹⁹⁵ *M. (A.) v. Ryan*, [1997] 1 SCR 157 at para 30.

¹⁹⁶ *Ibid* at para 16.

¹⁹⁷ Bryan Birtles, “On Sexual Consent in Canada: The Balance Between Protecting and Respecting Sexual Autonomy” (2020) 10:2 WJLS 1.

¹⁹⁸ See also *R v Ewanchuk*, [1999] 1 SCR 330 (the Court’s discussion of consent to sexual intercourse).

¹⁹⁹ Matthew Hart, “Youth Intimacy on Tumblr” (2015) 23:3 YOUNG 193 at 205.

²⁰⁰ *Ibid* at 207.

²⁰¹ Khoo, *supra* note 3 at 4.

²⁰² Karen Hammer, “A Scar is More than a Wound: Rethinking Community and Intimacy through Queer and Disability Theory,” (2014) 68:2 Rocky Mountain Rev 159 at 159.

²⁰³ Eleanor Formby, “LGBT ‘Communities’ and the (Self-)regulation and Shaping of Intimacy” (2022) 27:1 Sociol Res Online 2022, Vol. 27 8 at 26; David Loran, “The Meaning of Intimacy for Men Who Are Gay” (2 March 2011) at 25, online (pdf): *University of British Columbia* <<https://dx.doi.org/10.14288/1.0302114>>.

facilitate offline connections.²⁰⁴ In many ways, access to the internet has democratized intimacy.

Identity development

Digital sexual privacy is central to identity development in private and in public. As Citron says, “Free from the public’s glare and inspection, individuals can experiment with their intimate identities. They can explore their sexual orientation or gender identity before “going on stage” with them.”²⁰⁵ Digitization encourages the intellectual privacy of “thought and mind, and the development of opinions and beliefs.”²⁰⁶ Sexual and gender minorities in particular use the internet to build increasing self-awareness of their own orientations and identities, to learn more about their communities, communicate with other SGM, find comfort in their identities, and facilitate the coming out process.²⁰⁷

Coercive “real-life” policies like the United States’ former military “Don’t ask, don’t tell” rule stifle identity development by concealing it to the margins.²⁰⁸ Healthy identity development is predicated on a balance between decisional freedom in the private zone and reserve in the public zone.²⁰⁹ Barry D. Adam captures this interplay:

When the lives of lesbians and gay men are reduced to a “sexuality,” and sexuality is defined as a “private” realm with no place in the public domain, then the confinement of (homo)sexuality to the “private” sphere entails a set of social implications that impose special disabilities on gay and lesbian people. The difficulty with the “private” category is the inequity in the language applied to heterosexuality and homosexuality. While heterosexuality is quickly distinguished from its “non-sexual” public manifestations, such as romance, courtship, marriage, and family—which are documented

²⁰⁴ Tyler Hatchel, “The Digital Development of LGBTQ Youth: Identity, Sexuality, and Intimacy” in Michelle F. Wright, ed, *Emerging Adults in the Digital Age* (New York: IGI Global, 2016) at 65-68.

²⁰⁵ *Supra* note 6 at 11.

²⁰⁶ Koops et al, *supra* note 22 at 567.

²⁰⁷ Gary W. Harper et al, “The Internet’s Multiple Roles in Facilitating the Sexual Orientation Identity Development of Gay and Bisexual Male Adolescents” (2015) 10:5 Am J Mens Health 359.

²⁰⁸ See Jody Feder, “‘Don’t Ask, Don’t Tell’: A Legal Analysis” (6 August 2013) at 4, online (pdf): *Congressional Research Service* <sgp.fas.org/crs/misc/R40795.pdf>. See also US, Department of Defense, *Report and Recommendation on Service of Transgender Persons in the Military* (Washington, DC: 1000 Defense Pentagon 20301-1000, 2 February 2018) (During the Trump presidency, trans military recruits were obligated to hide their gender identities as a condition of service. “Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service” at 2); see also Erica L. Green, Katie Benner & Robert Pear, “Trump Administration Eyes Defining Transgender Out of Existence,” *The New York Times* (October 21, 2018).

²⁰⁹ Koops et al, *supra* note 22 at 544.

and celebrated in the arts, and institutionalized in the legal system—homosexuality is often not accorded the same amplitude. Same-sex courtship, romance, partnership, home-building, mutual support, and communication through the arts are not always allowed the same public manifestation, but rather are often subjected to the linguistic “squeeze” of the ‘sexuality’ category and thus consigned to the private.²¹⁰

Inequitable digital structures emulate this squeeze. Racial, sexual, and gender minorities are subject to extreme “intersectional surveillance online”²¹¹ impacting their associational, behavioural, and intellectual privacy rights. Healthy identity development relies on freedom of expression as a form of liberty privacy on public online forums—the freedom to choose what to say to whom, and in what conditions to say it.²¹²

Liberty privacy also includes the right to inconspicuousness in cyberspace. Closeted LGBTQ+ youth may hide pieces of their identities from their parents, teachers, and employers that they only feel comfortable sharing with supportive allies online. As we engage with the inevitable force of the internet, forms of digital anonymity and confidentiality,²¹³ like unlinkable identifiers²¹⁴ and the ability to purge the “trail of information fragments about us [which] is forever preserved... instantly available in a Google search,”²¹⁵ protect our personal data from being surveilled and appropriated. More than this, digital sexual privacy protections are assurances that every member of society can access the values of equality, intimacy, and bodily autonomy.

Conclusion

Nowadays, if you were to scroll through my friend Antoine’s Facebook account, you would see him posting about his work as a sexologist and an advocate for destigmatizing sex workers. You would find pictures of him attending pride parades with a smile on his face and volunteering at LGBTQ+ community organizations. You could look at the online groups he belongs to, like a queer affordable housing group and a virtual ballroom community. His digital

²¹⁰ Barry D. Adam, “Care, Intimacy and Same-Sex Partnership in the 21st Century” (2004) 52:2 *Current Sociology* 265 at 278.

²¹¹ Mary Anne Franks, “Democratic Surveillance” (2017) 30 *Harv JL & Tech* 425 at 465-64.

²¹² Francis & Francis *supra* note 11 at 277.

²¹³ See Ira Rubenstein & Woody Hartzog, “Anonymization and Risk” 91 *Wash L Rev* 703 at 704-730; Solon Barocas & Helen Nissenbaum, “Big Data’s end run around anonymity and consent,” in Julia Lane et al, eds, *Privacy, Big Data, and the Public Good: Frameworks for Engagement* (Cambridge: Cambridge University Press, 2014) at 49-56.

²¹⁴ Office of the Privacy Commissioner of Canada, *Identity, Privacy and the Need of Others to Know Who You Are: A Discussion Paper on Identity Issues*, Office of the Privacy Commissioner of Canada (Ottawa: Office of the Privacy Commissioner, 21 January 2008).

²¹⁵ Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007) at 5.

information paints a history of his sexuality amongst many other facets of his identity.

After he told me the story of his coming out, I asked Antoine how the experience affected him. He told me that the violation of his privacy was traumatizing, but that as an adult, he still widely uses the internet and has found deeply rewarding communities online. His most recent relationship was with someone he met through a dating app. He also sends nude photos of himself to his partners, though never with his face or any identifying features in view. He keeps these images in a secure virtual vault on his phone.

The answer to protecting our privacy is not to shut the computer off and deny ourselves the social goods technology provides, especially for sexual and gender minorities. Instead, we need to develop practical solutions to the risks of participation and hold abusers adequately to account. Just as its attendant violations are identifiable phenomena of the internet age, courts and lawmakers are long overdue in recognizing the emergence of a distinct right of our time: digital sexual privacy.

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