2022

The Queer Limits of Revenge Porn Laws

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Draft: September 2022

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64 B.C. L. Rev. (forthcoming 2023)
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The highly successful movement to combat the nonconsensual distribution of sexual imagery—a.k.a. "revenge porn"—has sent a powerful message that sexual expression through digital technology is an illegitimate basis for stigma, abuse, or the loss of employment. Although spearheaded by feminist advocates to counter the overwhelmingly gendered dynamics of revenge porn, these laws send a powerful message around sexual norms and sexual privacy more broadly that would appear to benefit queer communities especially. Nonetheless, revenge porn laws as enacted by state legislatures and interpreted by state courts are significantly limited in ways that undermine their practical and symbolic benefits for queer people and other sexual minorities. In virtually all of the 48 US states that have criminalized revenge porn, the enacted statutes draw a line between "private" or "intimate" images, which are protected against unauthorized distribution, and "public" or "commercial" images, which are expressly or impliedly excluded. And in some states, a person's reasonable expectation of privacy only extends to images initially shared in the context of a "relationship." These limits effectively carve out from protection wide swaths of sexual expression that are incredibly common—and often highly celebrated—within queer communities. Under these laws, sexual images that are taken in public contexts, such as a nightclub or a sexually-themed street fair, or shared in a commercial context, such as Grindr or Onlyfans, can be freely distributed with employers, families, and friends notwithstanding the distributor's intent to stigmatize, punish, and harass the subject of the image. This paper closely examines the limits of revenge porn laws for queer people and suggests ways of reframing these laws to better acknowledge and respond to queer forms of sexual privacy.

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I. Introduction

Queer people hold a significant stake in recent efforts to combat the nonconsensual distribution of sexual images—colloquially known as "revenge porn."[1] By prohibiting the unauthorized sharing of sexual imagery, the vast majority of states have recognized the ubiquity of sexual expression in digital contexts and have sent a powerful message that no one should be harassed, fired, or evicted just because some aspect of their sex life was caught on camera.[2] Recent legislation largely has been spearheaded by feminist scholars and advocates, who have both highlighted the image-based abuse experienced by many women and argued persuasively that women should not be blamed for using digital technologies as part of their intimate lives.[3] Though figuring less prominently in recent revenge porn debates, queer people—broadly defined[4] —have long faced similar threats of having their sexual desires outed

[1] The term "revenge porn" is both commonly used and highly contested. It is arguably significantly underinclusive in that it excludes forms of harmful disclosures that are not motivated by "revenge," but instead by money, humor, entertainment, or ego. It also arguably wrongly conflates all relevant forms of nudity or sexuality with "pornography." *See infra* notes [] and accompanying text. Although this Article does not necessarily *endorse* the term "revenge porn," it will generally use it in recognition of its entrance into the popular lexicon and of the abundance of scholarship and case law that employ it.

[2] As of this writing, 48 states have enacted revenge porn-specific laws. For an overview of state laws addressing nonconsensual pornography, see https://cybercivilrights.org/nonconsensual-pornagraphy-laws/.

[3] See, e.g., Danielle K. Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Danielle K. Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019).

[4] I use the term "queer" here as an umbrella identity category that includes lesbian, gay, bisexual, transgender, and questioning identities, but more broadly includes all individuals whose gender or sexuality identities do not conform to dominant norms of gender and/or sexuality or who may not easily fit within any particular sexual or gender identity category. By using the term "queer" to broadly refer to nonnormative genders and sexualities, I

to families, friends, employers, and law enforcement, and they similarly have had few legal remedies for the social, emotional, and financial consequences that can follow.[5] To the extent that revenge porn laws empower women and queer people to manage the boundaries of their sex lives, these laws represent a break from a legal system that historically has placed them at the mercy of patriarchal norms and the sexual stigmas embedded within them.[6] Revenge porn advocacy would accordingly appear to unite queer and feminist politics around a robust conception of sexual privacy that reflects a shared vulnerability to image-based abuses.

Nonetheless, with only a few key exceptions,[7] explicitly queer voices largely have been absent from the anti-revenge porn movement. Groundbreaking feminist scholarship on image-based abuses has created space for rethinking sexual norms in the digital context and in doing so has included the experiences of some queer revenge porn victims.[8] But a full-scale, honest engagement with sexual privacy in the digital age—and the potentially-uncomfortable discussions of actual sexual practices such an engagement would necessitate—has never been a high priority for mainstream LGBTQ+ advocacy.[9] As a result, although queer *people* have appeared in scholarship, litigation, and empirical studies of revenge porn, there has been little in the way of queer *analysis* about how revenge porn—and the laws regulating it—reshapes and/or reinforces dominant norms of gender and sexuality.[10]

As a result, the queer potential of revenge porn advocacy has been blunted by the actual legislation it has produced. In nearly every revenge porn statute enacted in the past decade, there are major, and largely unappreciated, limits on what types of sexual expression

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hope to avoid overlooking the experiences of individuals who may not clearly fall within any specific identity category or the sometimes-lengthy acronyms often used in connection with queer advocacy.

[5] See, e.g., Anita Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711 (2010)

[6] See, e.g., Citron, *Sexual Privacy*, *supra* note []; SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 39-44 (2021).

[7] See, e.g., Ari Ezra Waldman, *Law, privacy, and online dating: "Revenge porn" in gay online communities*, 44 L. & SOC. INQUIRY 987 (2019).

[8] See, e.g., Citron, *Sexual Privacy*, *supra* note [], Citron & Franks, *Criminalizing Revenge Porn*, *supra* note [], CARRIE GOLDBERG, NOBODY'S VICTIM: FIGHTING PSYCHOS, STALKERS, PERVS, AND TROLLS 35-54 (2019)(discussing litigation in *Herrick v. Grindr*).

[9] On the persistent distancing of prominent LGBTQ+ advocacy organizations from perceived sexual "deviance," see, e.g., Scott De Orio, *Bad Queers: LGBTQ People and the Carceral State in Modern America*, 47 LAW & SOCIAL INQUIRY 691 (2022); Marie-Amelie George, *The LGBT disconnect: Politics and perils of legal movement formation*, 2018 WIS. L. REV. 503 (2018); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004): 1399 LISA DUGGAN, THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY (2003). On the ongoing, significant gaps in queer advocacy, particularly around the regulation of sexual practices, see especially the essays collected in THE WAR ON SEX (DAVID HALPERIN & TREVOR HOPPE, EDS. 2017).

[10] Prof. Eden Sarid provides a useful overview of what a "queer analysis" of the law entails:

> A queer analysis would therefore endeavor "to reveal and disrupt narratives, conventions, institutions, and identities" that are structured around sex and sexuality and identify the ways in which certain kinds of stylizations of gender and sexuality are foregrounded and rewarded.

Eden Sarid, *A Queer Analysis of Intellectual Property*, 2022 WIS. L. REV. 91, 94 (2022) (quoting Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others*), 6 CRITICAL ANALYSIS L. 23, 37 (2019)).

are protected from unauthorized dissemination. What results is a large swath of sexual behavior that remain vulnerable to stigma, abuse, and harassment. Most significantly, the large majority of states provide no protection for images that were produced in a "public or commercial setting."[11] Accordingly, sexual images that are taken in public contexts, such as on a clothing-optional beach or a sexually-themed street fair, or in a commercial context, such as on adult websites like Onlyfans or Pornhub, can be freely distributed with employers, families, and friends notwithstanding the distributor's intent to stigmatize, punish, and harass the subject of the image. Moreover, in some states there is no reasonable expectation of privacy—and thus no protection—in images that were produced outside the context of an intimate "relationship."[12] Accordingly, sexual images initially produced for friends, casual sexual partners, or pseudo-strangers on Grindr remain fully subject to social stigma and the consequences that follow from unauthorized distribution outside the context in which they were produced.

These exceptions may seem benign, or perhaps even common-sense, but they encompass contexts and activities that have long been important to queer communities—both due to the practical needs of living in a heteronormative society and due to the political potential of these contexts to push back against such heteronormativity.[13] Public events like Folsom Street Fair, public places like Fire Island Pines, public accommodations like queer nightclubs, and publicly-distributed platforms like Grindr or Scruff all have been contexts in which queer people can find each other, notwithstanding the obstacles of living in a world whose sexual defaults render them invisible.[14] Commercial contexts like pornography or sex work similarly have important queer legacies—commercial pornography has frequently been the only context in which queer people can learn about non-hetero forms of sex,[15] and sex work has served as an economic lifeline for queer people, especially at the socioeconomic margins.[16] Queer people have needed to be public and needed to be commercial in order to construct social worlds that might include them.[17] Yet these spaces are excluded from the reach of newly-enacted sexual privacy protections.

To illustrate the disparate effects of these statutory carveouts, consider the following hypothetical. A school superintendent has received five emails, each containing sexually-explicit images of a different teacher within their district, and the superintendent is trying to decide whether to report the email's *sender* to the police or whether to proceed with

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[11] See, e.g., Code of Ala. 13A-6-240; Ariz. Rev. Stats. 13-1425; Conn. Gen. Stats. 53a-189c; Del. Code Title 11, 1335; Ga. Code 16-11-90.

[12] See Arkansas Code 5-26-314; State v. Van Buren, 214 A.3d 791, 818 (Vt. 2019).

[13] See, e.g., Joseph J. Fischel, *Keep Pride Nude*, BOSTON REV. (June 23, 2021), available at https://bostonreview.net/articles/keep-pride-nude/

[14] See, e.g., MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS (2002); JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA (2009); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1 (2008).

[15] See *infra* Part III(B).

[16] See, e.g., Kate D'Adamo, *Queering the Trade: Intersections of the Sex Worker and LGBTQ Movements*, in THE UNFINISHED QUEER AGENDA AFTER MARRIAGE EQUALITY (Angela Jones, Joseph Nicholas DeFilippis, Michael W. Yarbrough eds. 2018)

[17] See WARNER, PUBLICS AND COUNTERPUBLICS, *supra* note [].

disciplinary action against the *teacher*. The first teacher had sent nude photos of herself to her husband; when she filed for divorce, he sent these photos to the superintendent in an effort to get her fired. The second teacher had exchanged nude photos of themselves with an individual they had met on a popular dating/hookup app; when the teacher decided not to meet the individual in person, the individual tracked down the teacher's employer and emailed them the photos they had received. The third teacher spent an afternoon at a clothing-optional beach with several gay male friends; a parent of a child at his school surreptitiously photographed them and sent the photo to the superintendent. The fourth teacher, in order to pay for her master's degree, briefly maintained a profile on Onlyfans.com; one of her subscribers used a reverse-image search to discover her real identity and, after learning she had taken down her profile, sent a nude photo of her to the superintendent. The fifth teacher sent a nude photo of himself to an occasional paramour; the paramour's jealous ex-girlfriend hacked into the paramour's phone, found the nude photo of the teacher, and sent it to the superintendent.

Even though all five teachers in the above hypotheticals had engaged in lawful conduct, and all of the senders sought to harm the teachers professionally, only the first teacher's circumstances would unquestionably fall within the revenge porn statutes enacted in the vast majority of states (and only would be protected from adverse employment consequences in several of them). The other four teachers likely would remain subject to discipline in almost every state for the unauthorized dissemination of their nude images, and the other four senders would unlikely be prosecuted, notwithstanding their motivation to injure these teachers for their lawful sexual expression.[18] Although the legal treatment of teachers #2-5 in no way directly hinges upon their sexual orientation, this Article demonstrates that these carveouts keep queer people—those that identify as LGBTQ+ as well as other sexual subcultures—especially vulnerable to such image-based abuses.

Queer people have been formally extended the same legal protections as everyone else to explore their sexuality in private, intimate settings,[19] but they lack the pervasive social infrastructure available to straight people to find like-minded sexual partners and build communities with them.[20] Public and commercial spaces allow queer people to build queer communities around a shared experience of marginalized sexuality, but they also present the risk that compromising images will be captured and shared in ways that confirm the

[18] See State v. Van Buren, 214 A.3d 791, 823 (Vt. 2019)(finding no reasonable expectation of privacy in an image sent to a person who was not currently "in a relationship" with the subject of the image); Ex parte Fairchild-Porche, 2021 WL 5313684, at *9 (Tex. Ct. App. Nov. 16, 2021) (observing no reasonable expectation of privacy "if material was obtained of a person who purposely displays genitals in public"); cf. Martin v. Smith, 2020 WL 7310960, at *8 (Mich. Ct. App. Dec. 10, 2020) (rejecting proposition that concerns surrounding "revenge porn" applied to a plaintiff who had sent nude photos to a man he had met online, though never met in person); San Diego Unified School District v. Comm'n on Professional Competence, 124 Cal. Rptr. 3d 320 (Cal. Ct. App. 2011)(upholding termination of teacher who posted a sexually explicit Craigslist ad that was discovered by a parent in the school district). In a few states that *lack* the express carveouts for public or commercial settings, the applicable revenge porn statute may apply, assuming the court otherwise found a "reasonable expectation of privacy." See *infra* notes [] and accompanying text.

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

[20] See *infra* Part III(A).

homophobia that these communities are pushing back against.[21] Revenge porn laws send a message that individuals should not be harassed by an intimate partner in possession of a sexual image and that the existence of such sexual imagery should be considered irrelevant to someone's employment and education. Yet when a similar campaign of harassment is fueled by a photo obtained initially on Grindr or when a person is fired for appearing naked on Onlyfans, suddenly the abuse and discrimination that follow become fair game. These carveouts certainly are not limited to queer forms of sexual expression, but they are closely linked to them, practically and politically.

This paper examines recently-enacted revenge porn laws and shows how these laws exclude important, yet historically-marginalized, aspects of queer sexuality. Although the scholarship that drove these laws creates space for a robust, inclusive, and context-sensitive conception of sexual privacy that empowers individuals to manage their social boundaries,[22] the shift from scholarship to advocacy to legislation has resulted in simplistic forms of sexual privacy that protect absolute secrets, kept in indisputably private places.[23] Part I will document this shift by first examining the conceptual framing of nonconsensual pornography in legal scholarship and then surveying the 48 states that have enacted legislation to deter the practice and limit its real-world consequences. Part II will then closely examine the carveouts for public, commercial, and non-intimate images and show both how these carveouts correlate with queer sexual practices and how these carveouts map onto a long history of queer legal exclusions. It shows how revenge porn laws join forces with, for example, privacy torts, constitutional privacy, and employment law to punish queer sexuality that exits the closet and transgresses the boundaries between private and public.

The obvious solution to these underinclusive laws might be to plug the statutory holes and to expand revenge porn laws to protect against all conceivable forms of image-based abuse and harassment. Such expansion, however, exacerbates another potential tension between revenge porn laws and queer community: the role of law enforcement in protecting sexual privacy.[24] Although many states have provided civil causes of action and stand-alone employment and housing protections for revenge porn victims, the primary line of defense has been the criminal justice system[25]—a system with a long history of hostility towards the queer

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[21] See, e.g., *San Diego Unified School Dist. v. Comm'n Prof. Competence*, 124 Cal. Rptr. 3d 320 (Cal. Ct. App. 2011)(affirming termination of gay teacher who posted sexually explicit ad on Craigslist); Allen, *supra* note [] (collecting case law denying queer plaintiffs privacy protections in images used to out them); Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419 (2016) (collecting cases where BDSM communities have lost custody over leaked photos)

[22] See, e.g., Citron, *Sexual Privacy*, *supra* note [], at 1940 (critiquing "cramped" and "bright line" approaches to privacy); ARI EZRA WALDMAN, PRIVACY AS TRUST 72 (2018)(same).

[23] See SKINNER-THOMPSON, PRIVACY AT THE MARGINS, *supra* note [], at 47 (critiquing "rigid application of the secrecy paradigm").

[24] See, e.g., SKINNER-THOMPSON, PRIVACY AT THE MARGINS, *supra* note [], at 40 (expressing concerns about carceral framing)

[25] The major exception is the recently-reauthorized Violence Against Women Act which created a federal civil cause of action for unauthorized intimate image disclosure, but not did not create a new federal crime for the

communities it has policed. If revenge porn laws were expanded to cover queer public and commercial contexts, the practical result might be to welcome law enforcement to play a more active role in policing these contexts.[26] Law enforcement, unfortunately, has a horrifying track record of policing queer spaces, online and off, in the name of protecting the vulnerable.[27] Part III accordingly suggests an approach to image-based abuse that empowers vulnerable communities to police their own boundaries in the first instance before turning to the criminal law to police their boundaries for them.

This paper reimagines revenge porn laws in ways that are more inclusive of queer people's potential vulnerabilities to image-based abuses. These vulnerabilities stem not solely from abusive intimate partners and prudish employers, but also from a social environment that makes it very difficult to both build a vibrant sexual community and remain in compliance with the privacy norms of the closet. Although the immediate focus of this paper is the large body of recently-enacted revenge porn legislation, it more broadly suggests that sexual privacy may look different for queer people than for other populations. Queer people, like most people, need to be able to keep certain information and imagery out of the public sphere, but meaningful queer privacy ultimately also requires a substantial public component.

II. The Battle Against "Revenge Porn"

Although the nonconsensual distribution of naked imagery long predates the rise of digital networks, in the late 2000s the term "revenge porn" began to enter the popular lexicon to describe an increasingly widespread pattern of abuse and harassment directed predominantly against women.[28] The term most commonly connotes the practice of one intimate partner sharing a naked or sexual image of themselves, e.g. through "sexting," during the relationship, followed by the other partner either disseminating or threatening to disseminate the image if they dared to end the relationship.[29] Numerous revenge porn websites, such as Is Anyone Up? and MyEx.com, expressly welcomed submissions from jilted exes looking to exact revenge by sharing naked images, and often contact information, with an extremely wide audience. Revenge porn had become an attractive vehicle for abuse due to the wide spectrum of psychological, emotional, and economic harms it could impose on its victims: prospective employer deny victims jobs after conducting an Internet search of their names; current employers fire victims after receiving their naked images; strangers stalk or harass victims with information they obtained online; many victims suffer panic attacks, extreme anxiety, eating disorders, fear leaving their homes, and withdraw from social life, online and off. Moreover, prior to 2013, there was little meaningful redress available to the victims of

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same activity. See https://harvardcrcl.org/congress-reauthorizes-the-violence-against-women-act-adds-more-protections/

[26] On related critiques of "carceral feminism," see AYA GRUBER, THE FEMINIST WAR ON CRIME (2020)

[27] See, e.g., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (ANDREA RITCHIE, JOEY L. MOGUL, AND KAY WHITLOCK EDS. 2011).

[28] Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, NEW YORK MAGAZINE (July 21, 2013).

[29] See Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUDIES 534, 537 (2017) (discussing "the most familiar form of image-based abuse").

revenge porn, as only three states had criminalized the practice and law enforcement routinely brushed aside victims' complaints.[30] The growing practice of revenge porn drew strength from social environment that shamed women for their sexual expression and blamed them for their own harassment and abuse.

Against this backdrop, a coalition of legal scholars, lawyers, and survivors of image-based abuse built public awareness of the harms caused by revenge porn and pushed for legal reform. The result has been a substantial body of scholarship focused on revenge porn and related forms of image-based abuses, as well as a proliferation of law and policy reforms.

A. Scholarly Framings

Scholars have framed revenge porn as an issue involving two important concepts: civil rights and privacy. The civil rights framework emphasizes that the practice of using a person's nude imagery as a basis for abuse and harassment is overwhelmingly gendered and disproportionately impacts women's lives, both online and off. Most prominently, Professors Danielle Citron and Mary Anne Franks have not only emphasized that, statistically, women are much more likely to be the victims of revenge porn than men, but they also have connected these statistics to broader systems of gender inequality and structural misogyny.[31] Women often simultaneously are expected to publicly maintain a reputation for sexual purity while at the same time encouraged to share sexual images as the price of entry into intimate relationships. When these images are nonconsensually disclosed beyond their intended audience, the harassment that follows is then frequently attributed to the woman's poor decision to document her own sexuality, even if she was pressured to do so.[32] This dynamic of slut-shaming and victim-blaming can result in foreclosed professional opportunities within already-male-dominated spaces,[33] subjection to stalking and harassment,[34] and the silencing of

[30] See Citron & Franks, *Criminalizing Revenge Porn*, *supra* note [] at 366 (2014).
[31] See Citron & Franks, *Criminalizing Revenge Porn*, at 353-54; DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 45-55 (2014); see also Christine Geeng, Jevan Hutson, and Franziska Roesner, *Usable Sexurity: Studying People's Concerns and Strategies When Sexting*, Proceedings of the Sixteenth Symposium on Usable Privacy and Security August 10-11, 2020, available at https://www.usenix.org/conference/soups2020/presentation/geeng (reporting data showing that men who engaged in sexting were "significantly less likely to be concerned about blackmail" than were women or nonbinary study participants); McGlynn & Rackley, *supra* note [], at 544 ("First and foremost, it is important to recognize that the harms suffered by victim-survivors are deeply gendered."). More recent studies have suggested, however, that "men are victims at much higher rates than previously assumed," even though the impacts of revenge porn are particularly harmful for women and girls. Alexa Dodge, *Trading Nudes Like Hockey Cards: Exploring the Diversity of "Revenge Porn" Cases Responded to in Law*, 30 Soc. & Legal Studies 448, 451 (2020) (collecting research studies showing fewer gender disparities than indicated in earlier studies).
[32] See Citron & Franks, *Criminalizing Revenge Porn*, at 353 (discussing "slut-shaming" websites); McGlynn & Rackley, *supra* note [], at 548 ("Women are shamed for creating, or 'allowing' the creation of, sexual images of themselves, and this 'shame punishment' is fueled by cultural and social conditions of sexual inequality.").
[33] See Citron & Franks, *Criminalizing Revenge Porn*, at 352.
[34] See Citron & Franks, *Criminalizing Revenge Porn*, at 351-52.

women who dare try to enter the public sphere with a tainted sexual reputation.[35] Within a civil rights framework, revenge porn stands as a structural barrier to women's full and equal social participation.[36] Relatedly, some scholars have drawn explicit connections between revenge porn and other systemic forms of gender oppression, including intimate partner violence, sexual assault, and sexual harassment.[37] Accordingly, when the legal system refuses to take revenge porn seriously, just as when it refuses to take other forms of gendered violence seriously, it deviates from its supposed commitment to gender equality.

Legal scholars also have shifted discussions of revenge porn away from the narrow issue of sexual images in the hands of jilted exes—i.e. an issue of "revenge"—and towards a broader discussion of sexual privacy in a digital society. A privacy framework has several advantages over a harassment or "revenge" framework. First, emphasizing that revenge porn is a privacy violation broadens the circumstances in which the harms from the nonconsensual distribution of intimate images are understood to occur.[38] The gravamen of the violation is not the distributor's desire to inflict economic or emotional harm on the victim; instead, it is the loss of control over who has access to sexual depictions of the victim within a society that punishes people (again, especially women) who are publicly sexual, whether intentionally or not. This harm can occur when the distributor seeks revenge, but it can also occur when images are shared for purposes of bragging about sexual conquests,[39] for purposes of entertainment and "humor,"[40] or for economic gain.[41] Accordingly, although scholars still frequently use the term "revenge porn" in light of its widespread familiarity, many prefer the broader term "nonconsensual pornography" or "nonconsensual disclosure of intimate imagery" so as to signal an appropriately broader scope.[42] This Article's use of the term revenge porn is intended

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[35] See, e.g., CITRON, HATE CRIMES IN CYBERSPACE. One recent study suggests that women and sexual minorities have "internalized victim-blaming perspectives" regarding sexual privacy violations, shifting the focus away from the individual who are directly responsible for nonconsensually sharing their sexual images. See Christine Geen, Jevan Hutson, and Franziska Roesner, *Usable Sexurity: Studying People's Concerns and Strategies When Sexting*, Proceedings of the Sixteenth Symposium on Usable Privacy and Security August 10-11, 2020, available at https://www.usenix.org/conference/soups2020/presentation/geeng.

[36] McGlynn & Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUDIES 534, 546 (2017). ("Image-based sexual abuse compromises the dignity not only of the individuals involved, but also of all members of the same group (here typically women) who live in that society.")

[37] See *Reconceptualizing Revenge Porn*, at 219 (arguing that a privacy framework doesn't reflect the full impact of revenge porn and that the practice should be understood as a form of "sexual abuse")

[38] See Katherine G. Foley, Note, *"But, I Didn't Mean to Hurt You": Why the First Amendment Does Not Require Intent-to-Harm Provisions in Criminal "Revenge Porn" Laws*, 62 B.C. L. REV. 1365 (2021)("The push for a broad definition of nonconsensual pornography stems from new research reporting that approximately eighty percent of nonconsen-sual pornography perpetrators do not act with the intent to harm their victim.")

[39] See, e.g., https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/

[40] See, e.g., https://www.bbc.com/news/world-us-canada-40038332

[41] See, e.g., https://www.businessinsider.com/ryan-collins-allegedly-naked-photographs-celebrity-icloud-2016-3

[42] See Franks, *Crime of Revenge Porn*, at 664. Some scholars have folded revenge pornography into a larger umbrella of "image-based abuse" to reflect a broader range of abusive circumstances—such as domestic violence and youth bullying—beyond "revenge" in which a nonconsensual sexual image can figure prominently. See, e.g., Anastasia Powell, Adrian J. Scott, Asher Flynn, & Nicola Henry, *Image-Based Sexual Abuse: An International Study*

to reflect the colloquial usage of the term and is not tightly limited to circumstances involving vengeance towards the victim.

Second, a privacy framework connects revenge porn with a broad range of important social conditions that are prerequisites to meaningful social flourishing. The major sting of revenge porn often is tightly connected with a breach of trust: images were shared with another person under the (mistaken) belief that that person would keep those images to themselves.[43] By further disseminating images entrusted to them, the recipient of sexual images undermines both the trust that the sender had in the recipient as well as the sender's ability to place their trust in others in the future.[44] Trust and privacy are closely intertwined, and both are almost essential to forming meaningful social connections. Relatedly, privacy is closely connected with questions of intimacy: revenge porn is destructive both because it involves subject matter that is perceived as intimate—i.e. deeply personal and largely secretive[45]—and because it often is an outgrowth of relationships that are experienced as intimate—i.e. involving a willingness to disclose personal and secretive information.[46] Even if the victim of revenge porn isn't particularly secretive with respect to their sexual expression, the nonconsensual disclosure of sexual images undermines the agency of an individual to engage in the near-universal practice of boundary management, whereby they decide what information is allowed to flow within certain social contexts (work, church, family) but not into others.[47] Our various identities—whether professional, familial, or sexual—are often constructed through an ongoing and often delicate practice of keeping contexts separate and at least somewhat distinct. Revenge porn can be a rather dramatic and traumatic example of "context collapse," resulting in a loss of control and inability to remain in the driver's seat of one's own identity development.[48]

Before turning to the legislative successes of advocates and scholars—whether working in the vein of feminism and/or privacy, it is important to highlight the place of queer people within previous discussions of revenge porn. Although revenge porn discourse has been dominated by discussion of (mostly straight, cisgender) women's experiences and vulnerabilities, scholars in this area have observed that queer people have been subjected to revenge porn at significantly higher rates than heterosexual people with similar gender

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of Victims and Perpetrators (Feb. 2020), at 2, available at https://www.researchgate.net/publication/339488012; Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUDIES 534 (2017).

[43] See Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709 (2017).

[44] McGlynn & Rackley, *supra* note [], at 547.

[45] See Citron, *Compact for Sexual Privacy*, at [] ("The loss of privacy also undermines dignity by having others see people as just parts of their intimate lives and not as fully integrated human beings.").

[46] See Citron, *Compact for Sexual Privacy*, at [] ("[P]rivacy is the oxygen for intimacy."); Citron, *Sexual Privacy*, at 1875 ("Without sexual privacy, we have difficulty forming intimate relationships.").

[47] See Andrew Gilden, *Sex, Death, and Intellectual Property*, HARV. J.L. & TECH.; Citron, *Sexual Privacy*, at 1876 ("[T]he identification and protection of sexual privacy would affirm people's ability to manage the boundaries of their intimate lives.")

[48] See Andrew Gilden, *The Social Afterlife*, 33 HARV. J.L. & TECH. 329, 375 (2020). See generally HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010) (arguing that information should be protected according to the norms of distinct social contexts).

identities.[49] For example, according to a 2016 study, individuals who identify as gay or bisexual are *seven times* more likely to have been threatened with or actually victimized by revenge porn.[50] Queer people are vulnerable to revenge porn for many of the same reasons as straight victims of revenge porn, e.g., they also misplace trust in intimate partners and also bear the professional, social, and psychological consequences of living in a generally sex-negative culture. But there are some potentially significant differences in how queer people may be situated with respect to revenge porn.

First, there is an additional informational threat that can loom over queer victims of revenge porn: the disclosed images reveal not just the victim's naked body, but may reveal gender identities and sexual desires that have not been revealed in all social contexts.[51] In other words, revenge porn for queer people can be both an unauthorized outing *and* an unauthorized exposure of their naked bodies.[52] Unauthorized outing, even without intimate images, has well-documented social and psychological harms, and these may be compounded by the harms associated with revenge porn.[53] Moreover, until the Supreme Court's 2020 decision in *Bostock v. Clayton County*,[54] employment discrimination on the basis of gender identity or sexual orientation was permissible in many parts of the United States, and the lawfulness of discrimination on these bases in other contexts, such as housing and education, still has not been conclusively prohibited. Revenge porn thus adds a further layer of

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[49] See Citron, *Compact for Sexual Privacy*, at [] ("Nonconsensual porn impacts women and girls far more frequently than men and boys. Individuals who identify as sexual minorities are more likely than heterosexual individuals to experience threats of, or actual, nonconsensual pornography.") Christine Geen, Jevan Hutson, and Franziska Roesner, *Usable Sexurity: Studying People's Concerns and Strategies When Sexting*, Proceedings of the Sixteenth Symposium on Usable Privacy and Security August 10-11, 2020, available at https://www.usenix.org/conference/soups2020/presentation/geeng ("[W]omen and sexual minorities are disproportionately burdened by certain sexual privacy risks—receiving more unsolicited sexts, feeling pressured to sext, worrying more about negative judgements (both for sending and receiving) and the potential misuse of their intimate content."); Anastasia Powell, Adrian J. Scott, Asher Flynn, & Nicola Henry, *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators* (Feb. 2020), at 4, available at https://www.researchgate.net/publication/339488012 (We found 1 in 2 (56.4%) LGB+ respondents had experienced one or more form of image-based sexual abuse compared with 1 in 3 (35.4%) heterosexual respondents.").

[50] See Franks, *Crime of Revenge Porn*, at 665 (citing report by Data & Society Research Institute); see also Ari Waldman, Law, *Privacy, and Online Dating: 'Revenge Porn' in Gay Online Communities*, 44 LAW & SOCIAL INQUIRY 987 (2019) (discussing studies showing that 15 percent of lesbian, gay, and bisexual internet users report that someone has threatened to share their explicit images and 7 percent say that someone has actually done it); Citron, *Sexual Privacy*, at 1920 (same)

[51] See Citron, *Sexual Privacy*, at 1887 (observing that sexual privacy violations are often used to mark off "those who do not fall in line with heteronormativity").

[52] Cf. Anastasia Powell, Adrian J. Scott, Asher Flynn, & Nicola Henry, *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators* (Feb. 2020), at 4, available at https://www.researchgate.net/publication/339488012 ("Our survey found that LGB+ women victims of image-based sexual abuse were more likely to report greater health impacts (70.7%), as compared with heterosexual women (58.2%) and men (50.0% LGB+, 43.6% heterosexual), as a result of the image-based sexual abuse.").

[53] See Waldman, *Online Dating*, at [5] (observing that revenge porn "could uniquely harm queer populations," especially those in need of anonymity).

[54] 140 S. Ct. 1731 (2020).

professional vulnerability to queer victims. And even if, today, a trans or gay employee cannot lawfully be disciplined or fired on the basis of their gender or sexual identity, the public accessibility of an employee's sexual images may provide a useful, independent alibi for a hostile employer.[55] Accordingly, a sexually explicit documentation of a person's queerness can be an especially dangerous weapon in the hands of a hostile party.

Second, some queer people may be especially vulnerable to revenge porn due to significantly different social norms surrounding sexual images within certain queer communities. Some of the increased vulnerability faced by queer people may stem from comparatively high rates of online dating/sexting/hooking up; with the sheer volume of sexual communications come more opportunities for image-based abuse.[56] Unlike in the archetypical example of revenge porn, where the exchange of sexual images between men and women is often one-sided (requested by men, provided by women), scholars such as Ari Waldman have documented a "norm of reciprocity" among queer men online. Especially within gay male social networks, such as on the dating/hookup app Grindr, there often is a fairly low threshold of familiarity required for users to share sexual images with each other.[57] For some users, this reciprocity expectation stems from the sex-positivity of queer sexual spaces and the comparatively low levels of stigma surrounding nudity and sexuality.[58] For others, this reciprocity norm is less welcome and can feel either subtly or overtly coercive—in some ways not that dissimilar to accounts of straight women and girls with respect to nude images.[59] But regardless of whether the high volume of image exchanges reflects a sexually progressive or sexually coercive social environment, these exchanges all occur within a queer subculture that must exist within a broader, and often hostile, heteronormative society.[60] The tension between queer practices and heteronormative values easily can be exploited by a jilted lover, "concerned parent," gossip purveyor, or potential blackmailer.[61] The norms around image sharing may be relaxed within certain queer communities, but these relaxed norms neither eliminate expectations of nondisclosure beyond those communities[62] nor minimize the consequences that may follow from such disclosure.

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[55] See *infra* notes [] (discussing *San Diego Unified*).

[56] See David Hudson, *Gay and bi people more likely to be perpetrators and victims of revenge porn*, Gay Star News (Feb. 22, 2019), https://www.gaystarnews.com/article/image-based-sexual-abuse-revenge-porn (" It may be that some LGB individuals have more access to opportunities to engage in IBSA behaviours, especially if nude photos are used in user profiles on online dating sites."); see also

[57] See Waldman, *Online Dating*, at [2] (observing that the "norms of the platform demand" that users share images of themselves)

[58] See Waldman, *Online Dating*, at [12].

[59] See Waldman, *Online Dating*, at [11] (observing that some respondents were "resigned, almost nihilistic" about disclosure norms among gay and bisexual men).

[60] See Citron, *Sexual Privacy*, at 1897 ("In a sex-positive, bigotry-free world (one can dream!), we would still need sexual privacy. Regardless of whether anyone judges us, we should be able to manage the boundaries of our intimate lives.").

[61] See Waldman, *Online Dating*, at [22] (observing that revenge porn is a way of leveraging stereotypes of gay mean as promiscuous)

[62] See Waldman, *Online Dating*, at [13] ("You go on Grindr and you trust that everyone realizes that we're all in this together.").

Moreover, as will be discussed in more detail below, queer social spaces—offline as well as online—can often be overtly sexual or involve unabashed nudity; some examples include clothing-optional beaches, Pride and leather festivals, bathhouses, and public cruising spaces. These spaces are often celebrated for bringing together queer people in a way that provides much-needed visibility and a sense of community around minority sexual desires.[63] Nudity and sexuality may be celebrated within these social spaces, but the ubiquity of digital cameras and smartphones provides new opportunities for context collapse as images taken in these spaces wend their way into the heteronormative dominant culture.[64] Indeed, queer people are often acutely aware that open, unashamed participation in sexual communities carries practical risks in managing the boundaries between very different social, cultural, and professional environments.[65] Queer people accordingly will often engage in complex anonymizing and pseudonymizing practices when sharing sexual images--*not* due to any shame or discomfort with public sexuality but instead due to the plausible loss of hard-earned employment.[66]

B. From Scholarship to Reform

Scholars and advocates have not simply brought awareness to the growing problem of revenge porn, but also have been remarkably successful in bringing about significant legal reform. Although there always have been assorted legal remedies available for victims of revenge porn—e.g. via anti-stalking and harassment statutes, copyright law, and torts such as intentional infliction of emotional distress—before 2013 only three states had enacted a statute directly addressing the nonconsensual distribution of sexually explicit images.[67] The legal landscape, however, has shifted dramatically. As of this writing, 48 states have enacted criminal statutes banning some version of revenge porn, and least half of those states—as well as the federal government—have also created civil causes for victims of revenge porn. Furthermore, six states have extended employment protections to at least some victims of revenge porn; if a sexual image protected by theses statutes is distributed to the subject's employer, the employer would be prohibited from taking adverse actions. Finally, every major search engine and social media platform has adopted new policies prohibiting nonconsensual nudity.[68]

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[63] See *infra* Part III(A).

[64] See Christine Geen, Jevan Hutson, and Franziska Roesner, *Usable Sexurity: Studying People's Concerns and Strategies When Sexting*, PROCEEDINGS OF THE SIXTEENTH SYMPOSIUM ON USABLE PRIVACY AND SECURITY AUGUST 10-11, 2020, available at https://www.usenix.org/conference/soups2020/presentation/geeng (reporting observation from non-binary study participant that ""We live in a society of prudes—I worry that things will leak and get out there and people will judge me for what I have shared with someone under the pretext that it was going to be private").

[65] See *infra* Part III(A).

[66] See Alex Abad-Santos, *Gay men helped turn Twitter into an amateur porn paradise*, VOX (Apr. 16, 2021), available at https://www.vox.com/22382428/gay-twitter-alts-nudes-porn ("Listen, if I wasn't working at an elite university . . . I'd love to have people get off to watching me do that. But, you know, it's about as safe a space as I can get.").

[67] See Citron & Franks, *Criminalizing Revenge Porn*, at 371.

[68] See, e.g., Andrea Peterson, *Google joins the war on revenge porn*, WASHINGTON POST (June 19, 2015), available at https://www.washingtonpost.com/news/the-switch/wp/2015/06/19/google-joins-the-war-on-revenge-porn/ ; Jonathan Shieber, *Twitter makes another rule change; this time tackling revenge porn*, TECHCRUNCH (Oct. 27, 2017),

The success of the anti-revenge porn movement is undeniable, and the reforms it has provided are deeply important both in terms of practical relief for victims and in terms of powerfully expressing the moral wrong of distributing sexual images without the subject's consent. Nonetheless, there are some important distinctions between the scholarly framings of revenge porn, discussed above, and the actual legislation that it has helped produce. This subsection will both provide an overview of these legislative achievements and map out the limits of recent reforms.

Notwithstanding scholars' repeated emphasis that the crux of revenge porn is *not* the intentional harassment of victims, the large majority of revenge porn statutes require prosecutors or plaintiffs to prove that the defendant intended to "harass, humiliate, or injure"[69] the person depicted in a sexual image. In other words, despite scholarly efforts to frame revenge porn as a question of structural inequality and/or as an invasion of the victim's privacy, most states have created a narrower anti-harassment statute mapping much more closely to the early archetype of revenge porn (i.e., jealous exes with access to naked images). These "intent to injure" requirements generally have resulted from debates over the constitutionality of revenge porn statutes under the First Amendment; the ACLU has emphasized, including in both lobbying and litigation, that these statutes are unlawful content-based discrimination unless they contain language that limits their reach to intentional wrongdoers.[70] The ACLU's concern apparently has been that a broader statute would sweep in activities such as a journalists reporting on a public figure's sex life or a casual consumer of pornography sharing an image whose provenance they were unaware of.[71] The result is that nonconsensual disclosures motivated by money, entertainment, or bragging rights fall outside the scope of many states' prohibitions, notwithstanding the similar harms experienced by victims in these contexts.[72]

Moreover, significant statutory carveouts—ostensibly also meant to insulate legislation from First Amendment scrutiny—has limited some of the robust and flexible conceptions of privacy advocated by several scholars. Prof. Franks has advised numerous state legislatures considering enacting revenge porn statutes and, via the Cyber Civil Rights Initiative, has published a model criminal statute containing several express exemptions from liability. The CCRI model statute prohibits the knowing disclosure, or threat to disclose, an intimate image when the actor knows or recklessly disregarded the risk that the subject did not consent the

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available at https://techcrunch.com/2017/10/27/twitter-makes-another-rule-change-this-time-tackling-revenge-porn/ ; Soo Youn, *Facebook offers ways to fight revenge porn -- including sending your nude photos to the company first*, ABC News (Mar. 15, 2019), available at https://abcnews.go.com/Business/facebook-offers-ways-fight-revenge-porn-including-sending/story?id=61693264

[69] See, e.g., ORS 161.005; Katherine G. Foley, Note, *"But, I Didn't Mean to Hurt You": Why the First Amendment Does Not Require Intent-to-Harm Provisions in Criminal "Revenge Porn" Laws*, 62 B.C. L. REV. 1365 (2021)("[M]ost are harassment-based legislation that merely protects victims when their perpetrator acts with the intent to harm or harass.")

[70] Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, 69 FLA. L. REV 1251, 1327 (2018).

[71] Id.

[72] Mary Anne Franks, *Speaking of Women: Feminism and Free Speech*, SIGNS (2022), available at http://signsjournal.org/franks/

disclosure.[73] The model statute does not impose an "intent to harm" requirement, but it recommends that enacted statutes "include exceptions for sexually explicit images voluntarily exposed in public or commercial settings."[74] Prof. Franks further explains the reason behind these proposed exceptions:

> These exceptions are important to ensure that recording and reporting unlawful activity in public places (such as indecent exposure), reporting on newsworthy public events (such as topless protests), or forwarding or linking to commercial pornography are not criminalized.[75]

In other words, instead of insulating news reporting and commercial pornography from prosecution through a narrow state of mind requirement,[76] Prof. Franks has advocated for protecting these activities—and avoiding a potential conflict with the First Amendment—through an express exception to a more-broadly-scoped crime.[77]

Both of the approaches to limiting the reach of revenge porn legislation—the ACLU's preferred "intent to harm" requirement and the CCRI's "public and commercial settings" carveouts—have made their way into the criminal revenge porn statutes that have been enacted in 48 states.[78] As acknowledged by previous scholars, the majority of state statutes include an intent-to-harm requirement and thus represent anti-harassment as opposed to privacy concerns.[79] The "public and commercial settings" carveouts, which have not received any significant scholarly attention—similarly appear in a majority of enacted statutes. Twenty-nine states exclude from protection images depicting a person voluntarily exposing their intimate parts or engaging in sexual activity in a "public" setting.[80] Twenty-eight states also exclude from protection intimate images involving voluntary exposure or sexual activity in a "commercial" setting; one state, Louisiana, has a carveout for public, but not commercial,

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[73] Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, available at https://cybercivilrights.org/wp-content/uploads/2021/10/Guide-for-Legislators-10.21.pdf

[74] Franks, *Crime of Revenge Porn*, at 681; see also Citron & Franks, *Criminalizing Revenge Porn*, at 388 (observing the importance of clear exemptions that guard against criminalization of disclosures in the public interest).

[75] Id.

[76] For example, and by analogy, defamation laws are insulated from the First Amendment to the extent that they require actual malice in certain contexts, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and laws criminalizing "true threats" have been interpreted as requiring a subjective intent to threaten the victim, *Elonis v. United States*, 575 U.S. 723 (2015). These state-of-mind requirements are designed to ensure that the speaker can foresee that his or her speech will result in negative legal consequences. See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1641–46 (2013)

[77] The model CCRI statute does contain another exception that would likely cover some of the circumstances mentioned by Prof. Franks, namely "Disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment."

[78] A database of enacted revenge porn statutes is on file with the author and available at [LINK].

[79] See *supra* note [] and accompanying text.

[80] These states are: Alabama, Arizona, Connecticut, Delaware, Georgia, Hawai'i, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia.

settings.[81] Although the remaining nineteen criminal statutes do not expressly mention public or commercial settings, several criminalize the distribution of intimate images only if the depicted person had a "reasonable expectation of privacy" in the image;[82] as discussed further below, such provisions have been interpreted as significantly limiting the range of sexual images that are protected from disclosure, including images involving public nudity and images sent outside the context of a traditional, intimate relationship.[83] Additionally, one state, Arkansas, *expressly* limits the reach of its criminal statute to sexual images that were sent within such traditionally intimate relationships.[84]

Although a smaller number of states, as well as the federal government, have enacted *civil* revenge porn statutes, these statutes also generally contain carveouts for images taken in public or commercial settings. Some civil statutes, such as Oregon's, are parasitic on that state's criminal statute; in other words, the victim of revenge porn may bring a lawsuit only in the particular circumstances that would support a criminal prosecution, as outlined above.[85]

As of this writing, six states have enacted the Uniform Law Commission's model civil statute, The Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act ("UCRUDIIA"). The official comments accompanying UCRUDIIA explain that an image is "private," and thereby covered by the Act, if the depicted individual has a "reasonable expectation of privacy."[86] It provides the following examples of scenarios in which a person typically would, and would not, have such a reasonable expectation:

> An intimate image created by a photograph taken on a public nude beach or at a topless demonstration on Fifth Avenue is not obtained under circumstances in which the depicted individual had a reasonable expectation of privacy, while a photograph taken surreptitiously of a naked person entering the shower in her own home or other private location would be. Similarly, a depicted individual has a reasonable expectation of privacy in a topless selfie (self-taken photograph) sent confidentially by the depicted individual to the depicted individual's intimate partner.[87]

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[81] La. Rev Stat § 14:283.2 (2017)

[82] See, e.g., Colo. Rev. Stats. 18-7-107 (criminalizing the distribution of intimate images if the "depicted person had a reasonable expectation that the image would remain private"); Kan. Stat. 21-6101(8) (criminalizing the disclosure of sexual images "under circumstances in which such identifiable person had a reasonable expectation of privacy"); Mich. Crim. Law 750.145e (criminalizing the dissemination of a sexually explicit image "under circumstances in which a reasonable person would know or understand that the sexually explicit visual material was to remain private").

[83] See Ex parte Fairchild-Porche, 2021 WL 5313684, at *9 (Tex. Ct. App., Nov. 16, 2021)(" If, for example, the material was obtained by photographing a person who was purposely displaying the person's naked genitals in public, an ordinary person would not recognize as reasonable any expectation of privacy by the depicted person."); State v. Van Buren, 214 A.3d 791, 820 (Vt. 2019) (finding no reasonable expectation of privacy where the depicted person was not "in a relationship" with the person to whom she sent an intimate image).

[84] See Arkansas Code 5-26-314.

[85] ORS 30.833; see also, e.g., 13 Vt. Stat. § 2606(e)(1); Ohio Rev. Code § 2307.66.

[86] UCRUDIIA § 3, Comment. Prof. Franks was the reporter for UCRUDIIA. See id.

[87] UCRUDIIA § 3, Comment.

Accordingly, a reasonable expectation of privacy under the UCRUDIIA draws a distinction between disclosures made in traditionally private places, or within "intimate" partnerships, and disclosures in places accessible to a larger group of people. Even if a photo at a (lawful) nude beach was taken surreptitiously, and the photographer intentionally used the photo to cause emotional and economic harms, the depicted person would have no remedy for those harms under the Act.[88]

Significantly, UCRUDIIA *does* expressly state, "A depicted individual who does not consent to the sexual conduct or uncovering of the part of the body depicted in an intimate image of the individual retains a reasonable expectation of privacy *even if the image was created when the individual was in a public place*."[89] A victim of sexual assault of course should not be deprived of legal remedies based on the location of their assault, but this provision signals that the Act does not draw distinctions solely based upon whether a person's naked body was visible to a large number of people. Instead, the Act draws privacy distinctions based upon whether someone *voluntarily* displayed their body outside of their home or to people who are not their intimate partner, regardless of the defendant's motive or the plaintiff's injuries.[90] To the extent that UCRUDIIA and other revenge porn laws are meant to push back against blaming victims for letting other people see their naked bodies, these laws nonetheless tolerate certain forms of victim-blaming.

In March 2022, as part of its reauthorization of the Violence Against Women Act, Congress enacted the first federal revenge porn legislation, providing that a person depicted in an intimate image may bring a civil cause of action against an individual who disclosed the image with knowledge or reckless disregard of the depicted person's lack of consent to the disclosure.[91] The federal civil statute contains many of the limitations set forth by UCRUDIIA and its official commentary. Like UCRUDIIA, the federal civil statute applies to intimate images "produced while the identifiable individual was in a public place *only if* the individual did not . . . voluntarily display the content depicted; or . . . consent to the sexual conduct depicted."[92] Additionally, the federal statute does not apply to "an intimate image that is commercial pornographic content, unless that content was produced by force, fraud, misrepresentation, or coercion of the depicted individual."[93] The federal civil statute, like UCRUDIIA, recognizes that privacy violations and their resulting harms *can* occur when individuals are photographed in

[88] See also McGlynn & Rackley, *supra* note [], at 542 ("[W]e might reasonably class some images as non-private even where there was no consent to the taking of that particular image, or indeed any image at all, because of the public nature of the context in which the image was created and the participation of the individual depicted in them.")

[89] UCRUDIIA §3(d)

[90] See McGlynn & Rackley, *supra* note [] at 541 ("The public/private distinction is helpful here as it serves to delineate between circumstances in which an individual voluntarily exposes their sexual self and those where the exposure (or its extent) is involuntary.").

[91] Violence Against Women Act Reauthorization Act of 2022 §1309(b)(1).

[92] VAWA §1309(a)(5)(B).

[93] VAWA §1309(b)(4).

public settings or commercial contexts, but it nonetheless only protects those individuals who were naked in these contexts involuntarily.[94]

The dominant legislative approaches to revenge porn have been *sui generis* criminal statutes and civil causes of actions, but a few states have adopted additional important measures. Six states—California, Hawai'i, Illinois, New York, Oregon, and Washington—have incorporated revenge porn victims into their existing employment protections for certain crime victims.[95] Illinois law, for example, prohibits employers from discharging, refusing to hire, or otherwise discriminating against an individual because that individual "is or is perceived to be a victim of domestic violence, sexual violence, gender violence, or any criminal violence."[96] Victims of Illinois' criminal revenge porn statute are included within the definition of "sexual violence" and "criminal violence."[97]

Given that one of the major consequences of revenge porn is the loss of employment opportunities, the extension of antidiscrimination protections takes away a significant amount of the potential sting from the threat of unauthorized dissemination—at least for some victims. Even if an employer sees an employee's naked image, they are nonetheless prohibited from taking adverse actions against that employee; in other words, being seen nude, or in a sexual context, is suddenly irrelevant to one's employment in six states. Nonetheless, employment protections generally only apply in these states if the disclosed image falls within that state's criminal statute, so victims that fall within a statutory carveout remain at the mercy of an unsympathetic employer. To illustrate, if a woman in Oregon was photographed by her then-boyfriend while she was showering, and he sends that nude photo to the woman's employer after they broke up, that employer would be legally prohibited from firing her. By contrast, if her ex-boyfriend photographed her topless on a clothing-optional beach, and he vengefully sent the nude photo to her employer, the employer would not be prohibited from taking action on the basis of the image.[98] Moreover, in California, Hawai'i, and Washington, employment protections only apply to revenge porn practices that fall within narrower statutory definitions

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[94] See McGlynn & Rackley, *supra* note [], at 541 ("Thus, a photograph of a naked person taken for a pornographic magazine is a sexual image, but not a private one.").

[95] See Cal. Lab. Code § 230 (provides protections for victims of domestic violence, which is defined to cover revenge porn occurring within certain types of relationships); HI ST 378-2 (prohibiting discrimination against revenge porn victims that fall within certain categories of domestic violence); RCW 49.76.115 (prohibiting discrimination against victims of domestic violence, sexual assault, or stalking); ORS 659A.290 (prohibiting discrimination against victims of sexual assault, defined to include victims under Oregon's revenge porn statute); 820 ILCS 180/30 (prohibiting discrimination against victims of sexual violence and criminal violence); N.Y. Exec. Law § 296 (prohibiting employment discrimination against victims of domestic violence); see also https://slate.com/technology/2019/07/revenge-porn-law-new-york.html ("[E]mployers in New York are also not allowed to discriminate against an employee who has been a victim of nonconsensual porn.").

[96] 820 ILCS 180/30.

[97] 820 ILCS 180/10.

[98] Presuming, of course, that she could not establish discrimination on some other grounds, such as sex discrimination.

of domestic violence, further excluding unauthorized disclosures whose genesis lies outside familial or other traditionally intimate relationships.[99]

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Although legislation addressing revenge porn is widespread—spanning federal, state, criminal, and civil law—the protections it provides nonetheless are less robust than they may seem. In particular, the privacy protections afforded by recent revenge porn legislation is far more cramped than envisioned by the scholarship discussed above.[100] The limits imposed by the "intent-to-harm" requirement have been discussed at some length by other scholars,[101]but the other carveouts have received very little scholarly attention. By limiting protections outside of certain traditionally "private" spaces, such as bedrooms and hotel rooms, recently enacted revenge porn statutes exclude wide swaths of sexual activity that often is experienced as both meaningful and private by those involved. And, as the remainder of this Article demonstrates, this "under-inclusive, bright line"[102] approach to sexual privacy disproportionately excludes queer people, notwithstanding their heightened vulnerability to image-based abuse. By marking only certain sexual conduct as protected, revenge porn laws implicitly mark off other sexual conduct as unworthy of legal intervention on its behalf. [103]

III. Queer Exclusions

The previous Part highlighted three sets of exclusions from the reach of revenge porn laws: (1) voluntary sexual expression in public places, (2) voluntary commercial sexuality, and (3) sexuality outside of intimate relationships. This Part will demonstrate that each of these exclusions reflects sexual activities and contexts that are disproportionately important, both historically and currently, to queer communities. At first it may seem that the lines drawn between public/private, commercial/noncommercial, and strangers/intimates reflect common sense observations about when a person would be understandably upset about the loss of control over their sexual expression versus when that person should reasonably have anticipated the risk that they would lose such control. However, it is precisely these "common sense" intuitions around the propriety of sexual expression—distributed across an unquestioned geography of intimate, cultural, and economic life—that structure the heteronormative world order and define the queer political project.[104] What connects the

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[99] See Haw. Stat. 378-71; Cal. Lab. Code § 230; RCW 49.76.115

[100] See Citron, *Sexual Privacy*, at 1940 (observing that "cramped notions of privacy leave some invasions of sexual privacy without legal protection); Franks, *Crime of Revenge Porn*, at 662 (observing that privacy protections have been "diluted" by the tech industry and civil liberties groups)

[101] See, e.g., Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, 69 FLA. L. REV 1251, 1327 (2018); Foley, *supra* note [].

[102] See WALDMAN, PRIVACY AS TRUST, at 72

[103] Cf. Capers, *Real Women, Real Rape*, at 855 (observing that "criminal law has always played favorites," for example by excluding certain victims of sexual assault from legal protection); Capers, *Rejecting the Purity Myth* (observing that carveouts from rape shield laws reinforce notion that women who do not conform to heteronormative standards can expect to face threats of sexual violence).

[104] See Thea Johnson & Andrew Gilden, *Common Sense and the Cannibal Cop*, 11 STAN. J.C.R. & C.L. 313 (2015).

diverse sexual practices and identity categories that fall within the umbrella of queerness—e.g. gay, lesbian, bisexual, transgender, intersex, asexual, nonbinary, genderfluid, leather, kink, BDSM—is their position outside the dominant norms of sexuality and gender.[105] In order for queer practices and identities to move away from the margins, to obtain greater visibility, and to flourish without fear of violence from the state or its citizens, there will need to be significant shifts in the way that our legal system and society enforces inherited norms of sexual expression—as being appropriate in only very specific places and with only a narrow range of people.

Some of the most prominent scholars of revenge pornography and online harassment have emphasized the expressive value of laws prohibiting the nonconsensual creation and dissemination of sexual images. For example, Danielle Citron and Jonathon Penney explain, "Law educates us about what is 'good' or acceptable behavior and what is 'bad' or unacceptable behavior. People who internalize that message change their conduct."[106] Turning specifically to laws addressing cyber-harassment, including revenge porn, they observe that law "makes clear that the democratic majority disapproves of efforts to silence and intimidate victims . . . it signals that behavior intending to drive victims offline is unacceptable."[107]

To the extent that revenge porn laws send a powerful message that certain nonconsensual disclosures are "unacceptable" by a democratic majority, these laws nonetheless also send a powerful that certain nonconsensual disclosures are perfectly acceptable in the eyes of most Americans.[108] By carving out public, commercial, and nonintimate sexual expression from revenge porn legislation, lawmakers send a message that nudity and sexuality in these contexts deserve all the economic, social, and psychological risks that might accompany their unauthorized disclosure.[109] If revenge porn laws send a message to many victims that their sexual expression "is valued and that their suffering matters to the public,"[110] it also tells other victims that their sexual expression lacks such value and that their suffering is of no concern.

Of course, many aspects of law—especially criminal law—have been and continue to be hostile towards many forms of sexual expression, particularly sexual expression in public or commercial spaces. For example, laws prohibiting public nudity and indecent exposure remain in force, and sex work is unlawful throughout the United States. Accordingly, if public nudity

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[105] See, e.g., Ummni Khan, *Homosexuality and Prostitution: A tale of Two Deviancies*, 70 U. TORONTO L.J. 283 (2020).
[106] Danielle Citron & Jonathon Penney, *When Law Frees Us to Speak*, 87 Fordham L. Rev. 2317, 2321 (2019); see also Doron Dorfman, *The PrEP Penalty*, 63 B.C. L. REV. 813, 860-70 (2022)(connecting FDA blood ban policy to ongoing stigma surrounding gay men's sexuality).
[107] Citron & Penney, *supra* note [], at 2328.
[108] See Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1559 (2017) (arguing that traditional privacy baselines "mark and maintain traditional gendered social hierarchies").
[109] See Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Woman" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEOR. SOC. 233, 237, 239 (2012) (warning of "expressive justice" campaigns against sex crimes and the production of a paradigmatic "victim subject").
[110] Citron & Penney, *supra* note [], at 2327.

and commercial sex work remains criminalized, one might wonder: why should revenge porn laws protect sex workers and naked criminals from abuse? As the following sections indicate, a queer critique of recent revenge porn laws does likely also extend to laws criminalizing various forms of nudity and consensual sexual expression.[111] Nonetheless, it is important to emphasize, however, that much of the "public" and "commercial" sexuality that is carved out from revenge porn legislation is entirely lawful; for example, public nudity is not criminal at many beaches or street festivals, and non-obscene pornography is protected by the First Amendment.[112] Nonetheless, depictions of these lawful activities remain vulnerable to, and unprotected against, nonconsensual disclosures. Criminal prohibitions on certain forms of sexual expression may overlap with, but are not *coterminous* with, the carveouts that form the core of this paper's critique.

Revenge porn legislation, while presenting great potential to shift the norms and boundaries of sexual expression, nonetheless reinforces many of the traditional contours of heteronormativity. The past decade of revenge porn legislation, of course, is hardly the first time that law has failed to appreciate the value of sexual expression in public and commercial settings, or outside traditionally intimate relationships. Each of the following subsections will connect legislative line-drawing in revenge porn legislation both to important queer sexual, cultural, and political practices as well as to a history of queer vulnerabilities within the US legal system.

A. "Public" sexual images: Judicial Perceptions and Queer Experiences

1. Drawing the Line Between Public and Private

As explained above, 29 states have enacted revenge porn legislation that explicitly excludes images of voluntary nudity or sexual expression in "public" settings. Although no reported decision has directly applied these exceptions in a litigated dispute, several decisions nonetheless have discussed these exceptions and the logic behind them. For example, in *State v. Casillas*, the Minnesota Supreme Court upheld Minnesota's revenge porn statute against a First Amendment challenge and observed, "Journalists cannot be prosecuted because there are exemptions for the dissemination of private sexual images that involve matters of public interest and "exposure[s] in public."[113] This explanation dovetails with those provided by Prof. Franks and other scholars: sexuality in public is often a matter of public interest that journalists need space to report on without fear of criminal liability.[114]

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[111] See, e.g., BRETT LUNCEFORD, PUBLIC NUDITY AND THE RHETORIC OF THE BODY (2018); Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 551 (1998) ("Queers are forced to find each other in untrafficked areas because of the combined pressures of propri- ety, stigma, the closet, and state regulation such as laws against public lewdness.").

[112] See People v. Freeman, 758 P.2d 1128 (Cal. 1988).

[113] State v. Casillas, 952 N.W.2d 629, 643 (Minn. 2020).

[114] See *supra* note [] and accompanying text.

However, rather than expanding on this potential conflict between journalism and claims of privacy in public settings, most judicial explanations of the public settings exception instead fall back on majoritarian views of sexual privacy.[115] For example, the Texas Court of Criminal Appeals declared that "sex is inherently private," but nonetheless held that a victim's subjective expectation of privacy was insufficient to come within the reach of the state's revenge porn statute; the expectation needed to "objectively reasonable under the circumstances."[116] The court further explained: "If, for example, the material was obtained by photographing a person who was purposely displaying the person's naked genitals in public, *an ordinary person* would not recognize as reasonable any expectation of privacy by the depicted person."[117] The Vermont Supreme Court similarly explained that the statutory exclusion for voluntary nudity in public settings was meant to exclude circumstances where the individual had no reasonable expectation of privacy; it construed the state's revenge porn statute to exclude both "a nude photo that someone voluntarily poses for in the public park" as well as one taken in private "that the person then voluntarily posts in the same public park."[118] In other words, if a person is voluntarily naked in a "public" place or voluntarily *posts* a naked

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[115] It is especially difficult to map the public settings expression onto legitimate journalistic needs given that nearly all of judicial discussion of the exception involve indisputably private figures. And to the extent that they shield reporting on celebrities, it is far from clear that graphic depictions of even a *celebrity's* sex life are necessarily newsworthy matters of public concern in the absence of some accompanying concerns regarding corruption or serious criminal violations.

Most prominently, Terry Bollea, a.k.a. Hulk Hogan, obtained a $115 million jury verdict against Gawker for publishing an unauthorized sex tape. See Nick Madigan & Ravi Somaiya, Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker, NEW YORK TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html.
On the other hand, previous case law addressing the Hulk Hogan sex tape and sex tapes of Bret Michaels and Pamela Anderson have sent conflicting messages about the circumstances in which unauthorized disclosures of a celebrity's sex lives were protected by the First Amendment. See Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1031-37 (2019)(discussing cases).

By contrast, reporters were shielded from liability from posting nude photos of Rep. Katie Hill allegedly in a sexual encounter with a Congressional staffer in a hotel room. See, e.g., https://www.theguardian.com/us-news/2021/jun/04/katie-hill-ordered-to-pay-220000-costs-intimate-photos-suit. Similarly, reports on Rep. Anthony Weiner sending a naked photo of himself to a 15-year-old girl were also likely protected by the First Amendment. Notably, however, the line between protected journalistic activity and unlawful privacy violation in these cases in no way tracked the geographic location that the sexual images were taken, but were instead based upon their nexus to the public interest in the criminal activities of undoubtedly public figures. See *Hill v. Heslep*, No. 20STCV48797, at 8 (Apr. 27, 2021)("Here, the intimate images published by Defendant spoke to Plaintiff's character and qualifications for her position, as they allegedly depicted Plaintiff with a campaign staffer whom she was alleged to have had a sexual affair with and appeared to show Plaintiff using a then-illegal drug and displaying a tattoo that was controversial because it resembled a white supremacy symbol that had become an issue during her congressional campaign.").

[116] Ex parte Jones, 2021 WL 2126172, at *7, 12 (Tex. Ct. Crim. App. May 26, 2021); see also State v. Van Buren, 214 A.3d 791, 822 (Vt. 2019) ("We understand this to be an objective standard).

[117] Ex parte Jones at *12 (emphasis added); see also Ex parte Fairchild-Porche, 2021 WL 5313684, at *9 (Tex. Ct. App. Nov. 16, 2021) (same quote).

[118] State v. Van Buren, 214 A.3d 791, 813 (Vt. 2019).

image of themselves somewhere deemed public, then the "the State's interest in protecting the individual's privacy interest in that image is minimal."[119]

Sexual expression in a public park, or on a nude beach,[120] or on a website are not "objectively" private under most revenge porn legislative because they are perceived as located—both geographically and conceptually—outside of "a person's most intimate sphere."[121] The Vermont Supreme Court explained:

> Privacy here does not mean the exclusion of all others, but it does mean the exclusion of everyone but a trusted other or few.[122]

In other words, if you sexually express yourself in a place accessible to more than just a few trusted people, then documentation of your sexual expression becomes fair game for the entire world: your boss, your mother, your sheriff, and anyone on the internet who wants to see it.[123] This perspective is continuous with a long line of cases that have been skeptical of claims of privacy—in particular sexual privacy—in public places.[124] In William Prosser's seminal article on privacy law, he observes that "a lady who insists upon sun-bathing in the nude in her back yard . . . invited neighbors [t] examine her with appreciation and binoculars."[125]

Nonetheless, this spatialized, bright-line approach to privacy expectations flies in the face of most contemporary, context-sensitive accounts of privacy and identity development. Privacy entails the active, if imperfect, management of boundaries between disparate social contexts, [126] and can occur at the level of the family, the office, the online platform, or the

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[119] Van Buren at 813; see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991)(recognizing a legitimate government interest in furthering "societal disapproval of nudity in public places and among strangers").
[120] See UCRUDIIA § 3, discussed *supra* notes []-[] and accompanying text.
[121] Van Buren at 823; see also Carlos A. Ball, *Privacy, Property, and Public Sex*, at 42 ("The intuition of most people, including judges, seems to be that when sex takes place at a site that is generally accessible by the public, the sexual actors in question effectively waive whatever privacy interests they may have arising from their sexual conduct.").
[122] Van Buren, at 823.
[123] See Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1495-96 (2012)(surveying sexual assault cases inferring consent to sexual activity from the victim's previous "conduct deemed public").
[124] See, e.g., State v. Henry, 783 N.E.2d 609, 617 (Ohio Ct. App. 2002); People v. Anonymous, 415 N.Y.S.2d 921, 923 (N.Y. Just. Ct. 1979); Smayda v. United States, 352 F.2d 251, 254 (9th Cir. 1965); see Anita Allen, *Privacy Torts*, *supra* note []; Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747, 1759-60 (2019) ("[T]he privacy torts generally exclude public behavior and publicly known information. In these ambiguous situations, nudity really is not hidden form the public eye; there is no real expectation of privacy.").
[125] William L. Prosser, *Privacy* 48 CALIF. L. REV. 383 422 (1960).
[126] See, e.g., Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); Julie Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904 (2012).

community.[127] It can even occur among strangers.[128] This spatialized, yet seemingly-commonsense, approach to privacy is hardly unique to revenge porn law,[129] but nonetheless it substantially restricts sexual privacy to images that were created within, and intended to remain within, locations containing only a small number of people.[130]

Notwithstanding this consensus around what ordinary persons would expect to remain private in locations containing more than just a small circle of intimates, unauthorized dissemination of "subjectively" private images taken or posted in public settings can have nearly the same impact as images taken or posted in "objectively" private settings like a bedroom.[131] For example, in *San Diego Unified School District v. Commission on Professional Competence*, a tenured school teacher was terminated after he posted sexually explicit photos on the "men seeking men" section of Craigslist and an "anonymous male" sent the photos, and accompanying post, to the local police and the school superintendent.[132] Even though the Craiglist post did not include the teacher's name or employer, was posted off campus, and did not use any school resources, his termination was upheld by the California Court of Appeals due to his "immoral conduct" and "evident unfitness to serve as a teacher."[133] Aside from the Craigslist post, he was an educator in good standing , and the sole basis for his termination was a single post expressing his desire for oral and anal sex in a sexually-explicit online forum explicitly dedicated to adult men seeking other adult men.[134] In full transparency, there *were* aspects of the teacher's ad that absolutely indicated some serious character flaws; his posting was *expressly* racist and sizeist, emphasizing "No fats, fems, queens, Asians. NO BELLIES."[135]

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[127] See Julie Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 197-98 (2008)("Intimate relationships, community relationships, and more casual relationships all derive from selective exposure: from the ability to control in different ways and to differing extents what Erving Goffman called the "presentation of self." (quoting GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959)).

[128] See *infra* note []; Waldman, Privacy as Trust 53-54 (discussing the indicia of trust and expectations of trust within the Grindr ecosystem); Carlos Ball, *Privacy, Property, and Public Sex* at [].

[129] See Julie Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181 (2008); Waldman, *Privacy as Trust* at []. See *infra* notes [] and accompanying text regarding the historical exclusion of queer sexuality from privacy law.

[130] See also *infra* Part II(C).

[131] See *Recent Cases: State v. Van Buren*, 133 Harv. L. Rev. 2427, 2434 (May 10, 2020), available at https://harvardlawreview.org/2020/05/state-v-vanburen/ (observing that the victim in *Van Buren* "through her photos . . . forged an identity for herself as a sexual being" and that the court "failed to grapple with such harms to the privacy and concomitant self-expression of the individual); see also Ball, *supra* note [], at 59 ("This geographization of the right to sexual liberty, however, leaves unprotected all sexual conduct that takes place in public places, no matter how private that sexual conduct might be.").

[132] San Diego Unified School Dist. V. Comm'n on Prof. Competence, 124 Cal. Rptr. 3d 320, 324 (2011)

[133] Id. at 322.

[134] The teacher posted four pictures: two of his face and torso; one of anus; and one of his genitals. The accompanying text stated:

> "In shape guy, masc, attractive, 32 waist, swimmer's build, horny as fuck. Looking to suck and swallow masc guys, also looking to get fucked. Uncut and huge shooters jump to head of line. Give my [sic] your loads so I can shoot mine. White, black, Hispanic, European, all good. No fats, fems, queens, asians. NO BELLIES. Have pics when you email."

Id. at 323.

[135] San Diego Unified, 124 Cal. Rptr. 3d at 323.

Nonetheless, there was *no* mention anywhere in the court's opinion of these views, which are arguably far more relevant to the competency of a teacher in a diverse school district than is their unrepentant same-sex desires. Instead, all that appeared to matter to the court and to the school was the teacher's willingness to express their sexual desires, in a public context, in a manner that made his employer—an entirely unintended recipient—demonstrably uncomfortable.[136] And he is hardly the only teacher to have been terminated based on sexual images taken or posted outside of traditionally private settings. [137]

San Diego Unified and other teacher termination cases are in important ways similar to prototypical revenge porn scenarios. In both scenarios, sexual images tailored to one particular sexual context are nonconsensually transferred into a very different context, subjecting the depicted person to the full wrath of a sex-negative culture and the legal system that supports it. Both also are frequently motivated by some desire to injure and/or exert power over the depicted person. For example, the teacher in *San Diego Unified* was fired only because someone browsing the forum wished to negatively impact his career for some undisclosed reason—Because they had been rejected by him, explicitly or implicitly? Because they were uncomfortable with their own sexuality? Because they were looking for opportunities to harass queer people? It is highly implausible that whoever shared the teacher's sexually explicit personal ad did so out of a genuine belief that he posed a risk to schoolchildren; they found the ad either because they were *themselves* actively looking for sexual partners on Craigslist or because they were trying to identify queer people to torment. Just as in the prototypical revenge porn scenario, the teacher's sexual image became a weapon for harassment, triggered by the sender's personal vendetta and/or by their indoctrination into patriarchal beliefs and toxic heteronormativity. And like so many victims of revenge porn, the teacher in *San Diego Unified* was blamed for his own harassment; the court emphasized that he refused to acknowledge the immorality of his conduct, evidencing a "fixed character trait" that made him unfit for working with students.[138]

The inconsistent logic of the public settings exceptions becomes even clearer when compared with some states that *do not* have such exceptions. California, for example, does not have any public setting carveout, and at least one court has found a reasonable expectation of

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[136] The superintendent stated that she "had lost confidence in him" and "questioned his ability to serve as a role model." Id. at 324.

[137] See, e.g., Phenix City Bd. of Educ., 125 Lab. Arb. Rep. (BNA) 1473 (2009) (upholding termination of a bisexual teacher who was "quite comfortable with [her] sexuality" after the superintendent had received an "anonymous package" containing nude photos of her that had been posted online); L'Anse Creuse Pub. Schs., 125 Lab. Arb. Rep. (BNA) 527 (2008) (upholding termination where sexual photos of a teacher were unknowingly taken of her on a "party boat" and posted online without her consent); see generally, Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues In the Workplace Arising from New Technologies and How Arbitrators Are Dealing with Them*, 11 TRANSACTIONS: TENN. J. BUS. L. 9, 25 (2010) (collecting arbitral decisions upholding the termination of teachers whose naked images were posted online, both voluntarily and involuntarily); cf. Rodriguez v. Comm'n on Prof. Competence, 2015 WL 8767581, at *3 (Cal. Ct. App. Dec. 14, 2015) (upholding termination of teacher who pled no contest after being arrested by undercover cop who had solicited him for sex in a public bathroom, notwithstanding the absence of children, families, or any other adults in the vicinity).

[138] Id. at 326.

privacy in an image taken of a woman topless at a clothing optional beach.[139] Notwithstanding her then-boyfriend's promise that the image would "remain just between the two of them," he later posted the photo to her employer's Facebook page, calling her a "slut" and saying she should be laid off.[140] He was subsequently convicted under the state's revenge porn statute.[141] Following similar logic, in *State v. Culver*, the Wisconsin Court of Appeals rejected the defendant's argument that the statute was overbroad because it didn't specify any geographic limitations on the types of sexual imagery whose dissemination was proscribed—for example, it might potentially criminalize reporting on an awards show red carpet featuring "female celebrities wearing revealing outfits at a plainly public occasion."[142] The court responded that is was "uncertain as to why specifying the location of a captured image matters" and that concerns around the geographic dimensions of privacy would be addressed through required showing of the defendant's intent and the depicted person's knowledge and consent.[143] These jurisdictions indicate that the "public settings" exception is, at most, a very rough proxy for the legitimate interests of journalists and excludes many forms of image-based abuse based largely on majoritarian, spatialized intuitions regarding sexual privacy.

2. Queer Publics

It is precisely these majoritarian approaches to the geography of sexual privacy that render "public settings" exceptions troubling from the perspective of queer social practices and sexual politics. Many of the social settings that have provided important connective tissue for queer communities—both historically and today—almost certainly fall outside the scope of most revenge porn statutes. Sex in these public settings may defy majoritarian intuitions around sexual propriety, but it also can be a powerful source of individual pleasure, communal belonging, and political action.[144]

For example, pride parades and festivals have played an important role in providing visibility to queer communities and to communicate the message that queerness, in its many forms, is something worthy of celebration.[145] These events often feature far more nudity and open sexual expression than, say, the Macy's Thanksgivings Day Parade, but that's part of the point—to push back against repressive sexual norms and "celebrate queer love, queer family, and queer sex."[146] Participants may reasonably expect that they will be viewed by those in attendance—who are likely to be receptive to their message—but that doesn't diminish the

[139] People v. Iniguez, 247 Cal. Rptr. 3d 237, 240 (Cal. Super. Ct. App. Div. 2016).
[140] Id. at 240-41. The court did not explain just how dispositive the express representations of confidentiality were to the decision, or whether the result would have been the same had they not been in a committed relationship at the time.
[141] Id.
[142] State v. Culver, 384 Wis. 2d 222, 240 (Wisc. Ct. App. 2018).
[143] Id. at 240, n.14.
[144] See Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 560-61 (1998) (discussing queer "world making" practices such as "drag, youth culture, music, dance, parades, flaunting, and cruising").
[145] See, e.g., Joseph J. Fischel, *Keep Pride Nude*, Boston Review (June 23, 2021), available at https://bostonreview.net/articles/keep-pride-nude/.
[146] Fischel, *Keep Pride Nude*.

impropriety of someone in the audience taking a picture of their bare butt and intentionally sending it to their conservative boss. Moreover, many of these public festivals, such as the Folsom Street Fair in San Francisco, may be quite numerically large, but they are catered to particular subcultures, such as leather, kink, or BDSM.[147] Nudity or sexual activity at such legally-permitted events may be visible to many other people, but there is nonetheless a perceived boundary between this subculture and its participants' other, different social contexts.[148]

There are several other technically-public settings, embraced within queer communities, that involve visible nudity and/or sexual expression. Clothing-optional beaches—such as Black's Beach in San Diego, Herring Cove Beach in Provincetown, and Marshall's Beach in San Francisco—are celebrated queer destinations. Such destinations provide opportunities for visitors to celebrate their own bodies, appreciate the bodies of others, and potentially connect with others based on mutual attraction and/or shared values. Visitors can let their guard down in these spaces in ways they cannot in contexts where nudity is either taboo or prohibited. And with these lowered guards come opportunities to connect authentically with others and establish forms of intimacy perhaps illegible to the vast majority of Americans who have never been fully nude in public.[149] Nonetheless, there is no way to account for every last person who might make their way to a nude beach or to account for the many reasons why someone might try to exploit the social, economic, and physical vulnerabilities that attend being seen nude in American culture.

Bathhouses and other sex-related businesses have played a similar role in queer communities, though their history is often misunderstood. For many Americans, bathhouses catering to gay men—and their high-profile closures in San Francisco and New York—are closely and negatively associated with the AIDS epidemic.[150] Nonetheless, bathhouses and sex clubs historically have provided queer people unique opportunities to find sexual partners—and fulfilling sex—in venues that are largely insulated from the gaze of the outside world. And regardless of whether sex was the precise impetus for visiting bathhouses, these venues evolved into important social hubs. As phrased by Pat Califia, bathhouses "taught gay men to

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[147] See, e.g., BRETT LUNCEFORD, PUBLIC NUDITY AND THE RHETORIC OF THE BODY 175 (2018) ("Those who participate in Folsom Street Fair reject the conception of BDSM as deviant behavior by damaged people and celebrate a range of sexualities that go beyond the heteronormative standard."). Lunceford also connects the experience of participating in Folsom with the experience of nude revelers at Mardi Gras, who speak in terms of escaping their day-to-day lives and explore their "paradoxical identities." Id. at 130.

[148] LUNCEFORD, PUBLIC NUDITY at 170 ("Public nudity is permitted during Folsom but will get you arrested after the event is over, and not all wish to be outed as queer and/or kinky.").

[149] A 2015 survey conducted by the travel company Expedia revealed that only 3% of Americans have sunbathed fully nude on vacation. https://www.prnewswire.com/news-releases/expedias-heat-index-reveals-american-attitudes-towards-vacation-flings-beach-nudity-sexiest-cities-and-more-300033165.html

[150] See Stephen M. Engel & Timothy S. Lyle, *Fucking With Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking*, 92 CHI.-KENT L. REV. 961, 964 (2018) ("[B]athhouses were sites of unsafe sex, unsafe sex is linked to the transmission of HIV, and thus these institutions needed to be closed in the name of public health.").

see themselves as members of a common tribe with similar interests and needs."[151] They also were important sites for organizing politically as well as for educating the community about safer sex practices, notwithstanding the heavy blame they (in many ways unfairly) received for contributing to the spread of HIV.[152] Although far from ideal paradises,[153] bathhouses and sex clubs operate successfully in many cities around the world and still perform an important social function. As with clothing-optional beaches, these venues defy majoritarian sexual norms and celebrate the pleasurable—and often intimate—connections that emerge from sharing physical space with like-minded strangers.[154] Bathhouses and other sexual venues may involve patrons exposing their bodies to "strangers," but the shared desires, values, and experiences that bring these strangers together can imbue sexual venues with an unexpected aura of intimacy.[155]

A final group of public settings often associated with queer sexual practices are "cruising" spots: publicly-accessible venues like parks or restrooms where individuals can find others for relatively-spontaneous and often-anonymous sex. At first blush, these public sex settings may seem qualitatively different than the previous settings with respect to both reasonable privacy expectations and sociopolitical value. Nonetheless, a relatively sizeable body of scholarship has pushed back against these intuitions. Carlos Ball, reviewing sociological work on cruising in public restrooms, has observed that participants employ strategies both to avoid being seen by unwitting third parties and to ensure that only individuals familiar with the semiotics of cruising—e.g., body positions, foot tapping, code words—are included in sexual activity.[156] Participants may be strangers to each other; indeed, the appeal of these spaces may be the high degree of anonymity they provide compared to other sexual settings.[157] Nonetheless, participants' collective efforts to create a welcoming space for sexual activity produces an environment of mutual trust that, once again, deviates from majoritarian intuitions

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[151] See PAT CALIFIA, PUBLIC SEX 7 (2d ed. 2000).

[152] See PAT CALIFIA, PUBLIC SEX 6-7 (2d ed. 2000); Engel & Lyle, *supra* note [], at 964 ("[W]e challenge the dominant public health narrative by illustrating how bathhouses were critical sites of community development, including community-based responses to the HIV epidemic and crucial spaces for queer kinship.").

[153] Some bathhouses, for example, have struggled both to maintain spaces for gay "men" and to be welcoming spaces for trans people. See, e.g., https://www.gaystarnews.com/article/trans-man-sauna/

[154] See, e.g., TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF INTIMACY (2009); Trevor Hoppe, *Circuits of Power, Circuits of Pleasure: Sexual Scripting in Gay Men's Bottom Narratives*, 14 SEXUALITIES 193 (2011).

[155] See Chris Ashford & Gareth Longstaff, *(Re)regulating Gay Sex in Viral Times: COVID-19 and the Impersonal Intimacy of the Glory Hole*, 23 CULTURE, HEALTH & SEXUALITY 1559, 1562 (2021)("A series of commercial spaces or Public Sex Venues (PSVs) have similarly provided public sex spaces with an emphasis on displaying, affirming, experiencing, and celebrating the personal impersonal tensions associated with anonymous and promiscuous sexual intimacy between men"). Profs. Ashford and Longstaff note that during the height of the coronavirus pandemic, some local health departments suggested the use of glory holes—a staple of gay male public sex—as a way to avoid respiratory contact with sexual partners. Id. at 1567 ("Venues with precisely the facilities highlighted by some health authorities – notably the glory hole – arguably offer a key commercial space in which sex can take place with less harm than some other public sex spaces or the domestic setting of the home.").

[156] Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUMBIA J. GENDER & L. 1, 16-24 (2008).

[157] Paul Johnson, *Ordinary Folk and Cottaging*, 34 J.L. & SOC'Y 520, 535 (2007) ("Yet, ironically, it is the very privateness of the public toilets which afford the possibilities for the sexual encounters which take place within them . . . such encounters are premised upon a highly discreet form of interaction designed to maximize privacy and preclude visibility from unwilling participants."); MICHAEL WARNER, THE TROUBLE WITH NORMAL 176 (1999)("The need to resort to an undercover camera contradicts the claim that these places are already 'very public.'").

about how trust and privacy are distributed.[158] Police officers often will claim to be protecting children and families when they learn cruising lexicon, dress in skimpy clothes, and conduct undercover stings; research by J. Kelly Strader and Lindsey Hay on the LAPD, however, uncovered essentially zero evidence of community members being exposed to—or even complaining about—sex in parks or restrooms.[159] Accordingly, something else must be motivating the LAPD's many hours of foot-tapping in the men's room. Although sex in many bathrooms or parks may be unlawful, these cruising spots nonetheless share important similarities with festivals, nude beaches, and bathhouses: they all provide much-needed access to other queer people and at least a momentary escape from the demands to conform to a sex-negative, heteronormative society.[160]

These public settings accordingly are not just "sleazy" places that happen to cater to sexual interests shared by the queer people who frequent them; they are also constitutive of queer community, politics, and identities.[161] Against the backdrop of bathhouse closures in the 1980s and the intensified regulation of sex-related business districts in the 1990s, prominent queer theorists emphasized the importance of queer "publics" for opposing heteronormativity and creating space for queer flourishing.[162] "Publics," as envisioned by Michael Warner, are both spatial and discursive, referring to communally shared locations (physical or virtual) as well as shared modes of communication.[163] When these spaces and languages exist in tension and opposition to majoritarian cultural norms—whether homophobic, transphobic, misogynistic, racist, ableist, or xenophobic—they can take on the character of "counterpublics": forums in which minority experiences coalesce into communities otherwise inaccessible and unacceptable within the dominant culture.[164] Forums such as beaches, festivals, bathhouses, and cruising spots—public in the colloquial sense and counterpublic in the conceptual sense—accordingly can be integral to queer world-building.[165] In a culture that in many ways continues

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[158] See id. at 8 ("The anonymity and lack of emotional commitment that usually accompany public sex, then, become for some an appealingly transgressive alternative to the assimilationist and conservative goal of encouraging individuals, regardless of sexual orientation, to marry.").

[159] J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence's Harm Principle to Morals-Based Enforcement*, 59 AM. CRIM. L. REV. 465 (2019).

[160] See Wickliffe Shreve, *Stall Wars: Sex and Civil Rights in the Public Bathroom*, 85 L. & CONTEMP. PROBS. 127, 150 (2022) ("It is difficult for many to believe that places built or used for the primary goal of engaging in anonymous sexual encounters can be culturally productive in other ways, even foster community.").

[161] See Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 563 (1998)("Respectable gays like to think that they owe nothing to the sexual subculture they think of as sleazy. But their success, their way of living, their political rights, and their very identities would never have been possible but for the existence of the public sexual culture they now despise.").

[162] See Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 548 (1998).

[163] MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 65 (2002). Warner's work, developed in part with Lauren Berlant, builds off important work by feminist scholar Nancy Fraser. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25 SOCIAL TEXT 56 (1990).

[164] WARNER, COUNTERPUBLICS, AT [].

[165] MICHAEL WARNER, THE TROUBLE WITH NORMAL 179 (1999)("Contrary to myth, what one relishes in loving strangers is not mere anonymity, nor meaningless release. It is the pleasure of belonging to a sexual world[.]"); José Esteban Muñoz, Cruising Utopia 35 (2009)(arguing that public sex forums "help us carve out a space for actual, living, sexual citizenship"); Engel & Lyle, *supra* note [], at 966-67 ("Whether our critical eye turns to the architecture,

to be hostile towards overt expressions of queer sex, intimacy, identities, and expression, queer publics are vehicles through which people struggling against heteronormativity can find each other and see themselves. And only once queer people have the spaces and the words to embrace themselves can meaningful political and cultural transformation occur.

As digital technologies and social media platforms have proliferated over the past generation, so too have the counterpublic possibilities—spaces available from anywhere in the world that challenge dominant ways of living, speaking, and thinking.[166] For many queer people—and especially queer youth—online forums create opportunities to discover their sexual desires, educate themselves about the diversity of sexual practices, talk candidly with each other, and form relationships (sexual and/or otherwise) otherwise not available in their physical communities.[167] As Ari Waldman explains, queer social media addresses questions that are typically treated as taboo by mainstream culture:

> If queer adolescents want to learn how to put on makeup for their first drag show, they go to YouTube. If someone wants to learn the best way to come out to their parents as bisexual, they join a Facebook group or watch videos on TikTok. Without enough doctors trained in queer sexuality, adolescents turn to Google to learn how to safely prepare for anal sex. Social media is filling gaps.[168]

And especially during the coronavirus pandemic, social media and online content remained an invaluable bridge between lockdowns and the queer world outside.[169] Queer publics online—

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actions among bodies, or activities housed within these spaces, what becomes clear is that the bathhouses served as what queer theorist Michael Warner calls a counterpublic.").

[166] See Courtney Blackwell, Jeremy Birnholtz, and Charles Abbott, *Seeing and Being Seen: Co-Situation and Impression Formation Using Grindr, a Location-Aware Gay Dating App*, 17 NEW MEDIA & SOCIETY 1117, 1133 (2015) ("We showed how Grindr brings people together in ways that transcend geographic boundaries, often blurring boundaries around physical places and communities defined by shared interests in particular activities.")

[167] See Gilden, *Cyberbullying and the Innocence Narrative*; Ed Stein, *Queers Anonymous* [CITE]; Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2034 (2014) ("[U]se of intimate media may be particularly important for people with minority sexual preferences . . . Production of consensual intimate media allows people to challenge prevailing gender norms and communication patterns, and to take some control over self-representation."); Samuel Brando H. Piamonte, Mark Anthony M. Quintos & Minami O. Iwayama, *Virtual Masquerate: Understanding the Role of Twitter's Alt Community in the Social and Sexual Engagements of Men Who Have Sex with Men*, 13 BANWA A 1, 9 (2020) ("The sexual aspect of [alt-Twitter] is the core [of the network], but it has been enriched by more complex social benefits to users such as including formation of new friendships, sharing of information and advocacies, reciprocations of emotional support, and provision of 'safe space' for those who wish to express their sexuality[.]").

[168] Ari Ezra Waldman, *Disorderly Content*, at 48, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906001 (Aug. 17, 2021). See also TOM ROACH, SCREEN LOVE: QUEER INTIMACIES IN THE GRINDR ERA 67 (2021) ("[H]ookup apps provide a valuable forum for sexual knowledge circulation, an essential ingredient for a democratic sexual morality.").

[169] See Ashford & Gareth, *(Re)regulating Sex*, *supra* note [], at 1567 (discussing virtual sex parties hosted on Zoom); Abad-Santos, *supra* note [] (observing that alt-Twitter lets participants "tap into and share fetishes and kinks in a way that feels safe" and that it is also "according to many men, a secure, anonymous way to release the sexual frustration that's built up over the pandemic"). For a fascinating discussion of one queer writer's pandemic life, and an analysis of queer world building through "sexts, memes, resource-sharing via social media, online therapy

just like queer publics anywhere—are by no means fully-inclusive utopia,[170] but they have been crucial to the broadened acceptance of queer sexualities and identities both by those who are drawn to them as well as by many parts of the dominant culture.[171] Accordingly, when a platform censors a queer creator or an employer fires an employee for online cruising—like when law enforcement shuts down a bathhouse or pretends to be horny in a restroom—they are not simply policing particular individuals for deviant behavior; they are also whittling away at longstanding pillars of queer life.

Revenge porn practices can be especially insidious for queer people because they both punish and deter participation in queer publics. When an evening at a nightclub is recorded and sent to a family member, or a horny conversation on Grindr is screenshot and sent to a boss, the counterpublic potential of these spaces diminishes. These spaces are no longer relatively-safe spaces for frank communication with other trusted members of a community; they are instead more of the same social landmines that queer people are forced to navigate throughout their lives.[172] To avoid stepping on these landmines, queer people often must anonymize themselves in these spaces when they can, watch over their shoulders when they cannot, or choose to remain in heteronormative spaces.[173] In a similar vein, Prof. Franks has connected her advocacy against online sexism with the possibility of fostering online counterpublics wherein women are not shamed, harassed, or stalked for daring to openly pursue their social, professional, political, or sexual desires.[174] Anti-revenge porn laws are an important piece of this puzzle; they help counter the *laissez faire* dynamics of online speech that systematically silences women and other historically marginalized groups.[175] Anti-revenge porn law could also help counter the *laissez faire* dynamics of outing, shaming, and terrorizing queer people for daring to embrace their sexuality in view of others. Nonetheless, in most jurisdictions queer publics are too conventionally "public" to merit protection.

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sessions, online strip teases, Zoom calls with friends, camming, and other forms of online exchange," see Jenna Chasse, *How to Make a Queer Counterpuublic*, available at http://openresearch.ocadu.ca/id/eprint/3377/

[170] See *supra* note [] and accompanying text, discussing the racism and sizeism in the Craigslist post , e.g., [Sexual Racism]. Tim Dean, who has been an outspoken advocate for the social value of public sex, has nonetheless bemoaned the shift to the online cruising for facilitating the instrumentalizing of sexual partners, i.e. for disregarding their actual desires and pleasures. See Dean, *Unlimited Intimacy*, at

[171] See Gilden, *Cyberbullying and the Innocence Narrative*, *supra* note [].

[172] See WALDMAN, PRIVACY AS TRUST, at 18-19.

[173] Cf. Grant Anderson, "*Why Can't They Meet in Bars and Clubs Like Normal People?": The Protective State and Bioregulating Gay Public Sex Spaces*, 19 SOCIAL & CULTURAL GEOGRAPHY 699, 712 (2018) (observing that gay men developed expertise at "stealing moments of privacy and at finding the cracks in society where they could meet and not get caught.").

[174] Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. FORUM 427, 448 (2021)("In place of an idealized, unitary public square, we can envision the flourishing of multiple spaces—online and off, public and private—that provide the conditions necessary for free expression and democratic deliberation for different groups with different needs.").

[175] See Franks, *Beyond the Public Square*, at 448 ("But a few general guidelines for the would-be architects of democratic counterpublics can be sketched. One is the rejection of the faux laissez-faire approach of the idealized public square in favor of an intentional commitment to designing for democracy.").

Far beyond the issue of revenge porn and online privacy, sexual publics have long been highly vulnerable to social policing and largely ignored by privacy laws. Anita Allen has documented a lengthy history of queer exclusions from privacy law, often on the basis of the perceived publicness of the activity involved.[176] For example, Prof. Allen discusses a lawsuit involving a gay man who was nonconsensually photographed in a night club and then outed to his family and coworkers.[177] The court observed that the plaintiff had no objective expectation of solitude in a party he attended and accordingly dismissed his case.[178] Reviewing these and numerous other cases, Prof. Allen observes:

> If a person can be unlawfully stalked or sexually harassed in a crowded public place, it is unclear why a person cannot be a victim of a privacy intrusion while at a party. The courts could easily construe the targeting of a person in a public place for a photograph intended for publication without his consent as an unwelcome invasion."[179]

In addition to dismissing claims based upon the location of the privacy invasion, courts also have dismissed queer people's privacy claims based on their failure to keep their sexual orientation fully secret. Accordingly, if a person's sexuality is known within a local queer community, then it is free game for dissemination to the general public, even if such dissemination is malicious.[180] In other words, "once out, always out."[181] By contrast, in contexts *not* involving sex or queer people, Prof. Allen notes that courts have been willing to adopt a more protective, context-sensitive approach to a victim's privacy expectations.[182]

Public sexuality's social and legal vulnerability has not vanished alongside expanded constitutional rights for queer sexuality. Most prominently, numerous courts have held that *Lawrence v. Texas*, and its protections for consensual sexual decision-making, do not extend to consensual sexuality outside the confines of the home or other traditionally "private" spaces.[183] For example, several courts have held that *Lawrence* does not bar undercover police officers from soliciting—and then arresting—gay men for consensual sex in department store bathrooms, even if no unwitting third parties were present.[184] Because the proposed conduct

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[176] Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711 (2010).
[177] Id. at 1729-30 (discussing Prince v. Out Publ'g, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002).
[178] Id. at 1730.
[179] Id.
[180] Allen, *supra* note [], at 1749-50.
[181] Id. at 1750.
[182] Id. at 1730 (citing Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973)).
[183] See generally Ball, *supra* note [].
[184] See, e.g., Singson v. Commonwealth, 621 S.E.2d 682 (Va. Ct. App. 2005); Tjan v. Commonwealth, 621 S.E.2d 698 (Va. Ct. App. 2005). In Singson, an undercover police officer was stationed in the stall of a department store men's room, known for being a cruising spot for gay men, for at least thirty minutes before approached by the defendant. The court detailed what happened next:

> The undercover officer asked if Singson wanted to suck his penis, and Singson responded, "Yes." When the officer asked, "Do you want to do it in here," Singson nodded towards the handicap stall. The officer then asked if Singson wanted to suck his penis in the handicap stall, and Singson responded, "Yes."

Id. at 731.

"occurred in a public location," the "constitutionally-protected right to engage in private, consensual acts of sodomy" was not implicated.[185] Similarly, several courts have held that "the constitutional protection of sexual privacy did not extend to a social club where the patrons engaged in consensual sex."[186] In *832 Corporation v. Gloucester Township*, for example, the court zoomed in on Justice Kennedy's observation in *Lawrence* that the case implicated "the most private human conduct, sexual behavior," occurring in "the most private of places, the home."[187] A sex club, even one that requires membership or an RSVP for admittance, is accordingly a "public place" unaffected by the sexual freedoms protected by *Lawrence*.[188]

A tempting response for some readers might be that people in a sex club, bathroom, or nude beach should keep their clothes on if they don't want to be arrested, harassed, or fired—if they're concerned about the police or their boss seeing their naked body, then they should take responsibility for ensuring that untrusted third parties do not get the opportunity to surveille them. But this "personal responsibility" response is very similar to the logic that has motivated anti-revenge porn laws for the benefit of hetero, cisgender women; women are often pressured to be sexually available on demand within the confines of the "private" home, but then have been held responsible—professionally, legally, and morally—when those images cross the line into the public without their consent.[189] And when women have dared to be *intentionally* publicly sexual—online and off—the legal system at times has even brushed aside their subsequent sexual assault.[190] Queer people similarly have been forced out of the homes in order to find each other, explore their authentic selves, and escape the heteronormative expectations of their nuclear families; nevertheless, judges and lawmakers tell them that they should reasonably expect to be punished at work, in court, and by society when their "public" activities are documented without their consent. This spatial construction of private vs. public represses the sexual agency of *both* straight women and queer people.

The ongoing spatialized conception of sexual privacy downplays the importance of being visibly (or, more accurately, perceptibly) queer.[191] Without the ability to see, hear, or somehow experience other queer people, it is nearly impossible for communities to build a shared sense

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[185] Singson, 621 S.E.2d at 739.

[186] 832 Corp. v. Gloucester Township, 404 F. Supp. 2d 614 (D.N.J. 2005); see also Fleck & Assocs., Inc., v. City of Phoenix, 356 F.Supp.2d 1034, 1039 (D. Ariz. 2005).

[187] 832 Corp., 404 F. Supp. 2d at 623 (quoting Lawrence v. Texas, 539 U.S. at 567).

[188] 832 Corp., 404 F. Supp. 2d at 625. The *832 Corporation* case further discounted the potential community-building function of the "swingers" social club, concluding that the plaintiff's establishment "does not owe its existence to the associational preferences of its members but to the coincidence of their interest in the facilities offered by the owners." Id. In other words, the court is unwilling to countenance the counterpublic potential of a club that embraces sex outside the confines of monogamous marriage.

[189] See *supra* note [] and accompanying text.

[190] See Turkheimer, *Judging Sex*, *supra* note []; Kim Loewen, *Rejecting the Purity Myth: Reforming Rape Shield Laws in the Age of Social Media*, 22 UCLA WOMEN'S L.J. 151, 159 (2015)(discussing a sexual assault prosecution in which "the grand jury did not believe a girl who had posted provocative photos on-line could have been raped).

[191] See Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J. F. 454 (2021)("Although visibility comes with risks for members of marginalized groups, controlled visibility through privacy protections has the potential to serve important antisubordination goals and lead to broader societal participation of entire communities in the public square.").

of pride and foment political action against the structures of heteronormativity. As Lauren Berlant observed, "developing *spaces* of relative gay and lesbian saturation has been so important to building a less homophobic world." [192] In this sense, the strong sociolegal deterrents to queer visibility—and the corresponding pressures to keep queer sex *in*visible—is deeply ideological.[193] Heteronormative sexuality permeates the public sphere: romantic comedies, Victoria's Secret models, Viagra commercials, gender reveal parties, David's Bridal, and home renovation shows fetishizing young families in the suburbs.[194] Actual depictions and discussions of sexual activity may remain taboo—though easily accessible by anyone with an Internet connection—but the cultural expectations regarding sex and gender remain crystal clear: man and woman are different; woman should look sexy to attract man; man and woman have a magical, expensive wedding; man and woman buy a house and have some sort of sex (and kids) inside of it.[195]

Queerness provides alternatives to nearly every step in the heteronormative timeline: gender is fluid; anyone can be sexy; kinship has infinite forms; and sexual pleasure is valuable for its own sake. But these challenges cannot resonate without an audience—a public—to which it can speak.[196] The "objective" view that only secluded sex is private—and constitutionally protected—shuts down queer visibility by shunting all explicit depictions and discussions of sexuality into the bedroom, and into the closet.[197] Historical and ongoing morality campaigns—against comprehensive sex education,[198] against queer online content,[199]

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[192] See Lauren Berlant, Desire/Love 22 (2012)(emphasis in original).

[193] See, e.g., Fischel, *Keep Pride Nude*, *supra* note [] ("'[P]rivate' and 'public' have no purified empirical referents; but as political constructs, they help police what lusts, loves, and lives are criminal or free, shamed or venerated.").

[194] Cf. Ball, *supra* note [], at 57 ("Our society, for example, does not seem particularly concerned by titillating images of half-naked different-sex couples in billboard advertisements that are viewed, willingly or not, by thousands of people (including many children).").

[195] See Berlant & Warner, *Sex in Public*, *supra* note [], at 550 ("[B]ecause this [hegemonic] sex public officially claims to act only in order to protect the zone of heterosexual privacy, the institutions of economic privilege and social reproduction informing its practices and organizing its ideal world are protected by the spectacular demonization of any represented sex.").

[196] See Lauren Berlant, *Live Sex Acts*, 21 Feminist Studies 379, 385 (1995)(arguing that live sex acts are perceived as threatening because"they do not aspire to the privacy protections of the national cultur" or strive for "conventional romantic forms"); Joseph Fischel, *Keep Pride Nude* ("Leather chaps and nipple clamps and boys kissing boys and girls kissing girls— even on an otherwise unexceptional Bank of America float—model modes of living and loving that many kids and teenagers attending Pride have never seen, or have just seen online, and only as pornography.").

[197] See Kendall Thomas, *Beyond the Privacy Principle*, at 1455. As Thomas observes, "For heterosexuals, the concept of privacy serves to carve out a safe haven for human flourishing." Id. at 1454-55. By contrast, for gay mean and lesbians, "the claim of privacy always also structurally implies a claim to secrecy." Id. at 1455. See also Califia, *supra* note [], at 14 ("Too narrow a definition of privacy could leave us with little or no right to be visibly gay."). Cf. Susan Frelich Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, in The Oxford Handbook of Feminism and Law in the United States (Deborah L. Brake, Martha Chamallas & Verna Williams, eds. 2021) ("Keeping sex as a private matter only serves to protect a status quo that never gay women their due.").

[198] See, e.g., Tanya McNeill, *Sex education and the promotion of heteronormativity*, 16 Sexualities 826 (2013).

[199] See, e.g., Alexander Monea, The Digital Closet: How the Internet Became Straight (2022); Ari Waldman, *Disorderly Content*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906001

against queer teachers,[200] against even "saying gay" in the classroom[201]—are designed to clamp down on critical interventions into heteronormativity, or at least to bracket them until kids' indoctrination into the dominant culture is complete.[202] Equating privacy with invisibility, and denying sexual privacy when visible to more than a tiny group, suppresses opportunities for people of all ages to envision identities, experiences, and human connection that may resonate far more authentically than the defaults they've been force-fed since birth. As Brett Lunceford succinctly observes, "Being queer is not about a right to privacy; it is about the freedom to be public."[203]

The regulation of revenge porn may ultimately be a skirmish within the broader cultural battles over gender roles and sexual norms. Nonetheless, revenge porn laws provide an important insight into how the legal system will intervene in these battles, especially against the backdrop of digital technologies that can render nearly anyone's sex life, gender journey, or chosen family visible to millions of other people. To the extent that revenge porn laws attack some of the misogynistic pillars of heteronormativity, they nonetheless leave in place the geographic conceptions of appropriate sexuality and the impulse to blame victims for daring to cross the line between private and public spheres.[204] The spatial construction of sexual privacy, as embodied in most revenge porn legislation, may reflect "objective" intuitions around when privacy expectations are reasonable, but its continuing reaffirmation of these intuitions further entrenches the burdens of heteronormativity as experienced most acutely by queer people.

B. Commercial Sex

Twenty-eight states have enacted revenge porn statutes that expressly exclude images that capture voluntary nudity or sexual conduct in "commercial" settings. The "commercial" and "public" settings exceptions overlap in some important ways. Most straightforwardly, many of the public settings discussed in the previous section—bathhouses, sex clubs, and online platforms—are also commercial settings, and the justifications for—and arguments against—excluding them are likely the same. If you are choosing to be naked in a commercial venue, then you are likely choosing to expose your body to more than just a small number of other people. Additionally, some of these commercial venues may fall within the definition of a "public accommodation" under federal, state, or local law, limiting their owners' ability to

[200] See, e.g., Eric Rofes, *What happens when the kids grow up? The long-term impact of an openly gay teacher on eight students' lives*, in QUEERING ELEMENTARY EDUCATION (James T. Sears & William J. Letts Eds. 1999).
[201] See, e.g., Paige Hamby Barbeauld, *Don't Say Gay Bills and the Movement to Keep Discussion of LGBT Issues out of Schools,* 43 J.L. & EDUC. 137 (2014).
[202] See Thomas, *Beyond the Privacy Principle*, at 1456 ("The cloak of secrecy drawn around gay and lesbian lives in turn allows heterosexuals to maintain 'the epistemic privilege of unknowing'" (quoting Eve Kosofsky Sedgwick, Epistemology of the Closet 5 (1990)).
[203] LUNCEFORD, PUBLIC NUDITY at 5; see Berlant & Warner, *supra* note [], at 562 ("The queer project we imagine . . . is to support forms of affective, erotic, and personal living that are public in the sense of accessible, available to memory, and sustained through collective activity.").
[204] See Ball, *supra* note [] at 4("[W]hat should ultimately matter in determining the right [to privacy's] ambit is not where the sex takes place but whether the sexual actors' expectations of privacy are reasonable.").

exclude outsiders and undercutting the objective reasonableness of privacy expectations.[205] More theoretically, many of these commercial venues are "public" in the sense that they exist outside of traditionally "domestic" spaces; they are part of the economic sphere of the marketplace, and sex occurring in this sphere is accordingly out of sync with patriarchal norms around how gender and sexuality are supposed to be distributed.[206]

Courts and lawmakers have been relatively mum about what additional contexts the "commercial" exceptions are designed to capture. The Supreme Court of Minnesota observed that speech by "advertisers, booksellers, and artists" are protected "because images 'obtained in a commercial setting' for legal purposes fall outside the statute's reach."[207] Prof. Franks has similarly observed that a commercial exception would insulate the forwarding or linking to commercial pornography,[208] presumably where distributor might question whether it was created consensually. What likely is also covered by some, but not all,[209] states' commercial exceptions are other forms of sex work, including in-person sexual exchanges, which generally are unlawful and unprotected by the First Amendment, as well as virtual sexual exchanges, which are more likely to be lawful and constitutionally-protected.[210]

Voluntary[211] participants in commercial sex are highly vulnerable to image-based abuses, notwithstanding their exemption from at least 28 states' revenge porn laws. Most straightforwardly, many forms of sex work are illegal, so an intimate image taken in that context may be admissible evidence of a crime, and the possessor of such an image may hold significant leverage over the person(s) depicted.[212] Even for lawful commercial activities, such as consensual pornography or online sex work, unauthorized recordings and distributions can

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[205] See Ball, *supra* note [], at 25-31 (recognizing that public accommodations are "sexual safety zones" where queer people can isolate from the rest of the world). Note, however, that at least one court has rejected the owner of a sex club's argument that its patrons' constitutional privacy rights under *Lawrence v. Texas* were triggered by the club's status as a "private establishment" under otherwise-applicable public accommodations laws. 832 Corp. v. Gloucester, 404 F.Supp.2d 614, 622 (2005). See also Conn. General Statutes 53a-189 (defining "public place" as "any area that is used or held out for use by the public whether owned or operated by public or private interests.").

[206] See, e.g., Viviana A. Zelizer, *Money, Power, and Sex*, 18 YALE J.L. & FEMINISM 303 (2006).

[207] State v. Casillas, 952 N.W.2d 629, 643 (2020).

[208] *Supra* note [] and accompanying text.

[209] Minnesota's statute exempts from liability images "obtained in a commercial setting for the purpose of the legal sale of goods or services, including the creation of artistic products for sale or display." Minn. Crim. Stats. § 617.261. The provision referring to "legal sale of goods or services" likely excludes images obtained during the course of illegal sex work. Other states simply refer to images involving "voluntary exposure . . . in . . . commercial settings." E.g., Mont. Code § 45-8-213; Okla. Stats. § 1040.13b.

[210] See India Thusi, *Reality Porn*, 96 NYU L. REV. 738 (2021) (arguing that online interactive sex work is protected by the First Amendment, even if interactive in-person sex work is illegal).

[211] By "voluntary" here, I mean to distinguish those who are involuntarily coerced into commercial sex trades—what is typically understood as trafficking—from those who voluntarily, if begrudgingly, choose commercial sex as a means of subsistence in light of highly-constrained alternative economic opportunities. See, e.g., ANGELA JONES, CAMMING at [] (discussing advantages of virtual sex work for single mothers compared with low wage retail jobs).

[212] See, e.g., India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 206-11 (2019); Cf. Capers, *supra* note [], at 836-37 (discussing rape victims' history of sex work being used against them during rape prosecutions, both before and after enactment of rape shield laws).

result in substantial emotional or economic harms due to the heavy social stigma around commercialized sex.[213] Angela Jones has documented repeated concerns among online webcam models that their clients will "screen cap" and distribute their performances, potentially subjecting them to the loss of employment, doxing, and harassment—i.e., the prototypical consequences of revenge porn.[214] Performers who maintain Onlyfans accounts also report similar concerns when their subscribers copy or cap their content in order to begin a campaign of harassment against them.[215] Sex work in all forms is precarious in our culture, and images documenting sex work can further this precarity. [216]

The commercial settings exclusion disproportionately impacts queer people.[217] There are two main reasons. First, some queer people may be tightly constrained in their available financial opportunities, making sex work one of the few available avenues for economic survival.[218] This is frequently the case with trans women, and especially trans women of color.[219] Second, sexual norms within queer communities are often much more accepting of commercial sex work than mainstream culture and are far more likely to embrace nonprocreative sex outside of marriage, including in commercial settings.[220]

Moreover, commercial sex has provided important benefits to queer communities and queer world-making. These benefits in many ways track the benefits of the public sex forums discussed at length in the previous section. First, commercial sex can provide an important

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[213] See, e.g., City of San Diego v. Roe, 543 U.S. 77 (2004)(rejecting §1983 claim by police officer who was fired for selling nude videos of himself on eBay); Melissa Petro, *The "Hooker Teacher" Tells All*, in THE WAR ON SEX (DAVID M. HALPERIN & TREVOR HOPPE EDS. 2017)(describing author's experience of being fired after writing an op-ed mentioning her past work as stripper and sex worker).

[214] ANGELA JONES, CAMMING: MONEY, POWER, AND PLEASURE IN THE SEX WORK INDUSTRY 55, 120 (2020).

[215] See, e.g., Ortega v. Villa, No. CV 20-11361-DMG(AGRx), 2021 WL 5238786 (C.D. Cal. Sept. 10, 2021)(ordering default judgment against social media influencer who broadcast plaintiffs' Onlyfans videos on Instagram Live while sharing information about his prior sexual experiences with her).

[216] Moreover, especially since the passage of FOSTA-SESTA in 2018, it has become increasingly difficult to advertise sex work online, even if the underlying sex work is lawful. See, e.g., April Glaser, *After Backpage*, SLATE (Apr. 27, 2018), https://slate.com/technology/2018/04/after-backpage-and-sesta-sex-workers-worry-theyll-have-to-return-to-thestreets.html

[217] See generally Kate D'Adamo, *Queering the Trade: Intersections of the Sex Worker and LGBTQ Movements*, in THE UNFINISHED QUEER AGENDA AFTER MARRIAGE EQUALITY (ANGELA JONES, JOSEPH NICHOLAS DEFILIPPIS, MICHAEL W. YARBROUGH EDS. 2018).

[218] See Erin Fitzgerald, Sarah Elspeth Patterson, Darby Hickey, Cherno Biko, & Harper Jean Tobin, *Meaningful work: Transgender experiences in the sex trade*, at 5 NATIONAL CENTER FOR TRANSGENDER EQUALITY (2015)("An overwhelming majority (69.3%) of sex workers reported experiencing an adverse job outcome in the traditional workforce, such as being denied a job or promotion or being fired because of their gender identity or expression."). Angela Jones's research on online sex work shows that this line of work also may be particularly appealing to single mothers, due to the scheduling flexibility and the higher income compared to jobs in retail or service industries. JONES, CAMMING, at 94.

[219] Id.

[220] See David Eichert, *"It Ruined My Life": FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. SOC. POL'Y & L. 201 (2019).

educational function for those whose sexual desires fall outside the mainstream.[221] Particularly in the absence of comprehensive sex education and pervasive taboos around many types of sexuality, commercial offerings are often the only place where someone can learn about the myriad forms of sexual practices that await consenting adults. Pornography is often far from an ideal source of sex education, particularly where it glorifies misogyny or gendered violence,[222] but queer people often have nowhere else to look for information on issues like anal sex, sex toys, or sexual practices of trans people. Second, for many queer people, commercial settings provide some of the few contexts in which they can experience validation of their own sexual desires or recognition that their own bodies and minds are sexually desirable.[223] As Berlant and Warner recognized, commercial pornography and businesses are how many queer people "have learned to find each other; to map a commonly accessible world."[224] Queer commercial settings were especially important during the COVID-19 pandemic, as subscriptions to queer Onlyfans accounts skyrocketed during lockdowns, responding to an otherwise unmet need for sexual pleasure and connection.[225] Commercial queer content can bind together queer communities in important social and political ways, but its creators remain highly vulnerable: to social media platforms tightening up "community standards" to appeal to advertisers,[226] to politicians who equate voluntary sex work with trafficking,[227] and to vengeful viewers who use digital technologies to shame, extort, or cripple them financially.

Excluding commercial pornography and all forms of sex work from revenge porn protections may seem intuitive or perhaps even necessary as a practical matter. If someone is engaging in voluntary commercial sex, they are intending other people to view them sexually, and these other people are connected to them primarily through a financial relationship. In the absence of some express contractual restriction, there is nothing that would seem to legally or morally obligate either party to the transaction to keep any resulting images to themselves. It would seem strange, in the words of the Supreme Court of Hawai'i, to find a significant privacy interest in "swapping money for sex."[228] Nonetheless, if one of the justifications for revenge porn laws is that it is wrong to intentionally harass someone for engaging in consensual, pleasurable sexual expression, then this justification can absolutely extend to commercial settings. Prof. Citron has observed, "Crash Pad and other sites make pornography that

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[221] See Thusi, *Reality Porn*, *supra* note [], at 794-95 (arguing that content on Kink.com is "as much about sexual pleasure as [it is] about sexual education, normalization of the BDSM lifestyle, and embracing sexual freedom").
[222] See, e.g., Peggy Orenstein, *If You Ignore Porn, You Aren't Teaching Sex Ed*, THE NEW YORK TIMES (Jun. 14, 2021), available at https://www.nytimes.com/2021/06/14/opinion/sex-ed-curriculum-pornography.html
[223] See D'Adamo, *supra* note [], at 47 (observing that sex work can affirm gender and sexual identities marginalized in other areas of life).
[224] Berlant & Warner, *supra* note [], at 551; Ball, *supra* note [], at 9 (acknowledging the value of queer people "see[ing] others like themselves having sex" in pornography).
[225] See, e.g., Thusi, *Reality Porn*, *supra* note [], at 740; Ashford & Longstaff, *supra* note [], at 1568; Chasse, *supra* note [], at 12-13, 25 (describing Onlyfans as a shared site of pleasure and intimate exchange during the pandemic).
[226] See Waldman, *Disorderly Content*, *supra* note []; Alexander Cheves, *The Dangerous Trend of LGBTQ Censorship on the Internet*, OUT (Dec. 6, 2018), https://www.out.com/out-exclusives/2018/12/06/dangerous-trend-lgbtq-censorship-internet
[227] See Thusi, *Harm, Sex, and Consequences*, *supra* note [], at 203.
[228] State v. Romano, 155 P.3d 1102, 1110 (Haw. 2007).

celebrates lesbian, trans, and queer women . . . These activities matter for sexual expression and sexual autonomy."[229]

Despite the generally weak privacy protections generally afforded sex workers,[230] sexual privacy in commercial settings is not unprecedented. For example, in *State v. Adams*, the Wisconsin Court of Appeals upheld the conviction of a man who had secretly recorded his sexual activity with a hired sex worker.[231] Notwithstanding his argument that he needed to record the encounter "in case she overdosed on drugs or later accused him of beating her up," the court plainly stated, "The victim did not relinquish her reasonable expectation of privacy by engaging in commercial sexual activity."[232] Regardless of the stigma—and potentially even the lawfulness—attached to sex in commercial settings, it remains possible to recognize the boundaries that individuals create around their professional, intimate, and professional lives. Unauthorized distributions of intimate images can unsettle these boundaries in significantly harmful ways, even for—and sometimes especially for—individuals whose professional and sexual lives overlap.

C. Sex Outside Intimate Relationships

The final carveout in need of attention is the exclusion of statutory protections for images that were produced or shared outside the confines of traditionally intimate "relationships." Only one state—Arkansas—expressly limits revenge porn protections to situations where the distributor is "a family or household member" of the victim or "is in a current or former dating relationship" with the victim.[233] However, the Vermont Supreme in *State v. Van Buren* read a similar limitation into Vermont's statutory exclusion of contexts "where a person does not have a reasonable expectation of privacy."[234] Although this interpretation is so far limited to one small state, nearly every other state, including states without exceptions for public and commercial settings, similarly requires victims to have a "reasonable expectation of privacy" in their sexual images. Accordingly, if the *Van Buren* decision influences future interpretations of revenge porn statutes, the "relationship" could potentially, and drastically, limit the reach of revenge porn statutes to the most traditional, heteronormative contexts.

In *State v. Van Buren*, the defendant challenged both the constitutionality of the state's revenge porn statute and the sufficiency of the prosecution's evidence regarding the victim's reasonable expectation of privacy. The victim had sent nude pictures of herself to Anthony

[229] Citron, *Sexual Privacy*, *supra* note [], at 1897.
[230] See, e.g., Erotic Service Provider Legal Educ. & Research Fund v. Gascon, 880 F.3d 450, 456 (9th Cir. 2018)(rejecting argument that the constitutional privacy protections in *Lawrence v. Texas* extended to prostitution); 832 Corp. v. Gloucester, 404 F. Supp. 2d 614, 622 (2005)(rejecting argument that *Lawrence* extended sexual privacy "into the sphere of commercial interactions").
[231] State v. Adams, 863 N.W.2d 640 (Wis. Ct. App. 2015).
[232] Id.
[233] ARK. CODE 5-26-314.
[234] 13 V.S.A. § 2606; State v. Van Buren, 214 A.3d 791 (Vt. 2019).

Coon, "with whom she had a past but not present relationship," via Facebook Messenger.[235] The defendant, who claimed to be Coon's current girlfriend, somehow accessed Coon's Messenger account via his password-protected phone, without permission, and posted the victim's nude photos on Coon's Facebook page.[236] The defendant tagged the victim, said she was going to contact her employer, "ruin" her, and "get revenge."[237]

Although the Vermont Supreme Court upheld the state's revenge porn statute against a facial First Amendment challenge, it nevertheless dismissed the indictment.[238] According to the court, "the State has stipulated that complainant and Mr. Coon were not in a relationship at the time complainant sent Mr. Coon the photo, and there is no evidence in the record showing they had any kind of relationship engendering a reasonable expectation of privacy."[239] Despite evidence that the defendant accessed a Facebook account without permission, encountered nude photos, and intentionally sought to "get revenge" against the victim, the court was concerned that the victim's privacy expectations in the images were "not necessarily within the knowledge of the defendant."[240] According to the court, a reasonable expectation of privacy connotes a privacy expectation "within a person's most intimate spheres,"[241] and the victim failed to exclude "everyone but a trusted other or few" by sending it to someone the court perceived as falling outside such spheres.

The *Van Buren* reasoning is highly problematic—certainly for the people of Vermont, and potentially for victims of image-based abuses residing elsewhere. By drawing the statutory lines of protection narrowly around "relationships" and "intimate spheres," the court excludes enormously wide swaths of victims who greatly benefit from sexual privacy protections.[242] Consensual "sexting" of sexual images is incredibly common in the United States, both among people who are in "committed" and "casual" relationships.[243] It is entirely unclear what threshold of commitment or exclusivity must be met for a relationship to be sufficiently "intimate," but if the victim in *Van Buren* failed to meet that threshold, then it is highly unlikely that the millions of people sexting with prospective dates/lovers on apps like Tinder or Grindr will be able to either. The victim in *Van Buren* was far from a total stranger to Mr. Coon—they

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[235] 214 A.3d at 798.
[236] Id. at 818.
[237] Id.
[238] Id. at 819-20.
[239] Id. at 820. Without a reasonable expectation of privacy, the court observed that a prosecution under the statute "would not be a justifiable incursion upon First Amendment-protected speech." Id. at 820-21. The concern from a free speech perspective apparently would be that the possessor of an intimate image would not be on sufficient notice that its distribution would necessarily be contrary to the desires of the depicted person.
[240] Id. at 822.
[241] Id. at 823.
[242] See generally Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas*,* 104 COLUM. L. REV. 1399 (2004). (critiquing the highly circumscribed, privatized liberty interest set forth by *Lawrence*).
[243] See Jesse Singal, *Is it Time for Researchers to Rethink Sexting?*, The Cut (Aug. 10, 2015), available at https://www.thecut.com/2015/08/it-time-for-researchers-to-rethink-sexting.html (summarizing research showing that 73.9% of respondents reported sending sexual images in the context of a committed relationship and 43% reported sexting in the context of casual relationships).

had a "past" relationship[244] and were connected by phone and social media; by contrast, many people today consensually share sexual images with far more distant contacts.[245]

Revenge porn laws were enacted in recognition of the widespread practice of sexual image sharing and the vulnerabilities that emerge from it. Rather than blame someone for sharing sexual imagery with another person—as had been the case for many victims—scholars, advocates, and ultimately lawmakers chose to shift attention to the persons who shared the imagery without consent, who often very intentionally shamed or harmed the person. Cases like *Van Buren* signal perhaps that this legal, cultural, and moral shift has been a very modest one: the only victims that *don't* deserve blame for their sexual expression are those who have waited until they've scored an exclusive, intimate relationship before sharing nude images.[246] If instead someone shares nude images before they've found that special someone, or after they've left them, then apparently it is entirely acceptable (at least in Vermont) to intentionally try to get them fired and "ruin" them over Facebook.[247]

The intimate relationship exceptions in Vermont, Arkansas, and potentially elsewhere are a major blow to sexual privacy for a wide swath of the US population, but again they hit queer communities especially hard. As discussed at several points above, the norms of intimate images sharing in queer forums are often much more relaxed than in straight dating contexts, meaning that a larger portion of queer people's sexual images are likely to have been shared in the context of casual, fleeting, or anonymous relationships.[248] Such images almost certainly would fall outside an intimate relationship exception under the logic of *Van Buren*. For example, in *Martin v. Smith*, the Court of Appeals of Michigan upheld the dismissal of an intentional infliction of emotional distress claim where the parties—two men—had met on "an internet dating application" and the defendant distributed intimate photos and videos of plaintiff to plaintiff's friends and family.[249] Although not technically interpreting the state's revenge porn statute, the court's reasoning is remarkably similar to *Van Buren*:

> Although sending such photographs and videos to Martin's friend and brother is clearly offensive and a significant breach of trust, the undisputed evidence establishes that Martin (who was an adult at the time) knowingly and willingly took photographs and

[244] Because they had been in a "past" relationship, they may not have fallen within the intimate relationship exception in Arkansas. ARK. CODE 5-26-314(a)(2).
[245] See AMY ADELE HASINOFF, SEXTING PANIC (2015).
[246] See also Laura A. Rosenbury & Jennifer Rothman, *Sex in and Out of Intimacy*, 59 EMORY L.J. 809, 809 (2009) ("[C]ourts have extended legal protection to consensual sexual acts only to the extent such acts support other state interests, including marriage, procreation, and, most recently, the development of enduring intimate relationships.").
[247] See also Lara Karaian, *Policing 'Sexting': Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers' Digital Sexual Expression*, 18 THEORETICAL CRIMINOLOGY 282 (2014).
[248] See *supra* notes [] and accompanying text.
[249] Martin v. Smith, No. 354128, 2020 WL 7310960 (Mich. Ct. App. Dec. 10, 2020).

> videos of his person and then relinquished control over the images and videos when he sent them to Smith, whom he had never met in person.[250]

The court further rejected the contention that what happened in this case was an example of revenge porn: "[A]lthough Martin submitted scholarly articles concerning the impact of "revenge porn" on its victims, there is no evidence to support that the opinions in the articles could be applied to Martin."[251] Although it is unclear which specific articles were submitted to the court, its reasoning departs from the views of some prominent revenge porn scholars. For example, as observed by Prof. Citron, even though hookup apps generally do not entail the traditional markers of intimacy, "they warrant sexual privacy because of their centrality to autonomy and self-development."[252]

The impact of an intimate relationship exception as articulated by *Van Buren* accordingly would be especially profound for queer people. Every measure by which the Vermont Supreme Court outlined the scope of the still-quite-vague exception is saturated with heteronormativity; these measures include intimacy, exclusivity, and the neat division between "past" and "present" partners. As much as mainstream LGBTQ+ advocates have tried to play down the differences between queer and straight relationships,[253] queer people often openly challenge the default expectations of what ethical, fulfilling relationships must look like.[254] These queer challenges might include: finding meaningful intimacies at a sex club,[255] online,[256] or with a sex worker;[257] committing to relationships that are consensually non-monogamous or polyamorous;[258] valuing sexual relationships that weave between the labels of friends, lovers, roommates, and girlfriends; [259] and embracing intimacy that is tied neither to sex or biology.[260] The Vermont Supreme Court throws out the term "intimate spheres" as if it unquestionably

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[250] Id. at *6.

[251] Id. at *8.

[252] Citron, *Why Sexual Privacy Matters for Trust*, *supra* note [], at 1201; Rosenbury & Rothman, *supra* note [], at 836-38 (describing importance of sexual pleasure without regard to whether it occurs in context of intimate relationship); see also Citron, *Sexual Privacy*, *supra* note [], at 1890 (Observing that "we need sexual privacy in nude photos" even if not created in context of intimate relationships).

[253] See LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018).

[254] See, e.g., Phillip L. Hammack, David M. Frost & Sam D. Hughes, *Queer Intimacies: A New Paradigm for the Study of Relationship Diversity*, 56 J. SEX RESEARCH 556 (2019) (compiling extensive social scientific and theoretical studies on queer forms of intimacy and relationship forms).

[255] See, e.g., Gayle S. Rubin, *The Catacombs: A Temple of the Butthole*, reprinted in DEVIATIONS: A GAYLE RUBIN READER (2011); Joel I. Brodsky, *The Mineshaft: A Retrospective Ethnography*, 24 J. HOMOSEXUALITY 233 (1993).

[256] See, e.g., TOM ROACH, SCREEN LOVE: QUEER INTIMACIES IN THE GRINDR ERA (2021).

[257] Rosenbury & Rothman, *supra* note [], at 845-46 (observing the intimacy that is often involved in various forms of sex work); JONES, CAMMING at 90 ("Selling sex online opens up new opportunities for human intimacy, sexual encounters, and sexual pleasure.").

[258] See, e.g., Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU REV. L. & SOC. CHANGE 277 (2004); Hadar Aviram & Gwendolyn Leachman, *The Future of Polyamorous Marriage Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269 (2015).

[259] See, e.g., Elisabeth Morgan Thompson, *Same-Sex Friendship and Bisexual Image as a Context for Flexible Sexual Identity Among Young Women*, 6 J. BISEXUALITY 47 (2007).

[260] See Hammack, Frost, & Hughes, *supra* note [], at 579-82 (collecting research on concepts of "chosen" family among queer communities); see also Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189 (2007).

excludes "everyone but a trusted few," but intimacy need not be so quantitatively limited, nor must it be tightly confined to exclusive, in-or-out relationships.[261] Queer intimacies, relationships, and chosen families often eschew these heteronormative confines and provide alternate frameworks for finding meaningful, ethical, and satisfy connections with other people.[262] Any effort to cabin in sexual privacy to a "charmed circle"[263] of normatively intimate relationships leaves huge numbers of people unprotected from image-based abuses and sends a clear message that anyone whose sex life deviates from such relationships is to blame for the harm that might follow.[264]

IV. Queer Sexual Privacy and Revenge Porn Reforms

The anti-revenge porn movement may have launched principally as a feminist project: concentrated on the lived vulnerabilities of women in world of smartphones and social media, and beneficial to queer people to the extent that they share those vulnerabilities. Nonetheless, this Article has demonstrated that queer people are often distinctly vulnerable to image-based abuses, and they will remain vulnerable—notwithstanding new privacy laws—until scholars and advocates are willing to foreground queer sex, spaces, relationships, and communities.[265]

Without explicitly queer voices, revenge porn legislation risks bolstering, rather than transforming, dominant narratives around sex and nudity. For example, one concern occasionally raised in revenge porn scholarship is that new legislation protecting sexual privacy will reinforce the inherent shamefulness of sex.[266] Prof. Citron rejects this objection:

> Far from re-inscribing shame, the identification and protection of sexual privacy would affirm people's ability to manage the boundaries of their intimate lives. It would convey respect for individuals' choices about whom they entrust with their bodies and intimate information.[267]

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[261] See Rosenbury & Rothman, *supra* note [], at [CITE].
[262] See Hammack, Frost, and Hughes, *supra* note [].
[263] See Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, reprinted in DEVIATIONS: A GAYLE RUBIN READER (2011).
[264] See Berlant & Warner, *supra* note [], at 553 ("[H]eteronormative conventions of intimacy block the building of nonnormative or explicit public sexual cultures."). The *Van Buren* court, of course, is hardly the first court to ignore or downplay the value of sex outside of a traditionally-intimate relationship. See Ball, *supra* note [], at 5 (observing that *Lawrence v. Texas* ignored sex outside "ongoing relationships").
[265] Cf Waldman, *Online Dating*, *supra* note [], at 23 (noting the "unique burdens faced by gay and bisexual male users of the Internet").
[266] Citron, *Sexual Privacy*, *supra* note [], at 1876; see also Franks, *Crime of Revenge Porn*, *supra* note [], at 663 (acknowledging critique that criminalizing revenge porn will reinforce sexual stigmas)
[267] Citron, *Sexual Privacy*, *supra* note [], at 1876.

Prof. Citron's scholarship belies any attempt to stigmatize sexual expression[268]—queer or otherwise—but the case law discussing revenge porn does at times appear to conflate sex with shame. Courts have referred to nude images as "scarlet letters," [269] as leaving a "digital stain,"[270] and as "haunting" victims.[271] Sex repeatedly is framed as "the most private human conduct" and as being "inherently" private;[272] accordingly, "the harm" of revenge porn "largely speaks for itself."[273]

These statements likely are intended by judges to describe, empirically, the impact of revenge porn on many victims' lives, but they crystallize perspectives about sex and nudity that (1) are not universal[274] and (2) may ultimately limit the privacy of individuals whose value systems diverge from them. If someone *doesn't* view sex as being shameful, and is comfortable with more than just a few people seeing their naked bodies, this judicial rhetoric conceivably could provide fodder for denying them protection or concluding that their harasser's free speech rights outweigh their need for privacy.[275] Nowhere in the case law addressing recent revenge porn statutes is there a full-throated support for diverse forms of sexual expression or the value of actively exploring one's sexual desires.[276] If one of the goals of sexual privacy laws, such as revenge porn statutes, is to destigmatize sexual expression, then sexual narratives need to diversify and shift away from a tight conflation between sex, secrecy, shame, and stigma.[277] Such a shift would be decidedly queer.

A full articulation of queer sexual privacy, and its relationship to other prominent articulations of sexual privacy, is beyond the scope of this Article. Nonetheless, the tenuous

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[268] Citron, *Sexual Privacy*, *supra* note [], at 1898 ("The recognition that intimate activity and nudity can be viewed as discrediting and shameful—and result in discrimination—is not to suggest that intimate behaviors and nudity *are* discrediting and shameful" (emphasis in original)).
[269] State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020); State v. Katz, 2022 WL 152487, at *10 (Ind. 2022).
[270] State v. Van Buren, 214 A.2d 791, 795 (Vt. 2019)
[271] *Id.*
[272] Ex parte Jones, No. PD-0552-18, 2021 WL 2126172, at *7 (Tex. Ct. Crim. App. May 26, 2021). Similar perspectives are arguably reflected in scholarship that frames revenge porn as not just a sexual privacy violation, but also as sexual assault or a similar caliber of sexual offense, subject to sex offender registration. [CITE]
[273] State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020); State v. Katz, 2022 WL 152487, at *10 (Ind. 2022).
[274] See Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 842 (2006)("Not everyone prefers bodily privacy. Some people feel no need to cover up or to conduct intimacies behind closed doors. Some people like to feel "natural." Some people like being "sexy," even in public.").
[275] Cf. Courts colorfully discuss the impact of revenge porn in these terms in order to establish that there is a compelling government interest justifying a restriction on speech. See, e.g., Casillas, 952 N.W.2d at 641-42. It is unclear whether such an interest would be deemed compelling among populations with different sexual values who nonetheless would benefit from sexual privacy protections.
[276] See India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2468 (2021)("[E]xpressive theories of the law rarely acknowledge that there are multiple publics, with varying degrees of power and access to the deliberative process of determining what is moral and acceptable. This neglect means that criminal law's expressive value is limited by the systemic marginalization and isolation of entire communities from full political participation.")
[277] Cf. Roger N. Lancaster, *The New Pariahs: Sex, Crime, and Punishment in America*, in THE WAR ON SEX, *supra* note [], at 76 ("[F]eminist assertions that sexual images intrinsically harm women redound to the benefit of social conservatives and serve to curb freedoms, which will always involve risks and dangers.").

position of queer people within the new regulatory landscape of revenge porn provides some hints. Perhaps the most obvious response to the exclusion of public, commercial, and nontraditionally intimate sexuality would be to simply remove those exceptions and have substantially broader prohibitions on nonconsensual disclosures in most states. There's certainly some appeal here—in states where there is no exception for sexual images in public places (e.g. California and Wisconsin), there is case law embracing the sexual privacy of the depicted persons and acknowledging the wrongfulness of nonconsensual disclosure.[278]

But there's significant risk that in expanding *criminal* revenge porn laws—currently the dominant form of regulation—lawmakers would be inviting law enforcement into queer spaces in ways that may do more harm than good.[279] (Note: The concerns I raise here are in addition to the race and class disparities that so often attend carceral approaches)[280] As discussed at several points throughout this article, law enforcement has a long, and ongoing, history of surveilling, arresting, and harassing queer people under the guise of protecting vulnerable populations from sexual abuses.[281] This has been the case both in physical and virtual spaces. As issues such as child pornography, Internet predators, and online sex trafficking have attracted significant cultural and political attention over the past generation, significant financial resources have flowed towards law enforcement agencies willing to devote time and energy to fighting these scourges.[282] The result has been a disproportionate policing of queer spaces online, in ways that mimic their offline analogs: police officers pretending to be eager sexual partners, spending long periods of time encouraging queer people (especially gay men) to cross a legal line, and ultimately arresting them for doing so.[283] The result has been the destruction of many queer peoples' lives for sexually engaging with imaginary victims rather than interventions on behalf of actual victims of sexual violence, who too often are rendered invisible by the blinders of homophobia, misogyny, and racism.[284]

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[278] *See supra* note [] and accompanying text.

[279] See Waldman, *Online Dating*, *supra* note [], at 21 ("[T]he prospect of criminalization may raise concerns among queer communities. After all, the criminal law has long been leveraged to subordinate and discriminate against LGBTQ persons and other sexual minorities."); SKINNER-THOMPSON, PRIVCACY AT THE MARGINS, at 40 (expressing skepticism of carceral responses to revenge porn).

[280] See, e.g., Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5 (2017).

[281] *See supra* notes [] and accompanying text; see also *Rodriguez v. Comm'n on Prof. Competence*, No. B258035, 2015 WL 8767581, at (Cal. Ct. App. Dec. 15, 2015) (affirming termination of a teacher following arrest for public indecency notwithstanding "statements by [the arresting officer] in the arrest report and during his testimony reveal[ing] a bias against Rodriguez because of Rodriguez's perceived sexual orientation"); Waldman, *Disorderly Content*, *supra* note [], at 54; CALIFIA, PUBLIC SEX, at 19-21.

[282] See, e.g., Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEOR. SOC. 233, 237 (2012) (warning of "expressive justice" campaigns against sex-related crimes).

[283] See Gilden, *Punishing Sexual Fantasy*, *supra* note [], at 449.

[284] See ROGER LANCASTER, SEX PANIC AND THE PUNITIVE STATE (2011).

A broadly scoped criminal revenge porn statute could very easily continue this dynamic.[285] As discussed above, the norms of sexual image sharing on platforms such as Grindr are notably more liberal than on platforms catered to straight relationships. An undercover officer, educated in these norms, may be able to fairly easily create a profile of a conventionally attractive gay man, receive messages from other users, share some nude photos of an alleged sexual conquest, and urge other users to send the officer similar sexual images of other people. Upon receipt of the image and some indication that the disclosure was not expressly consensual, a crime is committed and an arrest is justified. This potential dynamic is not merely hypothetical for at least three reasons. First, it has happened when enforcing other laws meant to address online sexual harms.[286] Second, many states revenge porn laws have *express* carveouts for law enforcement activity, envisioning that law enforcement will be engaged in the nonconsensual sharing of nude images for investigatory purposes.[287] Third, some criminal revenge porn bills have been accompanied by parallel proposals to allocate financial resources for agencies that target online abuses, thereby nudging law enforcement to spend its time poking around sexual spaces.[288]

As I have argued elsewhere, one of the main problems with enforcing privacy through criminal law is that it detaches the person whose consent matters (the privacy holder) from the persons who are deciding whether that person has lawfully consented (police and prosecutors).[289] In the context of sexual privacy, where subjective perceptions vary greatly by individual and community, and are highly context-sensitive, this mismatch is especially problematic.[290] Law enforcement is either insufficiently steeped in the norms of particular subcultures that they are policing, making them a poor proxy for the interests of potential victims, or they are steeped in those norms solely for the purpose of exploiting them, making actual members of that subculture vulnerable to arrest and prosecution. And to the extent that expansions in criminal law expand state surveillance, the impacts of such surveillance are likely to spread unevenly across racial and ethnic lines.[291] Carceral responses to sexual harms,

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[285] See AYA GRUBER, THE FEMINIST WAR ON CRIME 197 (2020)(acknowledging that behaviors such as revenge porn are problematic, but arguing that "a regime to seriously criminalize any one of them would have far-reaching distributional effects").

[286] See Lancaster, *supra* note []; THE WAR ON SEX

[287] See, e.g., Code of Alabama 13A-6-240(d); Arizona Revised Statutes 13-1425(B)(2); Georgia Code 16-11-90(e)(1).

[288] See, e.g., Cybercrime Enforcement Training Assistance Act of 2016, H.R.4740, 114th Cong. (2016) ("[T]he Attorney General shall award grants under this section to States and units of local government for the prevention, enforcement, and prosecution of cybercrimes against individuals."). It should be noted, by contrast, that in states where revenge porn is a misdemeanor, prosecutors have complained of insufficient resources available to pursue revenge porn charges. See https://www.sfchronicle.com/bayarea/article/revenge-porn-law-17143216.php

[289] See Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 101; see also MICHAEL BRONSKI, THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM 158-65 (1998) (arguing that gay rights movement has failed to distinguish sufficiently between privacy chosen by the individual and privacy imposed by society); cf. Anderson v. Morrow, 371 F.3d 1027, 1041 (2004) (Berzon, J., concurring in part and dissenting in part) ("[T]he statutory provision alternatively invites those applying the law to invoke their own sexual mores and override JH's sexual choice when deciding whether JH is capable of consent in a particular instance.").

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[291] See, e.g., Doug Meyer, *Resisting Hate Crime Discourse: Queer and Intersectional Challenges to Neoliberal Hate Crime Laws*, 22 Crit. Crim. 113 (2014); LOIC WACQUANT, PRISONS OF POVERTY (2009).

especially online, have a history of disproportionately impacting queer people and run the risk of undermining the trust that binds queer communities together.[292]

There may be *some* role for criminal laws to play in this space, particularly when attached to purposeful activity directed towards financially harming, social stigmatizing, outing, and/or doxing people who have engaged in voluntary sexual expression. Such laws, ideally, would express an important message that intentionally shaming and tormenting people for their sexual desires and consensual sexual activity is unacceptable. As Prof. Waldman has argued, criminalization can benefit queer people because "revenge porn is one among the many pernicious ways in which sex, intimacy, and physical bodies can be weaponized to subordinate and discriminate against marginalized populations."[293] In addition to this expressive function, criminal laws tailored to the weaponizing of sexual expression also would hopefully deter efforts to, for example, get queer people fired for daring to be photographed naked. Moreover, some statutory element related to purposeful harm might limit the appeal of undercover revenge porn stings, as it would likely be much more difficult to show that someone sharing photos with a seemingly horny police officer is purposefully trying to imperil the subject of the shared photos.[294]

However, such an approach to revenge porn, designed with queer vulnerabilities explicitly in mind, creates some clear conflicts with feminist priorities. As amply illustrated by Prof. Franks and other scholars, many women are subjected to nonconsensual image-sharing not out of a desire to harm, but for entertainment, money, or bragging rights among men. Queer people can of course be subjected to these same dynamics, and may also vigorously object to them,[295] but a prohibition on nonconsensually sharing a very broad range of sexual images, without some element of intentionality, puts queer people in a precarious position with respect to plausibly hostile law enforcement. This is not to say that other obstacles to prosecution, such as a requirement in some states to show that a victim *in fact* suffered emotional distress,[296] could not relaxed for the benefit all victims. Nevertheless, a primarily carceral approach to revenge porn does raise potential tensions between queer and feminist approaches to image-based abuses.

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[292] See, e.g., SKINNER-THOMPSON, PRIVACY AT THE MARGINS, at 29-31.
[293] Waldman, *Online Dating*, *supra* note [], at 22.
[294] It would also limit the potential liability of an individual who shared an image from a third party where they were not entirely clear about its provenance or whether it was shared with explicit consent. See *State v. Casillas*, 938 N.W.2d 74, 89 (Minn. Ct. App. 2021) ("Depending on one's sensibilities and tolerance of sexual images on publicly available mediums, reasonable people could reach different conclusions regarding the privacy expectations associated with such images, rendering the reasonable knowledge standard highly subjective.").
[295] See Waldman, *Online Dating*, *supra* note [].
[296] See, e.g., https://www.sfchronicle.com/bayarea/article/revenge-porn-law-17143216.php. This assumes that these elements could be removed consistently with a state's constitutional free speech protections, which may be stronger than at the federal level. See, e.g., Moser v. Frohnmayer, 845 P. 2d 1284, 1287 (Or. 1993)("A statute may be valid if the focus of the enactment, as written, is on an identifiable actual effect or harm that may be proscribed, rather than on the communication itself." (internal citations omitted)).

This potential conflict between feminist and queer stakes in a criminal statute does not mean, however, that the issue of revenge porn is incompatible with a queer, feminist (and ideally anti-racist) coalition against patriarchal norms in digital technology. But it likely does suggest looking beyond criminal law for both meaningful remedies for victims as well as effective means for limiting the potential fallout from unauthorized disclosures.

One important avenue would be to lean more heavily on civil remedies. Many states, and recently the federal government, have enacted civil statutes empowering victims to bring claims against those who nonconsensually distribute their intimate images.[297] These statutes, however, generally have the same limits and carveouts as do criminal revenge porn statutes.[298] Expansions of civil remedies to cover the types of queer vulnerabilities discussed in this Article, however, do not raise the same concerns as would the expansion of criminal laws, due to a key distinction: the person whose boundaries are violated by revenge porn is the one deciding whether to pursue legal action against the distributor. [299] By placing decision-making authority directly in the victim's hands, civil enforcement of revenge porn laws is more likely to reflect the social norms of the victim's community.[300] An individual will likely only bring a civil action when the defendant's actions violate that individual's perception that the social codes of the community—either written or unwritten—have been violated, thereby injuring the individual.[301] To the extent that civil remedies line up with community norms, they are more likely than criminal laws to reinforce perceptions of trust and cohesion in the community.

There are, of course, substantial limits on what civil remedies can do. Lawsuits (and lawyers) can be expensive and time-consuming, and defendants will often lack the financial resources to make plaintiff's whole.[302] Moreover, revenge porn may cause professional and psychological harms that may be irreparable with money.[303] To the extent that injunctive relief might stop the defendant from further disseminating plaintiff's images, by the time an injunction issues the images already may be in the hands of multiple third parties with no direct connection to the plaintiff.

Going after the nonconsensual, viral spread of intimate images accordingly likely requires placing greater responsibility in the hands of the operators of online platforms. Doing so, however, runs directly into one of the most important and controversial laws of the Internet: Section 230 of the Communications Decency Act.[304] Section 230 immunizes operators

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[297] See *supra* notes [] and accompanying text.
[298] See, e.g., Violence Against Women Act Reauthorization Act of 2022 §1309(b)(1).
[299] See Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 102.
[300] See Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 101.
[301] See *id*.
[302] See, e.g., Doe v. Eisenberg, No. H-16-1149, 2021 WL 4310601 (S.D. Tex. July 7, 2021)(awarding over $100,000 in attorneys' fees based upon a jury verdict of $15,000 following a four-day trial). The plaintiff in *Eisenberg* was fortunate, however, to have been represented on a pro bono basis. See *id.* at *4.
[303] See, e.g., United Healthcare Ins. Co. v. AdvancePCS, 316 F.3d 737, 741 (8th Cir. 2002) ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury."); Chalk v. United States Dist. Court, 840 F.2d 701, 709 (9th Cir. 1988) (finding that emotional distress, depression, and anxiety may constitute irreparable injury)
[304] 47 U.S.C. § 230.

of online platforms from liability stemming from content created by their users,[305] making it very difficult to sue a social media company for hosting content that has caused harm to its users. For example, in *Herrick v. Grindr*, the plaintiff's ex-boyfriend created numerous fake profiles of plaintiff, resulting in strangers repeatedly showing up at his home and workplace looking for sex.[306] Despite repeated complaints to Grindr about the fake profiles, the company was able to dismiss the plaintiff's claims because the ex-boyfriend, and not Grindr, created the profiles in question.[307] In previous work, I have highlighted the potential queer benefits of Section 230, which insulates online sexual communities from efforts, especially by state prosecutors, to purge online content that violates majoritarian gender and sexual norms.[308] Indeed, FOSTA-SESTA, which in 2018 created the first new limit on Section 230 since its enactment in 1996, resulted in the removal of wide swaths of queer and sexually-explicit online content.[309] For example, Craigslist removed its online personals section,[310] and websites dedicated to subcultures like the Furries shut down entirely.[311] Accordingly, a substantial dismantling of Section 230 stands in potential tension with the availability of sexually-explicit online forums and the queer counterpublic potential they offer. [312]

Nevertheless, some very specific, targeted exceptions to Section 230 for civil revenge porn actions might benefit victims of revenge porn without triggering the dangers of a carceral response or existentially imperiling online platforms. As I've argued in other work, one fairly effective civil remedy for revenge porn violations has been provided by intellectual property—specifically copyright law, trademark law, and rights of publicity.[313] Sexual images are typically covered by some combination of these laws, and their online distribution often infringes on the rights of the image's author or subject.[314] Intellectual property laws are expressly carved out of

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[305] 47 U.S.C. § 230(c)(1).

[306] *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018).

[307] Id. at 590-91.

[308] See Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 103-04; Gilden, *Cyberbullying and the Innocence Narrative*, *supra* note [], at 390-92.

[309] See, e.g., Kendra Albert, *FOSTA in Legal Context*, 52 COLUM. HUMAN RIGHTS L. REV. 1084 (2021); see also https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either

[310] https://www.craigslist.org/about/FOSTA

[311] https://www.vice.com/en/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta

[312] Professor Citron has recently advocated limiting Section 230(c)(1) by limiting immunity to platforms that take "reasonable steps to address unlawful uses of its service that clearly create serious harm to others." See *How to Fix Section 230*, B.U. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054906 , at 16. Although many queer platforms ultimately would likely remain protected under this "reasonable content moderation" standard, they nonetheless would "have to convince a judge at the outset of a case (in a "motion to dismiss") that [they] had taken reasonable steps to address the specific type or types of illegality of which the plaintiffs were complaining about." Id. at 17.

[313] See Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 82-87; see also *Ortega v. Villa*, No. CV 20-11361-DMG(AGRx), 2021 WL 5238786 (C.D. Cal. Sept. 10, 2021)(entering default judgment of copyright infringement and misappropriation of likeness where defendant broadcasted plaintiffs' Onlyfans videos without her consent and ordering $135,107.50 in compensatory and punitive damages); Ex parte Jon*es*, No. PD-0552-18, 2021 WL 2126127, at *13 (Tex. Ct. Crim. App. May 26, 2021)(recognizing that copyright law can fill some of the gaps in the coverage of Texas's criminal statute).

[314] Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 82-87

Section 230, and platform liability for their users' infringement is typically subject to a notice-and-takedown regime: if platforms lack specific knowledge of infringement by a particular user, they are generally not liable; if they are notified of such infringement, they can avoid liability by promptly removing the infringing image.[315] Internet platforms have been subject to notice-and-takedown regimes for IP violations since the 1990s and although they are absolutely subject to abuse by aggressive rightsholders, they have not shattered the Internet's expressive ecosystem in a way similar to the broader carveouts provided by FOSTA-SESTA.[316] A similar notice-and-takedown regime, tailored specifically to revenge porn claims by the persons depicted in intimate images, could provide meaningful relief to those asserting their own sexual privacy without outright imperiling forums for sexual expression.[317]

Finally, one promising avenue for reform that has received little scholarly attention is the extension of antidiscrimination laws to the victims of revenge porn. As described earlier in this Article, six states provide at least some form of employment protection for victims of revenge porn; if someone's intimate images have been distributed without their consent, they cannot be lawfully fired on that basis.[318] Such employment antidiscrimination laws—along with parallel housing and educational antidiscrimination laws—potentially remove one of the major threats of revenge porn. If these laws were expanded to more states and incorporated into HR practices, someone fearing the disclosure of their intimate images at the very least would not need to worry that they would lose their job, even if their reputation might be impacted indirectly. Antidiscrimination protections for revenge porn victims not only sends the message, like criminal laws do, that nonconsensual disclosures are wrong; they also send the message that sexual expression is irrelevant to employment, housing, and education.[319] Unfortunately, in order to obtain the protection of these antidiscrimination laws, victims need to at the very least fall within the scope of the state's parallel criminal statute. This accordingly excludes victims who fall into the statutory gaps examined in this Article. Filling these gaps with expanded employment, housing, and education protections would provide important protections for many victims, without triggering the dangers of expanded criminal statutes.

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[315] 17 U.S.C. § 512 (creating statutory notice-and-takedown regime for copyright infringement); Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. 2010)(recognizing a similar regime for trademark infringement). Note that there currently is a circuit split as to whether rights of publicity are subject to Section 230's IP exception. *See* https://blog.ericgoldman.org/archives/2022/05/facebook-cant-shake-publicity-rights-claim-hepp-v-facebook.htm

[316] Gilden, *Sex, Death, and Intellectual Property*, *supra* note [], at 104.

[317] Cf. Bambauer, *Exposed*, *supra* note [], at [] (suggesting a reform to the Copyright Act to provide a similar cause of action for revenge porn victims, subject to copyright law's notice-and-takedown regime for intermediary liability); Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747 (2018)(arguing that the right of publicity would be an effective means of addressing revenge porn). This targeted approach to revenge porn and Section 230 might help avoid the "double bind" that Prof. Waldman describes with respect to queer content moderation—incentivizing too much content moderation can give rise to queer censorship while incentivizing too little leaves queer people vulnerable to harassment online. *See* Waldman, *Disorderly Content*, *supra* note [], at 57.

[318] *Supra* notes [] and accompanying text.

[319] See Bambauer, *Exposed*, *supra* note [], at 2040 ("There are few if any professions where intimate decisions affect an employee's performance or qualifications. Nonetheless, both empirical and anecdotal evidence suggests that this sort of unrelated information can adversely affect a candidate's prospects.")

Reducing the economic consequences of revenge porn might be especially responsive to concerns raised by queer people. The concern for many queer people isn't the prospect of other people seeing them naked *per se*, it's the prospect of being seen naked in particular sex-negative or heteronormative contexts. Many queer people openly embrace the opportunity to be publicly and/or commercially sexual when given the opportunity, but are forced to protect their anonymity or make other efforts to keep their social contexts separate. Members of sex-positive communities recognize that their professional goals could be derailed by other people's discomfort with what they happily are doing during their free time.[320]

The main objection to this final reform might be that certain occupations—e.g., teacher, police officer, judge—require a high moral standard in order to maintain the respect of the communities that may look up to them.[321] For example, in *Matter of Clark* the Supreme Court of Kansas held that a recently-retired judge should be publicly censured after sharing naked photos of himself on the online swingers' community Club Foreplay and another member's spouse sent the photos to the Commission on Judicial Conduct.[322] Even though the photos were unavailable to the general public, the judge "opened the door by releasing the photos to even one person on this social media website,"[323] and accordingly his "decision to take a picture of his penis and post that picture on a social media website . . . would appear to a reasonable person to undermine the judge's integrity and demean the judicial office."[324] The court observed, "Judges should be the role models of our society. A judge's integrity, while never spotless, should exhibit behavior that is or should be emulated by others."[325] The court apparently believed that sharing sexual images with willing participants in an online swingers' community should not be emulated, yet it seemed to have no concerns with the complainant's nonconsensual distribution of the judge's images outside the confines of that community.[326]

Teachers in particular repeatedly have been subjected to the logic that they can't be effective role models if they've ever voluntarily shared nude images or otherwise been recorded in a sexual context. In the words of one arbitrator who affirmed the termination of teacher whose ex-wife distributed his nude photos:

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[320] See Abad-Santos, *supra* note [].

[321] See Warren City Bd of Educ., 124 Lab. Arb. Rep. (BNA) 532, 534 (2007) ("For anyone in a high profile occupation, the possible exposure of such intimate photos certainly posed a continuing danger, whether the person is teacher, politician, clergy, executive, or any other person whose job requires others to look up and respect them for themselves and the position they hold.").

[322] Matter of Clark, No. 123,911, 2022 WL 259203 (Kan. Jan. 28, 2022); see also Matter of Archer, 2016 WL 7106106 at *1 (Al. Jud. Inq. Comm. 2016) (suspending a judge for 180 days without pay for having a racy Facebook relationship).

[323] Matter of Clark, at *4.

[324] Id. at *5.

[325] Id. at *5.

[326] See id. at *11 (Stegall, J., concurring)(" It appears to me that the Examiner and the Commission have unwittingly made themselves accomplices in one man's effort to exact revenge against Judge Clark by "disseminating" his nude photographs and images of his sexual activities in which he had an expectation of privacy.").

> The problem is that the grievant is a teacher, a role model, in a high school. The high school was profiled as a school with 1,600 to 1,700 students with a half and half racial mix. 'Demographic wise, we have a lot of students that are poverty level or below. The majority of our students come from single-parent households.' Does this mean that the role model requirement for a teacher is higher in this school more than a wealthy suburban high school? I do not feel that the possible greater need for a role model in this school with a lot of poverty is dispositive in this arbitration. Both types require role models.[327]

Accordingly, the expected role of a "role model" in a school environment, perhaps especially a school environment where students lack access to wealthy, white, married parents, is to replicate the sexual norms of communities that are replete with such persons. When teachers' lives are shown to be out of sync with those norms, even without their consent, they may be justifiably expelled from the community for exposing students to aspects of sexuality that (wealthy suburban?) parents might object to.

Even aside from the veiled racism and classism on display, the "role model" concern is wildly out of sync with the actual practices of young people, who share intimate images and seek out pornography far more often than the adults in their community may wish.[328] Perhaps, rather than treat the next generations as if they were, are, and always will be sexually innocent, they instead would benefit from having access to an adult who is unafraid of discussing their own journey of sexual discovery. In other words, perhaps they might benefit from talking more about sex in public.

V. Conclusion

Feminist scholars have highlighted both the widespread practice of sexual expression in digital contexts and the diverse set of vulnerabilities that can accompany it. The legal reforms that they have successfully ushered in send a powerful message about the impropriety of shaming people for their sexual expression, using their sexual expression to harm them in myriad ways, and denying them agency over the boundaries of their sex lives. These messages resonate deeply with queer communities and queer politics. Nevertheless, the fine print of revenge porn laws significantly undercut their queer potential. Queerness requires the construction of visible worlds that challenge the heteronormative principle that sex only belongs in the bedroom, beyond the reach of the market, and within committed relationships. Meaningfully queer sexual privacy would empower individuals and communities to manage their boundaries while nonetheless casting these principles aside.

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[327] Warren City Bd of Educ., 124 Lab. Arb. Rep. (BNA) 532, 536 (2007).

[328] See Gilden, *Cyberbullying and the Innocence Narrative*, *supra* note []; Lara Karaian & Andrew Tompkins, *Teenage Sexting: Sexual Expression Meets Mobile Technology*, in ENCYCLOPEDIA OF MOBILE PHONE BEHAVIOR 1526 (ZHENG YAN, ED. 2015) ("Taken together, these studies suggest that consensual sexting is a normal, everyday part of some teenagers' and adults' romantic relationships.").