EMORY | LAW

Emory Law Journal

Volume 71 | Issue 5

2022

Privacy Injunctions

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Danielle Keats Citron[*]

ABSTRACT

Violations of intimate privacy can be never ending. As long as nonconsensual pornography and deepfake sex videos remain online, privacy violations continue, as does the harm. This piece highlights the significance of injunctive relief to protect intimate privacy and legal reforms that can get us there. Injunctive relief is crucial for what it will say and do for victims and the groups to which they belong. It would have content platforms treat victims with the respect that they deserve, rather than as purveyors of their humiliation. It would say to victims that their intimate privacy matters and that sites specializing in intimate privacy violations are not lawless zones where their rights can be violated. For victims, the journey to reclaim their sexual and bodily autonomy, self-esteem and social esteem, and sense of physical safety proceeds slowly; the halting of the privacy violation lets that process begin. The crux of my proposal is straightforward: Lawmakers should empower courts to issue injunctive relief, directing content platforms that enable intimate privacy violations to remove, delete, or otherwise make unavailable intimate images, real or fake, that were hosted without written permission. They should amend Section 230 of the Communications Decency Act so that these enabling platforms can be sued for injunctive remedies. Market developments can fill some of the gaps as we wait for laws to protect intimate privacy as vigorously and completely as they should.

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INTRODUCTION

"I want those photos to disappear."[1] I have heard that sentiment countless times from people whose intimate images were shared online without their consent[2]—Carla included.[3]

As she headed to work, Carla started getting texts from people she did not know. The messages were basically the same. Just a question: Was she free for sex now? She immediately thought of her ex who warned her that she would regret ending their relationship. Could this be related?

So, Carla did what anyone would do in her position—she Googled her name. Behold, the first page featured links to adult sites and message boards displaying her nude and partially undressed photographs next to her name and cellphone number. Carla then checked her email. A colleague had sent an email saying that her "new" Facebook profile (which she had not created) included her nude photo. Her colleague asked, "Did you mean to post that or was it a goof?" That

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[1] Telephone Interview with Carla (Oct. 3, 2018) (notes on file with author). I am using a pseudonym for Carla and have altered some facts to protect her identity. The following account of what happened to Carla comes from my telephone interview with her.

[2] The term "intimate images" covers photographs, films, recordings, or other visual reproductions of people's undressed or partially undressed bodies (in particular, their genitals, pubic area, buttocks, anus, or female post-pubescent nipple) or sexual acts (including, but not limited to, masturbation; genital, anal, or oral sex; and sexual penetration with objects). MARY ANNE FRANKS, CCRI MODEL STATE LAW (n.d.), http://www.cybercivilrights.org/wp-content/uploads/2019/01/CCRI-Model-State-Law.pdf.

[3] Since talking to Carla, I have interviewed dozens of people from around the globe whose intimate privacy has been violated. Those interviews have informed my advocacy and scholarship, including my forthcoming book, DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE (forthcoming Sept. 2022) (on file with author). Carla's experience resonates with so many of those individuals' experiences.

the posting was unintentional was the better guess: Carla was a teacher whose Facebook community included former students. But, of course, it was not Carla's doing at all—her ex created a fake profile in her name and posted her intimate images without her permission.

There was more. Carla's ex had created a fake account on the dating app Tinder and sent her intimate photos to men who believed they were talking to her. He ran online ads claiming that Carla was "looking for hook ups." That day and in the days that followed, strange men came to Carla's house, saying that they were there "for their date." Through her locked door, Carla explained what her ex had done. The men were civil, all things considered. No one had hurt her—yet.

Carla and I talked about many things, but front of her mind was getting the intimate images taken down or somehow obscured. Some sites prohibit nonconsensual intimate images in their terms of service (TOS), so they would be inclined to remove them.[4] She could report the fake account to Tinder, which bans harassment.[5] She could ask Google to de-link the nonconsensual intimate images in searches of her name.[6]

Carla soon discovered that too many other sites had no intention of helping her. The entire business of these sites was hosting nonconsensual intimate images.[7] Their viewers expected to see a continuous stream of nude images. Without visitors, they could not earn advertising revenue.[8] That is why those sites ignored Carla's request to take down her intimate images.

Sending takedown requests posed other risks that Carla had not yet experienced, beyond wasting her time. A site could compound the damage by posting her takedown request. That would draw even more attention to her intimate images. I had seen that in several cases—it was cruel in the extreme.

Existing law was not on Carla's side, at least not yet. If a magazine published hard copies of Carla's nude images submitted by her ex, Carla could bring tort claims against the magazine.[9] In that lawsuit, she could ask the court to stop the magazine from selling copies with her nude images, a request known as

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[4] *See, e.g.*, *Terms of Service*, FACEBOOK, http://facebook.com/legal/terms (Jan. 4, 2022).

[5] *See Terms of Use*, TINDER, http://policies.tinder.com/terms/intl/en/ (Nov. 19, 2021) (stating users are not allowed to "bully, 'stalk', intimidate, assault, harass, mistreat, or defame any person").

[6] *Remove Non-consensual Explicit or Intimate Personal Images from Google*, GOOGLE SEARCH HELP, https://support.google.com/websearch/answer/6302812?hl=en (last visited Apr. 21, 2022).

[7] CITRON, *supra* note 3 (manuscript at 10).

[8] *Id.*

[9] Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1823–24 (2010).

injunctive relief.[10] But because those activities happened online, Carla had no legal remedy. A federal law passed in 1996—Section 230 of the Communications Decency Act (CDA)—shielded sites from liability related to their publication of user-generated content.[11] Sites that encourage and profit from third-party illegality like nonconsensual, intimate images have enjoyed immunity from liability under that law.[12] The legal shield secured by Section 230 would stop Carla's lawsuits against the sites peddling her intimate images.

What Carla experienced was a violation of her intimate privacy—the norms that set and fortify the boundaries around intimate life.[13] Intimate privacy concerns the extent to which others have access to, and information about, our bodies; minds (innermost thoughts, desires, and fantasies); health; sex, sexual orientation, and gender identity and expression; and close relationships.[14] It includes our online and offline activities, interactions, communications, and searches.[15] Intimate privacy is descriptive but also a normative concept: it captures the kind of privacy that we want, expect, and deserve at different times and in different contexts.[16]

Intimate privacy is of the utmost importance.[17] It is among the foundational types of privacy that deserve robust protection. It is the precondition to self-

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[10] CITRON, *supra* note 3 (manuscript at 143).

[11] 47 U.S.C. § 230(c) (2018).

[12] *Id.*

[13] Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019).

[14] In a series of articles, a book chapter, and now a forthcoming book, I have been developing a theory of intimate privacy upon which this Article draws. For 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 et al. 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, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763, 1768 (2021) [hereinafter Citron, *A New Compact*] ("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."); Citron, *supra* note 13, at 1874 (emphasizing the breadth of sexual privacy concerns—from concealing intimate activities to making personal decisions about one's life); Danielle Keats Citron, *Why Sexual Privacy Matters for Trust*, 96 WASH. U. L. REV. 1189, 1191–92 (2019) [hereinafter Citron, *Why Sexual Privacy Matters for Trust*] (highlighting that intimate privacy concerns both digital and non-digital forms of communication and information); Danielle Keats Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 COLUM. J.L. & ARTS 383, 385 (2019) (noting that sexual privacy includes personal decisions and communications about every aspect of intimate life).

[15] Citron, *Why Sexual Privacy Matters for Trust*, *supra* note 14, at 1191–92.

[16] Citron, *supra* note 13, at 1877.

[17] *Id.* at 1874 ("Sexual privacy sits at the apex of privacy values because of its importance to sexual agency, intimacy, and equality."); Citron, *A New Compact*, *supra* note 14, at 1768 (arguing that sexual privacy protects dignity and enables us to "enjoy self-esteem and social respect"). In prior work, I have used the terms sexual privacy and intimate privacy interchangeably. After careful reflection, I have come to think of the concept as better captured by intimate privacy, not because sexual privacy is inaccurate, but rather because some readers

development, human dignity, and close relationships.[18] It sets the course for our current and *future* selves.[19] It is indispensable for identity development, love, belonging, and equality.[20]

Although intimate privacy is fundamental to our lives, our failure to appreciate its significance has led to its under-protection. As I argue in my forthcoming book, intimate privacy should be recognized and protected as a civil right, by which I mean a basic entitlement for all *and* a commitment to non-discrimination.[21] Understanding intimate privacy as a civil right would clarify its moral significance. It would draw proper attention to the structural damage wrought by its violation—a majority of victims are women, minorities, or LGBTQ+ individuals, often with multiple, intersecting marginalized identities (as was true for Carla).[22] It would give us the vocabulary to express clearly and unequivocally to victims and the groups to which they belong that their intimate privacy matters, that the unwanted exposure of their intimate images will not be tolerated, and that content platforms bear responsibility to protect them.[23]

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might think sexual privacy only involves the parts of our lives that we associate with sex, sexual orientation, and sexual activity. As my work has made clear, the concept concerns all aspects of intimate life, which includes but is not limited to sex. Citron, *supra* note 13, at 1874. Nonetheless, it is best to clarify matters by using the term intimate privacy.

[18] *See* Citron, *supra* note 13, at 1882 (highlighting sexual privacy's value for "sexual autonomy, identity development, and intimate relationships").

[19] *See id.* (emphasizing that sexual privacy is integral to current experiences, such as sexual autonomy and relationships, as well as future growth, such as identity development).

[20] *Id.*

[21] CITRON, *supra* note 3 (manuscript at 13). In my book, I draw on legal philosopher Robin West's conception of civil rights—by which she means "natural or human rights" that enable "our most fundamental human capabilities." ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 157 (2019). Civil rights are entitlements that let us "thrive" and "enter and participate in civil society," feel like we belong, and engage as citizens. *Id.* at 114. Understanding civil rights as fundamental rights with basic entitlements has a rich history. *See* MARY WOLLSTONECRAFT, VINDICATION OF THE RIGHTS OF WOMAN: WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS 280–317 (The Floating Press 2010) (1792) (arguing that education is a fundamental entitlement); GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 9 (2013) (explaining that the federal Civil Rights Act of 1866 protected common law rights like the right to property because they were fundamental to participation in civil society); G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME II: FROM RECONSTRUCTION THROUGH THE 1920S, at 10 (2016) (stating that the Civil Rights Act ensured that all rights would be "afforded to blacks as well as whites"); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 147 (2007) (highlighting how lawyers at the Department of Justice's Civil Rights Section in the 1940s focused on eliminating barriers to free labor because it was a fundamental right).

[22] Citron, *supra* note 13, at 1881 (emphasizing that sexual privacy "deserves special protection" because it significantly impacts various groups).

[23] *Id.* at 1893 (using the first-hand experience of a novelist to highlight the importance of recognizing invasions of sexual privacy, especially when one belongs to a marginalized group); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 377 (2009) (demonstrating the benefits to women once cyber harassment is understood as gender discrimination, not a triviality to be ignored).

Recognizing intimate privacy as a civil right would lay the foundation for its vigorous protection. Reform efforts should include the adoption of legislation recognizing the propriety of injunctive relief in cases involving intimate privacy violations. Congress should amend Section 230 so that sites and other content platforms that enable intimate privacy violations can be sued for injunctive relief and attorney's fees.

This piece explores the role of the privacy injunction in protecting intimate privacy.[24] Part I highlights the ongoing nature of certain intimate privacy violations and the harm that is continuously inflicted. Part II proposes legal reforms and notes some First Amendment concerns and parallel efforts outside the United States. Part III suggests a potential market development that can provide relief as we wait for the law to protect intimate privacy as vigorously and completely as it should. Legal reform and market efforts, domestic and international, would help victims mitigate the damage, even though they could not undo the harm already suffered.

I. NEVER ENDING VIOLATION

This Part explores the damage that individuals suffer when their intimate images, real or fake, are posted online and how a federal law has insulated from liability the parties in the best position to help minimize the damage.

A. The Suffering

When people's intimate images—whether real (like nonconsensual pornography) or fake (like deepfake sex videos)—are disclosed without their permission, the damage can be profound. To better understand why, we need to acknowledge the visceral power of photographs and video recordings.

Photographic and recorded images grab our attention. They "imprint in our brains in ways so similar to lived experience."[25] We take them as the truth on

[24] Individuals violate intimate privacy in a host of ways (and surely will continue to do so in many more ways in the future, regrettably), including video voyeurism (where people are recorded without consent as they undress, shower, go to the restroom, have sex, etc.); upskirt and down shirt photographs (where photographs or videos are taken up people's skirts or down their blouses without their permission); sextortion (where people's nude images are used to extort more nude images and sexually explicit photographs and videos); nonconsensual pornography (where people's intimate images are disclosed without consent); deep fake sex videos (where people's faces are swapped into porn, often realistically, without their permission); and cyber flashing (where people's phones are bombarded with sexually explicit material without their permission, often by using the AirDrop feature on phones). CITRON, *supra* note 3 (manuscript at 58); Citron, *supra* note 13, at 1878.

[25] Jessica Silbey, *Persuasive Visions: Film and Memory*, 10 LAW, CULTURE & HUMANS 24, 31 (2014).

the notion that our eyes and ears do not lie to us.[26] Susan Sontag said the following about her craft: "Photographs furnish evidence. Something we hear about, but doubt, seems proven when we're shown a photograph of it."[27] Writing in 1859, Oliver Wendell Holmes Sr. described the then-new medium of photography as "the mirror with a memory."[28] Fake images can be just as potent, as "[s]tudies have shown that doctored photographs can implant and alter childhood and adult memories."[29]

Victims deal with this potency when they learn that their intimate images—real or fake—have been posted online without permission. They understand that their intimate images will stick in people's minds. Once people have seen their intimate images posted online, it is hard for victims to shake the feeling that other people have seen them naked, people who they do not want to see them naked.

Knowing that others—potentially many, many others—have seen one's naked (or partially naked) body or sex acts can be shattering to self-esteem. Victims are robbed of the core belief that their bodies are their own.[30] Unwanted exposure of our naked bodies makes us acutely aware that others see us as objects that can be violated rather than as human beings accorded respect. Victims describe feeling "virtually raped."[31] Philosopher Jean-Paul Sartre talked about the phenomenon of "[p]ure shame"—shame not because others know something undesirable about us but rather because others see us as objects, as less than human.[32] Victims internalize the view that they are just their genitals, breasts, or buttocks.[33] The unwanted exposure of their nude bodies and sexual activities gives them a "diminished status."[34]

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[26] *Id.* at 26 (explaining that the power of film "derives at first from the intensity of the personal faith in believing what we see"); Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Crisis for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1786 (2019).

[27] SUSAN SONTAG, ON PHOTOGRAPHY 3 (1973).

[28] Corydon Ireland, *The 'Mirror with a Memory*,*'* HARV. GAZETTE (Apr. 15, 2013), https://news.harvard.edu/gazette/story/2013/04/the-mirror-with-a-memory/.

[29] HANY FARID, DIGITAL DOCTORING: CAN WE TRUST PHOTOGRAPHS? 8 (n.d.), https://farid.berkeley.edu/downloads/publications/deception09.pdf (discussing these studies).

[30] Citron, *supra* note 13, at 1886.

[31] *Id.* at 1925.

[32] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY IN PHENOMENOLOGICAL ONTOLOGY 264 (Hazel E. Barnes trans., Citadel Press 2001) (1956).

[33] *See id.* at 264–65.

[34] MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 363 (2013).

Consider the experience of Indian journalist Rana Ayyub, whom the Modi government sought to discredit by releasing a deepfake sex video of her.[35] As Ayyub explained to me, seeing the video was a "punch to the gut."[36] Intellectually, she knew that it was not her naked breasts and mouth in the clip, that the body performing the sex act was not actually her body.[37] But no matter, she experienced the video as if it was her.[38] Ayyub vomited the first time that she saw it. After the clip went viral, she felt like there were millions of eyes on her body. She could not shake the feeling that people had seen her engaged in a sex act.[39]

Feelings of shame and alienation are paired with physical, emotional, and psychological trauma, including anxiety, depression, and PTSD.[40] Ninety-three percent of the victims surveyed by the Cyber Civil Rights Initiative (CCRI)—of which I am the Vice President—reported suffering "significant emotional distress."[41] Nearly fifty percent of survey respondents "ha[d] been harassed or stalked online" by people who had seen their intimate images; thirty percent were harassed or stalked either in person or on the phone by people who saw the images.[42]

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.[43] They have a hard time trusting other people.[44] They routinely withdraw from online and offline activities. They delete

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[35] Rana Ayyub, *I Was the Victim of a Deepfake Porn Plot Intended to Silence Me*, HUFFINGTON POST, https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316 (Nov. 21, 2018).

[36] Skype Interview with Rana Ayyub, Journalist, Wash. Post (May 9, 2019) (notes on file with author).

[37] *Id.*

[38] *Id.* Ayyub showed me the clip as we sat together in a cafe in Washington D.C., and it was unmistakably her, though, of course, not her.

[39] *Id.* The deepfake sex video was believed to be on more than half of the cellphones in India; that is more than 500 million people. *Id.*; Ayyub, *supra* note 35; *I Was Vomiting: Journalist Rana Ayyub Reveals Horrifying Account of Deepfake Porn Plot*, INDIA TODAY (Nov. 21, 2018), https://www.indiatoday.in/trending-news/story/journalist-rana-ayyub-deepfake-porn-1393423-2018-11-21.

[40] Citron, *Why Sexual Privacy Matters for Trust*, *supra* note 14, at 1208.

[41] CYBER C.R. INITIATIVE INC., END REVENGE PORN: A CAMPAIGN OF THE CYBER CIVIL RIGHTS INITIATIVE, INC. 1 (n.d.), https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf.

[42] *Id.*

[43] *Id.* at 2.

[44] *See* Citron, *Why Sexual Privacy Matters for Trust*, *supra* note 14, at 1193.

their social media accounts.[45] They stop checking their email or texts for fear that strangers have contacted them there.[46]

Women, racial minorities, people with disabilities, and LGBTQ+ individuals shoulder a disproportionate share of intimate privacy violations, with unique damage suffered by them and the groups to which they belong.[47] As Martha Nussbaum explains, "sexuality is an area of life in which disgust often plays a role."[48] In nearly "all societies, people identify a group of sexual actors as disgusting or pathological, contrasting them with 'normal' or 'pure' sexual actors."[49] Groups deemed pathological include those who do not fall in line with heteronormativity—e.g., women who have more than one sexual partner, LGBTQ+ individuals, and individuals in multiple sexual relationships.[50] If they have more than one marginalized identity, then those attitudes combine in a toxic brew.[51] Victims from these groups often absorb invidious stereotypes and "controlling images," as Patricia Collins Hill aptly describes them.[52] They believe that their bodies are shameful, that their suffering is *their* fault.[53]

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[45] 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 C.R. INITIATIVE, *supra* note 41, at 2.

[46] This theme persists in my interviews with victims. *Id.*; CITRON, *supra* note 3 (manuscript at 58–59).

[47] The majority of nonconsensual pornography victims are female. Citron, *supra* note 13, at 1919–20. LGBTQ+ individuals are more likely to experience nonconsensual porn than heterosexual individuals. *Id.* at 1920. Of the nearly 50,000 deep fake sex videos online in 2020, the overwhelming majority of them swapped *female* faces into porn without consent. *See, e.g.*, *Sensity*, I AMSTERDAM, https://www.iamsterdam.com/en/business/key-sectors/ai/testimonials/sensity (last visited Apr. 3, 2022); HENRY AJDER, GIORGIO PATRINI, FRANCESCO CAVALLI & LAURENCE CULLEN, THE STATE OF DEEPFAKES: LANDSCAPE, THREATS, AND IMPACT 1, 2 (2019), https://regmedia.co.uk/2019/10/08/deepfake_report.pdf (explaining that of the nearly 15,000 deepfake videos online, most were deepfake porn and 99% of the deepfake porn involved women).

[48] MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 17 (2010).

[49] *Id.*

[50] *Id.* at 17–18.

[51] *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244, 1266 (1991) (noting "women of color [are] marginalized within both" intersectional identities); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 159 ("[S]exist expectations of chastity and racist assumptions of sexual promiscuity combined to create a distinct set of issues confronting Black women.").

[52] PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 5 (2d ed. 2002) (2000); *see* PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 28–29, 50–51 (2004). For a powerful exploration of controlling images and their destruction on Black women, see generally TRESSIE MCMILLAN COTTOM, THICK: AND OTHER ESSAYS (2019).

[53] Citron, *supra* note 13, at 1898.

Heterosexual men experience a distinct kind of shame when their nude images are posted online: they feel embarrassed and emasculated.[54] The toxic masculinity that "degrade[s]" white women, women of color, disabled women, and LGBTQ+ individuals also says that white, cis-gender heterosexual men should feel ashamed for—as CCRI President Mary Anne Franks has brilliantly put it—"feel[ing] like a woman."[55]

Victims' careers are on the line. Employers decline to interview or hire them because their search results feature "'unsuitable' photographs."[56] They lose their jobs and have difficulty obtaining new ones.[57] They live with the fear that their professional reputations will be forever tarnished.[58]

The suffering is all the worse when intimate images remain online.[59] Victims describe living in "utter fear" because they know that their intimate images can be viewed, shared, and reposted at any time.[60] Museum curator and art historian Kara Jefts described her ex-boyfriend's posting of her nude images as an "incurable disease."[61] She routinely searched her name and checked adult sites to see if more photos were posted.[62]

As Australian researchers have put it, the "ongoing, existential threat" that intimate images will be viewed and others will appear "cast[s] a shadow over

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[54] LAW COMM'N, INTIMATE IMAGE ABUSE: A CONSULTATION PAPER 134 (2021), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf.

[55] Mary Anne Franks, *How to Feel Like a Woman, or Why Punishment is a Drag*, 61 UCLA L. REV. 566, 568 (2014).

[56] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 8 (2014) [hereinafter CITRON, HATE CRIMES IN CYBERSPACE]; Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 80 (2009) [hereinafter Citron, *Cyber Civil Rights*].

[57] Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back*, JEZEBEL (July 18, 2018, 2:20 PM), https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768; Jessica M. Goldstein, *'Revenge Porn' Was Already Commonplace. The Pandemic Has Made Things Even Worse*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html.

[58] CYBER C.R. INITIATIVE, *supra* note 41, at 2 (finding that fifty-seven percent of victims fear how nonconsensual pornography will damage their professional advancement; thirty-nine percent say that the privacy violation has impeded their ability to network).

[59] 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 56 (2021).

[60] *Id.*

[61] Zoom Interview with Kara Jefts (Aug. 14, 2020) (notes on file with author); Charlotte Alter, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017, 5:00 AM), https://time.com/4811561/revenge-porn/.

[62] Interview with Jefts, *supra* note 61.

victim-survivors' lives."[63] A woman (who the researchers interviewed) observed that "there's such a level of permanence which affects everything . . . especially if it's impossible to take photos down . . . . There will never be a day in my entire lifetime that all of the images of me could ever be deleted."[64]

As long as intimate images posted without consent remain online, the wrongful privacy violations continue. So too does the damage to individuals and the groups to which they belong—those group members see the violations as proof that they have no intimate privacy to claim and that their bodies and sexual activities can be exposed without their permission.

B. Law's Limits

Violations of intimate privacy exact profound harm, yet victims cannot sue the party in the best position to minimize that harm—online platforms. Why not? A hard-copy magazine that published user-submitted nonconsensual intimate images could be sued for privacy violations.[65] A brick-and-mortar business that enabled crimes could face lawsuits for aiding and abetting illegal activity.[66] But when those activities occur online, companies are shielded from legal liability.

The law responsible for this state of affairs is Section 230 of the CDA.[67] Congress passed Section 230 just as the commercial internet was taking off. In 1995, Representatives Chris Cox and Ron Wyden wanted the internet to be open and free, but they realized that openness risked the posting of abusive and "offensive" content.[68] They knew that federal agencies could not deal with all of the "noxious material" online.[69] They wanted technology companies to help moderate—remove, block, and filter—troubling online content.[70]

A New York trial court, however, threatened the possibility that companies would voluntarily moderate online content by ruling that efforts to remove and block user-generated content (and doing so incompletely) risked *increasing* their responsibility for defamation online.[71] The case, *Stratton Oakmont, Inc. v.*

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[63] HENRY ET AL., *supra* note 59, at 58.

[64] *Id.* at 56.

[65] Citron, *supra* note 9, at 1819–21.

[66] *Id.* at 1836–38 (discussing claims for tortious enablement of criminal conduct).

[67] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 56, at 170.

[68] *Id.*; Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 406 (2017); Citron, *Cyber Civil Rights*, *supra* note 56, at 116 n.377.

[69] Citron & Wittes, *supra* note 68, at 403.

[70] *Id.* at 404–06.

[71] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

Prodigy Services Company, involved a securities firm run by the self-proclaimed "Wolf of Wall Street," Jordan Belfort.[72] On a message board hosted by internet service provider Prodigy, someone accused Belfort's firm of defrauding investors.[73] Belfort and his firm sued Prodigy for hosting allegedly defamatory posts.[74] Prodigy argued that it was not a publisher like a newspaper, so it could not be liable for defamation that it knew nothing about.[75] The court disagreed, ruling that Prodigy would be treated as a publisher because it acted like a publisher in using filtering software to edit out and remove profanity.[76] The ruling told the early internet companies that engaging in content moderation was a risky proposition.[77] It is an understatement to say that the ruling was an anathema to federal lawmakers.[78]

To nullify the ruling in *Stratton Oakmont* and to incentivize private efforts at moderating online content, Cox and Wyden drafted Section 230(c).[79] The title of that provision—"Protection for 'Good Samaritan' blocking and screening of offensive material"—reflects its goal.[80] Section 230(c)(1) addresses the problem of under-filtering, exemplified by *Stratton Oakmont*. It provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[81] Section 230(c)(2) specifies broad protections for over-filtering:

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[72] *Id.* at *1; ROBBY SOAVE, TECH PANIC: WHY WE SHOULDN'T FEAR FACEBOOK AND THE FUTURE 54–55 (2021).

[73] *Stratton Oakmont*, 1995 WL 323710, at *1.

[74] *Id.* at *2. The irony, of course, is that Belfort likely knew that the posts were true—he subsequently faced criminal charges for running a boiler room that defrauded investors with pump and dump stock sales. He pleaded guilty to fraud, served twenty-two months in prison, and was ordered to pay back $110.4 million to people he defrauded. Since finishing his sentence, Belfort has made a living as a motivational speaker. He wrote a book about his crimes called *The Wolf of Wall Street*, which was made into a movie starring Leonardo DiCaprio. At a speech that he gave in 2014, he said of his criminal career, "'I got greedy,' . . . . 'Greed is not good.'" Stefania Bianchi & Mahmoud Habboush, *Wolf of Wall Street Belford Is Aiming for $100 Million Pay*, BLOOMBERG (May 19, 2014, 9:05 AM), https://www.bloomberg.com/news/articles/2014-05-19/wolf-of-wall-street-belfort-sees-pay-top-100-million-this-year; *Jordan Belfort*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jordan_Belfort (last visited Apr. 21, 2022).

[75] *Stratton Oakmont*, 1995 WL 323710, at *3.

[76] *Id.* at *4.

[77] *See id.* at *5.

[78] *See* 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Bob Goodlatte) (arguing Prodigy should in "no way" be responsible to edit information coming from any manner of sources to its bulletin board).

[79] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 56, at 170; *see also* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019) (providing a foundational, engrossing account of the passage of § 230 and the statute's interpretation in the judiciary).

[80] 47 U.S.C. § 230(c) (2018).

[81] *Id.* § 230(c)(1).

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.[82]

This legal shield does not apply to violations of federal criminal law, intellectual property claims, the Electronic Communications Privacy Act, and, as of 2018, the knowing facilitation of sex trafficking.[83]

Although the point of Section 230 was to incentivize "Good Samaritan" efforts to moderate online content, it has done far more than that, thanks to overbroad judicial decisions.[84] Courts have extended Section 230's legal immunity to sites that Benjamin Wittes and I argue constitute "Bad Samaritans."[85] Sites have been shielded from liability related to "unlawful activity on their systems—even when they actively encourage such activity or intentionally refuse to address it."[86]

The statute's legal shield has been interpreted to negate any and all remedies, even ones that are easy and inexpensive to administer and would significantly improve victims' situations.[87] For instance, the California Supreme Court ruled that Section 230 excused the review site Yelp from complying with a court order to remove defamatory content posted by a user.[88]

Bad Samaritan sites hosting Carla's nude images, for example, cannot be ordered to remove them. They enjoy immunity from liability for tort claims and

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[82] *Id.* § 230(c)(2).

[83] *Id.* § 230(e).

[84] Citron & Wittes, *supra* note 68, at 407.

[85] *Id.* at 408–09.

[86] *Id.* at 406–07.

[87] *Id.* at 413–14.

[88] Hassell v. Bird, 420 P.3d 776, 779 (Cal. 2018). The court order was entered on a default judgment. *Id.* at 781. The plaintiffs (a lawyer and a law firm) sued Ava Bird for defamation, false light, and intentional infliction of emotional distress in connection with her review of the firm on Yelp. *Id.* at 779–80. After the defendant failed to appear in court, the plaintiffs moved for a default judgment. *Id.* at 780. The trial court held an evidentiary hearing and then ruled in favor of plaintiffs and ordered Bird to remove the defamatory reviews. *Id.* at 780–81. After Bird failed to remove the posts, plaintiffs served a copy of the default judgment on Yelp, leading to Yelp's motion to set aside the judgment on the grounds of Section 230, which was denied. *Id.* at 781. The California Court of Appeals found that the trial court properly extended the order for injunctive relief to reach Yelp even though Yelp was not a party in the case. *Id.* at 782. It ruled that the trial court had the authority to require Yelp to remove the statements deemed defamatory because the injunction prohibiting Bird from repeating those statements was issued after a trial deemed those statements defamatory. *Id.* The California Supreme Court ruled that the trial court had no authority to require Yelp to remove the defamatory statements. *Id.*

requests for injunctive relief. Section 230 prevents the law from helping victims pressure sites to remove intimate images posted without permission. To this problem, I now turn.

II. REFORMING AVAILABLE REMEDIES

This Part explores legal reforms that will give victims what they want: the removal of their intimate images. This Part follows up that discussion with a short analysis of the First Amendment implications and some observations about synergies with approaches outside the United States.

A. Proposals

Lawmakers need to amend Section 230 so platforms that enable those violations can be sued. Congress should amend the statute to clarify that content platforms and search engines can be sued for injunctive relief and attorney's fees in cases involving violations of intimate privacy.[89]

Next, we need legislation empowering courts to issue injunctive relief that directs content platforms to remove, delete, or otherwise make unavailable intimate images, real or fake, that they have hosted without written permission. Such legislation should permit the recovery of attorney's fees. Clear legislative permission is crucial because courts are often reluctant to order injunctive relief without it.[90]

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[89] This is a modest part of my more comprehensive proposal to reform the under-filtering provision of Section 230, which shields platforms from liability for publishing or speaking information provided by someone else. 47 U.S.C. § 230(c)(1). In 2017, Lawfare Editor in Chief Benjamin Wittes and I teamed up to write the statutory language that federal legislators could use to reform that provision. Citron & Wittes, *supra* note 68, at 418–19. We built on my proposal for a reasonableness standard for platform liability in Citron, *Cyber Civil Rights*, *supra* note 56. We proposed that Section 230(c)(1)'s legal shield be conditioned on a showing that a content platform took "reasonable steps to prevent or address unlawful uses of its services." Citron & Wittes, *supra* note 68, at 419 (emphasis omitted); *see also* Danielle Keats Citron & Mary Anne Franks, *The Internet as Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 71 (conditioning the shield on taking "reasonable steps to address unlawful uses of its service that clearly create serious harm to others" (emphasis omitted)). The concept of unlawfulness refers to activities that would violate law on the books. I presented that approach before the House Permanent Select Intelligence Committee and the House Energy and Commerce Committee. *The National Security Challenge of Artificial Intelligence, Manipulated Media, and "Deep Fakes": Hearing Before the H. Permanent Select Comm. on Intel.*, 116th Cong. 9 (2019) (statement of Danielle Keats Citron, Professor, Univ. of Md. Francis King Carey Sch. of L.) (available at https://docs.house.gov/meetings/IG/IG00/20190613/109620/HHRG-116-IG00-Wstate-CitronD-20190613.pdf); *Fostering a Healthier Internet to Protect Consumers: Hearing Before the H. Comm. on Energy & Com.*, 116th Cong. 3 (2019) (statement of Danielle Keats Citron, Professor, Bos. Univ. Sch. of L.) (available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_Citron.pdf).

[90] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24 (2008).

This proposal follows in the civil rights tradition. A cornerstone of civil rights cases is injunctive relief.[91] Injunctive relief has safeguarded important rights by stopping entities from continuing discriminatory practices and requiring them to redesign structures that impede equality.[92] For instance, judges have ordered stores to rearrange their furniture so that wheelchair users could have equal access to and enjoyment of their services as required by the Americans with Disabilities Act of 1990.[93]

Injunctive relief is crucial for what it will *say* and *do* for victims and the groups to which they belong. As Rachel Bayefsky has argued, a crucial remedial task for courts is to "express respect for [people's] dignity."[94] A plaintiff's dignity is violated when they have been "treated as though [they do] not adequately matter; . . . excluded from a relevant social group; and . . . exposed in compromising ways."[95] Remedies express respect for a plaintiff's dignity when they send "the message that the plaintiff occupies a status higher than that of someone who could rightfully be treated in the way the defendant treated the plaintiff."[96] And they express respect for a plaintiff's dignity when they

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[91] OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4, 6 (1978); *see, e.g.*, The Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a) (2018). In some cases, like the Americans with Disabilities Act (ADA) of 1990, injunctive relief is the exclusive remedy. *Id.* §§ 12101–213. In a series of lectures, Owen Fiss explored the early-nineteenth-century use of injunctions to halt labor strikes and prevent state attorneys general from enforcing progressive legislation. FISS, *supra*, at 3–4. *Brown v. Board of Education*, decided in 1954, "gave the injunction a special prominence," saving it from its earlier disrepute. *Id.* at 4. Soon, judges extended the injunction to civil rights cases more generally. *Id.* A backlash to civil rights reform ensued, with resistance to *Brown* and structural injunctions issued to carry out its mandate in the 1960s and 1970s. *Id.* at 5. The backlash notwithstanding, the civil rights cases taught a crucial lesson about the *value* of injunctions—that there should not be a hierarchy of remedies with injunctions at the bottom. *Id.* at 6. Instead, injunctions may be precisely the right remedy to alter the status of a group. *Id.* at 87.

[92] FISS, *supra* note 91, at 4.

[93] Kalani v. Starbucks Corp., 117 F. Supp. 3d 1078, 1092 (N.D. Cal. 2015), *aff'd in part, vacated in part*, 698 F. App'x 883 (9th Cir. 2017); *see also* Long v. Coast Resorts, Inc., 267 F.3d 918, 925–26 (9th Cir. 2001) (finding a hotel violated the ADA in multiple ways and that the plaintiff was entitled to injunctive relief).

[94] Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266–67 (2021) [hereinafter Bayefsky, *Remedies and Respect*]. Bayefsky has done other crucial work along these lines. *See* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2333 (2018) (discussing the effect of the tangibility and intangibility distinction between harms for standing purposes and effect on different types of cases, including those involving discrimination); Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1587 (2016) (discussing psychological harm, such as discrimination, and standing).

[95] Bayefsky, *Remedies and Respect*, *supra* note 94, at 1289. Bayefsky explains that dignitary harms include individual harms—like "relegating the victim to a lower-than-deserved status"—and collective harms—like expressing disrespect to fellow members of the broader group to which the individual belongs. *Id.* at 1292. This accords with my view of the dignity denials inherent in the exposure of intimate information and images. *See id.* at 1289 n.200, 1312 n.384 (citing Citron, *Mainstreaming Privacy Torts*, *supra* note 9, and Citron, *Sexual Privacy*, *supra* note 13).

[96] *Id.* at 1313.

"require[] the defendant to act in the manner that would be warranted if the defendant had viewed the plaintiff with respect."[97] Dignity-expressing remedies are "an appropriate response to a legal violation that imposes dignitary harm," with such violations including "discriminat[ion] against members of a group based on a stigmatized trait" and "undue exposure, as with violations of privacy."[98] They "can take effect through a court's order to a defendant to take some action or to refrain from taking some action."[99]

Intimate privacy violations deserve dignity-expressing remedies, including privacy injunctions. Injunctive relief—in the form of a court order directing the removal of nonconsensual intimate images—would have sites treat victims with the respect that they deserve, rather than as the purveyors of their humiliation. It would have them honor victims' autonomy and wishes regarding the nondisclosure of their intimate images.

Court orders to remove nonconsensual intimate images would change the social meaning of hosting nonconsensual pornography, as Carla experienced, and deepfake sex videos, as Ayyub faced.[100] They would say to victims—and potential victims—that their intimate privacy matters and that sites specializing in intimate privacy violations are not lawless zones where their rights can be violated.[101] They would make clear that victims are not just their naked bodies or sex acts.[102]

The removal of intimate images would allow victims to begin to feel that they determine who has access to their naked bodies and sexual selves. The journey to reclaim their sexual and bodily autonomy, self-esteem and social esteem, and sense of physical safety may proceed slowly—but, at the least, the halting of the privacy violation lets that process begin.

Privacy injunctions would halt the violation from continuing, world without end. It would relegate intimate privacy violations to the past, rather than letting them live online in the present and potentially in perpetuity. It would thwart future harm, although it could not undo past harms.

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97 *Id.* at 1314.

98 *Id.* at 1311–12.

99 *Id.* at 1313.

100 Telephone Interview with Carla, *supra* note 1; Skype Interview with Rana Ayyub, *supra* note 36.

101 *See* Citron, *supra* note 13, at 1921, 1925, 1946 (describing the ways in which invasions of sexual privacy interfere with victims' self-identities).

102 *Id.* at 1884, 1918; Citron, *Why Sexual Privacy Matters for Trust*, *supra* note 14, at 1195; *see also* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 389 (2014) (describing the negative effects of revenge porn, especially on various aspects of the victims' identities and self-understandings).

Some interesting ideas have been percolating along these lines. For instance, the proposed Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UDII Act) allows victims to seek injunctive relief and reasonable attorney's fees and costs for the nonconsensual posting of intimate images except when images concern a matter of public interest.[103] As of 2021, Arkansas, Iowa, South Dakota, Nebraska, and Colorado adopted the UDII Act into law.[104]

New York's Civil Rights Law provides another template. Section 50 of the law recognizes a "[r]ight of privacy" in a living person's "name, portrait or picture" that has been used in advertising or for trade without that person's written consent.[105] Section 51, in turn, permits a court to order injunctive relief to restrain the use of that person's "name, portrait, picture or voice" for advertising or trade purposes without written consent.[106] Courts have granted injunctive relief in cases brought under these sections on behalf of celebrities whose fake nude portraits were used for commercial purposes.[107] Famed boxer and activist Muhammad Ali sued Playgirl Magazine for publishing a portrait of a nude Black man sitting in the corner of a box ring with the tag line, "the Greatest," Ali's catch phrase.[108] The trial court ordered the magazine to stop selling copies of the magazine with Ali's fake nude portrait.[109] The court explained that Ali had a "right . . . 'to be left alone' . . . [to] protect[] '[his] sentiments, thoughts and feelings . . . from [unwanted] commercial exploitation.'"[110]

In borrowing from the UDII Act and New York's Civil Rights Law, lawmakers should extend injunctive relief *beyond* commercial uses of intimate images. They should ensure that injunctive relief applies to truthful intimate images, like nonconsensual pornography, and manufactured intimate images,

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[103] Unif. Civ. Remedies for Unauthorized Disclosure of Intimate Images Act § 6(b) (Unif. L. Comm'n 2018) [hereinafter UDII Act]. The UDII Act also recognizes claims for damages and exemptions for intimate images related to matters of legitimate public interest, both of which I endorse. *Id.* § 4(b)(3); Citron, *supra* note 13, at 1948–49. Franks served as the Reporter for the Uniform Law Commission's committee that drafted this proposal. *See* UDII Act, *supra*.

[104] ARK. CODE ANN. §§ 16-129-101 to 112 (2021); IOWA CODE ANN. §§ 659A.1 to 9 (2022); S.D. CODIFIED LAWS §§ 21-67-1 to 9 (2021); COLO. REV. STAT. §§ 13-21-1401 to 1409 (2021). As of August 2021, there have been no cases brought under these newly enacted laws.

[105] N.Y. CIV. RIGHTS LAW § 50. Section 50 of the New York Civil Rights Law codifies the common law privacy tort of misappropriation. *Id.*

[106] *Id.* § 51.

[107] *See, e.g.*, Ali v. Playgirl, 447 F. Supp. 723, 725 (S.D.N.Y. 1978).

[108] *Id.* at 725, 727.

[109] *Id.* at 732.

[110] *Id.* at 728 (quoting Flores v. Mosler Safe Co., 196 N.Y.S.2d 975, 977–78 (N.Y. App. Div. 1959)).

like deepfake sex videos.[111] They should follow New York's Civil Rights Law in recognizing injunctive relief and attorney's fees against content platforms hosting real or fake intimate images *without the written consent of the people featured in the images* where the intimate images do not concern matters of legitimate public interest.[112] Written consent is practically feasible and crucially important. Sites, for instance, could offer drop down screens that would allow posters to upload the written permission that they received to post the subject's intimate images. Crucially, written consent—if indeed obtained under non-coercive circumstances—would signal that the subject of an image considered and affirmatively agreed to have their image disclosed. It is qualitatively different from presumed consent, which says little to nothing about what the plaintiff knows and permits.[113]

It is true that a court order for one site to remove a plaintiff's intimate image would not automatically apply to a different site. Intimate images often do not just appear on one site. When they are removed from one, perpetrators put them on others. If that happens, victims could show the new sites the court order as proof of the legitimacy of their claims. Sites might be inclined to honor those requests given the likelihood that plaintiffs might bring suit for injunctive relief and attorney's fees against them. If those sites refuse, victims must file a new lawsuit seeking injunctive relief.

Although the process is not ideal, it empowers victims. It clarifies that the law can help them. Counsel will take on their cases because sites usually are not judgment-proof, as most perpetrators are. Victims need to know that society recognizes the damage to their dignity and intimate privacy, that law can help them mitigate the damage, that sites are not law-free zones, and that lawyers will represent them. This approach will do that and more.

B. First Amendment Challenges

What about the argument that the disclosure of intimate images involves protected speech, so it cannot be the basis of civil remedies? When the government regulates speech based on the content of that speech, it usually must satisfy "strict scrutiny review."[114] Strict scrutiny is a tough standard, but it is not

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111 N.Y. CIV. RIGHTS LAW § 51.

112 *Id.*

113 CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 56, at 147–48 (distinguishing explicit consent from presumed consent in privacy contexts).

114 *Id.* at 199.

impossible to meet. It requires a showing that the law serves a compelling interest that cannot be promoted through less restrictive means.[115]

Criminal laws banning nonconsensual pornography, crafted with the help of Dr. Franks and the support of CCRI, have survived the crucible of strict scrutiny constitutional review. The Vermont Supreme Court upheld the state's nonconsensual pornography statute, finding that strict scrutiny was satisfied.[116] The court emphasized that "[f]rom a constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting the disclosure of other categories of nonpublic personal information" like health data.[117] The supreme courts of Minnesota, Illinois, and Indiana similarly upheld nonconsensual pornography statutes on the grounds that they are justified by a compelling government interest and are narrowly tailored to serve that interest.[118]

Now to discuss contexts in which courts would not grant injunctive—or any other—relief because doing so would be inconsistent with First Amendment doctrine and free speech values. Courts likely would not order the removal of intimate images *if* the public would have a legitimate interest in viewing them.[119] But to be clear: just because people want to see someone's intimate images does not transform that desire into a legitimate public interest. This is true for intimate images of people whose intimate lives do not attract attention and celebrities whose intimate lives are public obsessions.

Consider a case involving a sex video made by celebrities Bret Michaels and Pamela Anderson Lee during a romantic relationship.[120] A federal district court ordered an online adult subscription service to stop distributing the sex video, which the couple never agreed to make public.[121] The court ruled that the public had no legitimate interest in graphic depictions of the "most intimate aspects of" a celebrity couple's relationship.[122] The court reasoned that "sexual relations are among the most private of private affairs."[123] According to the court, a video of

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115 *Id.*

116 State v. VanBuren, 214 A.3d 791, 800 (Vt. 2019).

117 *Id.* at 811.

118 State v. Casillas, 952 N.W.2d 629, 644 (Minn. 2020); People v. Austin, 155 N.E.3d 439, 466 (Ill. 2019); State v. Katz, No. 20S-CR-632, slip op. at 2 (Ind. Jan. 18, 2022).

119 Citron, *supra* note 13, at 1948–49.

120 Michaels v. Internet Ent. Grp., 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

121 *Id.*

122 *Id.* at 840.

123 *Id.* at 841.

two people having sex "represents the deepest possible intrusion into such affairs."[124]

That leads to the next logical question: Would the public ever have a legitimate interest in *viewing* nonconsensual intimate images? What about public officials whose personal and public lives matter to voters? The public generally has a right to know about intimate information that sheds light on the credibility, trustworthiness, and fitness for office of both candidates and public officials.[125] By my lights, there can be a vast difference between learning about a public official's intimate information and seeing photographs or videos documenting it. That distinction is worth careful consideration.

Let us turn to the case of former congresswoman Katie Hill, who sued Salem Media, owner of RedState, for publishing semi-redacted nude photos of her.[126] One photo featured her with her female lover (a former campaign staffer); another featured Hill holding a bong.[127] Salem Media asked the California trial court to dismiss the lawsuit under the state's anti-SLAPP (Strategic Lawsuit Against Public Participation) provision, arguing that its publication of the photos involved a matter of public interest that superseded Hill's privacy interest.[128] The court granted the motion and dismissed Hill's suit.[129] The court reasoned that the photos shed light on Hill's fitness for office given her possible recreational drug use and affair with a campaign staffer.[130] The court rejected Hill's argument that the public could learn about those details without having to see the photographs and without invading Hill's intimate privacy.[131] The court refused to credit Hill's argument that publishing the photos was a gratuitous invasion of her privacy.[132]

I am with Hill and her counsel, Carrie Goldberg. Viewing the images themselves amounts to a "morbid and sensational" intimate privacy violation with little upside for public discourse.[133] The public did not need to *see* Hill's nude photos to have a conversation about a consensual relationship that she had with a former campaign staffer and her possession of what looked like drug

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124 *Id.*

125 Citron & Franks, *supra* note 102, at 383.

126 Hill v. Heslep, No. 20STCV48797 (Cal. Super. Ct. L.A. Cnty. Apr. 7, 2021).

127 *Id.* at 7.

128 *Id.* at 2.

129 *Id.* at 16.

130 *Id.* at 11.

131 *Id.* at 12.

132 *Id.* at 17–18.

133 Michaels v. Internet Ent. Grp., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (quoting Diaz v. Oakland Trib., Inc., 188 Cal. Rptr. 762, 767 (Cal. Ct. App. 1983)).

paraphernalia. Salem Media's story could have described the images and what they conveyed to discuss her fitness for office. The trial court, however, disagreed with that assessment and ordered Hill to pay approximately $54,000 to cover Salem Media's attorney's fees.[134]

Most cases involving the nonconsensual disclosure of intimate images will not present close calls about the boundaries of the public's legitimate interest. Most do not involve public officials. Most do not involve candidates for public office. Most involve private individuals, and the public has no legitimate interest in seeing their intimate images unless that is what those individuals want.

C. International Synergies

Empowering individuals and law enforcers with the ability to seek the removal of intimate images would bring the United States into alignment with the approach of other countries. Under the Charter of Fundamental Rights of the European Union ("EU Charter"), Article 7 guarantees "the right to respect for his or her private and family life, home and communications"; Article 8 secures "the right to the protection of personal data," including the fair processing of data "on the basis of the consent of the person concerned or some other legitimate basis laid down by law"; and Article 11 guarantees the freedom "to receive and impart information and ideas without interference by public authority."[135]

My proposal for injunctive relief is similar to the approach of the European Union's General Data Protection Regulation (GDPR) and judicial interpretations of the EU Charter.[136] Article 17 of the GDPR enables individuals to request that personal information that is "no longer necessary" be deleted or removed.[137] Article 9 of the GDPR prohibits the "[p]rocessing of personal data revealing" information about "a . . . person's sex life or sexual orientation" without explicit consent.[138]

For instance, early in 2021, the Norwegian Data Protection Authority (NDPA) indicated that it planned to issue a ten million Euro fine against the gay dating app Grindr for collecting subscribers' sensitive information—including

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[134] Text Message from Carrie Goldberg, Couns. for Katie Hill, to author (Aug. 6, 2021) (on file with author).

[135] Charter of Fundamental Rights of the European Union arts. 7, 8, 11, 2012 O.J. (C. 326) 397, 398.

[136] Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].

[137] *Id.* art. 17.

[138] *Id.* art. 9.

profile information—without explicit consent as required by Article 9.[139] NDPA gave Grindr advanced notification of the fine and ordered the company to *delete* the intimate information that it unlawfully collected.[140]

Interpreting the EU Charter, the Court of Justice of the European Union (CJEU) recognized a "right to be forgotten" in searches of one's name.[141] In 2010, Mario Costeja González complained to the Spanish Data Protection Authority (DPA) that a local newspaper refused to take down and Google refused to de-link from search results a ten-year-old story about his personal bankruptcy, which had been resolved.[142] The Spanish DPA rejected the complaint about the newspaper as inconsistent with free expression but ordered Google to remove links to the story in searches of the man's name.[143]

The CJEU agreed, finding that search results have a unique and significant impact on the "fundamental right to privacy."[144] It ruled that links should be removed from search results if they contain personal information that is no longer relevant.[145] The court explained that an individual's right to privacy, including the sensitivity of the information, would be balanced against the public's interest in that information.[146] In a subsequent decision, the CJEU found that the right to be forgotten does not apply globally.[147] Google has developed geo-blocking technology that prevents EU citizens from accessing de-indexed articles in the European Union.[148] My proposal would only apply to violations of intimate privacy involving intimate images, whereas the European rights to deletion or de-linking apply more broadly to any and all personal information that is no longer deemed necessary for public knowledge.[149]

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[139] Letter of Advance Notification of an Administrative Fine from Bjørn Erik Thon, Comm'r, Norwegian Data Prot. Auth., to Bryan Cave Leighton Paisner LLP (Jan. 24, 2021) [hereinafter Letter to Bryan Cave] (available at https://www.datatilsynet.no/contentassets/da7652d0c072493c84a4c7af506cf293/advance-notification-of-an-administrative-fine.pdf); Press Release, Norwegian Data Prot. Auth., Norwegian DPA: Intention to Issue €10 million Fine to Grindr LLC (Jan. 26, 2021) (available at https://edpb.europa.eu/news/national-news/2021/norwegian-dpa-intention-issue-eu-10-million-fine-grindr-llc_en).

[140] Letter to Bryan Cave, *supra* note 139; Press Release, Norwegian Data Prot. Auth., *supra* note 139.

[141] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317, ¶ 20 (May 13, 2014).

[142] *Id.* ¶¶ 14, 15.

[143] *Id.* ¶¶ 16, 17.

[144] *Id.* ¶ 87.

[145] *Id.* ¶ 94.

[146] *Id.* ¶ 81.

[147] Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés, ECLI:EU:C:2019:15, ¶¶ 57, 60 (Jan. 10, 2019).

[148] Leo Kelion, *Google Wins Landmark Right to Be Forgotten Case*, BBC NEWS (Sept. 24, 2019), https://www.bbc.com/news/technology-49808208.

[149] GDPR, *supra* note 136, art. 17.

All over the world, privacy and free speech are considered fundamental human rights.[150] The right to privacy or private life and the right to freedom of expression are enshrined in the Universal Declaration of Human Rights and the European Convention of Human Rights.[151] Fundamental rights to privacy and free speech are balanced under the concept of proportionality.[152] The proportionality analysis generally supports far more restrictions on free speech than the First Amendment would allow.[153] But the differences are not as significant for nonconsensual intimate images—especially if those images concern private individuals—as they are in other contexts like hate speech.

We have seen decisions upholding court orders to remove photographs that have gone further than U.S. courts would allow under the First Amendment. In 2012, the European Court of Human Rights (ECHR) decided a case concerning an Austrian magazine article about the Catholic Church.[154] The article was entitled "Porn scandal. Photographic evidence of sexual antics between priests and their students has thrown the diocese of St Pölten in disarray."[155] It included a photograph of the principal of a Catholic seminary with his hand on another man's crotch during a party at his home.[156] The article claimed that the principal had sexual relationships with seminarians.[157]

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150 As civil rights historian Carol Anderson has shown, Eleanor Roosevelt and President Truman dissuaded civil rights advocates, including those at the NAACP, from framing their demands for equality in terms of human rights. CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955, at 2–6 (2003). Behind their argument was the presumption that support for human rights expressed support for communism. *Id.* at 5. The NAACP shifted its campaign to focus on civil rights to avoid the possibility that calls "for true black equality" would be labeled as "subversive, communistic, and even treasonous." *Id.* at 6. Civil rights discourse made sense given its roots in the American tradition and the Bill of Rights. *Id.* Yet, as Anderson explains, the concept of human rights was broader than legal discrimination and could have captured the "education, health care, housing, and employment needs that haunted the black community." *Id.* at 2. My book builds on the work of others—legal philosophers like Robin West and historians like Carol Anderson and Risa Goluboff—that explores the potential for a broader understanding of civil rights: an understanding that not only encompasses a right to be free from discrimination (though it is that) but also to include fundamental rights that everyone should enjoy, including intimate privacy. *See* CITRON, *supra* note 3 (manuscript at 130–31).

151 G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 12, 19 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

152 *See* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 475 (2009).

153 *See infra* notes 154–62 and accompanying text.

154 Verlagsgruppe News GMBH and Bobi v. Austria, App. No. 59631/09 ¶ 6 (Dec. 4, 2012).

155 *Id.* ¶ 8.

156 *Id.* ¶ 9.

157 *Id.*

The principal sued the magazine for violating his privacy rights, as guaranteed by the EU Charter.[158] Austrian courts found that the magazine had the right to publish a story about the Church's hypocrisy and the principal's relationships but not to publish the photograph, which was not necessary to inform the public and just satisfied "an appetite for scandal."[159] The ECHR upheld the injunction as striking an appropriate balance between the newspaper's right to free speech and the principal's right to privacy.[160] The court explained that the magazine could inform the public about the matter without showing the photo of the principal's consensual homosexual relationship.[161] The court emphasized that "a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics," and the right to control the use of one's image is "one of the essential components of personal development," especially when it concerns their consensual relationships.[162]

This case would have come down differently in the United States. U.S. courts would likely find that the public would have a legitimate interest in seeing images attesting to the hypocrisy of religious leaders.[163] Because the photo provided some context for the claim that the priest was in a homosexual relationship and because it did not reveal his naked body at all, a court applying First Amendment doctrine would likely find that it shed light on a public issue in a way that would not constitute a gratuitous invasion of intimate privacy.[164] The photo did not involve nudity or sexually explicit activity, so it would not fall under my proposal. Its publication would not decimate intimate privacy in the way that a photo of someone's nude body or sexually explicit activity would.

III. MARKET INTERVENTIONS

As we wait for legal reform, tech companies have stepped into the breach in important ways, but far more can and should be done. This Part provides a brief recap on recent developments and focuses on potential market interventions that I would like to see expanded.

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158 *Id.* ¶¶ 11, 26.
159 *Id.* ¶ 25.
160 *Id.* ¶¶ 73, 95.
161 *Id.* ¶¶ 81, 82.
162 *Id.* ¶ 68.
163 *See supra* notes 127–32 and accompanying text (discussing Rep. Katie Hill's situation).
164 *See supra* note 132 and accompanying text.

A. Overview of Recent Developments

Google has come a long way in its policy towards nonconsensual intimate images in search results. For years, the company's mantra was that search was sacred.[165] It insisted that search results could not be changed because its search engine was neutral.[166] This was Google's position in 2012 when I began working with company officials in connection with the Anti-Cyberhate Working Group, led by the Anti-Defamation League.[167] This was its position in early 2015 when then-California Attorney General Kamala Harris formed the Cyber Exploitation Task Force to tackle nonconsensual pornography.[168] Google was adamant: no tinkering with search results; not then, not ever.[169]

On June 19, 2015, Google announced that it would treat nonconsensual intimate images like social security numbers and honor requests to remove them from search results in people's names.[170] Victims could finally get their nude images de-indexed from search results in their names.[171] Of course, no single factor prompted Google's policy change, but the CJEU's right to be forgotten decision and the Task Force's work likely played a role.[172]

In 2018, when Carla went to Google to de-link her intimate images from searches of her name, she got a response.[173] She would have to report new postings as they emerged, which took much time and mental energy. But now

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165 Jessica Guynn, *Google to Remove 'Revenge Porn' from Search Results*, USA TODAY (June 19, 2015, 1:00 PM), https://www.usatoday.com/story/tech/2015/06/19/google-revenge-porn-search-results/28983363/.

166 *Id.*

167 *ADL Teams with Internet Industry Leaders to Convene Cyberhate Working Group*, ADL (May 10, 2012), https://www.adl.org/news/article/adl-teams-with-internet-industry-leaders-to-convene-cyberhate-working-group.

168 I was a member of the Task Force and advised the then-AG on privacy matters. *See* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 773–74 (2016); *see* Cal. Dep't of Just., *AG Harris Debuts New Hub of Resources for Law Enforcement, Tech, and Victims of Cyber Exploitation*, YOUTUBE (Oct. 15, 2015), https://www.youtube.com/watch?v=clLB8frv568 (announcing the Task Force). Google was among fifty companies that joined the Task Force in its work. *Id.*

169 *See* Guynn, *supra* note 165 ("Google usually only removes search results with a valid legal request."). Never mind the fact that the company, along with other tech companies, had been altering results to remove public arrest records, photographs, and social security or stolen credit card numbers. Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1272–73 (2017).

170 Guynn, *supra* note 165.

171 *Id.*

172 Right after Google's announcement, Microsoft's Bing and Yahoo! followed suit, agreeing to de-index non-consensually posted nude or sexually explicit images in searches of people's names. *Industry Appendix of Resources on Non-consensual Distribution of Sexually Intimate Images*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/cyberexploitation/appendix (last visited Apr. 21, 2022).

173 Telephone Interview with Carla, *supra* note 1.

things are even easier.[174] On June 10, 2021, Google announced its creation of a new concept called "known victims."[175] For victims of nonconsensual pornography tagged as known victims, the search engine will automatically suppress explicit results from searches of their names (if victims ask Google to do so).[176] Google took this step after New York Times tech reporters Kashmir Hill and Daisuke Wakabayashi ran an article about websites soliciting defamation and charging money to take down the slanderous content.[177]

Facebook spearheaded another important development: the hashing of nonconsensual intimate images.[178] The company had long banned pornography,[179] so this step was not radical. Hashing is described as the following:

> [A] mathematical operation that takes a long stream of data of arbitrary length, like a video clip or string of DNA, and assigns it a specific value of a fixed length, known as a hash. The same files or DNA strings will be given the same hash, allowing computers to quickly and easily spot duplicates.[180]

In essence, hashes are digital fingerprints, each one unique. In conjunction with Microsoft, computer scientist and CCRI Board member Hany Farid developed PhotoDNA hash technology, which blocks, filters, and removes content that matches the hashes.[181]

Hashing has long been used to deal with child sex abuse material (CSAM). The National Center of Missing and Exploited Children (NCMEC) collects hashes of CSAM, storing them in a centralized database.[182] With access to the NCMEC database, tech companies can filter or block online content containing

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174 *Id.*

175 Kashmir Hill & Daisuke Wakabayashi, *Google Seeks to Break Vicious Cycle of Online Slander*, N.Y. TIMES, https://www.nytimes.com/2021/06/10/technology/google-algorithm-known-victims.html (June 22, 2021).

176 *Id.*

177 *Id.* Sites peddling nonconsensual intimate images engaged in the same extortionist racket until (then-AG) Harris's office prosecuted three site operators for extortion, which was not barred by Section 230 because it was the site operators' extortionist conduct at issue, not user-generated content. *See* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 56, at 175–76.

178 Citron, *supra* note 13, at 1955.

179 *Id.*

180 Jamie Condliffe, *Facebook and Google May Be Fighting Terrorist Videos with Algorithms*, MIT TECH. REV. (June 27, 2016), https://www.technologyreview.com/2016/06/27/159096/facebook-and-google-may-be-fighting-terrorist-videos-with-algorithms/.

181 Citron, *supra* note 13, at 1955 n.559.

182 *Taking the Child Exploitation Fight to the Cloud*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. (Nov. 2, 2017), https://www.missingkids.org/blog/2019/pre-update/fight-to-the-cloud.

hashed images.[183] Tech companies avail themselves of the database.[184] Self-interest is clearly afoot. Federal criminal law is exempt from Section 230 immunity, which means that publishing CSAM runs the risk of federal criminal liability for publishing child pornography.[185] That makes a considerable difference, and it is why you will not find CSAM on popular social media sites.

On Facebook, hashing techniques are being used to tackle nonconsensual pornography.[186] As of 2014, Facebook "banned nonconsensual intimate images in its [TOS]."[187] The company removed nonconsensual intimate images in response to reports of TOS violations but did nothing else.[188] That allowed people to repost the images on the site.[189] Facebook changed its policy in April 2017.[190] After individuals submitted reports of nonconsensual intimate images, the company's "specially trained representative[s]" designated images for hashing if they violated the company's ban on nonconsensual porn, allowing photo-matching technology to prevent the images from reappearing on Facebook and Instagram.[191] Facebook's storage of the hashed images posed little risk to intimate privacy because after images were hashed, the hashes were "the only remnant of that process."[192] Facebook removed and destroyed the intimate images.[193] As computer scientists explain, it is exceptionally difficult to reverse engineer a hash back to the original image.[194]

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183 Stephanie Mlot, *'Hash List' to Help Google, Facebook, More Remove Child Porn*, PC MAG. (Aug. 11, 2015), https://www.pcmag.com/news/hash-list-to-help-google-facebook-more-remove-child-porn.

184 *Id.*

185 CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 56, at 172.

186 Citron, *supra* note 13, at 1955.

187 *Id.*

188 *Id.*

189 CITRON, *supra* note 3 (manuscript at 202). For that reason, Franks and I urged Facebook to adopt a hashing program. Citron, *supra* note 13, at 1955. Franks "urged tech companies to adopt hash strategies to filter and block . . . nonconsensual porn" starting in 2014. *Id.* at 1955 n.560.

190 Citron, *supra* note 13, at 1955.

191 *Id.*

192 *Id.* at 1956.

193 *Id.*

194 *Id.* I have explored other developments at Facebook involving hash technology elsewhere. *See id.* at 1956–57. A partnership with "Australia's e-safety commissioner" allowed victims to submit intimate images to Facebook that someone had threatened but not yet posted so that the images could be hashed and preempted from appearing on Facebook and Instagram. *Id.* The pilot program is now part of Facebook's practices and has been extended beyond Australia to include Brazil, Canada, Italy, New Zealand, Pakistan, Taiwan, the United Kingdom, and the United States, with trusted partners in those countries working with Facebook, including CCRI. *NCII Pilot*, FACEBOOK, https://www.facebook.com/safety/notwithoutmyconsent/pilot/partners (last visited Apr. 21, 2022).

B. International Hash Database

There have been developments related to CSAM that should be extended to nonconsensual intimate images. The Internet Watch Foundation (IWF), a nonprofit organization located in Cambridge, England, has been combatting the spread of CSAM since 1996.[195] Although some financial assistance comes from the European Union, the group's funding primarily comes from internet companies.[196] In 2015, IWF teamed up with Microsoft's cloud service to enable the sharing of a hash list of CSAM images with online platforms like Facebook, Google, Twitter, and Yahoo.[197] Images come from reports to the hotline, the group's own research, and the U.K. Home Office's Child Abuse Image Database.[198] IWF has forty-three "portals" in Africa, Asia, Europe, and the Americas so that companies all over the world can report CSAM for inclusion in the hash list.[199] IWF's analysts assess reported material to confirm that it is CSAM before hashing it.[200] IWF says of its mission, "We have to act quickly. The longer an image stays live, the more opportunity there is for offenders to view and share it, and more harm is caused to the victims. In partnership with the online industry, we push to secure the rapid removal of this content."[201]

We need an IWF-like effort to combat nonconsensual intimate images. Online platforms should have access to a hash list of nonconsensual imagery so that they can filter, remove, and block them. Such an effort would scale up what victims want: for their clients, colleagues, friends, and loved ones not to see their intimate images. To be sure, a nonprofit devoted to nonconsensual porn would need to appreciate what nonconsensual porn is and what it is not. You cannot just look at a nude photo and make the judgment. Reviewers need facts suggesting that the image's subject did not consent to its sharing or disclosure. Without a human's holistic review of the facts, anti-porn activists could hijack the effort. Because a hash list can effectively blacklist images from the internet,

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195 *Our History*, INTERNET WATCH FOUND., https://www.iwf.org.uk/about-us/why-we-exist/our-history/ (last visited Apr. 21, 2022).

196 INTERNET WATCH FOUND., TRUSTEES' REPORT & FINANCIAL STATEMENTS: FOR THE YEAR ENDED 31 MARCH 2021, at 37 (2021), https://www.iwf.org.uk/media/hneggy0a/trustees-report-and-financial-statements-2021.pdf.

197 Mlot, *supra* note 183.

198 *Image Hash List*, INTERNET WATCH FOUND., https://www.iwf.org.uk/our-services/hash-list (last visited Apr. 31, 2022).

199 Mlot, *supra* note 183; *International Reporting Protocols*, INTERNET WATCH FOUND.: INT'L REPORTING PORTALS, https://annualreport2020.iwf.org.uk/partnerships/international/intro (last visited Apr. 21, 2022).

200 *Image Hash List*, *supra* note 198.

201 *UK-Hosted Child Sexual Abuse*, INTERNET WATCH FOUND.: THE ANN. REP. 2020, https://annualreport2020.iwf.org.uk/trends/uk/hosted (last visited Apr. 21, 2022).

reviewers should also be sure that the hashed images do not involve a matter of legitimate public interest.[202]

The organization running such a hash list should follow trust and safety best practices. They would have to ensure that their efforts do not impair the legal system. They would need to preserve the images and all relevant metadata (data about data), such as the name of the content's author, the date it was created, and any other data about the poster. This would take a page from the IWF and the NCMEC models—they have a legal right to indefinitely possess such material about CSAM to help support prosecutions.

Of course, sites peddling nonconsensual intimate images will not participate in this effort. That is precisely why the market will not solve the problem. Without laws recognizing injunctive relief and Section 230 reform, sites that make money from nonconsensual intimate images will not halt these privacy violations on their sites. There are limits to norms—that is why we need law and norms to work together.

CONCLUSION

A crucial task before us is ensuring that intimate privacy is protected with the vigor and completeness that it deserves. A modest but essential step would be legislative recognition of injunctive relief against content platforms hosting nonconsensual intimate images. For that to be possible, we would need to reform Section 230, which is no easy lift. The effort is worth it, however. Victims and the groups to which they belong need to know that the law can work for them and that their intimate privacy matters.

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[202] *See* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1066 (2018).