

THE QUEER LIMITS OF REVENGE PORN LAWS

ANDREW GILDEN

INTRODUCTION	802
I. THE BATTLE AGAINST “REVENGE PORN”	809
<i>A. Scholarly Framings</i>	810
1. Civil Rights Framework	810
2. Privacy Framework	812
3. The Queer Dimension	814
<i>B. From Scholarship to Reform</i>	817
II. QUEER EXCLUSIONS	825
<i>A. “Public” Sexual Images: Judicial Perceptions and Queer Experiences</i>	828
1. Drawing the Line Between Public and Private	828
2. Queer Publics	833
<i>B. Commercial Sex</i>	845
<i>C. Sex Outside Intimate Relationships</i>	849
III. QUEER SEXUAL PRIVACY AND REVENGE PORN REFORMS	854
CONCLUSION	866

THE QUEER LIMITS OF REVENGE PORN LAWS

ANDREW GILDEN*

Abstract: The highly successful movement to combat the nonconsensual distribution of sexual imagery—commonly known as “revenge porn”—sends a powerful message that sexual expression through digital technology is an illegitimate basis for stigma, abuse, or the loss of employment. Although feminist advocates spearheaded these laws to counter the overwhelmingly gendered dynamics of revenge porn, these laws also send a powerful message about sexual norms and sexual privacy that would appear to benefit queer communities especially. Nonetheless, as enacted by state legislatures and interpreted by state courts, revenge porn laws are significantly limited in ways that undermine their practical and symbolic benefits for queer people and other sexual minorities. In virtually all forty-eight U.S. states that have criminalized revenge porn, the enacted statutes draw a line between “private” or “intimate” images that are protected against unauthorized distribution and “public” or “commercial” images that 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 Article 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.

INTRODUCTION

Queer people hold a significant stake in recent efforts to combat the non-consensual distribution of sexual images, a practice colloquially known as “re-

* Associate Professor of Law, Willamette University. Many thanks to Kendra Albert, Albertina Antognini, Kyle Bristow, Brenda Cossman, Doron Dorfman, Brenda Dvoskin, Mailyn Fidler, Joe Fischel, Fanna Gamal, Thea Johnson, Thomas Kadri, Lara Karaian, Asaf Lubin, Kaipo Matsumura, Nick Nugent, Ngozi Okidegbe, Blake Reid, Gabe Rosenberg, Alan Rozenshtein, Scott Skinner-Thompson, Brian Soucek, India Thusi, and Ari Waldman for helpful feedback, and to Ronnie Hodgkinson for excellent research assistance.

venge porn.”¹ By prohibiting the unauthorized sharing of sexual imagery, the vast majority of states recognized the ubiquity of sexual expression in digital contexts and sent a powerful message that no one should be harassed, fired, or lose access to their housing just because some aspect of their sex life was caught on camera.² Additionally, these laws recognize that many women experience image-based abuse and reflect the views of feminist scholars and advocates, who have argued persuasively that society should not blame women for using digital technologies as part of their intimate lives.³ Though figuring less prominently in recent revenge porn debates, queer people—broadly defined⁴—have long faced similar threats of having their sexual desires outed to families, friends, employers, and law enforcement. Moreover, the legal system has provided them with 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 those norms.⁶ Revenge porn advocacy would accordingly appear to unite queer and

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 49–55 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, forty-eight states have enacted revenge porn-specific laws. See *Nonconsensual Pornography Laws*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/nonconsensual-pornography-laws/> [<https://perma.cc/8RWR-EJKB>] (providing an overview of state laws addressing nonconsensual pornography).

³ See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 345–49 (2014); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874–79 (2019) [hereinafter Citron, *Sexual Privacy*].

⁴ I use the term “queer” here as an umbrella identity category that includes not only 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 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. At the same time, I acknowledge that queer experiences with gender and sexuality vary greatly, and are mediated by their intersections with, for example, race, class, ability, and citizenship.

⁵ See, e.g., Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1721–22 (2010) (analyzing queer people’s use of tort law to seek justice for harms to their privacy).

⁶ See, e.g., Citron, *Sexual Privacy*, *supra* note 3, at 1879–81, 1890–98; SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 39–44 (2021).

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 the anti-revenge porn movement has largely lacked explicitly queer voices. To be sure, 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 And 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, revenge porn legislation has blunted the queer potential of the advocacy that preceded it. In nearly every revenge porn statute enacted in the past decade there are major, and largely unappreciated, limits on what types of sexual expression are protected from unauthorized dissemination. Consequently, a large swath of sexual behavior remains vulnerable to stigma, abuse, and harassment. Most significantly, the large majority of states provide no protec-

⁷ See Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 LAW & SOC. INQUIRY 987, 987 (2019) (documenting the prevalence of revenge porn in "gay and bisexual male online communities" and discussing the inadequacy of associated legal protections).

⁸ See, e.g., Citron, *Sexual Privacy*, *supra* note 3, at 1894–95, 1898–99; Citron & Franks, *supra* note 3, at 354–56; CARRIE GOLDBERG WITH JEANNINE AMBER, NOBODY'S VICTIM: FIGHTING PSYCHOS, STALKERS, PERVS, AND TROLLS 35–54 (2019) (discussing litigation in *Herrick v. Grindr LLC*, 765 F. App'x 586 (2d Cir. 2019)).

⁹ On the persistent distancing of prominent LGBTQ+ advocacy organizations from perceived sexual "deviance," see, for example, Scott De Orio, *Bad Queers: LGBTQ People and the Carceral State in Modern America*, 47 LAW & SOC. INQUIRY 691, 692–93, 702–03 (2022); Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 567–74; Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414–16 (2004); 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 M. Halperin & Trevor Hoppe eds., 2017).

¹⁰ Professor 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 (quoting Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 CRITICAL ANALYSIS L. 23, 37 (2019)).

tion for images produced in a “public or commercial setting.”¹¹ Accordingly, those in possession of sexual images taken in public contexts, such as a clothing-optional beach or a sexually themed street fair, or in commercial contexts, such as adult websites like OnlyFans or Pornhub, can freely distribute those sexual images with employers, families, and friends. And they can do so notwithstanding their 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 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 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 are all 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, for instance, is frequently the only context in which queer people can learn about non-hetero forms of sex.¹⁵ Similarly, sex work continues to serve as an economic lifeline for queer people, especially at the socioeconomic margins.¹⁶ Queer people need to be public and need to be commercial in order

¹¹ See, e.g., ALA. CODE § 13A-6-240(a), (c)(2) (2023); ARIZ. REV. STAT. ANN. § 13-1425(B)(3) (2023); CONN. GEN. STAT. § 53a-189c(b)(1) (2023); DEL. CODE ANN. tit. 11, § 1335(e)(3)–(4) (2023); GA. CODE ANN. § 16-11-90(e)(4)–(5) (2023).

¹² See ARK. CODE ANN. § 5-26-314(a)(2) (2023) (applying only when the distributor of an image is or was in a “family or household” or “dating relationship” with the person the image depicts); State v. VanBuren, 214 A.3d 791, 818 (Vt. 2018) (dismissing charges the state brought against a defendant under the state’s revenge porn law, VT. STAT. ANN. tit. 13, § 2606 (2023), because the complainant did not have “a reasonable expectation of privacy in the images” the defendant shared).

¹³ See, e.g., Joseph J. Fischel, *Keep Pride Nude*, BOS. REV. (June 23, 2021), <https://bostonreview.net/articles/keep-pride-nude/> [<https://perma.cc/255H-BFMZ>] (arguing that Pride event organizers should not exclude “(partial) nudity, fetish wear, and kinky activity”).

¹⁴ See *infra* notes 172–232 and accompanying text.

¹⁵ See *infra* notes 233–261 and accompanying text.

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 35, 37–38 (Angela Jones, Joseph Nicholas DeFilippis & Michael W. Yarbrough eds., 2018).

to construct social worlds that might include them.¹⁷ Yet newly enacted sexual privacy protections do not reach public or commercial spaces.

To illustrate the disparate effects of these carveouts, consider the following hypothetical. A school superintendent has received five emails, each containing sexually explicit images of a different teacher within their district. For each email, the superintendent is trying to decide whether to report the email's *sender* to the police or proceed with 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 attempting to get her fired. The second teacher had exchanged nude photos of themselves with an individual they 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 the teacher had sent. 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, 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 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 that most states have enacted. Of those states, only six states might protect them from adverse employment consequences as a result of being the victims of image-based abuse. In almost every other state, the superintendent could likely discipline the other four teachers for their nude images, and prosecutors likely would not seek charges against the other four senders, notwithstanding their motivation to injure these teachers for their lawful sexual expression.¹⁸ Alt-

¹⁷ See generally MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* (2002) (discussing the social and political importance of "queer publics").

¹⁸ See *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 788 (Tex. Ct. App. 2021) (observing no reasonable expectation of privacy "[i]f . . . material was obtained by photographing a person who was purposely displaying the person's naked genitals in public . . ."); *State v. VanBuren*, 214 A.3d 791, 823 (Vt. 2019) (finding that a person had no reasonable expectation of privacy in an image of herself that she sent to someone with whom she was not currently "in a relationship"); cf. *Martin v. Smith*, No. 354128, 2020 WL 7310960, at *3–6 (Mich. Ct. App. Dec. 10, 2020) (rejecting the proposition that the plaintiff, who had sent nude photos to a man with whom he had interacted solely online, suffered from impacts surrounding revenge porn); *San Diego Unified Sch. Dist. v. Comm'n on Pro. Competence*, 124 Cal. Rptr. 3d 320, 322–23 (Ct. App. 2011) (upholding the termination of a teacher

though the legal treatment of teachers two through five in no way directly hinges upon their sexual orientation, this Article demonstrates that revenge porn laws' carveouts keep queer people—those who identify as LGBTQ+ as well as other sexual subcultures—especially vulnerable to such image-based abuses.

Queer people may formally enjoy the same legal protections as anyone 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 around those connections.²⁰ Public and commercial spaces allow queer people to build queer communities around a shared experience of marginalized sexuality, but these spaces also present the risk that people will capture and share compromising images in ways that confirm the homophobia that these communities are pushing back against.²¹ Revenge porn laws send a message that intimate partners in possession of sexual images should not harass the individuals depicted in the image, and that employers and school districts should consider the existence of such sexual imagery as irrelevant to someone's employment and education. Yet the limited reach of revenge porn laws sends a message that if a harasser uses a photo obtained initially on Grindr, or if an employer fires a person for appearing naked on OnlyFans, suddenly the abuse and discrimination that follow become fair game. Queer forms of sexual expression may not be the express targets of exclusions for public and commercial contexts, but these contexts are nonetheless closely linked to queer expression, practically and politically.

This Article 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 scholar-

who posted a sexually explicit Craigslist ad that a parent in the school district discovered). In a few states that *lack* the express carveouts for public or commercial settings, the applicable revenge porn statute may apply, assuming that the court otherwise located a "reasonable expectation of privacy." See *infra* notes 167–171 and accompanying text.

¹⁹ See *Lawrence v. Texas*, 539 U.S. 558, 562–64, 578–79 (2003) (finding petitioners had a constitutional right to engage in same-sex intercourse in a home).

²⁰ See *infra* notes 295–359 and accompanying text.

²¹ See, e.g., *San Diego Unified*, 124 Cal. Rptr. 3d at 322–23 (affirming the termination of a gay teacher who posted sexually explicit ads on Craigslist); Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 436–38, 447 (2016) (collecting cases where members of BDSM communities have lost custody after their leaked photos and online profiles were presented to family courts). See generally Allen, *supra* note 5 (reviewing case law in which courts denied queer plaintiffs privacy protections in images used to out them).

²² See, e.g., Citron, *Sexual Privacy*, *supra* note 3, at 1940 (criticizing "cramped" and "bright line" approaches to privacy (quoting ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 72 (2018))).

ship to legislation has resulted in laws that recognize only simplistic forms of sexual privacy that protect tightly held secrets, kept in indisputably private places.²³

Part I of this Article documents this shift by first examining the conceptual framing of nonconsensual pornography in legal scholarship and then surveying the forty-eight states that have enacted legislation to deter the practice and limit its real-world consequences.²⁴ Part II then closely examines the carveouts for public, commercial, and non-intimate images and shows both how these carveouts correlate with queer sexual practices and how these carveouts map onto a long history of queer legal exclusions.²⁵ In so doing, Part II 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.²⁶ 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 system²⁷—a system with a long history of hostility toward the queer communities it has policed. If legislatures expanded revenge porn laws to cover queer public and commercial contexts, the practical result might be to welcome law enforcement to play a more active role in policing

²³ See SKINNER-THOMPSON, *supra* note 6, at 46 (critiquing “[r]igid application of the secrecy paradigm”). Professor Waldman defines the secrecy paradigm as “the idea that only secret information can be private.” WALDMAN, *supra* note 22, at 72 (citing CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 53–54 (2007)).

²⁴ See *infra* notes 32–125 and accompanying text.

²⁵ See *infra* notes 126–294 and accompanying text.

²⁶ See, e.g., SKINNER-THOMPSON, *supra* note 6, at 40–41 (expressing concerns about carceral framing).

²⁷ At the federal level, however, Congress has enacted only civil, as opposed to criminal, revenge porn legislation. The recently reauthorized Violence Against Women Act (VAWA) created a federal civil cause of action for unauthorized intimate image disclosure, but not did not create a new federal crime for the same activity. See Violence Against Women Act (VAWA) Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 840 (codified at 34 U.S.C. §§ 12291–12514); Marissa Wright, *Congress Reauthorizes the Violence Against Women Act, Adds More Protections*, HARV. C.R.–C.I. L. REV. AMICUS BLOG (Mar. 24, 2022), <https://harvardcrcl.org/congress-reauthorizes-the-violence-against-women-act-adds-more-protections/> [<https://perma.cc/LH9C-VRL3>] (summarizing the updates Congress made to the VAWA when reauthorizing it as part of the Violence Against Women Act Reauthorization Act of 2022).

these contexts.²⁸ Law enforcement, unfortunately, has a horrifying track record of policing queer spaces, online and off, in the name of protecting the vulnerable.²⁹ 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.³⁰

This Article 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 both to build a vibrant sexual community and remain in compliance with the privacy norms of the closet. Although the immediate focus of this Article is the large body of recently enacted revenge porn legislation, the Article more broadly suggests that sexual privacy may look different for queer people than for other populations.³¹ 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.

I. 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" entered the popular lexicon to describe an increasingly widespread pattern of abuse and harassment directed predominantly against women.³² The term most commonly connotes the practice of one intimate partner sharing a naked or sexual image of themselves, for example, through "sexting," during the relationship, followed by the other partner either disseminating or threatening to disseminate the image when the relationship ends.³³ Numerous revenge porn websites, such as Is Anyone Up? and MyEx.com, expressly welcomed submis-

²⁸ On related critiques of "carceral feminism," see generally AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* (2020) (analyzing the U.S. criminal justice system through a critical feminist lens).

²⁹ See, e.g., JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 129–32 (2011).

³⁰ See *infra* notes 295–359 and accompanying text.

³¹ In a forthcoming article, Brenda Dvoskin shows how existing sexual privacy theory reinforces conventional sexuality norms, in ways that make it difficult to argue that consensual sexual expression online can be normatively valuable. See generally Brenda Dvoskin, *Speaking Back to Sexual Privacy Invasions*, 98 WASH. L. REV. (forthcoming 2023). The normative vision of sexuality that Dvoskin advocates is likely consistent with the queerer forms of sexual privacy anticipated by this Article.

³² See Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 19, 2013), <https://nymag.com/news/features/sex/revenge-porn-2013-7/> [<https://perma.cc/96T2-NJP7>] (providing a brief overview of several notable historical events related to revenge porn).

³³ See Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL STUD. 534, 537 (2017) (describing revenge porn as "the most familiar form of image-based sexual abuse").

sions from jilted exes looking to exact revenge by sharing naked images, and often contact information, with an extremely wide audience.³⁴ Revenge porn has become an attractive vehicle for abuse due to the wide spectrum of psychological, emotional, and economic harms it often imposes on its victims.³⁵ To name a few, prospective employers have denied victims jobs after conducting an internet search of their names; current employers have fired victims after receiving their naked images; and strangers have stalked and harassed victims with information they obtained online. Victims have suffered from panic attacks, extreme anxiety, and eating disorders; feared leaving their homes; and withdrawn from social life, online and off.³⁶ Moreover, prior to 2013, there was little meaningful redress available to the victims of revenge porn, as only three states had criminalized the practice and law enforcement routinely brushed aside victims' complaints.³⁷ The growing practice of revenge porn drew strength from a social environment that shamed women for their sexual expression and blamed them for their own harassment and abuse.³⁸

Against this backdrop, a coalition of legal scholars, lawyers, and survivors of image-based abuse built public awareness of revenge porn's harms and pushed for legal reform. Their efforts created a substantial body of scholarship focused on revenge porn and related forms of image-based abuses, and led to a proliferation of law and policy reforms. The following Sections (A) discuss the frameworks different scholars have used to evaluate revenge porn laws³⁹ and (B) survey revenge porn laws that advocates have been able to secure.⁴⁰

A. Scholarly Framings

1. Civil Rights Framework

Scholars have generally framed revenge porn as an issue triggering 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 emphasized that, statistically, women are

³⁴ See Samantha H. Scheller, Comment, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 562–63 (2015).

³⁵ See Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 715–16 (2017) (providing an overview of revenge porn's harms).

³⁶ See *id.* (detailing the specific types of harm revenge porn can cause); Citron & Franks, *supra* note 3, at 350–54 (same).

³⁷ See Citron & Franks, *supra* note 3, at 366–67, 371.

³⁸ See Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 480–85 (2017).

³⁹ See *infra* notes 41–83 and accompanying text.

⁴⁰ See *infra* notes 84–125 and accompanying text.

much more likely to be the victims of revenge porn than men, and they have connected these disparities to broader systems of gender inequality and structural misogyny.⁴¹ Women are expected to publicly maintain a reputation for sexual purity while at the same time expected to share sexual images as the price of entry into intimate relationships.⁴² When these images are non-consensually disclosed beyond their intended audience, the harassment that follows is then traced to the woman's poor decision to document her own sexuality, as opposed to her partner's coercion or breach of trust.⁴³ This dynamic of slut-shaming and victim-blaming can result in foreclosed professional opportunities for women within already-male-dominated spaces,⁴⁴ subjection of women to stalking and harassment,⁴⁵ and the silencing of women who try to enter the public sphere with a tainted sexual reputation.⁴⁶ Within a civil rights framework, revenge porn stands as a structural barrier to women's full and equal

⁴¹ See Citron & Franks, *supra* note 3, at 353–54 (explaining that revenge porn affects women more often than men); DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 45–55 (2014) (describing one woman's experience being the target of revenge porn, and exploring the digital dimensions of revenge porn); see also Christine Geeng, Jevan Hutson & Franziska Roesner, *Usable Sexurity: Studying People's Concerns and Strategies When Sexting*, 16 USENIX SYMP. USABLE PRIV. & SEC. 127, 134 & tbl.8 (2020) (reporting that women and nonbinary individuals are much more likely than men “to be concerned about blackmail . . .”); McGlynn & Rackley, *supra* note 33, at 544 (stating that “[f]irst and foremost, it is important to recognise that the harms suffered by victim-survivors are deeply gendered” not only because most victim-survivors are women, but also because the harms themselves are misogynistic in nature). 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 STUD. 448, 451 (2021) (collecting research studies showing fewer gender disparities than earlier studies indicated).

⁴² See generally Tegan S. Starr & Tiffany Lavis, *Perceptions of Revenge Pornography and Victim Blame*, 12 INT'L J. CYBER CRIM. 427 (2018) (analyzing the shame and blame perceived against victims in the revenge porn context).

⁴³ See Citron & Franks, *supra* note 3, at 353 (noting that revenge porn perpetrators sometimes post images on “slut-shaming” websites); McGlynn & Rackley, *supra* note 33, at 548 (“Women are shamed for creating, or ‘allowing’ the creation of, sexual images of themselves, and this ‘shame punishment’ is fuelled by cultural and social conditions of sexual inequality.” (quoting Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 68, 68 (Saul Levmore & Martha C. Nussbaum eds., 2010))).

⁴⁴ See Citron & Franks, *supra* note 3, at 352 (explaining that if an employer or potential employer's internet search of an employee or job candidate returns sexual images, the employer may fire the employee or decline to hire the job candidate).

⁴⁵ See *id.* at 351–52 (documenting that some women were afraid to, or simply did not, leave their home out of fear for their personal safety after a revenge porn perpetrator posted their contact information and image online).

⁴⁶ See, e.g., CITRON, *supra* note 41, at 45–50. One recent study suggests that women and sexual minorities have “internalized ‘victim-blaming’ perspectives” regarding sexual privacy violations, shifting the focus away from the individuals who are directly responsible for non-consensually sharing their sexual images. Geeng et al., *supra* note 41, at 138.

social participation.⁴⁷ 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.⁴⁸ 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.

2. Privacy Framework

Legal scholars also have shifted discussions of revenge porn away from the narrow issue of sexual images in the hands of jilted exes—meaning, away from an issue of “revenge”—and toward a broader discussion of sexual privacy in a digital society.⁴⁹ 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.⁵⁰ 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.⁵¹ 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,⁵² for purposes of entertainment and “humor,”⁵³ or for economic gain.⁵⁴

⁴⁷ McGlynn & Rackley, *supra* note 33, at 546 (“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.”).

⁴⁸ See Roni Rosenberg & Hadar Dancig-Rosenberg, *Reconceptualizing Revenge Porn*, 63 ARIZ. L. REV. 199, 219 (2021) (arguing that a privacy framework “does not reflect the full impact of” revenge porn and that the practice should be understood as a form of “sexual abuse”).

⁴⁹ See, e.g., ANASTASIA POWELL, ADRIAN J. SCOTT, ASHER FLYNN & NICOLA HENRY, IMAGE-BASED SEXUAL ABUSE: AN INTERNATIONAL STUDY OF VICTIMS AND PERPETRATORS 2 (2020).

⁵⁰ 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, 1386 (2021) (“The push for a broad definition of nonconsensual pornography stems from new research reporting that approximately eighty percent of nonconsensual pornography perpetrators do not act with the intent to harm their victim.” (first citing ASIA A. EATON ET AL., CYBER C.R. INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 19 (2017); and then citing Danielle Citron & Mary Anne Franks, *Evaluating New York’s “Revenge Porn” Law: A Missed Opportunity to Protect Sexual Privacy*, HARV. L. REV. BLOG (Mar. 19, 2019), <https://blog.harvardlawreview.org/evaluating-new-yorks-revenge-porn-law-a-missed-opportunity-to-protect-sexual-privacy> [<https://perma.cc/D6ZZ-VEKR>])).

⁵¹ Citron, *Sexual Privacy*, *supra* note 3, at 1918.

⁵² See, e.g., Shawn Snow, *Seven Marines Court-Martialed in Wake of Marines United Scandal*, MARINE CORPS TIMES (Mar. 1, 2018), <https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/> [<https://perma.cc/J8J5->

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.⁵⁵ This Article’s use of the term revenge porn is intended to reflect the colloquial usage of the term and is not tightly limited to circumstances involving vengeance toward 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: a person shares images with someone under the (mistaken) belief that the recipient would keep those images to themselves.⁵⁶ By further disseminating images entrusted to them, the recipient of the 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.⁵⁷ Trust and privacy are closely intertwined, and both are almost essential to forming meaningful social connections.⁵⁸ Relatedly, privacy is closely connected with questions of intimacy: revenge porn is destructive both because it involves subject matter that is perceived as intimate—that is, deeply personal and largely secretive⁵⁹—and because it often is an outgrowth of relationships that are experienced as inti-

7DK7] (discussing the private Facebook group in which Marines shared and bragged about nude images they had received).

⁵⁵ See, e.g., *Playboy Model Sentenced for ‘Body-Shaming’ in LA Locker Room*, BBC (May 24, 2017), <https://www.bbc.com/news/world-us-canada-40038332> [<https://perma.cc/222S-2TZM>] (documenting a situation where someone took a photograph of an elderly woman without the woman’s knowledge and then posted the image online, ostensibly for comedic purposes).

⁵⁶ See, e.g., James Cook, *The US Government Says It Has Found the Man Behind the Massive iCloud Celebrity Photos Hack*, BUS. INSIDER (Mar. 16, 2016), <https://www.businessinsider.com/ryan-collins-allegedly-naked-photographs-celebrity-icloud-2016-3> [<https://perma.cc/T8RY-E9EG>] (implying that an individual involved in leaking naked pictures of celebrities did so, at least in part, for money).

⁵⁷ See Mary Anne Franks, *The Crime of “Revenge Porn”* (articulating the ways in which the words “revenge” and “porn” cause the term “revenge porn” to fail to accurately capture what it attempts to describe), in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 661, 663–64 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019). Some scholars have folded revenge pornography into a larger umbrella of “image-based sexual abuse” to reflect a broader range of abusive circumstances beyond “revenge”—such as domestic violence and youth bullying—in which a sexual image captured or distributed non-consensually can figure prominently. See, e.g., POWELL ET AL., *supra* note 49, at 2; McGlynn & Rackley, *supra* note 33, at 536–37.

⁵⁸ See Waldman, *supra* note 35, at 716 (discussing how “revenge porn” causes a social harm by eroding people’s ability to trust each other).

⁵⁹ McGlynn & Rackley, *supra* note 33, at 547.

⁵⁸ See WALDMAN, *supra* note 22, at 34–35 (discussing various scholars’ reasoning as to why privacy and trust are socially important).

⁵⁹ See Danielle Keats Citron, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763, 1795 (2021) (“The loss of sexual privacy also undermines dignity by having others see people as just parts of their intimate lives and not as fully integrated human beings.” (citing Citron, *Sexual Privacy*, *supra* note 3, at 1882–84)).

mate—that is, involving a willingness to disclose personal and secretive information.⁶⁰ Even if the victim of revenge porn is not 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 they will allow to flow within certain social contexts (for example, work, church, family) but not into others.⁶¹ In this understanding of privacy, we often construct our various identities—whether professional, familial, or sexual—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,” wherein victims experience a loss of control and an inability to remain in the driver’s seat of their own identity development.⁶²

3. The Queer Dimension

Before turning to the legislative successes of advocates and scholars, it is important to document the ways in which queer people have appeared within previous discussions of revenge porn. Although discussion of (mostly straight, cisgender) women’s experiences and vulnerabilities dominates revenge porn discourse, scholars have noted that revenge porn affects queer people at significantly higher rates than heterosexual people.⁶³ For example, according to a 2016 study, gay- or bisexual-identifying individuals face revenge porn, or

⁶⁰ See *id.* at 1796 (arguing that “privacy is the ‘oxygen’ for intimacy” (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 477–78 (1968))); Citron, *Sexual Privacy*, *supra* note 3, at 1875 (“Without sexual privacy, we have difficulty forming intimate relationships.”).

⁶¹ See Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 81–82 (2018) (noting the ways in which digital technology can make it harder for those who share sexually related media about themselves to manage who has access to that media); Citron, *Sexual Privacy*, *supra* note 3, at 1876 (asserting that “the identification and protection of sexual privacy would affirm people’s ability to manage the boundaries of their intimate lives”).

⁶² See Andrew Gilden, *The Social Afterlife*, 33 HARV. J.L. & TECH. 329, 375–76 (2020) (explaining how people sometimes seek to insulate certain aspects of their lives from certain contexts); HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 186 (2010) (arguing that information should be protected according to the norms of distinct social contexts).

⁶³ See Citron, *supra* note 59, at 1797 (“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.” (footnote omitted) (first citing EATON ET AL., *supra* note 50, at 12; then citing Citron, *Sexual Privacy*, *supra* note 3, at 1919–20; and then citing Waldman, *supra* note 7, at 987)); Geeng et al., *supra* note 41, at 138 (“[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.”); POWELL ET AL., *supra* note 55, at 4 (“We found 1 in 2 (56.4%) LGB+ respondents had experienced one or more form [sic] of image-based sexual abuse compared with 1 in 3 (35.4%) heterosexual respondents.”).

threats of it, at a rate seven times higher than straight-identifying individuals.⁶⁴ Like straight people, queer people are vulnerable to revenge porn because 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 revenge porn may affect queer people differently than straight people. These dangers can be divided into two general categories.

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 they have not disclosed in all social contexts.⁶⁵ In other words, revenge porn for queer people can be both an unauthorized outing *and* an unauthorized exposure of their naked bodies.⁶⁶ Unauthorized outing, even without intimate images, has well-documented social and psychological harms, and revenge porn may compound these harms.⁶⁷ Moreover, until the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County*,⁶⁸ employers in many parts of the United States could discriminate on the basis of gender identity or sexual orientation, and neither the Court nor Congress have conclusively prohibited discrimination on these bases in other contexts, such as housing and education.⁶⁹ Revenge porn thus adds a further layer of professional vulnerability to queer victims. And even if, today, employers cannot lawfully discipline or fire trans or gay employees because of their gender or sexual identity, employers can still fire such employees based on sexual images of them being publicly accessible. This

⁶⁴ See Franks, *supra* note 55, at 665 (citing AMANDA LENHART, MICHELE YBARRA & MYESHA PRICE-FEENEY, DATA & SOC'Y RSCH. INST. & CTR. FOR INNOVATIVE PUB. HEALTH RSCH., NON-CONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 5 (2016)); see also Waldman, *supra* note 7, at 987 (discussing the same study 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 someone has actually done it"); Citron, *Sexual Privacy*, *supra* note 3, at 1920 (same).

⁶⁵ See Citron, *Sexual Privacy*, *supra* note 3, at 1887 (observing that sexual privacy violations are often used to mark off "those who do not fall in line with heteronormativity").

⁶⁶ Cf. Waldman, *supra* note 7, at 1009 (demonstrating "the unique burdens faced by gay and bisexual male users of the Internet, many of whom risk surveillance, outing, and loss of control over their identities"); cf. POWELL ET AL., *supra* note 55, at 8 (finding "that LGB+ women victims of image-based sexual abuse were more likely to report greater health impacts" than heterosexual women or LGB+ men).

⁶⁷ See Waldman, *supra* note 7, at 991 (observing that revenge porn "could uniquely harm queer populations, especially those in need of . . . anonymity" (citing Mark Joseph Stern, *This Daily Beast Grindr Stunt Is Sleazy, Dangerous, and Wildly Unethical*, SLATE (Aug. 11, 2016), <https://slate.com/technology/2016/08/the-daily-beasts-olympics-grindr-stunt-is-dangerous-and-unethical.html> [<https://perma.cc/APX9-BYAA>])).

⁶⁸ 140 S. Ct. 1731, 1737–38, 1754 (2020).

⁶⁹ See Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

provides hostile employers with a legal, independent alibi for firing these employees.⁷⁰ Accordingly, a sexually explicit documentation of a person's queer-ness 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 community-specific social norms surrounding sexual images. Some of this increased vulnerability may stem from comparatively high rates of online dating, sexting, and hooking up. In other words, the sheer volume of sexual communications can lead to more opportunities for image-based abuse.⁷¹ Unlike in the archetypical example of revenge porn, where the exchange of sexual images between men and women is often one-sided (that is, requested by men, provided by women), scholars have documented a "norm of reciprocity" among queer men online.⁷² 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.⁷³ 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.⁷⁴ 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.⁷⁵ 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.⁷⁶ The tension between queer practices and heteronormative values easily can be exploited by a jilted lover, "concerned parent," gossip purveyor, or

⁷⁰ See *infra* notes 159–166 (discussing *San Diego Unified School District v. Commission on Professional Competence*, 124 Cal. Rptr. 3d 320, 322–23 (Ct. App. 2011), in which a school district fired a teacher based on the teacher's sexually explicit Craigslist post).

⁷¹ See John Riley, *Gay and Bisexual People More Likely to Commit Revenge Porn*, *Australian Study Says*, METROWEEKLY (Feb. 22, 2019), <https://www.metroweekly.com/2019/02/gay-bisexual-people-more-likely-to-commit-revenge-porn-study-says/> [<https://perma.cc/REA3-UKQQ>] (noting that "[i]t may be that some LGBT individuals have more access to opportunities to engage in [Image-Based Sexual Abuse] behaviors, especially if nude photos are used in user profiles on online dating sites" (quoting Nicole Henry, the study's chief investigator)).

⁷² Waldman, *supra* note 7, at 997–98.

⁷³ See *id.* at 988 (observing that the "norms of the platforms demand" that users share images of themselves).

⁷⁴ See *id.* (describing the experiences of survey participants).

⁷⁵ See *id.* at 997 (observing that some respondents "were resigned, almost nihilistic about" disclosure norms "among gay and bisexual men").

⁷⁶ See Citron, *Sexual Privacy*, *supra* note 3, 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.").

potential blackmailer.⁷⁷ The norms around image sharing may be relaxed within certain queer communities, but these relaxed norms neither eliminate expectations of nondisclosure beyond those communities⁷⁸ nor minimize the consequences that may follow from such disclosure.

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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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.⁸² Queer people accordingly 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.⁸³

B. From Scholarship to Reform

In addition to raising awareness to the growing problem of revenge porn, scholars and advocates have been remarkably successful in bringing about sig-

⁷⁷ See Waldman, *supra* note 7, at 1008 (observing that revenge porn is a way of “[l]everaging stereotypes of gay men as promiscuous” (first citing William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000); and then citing Luke Boso, *Dignity, Equality, and Stereotypes*, 92 WASH. L. REV. 1119 (2017))).

⁷⁸ See *id.* at 999 (“You go on Grindr and you trust that everyone realizes that we’re all in this together.” (quoting Stephen P., an interviewee for the article)).

⁷⁹ See *infra* notes 140–232 and accompanying text.

⁸⁰ See *infra* notes 140–232 and accompanying text.

⁸¹ See Geeng et al., *supra* note 41, at 133 (reporting an observation from a non-binary study participant that “[w]e 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”).

⁸² See *infra* notes 140–232 and accompanying text.

⁸³ See Alex Abad-Santos, *Gay Men Helped Turn Twitter into an Amateur Porn Paradise*, VOX (Apr. 16, 2021), <https://www.vox.com/22382428/gay-twitter-alt-nudes-porn> [<https://perma.cc/MLL4-L7TJ>] (“Listen, if I wasn’t [working] at an elite university . . . I’d love to have people get off to watching me [have sex]. But, you know, it’s about as safe a space as I can get.” (quoting a professor interviewed about his experience using Twitter to share sexual images)).

nificant legal reform.⁸⁴ Although there always have been assorted legal remedies available for victims of revenge porn—for example, 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.⁸⁵ The legal landscape, however, has shifted dramatically in the past ten years. As of this writing, forty-eight states have enacted criminal statutes banning some version of revenge porn, and at least half of those states and the federal government have created civil causes for victims of revenge porn.⁸⁶ Furthermore, six states have extended employment protections to at least some victims of revenge porn, prohibiting employers from taking adverse actions against an employee-victim protected under the statute.⁸⁷ Finally, major search engines and social media platforms have adopted new policies prohibiting nonconsensual nudity.⁸⁸

The success of the anti-revenge porn movement is undeniable, and its reforms 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 helped produce. This Section 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"⁸⁹ the person depicted in a sexual image.

⁸⁴ See generally Mary Anne Franks, "Revenge Porn" Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017) (describing "the legislative, technological, and social reform" tackling revenge porn).

⁸⁵ See Citron & Franks, *supra* note 3, at 371.

⁸⁶ See *Nonconsensual Pornography Laws*, *supra* note 2.

⁸⁷ See *infra* notes 117–119 and accompanying text.

⁸⁸ See Franks, *supra* note 84, at 1270 (describing steps that major tech companies and online platforms—including Reddit, Google, Twitter, Facebook, and Microsoft—took to combat revenge porn); e.g., Andrea Peterson, *Google Joins the War on 'Revenge Porn,'* WASH. POST (June 19, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/06/19/google-joins-the-war-on-revenge-porn/> [<https://perma.cc/P9E5-JYTX>]; Jonathan Shieber, *Twitter Makes Another Rule Change; This Time Tackling Revenge Porn*, TECHCRUNCH (Oct. 27, 2017), <https://techcrunch.com/2017/10/27/twitter-makes-another-rule-change-this-time-tackling-revenge-porn/> [<https://perma.cc/6ULF-AFFS>]; Soo Youn, *Facebook Offers Ways to Fight Revenge Porn—Including Sending Your Nude Photos to the Company First*, ABC NEWS (Mar. 15, 2019), <https://abcnews.go.com/Business/facebook-offers-ways-fight-revenge-porn-including-sending/story?id=61693264> [<https://perma.cc/XZ37-W3VA>].

⁸⁹ See, e.g., OR. REV. STAT. § 163.472 (2023); Foley, *supra* note 50, at 1368 ("[M]ost [revenge porn laws] are harassment-based legislation that merely protects victims when their perpetrator acts with the intent to harm or harass." (citing 48 States + DC + One Territory Now Have Revenge Porn

In other words, despite scholarly efforts to frame revenge porn as a question of structural inequality or as an invasion of the victim's privacy, most states have created a narrower anti-harassment statute designed to combat the prototypical revenge porn scenario (that is, jealous exes with access to naked images). These "intent to injure" requirements generally have resulted from debates over whether the First Amendment requires that revenge porn statutes only criminalize intentionally harmful conduct.⁹⁰ The result of these requirements is the exclusion of nonconsensual disclosures that are motivated by money, entertainment, or bragging rights, notwithstanding the similar harms experienced by victims in these contexts.⁹¹

Moreover, significant statutory carveouts—ostensibly also meant to insulate legislation from First Amendment scrutiny—limit some of the robust and flexible conceptions of privacy advocated for by several scholars. Professor Franks, for instance, advised numerous state legislatures that considered revenge porn statutes and, via the Cyber Civil Rights Initiative (CCRI), published a model criminal statute containing several express exemptions from liability.⁹² The CCRI model statute prohibits the knowing disclosure, or threat to disclose, an intimate image when the actor knows or recklessly disregards the risk that the subject did not consent the disclosure.⁹³ The model statute does not impose an "intent to harm" requirement, but it recommends that enacted statutes exclude "[i]mages involving voluntary exposure in public or commercial settings."⁹⁴ Professor Franks further explains the reason behind these proposed exceptions:

Laws, CYBER C.R. INITIATIVE, available at <https://web.archive.org/web/20211031192238/https://www.cybercivilrights.org/revenge-porn-laws/>).

⁹⁰ Franks, *supra* note 84, at 1327. The concern, voiced most vocally by the ACLU, is apparently that a broader statute would sweep in activities such as a journalist reporting on a public figure's sex life or a casual consumer of pornography sharing an image, the provenance of which they were unaware. See generally Complaint for Declaratory and Injunctive Relief, *Antigone Books L.L.C. v. Horne*, No. 14-cv-02100 (D. Ariz. Sept. 23, 2014) (suing to enjoin an allegedly overbroad revenge porn statute on First Amendment grounds); see also Franks, *supra* note 84, at 1327.

⁹¹ Mary Anne Franks, *Speaking of Women: Feminism and Free Speech*, SIGNS: FEMINIST FRIC-TIONS (2022), <http://signsjournal.org/franks/> [<https://perma.cc/RQ2H-9R3H>].

⁹² Mary Anne Franks, *CCRI Model State Law*, CYBER C.R. INITIATIVE [hereinafter Franks, *CCRI Model State Law*], <https://cybercivilrights.org/wp-content/uploads/2021/10/CCRI-Model-State-Law-for-NCP.pdf> [<https://perma.cc/FFH5-GMLN>]; see Franks, *supra* note 84, at 1256–57 (describing Professor Franks's role in advocating for the movement to combat revenge porn).

⁹³ MARY ANNE FRANKS, CYBER C.R. INITIATIVE, DRAFTING AN EFFECTIVE "REVENGE PORN" LAW: A GUIDE FOR LEGISLATORS 6 (2021), <https://cybercivilrights.org/wp-content/uploads/2021/10/Guide-for-Legislators-10.21.pdf> [<https://perma.cc/H7RH-VFA4>].

⁹⁴ Franks, *CCRI Model State Law*, *supra* note 92; see Franks, *supra* note 55, at 681; see also Citron & Franks, *supra* note 3, at 388 (observing the importance of clear "exemptions that guard against the criminalization of disclosures" in the public interest).

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.⁹⁵

In other words, instead of insulating news reporting and commercial pornography from prosecution through a narrow state of mind requirement,⁹⁶ Professor 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.⁹⁷

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 forty-eight states.⁹⁸ As acknowledged by previous scholars, most state statutes include an intent-to-harm requirement and thus represent anti-harassment as opposed to privacy concerns.⁹⁹ 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.¹⁰⁰ Twenty-eight states also exclude from protection intimate images involving voluntary exposure or sexual activity in a “commercial” setting.¹⁰¹ One state, Louisiana, has a carveout for public, but not com-

⁹⁵ Franks, *supra* note 55, at 681.

⁹⁶ For example, and by analogy, defamation laws are insulated from the First Amendment to the extent that they require actual malice in certain contexts, 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, 737–38 (2015); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264, 279–80 (1964). 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, 1636–37, 1641–46 (2013).

⁹⁷ The model CCRI statute does contain another exception that would likely cover some of the circumstances mentioned by Professor Franks, namely “[d]isclosures 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.” Franks, *CCRI Model State Law*, *supra* note 92.

⁹⁸ A database of enacted revenge porn statutes is on file with the author. Andrew Gilden, *Revenge Porn State Statutes* (Aug. 2, 2022) (on file with author).

⁹⁹ See *supra* note 89 and accompanying text.

¹⁰⁰ 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. Gilden, *supra* note 98.

¹⁰¹ *Id.*

mercial, settings.¹⁰² 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.¹⁰³ As will be discussed, courts have interpreted such provisions as significantly limiting the range of sexual images that the statutes protect from disclosure, including images involving public nudity and images sent outside the context of a traditional, intimate relationship.¹⁰⁴ Additionally, one state, Arkansas, *expressly* limits the reach of its criminal statute to sexual images that were sent within such traditionally intimate relationships.¹⁰⁵

A smaller number of states and the federal government have enacted *civil* revenge porn statutes, but 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 if the circumstances would also support a criminal prosecution, as outlined above.¹⁰⁶

As of this writing, eight states have enacted the Uniform Law Commission’s model civil statute, the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UCRUDIIA).¹⁰⁷ 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.”¹⁰⁸ It provides the following examples of scenarios in which a person typically would, and would not, have such a reasonable expectation:

¹⁰² LA. STAT. ANN. § 14:283.2(B)(3) (2023).

¹⁰³ See, e.g., COLO. REV. STAT. § 18-7-107(1)(II)(B) (2023) (criminalizing the distribution of intimate images if the “depicted person had a reasonable expectation that the image would remain private”); KAN. STAT. ANN. § 21-6101(a)(8) (2023) (criminalizing the disclosure of sexual images “under circumstances in which . . . [the] person [the image depicts] had a reasonable expectation of privacy”); MICH. COMP. LAWS § 750.145e(1)(c) (2023) (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”).

¹⁰⁴ See *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 788 (Tex. Ct. App. 2021) (finding that “[i]f, 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. VanBuren*, 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).

¹⁰⁵ See ARK. CODE ANN. § 5-26-314(a)(2) (2023).

¹⁰⁶ OR. REV. STAT. § 30.833(1) (2023); see also, e.g., OHIO REV. CODE ANN. § 2307.66(A) (LexisNexis 2023).

¹⁰⁷ *Civil Remedies for Unauthorized Disclosure of Intimate Images Act: Legislative Bill Tracking*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=668f6afa-f7b5-444b-9f0a-6873fb617ebb#LegBillTrackingAnchor> [<https://perma.cc/B3HM-U92X>].

¹⁰⁸ UNIF. CIV. REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT (UCRUDI-IA) § 3 & cmt. (UNIF. L. COMM’N 2018). Professor Franks was the reporter for UCRUDI-IA. (front matter).

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.¹⁰⁹

Accordingly, a reasonable expectation of privacy under 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 photographer surreptitiously took a photo of a person at a (lawfully) nude beach, and intentionally used that photo to cause the depicted person emotional and economic harm, the depicted person would have no remedy for those harms under the Act.¹¹⁰

Significantly, UCRUDIIA expressly states that "[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.*"¹¹¹ 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.¹¹² 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,

¹⁰⁹ See *id.* § 3 cmt.

¹¹⁰ See McGlynn & Rackley, *supra* note 33, 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.").

¹¹¹ UCRUDIIA § 3(d) (emphasis added).

¹¹² See McGlynn & Rackley, *supra* note 33, 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.").

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.¹¹³ The federal civil statute contains many of the limitations set forth by UCRUD-IIA 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.”¹¹⁴ 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”¹¹⁵ The federal civil statute, like UCRUDIIA, recognizes that privacy violations and their resulting harms *can* occur when individuals are photographed in public settings or commercial contexts, but it nonetheless only protects those individuals who were naked in these contexts involuntarily.¹¹⁶

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—incorporated revenge porn victims into their existing employment protections for certain crime victims.¹¹⁷ 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

¹¹³ Violence Against Women Act (VAWA) Reauthorization Act of 2022, Pub. L. No. 117-103, § 1309(b)(1)(A), 136 Stat. 840, 930.

¹¹⁴ *Id.* § 1309(a)(5)(B)(i)–(ii) (emphasis added).

¹¹⁵ *Id.* § 1309(b)(4)(A).

¹¹⁶ *See id.*; McGlynn & Rackley, *supra* note 33, at 541 (“Thus, a photograph of a naked person taken for a pornographic magazine is a sexual image, but not a private one.”).

¹¹⁷ *See* CAL. LAB. CODE § 230(b) (West 2023) (providing protections for victims of domestic violence, which is defined to cover revenge porn occurring within certain types of relationships); HAW. REV. STAT. § 378-2(a)(1) (2023) (prohibiting discrimination against revenge porn victims that falls within certain categories of domestic violence); 820 ILL. COMP. STAT. 180/30(a)(1)(A) (2023) (prohibiting discrimination against victims of sexual violence and criminal violence); N.Y. EXEC. LAW § 296(1)(a)–(b) (McKinney 2023) (prohibiting employment discrimination against victims of domestic violence); OR. REV. STAT. § 659A.290(2)(a) (2023) (prohibiting discrimination against victims of sexual assault, defined to include victims under Oregon’s revenge porn statute); WASH. REV. CODE § 49.76.115(1) (2023) (prohibiting discrimination against victims of “domestic violence, sexual assault, or stalking”); *see also* April Glaser, *New York’s New Revenge Porn Bill Is a Bittersweet Victory*, SLATE (July 25, 2019), <https://slate.com/technology/2019/07/revenge-porn-law-new-york.html> [<https://perma.cc/8MEC-CH3M>] (reporting that “employers in New York are also not allowed to discriminate against an employee who has been a victim of nonconsensual porn”).

criminal violence.”¹¹⁸ Victims of Illinois’s criminal revenge porn statute are included within the definition of “sexual violence” and “crime of violence.”¹¹⁹

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, the employer is nonetheless prohibited from taking adverse actions against that employee; in other words, being seen nude, or in a sexual context, is suddenly legally 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.¹²⁰ Moreover, in California, Hawai’i, and Washington, employment protections only apply to revenge porn practices that fall within narrower statutory definitions of domestic violence, further excluding unauthorized disclosures for which the genesis lies outside familial or other traditionally intimate relationships.¹²¹

* * *

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 are far more limited than envisioned by the scholarship discussed above.¹²² The limits imposed by the “intent-to-harm” requirement have been discussed at some length by other scholars,¹²³ but the other carveouts have received very little scholarly attention. By limiting protections outside of certain traditionally “private” spaces, such as bedrooms and hotel

¹¹⁸ 820 ILL. COMP. STAT. § 180/30(a)(1)(A).

¹¹⁹ *Id.* § 180/10(2.5), (20.5).

¹²⁰ Presuming, of course, that she could not establish discrimination on some other grounds, such as sex discrimination.

¹²¹ See HAW. REV. STAT. § 378-71 (2023); CAL. LAB. CODE § 230(b), (j)(6)(A); WASH. REV. CODE § 49.76.115(1).

¹²² See Citron, *Sexual Privacy*, *supra* note 3, at 1940 (observing that “cramped notions of privacy leave some invasions of sexual privacy without legal protection”); Franks, *supra* note 55, at 662 (observing that privacy protections have been “diluted” by the tech industry and civil liberties groups).

¹²³ See, e.g., Franks, *supra* note 84, at 1327; Foley, *supra* note 50, at 1381–89.

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 “underinclusive bright line”¹²⁴ 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.¹²⁵

II. 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 and private, commercial and noncommercial, and strangers and 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. These “common sense” intuitions about sexuality, however, pervade the heteronormative world order and produce an unquestioned geography of appropriate intimate, cultural, and economic life. Exposing and challenging these intuitions are key components of queer political projects.¹²⁶ The diverse sexual practices and identity categories that fall within the umbrella of queerness—gay, lesbian, bisexual, transgender, intersex, asexual, nonbinary, genderfluid, leather, kink, BDSM—are connected by their position outside the dominant norms of sexuality and gender.¹²⁷ 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 must be significant shifts in the way that our legal system and society enforces inherit-

¹²⁴ See WALDMAN, *supra* note 22, at 72.

¹²⁵ Cf. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 855 (2013) (observing that “criminal law has always played favorites,” for example, by excluding certain victims of sexual assault from legal protection (quoting I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979, 988 (2011))); Kim Loewen, Note, *Rejecting the Purity Myth: Reforming Rape Shield Laws in the Age of Social Media*, 22 UCLA WOMEN’S L.J. 151, 162 (2015) (observing that carveouts from rape shield laws “reinforce[] the notion that women who do not conform” to heteronormative standards can expect to experience threats of sexual violence).

¹²⁶ See Thea Johnson & Andrew Gilden, *Common Sense and the Cannibal Cop*, 11 STAN. J.C.R. & C.L. 313, 323 (2015).

¹²⁷ See, e.g., Ummni Khan, *Homosexuality and Prostitution: A Tale of Two Deviancies*, 70 U. TORONTO L.J. 283, 284 (2020).

ed norms of sexual expression—that is, the idea that sex is only appropriate in very specific places and with only a narrow range of people.

Some of the most prominent scholars of revenge pornography and online harassment emphasize 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.”¹²⁸ 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. . . . [I]t signals that behavior intending to drive victims offline is unacceptable.”¹²⁹

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 message that certain nonconsensual disclosures are perfectly acceptable in the eyes of most Americans.¹³⁰ By carving out public, commercial, and non-intimate 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.¹³¹ Yet if revenge porn laws send a message to many victims that their sexual expression “is valued and that their suffering matters to the public,”¹³² 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—continue to be hostile toward many forms of sexual expression, particularly sexual expression in public or commercial spaces.¹³³ For example, laws prohibiting public nudity

¹²⁸ Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 *FORDHAM L. REV.* 2317, 2321 (2019) (footnote omitted) (first citing Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 *MICH. L. REV.* 1061, 1062 (2016); and then citing Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2022, 2035–36, 2050–52 (1996)); 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).

¹²⁹ Citron & Penney, *supra* note 128, at 2327.

¹³⁰ See Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 *IOWA L. REV.* 1533, 1558 (2017) (arguing that traditional privacy baselines “mark and maintain traditional gendered social hierarchies” (citing Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2165–70 (1996))).

¹³¹ See Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*, 41 *THEORY & SOC’Y* 233, 237, 239 (2012) (warning of “expressive justice” campaigns against sex crimes and the production of a paradigmatic “victim subject”).

¹³² Citron & Penney, *supra* note 128, at 2327.

¹³³ See, e.g., Margo Kaplan, *Sex-Positive Law*, 89 *N.Y.U. L. REV.* 89, 115–41 (2014) (discussing the “criminalization of BDSM activity”); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 *COLUM. J. GENDER & L.* 1, 32–41 (2008) (noting the limitations on “sexual liberty”).

and indecent exposure remain in force, and in-person sex work is generally unlawful throughout the United States.¹³⁴ Accordingly, if public nudity and most 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 also extends to laws criminalizing various forms of nudity and consensual sexual expression.¹³⁵ Nonetheless, it is important to emphasize 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.¹³⁶ 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 Article’s critique.

Revenge porn legislation, with 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 to important queer sexual, cultural, and political practices as well as to a history of queer vulnerabilities within the U.S. legal system. Section A addresses public settings.¹³⁷ Section B addresses commercial settings.¹³⁸ Finally, Section C addresses sexual expression outside of intimate relationships.¹³⁹

¹³⁴ See generally, e.g., Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195 (2015); I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159.

¹³⁵ See generally BRETT LUNCEFORD, *PUBLIC NUDITY AND THE RHETORIC OF THE BODY* (2019) (discussing the sociopolitical dimensions of public nudity and laws regulating it); Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 551 n.9 (1998) (“Queers are forced to find each other in untrafficked areas because of the combined pressures of propriety, stigma, the closet, and state regulation such as laws against public lewdness.”).

¹³⁶ See *People v. Freeman*, 758 P.2d 1128, 1129, 1131 (Cal. 1988) (finding consensual, non-obscene pornography protected by the First Amendment).

¹³⁷ See *infra* notes 140–232 and accompanying text.

¹³⁸ See *infra* notes 233–261 and accompanying text.

¹³⁹ See *infra* notes 262–294 and accompanying text.

A. “Public” Sexual Images: Judicial Perceptions and Queer Experiences

1. Drawing the Line Between Public and Private

As explained above, twenty-nine states have enacted revenge porn legislation that explicitly excludes images of voluntary nudity or sexual expression in “public” settings.¹⁴⁰ 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 2020, in *State v. Casillas*, the Minnesota Supreme Court upheld Minnesota’s revenge porn statute against a First Amendment challenge and observed that “[j]ournalists 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.’”¹⁴¹ This explanation dovetails with those provided by Professor Franks and other scholars: sexuality in public is often a matter of public interest on which journalists need space to report without fear of criminal liability.¹⁴²

Still, 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.¹⁴³ For example, the Texas Court of Criminal Appeals declared that “sex is

¹⁴⁰ See Franks, *supra* note 91; *supra* note 100 and accompanying text.

¹⁴¹ *State v. Casillas*, 952 N.W.2d 629, 643 (Minn. 2020) (alteration in original) (quoting MINN. STAT. § 617.261, subdiv. 5(4)–(5) (2020)).

¹⁴² See *supra* notes 92–97 and accompanying text.

¹⁴³ It is especially difficult to map the public settings exception onto legitimate journalistic needs, given that nearly all the judicial discussion of the exception involves 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, popularly known as 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*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html> [https://perma.cc/KM3H-KLVG]. 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 celebrity 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, no liability attached to reporters who posted nude photos of U.S. Representative Katie Hill allegedly in a sexual encounter with a congressional staffer in a hotel room. See, e.g., *Katie Hill Ordered to Pay \$220,000 in Costs After Failed Intimate Photos Suit*, THE GUARDIAN (June 4, 2021), <https://www.theguardian.com/us-news/2021/jun/04/katie-hill-ordered-to-pay-220000-costs-intimate-photos-suit> [https://perma.cc/VM2E-WWHJ]. Similarly, reports on Representative Anthony Weiner sending a naked photo of himself to a fifteen-year-old girl were also likely protected by the First Amendment. See, e.g., Sarah Jeong, *How Anthony Weiner’s Risque Messages Shaped Our Revenge-Porn Laws*, WASH. POST (Sept. 1, 2016), <https://www.washingtonpost.com/posteverything/wp/>

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 be “objectively reasonable under the circumstances.”¹⁴⁴ The court further explained: “If, for example, the material was obtained by photographing a person who was purposely displaying his naked genitals in public, *an ordinary person* would not recognize as reasonable any expectation of privacy by the depicted person.”¹⁴⁵ 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.”¹⁴⁶ In other words, if a person is voluntarily naked in a “public” place or voluntarily *posts* a naked image of themselves somewhere deemed public, then “the State’s interest in protecting the individual’s privacy interest in that image is minimal.”¹⁴⁷

Sexual expression in a public park, or on a nude beach,¹⁴⁸ or on a website is not “objectively” private under most revenge porn legislative because it is perceived as located—both geographically and conceptually—outside of “a person’s most intimate spheres.”¹⁴⁹ The Vermont Supreme Court explained:

2016/09/01/how-anthony-weiners-risque-messages-shaped-our-revenge-porn-laws/ [https://perma.cc/48XF-VQ3P] (“After all, it would be absurd to imprison a tabloid reporter for screencapping the tweet that Weiner himself had sent out.”). 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. For example, in 2021, in *Hill v. Heslep*, the court found that:

[T]he 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.

No. 20STCV48797, 2021 Cal. Super. LEXIS 62480, at *13–14 (Super. Ct. L.A. Cnty. Apr. 7, 2021).

¹⁴⁴ *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *7, *12 (Tex. Ct. Crim. App. May 26, 2021); see also *State v. VanBuren*, 214 A.3d 791, 822 (Vt. 2019) (“We understand this to be an objective standard . . .”).

¹⁴⁵ *Jones*, 2021 WL 2126172, at *12 (emphasis added); see also *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 788 (Tex. Ct. App. 2021) (providing the same reasoning).

¹⁴⁶ *VanBuren*, 214 A.3d at 813.

¹⁴⁷ *Id.*; see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571–72 (1991) (recognizing a legitimate government interest in furthering “societal disapproval of nudity in public places and among strangers”).

¹⁴⁸ See UCRUDIIA § 3 cmt.; *supra* notes 108–112 and accompanying text.

¹⁴⁹ *VanBuren*, 214 A.3d at 823; see also *Ball*, *supra* note 133, 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

Privacy here clearly does not mean the exclusion of all others, but it does mean the exclusion of everyone but a trusted other or few.¹⁵⁰

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.¹⁵¹ This perspective is contiguous with caselaw and scholarship that have been skeptical of claims of privacy—in particular sexual privacy—in public places.¹⁵² In William Prosser’s seminal article on privacy law, he questions whether “a lady who insists upon sun-bathing in the nude in her own back yard should really have a cause of action for her humiliation when the neighbors examine her with appreciation and binoculars.”¹⁵³

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,¹⁵⁴ and can occur at the level of the family, the office, the online platform, or the community.¹⁵⁵ It can even occur among strangers.¹⁵⁶ This spatialized, yet seemingly common sense, approach to privacy is hardly unique to revenge porn law,¹⁵⁷ but nonetheless it substantially

public, the sexual actors in question effectively waive whatever privacy interests they may have arising from their sexual conduct.”).

¹⁵⁰ *VanBuren*, 214 A.3d at 823 (citing 3 RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. L. INST. 1977)).

¹⁵¹ 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 “[c]onduct deemed public”).

¹⁵² 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 (Just. Ct. 1979); *Smayda v. United States*, 352 F.2d 251, 254 (9th Cir. 1965), *abrogated by* *Katz v. United States*, 389 U.S. 347 (1967); Allen, *supra* note 5, at 1723–24; 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 from the public eye; there is no real expectation of privacy.” (footnote omitted) (citing *Del Mastro v. Grimado*, No. Civ.A BER-C_388-03E, 2005 WL 2002355, at *4 (N.J. Super. Ct. Ch. Div. Aug. 19, 2005))).

¹⁵³ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422 (1960).

¹⁵⁴ See, e.g., Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 131 (2004); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1908 (2013).

¹⁵⁵ See Julie E. 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 ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959))).

¹⁵⁶ See *infra* notes 178–188 and accompanying text; WALDMAN, *supra* note 22, at 53–54 (discussing the indicia of trust and expectations of trust within the Grindr ecosystem).

¹⁵⁷ See, e.g., Cohen, *supra* note 155, at 189–94.

restricts sexual privacy to images that were created within, and intended to remain within, locations containing only a small number of people.¹⁵⁸

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.¹⁵⁹ 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.¹⁶⁰ Even though the Craigslist 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 “evident unfitness to serve as a teacher” and “immoral conduct.”¹⁶¹ 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.¹⁶² In full transparency, there *were* aspects of the teacher’s ad that absolutely indicated some serious character flaws; namely, his posting was *expressly* racist and sizeist, emphasizing “No fats, fems, queens, Asians. NO BELLIES.”¹⁶³ Nonetheless, the court’s opinion did *not* mention 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, the court and the school appeared to concentrate on the teacher’s willingness to

¹⁵⁸ See *infra* notes 262–294 and accompanying text.

¹⁵⁹ See Recent Case, *State v. VanBuren*, 2018 VT 95, 214 A.3d 791, 133 HARV. L. REV. 2427, 2434 (2020) (observing that the victim in *State v. VanBuren* “[t]hrough her photos . . . forged an identity for herself as a sexual being” and that “[t]he court failed to grapple with such harms to the privacy and concomitant self-expression of the individual”); see also Ball, *supra* note 133, 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.”).

¹⁶⁰ 124 Cal. Rptr. 3d 320, 322–23 (Ct. App. 2011).

¹⁶¹ *Id.* at 322.

¹⁶² The teacher posted four pictures: two of his face and torso; one of his anus; and one of his genitals. *Id.* at 323. 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.

¹⁶³ *Id.*

express their sexual desires, in a public context, in a manner that made his employer—an entirely unintended recipient—demonstrably uncomfortable.¹⁶⁴ And he is hardly the only teacher to have been terminated based on sexual images taken or posted outside of traditionally private settings.¹⁶⁵

San Diego Unified and other teacher termination cases are similar to prototypical revenge porn scenarios in important ways. In both scenarios, sexual images tailored to one particular sexual context are non-consensually 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? Whatever the reason, 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.¹⁶⁶

¹⁶⁴ The principal stated that “she had lost confidence in [him] and questioned his ability to serve as a role model . . .” *Id.* at 324.

¹⁶⁵ See, e.g., *Phenix City Bd. of Educ.*, 125 Lab. Arb. Rep. (BL) 1473, 1473, 1476–78 (2009) (Baroni, Arb.) (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. (BL) 527, 527–29, 531 (2008) (Daniel, Arb.) (upholding termination where sexual photos of a teacher were unknowingly taken of her on a party boat and posted online without her consent); see also 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, 25–26 & nn.113–22 (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 Pro. Competence*, No. B258035, 2015 WL 8767581, at *1–3, *10 (Cal. Ct. App. Dec. 14, 2015) (upholding the termination of a teacher who pleaded no contest after being arrested by an 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).

¹⁶⁶ 124 Cal. Rptr. 3d at 326.

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 privacy in an image taken of a woman topless at a clothing-optional beach.¹⁶⁷ 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.¹⁶⁸ He was subsequently convicted under the state's revenge porn statute.¹⁶⁹ Following similar logic, in 2018, in *State v. Culver*, the Wisconsin Court of Appeals rejected the defendant's argument that Wisconsin's revenge porn statute was overbroad because it did not specify any geographic limitations on the types of sexual imagery for which 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."¹⁷⁰ The court responded that it 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 the required showing of the defendant's intent and the depicted person's knowledge and consent.¹⁷¹ 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.¹⁷²

¹⁶⁷ *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 240–41, 242–43 (App. Dep't Sup. Ct. 2016).

¹⁶⁸ *Id.* 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. *See id.* at 241–46.

¹⁶⁹ *Id.* at 240–41.

¹⁷⁰ 918 N.W.2d 103, 112 (Wis. Ct. App. 2018).

¹⁷¹ *Id.* at 112 n.14.

¹⁷² *See* Berlant & Warner, *supra* note 135, at 560–61 (discussing queer "world making" practices such as "drag, youth culture, music, dance, parades, flaunting, and cruising").

For example, Pride parades and festivals have played an important role in providing visibility to queer communities and communicating that queerness, in its many forms, is something worthy of celebration.¹⁷³ These events often feature far more nudity and open sexual expression than, say, the Macy's Thanksgiving Day Parade, but that is part of the point—to push back against repressive sexual norms and “celebrate queer love, queer family, and queer sex.”¹⁷⁴ A participant may reasonably expect that they will be viewed by those in attendance—who are likely to be receptive to their message—but that does not diminish the impropriety of someone in the audience taking a picture of, say, their bare butt and intentionally sending the picture 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.¹⁷⁵ 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.¹⁷⁶

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 allow 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 guards down in these spaces in ways they cannot in contexts where nudity is either taboo or prohibited. And these lowered guards enable people 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.¹⁷⁷ 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 ex-

¹⁷³ See, e.g., Fischel, *supra* note 13.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., LUNCEFORD, *supra* note 135, at 175 (“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.”). Professor 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.

¹⁷⁶ *Id.* at 170 (“Public nudity is permitted during Folsom Street Fair but will get you arrested after the event is over, and not all wish to be outed as queer and/or kinky.”).

¹⁷⁷ A 2015 survey conducted by the travel company Expedia revealed that only 3% of Americans have sunbathed fully nude on vacation. Expedia, *Expedia's Heat Index Reveals American Attitudes Towards Vacation Flings, Beach Nudity, Sexiest Cities and More*, PR NEWSWIRE (Feb. 9, 2015), <https://www.prnewswire.com/news-releases/expedias-heat-index-reveals-american-attitudes-towards-vacation-flings-beach-nudity-sexiest-cities-and-more-300033165.html> [<https://perma.cc/F6C3-9CX9>].

plot the social, economic, and physical vulnerabilities that come with 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.¹⁷⁸ Nonetheless, bathhouses and sex clubs historically have provided queer people—again, especially gay men—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. Indeed, bathhouses “taught gay men to see themselves as members of a common tribe with similar interests and needs.”¹⁷⁹ They also were important sites for organizing politically and educating the community about safer sex practices, notwithstanding the heavy blame they (in many ways unfairly) received for contributing to the spread of HIV.¹⁸⁰ Although far from ideal paradises,¹⁸¹ 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.¹⁸² 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.¹⁸³

¹⁷⁸ 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 CHL-KENT L. REV. 961, 964 (2017) (explaining that the state closed bathhouses ostensibly based on the reasoning that they “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.”).

¹⁷⁹ See PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 7 (2d ed. 2000).

¹⁸⁰ *Id.* at 6–7; Engel & Lyle, *supra* note 178, 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.”).

¹⁸¹ Some bathhouses, for example, have struggled both to maintain spaces for gay “men” and to be welcoming spaces for trans people. See, e.g., James Besanvalle, *Trans Man Kicked Out of London Gay Sauna for Not Having a Penis*, GAY STAR NEWS (Oct. 31, 2018), available at <https://web.archive.org/web/20220213150759/https://www.gaystarnews.com/article/trans-man-sauna/>.

¹⁸² See generally TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009) (discussing political potential of gay male bareback sex groups).

¹⁸³ 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 and impersonal tensions associated with anonymous and promiscuous sexual intimacy between

A final group of public settings often associated with queer sexual practices are “cruising” spots, or 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 pushes back against these intuitions. Carlos Ball, reviewing sociological work on cruising in public restrooms, has observed that participants employed strategies both to avoid being seen by unwitting third parties and to ensure that only individuals familiar with the semiotics of cruising—for example, body positions, foot tapping, code words—are included in sexual activity.¹⁸⁴ 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.¹⁸⁵ Still, participants’ collective efforts to create a welcoming space for sexual activity produces an environment of mutual trust that, once again, deviates from majoritarian intuitions about how trust and privacy are distributed.¹⁸⁶ Police officers often 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.¹⁸⁷ 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

men.”). Professors 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 1563, 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.”).

¹⁸⁴ Ball, *supra* note 133, at 16–24.

¹⁸⁵ Paul Johnson, *Ordinary Folk and Cottaging: Law, Morality, and Public Sex*, 34 J.L. & SOC’Y 520, 535 (2007) (“Yet, ironically, it is the very privateness of public toilets which afford the possibilities for the sexual encounters which take place within them. . . . [S]uch encounters are premised upon a highly discreet form of interaction designed to maximize privacy and preclude visibility to unwilling participants.” (citing LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* (1970)); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 176 (1999) (“The need to resort to an undercover camera contradicts the claim that these places are already ‘very public.’”)).

¹⁸⁶ See Ball, *supra* note 133, 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.”).

¹⁸⁷ J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 484–85 (2019).

festivals, nude beaches, and bathhouses in that 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.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰ “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.¹⁹¹ 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”: that is, forums in which minority experiences coalesce into communities otherwise inaccessible and unacceptable within the dominant culture.¹⁹² Forums such as beaches, festivals, bathhouses, and cruising spots, which are public in the colloquial sense and counterpublic in the conceptual sense, accordingly can be integral to queer world-building.¹⁹³ In a culture that in many ways continues to be hostile toward overt expressions of queer sex, intimacy, identities, and expression, queer publics are vehicles through which people struggling against

¹⁸⁸ See Wickliffe Shreve, *Stall Wars: Sex and Civil Rights in the Public Bathroom*, 85 LAW & 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.”).

¹⁸⁹ See Berlant & Warner, *supra* note 135, at 563 (“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.”).

¹⁹⁰ See *id.* at 548–49.

¹⁹¹ WARNER, *supra* note 17, at 65–66. Professor Warner’s work, developed in part with Lauren Berlant, builds off important work by feminist scholar Nancy Fraser. See generally Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25 SOC. TEXT 56 (1990) (studying the public sphere as it relates to society and democracy).

¹⁹² WARNER, *supra* note 17, at 112–13.

¹⁹³ WARNER, *supra* note 185, at 179 (“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: THE THEN AND THERE OF QUEER FUTURITY* 35 (2009) (arguing that public sex forums “help us carve out a space for actual, living sexual citizenship” (citing Lauren Berlant, *Live Sex Acts (Parental Advisory: Explicit Material)*, 21 FEMINIST STUD. 379, 379–404 (1995))); Engel & Lyle, *supra* note 178, at 966–67 (“Whether our critical eye turns to the architecture, 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.” (citing generally WARNER, *supra* note 17)).

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.¹⁹⁴ 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 or otherwise) that are not available in their physical communities.¹⁹⁵ 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 can] 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. . . . [W]ithout enough doctors trained in queer sexuality, adolescents turn to Google to learn how to safely prepare for intimacy. Social media websites are today's gatekeepers of queer knowledge ¹⁹⁶

¹⁹⁴ See Courtney Blackwell, Jeremy Birnholtz & Charles Abbott, *Seeing and Being Seen: Co-situation and Impression Formation Using Grindr, a Location-Aware Gay Dating App*, 17 NEW MEDIA & SOC'Y 1117, 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.").

¹⁹⁵ See Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.—C.L. L. REV. 357, 372–75 (2013); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.—C.L. L. REV. 159, 162 (2003); Derek E. 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." (footnotes omitted) (first citing Amy Adele Hasinoff, *Sexting as Media Production: Rethinking Social Media and Sexuality*, 15 NEW MEDIA & SOC'Y 449, 455–58 (2012); and then citing Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 702 (1995))); Samuel Brando H. Piamonte, Mark Anthony M. Quintos & Minami O. Iwayama, *Virtual Masquerade: Understanding the Role of Twitter's Alter Community in the Social and Sexual Engagements of Men Who Have Sex with Men*, BANWA SERIES A, June 3, 2020, at 1, 9 ("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. . . .").

¹⁹⁶ Ari Ezra Waldman, *Disorderly Content*, 97 WASH. L. REV. 907, 955 (2022); 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.").

Especially during the coronavirus pandemic, social media and online content remained an invaluable bridge between lockdowns and the queer world outside.¹⁹⁷ Queer publics online—just like queer publics anywhere—are by no means fully inclusive utopia,¹⁹⁸ 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.¹⁹⁹ Accordingly, when a platform censors a queer creator, or an employer fires an employee for online cruising, 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.²⁰⁰ 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.²⁰¹ In a similar vein, Professor 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.²⁰² Revenge porn laws

¹⁹⁷ See Ashford & Longstaff, *supra* note 183, at 1567 (discussing virtual sex parties hosted on Zoom); Abad-Santos, *supra* note 83 (observing that alt-Twitter lets participants “tap into and share fetishes and kinks in a way that feels safe” and that “[i]t’s 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 sessions, online strip teases, Zoom calls with friends, camming, and other forms of online exchange,” see Jenna Chasse, *How to Make a Queer Counterpublic 8* (2021) (M.F.A. thesis, Ontario College of Art & Design (OCAD) University) (on file with OCAD University Open Research Repository), <http://openresearch.ocadu.ca/id/eprint/3377/> [<https://perma.cc/X2UP-6U9S>].

¹⁹⁸ See, e.g., Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 FORDHAM L. REV. 2739, 2743 (2018). Tim Dean, who has been an outspoken advocate for the social value of public sex, has nonetheless bemoaned the shift to online cruising for facilitating the instrumentalizing of sexual partners, in other words, for treating them purely as means for sexual gratification. See Dean, *supra* note 182, at 176–77.

¹⁹⁹ See Gilden, *supra* note 195, at 377–80.

²⁰⁰ See WALDMAN, *supra* note 22, at 18–19.

²⁰¹ See Gilden, *supra* note 21, at 423–24.

²⁰² Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J.F. 427, 448 (2021), https://www.yalelawjournal.org/pdf/F7.FranksFinalDraftWEB_z23irc84.pdf [<https://perma.cc/6SV4-885G>] (“In place of an idealized, unitary public square, we can envision the

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.²⁰³ 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.

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.²⁰⁴ For example, Professor Allen discusses a lawsuit involving a gay man who was non-consensually photographed in a night club and then outed to his family and coworkers.²⁰⁵ The court observed that the plaintiff had no “objective expectation of . . . solitude at the party he had attended” and accordingly dismissed his case.²⁰⁶ Reviewing this and numerous other cases, Professor 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 intrusion ²⁰⁷

In addition to dismissing claims based on 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.²⁰⁸ In other words, “once out, always out.”²⁰⁹ By contrast, in contexts *not* involving sex or queer

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.”).

²⁰³ *See id.* (“But a few general guidelines for the would-be architects of democratic counter-publics 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.”).

²⁰⁴ Allen, *supra* note 5, at 1716 (“[T]he invasion of privacy tort has not reliably vindicated the complex interest LGBT plaintiffs understandably assert in what I term ‘selective disclosure’ of their sexual orientations or identities.”).

²⁰⁵ *Id.* at 1729–30 (discussing *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002)).

²⁰⁶ *Id.* at 1730.

²⁰⁷ *Id.* (footnote omitted) (citing *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973)).

²⁰⁸ *See id.* at 1748–50 (permitting a magazine to publish images of a same-sex couple’s wedding without the couple’s consent in part because the wedding was public).

²⁰⁹ *Id.* at 1749–50.

people, Professor Allen notes that courts have been willing to adopt a more protective, context-sensitive approach to a victim's privacy expectations.²¹⁰

Public sexuality's social and legal vulnerability has not vanished despite 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 home or other traditionally "private" spaces.²¹¹ 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.²¹² According to one court, "because [the] proposed conduct occurred in a public location," the "constitutionally-protected right to engage in private, consensual acts of sodomy" was not implicated.²¹³ 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."²¹⁴ In 2005, in *832 Corp. v. Gloucester Township*, for example, the U.S. District Court for the District of New Jersey zoomed in on Justice Kennedy's observation in *Lawrence* that the case implicated "the most private human conduct, sexual behavior," taking place in "the most private of places, the home."²¹⁵ 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*.²¹⁶

²¹⁰ *Id.* at 1730 (citing *Galella*, 487 F.2d 986).

²¹¹ 539 U.S. 558, 562–63, 579 (2003) (striking down a state law that criminalized same-sex sexual acts, in which defendant-petitioners had been engaging inside of a home); see *infra* notes 212–216 (discussing cases). See generally Ball, *supra* note 133 (discussing the limited geographical reach of the rights set forth in *Lawrence*).

²¹² See, e.g., *Singson v. Commonwealth*, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005) ("[B]ecause Singson's conduct occurred in a public place—not a private location—we hold that he lacks standing to challenge the constitutionality of [Virginia's crimes against nature law] on this ground."); *Tjan v. Commonwealth*, 621 S.E.2d 669, 672 (Va. Ct. App. 2005) (applying the same reasoning as *Singson*). In *Singson*, an undercover police officer stationed himself 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 being approached by the defendant. 621 S.E.2d at 685. 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.

²¹³ *Singson*, 621 S.E.2d at 688.

²¹⁴ *832 Corp. v. Gloucester Twp.*, 404 F. Supp. 2d 614, 623–24 (D.N.J. 2005) (citing *Fleck & Assocs., Inc., v. City of Phoenix*, 356 F. Supp. 2d 1034, 1039 (D. Ariz. 2005)).

²¹⁵ *Id.* at 623 (quoting *Lawrence*, 539 U.S. at 567).

²¹⁶ *Id.* at 625. The *832 Corp.* case further discounted the potential community-building function of the "swingers" social club, concluding that the "[p]laintiff's establishment 'does not owe its exist-

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 do not want to be arrested, harassed, or fired. Moreover, if they are 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 surveil them. But this “personal responsibility” response is very similar to the logic that has motivated revenge porn laws for the benefit of heterosexual, 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.²¹⁷ And when women have been *intentionally* publicly sexual—online and off—the legal system has brushed aside their subsequent sexual assaults.²¹⁸ 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 versus 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.²¹⁹ Without the ability to see, hear, or somehow experience other queer people, it is nearly impossible for communities to build a shared sense 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”²²⁰ In this sense, the

ence to the associational preferences of its members but to the coincidence of their interest in the facilities offered by the owners.” *Id.* (quoting *Clover Hill Swimming Club, Inc. v. Goldsboro*, 219 A.2d 161 (N.J. 1996)). In other words, the court was unwilling to countenance the counterpublic potential of a club that embraces sex outside the confines of monogamous marriage.

²¹⁷ See *supra* notes 42–47 and accompanying text.

²¹⁸ See Turkheimer, *supra* note 151, at 1495–96; Loewen, *supra* note 125, at 159 (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”).

²¹⁹ See Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454, 456 (2021), https://www.yalelawjournal.org/pdf/F7.Skinner-ThompsonFinalDraftWEB_uwu5tvzq.pdf [<https://perma.cc/5RCH-MRXM>] (“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.” (emphasis omitted) (footnote omitted) (citing Morgan M. Page, *One from the Vaults: Gossip, Access, and Trans History-Telling*, in TRAP DOOR: TRANS CULTURAL PRODUCTION AND THE POLITICS OF VISIBILITY 135, 143 (Reina Gossett, Eric A. Stanley & Johanna Burton eds., 2017))).

²²⁰ See LAUREN BERLANT, *DESIRE/LOVE* 22 (2012).

strong sociolegal deterrents to queer visibility—and the corresponding pressures to keep queer sex invisible—is deeply ideological.²²¹ 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.²²² 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.²²³

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.²²⁴ The “objective” view that only secluded sex is private—and thus constitutionally protected—shuts down queer visibility by shunting all explicit depictions and discussions of sexuality into the bedroom, and into the closet.²²⁵ Historical and ongoing

²²¹ See, e.g., Fischel, *supra* note 13 (“[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.”).

²²² Cf. Ball, *supra* note 133, 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).” (citing Clark Hoyt, Opinion, *A Semi-nude Minor? In the Times?*, N.Y. TIMES (Dec. 16, 2007), <https://www.nytimes.com/2007/12/16/opinion/16pubed.html> [<https://perma.cc/YM25-5KM3>])).

²²³ See Berlant & Warner, *supra* note 189, 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.”).

²²⁴ See Berlant, *supra* note 193, at 385 (arguing that live sex acts are perceived as threatening “because they do not aspire to the privacy protection of national culture” or strive for “conventional romantic forms”); Fischel, *supra* note 13 (“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 . . .”).

²²⁵ See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1455 (1992). As Professor 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 men and lesbians, “the claim of privacy always also structurally implies a claim to secrecy.” *Id.* at 1455; see also CALIFIA, *supra* note 179, 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* (“Keeping sex as a private matter only serves to protect a status quo that never gave women their sexual due.” (citing Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 857 n.57 (1985))), in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., 2021).

ing morality campaigns—against comprehensive sex education,²²⁶ against queer online content,²²⁷ against queer teachers,²²⁸ against even “saying ‘gay’” in the classroom²²⁹—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.²³⁰ 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 have been force-fed since birth. As set forth in the “Queer Nation Manifesto,” “[b]eing queer is not about a right to privacy; it is about the freedom to be public.”²³¹

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 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 crossing the line between private and public spheres.²³² 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.

²²⁶ See, e.g., Tanya McNeill, *Sex Education and the Promotion of Heteronormativity*, 16 *SEXUALITIES* 826, 835 (2013).

²²⁷ See Waldman, *supra* note 196, at 951–59. See generally ALEXANDER MONEA, *THE DIGITAL CLOSET: HOW THE INTERNET BECAME STRAIGHT* (2022) (arguing that the internet favors heteronormative content).

²²⁸ 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: ADVANCING THE DIALOGUE ABOUT SEXUALITIES AND SCHOOLING* 83, 83–85 (William J. Letts IV & James T. Sears eds., 1999).

²²⁹ See, e.g., Paige Hamby Barbeault, Note, “Don’t Say Gay” Bills and the Movement to Keep Discussion of LGBT Issues Out of Schools, 43 *J.L. & EDUC.* 137, 137 (2014).

²³⁰ See Thomas, *supra* note 225, at 1455–56 (“The cloak of secrecy drawn around gay and lesbian lives in turn allows heterosexuals to maintain ‘the epistemological privilege of unknowing.’” (quoting EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 5 (1990))).

²³¹ LUNCEFORD, *supra* note 135, at 5 (quoting *History Is a Weapon*, QUEER NATION MANIFESTO, <https://www.historyisaweapon.com/defcon1/queernation.html> [<https://perma.cc/NE2G-BL6G>]); see Berlant & Warner, *supra* note 135, at 562 (conceiving of a “queer project” that will “support forms of affective, erotic, and personal living that are public in the sense of accessible, available to memory, and sustained through collective activity”).

²³² See Ball, *supra* note 133, 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.” (emphasis omitted)).

B. Commercial Sex

Twenty-eight states have 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 exclude outsiders and undercutting the objective reasonableness of privacy expectations.²³³ 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.²³⁴

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 “[a]dvertisers, booksellers, and artists [is] protected because images ‘obtained in a commercial setting’ for legal purposes fall outside the statute’s reach.”²³⁵ Professor Franks has similarly observed that a commercial exception would insulate the forwarding of or linking to commercial pornography,²³⁶ presumably where the distributor might question whether it was created consensually. Some, but not all,²³⁷ states’

²³³ See *id.* 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*, 539 U.S. 558 (2003), were triggered by the club’s status as a “private establishment” under otherwise applicable public accommodations laws. 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614, 622 (D.N.J. 2005); see also CONN. GEN. STAT. §§ 53a-181(a), -189c(b)(1) (2023) (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”).

²³⁴ See, e.g., Viviana A. Zelizer, *Money, Power, and Sex*, 18 YALE J.L. & FEMINISM 303, 305–07 (2006).

²³⁵ *State v. Casillas*, 952 N.W.2d 629, 643 (Minn. 2020) (quoting MINN. STAT. § 617.261 subd. 5(4) (2023)).

²³⁶ See *supra* notes 92–97 and accompanying text.

²³⁷ 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. STAT. § 617.261 subd. 5(4). The provision referring to “legal sale of goods or services” likely excludes images stemming from illegal sex work. See *id.* Other states simply refer to

commercial exceptions likely cover 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.²³⁸

Voluntary²³⁹ participants in commercial sex are highly vulnerable to image-based abuses, notwithstanding their exemption from at least twenty-eight 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.²⁴⁰ Even for lawful commercial activities, such as consensual pornography or online sex work, unauthorized recordings and distributions can result in substantial emotional or economic harms due to the heavy social stigma around commercialized sex.²⁴¹ 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—that is, the prototypical consequences of revenge porn.²⁴² 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 the performer.²⁴³ Such copying and distribution both directly affects these performers' economic livelihoods, and

images involving "voluntary exposure . . . in . . . commercial settings." *E.g.*, MONT. CODE ANN. § 45-8-213(2)(b)(i) (2023); OKLA. STAT. tit. 21, § 1040.13b(C)(3) (2023).

²³⁸ See I. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738, 794–99 (2021) (arguing that online interactive sex work is protected by the First Amendment, even if interactive in-person sex work is illegal).

²³⁹ 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: MONEY, POWER, AND PLEASURE IN THE SEX WORK INDUSTRY* 94–97 (2020) (discussing the advantages of virtual sex work for single mothers, compared with low wage alternative jobs).

²⁴⁰ See, e.g., Thusi, *supra* note 134, at 206–11; cf. Capers, *supra* note 125, 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).

²⁴¹ See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 77–80 (2004) (per curiam) (rejecting a 42 U.S.C. § 1983 claim by a police officer who was fired for selling nude videos of himself on eBay); Melissa Petro, *The "Hooker Teacher" Tells All* (describing one author's experience of being fired after writing an op-ed mentioning her past work as stripper and sex worker), in *THE WAR ON SEX*, *supra* note 9, at 291, 291–93.

²⁴² See JONES, *supra* note 239, at 55, 120.

²⁴³ See, e.g., *Ortega v. Villa*, No. CV 20-11361, 2021 WL 5238786, at *2–3 (C.D. Cal. Sept. 10, 2021) (ordering default judgment against a social media influencer who broadcast the plaintiff's OnlyFans videos on Instagram Live while sharing information about his prior sexual experiences with her).

can cascade into a wider range of emotional and psychological harms.²⁴⁴ Sex work in all forms is precarious in our culture, and images documenting sex work can further this precarity.²⁴⁵

Although the social norms that constrain queer sexuality and commercial sexuality are not identical, the commercial settings exclusion nonetheless disproportionately impacts queer people.²⁴⁶ 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.²⁴⁷ This is frequently the case with trans women, and especially trans women of color.²⁴⁸ 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.²⁴⁹

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 educational function for those whose sexual desires fall outside the mainstream.²⁵⁰ 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

²⁴⁴ My thanks to Kendra Albert for raising this point. For a discussion of intellectual property claims in sexual imagery, motivated by a mixture of economic and psychological concerns, see generally Gilden, *supra* note 61.

²⁴⁵ Moreover, especially since Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act and the Stop Enabling Sex Trafficking Act (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-the-streets.html> [<https://perma.cc/24CD-DVND>]; see also Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA-SESTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018).

²⁴⁶ See generally D'Adamo, *supra* note 16, at 37–39 (illustrating how sex work is “an LGBTQ issue”).

²⁴⁷ See ERIN FITZGERALD ET AL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (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, *supra* note 239, at 94.

²⁴⁸ See FITZGERALD ET AL., *supra* note 247, at 5, 16.

²⁴⁹ See David Eichert, Note, “It Ruined My Life”: FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics, 26 VA. J. SOC. POL’Y & L. 201, 224 (2019).

²⁵⁰ See Thusi, *supra* note 238, 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”).

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,²⁵¹ 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.²⁵² 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.”²⁵³ Queer commercial settings were especially important during the COVID-19 pandemic, as subscriptions to queer OnlyFans accounts skyrocketed during lockdowns in response to an otherwise unmet need for sexual pleasure and connection.²⁵⁴ 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,²⁵⁵ to politicians who equate voluntary sex work with trafficking,²⁵⁶ 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

²⁵¹ See, e.g., Peggy Orenstein, Opinion, *If You Ignore Porn, You Aren’t Teaching Sex Ed*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/opinion/sex-ed-curriculum-pornography.html> [<https://perma.cc/7JZY-TDPL>].

²⁵² See D’Adamo, *supra* note 16, at 47 (observing that sex work can affirm gender and sexual identities “marginalized in other areas of . . . life”).

²⁵³ Berlant & Warner, *supra* note 135, at 551; Ball, *supra* note 133, at 9 (acknowledging the value of queer people “see[ing] others like themselves having sex” in pornography).

²⁵⁴ See, e.g., Thusi, *supra* note 238, at 740; Ashford & Longstaff, *supra* note 183, at 1568; Chasse, *supra* note 197, at 12–13, 25 (describing OnlyFans as a shared site of pleasure and intimate exchange during the pandemic).

²⁵⁵ See Waldman, *supra* note 196, at 935–36; 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> [<https://perma.cc/SG58-XJVT>].

²⁵⁶ See Thusi, *supra* note 134, at 203.

sex.”²⁵⁷ 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. Professor Citron has observed, “Crash Pad and other sites make pornography that celebrates lesbian, trans, and queer women. . . . These activities matter for sexual expression and sexual autonomy.”²⁵⁸

Despite the generally weak privacy protections afforded to sex workers,²⁵⁹ sexual privacy in commercial settings is not unprecedented. For example, in 2018, 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.²⁶⁰ Notwithstanding his argument that he needed to record the engagement “in case she overdosed on drugs or later accused him of beating her up,” the court plainly stated, “[t]he victim did not relinquish her reasonable expectation of privacy by engaging in commercial sexual activity.”²⁶¹ 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.²⁶² But the Vermont Supreme Court in *State v. VanBuren* read a similar limitation into Vermont’s statutory exclusion of contexts “where

²⁵⁷ *State v. Romano*, 155 P.3d 1102, 1110 (Haw. 2007) (alterations omitted).

²⁵⁸ Citron, *Sexual Privacy*, *supra* note 3, at 1897 (footnote omitted) (citing Maya M., *The 16 Best Porn Sites for Queer Women*, DAILY DOT (Apr. 17, 2017), <https://www.dailydot.com/irl/best-lesbian-porn-sites> [<https://perma.cc/S3YV-EPW6>]).

²⁵⁹ See, e.g., *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 456 (9th Cir. 2018) (rejecting the argument that the constitutional privacy protections in *Lawrence v. Texas* extended to prostitution); *832 Corp. v. Gloucester Twp.*, 404 F. Supp. 2d 614, 622 (D.N.J. 2005) (rejecting the argument that *Lawrence* extended sexual privacy “into the public sphere of commercial interactions” (emphasis omitted) (quoting Brief for Plaintiff at 4, *832 Corp.*, 404 F. Supp. 2d 614 (No. Civ. 04-1140))).

²⁶⁰ *State v. Adams*, 863 N.W.2d 640, 642 (Wis. Ct. App. 2015).

²⁶¹ *Id.* at 641–42.

²⁶² ARK. CODE ANN. § 5-26-314(a)(2) (2023).

a person does not have a reasonable expectation of privacy.”²⁶³ Although this interpretation is currently limited to just one small state, nearly every other state, including states without exceptions for public and commercial settings, similarly require victims to have a “reasonable expectation of privacy” in their sexual images. Accordingly, if the *VanBuren* 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 *VanBuren*, 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.²⁶⁴ The victim had sent nude pictures of herself to Anthony Coon, “with whom she had a past but not present relationship,” via Facebook Messenger.²⁶⁵ 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.²⁶⁶ The defendant tagged the victim, said she was going to contact her employer, “ruin” her, and “get revenge.”²⁶⁷

Although the Vermont Supreme Court upheld the state’s revenge porn statute against a facial First Amendment challenge, it nevertheless dismissed the indictment.²⁶⁸ 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.”²⁶⁹ 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.’”²⁷⁰ According to the court, a reasonable expectation of privacy

²⁶³ VT. STAT. ANN. tit. 13, § 2606(d)(1) (2023); *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019) (citing VT. STAT. ANN. tit. 13, § 2606(d)(1)).

²⁶⁴ *VanBuren*, 214 A.3d at 797.

²⁶⁵ *Id.* at 796–98.

²⁶⁶ *Id.* at 818.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 819–20.

²⁶⁹ *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 may not have sufficient knowledge about the “contours of complainant’s relationship . . . and whether that relationship engendered any reasonable expectation of privacy in the images complainant shared.” *Id.* at 822.

²⁷⁰ *Id.* at 818, 822 (quoting *Fraser v. Sleeper*, 933 A.2d 246, 251 (Vt. 2007)).

connotes a privacy expectation “within a person’s most intimate spheres,” 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.²⁷¹

The *VanBuren* 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,” *VanBuren* excludes enormously wide swaths of victims who would greatly benefit from sexual privacy protections.²⁷² Consensual “sexting” of sexual images is incredibly common in the United States, both among people who are in “committed” and “casual” relationships.²⁷³ 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 *VanBuren* 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 *VanBuren* was far from a total stranger to Mr. Coon—they had a “past” relationship²⁷⁴ and were connected by phone and social media; by contrast, many people today consensually share sexual images with far more distant contacts.²⁷⁵

States enacted revenge porn laws 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 *VanBuren* signal perhaps that this legal, cultural, and moral shift has been a very modest one: the only victims that *do not* deserve blame for their sexual expression are those who have waited until they have entered into an exclusive, intimate relationship before sharing nude images.²⁷⁶ If instead someone shares

²⁷¹ *Id.* at 823.

²⁷² See generally Franke, *supra* note 9 (critiquing the highly circumscribed, privatized liberty interest set forth by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

²⁷³ See Jesse Singal, *Is It Time for Researchers to Rethink Sexting?*, THE CUT (Aug. 10, 2015), <https://www.thecut.com/2015/08/it-time-for-researchers-to-rethink-sexting.html> [<https://perma.cc/377X-78XP>] (summarizing research showing that 73.9% of respondents reported sending sexual images “in the context of a committed relationship” and 43.0% reported sexting in the context of a casual relationship).

²⁷⁴ Because they had been in a “past” relationship, they may not have fallen within the intimate relationship exception in Arkansas. ARK. CODE ANN. § 5-26-314(a)(2) (2023).

²⁷⁵ See generally AMY ADELE HASINOFF, *SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT* (2015) (examining the widespread practice of consensual sexting).

²⁷⁶ See Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 809 (2010) (“[C]ourts have extended legal protection to consensual sexual acts only to the extent

nude images before they have found that special someone, or after they moved on, then apparently it is entirely acceptable (at least in Vermont) to intentionally try to get them fired and “ruin” them over Facebook.²⁷⁷

The intimate relationship exceptions in Vermont, Arkansas, and potentially elsewhere are a major blow to sexual privacy for a wide swath of the U.S. population, but again they hit queer communities especially hard. As discussed, the norms of intimate image 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.²⁷⁸ Such images almost certainly would fall outside an intimate relationship exception under the logic of *VanBuren*. For example, in 2020, 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 the plaintiff to the plaintiff’s friends and family.²⁷⁹ Although the court did not technically interpret the state’s revenge porn statute, its reasoning is remarkably similar to the court in *VanBuren*:

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 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.²⁸⁰

The court further rejected the contention that the case involved revenge porn, stating that “although 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.”²⁸¹ It is unclear which specific articles Martin submitted to the court, but the court’s reasoning departs

such acts support other state interests, including marriage, procreation, and, most recently, the development of enduring intimate relationships.”).

²⁷⁷ See Lara Karaian, *Policing ‘Sexting’: Responsibilization, Respectability and Sexual Subjectivity in Child Protection/Crime Prevention Responses to Teenagers’ Digital Sexual Expression*, 18 THEORETICAL CRIMINOLOGY 282, 284 (2014) (“[T]eenage girls are responsabilized for managing not only their own potential experiences of humiliation, sexual violation and criminalization, but also the criminalization of their peers . . .”).

²⁷⁸ See *supra* notes 63–64 and accompanying text.

²⁷⁹ *Martin v. Smith*, No. 354128, 2020 WL 7310960, at *1 (Mich. Ct. App. Dec. 10, 2020) (per curiam).

²⁸⁰ *Id.* at *6.

²⁸¹ *Id.* at *8.

from the views of prominent revenge porn scholars. For example, as observed by Professor 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.”²⁸²

The impact of an intimate relationship exception as articulated by *VanBuren* 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,²⁸³ queer people often openly challenge the default expectations of what ethical, fulfilling relationships must look like.²⁸⁴ These queer challenges might include: finding meaningful intimacies at a sex club,²⁸⁵ online,²⁸⁶ or with a sex worker;²⁸⁷ committing to relationships that are consensually non-monogamous or polyamorous;²⁸⁸ valuing sexual relationships that weave between the labels of friends, lovers, roommates, and girlfriends;²⁸⁹ and embracing intimacy that is tied neither to sex or biology.²⁹⁰ The Vermont Supreme Court throws out the term “intimate spheres”

²⁸² Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH U. L. REV. 1189, 1201 (2019); Rosenbury & Rothman, *supra* note 276, at 836–38 (describing the importance of sexual pleasure without regard to whether it occurs in the context of intimate relationships); *see also* Citron, *Sexual Privacy*, *supra* note 3, at 1890 (observing that “[w]e need sexual privacy in . . . nude photos” even if they are not “created . . . in the context of an intimate relationship”).

²⁸³ *See* LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM 12 (2018) (“As advocates display LGBT virtues in the production of ideal archetypes, what must we do with our embarrassing relatives?”).

²⁸⁴ *See generally* Phillip L. Hammack, David M. Frost & Sam D. Hughes, *Queer Intimacies: A New Paradigm for the Study of Relationship Diversity*, 56 J. SEX RSCH. 556 (2019) (compiling extensive social scientific and theoretical studies on queer forms of intimacy and relationship forms).

²⁸⁵ *See, e.g.*, GAYLE S. RUBIN, *The Catacombs: A Temple of the Butthole*, in *DEVIATIONS: A GAYLE RUBIN READER* 224, 227 (2011); Joel I. Brodsky, *The Mineshaft: A Retrospective Ethnography*, 24 J. HOMOSEXUALITY 233, 246–48 (1993).

²⁸⁶ *See, e.g.*, ROACH, *supra* note 196, at 66–67 (discussing queer forms of intimacy on Grindr).

²⁸⁷ Rosenbury & Rothman, *supra* note 276, at 845–46 (observing the intimacy that is often involved in various forms of sex work); JONES, *supra* note 239, at 90 (“Selling sex online opens up new opportunities for human intimacy, sexual encounters, and sexual pleasure.”).

²⁸⁸ *See generally, e.g.*, Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 317–21 (2004); Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269 (2015).

²⁸⁹ *See, e.g.*, Elisabeth Morgan Thompson, *Girl Friend or Girlfriend?: Same-Sex Friendship and Bisexual Images as a Context for Flexible Sexual Identity Among Young Women*, 6 J. BISEXUALITY 47 (2006).

²⁹⁰ *See* Hammack et al., *supra* note 284, at 579–82 (collecting research on relationships that are asexual and aromantic, as well as on concepts of “chosen” family among queer communities); *see also* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

as if it unquestionably excludes “everyone but a trusted other or few,” but intimacy need not be so quantitatively limited, nor must it be tightly confined to exclusive, in-or-out relationships.²⁹¹ Queer intimacies, relationships, and chosen families often eschew these heteronormative confines and provide alternate frameworks for finding meaningful, ethical, and satisfying connections with other people.²⁹² Any effort to cabin sexual privacy to a “charmed circle”²⁹³ 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.²⁹⁴

III. 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 a 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.²⁹⁵

Without incorporating explicitly queer voices, revenge porn legislation risks bolstering, rather than transforming, dominant narratives around sex and nudity. For example, one concern raised in revenge porn scholarship is that new legislation protecting sexual privacy will reinforce the inherent shameful-ness of sex.²⁹⁶ Professor Citron pushes back against 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

²⁹¹ See Rosenbury & Rothman, *supra* note 276, at 850–54; *State v. VanBuren*, 214 A.3d 791, 823 (Vt. 2019).

²⁹² See generally Hammack et al., *supra* note 284 (examining the diversity of queer relationships).

²⁹³ See GAYLE S. RUBIN, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in DEVIATIONS: A GAYLE RUBIN READER, *supra* note 285, at 137, 152 fig.1.

²⁹⁴ See Berlant & Warner, *supra* note 135, at 553 (“[H]eteronormative conventions of intimacy block the building of nonnormative or explicit public sexual cultures.”). The *VanBuren* 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 133, at 5 (observing that *Lawrence v. Texas* ignored sex outside “ongoing relationships”).

²⁹⁵ Cf. Waldman, *supra* note 7, at 1009 (noting the “unique burdens faced by gay and bisexual male users of the Internet”).

²⁹⁶ Citron, *Sexual Privacy*, *supra* note 3, at 1876; see also Franks, *supra* note 55, at 663 (acknowledging the critique that criminalizing revenge porn will reinforce sexual stigmas).

their bodies and intimate information.”²⁹⁷ Professor Citron’s scholarship does not express any desire to stigmatize sexual expression²⁹⁸—queer or otherwise—but the caselaw discussing revenge porn does at times appear to conflate sex with shame. Courts have referred to nude images as “scarlet letter[s],”²⁹⁹ as leaving a “digital stain,”³⁰⁰ and as “haunt[ing]” victims.³⁰¹ They repeatedly frame sex as “the most private human conduct” and as being “inherently” private;³⁰² accordingly, “the harm” of revenge porn “largely speaks for itself.”³⁰³

Judges likely intend these statements to describe, empirically, the impact of revenge porn on many victims’ lives, but they crystallize perspectives about sex and nudity that (1) are not universal³⁰⁴ and (2) may ultimately limit the privacy of individuals whose value systems diverge from them. If someone does *not* 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.³⁰⁵ Indeed, the caselaw ad-

²⁹⁷ Citron, *Sexual Privacy*, *supra* note 3, at 1876.

²⁹⁸ *Id.* 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.”). In a forthcoming article, Brenda Dvoskin more emphatically critiques existing sexual privacy scholarship for reinforcing the inherent shamefulness of public sexual expression. See Dvoskin, *supra* note 31 (manuscript at 11–13). I agree that sexual privacy law often reinforces sexual stigma, and I agree that sexual privacy scholarship *should* be more explicit about the social value of visibly consensual, pleasurable, and empowering sexual expression. I am unable, however, to locate an explicitly contrary agenda in the existing literature.

²⁹⁹ *State v. Katz*, 179 N.E.3d 431, 450 (Ind. 2022) (quoting *State v. Casillas*, 952 N.W.2d 629, 642 (Minn. 2020)).

³⁰⁰ *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (quoting Charlotte Alter, ‘It’s Like Having an Incurable Disease’: Inside the Fight Against Revenge Porn, TIME (June 13, 2017), <https://www.time.com/4811561/revenge-porn> [<https://perma.cc/G9UP-L984>]).

³⁰¹ *Id.*

³⁰² *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *7 (Tex. Crim. App. May 26, 2021) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)). 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. See Rosenberg & Dancig-Rosenberg, *supra* note 48, at 219 (proposing that revenge porn be categorized as a sex offense).

³⁰³ *Katz*, 179 N.E.3d at 450, 458 (quoting *Casillas*, 952 N.W.2d at 642).

³⁰⁴ 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.” (footnote omitted)).

³⁰⁵ See Dvoskin, *supra* note 31 (manuscript at 24–25) (arguing that sexual privacy theory reinscribes the shamefulness of public nudity and requires victims to conform to a victimization script that is supposed to accompany public exposure). 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

dress recent revenge porn statutes does not contain any full-throated support for diverse forms of sexual expression or the value of actively exploring one's sexual desires.³⁰⁶ 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.³⁰⁷ 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 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 simply be to remove those exceptions and have substantially broader prohibitions on nonconsensual disclosures in most states. There is certainly some appeal here—in states where there is no exception for sexual images in public places (for example, California and Wisconsin), there is caselaw embracing the sexual privacy of the depicted persons and acknowledging the wrongfulness of nonconsensual disclosure.³⁰⁸

But there is 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.³⁰⁹ Note that the concerns I raise here are in addition to the race and class

deemed compelling among populations with different sexual values who nonetheless would benefit from sexual privacy protections.

³⁰⁶ See India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2468 (2021) (reviewing GRUBER, *supra* note 28). Professor Thusi stated that:

expressive 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.

Id. (citing John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J.L. & RELIGION 35, 67 (2001)).

³⁰⁷ Cf. Roger N. Lancaster, *The New Pariahs: Sex, Crime, and Punishment in America* (“[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.” (citing PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 2d ed. 1992)), in THE WAR ON SEX, *supra* note 9, at 65, 76.

³⁰⁸ See *supra* notes 167–171 and accompanying text.

³⁰⁹ See Waldman, *supra* note 7, at 1007 (“[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.” (citing DEVIATIONS: A GAYLE RUBIN READER, *supra* note 285)); SKINNER-THOMPSON, *supra* note 6, at 40 (expressing skepticism of carceral responses to revenge porn).

disparities that so often attend carceral approaches.³¹⁰ As discussed, 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.³¹¹ 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 toward law enforcement agencies willing to devote time and energy to fighting these scourges.³¹² 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.³¹³ 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.³¹⁴

A broadly scoped criminal revenge porn statute could very easily continue this dynamic.³¹⁵ 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 fairly easily to 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

³¹⁰ See generally 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) (discussing law enforcement's racial profiling and harassment of trans women); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) ("[T]he very logics of the overlapping criminal justice and policing regimes systemically perpetuate racial, sexual, gender, colonial, and class violence through carceral power." (emphasis omitted)).

³¹¹ See *supra* notes 186–188 and accompanying text; see also Rodríguez v. Comm'n on Pro. Competence, No. B258035, 2015 WL 8767581, at *1, *7 (Cal. Ct. App. Dec. 15, 2015) (affirming the termination of a teacher following his arrest for public indecency notwithstanding "statements by [the arresting officer] in the arrest report and during his testimony reveal[ing] a bias against Rodríguez because of Rodríguez's perceived sexual orientation"); Waldman, *supra* note 196, at 964; CALIFIA, *supra* note 179, at 19–21.

³¹² See, e.g., Bernstein, *supra* note 131, at 237 (warning of "expressive justice" campaigns against sex-related crimes).

³¹³ See Gilden, *supra* note 21, at 449.

³¹⁴ Cf. ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 73 (2011) (describing the blinding effect of intensive reporting on sexual abuse in the Catholic Church).

³¹⁵ See GRUBER, *supra* note 28, at 197 (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").

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.³¹⁶ 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.³¹⁷ 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.³¹⁸

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).³¹⁹ 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.³²⁰ Law enforcement officers are either insufficiently steeped in the norms of the 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.³²¹ And to the extent that expansions in criminal

³¹⁶ See Lancaster, *supra* note 307, at 73–104.

³¹⁷ See, e.g., ALA. CODE § 13A-6-240(d) (2023); ARIZ. REV. STAT. ANN. § 13-1425(B)(2) (2023); GA. CODE ANN. § 16-11-90(e)(1) (2023).

³¹⁸ See, e.g., Cybercrime Enforcement Training Assistance Act of 2016, H.R. 4740, 114th Cong. § 2(a) (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 Tal Kopan & Megan Cassidy, *Should Revenge Porn Be a Federal Crime? Here's What the 190 Bay Area Cases Reveal*, S.F. CHRON., <https://www.sfchronicle.com/bayarea/article/revenge-porn-law-17143216.php> [<https://perma.cc/8FWQ-8TB3>] (May 7, 2022).

³¹⁹ See Gilden, *supra* note 61, at 101; see also MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM* 158–65 (1998) (arguing that the 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 (9th Cir. 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.”).

³²⁰ See Gilden, *supra* note 61, at 100–01.

³²¹ See Strader & Hay, *supra* note 187, at 469 (“Many stings tread uncomfortably close to entrapment. In one case, for example, police officers wore provocative clothing such as gay pride tshirts and speedos to a public park. There, the officers lured sting targets into bushes along a jogging trail and arrested them when they approached.” (citing Megan Smith, *Activist Questions Memorial Park Arrests of More Than Twenty Men*, OUTSMART MAG., <https://www.outsmartmagazine.com/2013/08/activist-questions-memorial-park-arrests-of-more-than-twenty-men/> [<https://perma.cc/VHN8-U9CN>] (Aug. 10, 2013)).

law expand state surveillance, the impacts of such surveillance are likely to spread unevenly across racial and ethnic lines.³²² Carceral responses to sexual harms, especially online, have a history of disproportionately impacting queer people and run the risk of undermining the trust that binds queer communities together.³²³

There may be *some* role for criminal laws to play in this space, particularly when attached to purposeful activity intentionally designed to financially harm, socially stigmatize, out, and/or dox 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 Professor 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.”³²⁴ In addition to this expressive function, criminal laws tailored to the weaponizing of sexual expression would hopefully deter efforts to, for example, get queer people fired for being photographed naked. Moreover, some statutory element related to intentional 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.³²⁵

However, an approach to revenge porn legislation that emphasizes intentional harm, even if designed with queer vulnerabilities explicitly in mind, creates some clear conflicts with feminist priorities. As amply illustrated by Professor 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

³²² See, e.g., Doug Meyer, *Resisting Hate Crime Discourse: Queer and Intersectional Challenges to Neoliberal Hate Crime Laws*, 22 CRITICAL CRIMINOLOGY 113, 120 (2014) (“As LGBT people of color, particularly those in low-income neighborhoods are most likely to be harmed as a result of increased police surveillance, the role of hate crime laws in further subsidizing and expanding law enforcement harms many LGBT people.” (first citing CHANDAN REDDY, *FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE* (2011); and then citing DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011))).

³²³ See, e.g., SKINNER-THOMPSON, *supra* note 6, at 29–31.

³²⁴ Waldman, *supra* note 7, at 1008.

³²⁵ 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. 2019) (“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.”), *rev’d*, 952 N.W.2d 629 (Minn. 2020).

same dynamics, and may also vigorously object to them,³²⁶ but a prohibition on non-consensually 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,³²⁷ could not be relaxed for the benefit all victims. Nevertheless, a primarily carceral approach to revenge porn raises potential tensions between queer and feminist approaches to image-based abuses.

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 suggests 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 non-consensually distribute their intimate images.³²⁸ These statutes, however, generally have the same limits and carveouts as criminal revenge porn statutes.³²⁹ Still, expansions of civil remedies to cover the types of queer vulnerabilities discussed in this Article 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.³³⁰ 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.³³¹ 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 violat-

³²⁶ See Waldman, *supra* note 7, at 995, 997 (discussing queer people's views on and experiences with revenge porn).

³²⁷ See, e.g., Kopan & Cassidy, *supra* note 318. 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) (en banc) ("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.'" (quoting *In re Fadle*, 802 P.2d 31, 48 (Or. 1990) (Unis, J., dissenting))).

³²⁸ See *supra* notes 106–117 and accompanying text.

³²⁹ See, e.g., Violence Against Women Act (VAWA) Reauthorization Act of 2022, Pub. L. No. 117-103, § 1309(b)(1)(A), 136 Stat. 840, 930.

³³⁰ See Gilden, *supra* note 61, at 102.

³³¹ Cf. *id.* at 101 (asserting that, in bringing intellectual property claims for sexual imagery, individual plaintiffs "need not garner the sympathy of law enforcement and can instead make enforcement decisions themselves").

ed, thereby injuring the individual.³³² 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 plaintiffs whole.³³³ Moreover, revenge porn may cause professional and psychological harms that may be irreparable with money.³³⁴ 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 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.³³⁵ Section 230 immunizes operators of online platforms from liability stemming from content created by their users,³³⁶ making it very difficult to sue a social media company for hosting content that has caused harm to its users. For example, in 2018, in *Herrick v. Grindr, LLC*, the plaintiff's ex-boyfriend created numerous fake profiles of the plaintiff, resulting in strangers repeatedly showing up at his home and workplace looking for sex.³³⁷ Despite repeated complaints to Grindr about the fake profiles, the company successfully convinced the court to dismiss the plaintiff's claims because the ex-boyfriend, and not Grindr, created the profiles in question.³³⁸ 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.³³⁹ Indeed, FOSTA-SESTA, which, in 2018, carved out an exception to Section 230 for state-law

³³² See *id.*

³³³ See, e.g., *Doe v. Eisenberg*, No. H-16-1149, 2021 WL 4310601, at *1, *4–5 (S.D. Tex. July 23, 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 pro bono. See *id.* at *4.

³³⁴ 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." (citing *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 625 (8th Cir. 1987))); *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709 (9th Cir. 1988) (finding that emotional distress, depression, and anxiety may constitute irreparable injury).

³³⁵ 47 U.S.C. § 230.

³³⁶ *Id.* § 230(c)(1).

³³⁷ 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018).

³³⁸ *Id.* at 590–91.

³³⁹ See Gilden, *supra* note 61, at 103–04; Gilden, *supra* note 195, at 390–92.

sex trafficking claims, led to the removal of wide swaths of queer and sexually explicit online content.³⁴⁰ For example, Craigslist removed its online personals section,³⁴¹ and websites dedicated to subcultures like the Furies shut down entirely.³⁴² 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.³⁴³

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 have 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.³⁴⁴ 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.³⁴⁵

Intellectual property laws are expressly carved out of Section 230, and platform liability for their users' infringement is typically subject to a notice-and-takedown regime. Under that regime, if platforms lack specific knowledge of infringement by a particular user, they are generally not liable, and if they are notified of such infringement, they can avoid liability by promptly remov-

³⁴⁰ See, e.g., Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084, 1088–91 (2021); see also Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either*, LAWFARE (Mar. 28, 2018), <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either> [<https://perma.cc/VZD8-Y7UT>].

³⁴¹ *FOSTA*, CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> [<https://perma.cc/387L-979E>].

³⁴² Samantha Cole, *Furry Dating Site Shuts Down Because of FOSTA*, VICE (Apr. 2, 2018), <https://www.vice.com/en/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta> [<https://perma.cc/4ZHW-7C4S>].

³⁴³ Professor Citron has recently recognized the “disastrous effects” of FOSTA-SESTA and, in a step away from previous, broader Section 230 reform proposals, now proposes a narrower “duty of care in matters involving intimate privacy violations, cyber stalking, and cyber harassment.” See Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. (forthcoming Apr. 2023) (manuscript at 29, 38–41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054906 [<https://perma.cc/5HTE-ELZ6>]. This duty of care “would take a page from the notice-and-takedown requirement in the Digital Millennium Copyright Act.” *Id.* (manuscript at 41) (citing Bambauer, *supra* note 195). As discussed in the following paragraph, I have previously argued that copyright law (including the Digital Millennium Copyright Act) can provide a useful model for dealing with sexual privacy violations.

³⁴⁴ See Gilden, *supra* note 61, at 82–87; see also *Ortega v. Villa*, No. CV 20-11361-DMG, 2021 WL 5238786, at *1, *3–4 (C.D. Cal. Sept. 10, 2021) (entering a default judgment of copyright infringement and misappropriation of likeness where the defendant broadcast the plaintiff's OnlyFans videos without her consent and ordering \$135,107.50 in compensatory and punitive damages); *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *13 (Tex. Crim. App. May 26, 2021) (recognizing that copyright law can fill some of the gaps in the coverage of Texas's criminal statute).

³⁴⁵ Gilden, *supra* note 61, at 82–87.

ing the infringing image.³⁴⁶ Internet platforms have been subject to notice-and-takedown regimes for IP violations since the 1990s and although these regimes are absolutely subject to abuse by aggressive rightsholders, they have not shattered the internet's expressive ecosystem like the FOSTA-SESTA carveouts have.³⁴⁷ 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.³⁴⁸

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.³⁴⁹ 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 human resources 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 send 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.³⁵⁰ Unfortunately, to obtain the protection of these anti-

³⁴⁶ See generally 17 U.S.C. § 512 (creating a 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 Eric Goldman, *Facebook Can't Shake Publicity Rights Claim*—Hepp v. Facebook, TECH. & MKTG. L. BLOG (May 3, 2022), <https://blog.ericgoldman.org/archives/2022/05/facebook-cant-shake-publicity-rights-claim-hepp-v-facebook.htm> [<https://perma.cc/W5JW-DYKP>].

³⁴⁷ Gilden, *supra* note 61, at 104.

³⁴⁸ Cf. Bambauer, *supra* note 195, at 2056–70 (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); Candeub, *supra* note 152, at 1751 (arguing that the right of publicity could be an effective means of addressing revenge porn). This targeted approach to revenge porn and Section 230 might help avoid the “double bind” that Professor Waldman describes with respect to queer content moderation—inc incentivizing too much content moderation can give rise to queer censorship while incentivizing too little leaves queer people vulnerable to harassment online. See Waldman, *supra* note 196, at 964.

³⁴⁹ See *supra* notes 117–121 and accompanying text.

³⁵⁰ See Bambauer, *supra* note 195, 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.”).

discrimination laws, victims would, at the very least, need to fall within the scope of the state's parallel criminal statute. This would accordingly exclude 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.

Reducing the economic consequences of revenge porn might be especially responsive to concerns raised by queer people. The concern for many queer people is not the prospect of other people seeing them naked per se, it is the prospect of being seen naked in 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.³⁵¹

The main objection to this final reform might be that certain occupations—for example, teacher, police officer, judge—require a high moral standard in order to maintain the respect of the communities that may look up to them.³⁵² For example, in 2022, in *In re 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.³⁵³ 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,"³⁵⁴ 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."³⁵⁵ The court observed that "[j]udges 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."³⁵⁶ The court apparently believed that shar-

³⁵¹ See Abad-Santos, *supra* note 83.

³⁵² See *Warren City Bd. of Educ.*, 124 Lab. Arb. Rep. (BL) 532, 534 (2007) (Skulina, Arb.) ("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.").

³⁵³ *In re Clark*, 502 P.3d 636, 637–38, 643 (Kan. 2022) (per curiam); see also *In re Archer*, No. 47, 2016 WL 7106106, at *1, *3 (Ala. Jud. Inquiry Comm'n Aug. 8, 2016) (suspending a judge for 180 days without pay for having a racy Facebook relationship).

³⁵⁴ *Clark*, 502 P.3d at 640.

³⁵⁵ *Id.* at 641.

³⁵⁶ *Id.* at 642.

ing 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.³⁵⁷

Moreover, teachers repeatedly have been subjected to the logic that they cannot be effective role models if they have 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:

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 of schools require role models.³⁵⁸

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 to which (wealthy suburban) parents might object.

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.³⁵⁹ Perhaps, rather than treat the next gen-

³⁵⁷ See *id.* at 647 (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.").

³⁵⁸ Warren City Bd. of Educ., 124 Lab. Arb. Rep. (BL) 532, 536 (2007) (Skulina, Arb.) (citation omitted) (quoting the high school's principal).

³⁵⁹ See Gilden, *supra* note 195 at 359–60; Lara Karaian & Andrew Tompkins, *Teenage Sexting: Sexual Expression Meets Mobile Technology* ("Taken together, these studies suggest that consensual sexting is a normal, everyday part of some teenagers' and adults' romantic relationships" (quoting HASINOFF, *supra* note 275, at 4)), in 3 *ENCYCLOPEDIA OF MOBILE PHONE BEHAVIOR* 1500, 1501 (Zheng Yan ed., 2015).

erations 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.

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 undercuts 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.