

## No Privacy in Public = No Privacy for the Precarious

Broadly speaking, both privacy doctrine and public discourse suggest that the right to privacy is significantly diminished once one enters the public realm or once one's information is shared with others.<sup>1</sup> In fact, certain doctrines provide that the right to privacy while in public is nearly nonexistent, that privacy is more or less “dead” once you walk out your front door or expose your activities to anyone else – even if you are fortunate enough to have your own property and still be on it.<sup>2</sup> Pursuant to this conception of the right to privacy, privacy is synonymous with secrecy – and, as described by Daniel Solove, this “secrecy paradigm” greatly limits legal protection for privacy.<sup>3</sup> As it stands, *without lived privacy, one has no claim to legal privacy or privacy rights – and without legal privacy, one has no ability to protect or maintain lived privacy.*<sup>4</sup>

But in a world of over seven billion people and almost constant surveillance by governments, corporations, and other individuals, keeping one's activities and information completely secret (and thus entitled to a right to privacy under the traditional “secrecy paradigm”) is impossible.<sup>5</sup> Even more so for certain marginalized communities who are more likely to live in conditions where their information is exposed to

<sup>1</sup> JULIE E. COHEN, CONFIGURING THE NETWORKED SELF 121 (2012) (“Generally speaking, surveillance is fair game within public space, and also within spaces owned by third parties”).

<sup>2</sup> MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 27 (2002) (“Modern American law frequently defines privacy as a zone of noninterference drawn around the home. So strong is this association that courts have sometimes refused to recognize a right to privacy in other spaces”); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1536–37 (2000).

<sup>3</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 497 (2006).

<sup>4</sup> Cf. Harry Surden, *Structural Rights in Privacy*, 60 S.M.U. L. REV. 1605, 1612 (2007) (analyzing the role of physical and technological structural restraints in protecting privacy rights).

<sup>5</sup> Andrew E. Taslitz, *Privacy as Struggle*, 44 SAN DIEGO L. REV. 501, 504–05 (2007) (documenting the “requirement of superhuman individual efforts to attain secrecy . . . as an essential prerequisite to the existence of privacy” rights).

others and who are more likely to be subject to and targeted for government surveillance in the first instance.<sup>6</sup>

This chapter discusses the current doctrinal and discursive barriers preventing a meaningful right to privacy while navigating both physical and online space, and once information has been exposed to others, and also highlights how this prevailing anti-privacy ethos creates unique problems for members of different marginalized groups. The narrow conception of privacy as being largely nonexistent in public spaces (sometimes referred to as “situated privacy”)<sup>7</sup> serves as a background rule or norm that enables and sanctions greater surveillance of marginalized communities.<sup>8</sup> The cramped legal frame leads to further loss of lived privacy with tangible consequences. It creates a self-fulfilling prophecy of privacy loss – once information is exposed to the “public” (even marginally), greater surveillance and loss of privacy is then often legally permissible. As another has put it, so long as legal privacy “is parasitical on private-sphere privacy, the former must die as its host dies, and this host is undoubtedly faltering today in the networked, monitored and digitized world we are calling our own.”<sup>9</sup> And the secrecy paradigm is increasingly debilitating as privacy-invading technologies expand the reach of state and private, corporate surveillance regimes (which often work hand in hand).

The physical and informational zone of what is truly secret – known to no one else – is shrinking dramatically.<sup>10</sup> As such, under the “privacy-only-in-private” theory, the law protects very little indeed. Paradoxically, as government, corporate, and citizen surveillance regimes expand (decreasing what can functionally be kept secret), the right to privacy is extinguished along with it.<sup>11</sup> Instead of serving as a bulwark against encroachments on privacy, the “privacy-only-in-private” theory is defined in such a way to ensure that privacy will, in fact, be dead. And this constricted legal definition of privacy permits privacy-invading technologies and criminal, administrative, corporate, and interpersonal/individual surveillance systems to have relatively free rein.

<sup>6</sup> VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE POLICE, AND PUNISH THE POOR* 6 (2017) (“People of color, migrants, unpopular religious groups, sexual minorities, and other oppressed and exploited populations bear a much higher burden of monitoring and tracking than advantaged groups”).

<sup>7</sup> Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 203 (2017).

<sup>8</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>9</sup> Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 118 (2008).

<sup>10</sup> Joel Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 142 (2014); BERNARDINE EVARISTO, *GIRL, WOMAN, OTHER* 144 (2019) (“the borders between public and private are dissolving”).

<sup>11</sup> Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment after Lawrence*, 57 UCLA L. REV. 1, 6–7 (2009) (“If public exposure forfeits privacy protections, then how constitutional doctrine defines public exposure determines what aspects of ordinary life receive protection from government interference. What receives constitutional protection in turn shapes the boundaries of ordinary life”).

But there is nothing a priori about this definition of private and public – instead, it is an ideology; a normative architecture that has profound implications for who is protected, and who is not; who has room to flourish, and who is squashed.<sup>12</sup> The limited conception of what is legally protected as “private” is a form of social control, helping to buttress hegemonic social norms and ways of being; ways of existing, with devastating implications for many marginalized communities whose lives are too often overdetermined by government and corporate attempts to render their lives observable.

To be sure, while the secrecy paradigm plays a prominent role in erasing both the lived privacy and legal privacy rights of many marginalized communities, it is reinforced by other background rules and rhetorical frames, such as those that frame privacy as a commodity or an element of property rights. As powerfully underscored by others,<sup>13</sup> the commodification of personal information encourages and endorses a transactional approach to privacy rights, countenancing the trading away of privacy for other material goods, ranging from government benefits to social media accounts. Such a frame also devalues privacy as a mere object of commerce, rather than a foundational, material right critical to human flourishing. *But before a person can even trade away their information, they must be deemed to control that information in the first instance.* Hence this book’s focus on legal rules and rhetorical frames that suggest people lack rights over their information at all once it is exposed to others.

#### LAW: PRIVACY AND PUBLIC ARE CONTRADICTIONARY TERMS

In several different doctrinal contexts, the law provides that privacy does not meaningfully exist in public space or once the information has been shared outside of limited confines. While what counts as “public” and “private” is driven by normative value judgments and choices, the law contributes to making them “seem to be preconceptual, almost instinctual” and powerfully shapes how we learn public and private, making the fixed conceptions “hard to challenge.”<sup>14</sup>

Fourth Amendment criminal procedure law is a prime example. In theory, the Fourth Amendment prevents the government from conducting searches for the purpose of investigating alleged criminal wrongdoing without first securing a warrant from a judge after showing that there is “probable cause” to believe that evidence of a crime will be discovered. But no protected “search” requiring a warrant and a showing of probable cause occurs if the person did not have a

<sup>12</sup> WARNER, *supra* note 2, at 27 (“Public and private are not always simple enough that one could code them on a map with different colors – pink for private and blue for public”).

<sup>13</sup> E.g., SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 65 (2019); JULIE E. COHEN, *BETWEEN TRUTH AND POWER* 50 (2019); KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 10, 66–68 (2017).

<sup>14</sup> WARNER, *supra* note 2, at 27.

“reasonable expectation of privacy” in the area or thing being searched in the first instance.<sup>15</sup>

With regard to physical privacy or observation of people as they move about their lives, the Supreme Court has largely provided (with some exceptions when targeted, law enforcement surveillance occurs over a prolonged period of time) that no reasonable expectation of privacy exists and therefore no warrant is required for the police to surveil people when their movements are otherwise observable from a public location. This principle has manifested in several, specific Fourth Amendment doctrines. For example, the open fields doctrine has been used to curtail the right to privacy – even on an individual’s own property, traditionally the place where the right to privacy is most sacrosanct. The open fields doctrine provides that an individual has no reasonable expectation of privacy for activities conducted out of doors, in fields, or property not within the “curtilage” – the area directly adjacent to the home. The Supreme Court has relied on the open fields doctrine to hold, for example, that no warrant was required for police to walk past a locked gate and “No Trespassing” signs and into secluded property in order to investigate reports that marijuana was being grown.<sup>16</sup> Interpreting the open fields doctrine on multiple occasions, the Supreme Court has taken a broad view of when privately owned property is exposed or open to the public and thus entitled to minimal Fourth Amendment privacy protections.

The cases in many ways speak for themselves. The Court has held that no warrant was required for police to inspect a predominately enclosed but partially open greenhouse within the curtilage of a home from a helicopter 400 feet above the ground, notwithstanding that the greenhouse could not be seen into from the street.<sup>17</sup> Similarly, no warrant was required for police to enter onto a 198-acre property, cross over a perimeter fence as well as multiple interior fences, and peer into a locked barn located half a mile from the public road and in close proximity to the property’s residence.<sup>18</sup> Nor was a warrant required for an aerial search of a backyard within the curtilage of a home that was enclosed by two separate fences, one 6 feet tall and the other 10 feet tall.<sup>19</sup> Based on this line of authority, a United States Court of Appeals recently held that there was no Fourth Amendment violation where police recorded an individual’s activity outside his home for ten weeks with a camera mounted on a utility pole by the utility company without a warrant. According to the court, “it is only the possibility that a member of the public may

<sup>15</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>16</sup> *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>17</sup> *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>18</sup> *United States v. Dunn*, 480 U.S. 294 (1987).

<sup>19</sup> *California v. Ciraolo*, 476 U.S. 207 (1986); *see also Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (permitting EPA aerial surveillance of outdoor area of Dow’s power plant without a warrant despite elaborate security around the complex). *But see Kyllo v. United States*, 533 U.S. 27 (2001) (holding that use of thermal imaging technology on house constitutes a search for which a warrant is required).

observe activity from a public vantage point – not the actual practicability of law enforcement’s doing so without technology – that is relevant for” determining whether a privacy violation has occurred under the Fourth Amendment.<sup>20</sup>

The Court has also held that when an individual places garbage on the street curb for collection, even if temporarily and opaquely packaged, such “public exposure” defeats any reasonable privacy expectation.<sup>21</sup> A similar criminal procedure concept, the “plain view” doctrine, provides that police officers may seize evidence of contraband when visible from a lawful vantage point.<sup>22</sup> This rule serves to sanction the widespread proliferation and use of police-worn body cameras and dash cameras as a means of surveillance and evidence gathering (often under the guise of police accountability).

With regard to privacy over information or communications, the Supreme Court has significantly weakened the protections provided by the Fourth Amendment through reliance on the so-called third-party doctrine. The third-party doctrine stipulates that, in certain situations, an individual’s “reasonable expectation of privacy” (again, the precondition for Fourth Amendment coverage) often evaporates once an individual shares the relevant information with another person or entity, sometimes referred to as a “third party.”<sup>23</sup> So, while the government may be required to obtain a warrant if it wants to directly intercept the content of a conversation between two people (for example, through a wiretap), if the information at issue (for example, that a call did in fact take place) is shared with a phone company (a third party), no warrant may be required to obtain that information either from the third party or through direct interception because the fact of the call is not one that was kept private in the first instance – the phone company was aware of the call, not just the two conversants, excusing the government from obtaining a warrant.<sup>24</sup> Correspondingly, under what has been dubbed “assumption of the risk,” the Supreme Court has concluded that when individuals volunteer information to others, they are assuming the risk that the other party may be an informant who may relay the information to law enforcement.<sup>25</sup> In such situations, the Court has often held that no “search” occurred and therefore the Fourth Amendment’s warrant requirement is not triggered.

The theme that links the third-party doctrine, the open fields doctrine, the plain view doctrine, assumption of the risk, and the secrecy paradigm more broadly, is the underlying notion that there is no meaningful right to privacy in public – if

<sup>20</sup> *United States v. Houston*, 813 F.3d 282, 289–90 (6th Cir. 2016).

<sup>21</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>22</sup> *Texas v. Brown*, 460 U.S. 730 (1983).

<sup>23</sup> As Kathy Strandburg has pointed out, the widely used phrase “third-party doctrine” is sometimes a misnomer since not all cases involve information shared between more than two individuals. Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 652 n.201 (2011).

<sup>24</sup> *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. White*, 401 U.S. 745 (1971).

<sup>25</sup> *Hoffa v. United States*, 385 U.S. 293 (1966).

information is even slightly exposed to others, the government and private parties are often permitted broad access.

While in 2018 the Supreme Court imposed an important but modest limitation on the third-party doctrine in *Carpenter v. United States*, the doctrine is far from being a dead letter.<sup>26</sup> In *Carpenter*, the Court concluded that a person's historical cell-site location information revealing encyclopedic data regarding the person's physical movements over a period of several days was not voluntarily shared with the service providers and therefore free game for government collection from the service providers without a warrant. Although the Court emphasized that Fourth Amendment doctrine must be attentive to technological changes (as it had in the past),<sup>27</sup> the Court also noted that its decision was a narrow one, that the third-party doctrine endured, and that it was the expansive scope of the search revealing "an all-encompassing record of the holder's whereabouts" over a sustained period of time that ran afoul of the Fourth Amendment. Indeed, post-*Carpenter*, many courts have continued to enforce the secrecy paradigm in the same old way notwithstanding the continued development and deployment of privacy-invading technologies by law enforcement.<sup>28</sup> In other words, though the Court in *Carpenter* expressed that a "person does not surrender all Fourth Amendment protection by venturing into the public sphere," under prevailing law they do surrender an astounding degree of protection, as outlined above.<sup>29</sup>

The secrecy paradigm's strictures are not unique to the Fourth Amendment context, which limits law enforcement's ability to conduct a search for the purpose of a criminal investigation without a warrant and probable cause, but also extends to the constitutional informational privacy context. In theory, the constitutional right to informational privacy, rooted in guarantees for substantive due process, limits the government's ability to disclose or "out" certain information regarding us.<sup>30</sup> But, as

<sup>26</sup> 138 S. Ct. 2206 (2018).

<sup>27</sup> See also *Riley v. California*, 573 U.S. 373 (2014) (emphasizing cell phones are qualitatively and quantitatively different in terms of the amount of information they reveal).

<sup>28</sup> E.g., *United States v. Kelly*, 385 F.Supp.3d 721 (E.D. Wis. 2019) (installation of two surveillance cameras recording defendant's comings and goings from an apartment over a period of nine days did not require a warrant post-*Carpenter*); *United States v. Kubasiak*, 2018 WL 4846761 (E.D. Wis. Oct. 5, 2018) (use of video camera in neighbor's house to surveil defendant's backyard over prolonged period of time not improper under *Carpenter*); *United States v. Morel*, 922 F.3d 1 (1st Cir. 2019) (no reasonable expectation of privacy in internet protocol (IP) address information used to access a website or application); *United States v. Felton*, 367 F.Supp.3d 569 (W.D. La. 2019) (same). But see *United States v. Moore-Bush*, 381 F.Supp.3d 139 (D. Mass. 2019) (video monitoring of person's home from police camera over eight-month-long period required warrant post-*Carpenter*), *appeal docketed*, No. 19-1582 (1st Cir. June 10, 2019).

<sup>29</sup> *Carpenter*, 138 S. Ct. at 2217; cf. Matthew Tokson, *The Next Wave of Fourth Amendment Challenges After Carpenter*, 59 WASHBURN L.J. 1 (2020) (noting the cryptic nature of *Carpenter* while expressing optimism about its privacy potential).

<sup>30</sup> *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (defining informational privacy as "the individual interest in avoiding disclosure of personal matters").

with the Fourth Amendment, several courts have concluded that if the information at issue has previously been exposed to anyone else, then there is no constitutional violation when the government further broadcasts the information.<sup>31</sup> For example, in *Doe v. Lockwood*, the Sixth Circuit Court of Appeals ruled that there was no violation of constitutional informational privacy where a municipal health commissioner allegedly disclosed that the plaintiff was HIV-positive to a local newspaper who then published the plaintiff's identity because the plaintiff had disclosed his status to a court when requesting medical leave from prison to receive treatment for his HIV.<sup>32</sup> Notwithstanding that the plaintiff's prior "disclosure" to a court was not the source where the defendant health commissioner obtained the private information and notwithstanding the compelling reasons for the plaintiff's disclosure (seeking medical treatment while in captivity), the Sixth Circuit concluded that the information at issue was already "public." Therefore, the health commissioner's alleged broadcast of the information to a local newspaper who published the information was not actionable.

The secrecy paradigm also extends beyond constitutional privacy law to privacy tort doctrine, which, in principle, is designed to secure privacy rights against other private-party actors – including corporations. For example, the Restatement (Second) of Torts provides with regard to the tort of publication of private facts that "there is no liability for giving further publicity to what the plaintiff [themselves] leaves open to the public."<sup>33</sup> The Restatement, in essence, embraces the idea that there is no privacy in public. And this premise has been advanced by the Supreme Court, which has held, for example, that no actionable privacy tort violation occurred where the press published information about a rape victim that was already in the public domain via court records.<sup>34</sup>

Lower courts have followed suit, even in egregious situations. For example, in *Doe v. Peterson*, plaintiff sued operators of a nude photograph website, where nude photos of plaintiff taken when she was a teenager and sent privately to her then boyfriend were posted. The court dismissed plaintiff's public disclosure claim, reasoning that because the photos had been previously posted by a different website, they were not private facts.<sup>35</sup> Similarly, in *Lentz v. City of Cleveland*, the court held that the plaintiff police officer could not successfully bring a public disclosure claim

<sup>31</sup> *E.g.*, *Chasensky v. Walker*, 740 F.3d 1088, 1097 (7th Cir. 2014); *Big Ridge, Inc., v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631, 652 (7th Cir. 2013); *Kerns v. Bader*, 663 F.3d 1173, 1187 (10th Cir. 2011); *Eagle v. Morgan*, 88 F.3d 620, 625–26 (8th Cir. 1996); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 116 (3d Cir. 1987).

<sup>32</sup> *Doe v. Lockwood*, No. 95–3499, 1996 U.S. App. LEXIS 19088, at \*13–17 (6th Cir. June 27, 1996).

<sup>33</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (gendered language revised).

<sup>34</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>35</sup> 784 F. Supp. 2d 831, 834–35 (E.D. Mich. 2011); *see also* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1917 (2019) (documenting weak legal recourse for victims of nonconsensual pornography).

pertaining to publication of his mental health history when, during the lawsuit, evidence was unearthed indicating that four years prior to the publication, the plaintiff's mental health information had been discussed at a public Civil Service Commission hearing.<sup>36</sup> More precisely, the disclosure was excused because, after the alleged disclosure, evidence was found indicating that the information had previously been disclosed. As will be outlined in more detail in Chapter 6, these examples are part of a long list over a recent decade-long period (2006–16) where courts have rigorously enforced the secrecy paradigm in public disclosure tort cases brought by plaintiffs of marginalized social status.

Indeed, they arguably represent an even stricter application of the secrecy paradigm than that imposed in one of the most high-profile (and highly criticized) public disclosure tort cases – the case of Oliver “Billy” Sipple.<sup>37</sup> Sipple had intervened to help prevent a would-be assassin from shooting then President Gerald Ford. In the aftermath of the attempted assassination, a newspaper reporting on the event suggested that Sipple was gay and that assertion was further reported by other newspapers. Sipple sued for public disclosure of private facts, but the Court of Appeal of California affirmed the grant of summary judgment in the defendants' favor. The court concluded that even though Sipple's family members learned of his sexual orientation for the first time because of the publication, his orientation was known to “hundreds” of others through, among other activities, his participation in gay parades, because he “spent a lot of time in [the] ‘Tenderloin’ and [the] ‘Castro,’” and because of “his friendship with Harvey Milk, another prominent gay.” The *Sipple* decision, while ignoring that information such as one's minority sexual orientation can be extremely sensitive and damaging depending on the context in which it is shared, is in one sense less drastic than the cases discussed above because Sipple's orientation was, purportedly, known to “hundreds.”

These examples underscore that for many living at the margins of society who (as will be demonstrated) are subjected to high levels of government and private surveillance and transparent living quarters, keeping any information – much less sensitive information – completely secret as privacy law is often interpreted to require is a practical impossibility. This narrow, warped doctrine disproportionately burdens marginalized communities who may share information as a form of bonding, identity exploration, or resistance, and who are, in certain contexts, less able to keep information secret *ex ante*, and thus entitled to legal protection. That is, these legal rules serve as the background conditions *facilitating* the diminished lived privacy of marginalized groups, which in turn leads to further diminished legal protections.

<sup>36</sup> No. 1:04CV0669, 2006 WL 1489379, at \*4 (N.D. Ohio May 22, 2006).

<sup>37</sup> *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040 (1984); ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION* Age 99, 111 (2018) (critiquing the complete secrecy requirement as applied in the LGBTQ outing context)



Extensive research now documents the degree to which marginalized communities experience less lived privacy, are subject to greater degrees of surveillance, and feel the burdens of any surveillance more acutely. These patterns emerge across a variety of intersectional, demographic factors (or what bell hooks referred to as “interlocking systems of domination”) including poverty, employment sector, race, religion, gender, sexuality, gender identity, and immigration status.<sup>38</sup> As Mary Anne Franks has observed, “[t]he surveillance of marginalized populations has a long and troubling history. Race, class, and gender have all helped determine who is watched in society, and the right to privacy has been unequally distributed according to the same factors.”<sup>39</sup>

And “surveillance” of marginalized communities takes many, diffuse, and often subtle forms. As surveillance studies scholars have emphasized, surveillance systems include much more than just law enforcement searches for the purpose of criminal investigations, but include administrative, bureaucratic, corporate, social, *and* law enforcement networks “that afford control of people through identification, tracking, monitoring, or analysis of individuals, data or systems.”<sup>40</sup> Surveillance systems also include outsourced, citizen-on-citizen surveillance that further erode lived privacy and provide fertile surveillance data for law enforcement and corporate regimes. Many of these tools/systems of surveillance have deep roots in constituting and maintaining the colonial state. I turn, now, to an examination of some of the ways – just some – that the privacy of marginalized groups is sacrificed by background legal rules, including the requirement for complete secrecy. This discussion is intended to be illustrative rather encyclopedic. Unfortunately, comprehensively cataloguing all the myriad ways in which marginalized communities are surveilled would be an impossible task. Instead, my aim here is to accentuate the many diverse ways in which the privacy of marginalized communities is invaded, in part as a result of the background secrecy paradigm framework. To be clear, not all of the examples discussed are necessarily a direct product of the secrecy paradigm, but those that aren’t illustrate the scope of surveillance of marginalized groups (in other words, the lack of lived privacy for such groups), and how any given exposure or privacy invasion will sanction further privacy invasions pursuant to the secrecy paradigm. The following discussion is broken down by different demographic characteristics in order to highlight that surveillance of the marginalized is widespread, but the deployment of these categories should not detract from the fact that many people live at the intersections of these classifications.

<sup>38</sup> BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 25 (Routledge 2015) (1989).

<sup>39</sup> Mary A. Franks, *Democratic Surveillance*, 30 *HARV. J.L. & TECH.* 425, 441 (2017); *see also* Alvaro M. Bedoya, *Privacy as Civil Right*, 50 *N.M. L. REV.* 301 (2020)

<sup>40</sup> TORIN MONAHAN, *SURVEILLANCE IN THE TIME OF INSECURITY* 8 (2010); *see also* DAVID LYON, *SURVEILLANCE SOCIETY* 2 (2001).

## PEOPLE WHO ARE ECONOMICALLY DISADVANTAGED

A system without protections for public privacy affords more protection to the affluent, who can afford to build higher walls – both literally and technologically – to keep surveillance regimes at bay.<sup>41</sup> Put differently by Neal Katyal, “[p]rivacy in America today is a luxury good that the poor often lack the resources to secure.”<sup>42</sup> The affronts to the privacy of poor communities are manifold, as documented by the important work of Michele Gilman and others.<sup>43</sup>

Without some modicum of privacy in public, the millions of people who are housing insecure or homeless are particularly vulnerable.<sup>44</sup> The lack of privacy while in public furthers the material deprivation of homeless people’s lives. Because privacy law is extremely home-centric,<sup>45</sup> it privileges those who are able to secure property for a home, particularly those who can own their own home (as opposed to rent and/or obtain government-subsidized housing). Indeed, under the most conservative and limited understandings of privacy rights, privacy violations occur when there is trespass, which is predicated on ownership or control over private property.<sup>46</sup> Without a home, an individual lives their life in public – on the streets or in shelters – in effect having to forfeit not just their health and safety, but privacy over their entire lives – including the most intimate aspects of their lives such as personal hygiene and sexual activity.<sup>47</sup> If an act is banned in public space, for the homeless it amounts to a total and complete ban because they have no private space in which to perform the action.<sup>48</sup> So privacy for the homeless is a critical first-order right that ensures that a whole host of embodied acts – including the most basic and intimate – are able to be performed at all. In addition to lack of privacy over sanitary and sexual practices, public health scholars and housing advocates

<sup>41</sup> William Stuntz, *Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).

<sup>42</sup> Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1129 (2002).

<sup>43</sup> Michele Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1403 (2012).

<sup>44</sup> Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty, and Policing*, 14 U. MD. L.J. RACE RELIG. GENDER & CLASS 240, 249 (2015); David Reichbach, *The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law Is Going after Jones*, 47 U.S.F.L.REV. 377 (2012).

<sup>45</sup> Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913–18 (2010).

<sup>46</sup> Cf. *United States v. Jones*, 565 U.S. 400 (2012) (placement of GPS tracking device on vehicle was a search because it was a trespass on private property).

<sup>47</sup> Christopher Slobogin, *The Poverty Exception to The Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003) (explaining that pursuant to Fourth Amendment doctrine, “people who live in public spaces (for instance, the homeless who reside in boxes) and people who have difficulty hiding or distancing their living space from casual observers (for instance, those who live in tenements and other crowded areas) are much more likely to experience unregulated government intrusions”).

<sup>48</sup> Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 318 (1991).

have observed that “housing is healthcare” and, among other limitations, the lack of secure shelter diminishes the ability of people to safely and securely store medications, including, for example, those needed to combat HIV which may need to be refrigerated.<sup>49</sup>

Several kinds of laws regulating people who are housing insecure all but ensure that they experience no lived privacy, therefore, no legal privacy rights pursuant to the secrecy paradigm and, therefore, no ability to exist and perform the most mundane, but critical, of human tasks.<sup>50</sup>

Anti-camping and sit-lie laws are a heartbreaking illustration.<sup>51</sup> Many homeless people live in tents or makeshift shelters on public land that is otherwise unoccupied (under highways, on piers, next to railways, for example), or simply sleep on public sidewalks or in parks because they have nowhere else to go. When individual tents or shelters are grouped together, they are sometimes referred to as “tent cities.” Several municipal governments have outlawed such survival practices to varying degrees.<sup>52</sup> These include purportedly “progressive” cities, such as Boulder, Colorado, and San Francisco.<sup>53</sup> The government’s ability not just to search but to forcibly remove, detain, and destroy the possessions of homeless people who attempt to subsist while on public land is made possible, in part, by background rules providing that there is no privacy in public. If a person enjoyed a legal right to privacy in public, then you could imagine their shelter being constitutionally protected from destruction by the government. Instead of protecting privacy, the law in many jurisdictions permits and encourages the government to criminalize efforts to maintain privacy and sanctuary while in public space – which is what anti-camping laws do.

In addition to anti-camping ordinances, homeless encampments are not infrequently swept and wholesale destroyed by city governments in the name of public health – tactics that have been endorsed by the Trump administration. Rather than provide services to the homeless, the government attacks individual efforts to survive. Because of the lack of privacy rights in public, efforts to maintain privacy are

<sup>49</sup> Armen Merjian, *HIV/AIDS and Housing*, in *AIDS AND THE LAW* (Skinner-Thompson ed., 6th ed. 2020).

<sup>50</sup> Waldron, *supra* note 48, at 320 (“If someone needs to urinate, what [they] need above all as a dignified person is the *freedom* to do so in privacy and relative independence of the arbitrary will of anyone else”) (gendered language revised; emphasis in original).

<sup>51</sup> Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 *GEO. J. ON POVERTY L. & POL’Y* 545, 556 (2006) (describing multiple laws, including anti-panhandling laws, designed to push homeless people from the public square).

<sup>52</sup> HOMELESS ADVOCACY POLICY PROJECT, *TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO* (2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf>.

<sup>53</sup> LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM 1–2 (2018) (critiquing lack of resistance by mainstream LGBT organizations to San Francisco’s sit-lie prohibition despite its impact on queer homeless youth).

themselves criminalized and targeted.<sup>54</sup> In effect, the existence of homeless people is criminalized through a series of laws regulating public space that Jeremy Waldron has described as “one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.”<sup>55</sup>

While some courts have recognized some limited privacy interests of homeless people even while in public space,<sup>56</sup> others have reached the opposite conclusion<sup>57</sup> and anti-camping and sit-lie ordinances remain prevalent and frequently enforced.<sup>58</sup> And, of course, homeless people are barred from building shelter on privately owned land because of trespass law that protects the privacy and property rights of the privileged – those able to own (or rent) property.<sup>59</sup>

Homeless people are policed and surveilled in public not just by the government, but also by social gaze and feelings of shame and disenfranchisement. The lack of private space can also make it difficult to form friendships and intimate relationships. As sociologists Matthew Taylor and Eileen Walsh put it, “[t]he homeless person, in this way, has a unique relation to privacy. Public spaces, by default, are the only places they can exist in, and yet the people in these public places want little to do with them. They are interminably in a confusing environment that neither welcomes nor integrates them.”<sup>60</sup>

Should people who are housing insecure desire and be able to find a bed in a housing shelter, their privacy rights are still greatly diminished. According to Taylor

<sup>54</sup> NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, VIOLATIONS OF THE RIGHT TO PRIVACY FOR PERSONS EXPERIENCING HOMELESSNESS IN THE UNITED STATES, A REPORT TO THE SPECIAL RAPPORTEUR ON THE RIGHT TO PRIVACY (May 31, 2017), <https://nlchp.org/wp-content/uploads/2018/10/Special-Rapporteur-Right-to-Privacy.pdf>.

<sup>55</sup> Waldron, *supra* note 48, at 301–02.

<sup>56</sup> *E.g.*, State v. Mooney, 218 Conn. 85 (1991) (person had reasonable expectation of privacy over closed duffel bag under bridge abutment where he had been living); State v. Pippin, 403 P.3d 907 (Wash. Ct. App. 2017) (person had state constitutional privacy interest in their tent notwithstanding that it was on public land in part because of intimate nature of information available); *cf.* Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018) (holding that where city criminalizes sleeping or lying in all public places without providing alternative shelter, the city violates the Eighth Amendment prohibition on cruel and unusual punishment).

<sup>57</sup> *E.g.*, People v. Thomas, 45 Cal. Rptr. 2d 610 (Cal. Ct. App. 1995) (no right to privacy in cardboard box being used as shelter where shelter was on public property in violation of sidewalk obstruction ordinance); People v. Ordorica, 2017 WL 4510738 (Cal. Ct. App. Oct. 10, 2017) (no right to privacy in mostly enclosed shelter constructed on state-owned land and no Fourth Amendment violation where police entered shelter with mental health outreach workers for purpose of providing aid, but nevertheless discovered weapon in the shelter).

<sup>58</sup> NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AND NATIONAL COALITION FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2009), [http://timefolds.com/nch/wp-content/uploads/2013/11/CrimzReport\\_2009.pdf](http://timefolds.com/nch/wp-content/uploads/2013/11/CrimzReport_2009.pdf).

<sup>59</sup> Waldron, *supra* note 48, at 299 (“As far as being on private property is concerned . . . the homeless person is utterly and at all times at the mercy of others”).

<sup>60</sup> Matthew R. Taylor & Eileen T. Walsh, *When Corporal Acts Are Labeled Criminal: Lack of Privacy among the Homeless*, 8 SOC. MIND 130–42 (2018).

and Walsh's ethnographic study, some homeless people prefer to remain on the street because homeless shelters are "privacy-starved environments."<sup>61</sup> The lack of personal space in shelters amplifies the ability of anyone else (staff or fellow shelter-seeker) to make another person physically or emotionally uncomfortable. The same study also documented that many people who had visited shelters felt they were asked too many prying questions. Nor do homeless shelters necessarily offer a place to store and access personal items on a long-term basis, or offer solitude where one can gather and develop one's thoughts. Of course, there is nothing that dictates that homeless shelters be built without privacy (or that our society refuse to provide adequate shelter for all). As with many purported privacy problems, it's a design choice.<sup>62</sup> And certain shelters have provided more privacy by creating individual "sleeping pods" for homeless people.<sup>63</sup>

Moreover, while the Department of Housing and Urban Development (HUD) under the Obama administration issued rules requiring shelters receiving federal funds to house transgender individuals based on their gender identity, giving transgender people the ability to access sex-segregated spaces consistent with their identity, in 2020 the Trump administration proposed a rule that would allow shelter providers to define and determine an individual's sex, giving them the power to invade the privacy of and exclude transgender people.<sup>64</sup>

Beyond issues of accommodation (either on the streets or in shelters), people who are housing insecure may be subject to privacy violations even when the government is attempting to provide services (as opposed to criminalize) the homeless. As Virginia Eubanks has emphasized, public assistance programs have long intruded into people's lives, using means-testing and income limits as rationalizations for "all manner of surveillance and policing of applicants and beneficiaries."<sup>65</sup> But technology is being deployed to amplify and automate the scope of this surveillance, including with respect to the homeless. For example, as documented by Eubanks, Los Angeles launched a "coordinated entry system" (CES) designed to match the most vulnerable people living without housing with public resources. In order to identify and triage the most vulnerable (and the purportedly most "deserving" of housing assistance), social workers, outreach workers, and shelters collect a host of

<sup>61</sup> *Id.*

<sup>62</sup> Ari Ezra Waldman, *Designing without Privacy*, 55 HOUS. L. REV. 659 (2018); Anna Lauren Hoffmann, *Data Violence and How Bad Engineering Choices Can Damage Society*, MEDIUM (Apr. 30, 2018), <https://medium.com/s/story/data-violence-and-how-bad-engineering-choices-can-damage-society-39e44150e1d4>.

<sup>63</sup> Sarah Marsh, *Wooden Sleeping Pods Offer Privacy to London's Homeless*, THE GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/society/2018/dec/19/wooden-sleeping-pods-privacy-shelter-london-homeless-deptford>.

<sup>64</sup> *Compare* 24 C.F.R. § 5.106 (2019) (granting equal access in accordance with gender identity) *with* 85 FED. REG. 44811 (July 24, 2020) (permitting shelters to assign people based on "biological sex").

<sup>65</sup> EUBANKS, *supra* note 6, at 28.

intimate information in order to input it into the “Vulnerability Index-Service Prioritization Assistance Tool” (VI-SPDAT).<sup>66</sup> Survey questions include inquiries into whether an individual had a history of sexual assault, mental health crises, sex work, or suicide, in addition to personal identifying information. The collected information is then made available to over 100 different organizations, including local governments. And while Eubanks documents examples of people being successfully matched to services under the largely automated program, she also uncovered examples where people divulged intimate data enabling them to be monitored and tracked by the government without ever receiving services.<sup>67</sup> Indeed, the scope of the privacy invasions involved in Los Angeles’s CES and VI-SPDAT system was flagged by the United Nations Special Rapporteur on Extreme Poverty and Human Rights Philip Alston as extremely troubling.<sup>68</sup>

Consequently, through a network of laws that criminalize their presence in public space, sacrifice privacy in homeless shelters, and monitor and surveil homeless people when they seek social services, homeless people are literally pushed from the public square and made invisible. As Loic Wacquant has put it, the poor are either disciplined or disappeared (and, consequently, so are the underlying failures of our social structures to care for members of our communities).<sup>69</sup> Such laws have a disproportionate effect on black, Latinx, and Native communities, as well as LGBTQ youth, who are overrepresented in the homeless population.<sup>70</sup>

People living on the streets or in shelters are not the only economically disadvantaged people subject to extensive surveillance and deprived of privacy. Those living in public housing – for example, federal housing projects or Section 8 subsidized housing – are subject to meaningful privacy loss in purported exchange for the housing assistance. For example, the “one strike, you’re out” policy permitting the eviction of federally subsidized housing tenants when any guest or visitor engages in illegal activity on the premises encourages third-party policing within communities in need.<sup>71</sup> And such policies have been extended to private housing not subject to federal subsidized housing requirements through local laws requiring housing leases

<sup>66</sup> *Id.* at 93–94.

<sup>67</sup> *Id.* at 114.

<sup>68</sup> Statement on Visit to the USA, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights (Dec. 15, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533&LangID=E>.

<sup>69</sup> LOIC WACQUANT, PUNISHING THE POOR xxii, 108, 288 (trans., Duke 2009) (2004).

<sup>70</sup> NATIONAL ALLIANCE TO END HOMELESSNESS, DEMOGRAPHIC DATA PROJECT: RACE, ETHNICITY, AND HOMELESSNESS, <https://endhomelessness.org/demographic-data-project-race>; LAURA E. DURSO & GARY J. GATES, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

<sup>71</sup> Regina Austin, *Step on a Crack, Break Your Mother’s Back: Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 288 (2002).

to include a “crime-free lease addendum.”<sup>72</sup> This is an example of the outsourcing of surveillance by governments – and how decreased lived privacy and lack of privacy vis-à-vis other individuals is utilized by lawmakers to advance draconian surveillance and regulatory policies. It takes policies such as the New York Metropolitan Transit Authority’s “If You See Something, Say Something” campaign for citizen surveillance of subways (which disproportionately impacts people who must take mass transit as opposed to driving) and applies it to people’s own living quarters, making them suspects in their own homes.

There are also examples of rent-stabilized housing landlords seeking to install facial recognition entry systems in order to control who can access their homes.<sup>73</sup> Such systems would give landlords unprecedented real-time surveillance of tenants and access to the tenants’ biometric data. And, as has been well documented, facial recognition systems are inaccurate, particularly when trying to identify people of color.<sup>74</sup> (In summer 2019, federal legislation was introduced to ban federally subsidized housing from using facial recognition technology, but as of spring 2020 had not been enacted.)<sup>75</sup>

In addition to laws designed to surveil people of limited means while they navigate “public” spaces (and, as noted, sometimes while in their homes), widespread and sophisticated administrative welfare surveillance further permits the state to have a deep and broad view of the lives of those seeking state assistance – including their informational privacy. In other words, the administrative welfare surveillance documented by Eubanks is not limited to the homeless, but extends to many seeking some measure of state assistance (however modest). For example, as documented by John Gilliom, so-called welfare bureaucracies collect, store, and collate massive amounts of information about people seeking public benefits, including information regarding their health, intimate relationships, and living situations, often treating people as objects to be known rather than individuals with

<sup>72</sup> Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 825 (2015).

<sup>73</sup> *Brooklyn Tenants File Legal Opposition to Landlord’s Application to Install Facial Recognition Entry System in Building*, LEGAL SERVICES NEW YORK (May 1, 2019), <https://www.legalservicesnyc.org/news-and-events/press-room/1466-brooklyn-tenants-file-legal-opposition-to-landlords-application-to-install-facial-recognition-entry-system-in-building>.

<sup>74</sup> E.g., Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects* (NISTIR 8280), Nat’l Inst. of Standards & Tech (Dec. 2019), <https://doi.org/10.6028/NIST.IR.8280> (highlighting widespread demographic disparities among nearly 200 facial recognition algorithms); ROBIN SLOAN, MR. PENUMBRA’S 24-HOUR BOOKSTORE 166 (2012) (noting racism of facial recognition software); cf. SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION 66–96 (2018) (documenting racist, sexist, stereotyped, and commodified Google search results for women of color).

<sup>75</sup> And some have made powerful calls for the complete ban of facial recognition software. Evan Selinger & Woodrow Hartzog, *The Inconsistency of Facial Surveillance*, 66 LOY. L. REV. 101 (2019).

agency.<sup>76</sup> Similarly, Khiara Bridges has underscored the “devastating absence of privacy” for “marginalized, indigent women who must turn to the state for assistance if they are to achieve healthy pregnancies and infants.”<sup>77</sup> Bridges highlights how women that seek care under Medicaid’s Prenatal Care Assistance Program (PCAP), are required by law to undergo several intrusive consultations that can include wholesale questioning of women’s lives, including their romantic relationships, relationships with parents, domestic violence, use of controlled substances, etc. As explained by Bridges, “wealth is the condition of possibility for privacy.”<sup>78</sup>

The threats posed by widespread surveillance of economically marginalized communities are amplified in a big data society.<sup>79</sup> As highlighted by researchers affiliated with Data & Society, low-income individuals are uniquely hampered by privacy threats posed by big data.<sup>80</sup> Impoverished individuals are burdened in multiple ways. First, as suggested above, they are subject to greater amounts of surveillance and data collection by government agencies, law enforcement agencies, and through social media. But beyond that, patterns of device use, decreased privacy literacy, and lack of financial access to devices with built-in privacy-enhancing technology further endanger poor communities.<sup>81</sup> For example, iPhones, which offer more privacy protections compared to other smartphone platforms (such as phones using Google’s Android operating system), are also significantly more expensive than other market options.<sup>82</sup> Moreover, poor communities are less able to bear the cost associated with any privacy violation, whether it be the disclosure of stigmatizing information preventing them from obtaining a job or having the resources to combat identity theft.<sup>83</sup> Put succinctly by Bridges, “[p]ower differentials will leave us differently exposed” and even assuming that there is equal observation (which there is not), any “equal observation will not result in equal exposure.”<sup>84</sup>

In short, the lack of protections afforded to public space have direct, material impacts on the lives of people who are economically disadvantaged, permitting the state and corporations greater insight into their lives and, in turn, greater regulatory and punitive impact.

<sup>76</sup> JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 30–39 (2001); see also WACQUANT, *supra* note 69, at 58 (explaining that social services have been retooled as an instrument of surveillance in the criminalization of state-sponsored poverty).

<sup>77</sup> Khiara Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122–23 (2011).

<sup>78</sup> *Id.* at 176; BRIDGES, *supra* note 13, at 5, 12.

<sup>79</sup> Solon Barocas & Andrew Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671 (2016).

<sup>80</sup> Mary Madden et al., *Privacy, Poverty and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53 (2017).

<sup>81</sup> *Id.* at 70–76.

<sup>82</sup> Leif Johnson, *Apple’s price inflation turns privacy from a right to a privilege*, MACWORLD (Nov. 8, 2018), <https://www.macworld.com/article/3318269/apples-price-inflation-turns-privacy-from-a-right-to-a-privilege.html>.

<sup>83</sup> Madden et al., *supra* note 80, at 55.

<sup>84</sup> BRIDGES, *supra* note 13, at 143.



## RACIAL MINORITIES

Racial minorities are also subjected to less lived privacy and therefore diminished privacy rights under the secrecy paradigm, paving the way for yet further surveillance of minority communities.

Indeed, heightened surveillance of racial minorities, particularly black people, has in many ways been a defining condition of both America itself and the lives of black people. As explained by Khiara Bridges, “it is an empirically demonstrated truth that the state focuses its gaze most specifically on the bodies of people of color.”<sup>85</sup> Put powerfully by sociologist Simone Browne in her important work on racialized surveillance, “Surveillance is nothing new to black folks. It is the fact of antiblackness.”<sup>86</sup> Surveillance of black people not only has served as a tool of monitoring and social control, but also serves to produce “blackness” as a category further enabling monitoring and categorization based on such “blackness.” This process has been referred to by Browne as “racializing surveillance” – whereby “enactments of surveillance reify boundaries along racial lines, thereby reifying race . . . where the outcome of this is often discriminatory and violent treatment.”<sup>87</sup> As explained by Browne, racialized surveillance helps structure social relations along racial lines, thereby privileging whiteness.<sup>88</sup>

Some of the historical examples of racialized surveillance documented by Browne include government, corporate, or individualized branding of black people as chattel slaves, the use of ships logs to categorize black people as commodities along with other cargo, the use of “overseers” to inspect and torment black slaves, the use of slave passes to identify and categorize people, fugitive slave advertisements, the census, and lantern laws which required black people out at night to carry a lantern so as to literally shine a light on them and expose them to view. Each of these surveillance practices helped produce blackness as a category enabling further surveillance and subjugation based on that category. They are examples of what Browne, drawing from Frantz Fanon and others, calls “epidermalization” – the imposition (sometimes literally, in the case of branding) of race on the body that produced a person of African descent as “black,” as “slave,” as “commodity,” and as “inferior.”<sup>89</sup>

But, of course, strategies of racialized surveillance are not a historical artifact. They continued apace with Jim Crow and FBI surveillance of black activists and intellectuals, and they continue today. Ta-Nehisi Coates’s contemporary description of the degree to which black bodies are targeted for surveillance and control is the most direct, and among the most stirring: “white America is a syndicate arrayed to

<sup>85</sup> *Id.* at 97.

<sup>86</sup> SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 10 (2015).

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.* at 17.

<sup>89</sup> *Id.* at 26.

protect its exclusive power to dominate and control [black] bodies.”<sup>90</sup> Coates’s disturbing account of the violence visited upon black bodies echoes that of James Baldwin and many others.<sup>91</sup> Surveillance – the erosion of public privacy – plays a prominent part in this syndicate.

The use of police floodlights to illuminate areas where people of color live and congregate, whether it be outside New York City Housing Authority developments or outside transit stations where people of color (many of them queer) enter lower Manhattan from New Jersey are, in effect, a modern instantiation of lantern laws – illuminating racial minorities while they try to move in public space at night.

A related high-profile contemporary example of the role of surveillance in the toolbox of control over racial minorities is New York City’s “stop-and-frisk” program, wherein black and Latinx people were targeted on public streets for police questioning, detention, and often body frisks.<sup>92</sup> Over 80 percent of the 4.4 million stop-and-frisk detentions made by the New York Police Department (NYPD) between 2004 and 2012 were of black or Hispanic individuals. The policy was an example of racial profiling, wherein people were explicitly targeted for stops based on their race, and discriminatory impact of a facially neutral policy that permitted frisks based, in part, on presence in a high crime area. The evidence of discrimination included the fact that the NYPD both carried out more stops in neighborhoods where there were more black and Latinx people than white people and, within any given neighborhood, officers were more likely to stop black and Latinx individuals than white folk. The practice was ruled unconstitutional in violation of the Fourteenth Amendment, ultimately leading New York to reform its written policies, but it’s emblematic of the degree to which dark bodies are targeted for additional scrutiny – and time will tell whether reform is instituted on the streets.

The stop-and-frisk program is part of broader approach to law enforcement that has disproportionately targeted black and Latinx communities for police patrols of public space – even when the law enforcement practice appears, at first glance, race neutral.<sup>93</sup> For instance, so-called broken windows policing posits that minor instances of property crime – such as vandalism – can create an atmosphere of

<sup>90</sup> TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 42 (2015).

<sup>91</sup> *E.g.*, JAMES BALDWIN, *THE FIRE NEXT TIME* 33–34 (1963) (recounting how “[w]hen I was ten, and didn’t look, certainly, any older, two policemen amused themselves with me by frisking me, making comic (and terrifying) speculations concerning my ancestry and probable sexual prowess, and for good measure, leaving me flat on my back in one of Harlem’s empty lots”); BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY* 68 (2004) (lamenting the “ritual [ized] sexualized torture of the black body” throughout American history); BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore 1939) (“Here is fruit for the crows to pluck, For the rain to gather, for the wind to suck, For the sun to rot, for the trees to drop, Here is a strange and bitter crop”).

<sup>92</sup> *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>93</sup> Roy Coleman, *Reclaiming the Streets: Closed Circuit Television, Neoliberalism and the Mystification of Social Divisions in Liverpool, UK*, 2 *SURVEILLANCE & SOC’Y* 293, 305 (2004) (explaining that “the black body has been and continues to be hugely symbolic and

lawlessness, sowing the conditions for more serious activity, such as violence. As the theory goes, one of the best ways to reduce or prevent violent crime (or crime that has a victim), is to have police focus on order maintenance in addition to criminal investigation. Order can be maintained through the use of police patrols in areas with “disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.”<sup>94</sup> Again, or so the theory goes.<sup>95</sup>

Relatedly, the use of actuarial tools to predict where crime will occur and the related designation of so-called high crime areas to justify continued over-policing in those areas, creates a feedback loop (or a ratchet effect) reinforcing justifications for heightened patrolling and surveillance of racial minority communities.<sup>96</sup> In other words, the more you put police in public areas (where privacy rights are slim to none), the more crime you’ll find because of that surveillance, justifying further surveillance.

As applied, the deployment of broken windows policing and actuarial practices has led to greater police presence and surveillance in communities of color (often communities that are also socioeconomically disadvantaged).<sup>97</sup> To be clear, *the greater police presence is itself a public privacy harm*, subjecting those in public space – walking down the street – to observation, surveillance, frisking, and social control by the police.<sup>98</sup> This is all the more true with the rapid proliferation of police-worn body cameras by law enforcement departments across the United States, and policies requiring police to activate their cameras more regularly, creating a vast repository of “evidence” that can be used against minority communities.<sup>99</sup>

representative of disorder for state and corporate servants,” and is therefore targeted for policing because the state views it as disruptive to the established order).

<sup>94</sup> George L. Kelling & James Q. Whitman, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), [https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single\\_page=true](https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true).

<sup>95</sup> The “theory” of broken windows policing has been powerfully critiqued by, among others, Jeremy Waldron, who has suggested that “aggressive policing strategies mean that we can have all the glamour of a prosperous-looking society without doing very much – doing perhaps much less than we have done in the past – to help the poor [and] the unfortunate.” Jeremy Waldron, *Homelessness and Community*, 50 U. TOR. L.J. 371, 388 (2000).

<sup>96</sup> BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 148 (2007); BRIDGES, *supra* note 13, at 91.

<sup>97</sup> THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (Mar. 2018).

<sup>98</sup> WACQUANT, *supra* note 69, at 4, 125, 265.

<sup>99</sup> MARY FAN, CAMERA POWER: PROOF, POLICING, PRIVACY, AND AUDIOVISUAL BIG DATA 3–5 (2019).

But that police presence qua surveillance, in turn, leads to additional privacy harms, including, as discussed above, stops, frisks, searches, and, potentially, arrest and incarceration, with the attendant loss of privacy they entail. As the Movement for Black Lives continues to effectively highlight, the harms visited upon communities of color by police surveillance of their communities are not limited to privacy harms – too often the patrols and surveillance lead to police brutality and death. In other words, it is the greater police presence in communities of color that contributes to and makes inevitable higher rates of arrest, conviction, and violence toward people of color. As explained by The Sentencing Project, the “rise of mass incarceration begins with disproportionate levels of police contact with African Americans.”<sup>100</sup>

As the NYPD stop-and-frisk policy highlights at scale, the disproportionate surveillance created by policies such as broken windows and actuarial policing – again, purportedly race-neutral forms of policing – is amplified by race-conscious and explicitly biased surveillance methods, such as racial profiling wherein people are targeted for surveillance and detention because of their race.<sup>101</sup> For example, there are recent examples where police departments have allegedly targeted Black Lives Matter (BLM) members for photographic surveillance while engaged in First Amendment protected protest activity<sup>102</sup> and for surveillance via social media,<sup>103</sup> with no basis for suspicion. The FBI has also targeted BLM members for surveillance.<sup>104</sup> And several recent studies document the ubiquity of racial profiling of motorists, leading to a disproportionate number of black people being pulled over and subsequently searched by police. A 2019 analysis conducted by the Stanford Computational Policy Lab of over 100 million municipal and state traffic stops conducted in jurisdictions across the country revealed “evidence of widespread discrimination in decisions to stop and search drivers.”<sup>105</sup> According to the study, there was “evidence that the bar for searching black and Hispanic drivers is lower than for searching whites.” So prevalent is the practice of racial profiling that in popular parlance it has been dubbed the criminalization of “driving while black.”<sup>106</sup>

<sup>100</sup> THE SENTENCING PROJECT, *supra* note 97, at 3.

<sup>101</sup> Cf. Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. (2019) (explaining that racism deserves as much attention as discrimination in legal discourse and law reform).

<sup>102</sup> Mark Morales & Laura Ly, *Released NYPD emails show extensive surveillance of Black Lives Matter protestors*, CNN (Jan. 18, 2019), <https://www.cnn.com/2019/01/18/us/nypd-black-lives-matter-surveillance/index.html>.

<sup>103</sup> *Black Lives Matter v. Town of Clarkstown*, 354 F.Supp.3d 313 (S.D.N.Y. 2018) (documenting allegations of surveillance of BLM members).

<sup>104</sup> DEFENDING RIGHTS & DISSENT, *STILL SPYING ON DISSENT: THE ENDURING PROBLEM OF FBI FIRST AMENDMENT ABUSE* (2019), <https://rightsanddissent.org/fbi-spying>.

<sup>105</sup> Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States*, Stanford Computational Policy Lab (2019), <https://5harad.com/papers/100M-stops.pdf>.

<sup>106</sup> Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

Or, as put by one of author Tayari Jones's characters in her moving novel highlighting the devastating role of policing on black relationships, "[a]pparently, make plus model plus race equaled *drug dealer*, even in Atlanta."<sup>107</sup>

#### RELIGIOUS MINORITIES

Like other minority communities, religious minorities – particularly Muslim communities – have been subjected to greater surveillance and diminished lived privacy.<sup>108</sup> For example, law enforcement agencies such as the NYPD created specific initiatives targeting Muslim communities for surveillance.<sup>109</sup> These surveillance initiatives included video monitoring of who enters and exits mosques and embedding undercover officers in Muslim community organizations, among other tactics. Like the racially applied stop-and-frisk program, the legality of the NYPD program was successfully challenged in federal court as a violation of constitutional guarantees of equal protection and free exercise, resulting in a settlement and commitment to end suspiciousness surveillance on the basis of religion or ethnicity.<sup>110</sup> But it was initially enabled by the lack of privacy in public, permitting police to, in effect, stake out Muslims.

There are also laws, particularly prevalent in Europe, that prevent Muslim women from wearing head veils in public and forcibly expose part of these women's bodies to public surveillance. In 2018, Denmark became the sixth European country to ban certain Muslim head and face coverings from being worn in public, and in 2019 the Canadian province of Quebec banned the wearing of face coverings by some government employees. But likewise in the United States, there are instances where government actors have targeted those wearing Muslim clothing for discriminatory treatment. Muslim women and youth have been subject to discrimination and harassment on the basis of their head veils at work,<sup>111</sup> while playing high school sports,<sup>112</sup> and simply trying to exist and enjoy public space by, for example, going for

<sup>107</sup> TAYARI JONES, *AN AMERICAN MARRIAGE* 218 (2018).

<sup>108</sup> BERNARD E. HARCOURT, *THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* 145–51 (2018).

<sup>109</sup> *Hassan v. City of New York*, 804 F.3d 277, 285 (2015) (outlining NYPD surveillance of Muslim communities).

<sup>110</sup> Stipulation of Settlement, *Hassan v. City of New York*, 2:12-cv-03401-WJM-MF (D.N.J. Apr. 5, 2018).

<sup>111</sup> *Cf. E.E.O.C. v. Abercrombie & Fitch Stores*, 135 S.Ct. 2028 (2015).

<sup>112</sup> Jamiel Lynch, *Hijab Rule Keeps Junior from Playing in Regional Title Basketball Game*, CNN (Mar. 26, 2017), <https://www.cnn.com/2017/03/15/us/maryland-hijab-high-school-basketball-rule/index.html>; Alaa Abdeldaiam, "It's So Demeaning as an Athlete": Muslim Teen DQ'd for Hijab Shows Need for Further Progress in Sports, *SPORTS ILLUSTRATED* (Oct. 26, 2019), <https://www.si.com/more-sports/2019/10/27/muslim-teen-runner-disqualified-for-hijab>.

a swim at a city pool.<sup>113</sup> And certain law enforcement practices within the United States at the federal and local levels have focused surveillance on those that do wear a veil.<sup>114</sup> Such policies impose obstacles on Muslim women's ability to be seen and heard in the public square. Veil restrictions "condition the entrance to the public sphere" on compulsory rejection of one's religion, and, I would add, a surrender of one's privacy.<sup>115</sup> Rather than representing a purported feminist liberation of Muslim women, veil restrictions operate as a form of surveillance of Muslim women, forcing them to expose themselves to society in a conforming way or forcing women out of public spaces and into the home,<sup>116</sup> ignoring the veil's potential as a liberating, empowering symbol.<sup>117</sup> Indeed, veil restrictions take their place within a long – and brutal – history of Western attempts to surveil, reveal, know, control and thereby produce the "dangerous" and "oriental" feminine other.<sup>118</sup>

#### QUEER COMMUNITIES

As with racial and religious minorities, surveillance and policing of lesbian, gay, bisexual, transgender, queer, and gender nonconforming people has been extensively documented and affectingly described.<sup>119</sup> The harms of surveillance are particularly acute for those who are both queer and racial minorities. Predating

<sup>113</sup> Melissa Gomez, *Muslims Describe Being Confronted at Pool: "We're Portrayed as Troublemakers,"* N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/us/muslim-children-pool-wilmington.html>; see also EVARISTO, *supra* note 10, at 58 (describing hostility toward Muslim women who wear a veil)

<sup>114</sup> MUSLIM AM. CIVIL LIBERTIES COAL ET AL., *MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS* 15–16 (2013) (detailing how surveillance of Muslim communities chills and burdens choices to wear head coverings); see also Sabrina Alimahomed-Wilson, *When the FBI Knocks: Racialized State Surveillance of Muslims*, 45 CRITICAL SOCIOLOGY 871, 873 (2019) (documenting the FBI's reliance on the wearing of "traditional Muslim attire" to identify those at risk of radicalization notwithstanding that such behavior amounts to "nothing more than a set of generalized characteristics that could be applied to a vast majority of Muslims").

<sup>115</sup> JUDITH BUTLER, *NOTES TOWARDS A PERFORMATIVE THEORY OF ASSEMBLY* 82 (2015).

<sup>116</sup> Cf. CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 100–02 (1987) (foregrounding how privacy of the home has often been a place of repression for women, and therefore framing women's rights in terms of "a right to privacy looks like an injury got up as a gift").

<sup>117</sup> FADWA EL GUINDI, *VEIL: MODESTY, PRIVACY AND RESISTANCE* xvii (1999) (detailing how "[v]eiling also symbolizes an element of power and autonomy and functions as a vehicle for resistance").

<sup>118</sup> EDWARD SAID, *ORIENTALISM* 300–01 (Vintage Books 1979) (1978).

<sup>119</sup> JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 45–58 (2011); Wesley Ware, *Rounding up the Homosexuals: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 77, 78 (Eric A. Stanley & Nat Smith eds., 2011).

the advent of contemporary administrative means for policing transgender identities (such as banning transgender access to bathrooms comporting with an individual's gender identity), the state and police have long surveilled, criminalized, and harassed queer individuals.

For instance, the so-called Lavender Scare of the 1950s involved the highest levels of the US government – including President Dwight Eisenhower and the US Senate under the influence of Joseph McCarthy – outing and firing thousands of gay federal government employees. More viscerally, in the 1960s, New York City police would enter clubs, line up, and check all gender nonconforming people to ensure that people “were wearing the legally mandated three pieces of ‘gender appropriate clothing.’”<sup>120</sup> And, of course, until the Supreme Court's 2003 decision in *Lawrence v. Texas*, states were permitted to criminalize same-sex intimacy – even in the privacy of one's own home.<sup>121</sup> As Eric Stanley puts it, “[t]rans/gender-non-conforming and queer people, along with many others, are born into webs of surveillance.”<sup>122</sup> As with profiling of people based on race, the pervasiveness with which transgender people – particularly trans women of color – are targeted for police scrutiny has been described aptly as the criminalization of “walking while trans.”<sup>123</sup> Tragically, sometimes the policing of trans women of color and trans youth has occurred with the acquiescence (and sometimes support) of more privileged members of the queer community. For example, trans people of color have been subjected to heightened police surveillance in Greenwich Village, New York City, and Boystown, Chicago with the support of some affluent, white gay property owners who live in these neighborhoods.<sup>124</sup>

But in addition to historic and continued over-policing of LGBTQ individuals, the administrative state also subjects queer people to additional, more subtle forms of surveillance – surveillance that is enabled in part by background rules providing that there is no privacy for information already exposed to the public. Rules regulating when and how a person can change their name and gender marker on government identification documents are a prime example. The complex rules that vary across different jurisdictions are difficult to navigate, often necessitating a lawyer and sometimes a court order. As Dean Spade has underscored, the classifications are not neutral and there is nothing preternatural about them; instead, they operate as a form of productive surveillance, reinscribing normative, state-sponsored iterations of

<sup>120</sup> Eric A. Stanley, *Fugitive Flesh*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 1, 1 (Eric A. Stanley & Nat Smith eds., 2011).

<sup>121</sup> 539 U.S. 558 (2003).

<sup>122</sup> Stanley, *supra* note 120, at 7.

<sup>123</sup> Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 *WM. & MARY J. WOMEN & L.* 5 (2017).

<sup>124</sup> ADLER, *supra* note 53, at 125–26.

gender identity (much in the same way the racialized surveillance documented by Simone Browne produces norms or associations around race).<sup>125</sup>

Categories themselves are a form of disciplinary power. As explained by Spade:

The invention of various categories of proper and improper subjects is a key feature of disciplinary power that pervades society. The creation and maintenance of such categories of people (e.g., the homosexual, the criminal, the welfare dependent mother, the productive citizen, the terrorist) establish guidelines and norms . . . . These norms and codes of behavior reach into the most minute details of our bodies, thoughts, and behaviors. The labels and categories generated through our disciplined behavior keep us in our places and help us know how to be ourselves properly.<sup>126</sup>

Put similarly by Lisa Jean Moore and Paisley Currah, “identity documents do not so much confirm identity as produce and authorize it legally.”<sup>127</sup> And this is just as true for any purportedly “new” category or expanded definition created by those resisting limited identity rubrics, for example those who challenge the scope of current categories (e.g., who counts as “male” or “female”) and create “new” categories/labels (e.g., “genderqueer”). As Michael Warner has explained, “almost everything about sex, including the idea of sexuality itself, depends on historical conditions, though perhaps at deep levels of consciousness that change slowly.”<sup>128</sup> The category of “transgender” is case and point. As one forward-thinking court recognized, “Transgender is ‘[a]n umbrella term that may be used to describe people whose gender expression does not conform to cultural norms and/or whose gender identity is different from their sex assigned at birth. Transgender is a self-identity, and some gender nonconforming people do not identify with this term.’”<sup>129</sup>

So, while recent public attention has been brought to the existence and importance of people who are transgender, in discussing “transgender” rights it is equally

<sup>125</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 744–45 (2008); see also TOBY BEAUCHAMP, GOING STEALTH: TRANSGENDER POLITICS AND U.S. SURVEILLANCE PRACTICES 2 (2019) (“surveillance is a central practice through which the category of transgender is produced, regulated, and contested”); Lisa Nakamura, *Blaming, Shaming, and the Feminization of Social Media*, in FEMINIST SURVEILLANCE STUDIES 221, 221 (DUBROFSKY & MAGNET, EDs., 2015) (explaining that “[t]here is no form of surveillance that is innocent” and that surveillance “remakes the body as a social actor, classifying some bodies as normative and legal, and some as illegal and out of bounds”) (emphasis in original).

<sup>126</sup> DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 106–07 (2011); see also MAGGIE NELSON, THE ARGONAUTS 86 (2015) (“Visibility makes possible, but it also disciplines: disciplines gender, disciplines genre”).

<sup>127</sup> Lisa Jean Moore & Paisley Currah, *Legally Sexed*, in FEMINIST SURVEILLANCE STUDIES 58, 63 (DUBROFSKY & MAGNET, EDs., 2015); see also BEAUCHAMP, *supra* note 125, at 25.

<sup>128</sup> MICHAEL WARNER, THE TROUBLE WITH NORMAL 10 (1999).

<sup>129</sup> *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at \*3 (D. Minn. Mar. 16, 2015) (alteration in original; emphasis added) (quoting TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 620 (Laura Erickson-Schroth, ed. 2014)).



important not to ignore identities that do not fit neatly into “new” categories being socially and legally enshrined, and appeals for privacy, invisibility, or “going stealth,” in some ways privilege those who can and want to conform to binary expressions of gender.<sup>130</sup> As author Maggie Nelson underscored in her social theory memoir, “[T]rans’ may work well enough as a shorthand, but the quickly developing mainstream narrative it evokes (‘born into the wrong body,’ necessitating an orthopedic pilgrimage between two fixed destinations) is useless for some. . . ? [F]or some, ‘transitioning’ may mean leaving one gender entirely behind, while for others. . . it doesn’t.”<sup>131</sup> Indeed, as Eve Kosofsky Sedgwick observed, “no matter what cultural construction, women and men are more like each other than chalk is like cheese.”<sup>132</sup>

That said, while categories – even new categories or expansions of existing categories – have their own disciplining, surveilling impact, any definitional expansion does have real emancipatory effect. Absolutely, as underscored by Audre Lorde, “[m]uch of western European history conditions us to see human differences in simplistic opposition to each other: dominant/subordinate, good/bad, up/down, superior/inferior.”<sup>133</sup> And such oppositional constructions of “difference” should be resisted. But while there is good reason to be skeptical of the oppositional construction of certain identities (male versus female; gay versus straight; trans versus cis), the emerging categories “have a real power to organize and describe their experience of their own sexuality and identity . . . If only for this reason, the categorization commands respect.”<sup>134</sup> Judith Butler, who was at the vanguard of theorizing how our sexual and gender identities are socially constructed, similarly recognized the instrumental, short-term political value of identity categories notwithstanding their long-term disciplinary risks.<sup>135</sup>

In short, when a person resists prevailing classifications or fails to conform to them and helps produce new forms of identity, the social tableau is beautifully expanded (even if imperfectly), but there can also be tremendous personal costs for each individual – including privacy costs. A closer examination of the myriad laws regulating government identification documents highlights how.

While progress is being made to liberalize name change laws in some communities across the United States, many jurisdictions impose significant barriers to changing one’s name on government identification documents. For example,

<sup>130</sup> BEAUCHAMP, *supra* note 125, at 47 (importantly critiquing the idea that all trans people can and should fit stereotypical notions of masculinity and femininity and, therefore, become invisible to surveillance regimes).

<sup>131</sup> NELSON, *supra* note 126, at 52–53.

<sup>132</sup> Eve Kosofsky Sedgwick, *Queer and Now*, in *TENDENCIES* 1, 7 (Eve Kosofsky Sedgwick ed., 1993).

<sup>133</sup> AUDRE LORDE, *SISTER OUTSIDER* 114 (rev. ed. 2007).

<sup>134</sup> Eve Kosofsky Sedgwick, *Epistemology of the Closet*, in *THE LESBIAN AND GAY STUDIES READER* 45, 55 (Aberlove et al. eds. 1993).

<sup>135</sup> Judith Butler, *Imitation and Gender Insubordination*, in *The Lesbian and Gay Studies Reader*, *supra* note 47, at 307, 308–09.

certain states forbid people convicted of felonies from changing their name for long periods of time and people convicted of certain crimes (such as identity theft) may be permanently barred from changing their names. Particularly given the over-policing and profiling of trans people of color, these laws represent a significant barrier for trans and gender nonconforming people seeking to live consistently with their gender identity.<sup>136</sup> As advocates have emphasized, such laws result in “forced outing that takes place every time [they are] required to present a government-issued identification or [are] called by [their] legal name in public.”<sup>137</sup>

But even where name changes are technically permitted, the process can be cumbersome and involve forced outing of intimate information. In New York State, for instance, a person must seek a court order changing their name (which absent an order to seal remains a public record open to all) and must also publish the fact that they changed their name in a local newspaper (though the publication requirement can be waived).<sup>138</sup> There are fees associated with both requesting the court order and publishing the notice in a newspaper. Should a name change petition be granted, the individual then still needs to provide the order to each different agency, such as the social security administration, where they want their name changed. Thus, while in theory many states permit name changes for transgender people, the barriers to obtaining accurate identifications across the panoply of government bureaucracies are substantial in terms of cost, privacy, and logistics.

Compared to name change requirements, there are often even higher hurdles for changing gender markers on government identification documents. A handful of jurisdictions, such as Tennessee and Ohio, do not permit the gender marker on one’s birth certificate to be changed under any circumstances. And many jurisdictions require that in order for an individual to change their gender marker on their birth certificate or driver’s license, an individual must first present medical documentation indicating that they have undergone gender confirmation surgery (sometimes referred to as sex reassignment surgery).<sup>139</sup> But from a medical perspective, gender identity – someone’s inner sense of belonging to a particular gender (such as man or woman), or not belonging to a particular category (nonbinary or gender nonconforming) – is the most appropriate determinant of someone’s “sex” classification, not so-called “biological sex.” Indeed, frequent legal and vernacular references to so-called “biological sex” are often imprecise because “sex-related characteristics include external genitalia, internal reproductive organs, gender

<sup>136</sup> Lark Mulligan, *The Case for Abolishing Illinois’ Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647, 650 (2017).

<sup>137</sup> Complaint for Declaratory and Injunctive Relief, *Ortiz v. Foxx*, No. 1:19-cv-02923 (N.D. Ill. May 1, 2019).

<sup>138</sup> N.Y. CIV. RIGHTS LAW §§ 60–65 (2019).

<sup>139</sup> E.g., LA. O.M.V. GENDER CHANGE/REASSIGNMENT POLICY § I 22.01 (2019); Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400–01 (2013).

identity, chromosomes, secondary sex characteristics [such as body hair,] genes” and hormones.<sup>140</sup> For the many who choose not to undergo surgery either because it (1) is not medically indicated, (2) is not necessary for the person to live consistently with their gender identity, or (3) is economically prohibitive,<sup>141</sup> such laws publicly out sensitive, intimate information to the public, including potential employers, who may note the potential dissonance between the person’s ID and gender presentation, increasing the likelihood of discrimination. As explained by Dean Spade, “[p]eople whose identity documents do not match their self-understanding or appearance also face heightened vulnerability in interactions with police and other public officials.”<sup>142</sup>

Even in jurisdictions that do permit changes to gender markers without rigorous medical documentation, most bureaucracies confine the choices available to the male–female binary.<sup>143</sup> Consequently, for those that wonderfully complicate the binary, their documentation does not accurately reflect their identity and they will continue to confront discomfort and problematic outing when required to present their identifications (or, as will be discussed below, when forced to use binary bathrooms). And in many of these more forward-thinking jurisdictions, the non-binary option is usually limited to a single, third-gender category (often denominated with “X”), rather than multiple additional categories, a blank spot permitting individuals the expressive freedom to self-describe, or the absence of gender classification altogether.<sup>144</sup>

Given these barriers to accurate identification documents, it’s no surprise that according to a national survey of transgender and gender nonconforming people published in 2012, only one-fifth of the people surveyed had been able to update all of their identification documents and records with accurate gender markers, one-third had updated none of their documents or records, and 41 percent lived without an accurate driver’s license or state ID. Of those who had presented an ID that did not match their gender identity, 40 percent reported being harassed based on the

<sup>140</sup> Expert Declaration of Deanna Adkins, MD, *Carcano v. McCrory*, No. 1:16-cv-00236 (M.D.N.C. May 13, 2016); see also Moore & Currah, *supra* note 127, at 63 (explaining that “[g]ender is shaped by the interplay between a number of distinct and often shifting historical factors”).

<sup>141</sup> Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 291 (2013).

<sup>142</sup> SPADE, *supra* note 126, at 146.

<sup>143</sup> In 2017, Oregon became the first state to allow people to select a nonbinary gender category on state identifications, including drivers’ licenses, followed by roughly a dozen states by summer 2019.

<sup>144</sup> Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 945 (2019) (explaining that the most enfranchising legal response to nonbinary identities may vary depending on the context, in some instances militating toward the creation of more classification options, and in others getting rid of gender-classifications altogether).

dissonance between their appearance/expression and their identification.<sup>145</sup> Similarly, according to a 2015 survey, only 11 percent of respondents reported that all of their IDs included the name and gender they preferred, and more than two-thirds reported that none of the identification documents were accurate.<sup>146</sup>

A related, nascent effort at gender surveillance has occurred in a number of states and localities over the last few years: so-called “bathroom bills” or “papers-to-pee” laws have been proposed, and in some instances (e.g., North Carolina), enacted. Certain iterations of these bills would have penalized transgender people for using restrooms inconsistent with the sex they were assigned at birth or inconsistent with an identification document. As outlined above, accurate identification documents may be difficult to obtain because of onerous medical and procedural requirements. Some of the laws that have been proposed would charge owners of public accommodations with enforcement of the laws and punish those proprietors with fines for permitting patrons to use the “wrong” restroom, outsourcing surveillance of transgender people to the private sector.<sup>147</sup> A ballot initiative proposed in California would have imposed a \$4,000 fine on any government entity or person who permitted a person to use a restroom inconsistent “with their sex as determined at birth, through medical examination, or court judgment recognizing a change of gender.”<sup>148</sup> These laws are the literal public policing of people’s gender identity.<sup>149</sup>

Other jurisdictions – often local school districts – have passed or regularly consider regulations targeting queer youth, forbidding students from using bathrooms or locker-rooms consistent with their gender identity.<sup>150</sup> And the Trump administration Department of Education recently concluded an investigation where it interpreted Title IX of the Education Amendments Act to require schools to exclude trans students from sports teams consistent with their gender identity.<sup>151</sup> More broadly, the Trump administration is considering or in some contexts has already proposed regulations that would define sex under federal law narrowly as an

<sup>145</sup> JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 5 (2012), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

<sup>146</sup> SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NATIONAL CENTER FOR TRANSGENDER EQUALITY 82 (2016).

<sup>147</sup> E.g., H.B. 583, Reg. Sess. (Fla. 2015).

<sup>148</sup> Initiative 15–0019, Limits on Use of Facilities in Government Buildings and Businesses (Cal. 2015), <https://oag.ca.gov/initiatives/search?populate=15-0019>.

<sup>149</sup> For a discussion of how the panoptic architecture of some modern lavatories itself can expose gender nonconforming individuals, see SHEILA L. CAVANAGH, QUEERING BATHROOMS 81 (2010).

<sup>150</sup> E.g., H.B. 663, 2016 Gen. Assemb. Reg. Sess. (Va. 2016) (proposing to require schools to force students to use bathrooms and locker-rooms corresponding to their so-called “anatomical sex”); S.B. 6, 85 Reg. Leg. Sess. (Tex. 2017) (proposing to require students to use only the bathrooms and locker-rooms corresponding to their so-called biological sex).

<sup>151</sup> Scott Skinner-Thompson, *Trump Administration Tells Schools: Discriminate against Trans Athletes or We’ll Defund You*, SLATE (JUNE 4, 2020), [https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html?via=recirc\\_recent](https://slate.com/news-and-politics/2020/06/betsy-devos-transgender-athletes-connecticut.html?via=recirc_recent).

immutable condition determined by external genitalia at birth, restricting transgender people's ability to be themselves and navigate a whole host of societal settings beyond bathrooms and including dormitories, homeless shelters, and prisons.<sup>152</sup>

The significance of these bathroom regulations and their role as one of the next battlegrounds for LGBTQ rights prompted one *New York Times* commentator to deem 2015 the "Year of the Toilet."<sup>153</sup> But the laws are about much more than toilets; they involve questions about whether society will recognize the existence of transgender lives and permit transgender people to fully participate in public life. As powerfully explained by the lawyers for Gavin Grimm, who was excluded from using the bathrooms consistent with his gender identity by his high school in Virginia, Gavin's "case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins."<sup>154</sup>

By dictating that people use the bathroom (or any other sex-segregated space) corresponding to their so-called "biological sex," often defined as the sex listed on one's birth certificate, such laws discriminate against transgender people on the basis of their sex and gender identity.<sup>155</sup> But, as with restrictive gender marker laws, they also potentially operate as a form of biometric, normalizing surveillance<sup>156</sup> that also out intimate information about trans people every time they are forced to use public restrooms or sex-segregated spaces that do not correspond to the individual's gender identity, subjecting them to ridicule and violence. In opposition to bathroom bills, some transgender people posted photos of themselves in bathrooms required by the bills, attempting to highlight the potential privacy implications of the laws for trans people. Others creatively created cards to hand out to those who they encountered in restrooms, explaining their presence.<sup>157</sup>

<sup>152</sup> Erica L. Green et al., "Transgender" Could Be Defined out of Existence under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

<sup>153</sup> Jennifer Weiner, Opinion, *The Year of the Toilet*, N.Y. TIMES (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/opinion/the-year-of-the-toilet.html>.

<sup>154</sup> G.G. v. Gloucester Cty. Sch. Bd., No. 16–1733, 2017 U.S. App. LEXIS 6034, at \*3 (4th Cir. Apr. 7, 2017).

<sup>155</sup> Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034 (7th Cir. 2017) (holding that school district's policy barring transgender student from using bathroom consistent with their gender identity likely discriminated under both Title IX and the Equal Protection Clause).

<sup>156</sup> BEAUCHAMP, *supra* note 125, at 95.

<sup>157</sup> While undoubtedly courageous of trans people to photograph themselves in bathrooms that do not resonate with their gender identity, there are important limitations to this kind of activism that seeks to, in essence, suggest that there is something problematic with, for example, a transmasculine person using the women's restroom. It arguably perpetuates tropes that transmen are somehow predators, and ignores that many trans people cannot or choose not to "pass" and therefore do feel most comfortable using bathrooms that align with their sex assigned at birth or gender-neutral bathrooms. Mitch Kellaway, *Casting Trans Men as Predators Won't Stop Bathroom Bills*, THE ADVOCATE (Mar. 29, 2016), <https://www.advocate.com/commentary/2016/3/29/casting-trans-men-predators-wont-stop-bathroom-bills>.

By invading their privacy, the restrictive bathroom regulations deter transgender people from entering the public square in the first instance and suggest that, to do so, they must accede to the state's arbitrary and inaccurate determination of who they are. These laws deny trans people agency over their own identity and foreclose access to the very venues where they could contest the state's determination, burdening their ability to participate in public life and denying their existence. As emphasized by Chase Strangio, laws targeting transgender people are "part of a coordinated effort at all levels of government to challenge trans existence, criminalize our bodies, and push us into the shadows."<sup>158</sup>

Quite right. And when paired with restrictive gender marker laws, laws forbidding transgender people from using public restrooms that comport with their gender identity put many trans people in an impossible double bind and infringe on their autonomous decisions over medical treatment. Although some proponents of bathroom bills claim that trans people who have surgery will be able to change their birth certificate and therefore use the public bathroom corresponding with their gender identity, transgender people will often be impeded from having surgery and will therefore be barred from accessing bathrooms consistent with their gender identity.

How so? Restrictive bathroom regulations often either explicitly condition entrance to a multi-occupancy single-sex facility on some kind of surgical transition<sup>159</sup> or on the existence of a birth certificate that has a gender marker corresponding to the sex of the restroom. For example, both HB2 passed (and partially repealed) in North Carolina and SB6 proposed in Texas conditioned entrance to sex-segregated facility on the sex listed on a birth certificate.<sup>160</sup> As discussed, many states only permit gender markers on a birth certificate to be modified if an individual has undergone surgery so, in effect, the birth certificate requirement often amounts to a surgery requirement. But under the prevailing medical recommendations, an individual only qualifies for genital surgery if they have reached the age of majority (most commonly, 18 years old in the United States) and if they have lived consistently for twelve months in the gender role that conforms with their gender identity.

According to the standards of care developed by the World Professional Association for Transgender Health, it is recommended that adult individuals needing metoidioplasty or phalloplasty (procedures to create a penis) or a vaginoplasty (a procedure to create a vagina) live for twelve continuous months "in a

<sup>158</sup> Chase Strangio, *Trump's Attack on Transgender Health Care Is an Attack on Trans People's Existence*, SLATE (May 9, 2018), <https://slate.com/human-interest/2018/05/trumps-attack-on-transgender-health-care-is-an-attack-on-trans-peoples-existence.html>.

<sup>159</sup> E.g., *Whitaker*, 858 F.3d at 1041 (school required "surgical transition" before it would permit transgender boy to use boys' restroom).

<sup>160</sup> N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3); Tex. Senate Bill 6, 85th Reg. Sess. (2017).

gender role that is congruent with their gender identity” before obtaining those surgeries.<sup>161</sup> Pursuant to the standards of care, “[d]uring this time, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role. This includes coming out to partners, family, friends, and community members (e.g., at school, work, other settings).” Presenting consistently on a day-to-day basis often includes using the restroom that corresponds with one’s gender identity. Therefore, restrictive bathroom regulations interfere with the medical requirements for obtaining certain surgeries in the first instance because they restrict people’s ability to use a single-sex public restroom until after having surgery. Using a single-sex public restroom is probably one of the few activities in many people’s daily lives that is, in fact, segregated by sex. How, then, is a person supposed to live consistently for a year in their true gender role if they are forbidden from doing one of the principle social activities that is sex-segregated?

In other words, restrictive bathroom regulations create a catch-22 even for those transgender individuals who do feel the need for certain kinds of surgery. The regulations often require surgery before using a single-sex bathroom but erect significant barriers to compliance with the recommended medical prerequisites for having certain surgeries. The double bind for transgender people who do not need particular gender confirmation surgeries to live comfortably and consistently with their gender identity and for youth who are often not eligible for surgery is even more apparent. Because such people are forbidden from using the public restrooms that correspond to their gender identity and expression because they have not had the required surgery, every time they use a single-sex bathroom that does not match their gender expression, sensitive, intimate information about their identities and their bodies will be publicly disclosed. If they want to avoid such outing, they will be forced to undergo some sort of surgical intervention – surgery they may not need to live comfortably with their gender identity, that may not be medically indicated, or that may be prohibitively expensive for a particular individual.<sup>162</sup>

The costs of restrictive gender classification laws are magnified for the disproportionate number of trans and genderqueer people that are incarcerated. Many jails, prisons, juvenile detention centers, and immigrant detention centers in the United States do not house trans folk in ways consistent with their gender identity. In other words, trans women will often be housed in male facilities. For example, while the Obama administration had provided that initial housing designations for the federal

<sup>161</sup> WORLD PROFESSIONAL ASSOCIATION OF TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE (7th Version, 2012).

<sup>162</sup> Restrictive bathroom laws are often defended in the name of protecting the privacy of those who do not want to share a bathroom or locker-room with a trans person. But the existence of transgender people does not pose a privacy threat to anyone. See Scott Skinner-Thompson, *Bathroom Bills and the Battle over Privacy*, SLATE (May 10, 2016), <https://slate.com/human-interest/2016/05/in-the-battle-over-bathroom-privacy-transgender-peoples-needs-matter-more.html>; Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719 (2019).

Bureau of Prisons could be made based on the individual's gender identity, the Trump administration predictably reversed course, providing that the initial determination of where an individual should be housed should be based on so-called biological sex.<sup>163</sup> These administrative policies create surveillance violence, outing trans people as such within prison, and potentially subjecting them to sexual violence by other inmates or correctional officers. According to the 2015 US Transgender Survey conducted by the National Center for Transgender Equality of over 27,000 transgender people, one in five respondents who had been incarcerated in a jail, prison, or juvenile detention center in the past year reported being sexually assaulted by facility staff or other inmates – five to six times higher than the overall incarcerated population.<sup>164</sup> The lack of appropriate identification combined with restrictive housing policies leads to privacy violations and violence.

#### WOMEN

Despite privacy's critical role in advancing gender equity, women also face unique privacy threats and are subjected to a substantial amount of gendered and sexualized surveillance gaze, many instances of which are abetted by the secrecy paradigm.<sup>165</sup> For example, women are disproportionately targeted for cyber harassment, including the nonconsensual disclosure of intimate images, or so-called "revenge porn."<sup>166</sup> According to a recent study of nonconsensual pornography websites across the United States, 91.8 percent of images examined featured female victims, and only 7.4 percent feature male victims.<sup>167</sup> (Queer folk are also disproportionately threatened by nonconsensual disclosure of their intimate images.)<sup>168</sup> Nonconsensual disclosure of intimate images can visit concrete material harms by creating a cycle of online harassment, leading to further sexual coercion, exacting devastating mental health harms, preceding physical violence, and endangering

<sup>163</sup> U.S. Dep't of Justice, Bureau of Prisons, Transgender Offender Manual, Change Notice, 5200.04 CN-1 (May 11, 2018).

<sup>164</sup> JAMES ET AL., *supra* note 146, at 191.

<sup>165</sup> ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 123–28 (1988).

<sup>166</sup> DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 13 (2014); *see also* Karen E.C. Levy, *Intimate Surveillance*, 51 IDAHO L. REV. 679, 681 (2015) (documenting extensive methods for monitoring people's intimate lives)

<sup>167</sup> Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCH. 50, 58 (2018); *see also* Yanet Ruvulcaba & Asia A. Eaton, *Nonconsensual Pornography among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men*, PSYCHOL. VIOLENCE (2019), <https://psycnet.apa.org/doi/10.1037/vio0000233>; Asia A. Eaton et al., 2017 *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, CYBER CIVIL RIGHTS INITIATIVE (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

<sup>168</sup> Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 LAW & SOCIAL INQUIRY 987 (2019).



employment opportunities.<sup>169</sup> Activist and revenge porn victim Holly Jacobs has courageously discussed the impact that nonconsensual disclosure of nude images had on her life: the disclosure directly led to online harassment and terrorization, mental health harms, and employment barriers, among other harms.<sup>170</sup> While increased attention is being paid to the harms of nonconsensual disclosure of intimate images and new legislation enacted in many states thanks to courageous activists and scholars,<sup>171</sup> attempts to obtain legal redress are sometimes thwarted by the secrecy paradigm.<sup>172</sup>

For instance, as described above, in *Doe v. Peterson*, plaintiff sued operators of a nude photograph website, where nude photos of plaintiff taken when she was a teenager and sent privately to her then boyfriend were posted. The court dismissed plaintiff's public disclosure claim, reasoning that because the photos had been previously posted by a different website, they were not private facts. Put differently, the bad act of another excused subsequent bad acts of disclosure.

There are important cases going the other direction and holding perpetrators of revenge porn accountable in civil actions,<sup>173</sup> but one of the principal arguments advanced against holding people accountable for nonconsensual image distribution is "that a woman's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public. Said another way, a victim's consent in one context is taken as consent for other contexts."<sup>174</sup>

Tragically, female victims of sexual violence have also been unable to stop documentation pertaining to assaults against them from proliferating without their consent. In fact, several of the Supreme Court's key rulings establishing the secrecy paradigm in the tort context involve the Court concluding that because the identity of sexual assault victims were in publicly available court records or police reports, further publication of that information was free game.<sup>175</sup> One extreme example of this is the case of *Anderson v. Suits*.<sup>176</sup> There, the court relied on the

<sup>169</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 39 WAKE FOREST L. REV. 345, 351–52 (2014).

<sup>170</sup> CITRON, *supra* note 166, at 45–50.

<sup>171</sup> Cyber Civil Rights Initiative (<https://www.cybercivilrights.org>), founded by Holly Jacobs, has been at the vanguard of raising awareness regarding nonconsensual pornography.

<sup>172</sup> To the extent that advocates call for a carceral response to nonconsensual image disclosure, I remain skeptical, in part, out of concern that any new criminal laws will be disproportionately enforced against members of marginalized communities, including racial minorities and queer individuals. Cf. Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18:3 DIFFERENCES 128, 143 (2007).

<sup>173</sup> *E.g.*, Taylor v. Franko, No. 09–00002 JMS/RLP, 2011WL 2746714 (D. Haw. June 12, 2011); Patel v. Hussain, 485 S.W.3d 153 (Tex. App. 2016).

<sup>174</sup> Citron & Franks, *supra* note 169, at 348.

<sup>175</sup> Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Florida Star v. B.J.F., 491 U.S. 524 (1989).

<sup>176</sup> 499 F.3d 1228 (10th Cir. 2007).

“newsworthiness” principle, a closely related doctrinal cousin of the secrecy paradigm, also grounded in the First Amendment. Newsworthiness refers to the rule that if a certain topic is of legitimate public concern, discussion of it by society, including the press, is insulated from liability. In *Suiters*, the Tenth Circuit (in a decision joined by then Judge, now Justice, Neil Gorsuch) affirmed the grant of summary judgment in favor of media defendants who published limited portions of a video of a woman allegedly being raped while unconscious by her husband. The woman allegedly provided the tape to law enforcement on the condition that it not be shared, but the court concluded that because the tape was relevant to the prosecution of the woman’s husband for sexual assault, including assault on other victims, the video was newsworthy and therefore free game for publication by the media. (Absurdly, the court also downplayed the extent of the privacy violation, noting the woman “was never identified by name, and the excerpted portion of the videotape was limited to a few movements of the alleged attacker’s naked body without disclosing the sexual acts in great detail; only [the woman’s] feet and calves were clearly visible, and they bore no identifying characteristics.”)<sup>177</sup>

While rape shield laws may protect the identity of assault victims from being disclosed in the course of a criminal proceeding,<sup>178</sup> think of the incentives created by a regime that essentially immunizes downstream disclosure once the identity has been disclosed in the first instance or if it is related to a law enforcement concern (which are almost always deemed “newsworthy”): if a woman is subject to sexual assault and they come forward, their identity may be free game for discussion. While victims of assault should of course feel no stigma, the decision about whom to disclose any such assault is highly personal and should remain with each individual.

Relatedly, the secrecy paradigm has also stymied efforts to protect women from privacy intrusions (as opposed to disclosures) in public. For example, in *Gary v. State*, a Georgia appellate court overturned the criminal invasion of privacy conviction of a grocery store employee who aimed his cellphone camera up the skirt of a woman on at least four occasions, recording video. The court concluded that the conviction was improper because the woman was in a public place and therefore could not “reasonably expect to be free from intrusion or surveillance.”<sup>179</sup> The absence of privacy in public works with technological advances to render women more vulnerable: while the physical lifting of someone’s skirt to view intimate areas would, undoubtedly, be deemed a privacy violation, the same view captured via camera, perhaps with telephoto lens, is ignored because it occurs in

<sup>177</sup> *Id.* at 1237.

<sup>178</sup> *E.g.*, Col. Rev. Stat. §18–3–407(3).

<sup>179</sup> 790 S.E.2d 150, 151, 153 (Ga. Ct. App. 2016). *But see* Commonwealth v. Nascimento, 79 N.E.3d 1075 (Mass. App. Ct. 2017) (upholding conviction of person who videotaped two teenage girls under their sundresses while they traveled on a public ferry).

“public.”<sup>180</sup> When juxtaposed to regulatory efforts to unveil Muslim women, discussed above, such cases suggest a perverse trend: women are at times forced by the law *not* to take efforts to shield their bodies in public and, once their bodies are exposed, they lose any ability to limit the degree to which their bodies are further documented and disseminated.

The lack of privacy in public emboldens not just the public, objectifying gaze of women by other people, it also facilitates catcalling and verbal harassment of women in public space. As explained by JoAnne Sweeny, “[b]oth street and cyber-harassment carry significant harms for their victims, resulting in women often leaving or reducing their exposure to the public sphere out of fear . . . The right to speak [in public], to say harassing, hateful things, should not outweigh a woman’s right to some privacy and peace when she enters the public sphere.”<sup>181</sup>

The reality of the ubiquitous and gendered surveillance gaze is amplified by the fact that though certain surveillance regimes, such as video/CCTV “security” cameras, are sometimes justified as a means of protecting women from harassment, such cameras can just as plausibly serve as a means of harassment by peeping toms.<sup>182</sup> Even assuming that these cameras are not perverted for gender harassment, while video cameras may in certain instances protect privileged women from sexual assault, video surveillance of public space (and the lack of privacy while in public), is just as often used to police women from marginalized backgrounds: sex workers, poor women, queer women, and women of color.<sup>183</sup> Consequently, rather than viewing “security” cameras as a form of protection, women from marginalized backgrounds often remain wary of these cameras.

The lack of protection for privacy in public also enables the videotaping, harassment, and doxing of women who attempt to exercise their right to reproductive healthcare, including the right to obtain an abortion, and those that provide healthcare services to women.<sup>184</sup> (Doxing is the posting of personally identifiable information about a person for purposes of galvanizing social opprobrium – or

<sup>180</sup> Marc Tran, *Combating Gender Privilege and Recognizing a Woman’s Right to Privacy in Public Spaces: Argument to Criminalize Catcalling and Creepshots*, 20 HASTINGS WOMEN’S L.J. 186, 196 (2015).

<sup>181</sup> JoAnne Sweeny, *Trapped in Public: The Regulation of Street Harassment and Cyber-Harassment under the Captive Audience Doctrine*, 17 NEV. L.J. 651, 666 (2017).

<sup>182</sup> Hille Koskela, *Video Surveillance, Gender, and the Safety of Public Urban Space: “Peeping Tom” Goes High Tech?*, 23 URB. GEOGRAPHY, 257, 264 (2002).

<sup>183</sup> Amanda Glasbeek, *They Catch You Doing the Simple, Human Things: CCTV, Policing, and Gendered Exposure*, 12 J. L. & EQUALITY 63, 77 (2016).

<sup>184</sup> Rachel L. Braunstein, Note, *A Remedy for Abortion Seekers under the Invasion of Privacy Tort*, 68 BROOK. L. REV. 309, 309 (2002); Alice Chapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1545–46 (2003); Yochi J. Dreazen, *Abortion Protestors Use Cameras, Raise New Legal Issues, Lawsuits*, WALL STREET J. (May 28, 2002), <https://www.wsj.com/articles/SB1022539371607091560>.

worse – toward the individual.)<sup>185</sup> Women have been videotaped and harassed by antiabortion activists both as they enter and exit clinics, sometimes even in instances where the patient is being transported via stretcher to an ambulance for more urgent medical care. When women have attempted to hold accountable those who record them as they enter/exit abortion clinics, such attempts have sometimes been thwarted because the women were in “public” as they entered the healthcare office.<sup>186</sup> Harassment outside of abortion clinics has led some women attempting to exercise their rights and doctors providing reproductive healthcare to hood or conceal their identity as they enter abortion clinics.<sup>187</sup>

Even should a woman not be videotaped and harassed while entering an abortion provider’s office, she may face immense privacy hurdles in order to obtain an abortion – particularly if she is economically deprived. For instance, the Hyde Amendment prohibits the use of federal funds for abortion unless the abortion is necessary for the life of the mother, or if the pregnancy is the result of rape or incest. Many women who are impoverished rely on Medicaid for their healthcare. If a state follows the Hyde Amendment and restricts Medicaid funding for abortions to pregnancies resulting from rape or incest, indigent women will have to disclose their assault to healthcare providers (which, in turn, may deter them from seeking an abortion at all). The attacks on poor women’s privacy is not limited to the abortion context – as noted above when discussing the privacy of people who are economically disadvantaged and the important work of Khiara Bridges, women who rely on state assistance are subjected to manifold privacy invasions in order to secure modest public benefits, including reproductive healthcare. And as meticulously documented by Michele Goodwin, women’s reproductive health is also surveilled and controlled through the criminal law system where, for example, fetal drug laws are used to control the reproductive choices of women (often people of color and people of limited means), including through disclosure of information pertaining to their medical and reproductive health.<sup>188</sup>

Thus, in a variety of contexts, women’s privacy is endangered by various surveillance regimes, and the background legal rules that support those regimes.

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All told, when weak doctrinal protections for privacy in public, which are premised on the ability to keep the information secret in order to have a right to privacy are overlaid with the lack of lived privacy of many marginalized groups, these marginalized groups are left with little in the way of remedies if they want to fight any privacy

<sup>185</sup> Colin J.A. Oldberg, Note, *Organizational Doxing: Disaster on the Doorstep*, 15 *COLO. TECH. L.J.* 181, 183 (2017).

<sup>186</sup> *United States v. Vasquez*, 31 F. Supp. 2d 85, 90–91 (D. Conn. 1998); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513–14 (Tex. 1993).

<sup>187</sup> RACHEL GRADY & HEIDI EWING, *12TH & DELAWARE* (LOKI FILMS 2010).

<sup>188</sup> MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 28–45 (2020).

invasion inflicted by the government or a private party. While the above discussion has focused on issues of poverty, race, sexuality, gender identity, gender, and religion, certainly other forms of marginalization are also exacerbated by the interaction between lived exposure and the secrecy paradigm. Such is the case for immigrants targeted with laws permitting their arrest based on suspicion of being removable and who are otherwise subject to surveillance that is now pervasive and decoupled from examination at the border.<sup>189</sup> It's true for people living with disabilities whose impairments may be disclosed or made more visible due to socially constructed ableist architectures.<sup>190</sup> For workers who are subject to intensive monitoring and tracking by their employers, the secrecy paradigm also leaves them vulnerable.<sup>191</sup> Equally so for formerly incarcerated individuals who may lack protection over their "public" criminal record, exposing them to employment discrimination.<sup>192</sup> And for Native Americans who continue to be subjected to government and privatized surveillance for their activism.<sup>193</sup> There are many other examples (some of which are interspersed in the chapters that follow). But my hope is that this chapter has shed some light on why privacy matters for the marginalized, and the doctrinal rules that facilitate the lack of privacy for these groups.

<sup>189</sup> Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 9 (2014).

<sup>190</sup> Natalia Pérez Liebergesell et al., *Designing from a Disabled Body: The Case of Architect Marta Bordas Eddy*, MULTIMODAL TECH. & INTERACTION (2018).

<sup>191</sup> E.g., Karen E.C. Levy, *The Contexts of Control: Information, Power, and Truck-Driving Work*, 31 INFO. SOC'Y 160 (2015).

<sup>192</sup> Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2296–97 (2018).

<sup>193</sup> Alleen Brown et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to "Defeat Pipeline Insurgencies"*, THE INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.