



## INTIMATE PRIVACY'S PROTECTION ENABLES FREE SPEECH

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The protection of intimate privacy isn't at odds with free expression. At times, we prioritize one value over the other, but, more often, intimate privacy is an essential precondition for self-expression. Intimate privacy allows us to experiment with ideas, identities, and love. It secures space for us to figure out who we are and who we want to become. It frees us to forge close relationships. Intimate privacy enables us to trust others with our innermost thoughts, feelings, and past experiences so that we can come to know them, and they can come to know us. Mutual self-revelation is at the heart of love. The fight for intimate privacy is the fight for free speech.

This short essay highlights intimate privacy's significance for free speech. I explore how intimate privacy violations undermine the ability to engage in self-expression and to forge close relationships. I end with a high-level overview of empirical studies that I have been conducting with Jonathon Penney and Alexis Shore. Our preliminary findings suggest that the

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protection of intimate privacy—both in law and in the policies of social media platforms—inculcates trust necessary for victims to speak.

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INTRODUCTION

The protection of intimate privacy isn’t at odds with free expression. Yes, at times, we prioritize one value over the other, but more often, intimate privacy is an essential precondition for self-expression. The fight for intimate privacy is the fight for free speech.

Here are some of the ways that intimate privacy and free speech go hand in hand: Intimate privacy allows us to experiment with ideas, identities, and love. It secures space for us to figure out who we are and who we want to become. It frees us to forge close relationships. It enables us to trust others with our innermost thoughts, feelings, and past experiences—good, bad, and ugly—so that we can come to know them, and they can come to know us. Mutual self-revelation is at the heart of love.

In this short essay, I highlight intimate privacy’s significance for free speech. I explore how intimate privacy violations undermine the ability to engage in self-expression and to cultivate close relationships. I end with a high-level overview of empirical studies that I have been conducting with Jonathon Penney and Alexis Shore. Our preliminary findings suggest that the protection of intimate privacy—both in law and in the policies of social media platforms—inculcates the trust necessary for victims to speak.

I. WHAT INTIMATE PRIVACY SECURES

Let me first define the term “intimate privacy.” Intimate privacy refers to the norms that set and fortify the boundaries around our intimate lives. It concerns the extent to which others have access to, and information about, our bodies; minds (such as searches, feelings, reading material); health, sex, sexual orientation, sexual

activity, and gender; and close relationships. Intimate privacy is implicated in our online and offline activities, when we are alone or with trusted others, when we interact with digital tools and services like dating apps or digital personal assistants.<sup>1</sup>

Intimate privacy deserves special protection because of its centrality to human flourishing and civic engagement. It serves as a precondition to identity development and self-expression, human dignity, and love. When we know our intimate privacy is protected, when we trust others to secure it, when we know that intimate privacy is ours to claim, we can express ourselves freely. We can make the most out of all of life's crucial opportunities.

A crucial aspect of intimate privacy involves the human body. Self-understanding begins with our experience of our physical selves. Through our relationship with our bodies, we experiment with and develop unique identities.<sup>2</sup> Having time with our bodies—either alone or with trusted others—is crucial for figuring out who we are and who we want to be.<sup>3</sup> We develop a sense of ourselves in physical

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<sup>1</sup> In a series of articles, a book chapter, and a recent book, I have been developing a theory of intimate privacy upon which this short essay draws. My book, *THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE*, came out in W.W. Norton and Penguin Vintage UK on October 4, 2022. For my published work, see Danielle Citron, *Protecting Sexual Privacy in the Information Age*, in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* 46, 52 (Marc Rotenberg, Julia Horwitz & Jeramie Scott eds., 2015) (“Nude photos and sex tapes are among the most private and intimate facts; the public has no legitimate interest in seeing someone’s nude images without that person’s consent.”); Danielle Keats Citron, *Presidential Privacy Violations*, 2022 *ILL. L. REV.* 1913 (2022); Danielle Keats Citron, *Privacy Injunctions*, 71 *EMORY L.J.* 955 (2022); Danielle Keats Citron, *A New Compact for Sexual Privacy*, 62 *WM. & MARY L. REV.* 1763, 1768 (2021) (“Sexual (or intimate) privacy concerns information about, and access to, the body, particularly the parts of the body associated with sex, gender, sexuality, and reproduction.”); Danielle Keats Citron, *Sexual Privacy*, 128 *YALE L.J.* 1870 (2019) (emphasizing the breadth of sexual privacy concerns—from concealing intimate activities to personal decisions about one’s life); Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 *WASH. U. L. REV.* 1189, 1191–92 (2019); Danielle Keats Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 *COLUM. J.L. & ARTS* 383, 385 (2019).

<sup>2</sup> These insights stem from a rich literature on the relationship of the body to human experience. See, e.g., IRIS MARION YOUNG, *ON THE FEMALE BODY EXPERIENCE: THROWING LIKE A GIRL AND OTHER ESSAYS* (2005); ROBIN WEST, *CARING FOR JUSTICE* (1999). Among my favorite scholarly articles is Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149 (2000).

<sup>3</sup> Citron, *Sexual Privacy*, *supra* note 1.

spaces where we feel a sense of ease.<sup>4</sup> Transgender writer and activist Janet Mock recalled her experience of trying on her mother's clothes in her bedroom.<sup>5</sup> In her home, with her best friend by her side, she experimented with and affirmed her gender identity.<sup>6</sup> In those moments, in that space, Mock felt free from public judgment. She trusted her best friend to be discreet, which gave her time to explore her identity before sharing it with others. Intimate privacy let Mock see herself as a young girl and to consider the woman she would become.<sup>7</sup>

In these and other ways, we can appreciate the connection between intimate privacy and human dignity. By human dignity, I am referring to self-esteem and social esteem.<sup>8</sup> When we get to determine who has access to our bodies and innermost thoughts—and who does not—we can see ourselves as in charge of our lives. When we are allowed to be seen as whole people rather than as fragments of ourselves (our body parts), we can enjoy the social bases of esteem.<sup>9</sup>

Philosopher Jean-Paul Sartre explored the relationship between the privacy afforded the human body and self-respect and social respect. In *Being and Nothingness: An Essay on Phenomenological Ontology*, Sartre differentiated the experience of being ashamed and “pure shame,” by which he meant the experience of being seen as an object, as less than human.<sup>10</sup> To illustrate the former, Sartre asked readers to consider a man crouching at someone's door, watching the person through the keyhole. When the “peeping tom” heard a noise in the hallway, he feared that he was about to be caught. He felt ashamed that he would be seen as a voyeur.<sup>11</sup> The peeping tom's shame differs from “pure shame.” As Sartre explained, when we wear clothing, we are claiming the right to be seen without being seen as an object. When we are stripped of our clothing without permission, we are seen as *objects*, as

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<sup>4</sup> See YOUNG, *supra* note 2.

<sup>5</sup> JANET MOCK, *REDEFINING REALNESS: MY PATH TO WOMANHOOD, IDENTITY, LOVE, AND SO MUCH MORE* (2014).

<sup>6</sup> *Id.* at 248.

<sup>7</sup> *Id.*

<sup>8</sup> See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 177 (2011).

<sup>9</sup> Citron, *Sexual Privacy*, *supra* note 1, at 1875–76, 1886.

<sup>10</sup> JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY* 352 (Hazel E. Barnes trans., Washington Square Press 1984) (1943).

<sup>11</sup> *Id.* at 353–54, 368–69.

genitals, breasts, or buttocks, not as whole people.<sup>12</sup> Our awareness of being reduced to an object, of being denied intimate privacy, is what Sartre described as pure shame.<sup>13</sup> The ability to decide who sees our bodies affords us self-respect and social respect.

Another aspect of intimate privacy is its role in the formation of close relationships. Intimate privacy is the ingredient that lets people know each other deeply. Intimate relationships develop through a process of mutual self-disclosure and mutual vulnerability.<sup>14</sup> We come to know others and others come to know us over time.<sup>15</sup> We share our desires, secrets, and painful past experiences with our partners if our partners share theirs. Reciprocal vulnerability generates confidence that our partners will not hurt us intentionally. When we trust our partners to be discreet, we will share ourselves freely. When we believe that they will treat our confidences with care, we don't feel the need to hide or self-censor personal facts and feelings.<sup>16</sup> We even feel guilty when we don't tell them about our "invisible failings"—it "casts a shadow over the relationship if we don't tell them."<sup>17</sup> As Charles Fried wrote long ago, privacy is the "necessary atmosphere" for love, "as oxygen is for combustion."<sup>18</sup>

Intimate privacy makes it possible to engage in authentic self-expression and to forge close associations. Its violation ruptures the trust that we need to feel free to speak, experiment with ideas and identities, and to fall in love.

## II. COSTS TO FREE EXPRESSION WHEN INTIMATE PRIVACY IS VIOLATED

When the boundaries around our intimate lives are violated, self-expression can become impossible. Consider the impact of intimate privacy violations at the

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<sup>12</sup> *Id.* at 384.

<sup>13</sup> *Id.* ("Pure shame is not a feeling of being this or that guilty object but in general of being *an* object").

<sup>14</sup> IRWIN ALTMAN & DALMAS TAYLOR, *SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS* 6 (1973).

<sup>15</sup> Gordon J. Chelune, Joan T. Robinson & Martin J. Kommor, *A Cognitive Interactional Model of Intimate Relationships*, in *COMMUNICATION, INTIMACY, AND CLOSE RELATIONSHIPS* 11, 14 (Valerian J. Derlega ed., 1984).

<sup>16</sup> *Id.* at 29–33.

<sup>17</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF A SPOILED IDENTITY* 74 (1963).

<sup>18</sup> CHARLES FRIED, *AN ANATOMY OF VALUES* 140 (1970).

hands of individuals, whether strangers or former friends and lovers. Intimate privacy can be violated in different ways. Individuals secretly record people undressing; they swap victims' faces into pornography; they hack online accounts to obtain victims' nude images and threaten to post those images online unless victims share more; they post victims' nude images online. After we have been secretly recorded having sex or our nude image is shared online in betrayal of our trust, intimate expression can seem dangerous, almost foolhardy, lest it be weaponized against us again.

Let me share with you the experience of a young woman whom I will call Joan.<sup>19</sup> While traveling for work, Joan stayed in a hotel. When she returned home, she received an email from a stranger. The email included a video of her showering and urinating in the hotel bathroom, a video that she never knew existed, let alone gave anyone permission to take. The emailer, presumably a hotel employee, threatened to post the video on adult sites and to send it to Joan's LinkedIn contacts unless she sent additional nude photos and videos of herself. After Joan refused, the emailer made good on the threats. The emailer sent the video to Joan's graduate school classmates and her work colleagues (who the emailer presumably found via her LinkedIn profile). The emailer posted the video (with her name embedded in the title of the video) on adult sites, including PornHub. The video appeared on dating sites next to the suggestion that Joan was available for sex.

Joan experienced three types of intimate privacy violations at the hands of the emailer. The first involved video voyeurism—the nonconsensual videotaping of her in the bathroom where she expected privacy.<sup>20</sup> The second was attempted sextortion—the emailer's demand for more nude images on the threat of the release of the video of her showering and urinating.<sup>21</sup> The last involved nonconsensual pornography—the disclosure of Joan's intimate images online without her permission.<sup>22</sup>

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<sup>19</sup> I describe Joan's experience in my forthcoming book. Joan and I had a series of in-person and telephone interviews over the course of several years.

<sup>20</sup> Citron, *Sexual Privacy*, *supra* note 1, at 1909; *see id.* at 1899–90.

<sup>21</sup> *Id.* at 1915.

<sup>22</sup> Intimate privacy can be violated in many other ways, including the nonconsensual taking of images up people's skirts and down their blouses, and the creation and sharing of images and videos falsely showing people engaged in sex acts such as deepfake sex videos. *See id.* at 1917.

Joan did everything that she could to get the videos and posts taken down, but she was met with a brick wall of silence. Most adult sites ignored her requests to remove the video. PornHub, the most popular adult site in the world, was helpful in the beginning. The site took down the videos in response to Joan's initial complaints. Unfortunately, the privacy invader kept reposting the video. After a while, PornHub stopped responding to Joan's requests to remove the video. Despite Joan's best efforts, the video appeared on adult sites and many of the posts had thousands of views.

For Joan, as for so many people facing such abuse, the privacy violations were never ending. No matter what Joan did, the video remained online. For months and months, Joan searched for new postings every day and found more and more sites where the video had been posted.

Joan felt scared and alone. No space seemed safe—not a public restroom, gym locker, or store changing area. If a hotel employee could hide a camera in her room, so could others with access to other areas where she expected and deserved privacy. She shuttered her social media accounts. She did not want to retreat from online engagement, but she felt like she had no choice. After all, the privacy invader seemingly identified her friends and co-workers from her social media accounts. She closed her Facebook account, even though it was how she kept in touch with friends from college and high school. She took down her LinkedIn profile, even though she knew that she needed to be on the site if she ever wanted to change jobs.

Telling her boss about what had happened was a nightmare. Although her boss conveyed support, Joan could not help but worry that her employer and co-workers now saw her as a nude body on the toilet and in the shower. She was humiliated.

Joan suffered severe anxiety and depression. She lost a significant amount of weight; it was a way for her to regain control over her body and make it difficult for people to recognize her from the video. She worked out every day in the hopes that gaining strength would enable her to fend off attackers. Joan worried that someone might respond to the fake ads and accost her offline.

The experience fundamentally changed the arc of Joan's life. Joan was engaged at the time of the initial privacy violation. Her fiancé was incredibly understanding. Indeed, he helped Joan contact adult sites and request the removal of the videos. When it became unbearable for Joan to check the sites, he monitored Google for new postings of the video. Joan and her fiancé delayed their wedding. As Joan explained to me, how could she get married when she felt afraid to leave her house?

(They eloped two years later.)

Long after the initial emails and posts, Joan felt watched and unsafe. Any time her laptop or phone seemed to slow down or have issues, she immediately thought that her tormentor had hacked her devices. Joan’s sense of ease—her preternatural optimism—was gone, thanks to the violation of her intimate privacy.

Young women, sexual and gender minorities, and nonwhites suffer a disproportionate amount of intimate privacy violations.<sup>23</sup> Intimate privacy violations are distinctly costly to women and members of vulnerable communities because of the way that pernicious stereotypes work. As Martha Nussbaum explains, “sexuality is an area of life in which disgust often plays a role.”<sup>24</sup> Sex signifies our animal nature because it “involves an exchange of bodily fluids.”<sup>25</sup> In nearly all societies, “people identify a group of sexual actors as disgusting or pathological, contrasting them with ‘normal’ or ‘pure’ sexual actors (prominently including the people themselves and their own group).”<sup>26</sup> That group often includes people who don’t fall in line with heteronormativity, such as women who have had more than one sexual partner and LGBTQ individuals. When the images of their naked bodies or sexual activities are exposed and posted online, their bodies are likely to be seen as disgusting. Their sexual activities are likely to be counted against them, viewed as proof that they are unseemly, sexually promiscuous, and disgusting. Here, we can see the inextricable link between intimate privacy and equality.

The blow to equality is paired with a blow to free expression. The self-censorship that Joan experienced is typical. Social scientist and legal scholar Jonathon

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<sup>23</sup> Citron, *Sexual Privacy*, *supra* note 1, at 1905–21; CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION (2017). According to a 2017 survey conducted by Australia’s e-Safety Commissioner, women were twice as likely to be victims of nonconsensual disclosure of intimate images; indigenous Australians were twice as likely to have experienced the abuse of their intimate images than non-Indigenous Australians. NICOLA HENRY, CLARE MCGLYNN, ASHER FLYNN, KELLY JOHNSON, ANASTASIA POWELL & ADRIAN J. SCOTT, IMAGE-BASED SEXUAL ABUSE: A STUDY ON THE CAUSES AND CONSEQUENCES OF NON-CONSENSUAL NUDE OR SEXUAL IMAGERY 35–36 (2021). Of the 15,000 deepfake videos posted online in 2019, about 95% inserted women’s faces into porn. Henry Ajder, Giorgio Patriani, Francesco Cavalli & Lauren Cullen, *The State of Deepfakes*, DEEPTRACE (2019).

<sup>24</sup> MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 17 (2010).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Penney has shown that when targeted with online abuse, women are more chilled in their speech than men.<sup>27</sup> In the face of the nonconsensual taking, use, and sharing of intimate images, women were inclined to self-censor; they changed how they expressed themselves online; they were less controversial, far more muted, and connected with fewer individuals.<sup>28</sup> They were more likely to withdraw from online activities, including shutting down their accounts.<sup>29</sup>

Victims of intimate privacy violations often isolate themselves. They disconnect from loved ones and from online connections. As Nicola Henry and her coauthors explain, such isolation is “due to a profound breach of trust, not only in relation to the abuser, but from family, friends, and the world around them.”<sup>30</sup> Victims feel like they can no longer “trust anyone” or “anything.”<sup>31</sup> Developing or sustaining close relationships can be difficult in the aftermath of intimate privacy violations. Victims feel alienated from loved ones who find it difficult to understand what happened.<sup>32</sup>

In writing my recent book *The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age*, I interviewed more than 60 individuals whose intimate privacy had been violated. They hailed from the United States, the United Kingdom, India, and Iceland. Most of those individuals were women, sexual and gender minorities, Black individuals, nonwhites, often with several marginalized identities.

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<sup>27</sup> Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 INTERNET POL'Y REV. 1, 11 (2017).

<sup>28</sup> HENRY ET AL., IMAGE-BASED SEXUAL ABUSE, *supra* note 23, at 59. As a report issued by Data & Society in 2016 showed, “younger women are most likely to self-censor to avoid potential online harassment: 41% of women ages 15 to 29 self-censor, compared with 33% of men of the same age group and 24% of internet users ages 30 and older (men and women).” AMANDA LENHART, MICHELE YBARRA, KATHRYN ZICKUHR & MYESHIA PRICE-FEENEY, ONLINE HARASSMENT, DIGITAL ABUSE, AND CYBERSTALKING IN AMERICA 4 (2016).

<sup>29</sup> The CCRI study found that twenty-six percent of survey respondents closed Facebook accounts; eleven percent closed Twitter accounts; and eight percent closed LinkedIn accounts. CYBER CIVIL RIGHTS INITIATIVE STUDY, *supra* note 23, at 2.

<sup>30</sup> HENRY ET AL., IMAGE-BASED SEXUAL ABUSE, *supra* note 23, at 58.

<sup>31</sup> *Id.* at 59. This accords with a 2019 study that found that the nonconsensual taking, use, or sharing of intimate images engenders an “intense shift” towards a position of lack of trust. Mollie C. DiTullio & Mackenzie M. Sullivan, *A Feminist-Informed Narrative Approach: Treating Clients Who Have Experienced Image-Based Abuse*, 31 J. FEMINIST FAM. THERAPY 100, 113 (2019).

<sup>32</sup> *Id.*

Nearly every single person experienced a blow to their willingness to express themselves. As Joan did, they shut down their social media accounts. They stopped emailing and texting friends. They stopped dating. They deleted their online dating apps. They feared all new relationships, including friendships. They lost trust in the world around them and in their ability to safely express themselves online and off.

As my scholarship has shown, law is insufficiently protective of intimate privacy. To give you a (too) brief sense of the problem, if perpetrators can be found, then suing them usually is not a realistic option. Bringing civil claims is expensive.<sup>33</sup> There aren't enough lawyers taking on cases involving intimate privacy violations on a pro bono or low-cost basis.<sup>34</sup> Nor are there enough lawyers with special expertise in cases involving intimate privacy violations.<sup>35</sup> Perpetrators often have few funds to recover, making it difficult to convince a lawyer to take a case on contingency.<sup>36</sup> In the United States, prosecutors typically decline to bring criminal charges because it isn't worth the resources and time to pursue charges that mostly involve misdemeanors.<sup>37</sup>

As I have explored in my work, the parties in the best position to minimize the damage—content platforms—enjoy legal immunity for intimate images posted by users, so far too many sites respond slowly or not at all.<sup>38</sup> Because of Section 230 of the Communications Decency Act of 1996, the federal law interpreted to provide a broad shield from liability to platforms hosting intimate privacy violations (even violations that platforms have solicited and monetized), most adult sites and adult finder sites refused to help Joan. Recall that PornHub stopped helping Joan after a

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<sup>33</sup> Citron, *Sexual Privacy*, *supra* note 1.

<sup>34</sup> *Id.*

<sup>35</sup> As I have discussed in my work and as my book explores, there are some notable exceptions like Carrie Goldberg, Erica Johnstone, Elisa D'Amico, David Bateman, and attorneys at the helm of the Cyber Civil Rights Legal Project, a pro bono effort spearheaded by the law firm K&L Gates. See Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (and As It Should Be)*, 118 MICH. L. REV. 1073 (2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., Danielle Keats Citron, *How to Fix Section 230*, B.U. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4054906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054906); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017).

few months. There are more than 9,500 sites whose business model is hidden cameras, nonconsensual porn, and deepfake sex videos.<sup>39</sup> Because many of those sites are hosted in the United States, they have no legal or market incentive to take down nonconsensual intimate images.

### III. HOW LEGAL PROTECTIONS AND INDUSTRY NORMS CAN FREE VICTIMS TO SPEAK

In my recent book, I lay out a plan for both law and industry practices to provide meaningful protection for intimate privacy.<sup>40</sup> We can and should build on civil rights tradition in protecting intimate privacy. American civil rights laws require powerful entities with control over our important rights to act as the caretakers of those rights. This would require legislatures and courts to flesh out the duties of content platforms, private companies, and governments, just as modern civil rights laws have clarified the duties of schools, employers, hotels, restaurants, and transportation providers to secure reasonable accommodations and modifications for disabled individuals. As we wait for law to protect intimate privacy as vigorously and comprehensively as it should, content platforms can and should protect people from intimate privacy violations on their own.

If law and market measures moved in that direction (one can hope and advocate as I have!), the expressive impact would be profound. Both law and corporate speech policies have great potential to tell intimate privacy victims that they matter, that they can express themselves knowing that companies and the law can help them if their intimate privacy is exploited.

We have some reason to be optimistic. In 2019, Jonathon Penney and I wrote

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<sup>39</sup> CITRON, *THE FIGHT FOR PRIVACY*, *supra* note 1. My research assistant obtained a list of non-consensual intimate image sites that DMCA Defender had dealt with in trying to get nonconsensual intimate images taken down, and there were more than 9,500 sites on the list. E-mail from DMCA Defender to Julia Schur (Dec. 10, 2019) (on file with author). By way of comparison, when I was writing *HATE CRIMES IN CYBERSPACE*, which tackled the phenomenon of cyber stalking, my research assistants and I found 40 sites devoted to nonconsensual intimate images—that was in 2013.

<sup>40</sup> I leave the details for readers of *THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE*. To give you a brief sense of my core argument, intimate privacy should be understood and protected as a fundamental human right and a civil right. Civil rights are legal rights whose protection are essential for human beings to flourish, enjoy respect, and feel that they belong. They are moral rights deserving priority: they can't be traded away without a good reason. Civil rights are fundamental entitlements for everyone, but they also require protection against discrimination given the bigoted attitudes and stereotypes facing women and vulnerable people.

about the expressive impact of cyber harassment laws.<sup>41</sup> We drew on Penney's important empirical evidence that cyber harassment laws have a salutary impact on people's online speech and engagement, particularly for women.<sup>42</sup> Penney administered an original online survey to 1,296 U.S.-based adults, which described to participants a series of hypotheticals.<sup>43</sup> One scenario concerned participants being made aware that the government had enacted a new law with tough civil and criminal penalties for cyber harassment. Responses offered a range of insights. They suggested that a cyber harassment law would have few chilling effects on regular speech.<sup>44</sup> Of the participants, 87 percent indicated that a cyber harassment law would have no impact or would make it more likely for them to speak and write online.<sup>45</sup>

Crucially, Penney's empirical research showed that a cyber harassment law might actually encourage online expression, particularly for women.<sup>46</sup> Penney's analysis revealed a gender effect in response to the law—female participants in the survey were statistically more likely to engage online in response to the cyber harassment law in a variety of ways.<sup>47</sup> Female survey participants reported being more likely to share content online and more likely to engage on social network sites in response to the government enacting cyber harassment laws. Penney and I joined together to argue that cyber harassment laws would have that salutary impact given law's expressive value.<sup>48</sup> Those laws would tell victims that their safety and online

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<sup>41</sup> Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 *FORDHAM L. REV.* 2317 (2019).

<sup>42</sup> Penney, *supra* note 27.

<sup>43</sup> Citron & Penney, *supra* note 41, at 2330.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2331–32.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> In 2009, I wrote an article arguing that laws combating cyber gender harassment would have a crucial expressive value in telling victims that they were protected and that their life opportunities and suffering mattered. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 *MICH. L. REV.* 373 (2009). I contended that those laws would free victims to speak. But at the time I had no empirical evidence supporting that point until Jonathon Penney conducted his crucial studies. This is true of Penney's work more generally. His empirical research and insights on law's expressive value have been invaluable to information privacy scholars. What we have long argued—including that government surveillance can chill self-expression—Penney has proven.

engagement are valued, that they will be protected, and that they matter.<sup>49</sup>

In 2021, Penney and I teamed up again to conduct empirical research on the potential impact of both legal and industry efforts to protect intimate privacy (with a special focus on the responsibilities of online platforms).<sup>50</sup> Researcher Alexis Shore joined us in that effort. Our preliminary findings suggest that both legal protections and industry measures would engender trust in companies and the legal system such that individuals would be more inclined to engage in self-expression online.

In one experimental study, participants were exposed to different protective sexual privacy interventions. We found that participants who had previously experienced forms of online abuse—including intimate privacy violations—were more inclined to disclose and express intimate information after becoming aware of measures enacted to protect intimate privacy. That finding held across all conditions—for interventions involving both legal and platform-based measures—though participants presented with *platform*-based measures were even more likely to be willing to engage in intimate expression.

In another experimental study with a pre/post longitudinal design, our preliminary results found that both legal and platform-based intimate privacy measures had a positive impact on trust among participants. After participants were made aware of both legal and platform-based intimate privacy measures, trust became a strong predictor of intimate expression online and offline, and that predictive relationship was even stronger among participants who had previously experienced online abuse. We also found that both legal and platform measures increased trust in partners such that they would be inclined to share and disclose intimate information to them, especially among certain minority groups that are most often the targets of online abuse and intimate privacy violations.

These findings suggest that legal and platform-based intimate privacy measures can promote trust, leading to greater intimate expression and sharing over the long term. Though these findings are only preliminary, both studies suggest that individuals will feel more inclined to engage in intimate expression with partners if they

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<sup>49</sup> Jonathon Penney, *Online Abuse, Chilling Effects, and Human Rights*, in *CITIZENSHIP IN A CONNECTED CANADA: A RESEARCH AND POLICY AGENDA 207* (Elizabeth Dubois & Florian Martin-Bariteau eds., 2020).

<sup>50</sup> The Knight Foundation supported our empirical research project with a \$75,000 grant.

know that platforms have legal incentives to protect them from illegality online and that they are engaging efforts pursuant to those requirements.

#### CONCLUSION

We are at a tipping point. Our intimate privacy is being violated when we most need it. We need to protect intimate privacy for the good of free expression. In short, our preliminary findings suggest that protecting intimate privacy can help provide the reassurance that victims need to express themselves rather than retreating into silence. Law and self-governance aimed to protect intimate privacy can indeed free us to speak.