DEFRAGGING FEMINIST CYBERLAW

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ABSTRACT

In 1996, Judge Frank Easterbrook famously observed that any effort to create a field called cyberlaw would be "doomed to be shallow and miss unifying principles." He was wrong, but not for the reason other scholars have stated. Feminism is a unifying principle of cyberlaw, which alternately amplifies and abridges the feminist values of consent, safety, and accessibility. Cyberlaw simply hasn't been understood that way—until now.

In computer science, "defragging" means bringing together disparate pieces of data so they are easier to access. Inspired by that process, this Article offers a new approach to cyberlaw that illustrates how feminist values shape cyberspace and the laws that govern it. Consent impacts copyright law and fair use, the Digital Millennium Copyright Act (DMCA), criminal laws, and free speech. Each of those laws is informed by the invasive act of sharing nonconsensual intimate imagery, better known as "revenge porn." Two other laws, the Americans with Disabilities Act (ADA) and the recent amendments to Communications Decency Act (CDA) § 230, are crucial to promoting web accessibility for all people, including disabled people and sex workers. And safety influences privacy law and the Computer Fraud and Abuse Act, which affect the rights of pregnant people and targets of online harassment. This Article concludes that feminist cyberlaw is a new term, but feminism has always been foundational to making sense of cyberlaw.

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DOI: https://doi.org/10.15779/Z38KD1QM62

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I. INTRODUCTION

On April 14, 1996, nineteen-year-old Jennifer Ringley made a choice that foretold the future of feminism in cyberspace.[1] She began broadcasting her daily life with a small webcam focused on her dorm room.[2] Every fifteen minutes, the webcam snapped a still image that automatically uploaded to her website, Jennice.[3] Viewers could tune in to the Jennicam to watch Ringley working.[4] Or getting ready for a night out.[5] Or preparing for a night in, sometimes with a boy.[6] Not surprisingly, the Jennicam captured Ringley in

1. *See generally* JOANNE MCNEIL, LURKING: HOW A PERSON BECAME A USER (Picador 2020) (recounting the impact of Jennicam); Reply All, *Jennicam*, GIMLET MEDIA, https://gimletmedia.com/shows/reply-all/8whoja (interviewing Jenni about Jennicam) [hereinafter Reply All, *Jennicam*]. For a discussion of the brief collapse of the Reply All podcast, see Jenny Gross, *Host of 'Reply All' Podcast Takes Leave of Absence After Accusations of Toxic Culture*, N.Y. TIMES (Feb. 18, 2021), https://www.nytimes.com/2021/02/18/business/media/pj-vogt-reply-all.html. The word "cyberspace" is widely misattributed to a man, when it was coined in the late 1960s by artist Susanne Ussing. Jacob Lillemose & Mathias Kryger, *The (Re)invention of Cyberspace*, KUNSTKRITIKK, NORDIC ART REV. (Aug. 24, 2015), https://kunstkritikk.com/the-reinvention-of-cyberspace/. This Article uses "cyberspace" interchangeably with "the internet," "online," and "the web."

2. Linton Weeks, *Jenni, Jenni, Jenni: A Life Laid Bare on the Computer Screen*, L.A. TIMES (Oct. 1, 1997), https://www.latimes.com/archives/la-xpm-1997-oct-01-ls-37894-story.html [hereinafter Weeks, *A Life Laid Bare*]; Jennifer Ringley, *Frequently Asked Questions*, JENNICAM (Dec. 10, 1997), https://web.archive.org/web/19971210110509/http:/www.boudoir.org/faq/jenni.html. It's been suggested that Ringley's attachment to her webcam amounted to creating one of cyberspace's first cyborgs. PopMatters Staff, *The New Cyborgs: Cyberculture and Women's Webcams*, POPMATTERS (June 7, 2000), https://www.popmatters.com/000607-lee-2496033552.html.

3. "Jennicam" has been stylized over the years as JenniCam, JenniCAM, and Jennicam—this Article adopts the latter. Reply All, *Jennicam*, *supra* note 1.

4. Weeks, *A Life Laid Bare*, *supra* note 2.

5. Reply All, *Jennicam*, *supra* note 1.

6. *Id.*

various states of nudity.[7] (Ringley rejected the label of pornography.)[8] Mostly male fans of all ages became obsessed with her feed.[9] Views grew to more than one hundred million each day.[10] Someone started a dedicated Jennicam Internet Relay Chat (IRC) channel.[11] Someone else created a website dedicated to her feet.[12] She was featured on This American Life, appeared on The David Letterman Show, and guest starred on the television series Diagnosis Murder.[13]

But not everyone was a fan. After the Jennicam broadcast Ringley having sex with a fellow camgirl's fiancé, she became a target for harassment.[14] Some women adopted whorephobic rhetoric and criticized Ringley.[15] A prominent legal scholar likened her to a "call girl."[16] A Washington Post writer called her a "redheaded little minx" and an "amoral man-trapper."[17] She also received avalanches of "lewd, rude, and crude" emails.[18] Those emails escalated to death threats accompanied by demands that she "show more."[19] In 2003, she pulled the plug on Jennicam and went almost entirely dark.[20]

Ringley's experience encapsulated a trio of feminist values—consent, accessibility, and safety, which often overlap—that inform cyberspace. While the feminist value of consent is complex and contested, it has long been central to feminist discourse.[21] Ringley chose to broadcast her life online freely. Information accessibility drove women to establish many of the first American

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7. *Id.*

8. Weeks, *A Life Laid Bare*, *supra* note 2.

9. Thomas C. Hall, *JenniCam's So-Called Life Goes Live*, WASH. BUS. J. (Jan. 19, 1998), https://www.bizjournals.com/washington/stories/1998/01/19/tidbits.html.

10. Reply All, *Jennicam and the Birth of 'Lifecasting*,' DIGG (Apr. 13, 2015), https://digg.com/2015/reply-all-jennicam.

11. *Id.*

12. *Id.*

13. This American Life, *Tales from the Net*, CHI. PUB. RADIO (CBS television broadcast June 6, 1997), https://www.thisamericanlife.org/66/tales-from-the-net; *Diagnosis Murder: Rear Windows* (Nov. 12, 1998), https://www.youtube.com/watch?v=flDGYMwHFwE.

14. Lib Copel, *All a Woman Can Bare*, WASH. POST (Aug. 26, 2000), https://www.washingtonpost.com/archive/lifestyle/2000/08/26/all-a-woman-can-bare/f104e1fc-7cc1-47ca-acad-53193eb1c18b/.

15. *Id.*

16. Anita Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1191 (2000).

17. Lib Copel, *All a Woman Can Bare*, WASH. POST (Aug. 26, 2000), https://www.washingtonpost.com/archive/lifestyle/2000/08/26/all-a-woman-can-bare/f104e1fc-7cc1-47ca-acad-53193eb1c18b/.

18. Weeks, *A Life Laid Bare*, *supra* note 2.

19. Hugh Hart, *April 14, 1996: JenniCam Starts Lifecasting*, WIRED (Apr. 14, 2020), https://www.wired.com/2010/04/0414jennicam-launches/.

20. *But see* Reply All, *Jennicam*, *supra* note 1.

21. Robin West, *Sex, Law and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE (Alan Wetheimer & William Miller eds., Ox. Academic Press 2009).

libraries. [22] Ringley had physical access to a webcam and an internet connection, and the technical ability to create a website that other people could access in turn. The longtime work of domestic violence advocates protecting clients from abuse reveals the importance of safety.[23] Ringley received abuse and harassment in retaliation for Jennicam. But the development of responsive governance addressing these values was not a given.

The same year Ringley launched Jennicam, the co-founder of the Electronic Frontier Foundation, John Perry Barlow, issued *A Declaration of the Independence of Cyberspace*. He stated, "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather."[24] He added that citizens of cyberspace were "creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force or station of birth." [25] Barlow specifically mentioned race and socioeconomic status, but he didn't explore how an ungoverned cyberspace would affect women, queer, disabled, or other marginalized people. Ringley's experiences suggested that a largely unregulated cyberspace affected women differently—and not for the better.

But the alternative was not necessarily preferable. As early as the 1980s, Congress and courts embraced the task of governing cyberspace, even when both barely understood it.[26] Scholars reacted. A new field developed to study

22. *See generally* Anne Firor Scott, *Women and Libraries*, 21 J. LIBR. HIST. (1974–1987) 253 (1986) (noting that "[p]erhaps 75 percent of [public] libraries were initiated by women's groups, often originally for their own use").

23. *See generally* Deborah Epstein, Margret Bell & Lisa Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER, SOCIAL POL'Y & L. 465 (2003) (discussing that abuse can be from an abuser as well as the state).

24. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence. The Declaration was written from Davos, Switzerland. Barlow's manifesto has been critiqued for its incomplete vision of cyberspace, including the threats from corporations rather than governments. *See, e.g.*, April Glaser, *The Incomplete Vision of John Perry Barlow*, SLATE (Feb. 8, 2018), https://slate.com/technology/2018/02/john-perry-barlow-gave-internet-activists-only-half-the-mission-they-need.html.

25. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence.

26. *See, e.g.*, 18 U.S.C. § 1030 (poorly drafted federal anti-hacking law enacted in 1986); Reno v. ACLU, 521 U.S. 844, 849 (1997) (Supreme Court clunkily explaining "cyberspace" for the first time).

laws that apply to computers, networks, and the internet, collectively called "cyberlaw."[27]

Early cyberlaw scholarship focused on governance mechanics.[28] Throughout the nineties and mid-aughts, however, scholars increasingly explored how oppression colored people's experience of cyberspace and its governance. Sonia Katyal, Rebecca Tushnet, and Madhavi Sunder examined how digital intellectual property (IP) laws can disadvantage, and occasionally empower, marginalized people.[29] Danielle Citron and Julie Cohen explored where existing information laws and policies can fail those same communities.[30] Anita Allen, Jerry Kang, and Cheris Kramarae dove directly into issues at the intersection of gender, race, and cyberspace.[31] And Jane Bailey and Adrienne Telford advocated for using cyberfeminism to explore

27. *Cyberlaw*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Cyberlaw" is attributed to Jonathan Rosenoer, who is credited with coining it in the mid-nineties. Jonathan Rosenoer, *CyberLaw, 25 Years Later: Innovation, Transformation, and an Emerging Backlash*, HARV. J.L. & TECH. DIGEST (Oct. 4, 2017), https://jolt.law.harvard.edu/digest/cyberlaw-25-years-later-innovation-transformation-and-an-emerging-backlash.

28. *See, e.g.*, Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace,* 45 EMORY L.J. 911 (1996); Dan L. Burk, *Federalism in Cyberspace,* 28 CONN L. REV. 1095 (1996); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

29. *See, e.g.*, Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SO. POL'Y & L. 463 (2006) (noting that copyright law affects online "slash" fan fiction, which focuses on romantic or sexual relationships between same-sex characters, that is primarily written by women); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 273 (2007) (asserting that fair use favors sexualized critique); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 1 (2007) (arguing that copyright law affects fan fiction, largely authored by women, that subverts the hegemony of original texts); *see also* Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 519 (2006) (examining hypertext works through a feminist lens and offering a feminist critique of copyright).

30. *See, e.g.*, DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (Harv. Univ. Press, 2014) (building on scholarship demonstrating that women and other marginalized people are uniquely targeted for privacy invasions and harassment online); *see also* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (Yale Univ. Press 2012) (asserting that information flows should not interfere with any person's capacity for play).

31. Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000) (deconstructing impacts of race and gender); Jerry Kang, *Cyber-Race,* 113 HARV. L. REV. 1130 (2000) (discussing impact of race); Cheris Kramarae, *Technology Policy, Gender, and Cyberspace*, 4 DUKE J. GENDER L. & POL'Y 149 (1997) (describing impact of gender).

gendered dynamics in a technologically-sophisticated capitalist society.[32] Investigating the interplay between cyberspace and marginalized communities continues with more recent scholarship by Kendra Albert, Lindsey Barrett, Carys Craig, Hannah Bloch-Wehba, Mary Anne Franks, Kate Klonick, Karen Levy, Elizabeth Joh, Kristelia García, Andrew Gilden, Ngozi Okidegbe, Blake Reid, Vincent Southerland, and Ari Waldman.[33] So far, this work has been dynamic, diverse, and diffuse.

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32. Jane Bailey & Adrienne Telford, *What's So "Cyber" About It?: Reflections on Cyberfeminism's Contribution to Legal Studies*, 19 CAN. J. WOMEN & L. 243, 245 (2013). Donna Haraway's *a Cyborg Manifesto: Science, Technology, and Socialist Feminism in the Late Twentieth Century*, *in* SIMIANS, CYBORGS, AND WOTNETT: THE REINVENTION OF NATURE (Donna Haraway ed., Routledge 1991) was foundational to the formation of cyberfeminism.

33. *See, e.g.*, Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTM'T L.J. (forthcoming 2022) (discussing amendments to Communications Decency Act § 230 harm sex workers); Lindsey Barrett, *Rejecting Test Surveillance in Higher Education*, 1 MICH. ST. L. REV. (forthcoming 2023) (explaining that proctoring software negatively impacts students, disabled people, and people of color); Carys J. Craig, Joseph F. Turcotte & Rosemary J. Coombe, *What's Feminist About Open Access?: A Relational Approach to Copyright in the Academy*, 1 FEMINIST@LAW 1 (2011) (providing a feminist critique of copyright and deploying open access paradigms as a counterpoint to those critiques); Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT'L L.J. 41 (2020) (arguing that automated content moderation policies disproportionately impact marginalized people); Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011) (asserting that cyberspace idealists overlook and underestimate harms inflicted on women and other marginalized people online); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029 (2016) (explaining how online shaming can amount to harassment that targets women and marginalized people); Karen Levy, *Intimate Surveillance*, 51 ID. L. REV. 679 (2015) (discussing technology betrays the privacy of women and other people in intimate relationships); Elizabeth E. Joh, *Artificial Intelligence and Policing: First Questions*, 41 SEATTLE U. L. REV. 1139 (2018) (explaining artificial intelligence systems are dangerous when integrated with the criminal legal system, which disproportionately affects people of color); Chris Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 805 (2022) (discussing how copyright governs online streaming affects women and Black artists); Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357 (2013) (discussing gay teens are especially likely to be targeted for online harassment); Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591 (2020) (discussing the internet remains inaccessible to many people with disabilities); Vincent Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021) (explaining algorithmic tools in the criminal legal system disproportionately impact marginalized people); Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 L. & SOC. INQ. 987 (2019) (explaining nonconsensual intimate imagery targets queer men as well as women). I have also written in this space. *See, e.g.*, Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018) (invoking fair use can create fairer artificial intelligence for women, queer people, and other marginalized people).

In computer science, "defragging" means bringing together disparate pieces of data so they are easier to access.[34] Inspired by that process, this Article brings together cyberlaw doctrines in a new way that makes it easy to see how feminism shapes cyberspace and the laws that govern it. Such a claim is counterintuitive. Men are credited with building the internet.[35] Men founded its most dominant websites.[36] Mostly men enact laws that govern those sites.[37] And mostly men interpret those laws.[38] Yet feminist values and reactions to them play a central role in the development of cyberlaw doctrines.

Feminist cyberlaw uses intersectional feminism to understand how cyberlaws contribute to the oppression and liberation of marginalized people. bell hooks defined intersectional feminism broadly, meaning "the movement

34. Whitson Gordon, *What is "Defragging," and Do I Need to Do It to My Computer?*, LIFEHACKER (Jan. 16, 2013), https://lifehacker.com/what-is-defragging-and-do-i-need-to-do-it-to-my-comp-5976424.

35. This is, unsurprisingly, a misconception. *See generally* CLARE L. EVANS, BROAD BAND: THE UNTOLD STORY OF THE WOMEN WHO MADE THE INTERNET (Portfolio 2018) (debunking the myth of male geniuses creating cyberspace).

36. All of the top five most visited websites were founded by men—sometimes multiple men. *Top Websites Ranking*, SIMILARWEB (2023), https://www.similarweb.com/top-websites/. *From the Garage to the Googleplex*, GOOGLE (2002), https://about.google/our-story/ (Google co-founders Larry Page and Sergey Brin); Christopher McFadden, *YouTube's History and Its Impact on the Internet*, INTERESTING ENG'G (May 20, 2021), https://interestingengineering.com/culture/youtubes-history-and-its-impact-on-the-internet (featuring YouTube co-founders Chad Hurley, Steve Chen, and Jawad Karim); *Mark Zuckerberg, Founder, Chairman and Chief Executive Officer*, META (2022), https://about.facebook.com/media-gallery/executives/mark-zuckerberg/ (Facebook founder Mark Zuckerberg); Nicholas Carlson, *The Real History of Twitter*, INSIDER (Apr. 13, 2011), https://www.businessinsider.com/how-twitter-was-founded-2011-4?op=1 (featuring Twitter co-founders Jack Dorsey, Noah Glass, Biz Stone, and Evan Williams); Avery Hartmans, *The Rise of Kevin Systrom, Who Founded Instagram 10 Years Ago and Built It Into One of the Most Popular Apps in the World*, BUS. INSIDER (Oct. 6, 2020), https://www.businessinsider.com/kevin-systrom-instagram-ceo-life-rise-2018-9 (featuring Instagram co-founders Kevin Systrom and Mike Krieger). The founders are also overwhelmingly white. *Id.*

37. In 2021, Congress was comprised of the highest number of women in history—just 27%. Carrie Blazina & Drew DeSilver, *A Record Number of Women are Serving in the 117th Congress*, PEW RSCH. CTR. (Jan. 15, 2021), https://www.pewresearch.org/fact-tank/2021/01/15/a-record-number-of-women-are-serving-in-the-117th-congress/. Congress also remains overwhelmingly white, with only 23% members identifying as racial or ethnic minorities—a record. Katherine Schaefer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/.

38. Women comprise just under 33% of the federal judiciary, which is also a whopping 74% white. *January 20, 2021 Snapshot: Diversity of the Federal Bench*, AM. CONST. SOC'Y (2022), https://www.acslaw.org/judicial-nominations/january-20-2021-snapshot-diversity-of-the-federal-bench/.

to end sexism, sexist exploitation, and oppression."[39] Intersectionality, a term coined by scholar Kimberlé Crenshaw, is:

> a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other. We tend to talk about race inequality as separate from inequality based on gender, class, sexuality or immigrant status. What's often missing is how some people are subject to all of these, and the experience is not just the sum of its parts.[40]

Intersectional feminism recognizes that oppression comes from many sources and provides a framework for addressing the oppression of people with overlapping identities, such as Black women, queer women, disabled women, poor women, women crime victims, women across these identities, and even oppressed people who are not women at all.[41] This means that hooks' intersectional feminism is expansive; it arguably threatens to swallow all equitable movements.[42] But a broad approach is crucial to realizing that equity for women that fails to dismantle oppression broadly reflects a privileged and partial feminism.[43]

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39. BELL HOOKS, FEMINISM IS FOR EVERYBODY: PASSIONATE POLITICS viii (South End Press 2000). Intersectional feminism stands in opposition to so-called white feminism, which can overlap with radical feminism and is prevalent within technology generally. *Compare* SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013) (describing "feminist" strategies for relatively privileged white women to navigate white collar workplaces) *with* MIKKI KENDALL, HOOD FEMINISM: NOTES FROM THE WOMEN THAT A MOVEMENT FORGOT 2 (Penguin 2020) ("[W]hite feminism tends to forget that a movement that claims to be for all women has to engage with the obstacles women who are not white face.").

40. Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, TIME (Feb. 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/ (interviewing Kimberlé Crenshaw about the meaning and impact of intersectionality); Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (establishing the concept of "intersectionality").

41. *See, e.g.*, Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories*," 4 L. & SEXUALITY 83 (1994) (discussing limited triumphs of queer liberation to queer people of color, trans people, and poor people); Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099 (2017) (describing discrimination against disabled women and disabled women of color); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934 (2015) (detailing subordination on the basis of race and socioeconomic status).

42. It certainly overlaps with aspects of lesbian and critical race feminism.

43. *Compare* SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013) *with* Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (coining the term "intersectionality" to illuminate how overlapping characteristics, such as race and gender, create interlocking systems of oppression); Patricia

However, a different flavor of feminism has been a pervasive and persistent force in cyberlaw: radical feminism.[44] Pioneered by scholar Catharine MacKinnon and popularized throughout the 1970s, radical feminism focuses on the belief that women's oppression by men is responsible for the inequities that women experience economically, politically, and socially.[45] Within this framework, men are privileged and women are subordinated.[46] Radical feminists are not a monolith, but this Article details how radical and its adjacent feminisms shaped cyberlaw, from the embrace of criminal law to promote feminist goals to hostility toward pornography and sex workers.[47]

The approaches and doctrines discussed in this Article are illustrative, not exhaustive. Alternate feminist movements, such as liberal feminism and critical race feminism, hold insights into feminist cyberlaw.[48] Critical theories, including queer and critical race theory, provide additional cyberlaw perspectives.[49] Beyond the lens of law, interdisciplinary methodologies, such as value-sensitive design and design justice, conceptualize the flaws and transformative potential of cyberspace.[50] Among legal doctrines, other intellectual property doctrines, such as patents, trademarks, and trade secrets,

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Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. 514 (1989) (contextualizing Black women's unique positionality to oppression).

44. Conservative feminism, which shares disapproving views regarding pornography and sex work with radical feminists, has also played an important role. Where relevant, the influence of other strands of feminist theory are identified with referrals to deeper dives into those approaches.

45. NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY 23 (2016). *See generally* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (Yale U. Press 1979) (launching radical feminism).

46. NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY 23 (2016).

47. *See infra* Section II.C, Part III, Section IV.B.

48. Select examples of additional feminisms include equal treatment, cultural, lesbian, ecofeminism, pragmatic, postmodern, and Marxist feminism. *See generally* NANCY LEVIT & ROBERT R. M. VERCHICK, FEMINIST LEGAL THEORY (2016); Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer*, 57 AM. CRIM. L. REV. 1569 (2020).

49. *See generally* DINO FELLUGA, CRITICAL THEORY: THE KEY CONCEPTS (Routledge 2015); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., The New Press 1996).

50. *See generally* BATYA FRIEDMAN & DAVID G. HENDRY, VALUE SENSITIVE DESIGN (MIT Press 2019) (accounting for human values in design processes); SASHA COSTZANA-CHOCK, DESIGN JUSTICE: COMMUNITY-LED PRACTICES TO BUILD THE WORLDS WE NEED (MIT Press 2020) (advocating design led by marginalized communities). So does data feminism. CATHERINE D'IGNAZIO & LAUREN F. KLEIN, DATA FEMINISM (MIT Press 2020) (advancing feminist values in data practices).

can be understood through feminist cyberlaw.[51] So are governance doctrines, such as those surrounding data protection, cybersecurity, labor, and antitrust.[52] International perspectives, both comparatively and on their own terms, hold insights into these and many more doctrines.[53] Each and all these topics are ripe subjects for future feminist cyberlaw scholarship.[54]

This Article begins that conversation by illuminating how a handful of core cyberlaw doctrines both undermine and underscore what I call the "Ringley Trifecta" of feminist values: consent, accessibility, and safety. Some of those cyberlaw doctrines were born of the internet, such as the DMCA, and others have become tethered to it intimately, such as privacy law. This Article offers a sharp taxonomy of cyberlaws, including general laws that were not intended,

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51. *See, e.g.*, Andrew Gilden & Sarah R. Wasserman Rajec, *Pleasure Patents*, 63 B.C. L. REV. 571 (2022) (discussing patents for sexual pleasure, including virtual reality systems); Amanda Levendowski, *Trademarks as Surveillance Transparency*, 36 BERKELEY TECH. L.J. 439 (2021) (detailing how to discover secret surveillance technologies using the federal trademark register); Alexandra J. Roberts, *Oppressive and Empowering #Tagmarks*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024) (describing how marginalized communities resist and embrace proprietary activist hashtags trademarks) (building on Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599 (2017)); Rebecca Wexler, *Life, Liberty and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018) (detailing how trade secrecy is invoked to shield algorithms from disclosure in criminal legal proceedings); Sonia Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183 (2019) (discussing interventions to prevent invocation of trade secrecy in criminal legal proceedings).

52. *See, e.g.*, MEG LETA JONES, CTRL+Z: THE RIGHT TO BE FORGOTTEN 5, 59, 86, 156, 161 (N.Y.U. Press 2016) (discussing effects of a permanent internet on women); Karen Levy & Bruce Schneier, *Privacy Threats in Intimate Relationships*, 6 J. CYBERSECURITY 1 (2020) (https://doi.org/10.1093/cybsec/tyaa006) (discussing effects of intimate partner relationship on cybersecurity interventions); Amazon.com Services *and* Retail, Wholesale, and Department Store Union, Case 10-RC-269250 (Nat'l Labor Relations Bd. Aug. 2, 2021), https://www.documentcloud.org/documents/21033629-hearing-officers-report-in-amazon-case-no-10-rc-269250 (recommending that low-income Amazon workers hold new election whether to unionize despite attempted Amazon interference); Gabreille Rejouis, *Black Feminist Antitrust for a Safer Social Media*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024) (calling for the application of Black feminist principles to antitrust).

53. *See, e.g.*, Edward Carter, *Argentina's Right to Be Forgotten*, 27 EMORY INT'L L. REV 23 (2013); Sylwia Ćmiel, *Cyberbullying Legislation in Poland and Select EU Countries*, 109 PROCEDIA SOC. & BEHAV. SCI. 29 (2014); Fawzia Cassim, *Addressing the Growing Spectre of Cyber Crime in Africa: Evaluating Measures Adopted by South African and Other Regional Role Players*, 44 COMPAR. & INT'L L. S. AFR. 123, 123–38 (2011); Daniel J. Ryan, Maeve Dion, Eneken Tikk & Julie J. C. H. Ryan, *International Cyberlaw: A Normative Approach*, 42 GEO. J. INT'L L. 1161 (2011); Renata de Lima Machado Rocha, Roberta Duboc Pedrinha & Maria Helena Barros de Oliveira, *The Treatment of Revenge Pornography by the Brazilian Legal System*, 43 SAÚDE DEBATE (2019).

54. My colleague Meg Leta Jones and I have asked colleagues to begin exploring these topics in our forthcoming edited volume. FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024).

but nevertheless operate, as cyberlaws. The first category includes cyberlaws that can be appropriated for feminist goals, such as furthering feminist values. These laws are civil, and creative deployment of these general laws can promote the feminist values of consent and accessibility. Using the DMCA to remove nonconsensual intimate imagery is one example. The second category includes cyberlaws that cannot be appropriated for feminist goals. These laws are both civil and criminal, and they are intertwined with the feminist values of consent, accessibility, and safety. However, they are not equipped to consistently promote those values, but merely engage with them. Privacy, which has recently been gutted by the Supreme Court and no longer shields pregnant people from invasive scrutiny, illustrates this category. And the final category is feminist cyberlaws that can subvert feminist goals. These laws are enacted as cyberlaws with a feminist purpose, such as criminalizing nonconsensual intimate imagery or banning content promoting sex trafficking. However, their breadth means that these laws can be weaponized against marginalized people, threatening their safety and undermining their consent. These categories are contextual and flexible, and they offer the beginnings of a broader conversation about cyberlaws.

To begin the work of illuminating feminism's role in cyberlaw, this Article proceeds in three Parts after this Introduction. Each Part analyzes a cyberlaw doctrine through one aspect of the Ringley Trifecta—consent, accessibility, and safety—by recounting the history of the doctrine, discussing how it promotes or subverts the central feminist value, and reflecting on the implications of those effects for both feminism and cyberlaw.

Part II examines how consent impacts copyright law and fair use, the DMCA, criminal laws, and free speech. The copyright doctrine of fair use allows other people to use copyrighted works without consent under certain conditions—and without concern for the desires of photographic subjects.[55] The DMCA was enacted to prevent accessing others' content without consent, which can include the distribution of nonconsensual intimate imagery.[56] The latter issue has also encouraged scholars to call for new criminal laws combatting consentless invasions of privacy and dignity.[57]

Part III explores the importance of accessibility by considering the effects of the ADA and the FOSTA/SESTA amendments to Communications Decency Act (CDA) § 230 on web accessibility.[58] Activist plaintiff lawyers

55. 17 U.S.C. § 107.

56. 17 U.S.C. § 512; 18 U.S.C. § 1030.

57. *Infra* Sections I.B, II.C, IV.A.

58. FOSTA/SESTA is the colloquial term for the twin bills known as the Allow States and Victims to Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act.

made web accessibility for disabled people an urgent legal issue by strategically suing corporations with inaccessible websites.[59] But technological access is not the only hurdle for an accessible cyberspace. After the enactment of the FOSTA/SESTA amendments to CDA § 230, sex workers found themselves increasingly isolated from the internet due to overaggressive content moderation policies adopted by interactive service providers, a trend that is bearing out with other marginalized communities as well.[60]

And Part IV exposes how safety influences privacy law and the Computer Fraud and Abuse Act (CFAA). Increasingly, abuse is facilitated by cyberspace. Technologically tracking abortion doctors and pregnant people exposes both groups to increased risks of harassment by both anti-abortion activists and police.[61] Computers are used to spread hateful messages or fantasize about hurting women.[62] In both cases, the law cannot be appropriated to counter these harms—occasionally for the better. This Article concludes that feminist cyberlaw is a new term, but feminism has always been foundational to making sense of cyberlaw.

II. IMPACT OF CONSENT ON CYBERLAW

Women's bodies inspired the modern internet. In 2000, a Google co-founder directed his engineers to create a tool for finding photographs of Jennifer Lopez in a breast- and belly-button-baring gauzy green gown.[63] Three years later, a Harvard student secretly scraped his women classmates' photographs to create a database dedicated to ranking their hotness.[64] The following year, three engineers launched YouTube so searchers could watch Justin Timberlake nonconsensually reveal Janet Jackson's breast during their

59. Minh Vu, Kristina Launey & John Egan, The Law on Website and Mobile Accessibility *Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, AM. BAR ASS'N. (Jan. 1, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/jf22/vu-launey-egan/.

60. MTV News Staff, *How the Social Media Censorship of Sex Workers Affects Us All*, MTV (Oct. 29, 2019), https://www.mtv.com/news/uozyys/sex-work-censorship-effects.

61. *Infra* Section IV.A.

62. United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009); United States v. Valle, 807 F.3d 508, 528 (2d Cir. 2015).

63. Eric Schmidt, *The Tinkerer's Apprentice*, PROJECT SYNDICATE (Jan. 19, 2015), https://www.project-syndicate.org/onpoint/google-european-commission-and-disruptive-technological-change-by-eric-schmidt-2015-01; Rachel Tashjian, *How Jennifer Lopez's Versace Dress Created Google Images*, GQ (Sept. 20, 2019), https://www.gq.com/story/jennifer-lopez-versace-google-images.

64. Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, HARV. CRIMSON (Nov. 19, 2003), https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the/.

Super Bowl halftime show.[65] But a decade before the male gaze was credited with internet ingenuity, early 1990s sex workers laid foundations for the present web by curating chat rooms, patronizing ecommerce sites, and creating online ads to help new users seek out nudity—with consent.[66]

That irresistible impulse drove early internet governance. Just one year before Barlow unveiled his manifesto, then-Senator James Exon proclaimed that "[t]he information superhighway should not become a red-light district."[67] In the ensuing decades, platforms heeded his call by punishing online nudity, often targeting sex workers and queer people, sometimes lacking formal legal requirements to do so, and consistently creating a pattern of innovation and retaliation. Sex workers originated taking credit card payments for online transactions.[68] Years later, growing numbers of credit card companies and other payment platforms refused to do business with them.[69] Sex workers embraced online personal ads to promote their services.[70] Threatened by state

65. Alessandra Stanley, *The TV Watch; A Flash of Flesh: CBS Against Is in Denial*, N.Y. TIMES (Feb. 3, 2004), https://www.nytimes.com/2004/02/03/arts/the-tv-watch-a-flash-of-flesh-cbs-again-is-in-denial.html; Rob Sheffield, *YouTube Origins: How Nipplegate Created YouTube*, ROLLING STONE (Feb. 11, 2020), https://www.rollingstone.com/culture/culture-features/youtube-origin-nipplegate-janet-jackson-justin-timberlake-949019/. Timberlake offered meager and belated apologies to Jackson—and his ex-girlfriend Britney Spears, whom he also mistreated—more than a decade after the incident. Julia Jacobs, *Justin Timberlake Apologizes to Britney Spears and Janet Jackson*, N.Y. TIMES (Mar. 4, 2021), https://www.nytimes.com/2021/02/12/arts/music/justin-timberlake-statement-britney-spears.html.

66. Decoding Stigma, *Sex Workers Built the Internet: An Oral History Roundtable Tracing the Early Days of An Internet Built on Desire, Erotic Labor, Communal Care, and Animated GIFs*, NEW SCHOOL FOR SOC. RSCH. (Apr. 22, 2022), https://www.youtube.com/watch?v=C15TvZiJ95k. *See generally* HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021) (discussing the perspectives of people engaged in sex work are complex and non-monolithic).

67. Sarah Jeong, *How Naked Women Shaped the Internet*, DENVER POST (Aug. 27, 2016) (reprinted from WASH. POST, paywalled), https://www.denverpost.com/2016/08/27/how-naked-women-shaped-the-internet/.

68. Decoding Stigma, *supra* note 66.

69. VALERIE WEBBER, THE IMPACT OF MASTERCARD'S ADULT CONTENT POLICY ON ADULT CONTENT CREATORS (2022), https://drive.google.com/file/d/1167acd62YZqc-j7guzeiOqPjbh3pW03w/view; Samantha Cole, *'War Against Sex Workers': What Visa and Mastercard Dropping Pornhub Means to* Performers, MOTHERBOARD (Dec. 11, 2020), https://www.vice.com/en/article/n7v33d/sex-workers-what-visa-and-mastercard-dropping-pornhub-means-to-performers; Natasha Tusikov, *Censoring Sex: Payment Platforms' Regulation of Sexual Expression*, 26 SOCIO. CRIME, L. & DEVIANCE 63 (2021), https://www.emerald.com/insight/content/doi/10.1108/S1521-613620210000026005/full/html.

70. Decoding Stigma, *supra* note 66.

attorneys general and Congress, those services folded.[71] Sex workers and queer people created some of the original social networks.[72] Yet many mainstream platforms censor their content.[73]

Unsurprisingly, corporations, Congress, and even courts remain uncomfortable with nude bodies, particularly women's.[74] This Part uses consent to explore how governing nudity in cyberspace plays out across copyright law, criminal law and enforcement, and free speech doctrine. Section II.A looks to copyright law, where Google's appropriation of nude models' photographs paved the way for other digital fair uses. In this critical case, however, the judge made no mention that the models never consented to their images becoming more easily findable online because copyright law considers such issues legally irrelevant. In other issues of nonconsensual use, however, the law is surprisingly responsive. Section II.B unpacks how the notice-and-takedown provisions of the DMCA can effectively take down intimate images shared online without consent, known as nonconsensual intimate imagery.[75] But not all scholars and activists agree that civil remedies are the right approach to privacy invasions as repugnant as nonconsensual intimate imagery

71. Julie Adler, *The Public's Burden in a Digital Age: Pressures on Intermediaries and the Privatization of Internet Censorship*, 20 J. L. & POL'Y 231 (2011) (discussing the folding of Craigslist adult services and law enforcement seizing of Backpage). One of those services, Backpage, had an alarming history of nonconsensual sex trafficking victims also appearing in its pages. *See, e.g.*, Jane Doe No. 1 v. Backpage.com LLC, 817 F.3d 12, 16 (1st Cir. 2016).

72. Decoding Stigma, *supra* note 66.

73. *Platforms Which Discriminate Against Sex Workers*, SURVIVORS AGAINST SESTA (June 7, 2022), https://survivorsagainstsesta.org/platforms-discriminate-against-sex-workers/; *see also* Paris Martineau, *Tumblr's Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2010), https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online/; Brit Dawson, *Instagram's Problem with Sex Workers is Nothing New*, DAZED (Dec. 24, 2020), https://www.dazeddigital.com/science-tech/article/51515/1/instagram-problem-with-sex-workers-is-nothing-new-censorship; Reina Sultan, *Terms of Service: Inside Social Media's War on Sex Workers*, BITCH (Aug. 23, 2021), https://www.bitchmedia.org/article/inside-social-medias-war-on-sex-workers. Queer people's content, even when it contains no nudity, are also often censored under platforms' policies. Emily J. Born, *Too Far and Not Far Enough: Understanding the Impact of FOSTA*, 94 N.Y.U. L. REV. 1623, 1648–49 (2019); Rebecca Greenfield, *Why Is Tumblr Censoring #Gay Searches?*, ATLANTIC (July 22, 2013), https://www.theatlantic.com/technology/archive/2013/07/why-tumblr-censoring-gay-searches/313054/.

74. Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV 600 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=875840; I. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738 (2021), https://www.nyulawreview.org/issues/volume-96-number-3/reality-porn/.

75. In its early days, nonconsensual intimate imagery and its distribution was often called "revenge porn," a twofold misnomer: many distributions are for motivations besides revenge, and pornography is consensual. Nonconsensual intimate imagery distribution is also preferable to "nonconsensual pornography" for the latter reason.

distribution. Section II.C turns to advocacy for criminal nonconsensual intimate imagery distribution laws which, not unlike early radical feminist legislation banning pornography, raise First Amendment overbreadth concerns. Calls for criminalization also urge reflection about whether an oppressive criminal legal system can ever be harnessed for feminist goals. Each doctrine is impacted by how consent interacts with nudity, and feminist cyberlaw has something to say about all of them.

A. COPYING COPYRIGHTED NUDITY AS FAIR USE

Photographs of nude models paved the way for internet innovations like image search engines, plagiarism detection software, and accessible books for disabled people.[76] When Google launched its Image Search feature so users could ogle Jennifer Lopez's breasts, it displayed copies of iconic images from her Grammys appearance. Those images were not owned by Google or even Lopez—they belonged to organizations like Getty Images.[77] Google did not have consent to display any of those images, but it did so anyway. And it did the same when it displayed copies of photographs of nude models from an agency called Perfect 10.[78] Unlike the owners of Lopez's photographs, however, Perfect 10 sued.[79]

In 2007, seven years after the advent of Google Image Search, Perfect 10 sued Google for copyright infringement.[80] In theory, Perfect 10 had a point. Photographs, including those featuring nudity, are copyrightable.[81] The law

76. Perfect 10 v. Amazon, 508 F.3d 1146, 1155 (9th Cir. 2007) (search engines); A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (plagiarism detection software); Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (accessible library). Nudity also plays a role in offline fair use cases. *See, e.g.*, Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000) (unsuccessfully challenging nonconsensual publication of nude and nearly nude photographs of Miss Puerto Rico Universe 1997).

77. Amy De Klerk, *Versace Just Recreated Jennifer Lopez's Iconic Grammy's Dress*, HARPER'S BAZAAR (Dec. 3, 2018), https://www.harpersbazaar.com/uk/fashion/fashion-news/a25378084/versace-recreated-jennifer-lopez-green-dress/; Scarlett Kilcooley-O'Halloran, *J Lo Responsible for Google Images*, VOGUE (Apr. 8, 2015), https://www.vogue.co.uk/article/j-lo-green-versace-dress-responsible-for-google-image-search.

78. *See generally* Perfect 10 v. Amazon, 508 F.3d 1146, 1155 (9th Cir. 2007).

79. Perfect 10 v. Google, 416 F. Supp. 2d 828, 834 (C.D. Cal. 2006), *aff'd in part, rev'd in part, remanded*; Perfect 10 v. Amazon, 508 F.3d 1146, 1155 (9th Cir. 2007) (alleging copyright infringement).

80. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1154 (9th Cir. 2007). Perfect 10 also sued Google for trademark infringement and dilution. *Id.*

81. 17 U.S.C. § 102(5) (extending copyright to "pictorial, graphic, and sculptural works") (codifying Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)); Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 865 (5th Cir. 1979) (refusing an obscenity claim as a defense to copyright infringement).

entitles copyright owners to a set of exclusive rights, including display.[82] Appropriating exclusive rights in copyrighted works without authorization generally amounts to infringement.[83] Which is exactly what Google would seem to have done by consentlessly displaying thumbnails of Perfect 10 images responsive to Image Search queries.[84]

Copyright law was not designed to be feminist—indeed, many scholars have offered feminist critiques of copyright law.[85] The first copyright law, the Statute of Anne of 1710, was drafted and enacted by a British Parliament comprised of privileged white men, largely for the benefit of other privileged white men, to encode men's vision for the intersection of creativity and capitalism.[86] Most recently, the Copyright Act of 1976, largely drafted by a white woman named Barbara Ringer,[87] eliminated formalities for copyright registration and extended copyright terms, which made it more challenging for the public to access and reimagine copyrighted works.[88] And while copyright today protects works by authors of all genders, it also protects misogynistic,

82. 17 U.S.C. § 106(5) (reserving copyright owners' rights to "display the copyrighted work publicly").

83. 17 U.S.C. § 501(a). Perfect 10 also registered each of the images with the Copyright Office, a prerequisite for litigation. Perfect 10 v. Google, 416 F. Supp. 2d at 832; 17 U.S.C. § 412. Successful registration is now a prerequisite for litigating copyright infringement claims. Fourth Estate Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 892 (2019).

84. Perfect 10 v. Google, 416 F. Supp. 2d at 833.

85. Instead, scholars have offered feminist critiques of copyright law. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL. & L. 551, 564 (2006); *see also* Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 519 (2006); Malla Pollack, *Towards a Feminist Theory of the Public Domain, or Rejecting the Scope of United States Copyrightable and Patentable Subject Matter,* 12 WM. & MARY J. WOMEN & L. 603 (2006); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273 (2007); Carys Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 J. GENDER SOCIAL POL'Y & L. 207 (2007); Emily Chaloner, *A Story of Her Own: A Feminist Critique of Copyright Law*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 221 (2010).

86. Copyright Act of 1710, 8 Ann. c. 21 (encouraging learning by securing limited monopolies to authors and purchasers of copies); *see also* Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. J. GENDER, SOC. POL'Y & L. 512, 557 (2006) (critiquing the patriarchal origins of copyright law).

87. For more information about the remarkable Ringer, who also helped codify fair use, see Amanda Levendowski, *The Lost and Found Legacy of Barbara Ringer*, ATLANTIC (July 11, 2014), https://www.theatlantic.com/technology/archive/2014/07/the-lost-and-found-legacy-of-a-copyright-hero/373948/.

88. 17 U.S.C. § 102 (stating that copyright subsists in "original works of authorship fixed in any tangible medium of expression," without mention of notice formalities or registration); 17 U.S.C. § 302 (generally extending term to life of the author plus seventy years).

racist, homophobic, ableist, and colonialist works as much as any others.[89] Yet copyright law is a general law that often operates as a cyberlaw, and it can be appropriated for feminist goals, such as encouraging the creativity of marginalized authors or shielding subjects from unwanted uses.[90] While Perfect 10 undoubtedly acted out of capitalist self-interest, its copyright lawsuit could have protected hundreds of models from the nonconsensual amplification of their nude photographs. However, copyright has a complex relationship with consent that complicates its ability to be appropriated for feminist goals and instead puts copyright into conflict with the value of consent.

That conflict is rooted in another area of copyright law, one that gave Google a powerful counterargument to allegations of infringement: its Image Search was fair use. The doctrine of fair use allows—even incentivizes—the use of copyrighted works without consent.[91] According to the Supreme Court, "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purposes, '[t]o promote the Progress of Science and useful Arts.'"[92] Keeping with the Court's belief that fair use is classic Americana, the doctrine originated

89. In some cases, copyright law even promotes the creation of such works. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (finding parody rap discussing "big hairy," "need to shave that stuff," "bald headed," and "two timin'" women to be fair use); *cf.* Kimberlé W. Crenshaw, *Beyond Racism and Misogyny: Feminism and 2 Live Crew, in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda, Charles R. Lawrence, Richard Delgado & Kimberlé W. Crenshaw eds., 2019) (discussing the anti-racist sentiment in the same parody); Cariou v. Prince, 14 F.3d 694 (2d Cir. 2013) (finding appropriation of Rastafarian portraits to be fair use). However, requiring consent for every secondary use can stifle feminist critique. *See, e.g.*, Mattel v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (observing that Mattel "would be less likely to grant a license to an artist that intends to create art that criticizes and reflects negatively on Barbie's image," which could be described as feminist art).

90. Carys Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 J. GENDER, SOC. POL'Y & L. 207, 236–37 (2007) (arguing that feminist theory can recast copyright law to create an "author-subject"). Creatively using copyright law to promote feminist goals is a longtime focus of my scholarship. *See, e.g.*, Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422 (2014) (arguing that copyright can provide targets of nonconsensual intimate imagery with useful remedies); Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018) (asserting that copyright can create fairer artificial intelligence for women, queer people, people of color, and other marginalized people); Amanda Levendowski, *Resisting Face Surveillance with Copyright Law*, 100 N.C. L. REV. 1015 (2022) (proposing that copyright can prevent many forms of face surveillance predicated on profile pictures).

91. Harper & Row v. Nation Enters., 471 U.S. 539, 549 (1985).

92. Campbell v. Acuff-Rose Music, 510 U.S. 569, 575 (1994) (quoting U.S. CONST. Art. 1, § 8, cl. 8).

with litigation over publication of George Washington's papers.[93] Fair use was later codified by the Copyright Act of 1976[94] as a means of identifying permissionless uses that are "not an infringement of copyright."[95] Under fair use, certain uses are privileged[96] and whether a use is fair comes down to how a court assesses four factors, including:

> (1) The purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes;
>
> (2) The nature of the copyrighted work;
>
> (3) The amount and substantiality of the portion used in relation to the work as a whole; and
>
> (4) The effect of the use on the potential market for or value of the copyrighted work.[97]

On appeal, in *Perfect 10 v. Amazon*, the Ninth Circuit examined Google's use under the four factors of fair use and Judge Ikuta's analysis of the first factor powerfully influenced subsequent digital fair uses.[98] Under the first factor, the court inquired into whether Google use was "transformative," meaning whether its image search engine did not "merely supersede the objects of the original creation" but "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or

93. *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (developing a multi-factor test for fair use).

94. Former Register of Copyrights Barbara Ringer played an important role in the codification of fair use. To learn more about Ringer, see Amanda Levendowski, *The Lost and Found Legacy of Barbara Ringer*, ATLANTIC (July 11, 2014), https://www.theatlantic.com/technology/archive/2014/07/the-lost-and-found-legacy-of-a-copyright-hero/373948; Advancing Inclusion in Copyright and Register Barbara Ringer's Legacy, U.S. COPYRIGHT OFF. (Nov. 19, 2020), https://copyright.gov/events/barbara-ringer/.

95. 17 U.S.C. § 107. While fair use is often framed as an affirmative defense—the district court in Perfect 10 treated it as such—the statutory language suggests it's more like a wholesale exemption rather than an exception. *See generally* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015) (arguing that fair use should be understood as a defense, but not an affirmative one).

96. Those uses include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ." 17 U.S.C. § 107.

97. *§ Id.*

98. 508 F.3d 1146 (9th Cir. 2007). It is worth noting that, under the second factor assessing the creativity of a work, Google argued that nude photographs were less creative than other artistic works—a proposition the district court rejected. Perfect 10 v. Google, 416 F. Supp. 2d 828, 849–50 (C.D. Cal. 2006). It did, however, suggest that viewers of nude photographs were less discerning than others. *Id.* at 847.

message."[99] Judge Ikuta explained that search engines transform images from works into "a pointer directing a user to a source of information."[100] Judge Ikuta also noted that using the entire photographs did "not diminish the transformative nature of Google's use."[101] Judge Ikuta concluded that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails . . . ."[102]

Judge Ikuta's decision paved the way for transformative technological uses that were not only legally fair, but more socially fair as well.[103] Nearly a decade later, the Second Circuit invoked her decision to support its finding that the HathiTrust Digital Library, a mass digitization project to provide accessible books to disabled people, was fair use.[104] That same court cited Judge Ikuta's reasoning to conclude that Google Books, the company's massive searchable book digitization project, was transformative despite its commerciality.[105] That decision enabled rich text and data mining research into Google Books volumes.[106] And engineers of AI systems implicitly rely on the decision to curate more equitable datasets—ones without the well-documented discriminatory effects of earlier systems.[107]

The legacy of *Perfect 10* is not all positive. The right to hoover up other people's photographs indiscriminately enabled Google Search results that

99. *Id.* at 1164 (quoting *Campbell*, 510 U.S. at 579).

100. *Id.*

101. *Id.*

102. *Perfect 10 v. Amazon*, 508 F.3d at 1166. The finding that commerciality was not dispositive marked a departure from the Supreme Court's prior stance. Sony Corp. Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.").

103. Not all fair uses promote fairness. *See* Amanda Levendowski, *Feminist Use*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024) (highlighting misogynistic, racist, and invasive colorable fair uses).

104. Authors Guild v. HathiTrust, 755 F.3d 87, 95 (2d Cir. 2014).

105. Authors Guild v. Google, 804 F.3d 202, 217 (2d Cir. 2015).

106. Matthew Sag has written and advocated about the promise of text and data mining, and attendant copyright issues, for the better part of a decade. *See* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1682 (2009); Matthew Sag, *Orphan Works as Grist for the Data Mill*, 27 BERKELEY TECH. L.J. 1503 (2012); Brief of Digital Humanities and Law Scholars as Amici Curiae In Support of Defendant-Appellees and Affirmance, Authors Guild v. Google (2d Cir. 2014); Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC'Y USA 291 (2019).

107. *See generally* Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018) (arguing that most uses of copyrighted works to train AI systems are fair use). *But see* Levendowski, *Resisting Face Surveillance*, *supra* note 90 (noting a key exception in the use of profile pictures to train face surveillance).

traffic in oppressive imagery, including misogynoir, by suggesting pornographic results for searches of "Black girls" but not other comparable searches.[108] Judge Ikuta's rationale positioning search engines as fair use has been appropriated by face surveillance company Clearview AI, which describes itself as a "search engine . . . providing for highly accurate facial recognition," to defend its private database of billions of scraped photographs used by law enforcement.[109] And a similar fair use analysis can be invoked to argue that content used to train "deepfakes," false video and audio generated by AI systems overwhelmingly used to create nonconsensual intimate imagery, are likewise fair use.[110] There is also an important issue missing from Judge Ikuta's decision entirely: what about the nude models whose images were made searchable online?

Google's appropriation of photographs of those models made their images freely, easily available in a way they weren't before. Previously, those Perfect 10 photographs were limited to newsstands ($7.99 an issue) and web subscriptions ($25.50 per month).[111] The photographs' existence were effectively obfuscated by paywalls that limited their accessibility. Google was not legally obligated to seek, or even consider, the models' consent—it certainly was not given. Yet the *Perfect 10* decision glosses over Google's violation of the models' agency.

The obvious reason is that copyright law is uninterested in photographic subjects, who have no copyright interest in works featuring their likeness.[112] Recognizing authors as photographers, rather than subjects, originated with the decision establishing the copyrightability of photography itself. In *Burrow-Giles Lithographic v. Sarony*,[113] photographer Napoleon Sarony snapped a shot of Oscar Wilde that was consentlessly reproduced by Burrow-Giles

108. "Misogynoir" was coined by queer Black feminist scholar Moya Bailey to describe "the unique ways in which Black women are pathologized in popular culture." *See* Moya Bailey, *More on the Origin of Misogynoir*, TUMBLR (Apr. 27, 2014), https://moyazb.tumblr.com/post/84048113369/more-on-the-origin-of-misogynoir. 'SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018) (Dr. Safiya Noble raising early concerns over Google Image Search's misogynoir results.)

109. *Principles*, CLEARVIEW AI, https://perma.cc/GM3V-YJQA. The company is unlikely to be a search engine. Levendowski, *Resisting Face Surveillance*, *supra* note 90.

110. *The State of Deepfakes: Landscape, Threats, and Impact*, DEEPTRACE (Sept. 2019), https://enough.org/objects/Deeptrace-the-State-of-Deepfakes-2019.pdf (identifying 96% of deepfakes as pornographic).

111. Perfect 10 v. Google, 416 F. Supp. 2d 828, 831–32 (C.D. Cal. 2006).

112. Selfies, which collapse author and subject, are the notable exception. *Supra* Section II.B. *But see* Garcia v. Google, 786 F.3d 733 (9th Cir. 2015) (unsuccessfully invoking copyright law to censor an actor's appearance in a controversial film). Alternatively, other areas of law—such as right of publicity—are very interested in the nonconsensual use of one's likeness.

113. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54–55 (1884).

Lithographic. [114] Wilde—notorious, debonair, and controversial—undoubtedly made the shot noteworthy. But the Supreme Court took painstaking lengths to celebrate Sarony's contributions, including:

> posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.[115]

According to the Court, Sarony, as the photographer, owned the copyright.[116] Wilde, as the subject, was simply there.

This tension has become pronounced among open knowledge projects. Authors, who may or may not have permission from their subjects, are entitled to share their works for remix, reuse, and reappropriation. Organizations like Creative Commons (CC) make that easy. Dedicated to building a "vibrant, collaborative global commons,"[117] CC offers a suite of licenses that modify the all-rights-reserved approach to copyright, which allows authors to make their works more accessible to all. But that includes organizations dabbling in dubious technology.

In 2020, IBM was outed for automatically copying, or "scraping," CC-licensed photographs to fuel its face recognition technology.[118] Many authors were alarmed. "None of the people I photographed had any idea their images were being used in this way," explained Greg Peverill-Conti, who unknowingly

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114. *Id.*

115. *Id.* at 60.

116. *Id.* For a deeper dive into the effects of this conclusion, see Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 385–88 (2004); cf. Eva E. Subotnick, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1499–504 (2011).

117. *About The Licenses*, CREATIVE COMMONS (2022), https://creativecommons.org/licenses/.

118. Olivia Solon, *Facial Recognition's 'Dirty Little Secret': Millions of Online Photos Scraped Without Consent*, NBC NEWS (Mar. 12, 2020), https://www.nbcnews.com/tech/internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921 [hereinafter Solon, *Dirty Little Secret*]. Investigatory tools can determine if one's photographs were appropriated for face surveillance. Cade Metz & Kashmir Hill, *Here's a Way to Learn if Facial Recognition Systems Used Your Photos*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/01/31/technology/facial-recognition-photo-tool.html (describing Exposing.AI). In 2022, I supervised student attorneys in the iPIP Clinic advising an open knowledge client on addressing the appropriation of copyrighted works for face surveillance. All comments are based on publicly available information.

contributed more than 700 photographs to the IBM dataset.[119] The company reassured authors (and the public) that its product was not intended for law enforcement, but IBM has a long history of secretly selling oppressive surveillance tools to governments.[120] Initially, IBM rode the wave of criticism. But in the wake of George Floyd's murder by police officer Derek Chauvin, amid calls from Black Lives Matter and feminist activists to defund the police and abolish surveillance technology, IBM announced that it would sunset its face recognition program.[121] Yet IBM was arguably legally entitled to use those photographs—through CC licensing, consent had already been granted.[122]

To be clear, copyright law does not need to be changed to protect subjects. There are good reasons for showing or sharing works, even works featuring nudity, without subjects' specific consent. Critics did so to expose the torture occurring at Abu Ghraib.[123] Art enthusiasts might hang prints by Robert Mapplethorpe in their homes.[124] Whistleblowers may leak harassing photographs from powerful men to the press.[125] But copyright law barely defines definitively what constitutes fair use—it is even less equipped to determine what is "fair" in the sense of "equitable."[126] Other doctrines, such

119. Solon, *Dirty Little Secret*, *supra* note 118. An IBM spokesperson stated that the images could be removed from the dataset on request. *Id.*

120. Including literal Nazis. *See, e.g.*, EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001). More recently, IBM created CCTV technology searchable by skin tone, as well as an "intelligent video analytics" product that could tag people on body-worn camera footage by ethnicity. *See* Solon, *Dirty Little Secret*, *supra* note 118; Levendowski, *Resisting Face Surveillance*, *supra* note 90.

121. Arvind Krishna, *IBM CEO's Letter to Congress on Racial Justice Reform*, IBM: THINKPOLICY BLOG (June 8, 2020), https://www.ibm.com/blogs/policy/facial-recognition-sunset-racial-justice-reforms/.

122. Levendowski, *Resisting Face Surveillance*, *supra* note 90, at 1045.

123. *See* DAVID LEVI STRAUSS & CHARLES STEIN, ABU GHRAIB: THE POLITICS OF TORTURE (2004).

124. For examples of Mapplethorpe's art, see Robert MAPPLETHORPE, PORTRAIT OF JACK STAHL (1976).

125. This is a variation on the Sydney Leathers scandal. Abraham Riesman, *The Secret Struggle of the Woman Who Took Down Weiner*, CUT (May 20, 2016), https://www.thecut.com/2016/05/pain-triumph-weiner-sexter-sydney-leathers.html.

126. As Lawrence Lessig quipped, "[F]air use in America simply means the right to hire a lawyer to defend your right to create." LAWRENCE LESSIG, FREE CULTURE Ch. 16 (2004), http://www.authorama.com/free-culture-16.html. And several iconic fair uses reflect misogyny, racism, and colonialism. *See, e.g.*, Campbell v. Acuff-Rose, 510 U.S. 569 (1994) (releasing parody calling women "big hairy," "need to shave that stuff," "bald headed," and "two-timin'"); *see also* Michelle Ruiz, *Safiya Noble Knew the Algorithm Was Oppressive*, VOGUE (Oct. 21, 2021), https://www.vogue.com/article/safiya-noble; Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013) (appropriating photographs of Black Rastafarians). *But see* Kimberlé W. Crenshaw, *Beyond Racism and Misogyny: Feminism and 2 Live Crew, in* WORDS THAT WOUND:

as the right of publicity, may be better tailored to solving the schism between photographers' or fair users' wants and subjects' consent.[127]

B. TAKING DOWN NONCONSENSUAL INTIMATE IMAGERY WITH THE DIGITAL MILLENNIUM COPYRIGHT ACT

Sometimes, a photographic subject's lack of consent to use a work coincides with copyright infringement. In 2013, David K. Elam II responded to the end of his relationship with Jane Doe by threatening to ruin her life.[128] He delivered. Elam got to work about spreading Doe's intimate images, shared in the context of a relationship, across the internet.[129] He uploaded her images to multiple pornographic websites and directly shared links with Doe's classmate and mother.[130] Doe registered her selfies with the U.S. Copyright Office and sued for copyright infringement.[131] Elam had no defense.

Crucially, Elam's misappropriation was unlikely to be fair use. In a case over the republication of President Gerald Ford's biography recounting his pardon of Richard Nixon, the Supreme Court stated that authors' "right to control the first public appearance of [their] undisseminated expression will outweigh a claim of fair use" because "the scope of fair use is narrower with

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CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda, Charles R. Lawrence, Richard Delgado & Kimberlé W. Crenshaw eds., 2019) (discussing anti-racist speech reflected in the song); Jessie Heyman, *SuicideGirls Respond to Richard Prince in the Best Way*, VOGUE (May 28, 2015), https://www.vogue.com/article/suicidegirls-richard-prince (appropriating alt-models' Instagram posts for gallery show); Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007) (appropriating nude models' images and later serving up misogynoir search results). For a discussion of what a model for feminist fair use, or "feminist use," looks like, see Amanda Levendowski, *Feminist Use*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024) (manuscript on file with author).

127. *See, e.g.*, N.Y. Civ. Code §§ 50–51. For a comprehensive discussion of right of publicity laws, see JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018); Jason Schultz, *The Right of Publicity–A New Framework for Regulating Facial Recognition* (manuscript on file with author).

128. Jane Doe v. David K. Elam II, First Amended Complaint, 2:14-cv-09788 (C.D. Cal. Feb. 12, 2015), at *2, https://www.courtlistener.com/docket/4152345/11/jane-doe-v-david-k-elam-ii/. Doe was represented by K&L Gates, which has a boutique pro bono practice litigating on behalf of nonconsensual intimate imagery victims. Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html/.

129. Jane Doe v. David K. Elam II, First Amended Complaint, 2:14-cv-09788 (C.D. Cal. Feb. 12, 2015), at *2, https://www.courtlistener.com/docket/4152345/11/jane-doe-v-david-k-elam-ii/.

130. *Id.* at *3. The posts often included Doe's personal information, such as her name and school, and Doe received "countless" messages and requests from strangers through her personal social media accounts.

131. *Id.* at *6.

respect to unpublished works."[132] In the largest judgment of its kind, the district court awarded Doe $450,000 in damages for Elam's infringement.[133] And while imperfect, there was also another tool in Doe's arsenal: the Digital Millennium Copyright Act (DMCA).[134]

Enacted in 1998, the DMCA responded to a rapidly growing internet by providing copyright owners with new tools to tackle web users' infringement.[135] However, its provisions go beyond the exclusive rights traditionally protected by copyright law—it's best understood as a paracopyright law.[136] Its provisions revolutionized responses to copyright infringement in two ways. First, it created a safe harbor protecting online service providers (OSPs) from copyright infringement liability so long as the OSPs satisfied certain statutory conditions.[137] Second, it created a new way for copyright owners to request removal of infringing content: notice and takedown.[138] By sending compliant notices of infringing content to OSPs,

132. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555, 564 (1985).

133. For context, it was a default judgment rather than a jury award. Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html/.

134. Jane Doe v. David K. Elam II, First Amended Complaint, 2:14-cv-09788 (C.D. Cal. Feb. 12, 2015), at *5 (describing counsel's "diligent issuance of takedown letters" which were not immediately effective but appear to have had some effect between 2013 and 2015 when the lawsuit was file). I proposed using the DMCA to combat nonconsensual intimate imagery as a law student in the first scholarly paper to make the recommendation. Levendowski, *Using Copyright*, *supra* note 90, at 442–43. This piece has been put into practice. In 2021, I supervised student attorneys in Georgetown's iPIP Clinic developing a guide to using the DMCA to take down nonconsensual intimate imagery for domestic violence service providers. *Taking Down Online Nonconsensual Pornography: A Guide*, DV ADVOCATES (Dec. 2021) (manuscript on file with author).

135. This Part focuses on § 512 of the DMCA; its companion, § 1201, creates penalties for the circumvention of copyright protection systems, often embodied as digital rights management (DRM) technology. 17 U.S.C. § 1201. Every three years, civil society, libraries, archives, educational institutions, hobbyists, and others engage in the strange and chaotic process of submitting requests for exemptions from § 1201 to the Librarian of Congress, which are then attacked by copyright owners. In 2020, I supervised student attorneys Michael Rubayo and Natasha Tverdynin in the iPIP Clinic filing an exemption comment, which as partially granted, on behalf of the Electronic Frontier Foundation. *Comments of the Electronic Frontier Foundation on Proposed Class 12: Computer Programs—Repair*, ELEC. FRONTIER FOUND. (Dec. 14, 2020), https://www.eff.org/document/dmca-1201-2021-comments-electronic-frontier-foundation-proposed-class-12-computer-programs.

136. H.R. REP. NO. 105-551, pt. 2, at 24 (1998) (acknowledging that the DMCA "represent[s] an unprecedented departure into what might be called paracopyright"); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 24 (2001) (discussing the DMCA as paracopyright law).

137. 17 U.S.C. §§ 512(a)–(d).

138. 17 U.S.C. § 512(c)(3).

copyright owners could put pressure on OSPs to respond or risk losing their safe harbor.[139] The DMCA falls within the first category: cyberlaws that can be appropriated for feminist goals, such as combating nonconsensual intimate imagery. But Congress certainly did not anticipate that the DMCA would become a powerful civil tool for removing such harassing and harmful content.

Victims of nonconsensual intimate imagery distribution have an interest in removing their images from the internet quickly and quietly. Consequences can be dire, from mental health diagnoses of anxiety, depression, or post-traumatic stress disorder (PTSD),[140] to loss of employment,[141] to self-harm.[142] Drawn-out litigation can further burden victims, who are disproportionately women and queer people.[143] Luckily, most nonconsensual intimate imagery victims can use the DMCA to remove their images.

A survey by anti-nonconsensual intimate imagery advocacy organization Cyber Civil Rights Initiative established that 80% of victims reported that their nonconsensual intimate images were selfies, meaning that victims are authors, subjects, and copyright owners all at once.[144] As a result, most victims can use the DMCA notice process to take down their images. Sending a DMCA notice is free, unlike registering a copyright or initiating a lawsuit.[145] Sending a DMCA notice does not require additional disclosure of the underlying image, unlike

139. *Cf.* 47 U.S.C. § 230(e)(2) (noting that the Communications Decency Act does not "limit or expand any law pertaining to intellectual property"). For more on CDA § 230, see *infra* Section III.B.

140. Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22 (2016).

141. Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back*, JEZEBEL (July 18, 2018), https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768.

142. Tyler Clementi and Amanda Todd reflect two tragic examples. Michelle Dean, *The Story of Amanda Todd*, NEW YORKER (Oct. 18, 2012), https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd.

143. Amanda Lenhart, Myeshia Price-Feeney & Michele Ybarra, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn"*, DATA & SOC'Y, 16 (Dec. 13, 2016), https://datasociety.net/library/nonconsensual-image-sharing/; Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 L. & SOC. INQUIRY 987, 987–88 (2019).

144. *Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims*, CYBER CIVIL RIGHTS INITIATIVE (Sept. 10, 2013), https://www.cybercivilrights.org/wp-content/uploads/2015/06/SB255_Press-Release.pdf (citing Cyber Civil Rights Initiative survey finding that 80% of nonconsensual intimate imagery images are selfies).

145. 17 U.S.C. § 512. It also imposes no inherent costs on recipients of DMCA takedown requests, unlike most litigation complaints.

registration or litigation.[146] Sending a DMCA notice doesn't even require a lawyer, as any copyright owner or their agent can submit one.[147] And, most importantly, it works.

Take Celebgate. In 2014, dozens of women celebrities' nude images were hacked and leaked to reddit.[148] The moderators of subreddits where the images appeared declined to respond immediately, and so did the site itself. But one thing caught reddit's attention: DMCA takedown notices. As then-CEO Yishan Wong explained in his blog post about the incident, "[i]n accordance with our legal obligations, we expeditiously removed content hosted on our servers as soon as we received DMCA requests from the lawful owners of that content, and in cases where the images were not hosted on our servers, we promptly directed them to the hosts of those services."[149]

While the DMCA took down the original photographs, irreversible harm had already been done.[150] Jennifer Lawrence, whose images were included in the hack, put it bluntly by explaining "It's my body, and it should be my choice, and the fact that it is not my choice is absolutely disgusting. I can't believe we even live in that kind of world."[151]

Despite its effectiveness, some scholars, including Rebecca Tushnet and Jeannie Fromer, are skeptical that copyright should be invoked to tackle

146. 17 U.S.C. §§ 512I(3)(A)(i)-(vi). A DMCA notice may still create a public record of the request. The Lumen database, for example, archives records of DMCA notices. *About Us*, LUMEN (2022) https://www.lumendatabase.org/pages/about.

147. 17 U.S.C. § 512(c)(3)(A)(vi).

148. Mike Isaac, *Nude Photos of Jennifer Lawrence Are Latest Front in Online Privacy Debate,* N.Y. TIMES (Sept. 2, 2014), https://www.nytimes.com/2014/09/03/technology/trove-of-nude-photos-sparks-debate-over-online-behavior.html. To put reddit into context, see Keegan Hankes, *How Reddit Became a Worse Black Hole of Violent Racism than Stormfront*, GAWKER (Mar. 10, 2015), https://www.gawker.com/how-reddit-became-a-worse-black-hole-of-violent-racism-1690505395. The article's title says it all. While copyright carried the day, hacking is criminalized under the Computer Fraud and Abuse Act, which has been used to prosecute traffickers of nonconsensual intimate imagery. *See infra* Section IV.C.

149. Yishan Wong, *Reddit CEO: Every Man is Responsible for His Own Soul*, REDDIT (Sept. 7, 2014), https://redef.com/author/540c232b66c1b42455d31ce1. Please take note of the truly awful title of the post—yikes.

150. Some of the images remain findable today. Google only began removing the hacked images from its subsidiaries after being threatened with a $100 million lawsuit; other smaller sites responded within hours to DMCA takedown requests. Alex Hern & Dominic Rushe, *Google Threatened with $100m Lawsuit over Nude Celebrity Photos*, GUARDIAN (Oct. 2, 2014), https://www.theguardian.com/technology/2014/oct/02/google-lawsuit-nude-celebrity-photos.

151. VANITY FAIR, *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a "Sex Crime,"* (Oct. 7, 2014), https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover/.

nonconsensual intimate imagery.[152] Their concerns are not misplaced. Invoking the DMCA can have serious costs. As Cathay Smith has observed, the DMCA's extrajudicial process encourages its weaponization by rightsholders.[153] Jennifer Urban, Joe Karaganis, and Brianna Schofield illustrated how that weaponization threatens the free speech of fans, activists, and critics alike.[154] And the practical success of DMCA takedowns also does nothing to change the dangerous societal attitudes that prize intellectual property rights over people's privacy and autonomy.[155] Yet despite its flaws, the DMCA can be effective when little else is.[156]

C. CRIMINALIZING NONCONSENSUAL INTIMATE IMAGERY AND PROTECTING FREE SPEECH

Nonconsensual intimate imagery distribution is not only subject to civil remedies. The nonconsensual exposure of Rutgers freshman Tyler Clementi's most private moments tested one of the earliest criminal nonconsensual

152. Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2348 (2014) (reviewing Derek E. Bambauer, *Exposed*, 98. MINN. L. REV. 2025 (2014)) (rejecting the use of copyright to combat nonconsensual intimate imagery); Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 580 (2015) (discussing my recommendation to use the DMCA to take down nonconsensual intimate imagery and describing privacy as an "ill-fitting motivations" for asserting copyright). Some scholars go a step further and reject the use of copyright to protect against privacy harms at all. *See, e.g.*, Hon. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1129 (1990) ("The occasional attempt to read protection of privacy into the copyright is also mistaken."); Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 4 B.Y.U. L. REV. 929, 996 (2019) ("Despite the legitimate and sometimes profound harms experienced by some privacy victims, copyright law should not be manipulated to fix privacy law's problems.").

153. Cathay Smith, *Weaponizing Copyright*, 35 HARV. J.L. & TECH. 193, 231–33 (2022).

154. Jennifer M. Urban, Joe Karaganis & Brianna Schofield, *Notice and Takedown in Everyday Practice*, UC Berkeley Pub. L. Research Paper No. 2755628 (2016). This threat is not limited to the DMCA but extends to copyright itself. Cathay Y.N. Smith, *Copyright Silencing*, 106 CORNELL L. REV. 71 (2021). For specific examples of DMCA weaponization, see Jon Brodkin, *Twitter Suspends Sports Media Accounts After NFL Says GIFs Violate Copyright*, ARS TECHNICA (Oct. 13, 2015), https:// arstechnica.com/tech-policy/2015/10/nfls-copyright-complaints-lead-to-twitter-crackdown-on-sports-gif-sharing/ (deployment against sports fansite Deadspin); Alejandro Menjivar, Natalia Krapiva & Rodrigo Rodríguez, *Warning: Repressive Regimes Are Using DMCA Takedown Demands to Censor Activists*, ACCESS NOW (Oct. 22, 2020), https://www.accessnow.org/dmca-takedown-demands-censor-activists/ (weaponization against activist content by Nicaragua, Tanzania, and Ecuador); Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube*, ELEC. FRONTIER FOUND. (Sept. 5, 2008), https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube.

155. Sarah Jeong, *Après Moi, Le Déluge: What Went Wrong on Reddit*, FORBES (July 15, 2015), https://www.forbes.com/sites/sarahjeong/2015/07/15/apres-moi-le-deluge-what-went-wrong-on-reddit/.

156. Levendowski, *Using Copyright*, *supra* note 90, at 446.

intimate imagery laws. Unbeknownst to Clementi, his roommate and another student surreptitiously filmed him with another man, shielded only by a blanket, and streamed it live over the internet.[157] Clementi's roommate tweeted about the invasion, saying "Roommate asked for the room till midnight. I went into molly's [sic] room and turned on my webcam. I saw him making out with a dude. Yay."[158] Three days later, Clementi died by suicide.[159]

The filming duo were charged with invasion of privacy under New Jersey's nonconsensual intimate imagery statute.[160] Enacted in 2003, the law criminalizes, in part, when an individual:

> knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.[161]

Violating the law is a third-degree felony.[162] In nearly all other states at that time, however, there were no targeted criminal nonconsensual intimate imagery laws.[163] Criminal nonconsensual intimate imagery laws fall into the third category of cyberlaws: feminist cyberlaws that can subvert feminist goals. While criminal nonconsensual intimate imagery laws can be powerful ways of retaliating against consentless acts that threaten victims' safety, these laws can also be drafted so poorly—and unconstitutionally—that they can be weaponized against marginalized people. There also remains an open question

157. Lisa W. Foderaro, *Private Moment Made Public, Then A Fatal Jump*, N.Y. TIMES (Sept. 29, 2010, https:// www.nytimes.com/2010/09/30/nyregion/30suicide.html; Ian Parker, *The Story of a Suicide*, NEW YORKER (Jan. 29, 2012), https:// www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide.

158. Nate Schweber & Lisa W. Foderaro, *Roommate in Tyler Clementi Case Pleads Guilty to Attempted Invasion of Privacy*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/nyregion/dharun-ravi-tyler-clementi-case-guilty-plea.html.

159. Foderaro, *supra* note 157. People considering suicide can call the National Suicide Prevention Lifeline at 1-800-273-TALK (8255).

160. *Two Rutgers Students Charged With Invasion of Privacy*, MIDDLESEX CNTY. PROSECUTOR'S OFF. (Sept. 28, 2010), https://web.archive.org/web/20120310150735/http://www.co.middlesex.nj.us/prosecutor/PressRelease/Two%20Rutgers%20students%20charged%20with%20invasion%20of%20privacy.htm.

161. N.J.S.A. § 2C:14-9(b).

162. *Id.*

163. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 371 (2014).

among feminists about whether criminal laws can ever be used to promote feminist goals.[164]

At the time, there were other criminal laws applicable to nonconsensual intimate imagery distribution. Some instances of copyright infringement are crimes.[165] Other laws, such as the Computer Fraud and Abuse Act, criminalize the kind of hacking that targeted celebrities like Jennifer Lawrence.[166] Manipulating images to create false disparaging ones amounts to criminal defamation in some states.[167] One federal criminal law even requires recordkeeping to verify the identities and ages of performers in all visual depictions of sexually explicit conduct.[168] Several of these laws or their civil analogs have been successfully used to combat nonconsensual intimate imagery but, of these, the New Jersey criminal law was most relevant to Clementi.

However, the mere existence of these laws did not make them easy for victims to invoke, even when they were applicable. Serious structural barriers remained. As victim and activist Holly Jacobs explained, "I don't just see the gaping holes in our legal system; I experience them firsthand."[169] Law enforcement and prosecutors often blamed victims for taking the images and avoided taking on cases that were perceived as factually and technologically

164. *See, e.g.*, Elizabeth Bernstein, *The Sexual Politics of the 'New Abolitionism,'* 18 DIFFERENCES 3 (2007), https://glc.yale.edu/sites/default/files/pdf/sexual_politics_of_new_abolitionism_.pdf (coining the term "carceral feminism").

165. Levendowski, *Using Copyright*, *supra* note 90, at 445; *see also* 17 U.S.C. § 506(a). Civil copyright laws have been used effectively. Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html/ (detailing $450,000 default judgment for copyright infringement in nonconsensual intimate imagery lawsuit).

166. 18 U.S.C. § 1030(a)(2)(C); *Computer Crime Statutes*, NAT'L CONF. STATE LEG. (May 4, 2022), https://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx (detailing state versions of the CFAA). The CFAA has also been used effectively. *See, e.g.*, Department of Justice, *"Operator of 'Revenge Porn' Website Sentenced to 2 ½ Years in Federal Prison in Email Hacking Scheme to Obtain Nude Photos*" (Dec. 2, 2015), https://www.justice.gov/usao-cdca/pr/operator-revenge-porn-website-sentenced-2-years-federal-prison-email-hacking-scheme. For more on Hunter Moore and the CFAA, see *infra* Section IV.C.

167. *Map of States with Criminal Laws Against Defamation*, ACLU (2022), https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation.

168. *See* 18 U.S.C. §§ 2257–2257A. The latter provision has been challenged as unconstitutional. *See* Ann Bartow, *Why Hollywood Does Not Require "Saving" From the Recordkeeping Requirements Imposed by 18 U.S.C. Section 2257*, 118 YALE L.J.F. (2008).

169. Holly Jacobs, *Victims of Revenge Porn Deserve Real Protection*, GUARDIAN (Oct. 8, 2013), https://www.theguardian.com/commentisfree/2013/oct/08/victims-revenge-porn-deserve-protection. The case against Jacobs' ex-boyfriend, who distributed her images, was dismissed. *Id.* She founded the advocacy organization Cyber Civil Rights Initiative. *Id.*

tricky.[170] Once victims found an advocate, lawyers and litigation remained expensive. And retelling the same story over and over, including publicly before a judge and jury, and possibly before the person who released the images, could mount a traumatic toll that some victims were not willing to take.

In 2014, scholars Danielle Citron and Dr. Mary Anne Franks believed existing laws could not be an effective deterrent—why else would rates of victimization be rising?[171] They opted to resist nonconsensual intimate imagery another way: by advocating for its criminalization.

In *Criminalizing Revenge Porn*, Citron and Franks detailed the harms of nonconsensual intimate imagery to support their call for criminalization. In a study of 1,244 people, over 50% of victims reported that their images were accompanied by their full names and social network profiles; over 20% included their email address and telephone number.[172] Preventing nonconsensual intimate imagery, they explained, was more complicated than victims logging off. These kinds of accompanying disclosures meant that online aggression could translate to offline attacks, including stalking, harassment, and rape.[173] Citron and Franks positioned nonconsensual intimate imagery on the newest attack on women and girls' autonomy, not unlike domestic violence, sexual assault, and sexual harassment.[174] Like those issues, the road to preventing nonconsensual intimate imagery would be "long and difficult."[175] But perhaps a targeted criminal law could help.

Citron and Franks did not initially provide model legislation, instead opting to outline key features of nonconsensual intimate imagery laws.[176] The pair was mindful that a poorly drafted nonconsensual intimate imagery law could run afoul of the First Amendment and be struck down as unconstitutional.[177] That concern must be contextualized by a much earlier example of scholars

170. *Id.*

171. Citron & Franks, *supra* note 163, at 349. Franks produced model legislation in subsequent articles. *See, e.g.*, Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1292, 1331 (2017); Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER C.R. INITIATIVE (updated Oct. 2021), https://cybercivilrights.org/wp-content/uploads/2021/10/Guide-for-Legislators-10.21.pdf.

172. Citron & Franks, *supra* note 163, at 350–51.

173. *Id.*; *see also* Edecio Martinez, *Alleged 'Craigslist Rapist' Ty McDowell: Ex-Marine Tricked Me Into Raping Former Girlfriend*, CBS NEWS (Mar. 8, 2010), https://www.cbsnews.com/news/alleged-craigslist-rapist-ty-mcdowell-ex-marine-tricked-me-into-raping-former-girlfriend/.

174. Citron & Franks, *supra* note 163, at 347–48.

175. *Id.*

176. *Id.* at 387–90.

177. *Id.* at 386.

advocating a different kind of law targeting nudity, this kind consensual: banning pornography.

In 1983, the Indianapolis city council enacted an ordinance inspired by the scholarship, advocacy, and model legislation of radical feminist scholars Andrea Dworkin and Catharine MacKinnon, who argued that pornography "is a systemic practice of exploitation and subordination based on sex that differentially harms and disadvantages women."[178] Consistent with Dworkin and MacKinnon's work, the ordinance broadly defined pornography as

> the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
>
> 1. Women are presented as sexual objects who enjoy pain or humiliation; or
>
> 2. Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> 3. Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> 4. Women are presented as being penetrated by objects or animals; or
>
> 5. Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
>
> 6. Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[179]

While the ordinance positioned itself as a feminist one, it only endorsed a radical flavor of feminism. Other feminists countered that MacKinnon and Dworkin's approach ignored the ordinance's paternalism, hostility to some feminist works, likely weaponization against feminists and lesbians, and effect on sex workers—many of whom are women and feminists—who might exercise their agency to choose consensual sex work.[180] It also happened to be unconstitutional.

178. ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 138 (1988).

179. *Id.* at 138–39.

180. Nadine Strossen, *Feminist Critique of 'the' Feminist Critique of Pornography*, *An Essay*, 79 VA. L. REV. 1099, 1140–71 (1993) (outlining ten ways that pornographic censorship could undermine the interests of women and feminists).

In *American Booksellers Association v. Hudnut*, booksellers challenged the statute as an unconstitutional restraint on free speech by invoking classic texts like Greek myths and James Joyce's Ulysses as potentially prohibited "pornography."[181] At the Seventh Circuit, Judge Easterbrook observed that the ordinance's definition of pornography was "considerably different" from the Supreme Court's definition of obscenity, one of the few categories of speech unprotected by the First Amendment.[182] The Supreme Court defined obscenity in *Miller v. California*, explaining that "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." [183] Among its constitutional shortcomings, the ordinance did not contemplate that pornography could have any value, let alone "literary, artistic, political, or scientific value." Indianapolis and its amici were undeterred by the mismatch and positioned it as a powerful way to move the needle on societal attitudes toward women.[184] MacKinnon went a step further, asserting that "if a woman is subjected, why should it matter that the work has other value?"[185]

As Judge Easterbrook explained, it mattered because the First Amendment could not tolerate what amounted to "thought control." [186] While Judge Easterbrook accepted Dworkin and MacKinnon's position that all pornography created and maintained sex as a basis of discrimination—a contentious call—he nevertheless determined that pornography is protected speech.[187] He concluded that well-intentioned bans on broad swaths of speech must yield to the First Amendment.[188]

A sloppy criminal nonconsensual intimate imagery law ran the risk of becoming the next *Hudnut*. Sensitive to overbreadth issues, Citron and Franks recommended requiring proof that victims suffered harm.[189] Similarly, they endorsed laws that reflected the state of First Amendment doctrine by including clear public interest exemptions.[190] And they favored laws that put people on notice by providing clear, specific, and narrow definitions for

181. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).

182. *Id.* at 324.

183. *Id.* at 324 (quoting Brockett v. Spokane Arcades, 472 U.S. 491 (1985)).

184. *Id.* at 325.

185. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985).

186. *Am. Booksellers Ass'n*, 771 F.2d at 328.

187. *Id.* at 329. He also, unflatteringly and unfairly, compared pornography to "racial bigotry, anti-semitism, violence on television, [and] reporters' biases . . . ." *Id.* at 330.

188. *Id.*

189. Citron & Franks, *supra* note 163, at 388.

190. *Id.*

important terms, such as "sexually explicit," "nude," and "disclosure."[191] This tailoring, Citron and Franks explained, would elide constitutional issues with the legislation.[192]

Many state legislatures agreed and answered Citron and Franks' call, some even developing their bills in consultation with them.[193] In less than a decade, the United States went from one New Jersey law to criminal nonconsensual intimate imagery statutes in 48 states, Guam, and the District of Columbia.[194] But not every state credited Citron and Franks' criteria for a criminal law. To the contrary, Arizona's attempt at a criminal nonconsensual intimate imagery law embodied why the state earned its wild, wild west reputation.

The Arizona nonconsensual intimate imagery law stated that it was:

> unlawful to intentionally disclose, display, distribute, publish, advertise, or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.[195]

The law ignored all of Citron and Franks' recommendations. It did not require proof of harm—it did not even require proof that the person was recognizable or had a reasonable expectation of privacy in the image. It provided a handful of public interest exemptions, including when reporting unlawful activity to law enforcement or as required by law, when seeking medical treatment, and

191. *Id.* at 388–89.

192. Citron and Franks disagreed about the standard for a mens rea requirement. *Id.* at 387 n.278. For endorsements of constitutional criminal nonconsensual intimate imagery laws, see Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247 (2015). Others preferred the categorization of nonconsensual intimate imagery as unprotected speech. *See, e.g.*, Evan Ribot, *Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?*, UNIV. CHI. L.F. 15 (2019); *cf.* John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215 (2014); Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013), https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/.

193. *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1293 (2017).

194. Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NAT'L ASSOC. ATTORNEYS GENERAL (Nov. 16, 2021), https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn/. Since 2016, Representative Jackie Spier has introduced federal nonconsensual intimate imagery legislation on several occasions. *Intimate Privacy Protection Act Reintroduced in Congress*, EPIC (May 21, 2019), https://epic.org/intimate-privacy-protection-act-reintroduced-in-congress/.

195. Antigone Books v. Horne, Complaint, No. 2:14-cv-02100, at *18 (D. Ariz. Sept. 23, 2014), https://www.aclu.org/legal-document/antigone-books-v-horne-complaint. I was formerly a bookseller at Changing Hands Bookstore, one of the named plaintiffs.

when voluntarily exposed publicly or commercially.[196] Newsworthiness was not among them.[197] And while it included a definitions section, "disclosure" was not among the terms defined there.[198] The law was flawed and overbroad. It's no surprise that the American Civil Liberties Union took issue with it.

In *Antigone Books v. Horne*, the first lawsuit challenging a criminal nonconsensual intimate imagery law, Arizona bookstores rallied to protest the overbroad law banning speech.[199] Booksellers explained that any law that criminalizes displaying Pulitzer Prize-winning photographs, publishing news articles detailing detainees' abuse, distributing educational images of breast-feeding mothers, and disclosing unsolicited sexts to a parent—and that poses an existential threat to galleries, libraries, and bookstores that show, share, and sell works featuring nudity—must be unconstitutionally overbroad.[200] However, the court never got a chance to agree. The booksellers and the Attorney General stipulated that the government would be permanently enjoined from "enforcing, threatening to enforce, or otherwise using Arizona Revised Statute § 13-1425 in its current form."[201]

After Arizona, several other states squarely confronted the constitutionality of their nonconsensual intimate imagery statutes. Vermont's Supreme Court rejected the State's assertion that all nonconsensual intimate imagery amounted to unprotected obscenity, but concluded that its interest in criminalizing nonconsensual intimate imagery was compelling, narrowly tailored, and constitutional.[202] After Illinois's statute was struck down by the lower court, the Illinois Supreme Court declined to create a new category of unprotected speech but determined that the statute did not overly restrict the disseminator's speech and was neither overbroad nor vague.[203] And the Minnesota Supreme Court similarly reversed the court of appeals by rejecting

196. *Id.*

197. *Id.* Without such an exception, Sydney Leathers' disclosure of Congressman Anthony Weiner's nudes could have been a crime. *See generally* Abraham Riesman, *The Secret Struggle of the Woman Who Took Down Weiner*, N.Y. MAG. (May 20, 2016), https://www.thecut.com/2016/05/pain-triumph-weiner-sexter-sydney-leathers.html.

198. Antigone Books v. Horne, Complaint, No. 2:14-cv-02100, at *18–19 (D. Ariz. Sept. 23, 2014), https://www.aclu.org/legal-document/antigone-books-v-horne-complaint.

199. *Id.*

200. *Id.* at *3.

201. *See* Final Decree, Antigone Books v. Horne, No. 2:14-cv-02100, at *2 (D. Ariz. July 10, 2015), https://www.aclu.org/legal-document/antigone-books-v-horne-final-decree/. The law has since been amended. Ariz. Rev. Stat. § 13-1425.

202. State v. Rebekah S. VanBuren, 214 A.3d 791, 799 (Vt. 2019) https://www.vermontjudiciary.org/sites/default/files/documents/op16-253.pdf.

203. People v. Austin, 155 N.E.3d 439, 474 (Ill. 2019), https://courts.illinois.gov/Opinions/SupremeCourt/2019/123910.pdf.

attempts to carve out nonconsensual intimate imagery as unprotected speech and ultimately upheld the statute as constitutional.[204] In each case, the courts detailed and credited the serious harms inflicted on victims of nonconsensual intimate imagery, often citing Citron and Franks.[205]

But constitutionality is accompanied by another challenge facing criminal nonconsensual intimate imagery laws: the criminal legal system itself. During the height of the Black Lives Matter protests in 2020, some feminists amplified longtime calls for abolition of the criminal legal system.[206] And yet, as Citron and Franks illustrated, criminal laws can be invoked to prosecute harms against women and girls. How could those truths coexist? Elizabeth Bernstein coined the term "carceral feminism" as her resounding response that they cannot.[207]

Carceral feminism describes the allure of a law-and-order agenda, an approach which reflects a "drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals."[208] However, with poorly drafted nonconsensual intimate imagery laws like Arizona's, feminist goals can be easily subverted and those laws turned against marginalized people, including trans and queer people. Sharing images of top surgeries, swapping photographs of queer intimacy, and even exposing videos of sexual harassment to the press could be swept into the scope of an overbroad criminal nonconsensual intimate imagery law, which could be weaponized by motivated prosecutors.[209] When it comes to crafting criminal legal interventions, the specifics are critical.

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204. State v. Casillas, 952 N.W.2d 629 (Minn. 2020), https://www.courthousenews.com/wp-content/uploads/2020/12/mn-revenge.pdf.

205. *Rebekah S. VanBuren*, 214 A.3d at 794; People v. Austin, 155 N.E.3d at 451; *Casillas*, 952 N.W.2d at 644 n.10. For the First Amendment wonks, the courts applied different standards of scrutiny, with some opting for strict and other opting for intermediate scrutiny. *Id.*

206. *See, e.g.*, Lanre Bakare, *Angela Davis: 'We Knew That the Role of the Police Was to Protect White Supremacy*, GUARDIAN (June 15, 2020), https://www.theguardian.com/us-news/2020/jun/15/angela-davis-on-george-floyd-as-long-as-the-violence-of-racism-remains-no-one-is-safe (recounting activist Angela Davis' decades-long campaign to defund the police). For a deeper dive into Davis' approach to prison abolition, see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2011).

207. Bernstein, *supra* note 164.

208. *Id.* at 143; Mimi Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 219 (2018), https://transformharm.org/wp-content/uploads/2018/12/Kim-2018-FromCarceralFeminismtoTransformativeJustice.pdf.

209. Back in Arizona, law enforcement harassed the *Phoenix New Times* for printing artistic photographs of nude children by artist Betsy Schneider under broad child sex abuse material (CSAM) criminal laws. Amy Silverman, *Artist Betsy Schneider Takes Pictures of Her Children Naked and Shows Them to the World*, PHOENIX NEW TIMES (Aug. 14, 2008), https://

III. IMPORTANCE OF ACCESSIBILITY TO CYBERLAW

Former Senator Exon opened his remarks before the Senate by quoting a chaplain.[210] "Almighty God, Lord of all life," he proclaimed, "we praise You for the advancements in computerized communications that we enjoy in our time. Sadly, however, there are those who are littering this information superhighway with obscene, indecent, and destructive pornography."[211] Exon's prayer preluded his introduction of legislation criminalizing minors' access to sex online.[212]

The Communications Decency Act (CDA) was intended to shield minors from "obscene or indecent messages," as well as "patently offensive" messages, defining the latter as any message that "in context, depicts or describes . . . sexual or excretory activities or organs."[213] The law criminalized knowingly sending such messages to minors.[214] The CDA did not define "indecent."[215] And while it cribbed obscenity language from Miller, it excluded any of the exemptions and caveats that made obscenity bans constitutional. Though Exon's office was unlikely to acknowledge the inspiration, the CDA nevertheless mirrored many concerns raised by the radical feminist *Hudnut* ordinance.[216] Immediately after the CDA was enacted, the ACLU and nineteen other plaintiffs challenged its constitutionality.

In *Reno v. American Civil Liberties Union*, the Supreme Court squarely confronted the internet for the first time.[217] In its inaugural decision on this new medium, Justice Stevens explained that the internet was "known to its users as 'cyberspace' . . . located in no particular geographical location but

www.phoenixnewtimes.com/news/artist-betsy-schneider-takes-pictures-of-her-children-naked-and-shows-them-to-the-world-6438551; Nick Martin, *Newspaper's Nude Child Photos Draw Police Review*, EAST VALLEY TRIB. (Aug. 18, 2008), https://www.eastvalleytribune.com/news/article_89b8be5b-ee57-5c01-a7e3-a7aa0cb83918.html?mode=jqm.

210. 141 CONG. REC. S8329 (daily ed. June 14, 1995).

211. *Id.*; Exon Amendment No. 1268.

212. Reno v. ACLU, 521 U.S. 844, 849 (1997).

213. *Id.* at 859–60.

214. *Id.*

215. *Id.*

216. The more obvious influence is conservativism.

217. *Id.* Technically, its first mention of cyberspace was a concurrence citation to Lawrence Lessig. Denver Area Ed. Telecomm. Consortium v. F.C.C., 518 U.S. 727, 777 (1996). Since then, four other Supreme Court cases mention cyberspace. Nixon v. Shrink Missouri Gov't P.A.C., 528 U.S. 377, 408 (2000); Ashcroft v. ACLU, 535 U.S. 564, 612 (2002); United States v. Am. Library Ass'n, 539 U.S. 194, 240 n.6 (2003); Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 377–78 (2008); Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

available to anyone, anywhere."[218] Despite the government's claim that the CDA amounted to a sort of "cyberzoning," its provisions "applie[d] broadly to the entire universe of cyberspace."[219] As a result, the Court determined that the CDA was a blanket, content-based restriction of speech.[220] And a vague and overbroad one at that.[221]

The CDA was silent about whether determinations of indecency or patent offensiveness were from the perspective of minors or all of society.[222] With regards to the latter, Justice Stevens expressed prescient concerns about criminalizing parents who emailed their underage college freshmen information about birth control because the college town's community may find those communications indecent or patently offensive.[223] These issues, among others, led the Court to conclude that the CDA was unconstitutional under the First Amendment.[224] As Justice Stevens put it, the CDA "threaten[ed] to torch a large segment of the internet community . . . [and] the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[225]

The Court's decision in *Reno* enabled free, easy access to sexual content online—but only for some people and only in some contexts. This Part uses accessibility to examine how governing sex in cyberspace plays out across the Americans with Disabilities Act (ADA) and a surviving portion of the CDA, § 230. For many disabled users, ubiquitous online sex remains accessible only hypothetically. Section III.A examines how strategic litigation under the ADA casts the internet as a "place of public accommodation" requiring full accessibility of websites, including pornographic ones. Rather than provide paths to accessibility, other areas of law pose barriers to it. Section III.B illustrates how the FOSTA/SESTA amendments to the CDA existentially threaten sex workers' online content with dangerous offline effects. Both laws expose how sex and accessibility in cyberlaw mesh and how feminist cyberlaw

218. *Reno v. ACLU*, 521 U.S. at 851.

219. *Id.* at 868.

220. *Id.*

221. *Id.* at 871–73.

222. *Id.* at 871 n.37.

223. *Id.* at 878. It is difficult to believe that the Supreme Court used to care about accessibility of information about birth control, but it did. *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing that the constitutional right to privacy protects use of contraception by married people), *with* Dobbs v. Jackson Women's Health Org., U.S. No. 19-1392 (2022), at *37 (perhaps not?).

224. Reno v. ACLU, 521 U.S. 844, 879 (1997).

225. *Id.* at 882, 885.

provides a framework for linking them to other restrictions on information, such as employment, childcare, and healthcare resources.

A. ACCESSING THE INTERNET USING THE AMERICANS WITH DISABILITIES ACT

On October 5, 2019, a New Yorker named Yaroslav Suris did what many people do on a Saturday: he visited a series of popular porn websites in an attempt to watch some videos.[226] But titles like "Sexy Cop Gets Witness to Talk," among others, did not work for Suris.[227] But the websites were not down for maintenance. His operating system was updated. There was no outage with his wireless service. The videos' unavailability was more fundamental. Suris is deaf, and none of the websites had adequate closed captioning.[228]

While Suris is a man, resource inaccessibility disproportionately affects women. One in four people in the country are disabled, and most disabled people are women.[229] Accessing sex is important, but websites increasingly determine the availability of other life-critical resources like banking, employment applications, childcare video conferences, and healthcare resources. Ensuring the internet's full accessibility to disabled people could not be more urgent.

One approach to creating accessible television programs, DVDs, and streaming services is closed captioning, which displays transcribed and descriptive text over the videos. With closed captioning, deaf and hard-of-hearing people can enjoy videos, and it also enables anyone to experience videos in environments that might be loud, such as in bars and restaurants, or

226. Suris v. MG Freesites, First Amended Complaint, No. 1:20-cv-00284, at *3 (June 10, 2020).

227. *Id.* at 5. This Article does not endorse the use of any cops, let alone sexy cops, to coerce confessions from people accused of crimes.

228. *Id.* at 2–3. This Article does not capitalize deaf because here, it refers to the audiological condition of not hearing rather than the specific community of Deaf people who share a language, culture, and community. *See generally* CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE (Harv. U. Press 1988) (describing features of the Deaf community).

229. Catherine A. Okoro, NaTasha D. Hollis, Alissa C. Cyrus, Shannon Griffin-Blake, *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016*, CTR. FOR DISEASE CTRL. (Aug. 17, 2018), https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm; *Disability and Health Information for Women with Disabilities*, CTR. FOR DISEASE CTRL. (2022), https://www.cdc.gov/ncbddd/disabilityandhealth/women.html. Roughly thirty-six million women are disabled in the United States. *Spotlight on Women with Disabilities*, DEP'T LAB. (Mar. 2021), https://www.dol.gov/sites/dolgov/files/ODEP/pdf/Spotlight-on-Women-with-Disabilities-March-2021.pdf.

in quiet environments, like libraries and hospitals.[230] While the Federal Communications Commission (FCC) regulates closed captioning for television, its regulations generally do not require captions for internet videos.[231] But Suris wasn't concerned with FCC regulations. Instead, he sued some of the biggest porn video websites alleging violation the ADA as a means of, as Bradley Allan Areheart and Michael Ashley Stein put it, "integrating the [i]nternet."[232] But the ADA is not a feminist cyberlaw.[233] Indeed, it's not a cyberlaw at all. Instead, it falls within the first category of "cyberlaws" as a general law that can be appropriated for feminist goals, like promoting web accessibility.

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230. This is an example of the "curb-cut effect," a term coined by Angela Glover Blackwell to describe how accessibility innovations for marginalized people improve conditions for all people. Angela Glover Blackwell, *The Curb-Cut Effect*, STAN. SOC. INNO. REV. (Winter 2017), https://ssir.org/articles/entry/the_curb_cut_effect. The premise is powerful, but attempted implementation can prioritize ableist "universal" accessibility at the expense of disabled people's lived experience. Blake Reid, *The Curb-Cut Effect, Spillovers, and the Perils of Accessibility Without Disability*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024) (manuscript on file with author). For a deeper dive into closed captioning, see Blake Reid, *Third Party Captioning and Copyright*, GLOBAL INITIATIVE FOR INCLUSIVE INFORMATION & COMM. TECH. (2014), https://ssrn.com/abstract=2410661.

231. *Closed Captioning of Internet Video Programming*, FED. TRADE COMM'N (2022), https://www.fcc.gov/consumers/guides/captioning-internet-video-programming (outlining limited exceptions).

232. Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449 (2015); Suris v. Mindgeek Holding, First Amended Complaint, No. 1:20-cv-00284, at *4 (June 10, 2020). Suris' lawsuit was perhaps the most salacious, but it was far from the first. Decisions about web accessibility remain limited, but lawsuits are skyrocketing. Minh Vu, Kristina Launey & John Egan, *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, AM. BAR ASS'N.: TECHSHOW ISSUE (Jan. 1, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/jf22/vu-launey-egan/. In the wake of booming litigation, the Department of Justice (DOJ) recently issued guidance on web accessibility under the ADA. *Guidance on Web Accessibility and the ADA*, DEP'T JUST. (Mar. 18, 2022), https://beta.ada.gov/resources/web-guidance/. The DOJ guidance is so new that it's still hosted on a beta website. *Id.* But the internet's hostility to disability predates this wave of litigation considerably and reflects it deeply. For an accounting of internet ableism, see Blake Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591 (2020).

233. Scholars, particularly junior ones, long recognized that it might be used that way, however. *See* Kenneth Kronstadt, Note, *Looking Behind the Curtain: Applying Title III of the Americans with Disabilities Act to Business Behind Commercial Websites*, 81 S. CAL. L. REV. 111 (2007); Katherine Rengel, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 JOHN MARSHALL J. COMPUT. & INFO. L. 543 (2008); Stephanie Khouri, Note, *Disability Law—Welcome to the New Town Square of Today's Global Village: Website Accessibility for Individuals with Disabilities after* Target *and the 2008 Amendments to the Americans with Disabilities Act*, 32 U. ARK. LITTLE ROCK L. REV. 331 (2010).

After decades of advocacy by disability rights activists and organizations, Congress finally recognized that disabled people are subjected to rampant isolation and discrimination, and—unlike many other marginalized people—lacked adequate legal means of recourse to address their subjugation.[234] In 1990, the ADA was enacted to, in part, "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[235] It included the charge that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[236]

The ADA defined a "public accommodation" as encompassing more than a dozen private entities whose operations "affect commerce," including "motion picture houses, laundromats, museums, and day care centers."[237] While the ADA did not expressly limit itself to physical places, all its examples were brick-and-mortar establishments.[238] Its impact was huge, opening new spaces to the sixty-one million adults in the United States living with a disability.[239]

The ADA defines "discrimination" as the exclusion, denial, or segregation of disabled people, including people who require auxiliary aids.[240] Qualifying entities may need to provide aids and services that include, among other examples, "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[241] Suris' lawyer followed the steps of others to connect the two provisions and allege

234. 42 U.S.C. § 12101(a). For a deeper history of the ADA and its champions, see JUDITH HEUMANN & KRISTEN JOINER, BEING HEUMANN: AN UNREPENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST (2020) (iconic disability rights activist recounting her and others' activism that enabled the ADA).

235. 42 U.S.C. § 12101(b). The ADA was signed into law by President George H.W. Bush surrounded by all White disability rights advocates, even though an estimated one-third of all Black Americans murdered by police have a physical or mental disability. *See* Nora McGreevy, *The ADA Was a Monumental Achievement 30 Years Ago, but the Fight for Equal Rights Continues*, SMITHSONIAN MAG. (July 24, 2020), https://www.smithsonianmag.com/history/history-30-years-since-signing-americans-disabilities-act-180975409/.

236. 42 U.S.C. § 12182(a).

237. 42 U.S.C. § 12181(7).

238. *Id.*

239. *Disability Impacts All of Us*, CTR. FOR DISEASE CONTROL & PREVENTION (2022), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.

240. 42 U.S.C. §§ 12101, 12182.

241. 42 U.S.C. §§ 12103(1), 12182(2)(a)(3).

that the absence of effective closed captioning constituted a failure to provide auxiliary aids and services for deaf and hard-of-hearing people as required in places of public accommodation—this time, in cyberspace. And Suris had the law on his side.

Circuits remain split about how the ADA applies to the internet, with some declining to apply the ADA to websites that exist separately from a physical location.[242] But in the Eastern District of New York, where Suris filed his lawsuit, Judge Weinstein had previously taken an expansive view of the ADA's mandate to dismantle ableism. "A rigid adherence to a physical nexus requirement leaves potholes of discrimination in what would otherwise be a smooth road to integration," he wrote, continuing that "[i]t would be perverse to give such an interpretation to a statute intended to comprehensively remedy discrimination."[243] But a judge never invoked Judge Weinstein's conclusion to determine that Suris and other disabled people were entitled to equal access to experiencing sex online. Five months after Suris sued, the parties settled on undisclosed terms.[244]

242. Websites with brick-and-mortar locations are generally covered. The First Circuit previously held that a public accommodation did not need to be a physical place, though it has yet to squarely address the website question. *See* Carparts Distrib. Ctr. v. Auto Wholesalers' Ass'n of New England, 37 F.3d 12, 19–20 (1st Cir. 1994). The Third and Sixth Circuits have likewise yet to address the internet question, but previously held that public accommodations only extend to physical places. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997). The Ninth Circuit excludes websites with no offline presence. *See* Cullen v. Netflix, Inc., 600 F.App'x 508 (9th Cir. 2015). The district court landscape, including intra-E.D.N.Y., is a chaotic patchwork. *Compare* Winegard v. Newsday LLC., 556 F. Supp. 3d 173 (E.D.N.Y. 2021) (deciding that a website is not a place of public accommodation requiring captions), *with* Andrews v. Blick Art Materials, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (noting that a website may be a place of public accommodation). For more scholarly examinations of the internet as a place of public accommodation, see, e.g., Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205; Colin Crawford, *Cyberplace: Defining a Right to Internet Access Through Public Accommodation Law*, 76 TEMP. L. REV. 225 (2003); Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963 (2004); Priya Elayath, *Americans with Disabilities Act's Title III Public Accommodations and its Application to Web Accessibility and Telemedicine*, 17 U. ST. THOMAS L.J. 156 (2020); Hassah Ahmad, *Beyond Sight: Modernizing the Americans with Disabilities Act and Ensuring Internet Equality for the Visually Impaired*, 25 J. GENDER RACE & JUST. 321 (2022).

243. Andrews v. Blick Art Materials, 268 F. Supp. 3d 381, 397 (E.D.N.Y. 2017).

244. Suris v. MG Freesites, Notice of Settlement, No. 1:20-cv-00284 (Nov. 6, 2020), https://storage.courtlistener.com/recap/gov.uscourts.nyed.443933/gov.uscourts.nyed.443933.25.0.pdf. Suris has been the named plaintiff in several other ADA-related lawsuits with mixed results. *See, e.g.*, Suris v. Gannett, No. 20-cv-1793 (E.D.N.Y. July 14, 2021); Suris v. Collive Corp., No. 20-cv-06096 (E.D.N.Y. Jan. 10, 2022).

Closed captioning is far from the only accessibility issue disabled people face when seeking sex, or any information, online.[245] Many disabled people, disproportionately so, do not own computers or smartphones or even access the web.[246] A full 15% of disabled adults report not using the internet at all.[247] Rarely discussed, this manifestation of the so-called "digital divide," compounded by technical accessibility issues, deprives disabled people of experiencing the internet. While disabled people have proven that it is possible to live offline, it will become increasingly difficult as more life-critical resources shift to websites and apps.

Already, systemic barriers deny disabled people the positive effects of engaging with sex online, which can be educational, enjoyable, and even ethical.[248] Pornography also creates opportunities for representation: many sex workers are disabled.[249] The presence of disabled people in sex work is powerful. As much as society and the media ignore it, sex worker Billy Autumn explained that "[d]isabled people fuck."[250]

245. The Center for Democracy and Technology has done an impressive job of centering these issues—which include biased automated hiring software, flawed algorithmic benefits assessments, oppressive content moderation policies, and increased surveillance tools in schools—in recent years. Maria Town & Alexandra Reeve Givens, *In Our Tech Reckoning, People with Disabilities are Demanding a Reckoning of Their Own*, TECH. POL'Y PRESS (Jan. 24, 2022), https://techpolicy.press/in-our-tech-reckoning-people-with-disabilities-are-demanding-a-reckoning-of-their-own/.

246. Andrew Perrin & Sara Atske, *Americans with Disabilities Less Likely Than Those Without to Own Some Digital Devices*, PEW RSCH. CTR. (Sept. 10, 2021), https://www.pewresearch.org/fact-tank/2021/09/10/americans-with-disabilities-less-likely-than-those-without-to-own-some-digital-devices/.

247. *Id.*

248. Emily F. Rothman, *The Benefits of Pornography*, PORNOGRAPHY & PUB. HEALTH ch. 13 (2021). For deeper dives into the digital divide, see Haochen Sun, *Bridging the Digital Chasm Through the Fundamental Right to Technology*, 28 GEO. L. REV. 75 (2020); Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RSCH. CTR. (Apr. 13, 2012), http://www.pewinternet.org/2012/04/13/digital-differences.

249. Loree Erickson, *Why I Love Hickies and Queer Crip Porn*, COMING OUT LIKE A PORN STAR: ESSAYS ON PORNOGRAPHY, PROTECTION, AND PRIVACY (Jiz Lee ed., 2015) (recounting sex work with disabilities); moses moon, *Symposium Introduction: Sex Workers' Rights, Advocacy, and Organizing*, 52 COLUM. HUM. RTS. L. REV. 1062 (2021) (recounting sex work with disabilities); *Sex Work as Work and Sex Work as Anti-Work*, HACKING//HUSTLING (Apr. 2021), https://www.youtube.com/watch?v=sxAAXHS-QfE (engaging with a disability-centered sex work ethos); Katie Tastrom, *Sex Work is a Disability Issue. So Why Doesn't the Disability Community Recognize That?*, ROOTED IN RIGHTS (Jan. 4, 2019), https://rootedinrights.org/sex-work-is-a-disability-issue-so-why-doesn't-the-disability-community-recognize-that/.

250. Sophie Saint Thomas, *These Disabled Porn Performers are Changing How We Talk About Sex and Disability*, MIC (Dec. 16, 2015), https://www.mic.com/articles/130673/these-disabled-porn-performers-are-changing-how-we-talk-about-sex-and-disability.

Many radical feminists, as well as others, object to those framings of pornography.[251] Anti-pornography feminists, including MacKinnon and Dworkin, believe that pornography is exploitative and subjugates women.[252] As Gail Dines put it, "[p]ornography is the perfect propaganda piece for the patriarchy. In nothing else is their hatred of us quite as clear."[253] Anti-pornography feminists also point to disturbing research detailing dangerous effects of pornography.[254] However, it remains unclear how pervasive cultural misogyny factors into people's experiences of pornography, including whether research results are attributable to correlation or causation. This ambiguity is why some researchers liken pornography to alcohol, which is likewise legal, ubiquitous, and extensively regulated—individual reactions depend on the person and vary considerably.[255] But society has determined that these variations are not justifications for bans.

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251. So do some other feminists. Conservative feminists, for example, likewise reject that pornography holds value. Those arguments go beyond the scope of this Article, but a deeper dive is provided by P. Brooks Fuller, Kyla P. Garrett Wagner & Farnosh Mazandarani, *Porn Wars: Serious Value, Social Harm, and the Burdens of Modern Obscenity*, 28 AM. U. J. GENDER SOC. POL'Y & L. 121 (2020).

252. ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 138 (1988). Anti-pornography feminism is also bound up with objections to sex work, as discussed *supra* in Section III.B.

253. Julie Bindel, *The Truth About the Porn Industry*, GUARDIAN (July 2, 2010), https://www.theguardian.com/lifeandstyle/2010/jul/02/gail-dines-pornography. For a deeper dive into anti-pornography views, see GAIL DINES, PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY (Beacon Press 2011). Some scholars and performers would counter that this perspective erases the experiences of women performers, as well as men, trans men, and nonbinary performers. HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021) (detailing reflections from dozens of pornography performers); R.L. Goldberg, *Staging Pedagogy in Trans Masculine Porn*, 7 TRANSGENDER STUDIES Q. 208 (2020), https://read.dukeupress.edu/tsq/article-abstract/7/2/208/164819/Staging-Pedagogy-in-Trans-Masculine-Porn; Angela Jones, *Cumming to a Screen Near You: Transmasculine and Non-Binary People in the Camming Industry*, 8 PORN STUDIES 239 (2021), https://www.tandfonline.com/doi/abs/10.1080/23268743.2020.1757498.

254. *See, e.g.*, Gert Martin Hald, Neil M. Malauth & Carlin Yuen, *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAVIOR 14 (2009) (meta-analysis linking habitual pornography viewing with violent ideation and behavior); Simone Kühn & Jürgen Gallinat, *Brain Structure and Functional Connectivity Associated with Pornography Consumption: The Brain on Porn*, 7 J. AM. MED. ASS'N PSYCHIATRY 827 (2014) (finding decreases in brain activity of habitual pornography viewers); Paula Banca, Laurel S. Morris, Simon Mitchell, Neil A. Harrison, Marc N. Potenza & Valerie Voon, *Novelty, Conditioning, and Attentional Bias to Sexual Rewards*, 72 J. PSYCHIATRIC RSCH. 91 (2016) (suggesting that pornography incentivizes habitual viewers to seek increasingly novel, hardcore images).

255. Zoe Cormier, *Is Porn Bad For You?*, BBC SCI. FOCUS (Dec. 21, 2020), https://www.sciencefocus.com/the-human-body/is-pornography-harmful/.

For now, the power of the ADA to promote web accessibility remains uncertain. The Supreme Court recently declined to resolve the developing circuit split over the scope of the ADA.[256] Disabled people across America are confronted with a patchwork of web accessibility decisions, with their civil rights limited by jurisdiction and happenstance. Only subsequent litigation or legislation will reveal the ability of the ADA to create a cyberspace that reflects the accessibility that disabled people deserve.

B. AMENDING COMMUNICATIONS DECENCY ACT § 230 TO CRIMINALIZE SEX WORK CONTENT

Internet accessibility is also a perennial problem for sex workers.[257] In the early 1990s, Danni Ashe joined Usenet, a precursor of contemporary web forums, and discovered that other users were illicitly swapping many of her photos.[258] She decided to go direct-to-consumer by introducing herself on the Alt.Sex newsgroup, pointing people to her fanclub address to promote her work as a stripper and dancer.[259] As she recounts, "I'll never forget the stern reply I got from . . . the moderator of Alt.Sex, saying my 'commercial postings' wouldn't be tolerated."[260] Decades later, the exclusionary sentiment that sex

256. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, No. 18-1539 (Oct. 7, 2019). Some scholars have critiqued its invocation to enable web accessibility. Paul Taylor, *The Americans with Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26 (2001); Eric Goldman, *Will the Americans With Disabilities Act Tear a Hole in Internet Law?*, ARS TECHNICA (June 27, 2012), https://arstechnica.com/tech-policy/2012/06/will-the-americans-with-disabilities-act-tear-a-hole-in-internet-law/.

257. *Sexual Gentrification: An Internet Sex Workers Built*, HACKING//HUSTLING (Apr. 6, 2022), https://hackinghustling.org/sexual-gentrification-an-internet-sex-workers-built/. Thanks to Kendra Albert for flagging many of the sources in this Part. A few words about "sex work." It can be, at once, a broad term describing exchanges of sex or sexual activity and a non-stigmatizing term for prostitution. Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA, SESTA*, HACKING//HUSTLING (2020), https://hackinghustling.org/wp-content/uploads/2020/02/Erased_Updated.pdf. Some sex workers only use the term to describe prostitution. *See, e.g.*, moses moon, *Symposium Introduction: Sex Workers' Rights, Advocacy, and Organizing*, 52 COLUM. HUM. RTS. L. REV. 1062 (2021) (situating erotic labor on a spectrum, which ranges from "legal pornography and erotic dancing (stripping), to quasilegal cyber erotic labor (including cammodeling and selling access to explicit videos on sites like OnlyFans and ManyVids), to illegal prostitution (sex work)). This Article uses the term broadly. Sex work can be work—or it can be antiwork. HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021). And it can be a diverse community. As moses moon observes, there are more "Black, Asian, Latine, queer, and trans folks" involved and visible in the sex worker rights movement now than ever before." moses moon, *Symposium Introduction: Sex Workers' Rights, Advocacy, and Organizing*, 52 COLUM. HUM. RTS. L. REV. 1062, 1074 (2021).

258. Michael Brooks, *The Porn Pioneers*, GUARDIAN (Sept. 29, 1999), https://www.theguardian.com/technology/1999/sep/30/onlinesupplement.

259. *Id.*

260. *Id.*

workers do not belong on the internet was all but codified by the Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act (FOSTA/SESTA) amendments to the remainder of the CDA.[261] FOSTA/SESTA falls within the third category of cyberlaws—it purported to be a feminist cyberlaw, one that bundled its prohibitions with banning sex trafficking content, but it has subverted other feminist goals, like bodily autonomy.[262]

Unlike the parts of the CDA that were struck down by the Supreme Court, CDA § 230 had less to do with sex and everything to do with capitalism.[263] In the early 1990s, corporations began hosting interactive services, such as bulletin boards. Some users posted unflattering content, and subjects of users' unfavorable posts countered with litigation.[264] Not against users who'd posted the content, but against the companies that hosted their diatribes.[265] And subjects started winning.[266]

While some members of Congress fretted about the infinite accessibility of sex online, others feared that crushing financial liability for these interactive computer services would bludgeon the burgeoning internet.[267] Which is why

261. FOSTA stands for the House's Fight Online Sex Trafficking Act, H.B. 1865 (2017); SESTA refers to the Senate version, the Stop Enabling Online Sex Traffickers Act. S.1693 (2018). Following the lead of Kendra Albert and sex workers, this Article refers to the combined bills as "FOSTA/SESTA." *See, e.g.*, Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTM'T L.J. (forthcoming 2022) (using FOSTA/SESTA); moses moon, *Symposium Introduction: Sex Workers' Rights, Advocacy, and Organizing*, 52 COLUM. HUM. RTS. L. REV. 1062 (2021) (same); Danielle Blunt & Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage*, HACKING//HUSTLING (2020) (same), https://hackinghustling.org/wp-content/uploads/2020/02/Erased_Updated.pdf.

262. Liz Tung, *FOSTA/SESTA Was Supposed to Thwart Sex Trafficking. Instead, It's Sparked a Movement*, WHYY (July 10, 2020), https://whyy.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/.

263. Of course, sex and capitalism often go hand-in-hand. For a deeper dive into sex work and capitalism, see HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021) (interviewing eighty-one porn industry folks—including performers, producers, and directors—about their experiences with sex-work labor).

264. *See, e.g.*, Stratton Oakmont Inc. v. Prodigy Services Co., 1995 WL 323710 (S. Ct. N.Y. May 24, 1995) (successfully suing interactive service provider Prodigy for defamation over users' posts alleging that Stratton Oakmont engaged in criminal acts. Which it had—Martin Scorsese made an entire film about it.). WOLF OF WALL STREET (2013).

265. Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995).

266. *Id.*

267. Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands By It—And Everything It's Brought with It*, VOX (May 16, 2019), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality. Senator Wyden was one of two senators who opposed SESTA. *Roll Call Vote 115th Congress - 2nd Session*, U.S. SENATE (Mar. 21, 2018), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1152/vote_115_2_00060.htm.

Senator Ron Wyden and former Representative Chris Cox introduced CDA § 230, which, at its operative core, stated

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[268]

Effectively, CDA § 230 created a safe harbor for interactive computer services from liability for users' content. It threw in an incentive to moderate content without risking the loss of that safe harbor.[269] It included limited carve-outs from the safe harbor for hosting content in violation of criminal and intellectual property laws.[270] And after FOSTA/SESTA was enacted, it created new carve-outs for hosting user-generated content related to sex trafficking and prostitution.[271]

FOSTA/SESTA embraced a radical feminist view of sex work when it codified that:

> Nothing in this section . . . shall be construed to impair or limit . . . any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18 [criminalizing the promotion or facilitation of prostitution and reckless disregard of sex trafficking], and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.[272]

The amendment codified the same impulse that booted Danni Ashe off Alt.Sex: sex workers should not be able to freely access the internet. As Kendra Albert explains, "FOSTA/SESTA is better understood as the logical extension

268. 47 U.S.C. § 230(c)(1). For a deeper dive into the history of CDA § 230, see JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (Cornell U. Press 2019). That crimes and infringements are on the same level is a coup by the content-creation industry.

269. 47 U.S.C. § 230(c)(2).

270. 47 U.S.C. § 230(e). The latter exemption explains why ISPs are responsive to allegations of copyright infringement: not only can their failure to respond eliminate their DMCA safe harbor, but it can also shatter their CDA § 230 one.

271. 47 U.S.C. § 230(e). Both were already federal crimes that fell within the existing exemption for criminal content. 18 U.S.C. § 2421A. Accompanying provisions criminalized owning, operating, or managing interactive computer services with the intent to facilitate or promote prostitution and created a civil right of action for people harmed by services that promoted or facilitated trafficking of five or more people. 18 U.S.C. § 2421A. As Kendra Albert points out, FOSTA/SESTA did not remove CDA § 230 immunity for the latter claim, and courts have responded by saving Congress' failure and exempting sites for liability anyway. Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTM'T L.J., at 12 (forthcoming 2022).

272. 47 U.S.C. § 230(e)(5).

of a set of campaigns to make it more difficult for folks engaging in sex work to use mainstream public accommodations, often pushed in the name of fighting sex trafficking."[273] Viewed in that light, FOSTA/SESTA has been a resounding success at effectively banishing sex workers from web services that make their work safer.

Online advertising allowed sex workers to vet potential clients.[274] Social media sites let sex workers create supportive communities, as well as swap harm reduction tips and client information.[275] Used together, these aspects of the internet measurably reduced offline violence against sex workers.[276] FOSTA/SESTA threw a wrench in all of that.[277]

Even before FOSTA/SESTA, some sex workers struggled to place ads—many of the old standby websites folded.[278] After FOSTA/SESTA, however,

273. Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTM'T L.J., at 2 (forthcoming 2022), https://ssrn.com/abstract=4095115.

274. Catherine Barwulor, Allison McDonald, Eszter Hargittai & Elissa M. Redmiles, *"Disadvantaged in the American-Dominated Internet": Sex, Work, and Technology*, PROC. CHI. CONF. HUM. FACTORS IN COMPUT. SYS. (2021), https://dl.acm.org/doi/fullHtml/10.1145/3411764.3445378.

275. Sandra Song, *Inside Switter, the Sex Worker Social Network*, PAPER (Dec. 13, 2018), https://www.papermag.com/switter-sex-worker-social-network-2623333073.html. Switter closed down on May 14, 2022 "due to the collective weight of the recent anti-sex and anti-LGBTQIA+ legislative moves which made the continued operation of Switter untenable." *Rest in Power*, SWITTER (2022), https://switter.at/; *see also* Blunt & Wolf, *supra* note 261.

276. Online harassment, however, remained high. Teela Sanders, Jane Scoular, Rosie Campbell, Jane Pitcher & Stewart Cunningham, *Beyond the Gaze: Briefing on Internet Sex Work*, U. LEICESTER 7–8 (2018); *see also* REPLY ALL, #119 NO MORE SAFE HARBOR (Apr. 20, 2018) (interviewing economist Scott Cunningham about measurable impacts of FOSTA/SESTA on violence against sex workers and generally).

277. Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019); Heidi Trip, *All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims*, 124 PENN. STATE. L. REV. 219 (2019).

278. Craigslist's Adult section, Rentboy, and Backpage folded, largely due to concerns under existing laws, before the threat of FOSTA/SESTA. Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES (Sept. 15, 2010), https://www.nytimes.com/2010/09/16/business/16craigslist.html (noting that seventeen attorneys general demanded the site's closure by letter); Lisa Duggan, *What the Pathetic Case Against Rentboy.com Says About Sex Work*, NATION (Jan. 7, 2016) (law enforcement targeting and, in some cases, arresting and charging, multiple employees of Rentboy.com for conspiracy to violate the Travel Act by promoting prostitution), https://www.thenation.com/article/archive/what-the-pathetic-case-against-rentboy-com-says-about-sex-work/; Dell Cameron, *Feds Praise Backpage Takedown as Sex Workers Fear for Their Lives*, GIZMODO (Apr. 9, 2018) (FBI seizing Backpage.com and prosecutors charging several affiliates with existing crimes), https://gizmodo.com/feds-praise-backpage-takedown-as-sex-workers-fear-for-t-1825124288.

many other sites declined to host their content.[279] Sex workers even reported content disappearing from Google Drive.[280] As one sex worker put it, "[s]ex workers are disappearing from the internet. Workers' sites have been taken down, ad sites are hard to comply with and are always changing their rules, Twitter and Instagram are deleting accounts just for being a sex worker."[281] Decisions by interactive computer services to effectively kick sex workers off their networks took a measurable toll: a comprehensive survey from sex worker collective Hacking//Hustling uncovered that 72.45% of respondents reported increased economic instability, and 33.8% reported increased violence from clients post-FOSTA/SESTA.[282] Yet no moves have been made to repeal the law.[283]

Effectively limiting sex workers' presence online does not present a problem for all feminists. Many radical feminists, among other feminists, oppose sex work and reject sex workers' assertions that they choose to engage in the sex trades.[284] Anti-sex-work feminists believe that sex work is economically coercive and reifies patriarchal views about women.[285] For anti-sex-work feminists, the harms of sex work cannot be overstated. In a debate about sex work, Catharine MacKinnon argued that the effect of money exchanged in sex work is akin to the physical force used in rape.[286]

Some scholars and sex workers counter anti-sex-work conceptualizations of the sex trades. Critiques of sex work ignore that all labor is coercive under

279. Jillian C. York, *Silicon Valley's Sex Censorship Harms Everyone*, WIRED (Mar. 18, 2022), https://www.wired.com/story/silicon-values-internet-sex-censorship/.

280. Samantha Cole, *Sex Workers Say Porn on Google Drive Is Suddenly Disappearing*, VICE (Mar. 21, 2018), https://www.vice.com/en/article/9kgwnp/porn-on-google-drive-error.

281. Blunt & Wolf, *supra* note 261, at 26.

282. *Id.* at 18; *see also* Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019).

283. Representative Ro Khanna introduced legislation to study the effects of FOSTA/SESTA. The SAFE SEX Workers Study Act, H.R. 5448, 116th Cong. (2019-2020), https://www.congress.gov/bill/116th-congress/house-bill/5448/text. The bill failed.

284. Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 MINN. J.L. & INEQUITY 19 (2012). So do conservative feminists, but those views are beyond the scope of this Article. For a deeper dive into those views, see Karen Green, *Prostitution, Exploitation and Taboo*, 64 PHILOSOPHY 525, 532 (1989).

285. *See generally* KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY (NYU Press 1996).

286. *It's Wrong to Pay for Sex*, CONN. PUB. BROAD. NET. (May 8, 2009), https://web.archive.org/web/20100625230257/http://www.cpbn.org/program/intelligence-squared/episode/its-wrong-pay-sex. Catharine MacKinnon is a longtime vocal critic of sex work, as well as pornography. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS (2007); Catharine MacKinnon, *Trafficking, Prostitution, and Inequality,* 46 HARV. C.R.-C.L. L. REV. 271 (2011).

capitalism, which does not negate the need for safe working conditions.[287] It also minimizes the experiences of queer men, trans men, and nonbinary people in the sex trades.[288] Sex workers have also called out the paternalism behind such arguments, which overlook the autonomy of sex workers to define their own destinies.[289] In their own account of their experiences trading sex, Lorelai Lee explained that "[t]he things that sex workers do to stay safe are almost always the things civilians want to pass laws to stop."[290] Through that lens, it is no surprise that sex workers' ability to freely access the internet sat squarely in congressional crosshairs.

Targeting sex workers' online content is not an isolated act—it's a harbinger of what will come for other marginalized communities. One of Albert's lessons for technology policy advocates from FOSTA/SESTA is a warning that targeting sex workers is rooted in the same misogynistic, heteronormative impulses underlying attacks on content related to trans people and abortion access.[291] They caution that "[s]hadowbanning, deplatforming, and the chilling effects that have come along with [FOSTA/SESTA] may happen to sex workers first, but as the invocations of moral panics succeed, the advocates who use them will not stop with those in the sex trades."[292] As trans healthcare and abortion are increasingly criminalized at the state level, interactive computer services may decide it's not worth hosting that content either.[293] FOSTA/SESTA demonstrates that interactive service providers will choose to censor content even if they needn't do so legally.

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287. Malak Mansour, *On Marxism, Capitalism, and the Sex Industry*, WATCHDOGS GAZETTE (June 23, 2022), https://watchdogsgazette.com/opinions/on-marxism-capitalism-and-the-sex-industry/.

288. David Eichert, *"It Ruined My Life": FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. SOC. POL'Y & L. 201 (2019); Angela Jones, *Where the Trans Men and Enbies At?: Cissexism, Sexual Threat, and the Study of Sex Work*, 14 SOCIO. COMPASS 2 (2020), https://compass.onlinelibrary.wiley.com/doi/10.1111/soc4.12750.

289. HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021). Hacking//Hustling and other sex worker collectives constantly reinforce this narrative through advocacy.

290. Lorelei Lee, *Cash/Consent: The War on Sex*, 35 N+1 MAG. (2019), https://www.nplusonemag.com/issue-35/essays/cashconsent/. Sex workers often refer to people outside the industry as "civilians." HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM (2021) (explaining that sex workers often refer to people outside the industry as "civilians.").

291. Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTM'T L.J. (forthcoming 2022).

292. *Id.*

293. 42 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). This already played out under FOSTA/SESTA, which resulted in the

IV. INFLUENCE OF SAFETY ON CYBERLAW

Assistant Majority Leader Rhonda Fields ran for office in Colorado because her son and his fiancée were shot and murdered in 2005.[294] To prevent heartbreak for other families, Fields sought office.[295] She was the first Black woman elected to her district in Aurora, Colorado.[296] Her district may sound familiar because, shortly into her term, a man opened fire in a crowed movie theatre, murdering twelve people and injuring seventy more.[297] Fields responded by supporting gun legislation that was signed into law by the governor.[298] Detractors retaliated. Fields' family became the targets of vicious online harassment. As Fields recounted, "I just thought this came with the job, but when they used my daughter's name, when they said 'We're going to come after you and your daughter and your family, and there will be lots of blood,' that's when it became real."[299] One email riddled with racist and sexist slurs was more explicit: "Hopefully somebody Gifords [sic] both of your asses with

censorship of some queer content. Nate 'Igor' Smith, *"The Death of Tumblr*," BOINGBOING (Dec. 3, 2018), https://boingboing.net/2018/12/03/the-death-of-tumblr.html; Matt Baume, *"How Queer Adult Comic Artists Are Being Silenced by FOSTA-SESTA*," THEM (Apr. 22, 2020), https://www.them.us/story/fosta-sesta-silencing-queer-comics. Criminalizing abortion also creates important questions for digital security. Karen Levy & Michela Meister, *Title Forthcoming*, *in* FEMINIST CYBERLAW (Meg Leta Jones & Amanda Levendowski eds., forthcoming 2024). It's beginning to happen with abortion content already. Benjamin Powers, *Facebook and Instagram Have Started Taking Down Abortion Pill Posts Since the Fall of* Roe, GRID (June 29, 2022), https://www.grid.news/story/technology/2022/06/29/facebook-and-instagram-have-started-taking-down-abortion-pill-posts-since-the-fall-of-roe/.

294. Karen Augé, *5 Years After Son's Murder, Mother Struggles to Redefine Her Life*, DENVER POST (July 17, 2010), https://www.denverpost.com/2010/07/17/5-years-after-sons-murder-mother-struggles-to-redefine-her-life/. Javad Fields was slated to testify in his friend's murder trial. *Id.*

295. Candice Norwood, Chloe Jones & Lizz Bolaji, *More Black Women Are Being Elected to Office. Few Feel Safe Once They Get There*, PBS NEWS HOUR (June 17, 2021), https://www.pbs.org/newshour/politics/more-black-women-are-being-elected-to-office-few-feel-safe-once-they-get-there.

296. *Id.*

297. A&E Television Networks, *Aurora Shooting Leaves 12 Dead, 70 Wounded*, HIST. (July 19, 2021), https://www.history.com/this-day-in-history/12-people-killed-70-wounded-in-colorado-movie-theater-shooting.

298. Associated Press, *Colorado Governor Signs Gun Control Bills*, POLITICO (Mar. 20, 2013), https://www.politico.com/story/2013/03/colorado-governor-john-hickenlooper-gun-control-bills-089127.

299. Candice Norwood, Chloe Jones & Lizz Bolaji, *More Black Women Are Being Elected to Office. Few Feel Safe Once They Get There*, PBS NEWS HOUR (June 17, 2021), https://www.pbs.org/newshour/politics/more-black-women-are-being-elected-to-office-few-feel-safe-once-they-get-there.

a gun," alluding to the attempted assassination of former Representative Gabby Giffords, who was shot and nearly killed in Tucson, Arizona.[300]

Threatening people's safety through online harassment dates back to the early days of the internet.[301] It includes a range of behaviors, such as: sexist, racist, homophobic, and ableist name calling; releasing nonconsensual intimate imagery; rape or death threats; doxxing;[302] hacking; and much more.[303] It can be a one-off message or a coordinated attack.[304] It can be shared directly or tweeted into the ether. And it is alarmingly common. Of all American internet users, nearly one in four report experiencing online harassment.[305] But harassment does not affect internet users equally.

As journalist Amanda Hess recounted in *Why Women Aren't Welcome on the Internet*, women are likely to report being harassed on the internet.[306] Women of color—including Black, Asian, Latine/Latinx, and mixed-race women—are also 34% more likely to be mentioned in abusive or problematic tweets than White women, with Black women being overwhelmingly targeted for

300. *Id.* The author of the missive was charged with harassment but, in a stunning rejection of carceral feminism, Fields requested that the case be dismissed after he agreed to a permanent restraining order. *Id.*

301. *See, e.g.*, Julian Dibbel, *A Rape in Cyberspace*, VILLAGE VOICE (Oct. 18, 2005), https://www.villagevoice.com/2005/10/18/a-rape-in-cyberspace/ (iconically recounting graphic online harassment, amounting to a rape, within a LambdaMOO community). Definitionally, this Article discusses harassment as a social phenomenon that, in some circumstances, has legal consequences rather than hewing to the legal definition of harassment. This is because legal harassment generally requires direct communication with a victim in a way that is likely to cause annoyance or alarm, but not all actions amounting to social online harassment satisfies that legal definition. Amanda Levendowski, *Using Copyright*, *supra* note 90.

302. "Doxxing" exposes victims' personal information, such as home addresses and jobs. It is common for victims of nonconsensual intimate imagery distribution.

303. Maeve Duggan, *Part 4: The Aftermath of Online Harassment*, PEW RSCH. CTR. (Oct. 22, 2014), https://www.pewresearch.org/internet/2014/10/22/part-4-the-aftermath-of-online-harassment/.

304. Danielle Keats Citron, *Addressing Cyber Harassment: An Overview of Hate Crimes in Cyberspace*, 6 CASE W. RES. J.L. TECH. & INTERNET 1 (2015) (recounting the GamerGate harassment campaign).

305. Emily A. Vogels, *Roughly Four-in-Ten Americans Have Experienced Online Harassment, With Half This Group Citing Politics as the Reason They Think They Were Targeted. Growing Shares Face More Severe Online Abuse Such as Sexual Harassment or Stalking*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/.

306. Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/women-arent-welcome-internet-72170 (recounting her own invasive online harassment and contextualizing it broadly to all women online). Men also experience harassment online, though it is less related to their gender. Vogels, *Online Harassment*, *supra* note 305.

harassment.[307] While percentages of people victimized by online harassment do not seem to be growing, it is becoming more severe.[308]

For a time, "online" was perceived to be distinct from "offline."[309] That fantasy is disrupted when online harassment fuels offline consequences. Victims of online harassment report harmful, detrimental offline consequences to their mental health, including depression, anxiety, suicidal ideation, and panic attacks.[310] Online harassment like doxxing puts victims at risk of strangers showing up to their homes or workplaces.[311] Other harassment techniques popular in online communities, such as calling law enforcement with erroneous reports likely to attract SWAT teams, known as "swatting," can even be deadly.[312]

No matter the form, online harassment threatens the offline safety of its recipients irrevocably.[313] This Part uses safety to examine how governing harassment in cyberspace plays out across privacy and the Computer Fraud

307. Hess, *'supra* note 306. Fields' position attracts acute toxicity: among Black women politicians and journalists alone, roughly one in ten tweets mentioning them was abusive or problematic. *See* Amnesty International & Element AI, *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse Against Women on Twitter*, AMNESTY INT'L (2017), https://decoders.amnesty.org/projects/troll-patrol/findings.

308. Sophie Bertazzo, *Online Harassment Isn't Growing—But It's Getting More Severe*, PEW RSCH. CTR. (June 28, 2021), https://www.pewtrusts.org/en/trust/archive/spring-2021/online-harassment-isnt-growing-but-its-getting-more-severe. For a deeper dive into online harassment, see DANIELLE CITRON, HATE CRIMES IN CYBERSPACE (2014).

309. *See* Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003) (responding to Dan Hunter, *Cyberspace as Place at the Tragedy of the Anticommons*, 91 CALIF. L. REV. 439 (2003)); *cf.* Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007).

310. Francesca Stevens, Jason R.C. Nurse, Budi Arief, *Cyber Stalking, Cyber Harassment, and Adult Mental Health: A Systemic Review*, 24 CYBERPSYCHOLOGY BEHAV. SOC. NETW. 367 (2021).

311. CARRIE GOLDBERG, NOBODY'S VICTIM: FIGHTING HARASSMENT ONLINE & OFF (2019); *see also* Nathan Mattise, *Anti-Doxing Strategy—or, How to Avoid 50 Qurans and $287 of Chick-Fil-A*, ARS TECHNICA (Mar. 15, 2015), https://arstechnica.com/information-technology/2015/03/anti-doxing-strategy-or-how-to-avoid-50-qurans-and-287-of-chick-fil-a/ (offering strategies to avoid doxxing after being a target).

312. *See, e.g.*, Michael Brice-Saddler, Avi Selk & Eli Rosenberg, *Prankster Sentenced to 20 Years for Fake 911 Call That Led Police to Kill an Innocent* Man, WASH. POST (Mar. 29, 2019), https://www.washingtonpost.com/nation/2019/03/29/prankster-sentenced-years-fake-call-that-led-police-kill-an-innocent-man/; Maria Cramer, *A Grandfather Died in 'Swatting' Over His Twitter Handle, Officials Say*, N.Y. TIMES (July 24, 2021), https://www.nytimes.com/2021/07/24/us/mark-herring-swatting-tennessee.html. For a feminist account of swatting, see Caroline Sinders, *That Time the Internet Sent a SWAT Team to My Mom's House*, BOINGBOING (July 24, 2015), https://boingboing.net/2015/07/24/that-time-the-internet-sent-a.html. Bills have been introduced to criminalize swatting. *See* Preserving Safe Communities by Ending Swatting Act, H.R. 4523 (117th Congress 2021-2022).

313. Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/women-arent-welcome-internet-72170.

and Abuse Act, the federal anti-hacking law. Section IV.A unpacks how longtime surveillance practices will be weaponized to invade the privacy of abortion providers and pregnant people after the Supreme Court's recent overruling of *Roe v. Wade*. Information collected by search engines, technology companies, and data brokers can and will be used by anti-abortion activists and law enforcement to threaten the safety of people needing abortions or experiencing miscarriages—in some cases, it's already happening. Under another law, however, technological harassment is criminally prosecuted, albeit with spotty success. Section IV.B looks at several high-profile prosecutions under the Computer Fraud and Abuse Act to expose an unexplored common thread: prosecutors targeting people using technology to threaten the safety of girls and women. Both issues illustrate the influence of safety on cyberlaw, and feminist cyberlaw offers a way to weave the two together.

A. INVADING PRIVACY WITH SURVEILLANCE TECHNOLOGIES

Internet harassment can be well-organized and alarmingly effective. In the mid-1990s, the American Coalition of Life Activists (ACLA) launched a website called the Nuremburg Files featuring wanted-style posters of abortion providers and supporters claiming their behavior amounted to "crimes against humanity."[314] The site doxxed doctors and clinic staff by publicly posting their names, photographs, home addresses, and even family details.[315] The ACLA also launched a so-called Deadly Dozen poster targeting a handful of physicians.[316] When physicians were injured, their names were greyed out; murdered physicians' names were stricken through.[317] When targeted providers sued the ACLA, the jury viewed the harassing website as a hitlist that violated the Freedom of Access to Clinic Entrances (FACE) Act, which was enacted to protect abortion seekers and allies from physical obstruction, intimidation, and interference with abortion rights.[318] That jury awarded $120.8 million in actual and punitive damages, one of the largest verdicts in any online harassment case.[319]

314. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1080 (9th Cir. 2002), *on remand*, 300 F. Supp. 2d 1055 (D. Or. 2004).

315. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 41 F. Supp. 2d 1130, 1134–52 (D. Oregon 1999), *rev'd* 244 F.3d 1007 (9th Cir. 2001), *reinstated*, 290 F.3d 1058, 1080 (9th Cir. 2002), *on remand*, 300 F. Supp. 2d 1055 (D. Or. 2004).

316. *Id.*

317. *Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1065.

318. 18 U.S.C. § 248(a). Wild to think such a law could get passed a few decades ago.

319. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 518 F.3d 1013, 1016 (9th Cir. 2008). The Ninth Circuit reduced punitive damages to $4.7 million. *Id.*

It was cold comfort. After the website's creation, two abortion doctors were murdered in their homes.[320] An abortion clinic was bombed.[321] Another doctor was killed by a sniper.[322] Immediately after, the site struck through the deceased doctor's name.[323]

The right to an abortion was previously underpinned by privacy.[324] In *Roe v. Wade*, Justice Blackmun recognized women's constitutional right to decisional privacy when choosing abortion, explaining that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution," despite privacy not being "explicitly mention[ed]."[325]

Privacy was once in the first category of "cyberlaws," as a general law that was successfully appropriated for feminist goals in cyberspace, but that is no longer sustainable without meaningful legislative intervention. But that privacy right exists no longer in the eyes of the Supreme Court—its recent decision in *Dobbs v. Jackson Women's Health Organization* eradicated it.[326] Absent comprehensive privacy legislation, privacy falls into the second category of cyberlaws. Instead, privacy is presently relegated to the second category of cyberlaws that cannot be appropriated for feminist goals, such as reproductive justice.

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320. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1817 (2010) (citing DANIEL SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007)).

321. *Id.*

322. *Id.*

323. *Id.*

324. *See* Roe v. Wade, 410 U.S. 113 (1973). Not all feminists embrace abortion as a pregnant person's right, particularly conservative feminists. While those arguments are beyond the scope of this Article, a deeper dive into those discussions can be found in Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After* Gonzales v. Carhart, 36 HARV. J. L. & GENDER 123, 170 n.156 (2013).

325. *Roe*, 410 U.S. at 152. Other key sources of privacy rights are sourced to an unusual source: law review articles. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). The Court's subsequent decision in *Casey* centered on grounding the right to an abortion in the Fourteenth Amendment's due process clause, though privacy remained an important component. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 846, 915 ("Constitutional protection of a women's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment . . . The woman's constitutional liberty interest also involves her freedom to decide matter of the highest privacy and the most personal nature.").

326. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973)). *Dobbs* also put defending the right to use contraception, engage in "private, consensual sexual acts," and "marry a person of the same sex," under the microscope for potential reversal. *Id.* at 2258.

In *Dobbs*, Justice Alito claimed that the Court was compelled to overrule *Roe* and its successor, *Planned Parenthood v. Casey*, because "[t]he Constitution," a document written entirely by men who could not become pregnant, "makes no reference to abortion . . . and no such right is implicitly protected by any constitutional provision."[327] Post-*Dobbs*, abortion became entirely or near entirely banned in thirteen states.[328] It is strictly limited in many others.[329] And these laws may extend to people experiencing miscarriages, who will be caught up in the prosecutorial fervor.[330]

But *Dobbs* is not a complete throwback to the 1970s. Back then, law enforcement largely relied on human-driven intelligence and physical surveillance to invade the privacy of people needing abortions.[331] Today, the government—and, in some instances, abortion activists—also benefit from the tireless assistance of what Shoshana Zuboff calls "surveillance capitalism," meaning "the unilateral claiming of private human experience as free raw material for translation into behavioral data."[332] Pregnant people's attempts at gathering information now involve search engines, technology companies, and data brokers, each of which can provide pregnant people's information to law enforcement or, in some instances, anti-abortion activists.

Sharing and selling sensitive data is not new. The present information privacy crisis for abortion providers and pregnant people was predictable—and preventable.[333] But the specific ways that abortion-related data will be

327. *Id.* at 2242; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

328. *Abortion Policy in the Absence of* Roe*,* GUTTMACHER INST. (July 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.

329. *Id.*

330. Between 1973 and 2005, sixty-eight women were investigated for crimes related to their own pregnancies. Gabriela Weigel, Laurie Sobel & Alina Salganicoff, *Criminalizing Pregnancy Loss and Jeopardizing Care: The Unintended Consequences of Abortion Restrictions and Fetal Harm Legislation*, 30-3 WOMEN'S HEALTH ISSUES 143 (2020); *see also* Robin Levinson-King, *US Women Are Being Jailed for Having Miscarriages*, BBC (Nov. 12, 2021), https://www.bbc.com/news/world-us-canada-59214544. Enforcement of these laws will have a disproportionate impact on women of color and poor women. Priscilla Thompson & Alexandra Turcios Cruz, *How an Oklahoma Woman's [sic] Miscarriage Put a Spotlight on Racial Disparities in Prosecutions*, NBC NEWS (Nov. 5, 2021), https://www.nbcnews.com/news/us-news/woman-prosecuted-miscarriage-highlights-racial-disparity-similar-cases-rcna4583.

331. *See generally* THE JANES (2022).

332. John Laidler, *High Tech Is Watching You*, HARV. GAZETTE (Mar. 4, 2019), https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ (interviewing Shoshanna Zuboff). For a deeper dive into surveillance capitalism, see SHOSHANNA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT A NEW FRONTIER OF POWER (2019).

333. *See, e.g.*, Paul M. Schwartz, *Privacy and Democracy in Cyberspace,* 52 VAND. L. REV. 1609 (1999) (describing information privacy online as a "horror show"); Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701 (2010)

weaponized to harass abortion providers, seekers, and people experiencing miscarriages remains uniquely invasive.

When it comes to law enforcement investigations of abortions and miscarriages, Cynthia Conti-Cook cautioned that "[t]he most harmful type of digital evidence is online search browsing history."[334] Even before *Dobbs*, she was proven right. In 2018, a Black mother named Latice Fisher was harassed by law enforcement and jailed for two years after her miscarriage.[335] Evidence "against her" included her Google searches for abortion pills.[336] In Fisher's case, she voluntarily gave law enforcement access to her phone.[337] That technique does not scale.[338] But law enforcement has a tool that does: keyword warrants.

Close cousins to geofence warrants, which request geolocation data for devices within a particular radius,[339] keyword warrants enable law enforcement

(rejecting so-called anonymization as a sufficient fix for privacy invasive practices); JULIE COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 267 (2012) (arguing that "meaningful reform in information law and information policy requires a deep and fundamental rethinking of the most basic assumptions on which they are founded," which did not occur in intervening years); Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1 (2020) (detailing the ways pregnant people can be surveilled digitally); Elizabeth Joh, *The Potential Overturn of* Roe *Shows Why We Need More Digital Privacy Protections*, SLATE (May 9, 2022), https://slate.com/technology/2022/05/roe-overturn-data-privacy-laws.html (advocating for privacy-protective laws in advance of *Roe*'s reversal); *cf.* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L. REV. 1087 (2006) (reviewing DANIEL SOLOVE, THE DIGITAL PERSON: PRIVACY AND TECHNOLOGY IN THE INFORMATION AGE (2004) and highlighting select scholars' focus on information privacy exclusive of decisional privacy); Ann Bartow, *A Feeling of Unease About Privacy Law*, 155 U. PA. L. REV. 52 (2006) (critiquing Daniel J. Solve, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) for focusing on information privacy exclusive of decisional privacy, specifically abortion rights). For a deeper dive into abortion rights as privacy rights, see Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995).

334. Lauren Rankin, *How an Online Search for Abortion Pills Landed This Woman in Jail*, FAST CO. (Feb. 26, 2020), https://www.fastcompany.com/90468030/how-an-online-search-for-abortion-pills-landed-this-woman-in-jail.

335. *Id.* She was accused of second-degree murder.

336. *Id.*

337. *Id.*

338. As of 2019, high-end estimates pin the number of legalized U.S. abortions at 920,000 per year, Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (June 24, 2022) (synthesizing data from the Center for Disease Control and Guttmacher Institute, both of which are subject to caveats and limitations), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/.

339. Geofence warrants were used to investigate the Capital Riots. Mark Harris, *How a Secret Google Geofence Warrant Helped Catch the Capitol Riot Mob*, WIRED (Sept. 30, 2021), https://www.wired.com/story/capitol-riot-google-geofence-warrant/. Geofencing more generally

to request sensitive information, such as all Google accounts and IP addresses of people who ran searches for certain keywords, such as "abortion pills," "abortion clinic," or even "Planned Parenthood," over a period of time.[340] Only a few such warrants are public presently—most are sealed or presumed sealed—but their use will grow as law enforcement realizes that can deploy a legal dragnet to invade pregnant people's privacy, which may also set those people up for harassment.[341]

Other technology companies collect equally sensitive information. Facebook, for example, already stores data that can get abortion seekers harassed, prosecuted, or both.[342] Facebook messages are not encrypted by default, which means they can often be freely and easily handed over to law enforcement—and that is exactly what happened to a mother and her teen daughter who are being prosecuted for allegedly self-administering the

has been weaponized against abortion clinics already, with one organization using it target people visiting clinics with messages like "You Have Choices." Nate Raymond, *Firm Settles Massachusetts Probe Over Anti-Abortion Ads Sent to Phones*, REUTERS (Apr. 4, 2017), https://www.reuters.com/article/massachusetts-abortion/firm-settles-massachusetts-probe-over-anti-abortion-ads-sent-to-phones-idUSL2N1HC04K.

340. Thomas Brewster, *Exclusive: Government Secretly Orders Google to Identify Anyone Who Searched a Sexual Assault Victim's Name, Address or Telephone Number*, FORBES (Oct. 4, 2021), https://www.forbes.com/sites/thomasbrewster/2021/10/04/google-keyword-warrants-give-us-government-data-on-search-users/.

341. Jessica Schladebeck, *Feds Issue Secret 'Keyword Warrants' for Google Search History*, GOV'T TECH. (Oct. 7, 2021), https://www.govtech.com/security/feds-issue-secret-keyword-warrants-for-google-search-history. Hoping for resistance from Google appears to be a lost cause. Naomi Gilens, Jennifer Lynch & Veridiana Alimonti, *Google Fights Dragnet Warrant for Users' Search Histories Overseas While Continuing to Give Data to Police in the U.S.*, ELEC. FRONTIER FOUND. (Apr. 5, 2022), https://www.eff.org/deeplinks/2022/04/google-fights-dragnet-warrant-users-search-histories-overseas-while-continuing. Using search engine data as evidence is not the only way it can be weaponized. Anti-abortion organizations use Google ads to harass pregnant people with pro-life messages when they try to search for abortion services. Emma Cott, Nilo Tabrizy, Aliza Aufrichtig, Rebecca Lieberman & Nailah Morgan, *They Search Online for Abortion Clinics. They Found Anti-Abortion Centers*, N.Y. TIMES (2022), https://www.nytimes.com/interactive/2022/us/texas-abortion-human-coalition.html.

342. Grace Oldham & Dhruv Mehrotra, *Facebook and Anti-Abortion Clinics are Collecting Highly Sensitive Info on Would-Be Patients*, MARKUP (June 15, 2022), https://themarkup.org/pixel-hunt/2022/06/15/facebook-and-anti-abortion-clinics-are-collecting-highly-sensitive-info-on-would-be-patients. Privacy invasions resulting in harassment are baked into Facebook's origin story. Never forget that Mark Zuckerberg's first foray into social media was Facemash, which let users rank the hotness of scraped photographs of his Harvard classmates—and which the Fuerza Latina and Association of Black Women both blasted. Katharine A. Kaplan, *Facemash Creator Survives Ad Board*, HARV. CRIMSON (Nov. 19, 2003), https://www.thecrimson.com/article/2003/11/19/facemash-creator-survives-ad-board-the/.

daughter's abortion.[343] But there are even more surreptitious ways for Facebook to aid surveillance.

Despite the platform's prohibition on sites and apps using Facebook advertising technology that send the company "sexual and reproductive health data,"[344] an investigation by Grace Oldham and Dhruv Mehortra revealed that hundreds of anti-abortion clinics use a piece of Facebook's code called a tracking pixel.[345] The pixel lets those sites capture sensitive information, including appointments for "abortion consultation" or "pre-termination screening," alongside schedulers' names, emails, or phone numbers.[346] Those details are then shared with Facebook.[347] As a result, the company retains a treasure trove of data about who is making, or attempting to make, abortion-related appointments and where those appointments are located.[348]

Unlike technology companies, data brokers aren't just in the business of hoarding data—they're in the business of selling it. One particularly popular type of sellable data is location data. As the Supreme Court has recognized, location data can reveal the most sensitive information about people, including who's attending church, sleeping at a lover's apartment, or visiting an abortion clinic.[349] There was a market for the that data even before *Dobbs*. One company called SafeGraph obtains location data from apps and resells it.[350] The company claims to track granular information about how often people visit a location, how long they stay there, where else they go, and—most alarmingly—where they live, down to a census block level.[351] Perhaps spotting an opportunity, the company already marked "Planned Parenthood" as a

343. Albert Fox Cahn, *Facebook's Message Encryption Was Built to Fail*, WIRED (Aug. 10, 2022), https://www.wired.com/story/facebook-message-encryption-abortion/.

344. *About Sensitive Health Information*, META (2022), https://www.facebook.com/business/help/361948878201809?id=188852726110565.

345. Oldham & Mehrotra, *supra* note 342.

346. *Id.*

347. *Id.*

348. *Id.*

349. United States v. Carpenter, 585 U.S. ___ at 18 (2018). Exposure of abortion clinic location data is, unfortunately, not a new problem. Jennifer Valentino-DeVries, Natasha Singer, Michael H. Keller & Aaron Krolik, *Your Apps Know Where You Were Last Night, and They're Not Keeping It a Secret*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html.

350. Joseph Cox, *Data Broker Is Selling Location Data of People Who Visit Abortion Clinics*, VICE (May 3, 2022), https://www.vice.com/en/article/m7vzjb/location-data-abortion-clinics-safegraph-planned-parenthood. Alarmingly, it's not alone. Jon Keegan, *Planned Parenthood Data Found on Another Location Data Dashboard*, MARKUP (July 15, 2022), https://themarkup.org/privacy/2022/07/15/planned-parenthood-data-found-on-another-location-data-dashboard.

351. *Id.*

trackable "brand" and sold data on more than six hundred Planned Parenthood locations, some of which provide abortion services.[352]

These sensitive disclosures can fuel harassment by anti-abortion activists and law enforcement alike. Search engine data can replicate, or even amplify, harassment like that experienced by Latice Fisher, both by targeting people who have abortions and people who did not obtain one. Anti-abortion clinics can masquerade as abortion providers to collect information about would-be patients and feed that data back to technology companies. Or activists and law enforcement can simply purchase providers' and seekers' location data.[353] These routes lead to a long road of potential harassment, from mailing or emailing targets harassing anti-abortion messages such as "BABY MURDERER," or pummeling them with harmful misinformation about abortion procedures. Other techniques, like doxxing, continuing ACLA's campaign by creating hitlists, or increasing abortion providers' and pregnant peoples' contact with law enforcement, can pose serious threats to people's safety.

Post-*Dobbs* surveillance will not be felt equally. Black and low-income pregnant people are already disproportionately surveilled.[354] People of color are more likely to have pregnancy complications, such as ectopic pregnancies.[355] And Black people miscarry at higher rates.[356] Together, these realities increase the likelihood of contact between pregnant people of color, low-income pregnant people, and law enforcement. That contact can be dangerous. Once investigated by law enforcement, pregnant low-income

352. *Id.* SafeGraph has said it will stop selling such sensitive data. Joseph Cox, *Data Broker SafeGraph Stops Selling Location Data of People Who Visit Planned Parenthood*, VICE (May 4, 2022), https://www.vice.com/en/article/88gyn5/data-broker-safegraph-stops-selling-location-data-of-people-who-visit-planned-parenthood. Other data brokers are still stepping up.

353. Sharon Bradford Franklin, Greg Nojeim & Dhanaraj Thakur, *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data From Brokers*, CTR. FOR DEMOCRACY & TECH. (Dec. 2021), https://cdt.org/wp-content/uploads/2021/12/2021-12-08-Legal-Loopholes-and-Data-for-Dollars-Report-final.pdf.

354. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y L. 299, 333 (2013).

355. Debra B. Stulberg, Loretta R. Cain, Irma Dahlquist & Diane Lauderdale, *Ectopic Pregnancy Rates and Racial Disparities in the Medicaid Population, 2004-08*, 102 FERTILITY & STERILITY 1671, 1674 (2014). This research does not address trans women, but this Article uses inclusive language.

356. Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz & Katherine E. Hartmann, *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271 (2013).

people and people of color, especially Black people, are more likely to be arrested or otherwise deprived of liberty.[357]

Abortion seekers face a dilemma: disclose private information that makes abortion attainable and risk its weaponization, or deprive oneself of crucial information that could make a life-changing decision easier.[358] Legally, these technological entities owe users limited duties to protect their privacy.[359] But that does not always align with people's perceptions. Radical feminists may not want those expectations to be realigned entirely.[360] Invasive surveillance techniques threaten the safety of abortion providers and pregnant people, but they can also be deployed to investigate misogynistic crimes that some feminists consider more worthy of prosecution, such as intimate partner violence.[361] However, barring legislative intervention regulating these techniques, abortion providers, abortion seekers, and people experiencing

357. Paltrow & Flavin, *supra* note 354, at 322.

358. Helen Nissenbaum's theory of contextual integrity explains why people are willing to disclose information in some circumstances or to some people but not others. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004), https://core.ac.uk/download/pdf/267979739.pdf. Margot Kaminski's conceptualization of "boundary management," adapted from social psychologist Irwin Altman, also offers a useful framework for understanding privacy harms. Margot E. Kaminski, *Regulating Real-World Surveillance*, 9 WASH. L. REV. 1113 (2015).

359. Some scholars think those duties should be more robust. *See, e.g.*, Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. DAVIS L. REV. 1183 (2016); ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE (2018); Lindsey Barrett, Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries, 42 SEATTLE U. L. REV. 1057, 1058 (2019); Lauren Henry Scholz, *Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions*, J. CORP. L. 144, 144 (2020); Neil M. Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. 961 (2021). The idea of corporations as "information fiduciaries" is not universally popular; *cf.* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

360. Radical feminism played a powerful role in shifting and reshaping the discourse around intimate partner violence. For a deeper dive into the role of radical feminism in criminalizing intimate partner violence, see Carolyn Hoyle, *Feminism, Victimology and Domestic Violence*, *in* HANDBOOK OF VICTIMS AND VICTIMOLOGY 165 (Sandra Walklate ed., Willan Publishing 2007) ("Feminism, particularly radical feminism, has done more to help those harmed by domestic violence than any other movement. It was essential in altering policymakers and practitioners to the physical and emotional abuse that occurs within families.").

361. Internet search information was famously invoked in Scott Peterson's murder of Laci Peterson, his pregnant wife. *Peterson Compute Shows Internet Searches on Boat Launches*, BAY CITY NEWS (Aug. 4, 2004), https://www.sfgate.com/news/article/Peterson-computer-shows-internet-searches-on-boat-2703609.php. Sensitive data has factored into multiple murders of wives by their husbands. *See, e.g.*, Jack Morse, *He Said He Was Asleep at Time of Wife's Murder. His Health App Said Otherwise*, MASHABLE (Feb. 9, 2021), https://mashable.com/article/smartphone-health-app-data-police.

miscarriages have limited legal means of invoking privacy to protect themselves.[362]

B. HACKING UNDER THE COMPUTER FRAUD AND ABUSE ACT

Not all harassment is preventable with better tools or methods. In 2010, Hunter Moore launched the website isanyoneup.com to solicit and distribute nonconsensual intimate images, mostly of women.[363] Alongside their photographs, Moore doxxed victims by including their full names, jobs, social media profiles, and cities of residence, all but ensuring the images would show up in Google Search results.[364] Moore quickly established himself as the most hated man on the internet. He responded to desperate cease-and-desist letters with "LOL."[365] He described himself as a "professional life ruiner."[366] He reported having no trouble sleeping at night.[367] Until the FBI arrested him for obtaining dozens of nudes by hacking email accounts, which violates the only criminal law inspired by the Matthew Broderick film War Games.[368]

362. Congressional inaction is not for lack of trying. Daniel J. Solove, *A Brief History of Information Privacy, in* PROSKAUER ON PRIVACY (PLI 2006); Anupam Chander, Margot Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1769–76 (2021) (discussing state and local privacy developments absent a comprehensive federal privacy law). And on June 15, 2022, Senator Elizabeth Warren introduced the Health and Location Data Protection Act, which could curb some of these privacy-invasive practices. S. 4408 (117th Cong. 2022). For a critical take on privacy legislation drafting, see Julie E. Cohen, *How (Not) To Write A Privacy Law*, KNIGHT KNIGHT FIRST AMENDMENT INST. (Mar. 23, 2021), https://knightcolumbia.org/content/how-not-to-write-a-privacy-law.

363. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668/.

364. *Id.* With the CFAA, the feminist values of consent and safety intersect.

365. *Id.* at 3. Moore invoked the provisions of CDA § 230 to protect himself from liability (though it was later revealed that he created some of the content himself). *Id.*

366. Carole Cadwalladr, *Charlotte Laws' Fight with Hunter Moore, the Internet's Revenge Porn King*, GUARDIAN (Mar. 30, 2014), https://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king.

367. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668/.

368. United States v. Moore, Indictment, No. 2:13-CR-00917 (C.D. Cal. 2013), https://www.wired.com/images_blogs/threatlevel/2014/01/revenge-porn-Moore-Evens-indictment.pdf; WARGAMES (1983). It is not the only Broderick film with legal consequences, however—*Project X* led to the invocation of animal abuse laws. Deborah Caulfield, *New Charges of Animal Abuse in 'Project X': D.A. Office Asked to File Criminal Complaints*, L.A. TIMES (Nov. 2, 1987), https://www.latimes.com/archives/la-xpm-1987-11-02-ca-12056-story.html. This section riffs on my prior discussion of the CFAA in Amanda Levendowski, *Teaching Doctrine for Justice Readiness*, 29 CLINICAL L. REV. 1 (forthcoming 2022).

As a refresher, Broderick circa 1983 plays a teen hacker who accidentally hacks a military supercomputer.[369] Several members of Congress embraced the view that the film was a "realistic representation of the automatic dialing and access capabilities of the personal computer" and responded by enacting what became the Computer Fraud and Abuse Act (CFAA).[370] The CFAA penalizes, in its broadest provision, "intentionally access[ing] a computer without authorization or exceed[ing] authorization, and thereby obtain[ing] information from any protected computer."[371] Because a protected computer includes any computer "used in or affecting interstate or foreign commerce or communication," the CFAA effectively applies to any device connected to the internet.[372] The CFAA falls within the second category of cyberlaws, as it's a cyberlaw that cannot—despite prosecutorial attempts to the contrary—be appropriated for feminist goals of mitigating misogynistic harassment. Ironically, however, a narrow reading of the CFAA that permits certain types of harassment also paves the way for pursuing the feminist goals of investigating employment discrimination and corporate malfeasance.

In its early years, prosecutors used the CFAA to target various forms of hacking.[373] But invocation of the CFAA as a straightforward hacking law did not last.[374] In the thirty-seven years since the CFAA's enactment, a deep, contentious split developed between the circuits that restricted the CFAA to hacking and interpreted its provisions narrowly[375] and the others that significantly expanded its scope.[376] In those latter jurisdictions, common uses

369. WARGAMES (1983). The film was nominated for three Academy Awards. *The 56th Academy Awards*, OSCAR (Apr. 9, 1984), https://www.oscars.org/oscars/ceremonies/1984.

370. H.R. REP. NO. 98-894, at 6 (1984).

371. 18 U.S.C. § 1030(a)(2)(C). Technically, the law was enacted as the Comprehensive Crime Control Act and expanded into the CFAA two years later. Orin Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1563–64 (2010).

372. 18 U.S.C. § 1030(e)(2).; *See, e.g.*, United States v. Drew, 259 F.R.D. 449, 457 (C.D. Cal. 2009) (noting that the final elements of 18 U.S.C. § 1030(a)(2)(C) "will always be met when an individual using a computer contacts or communicates with an Internet website").

373. *See, e.g.*, United States v. Morris, 928 F.2d 504 (2d Cir. 1991) (prosecuting hacker who released the eponymous Morris worm).

374. *See, e.g.*, United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (invoking the CFAA to prosecute cyberbullying).

375. WEC Caroline Energy Sols. LLC v. Miller, 687 F.3d 199, 207 (4th Cir. 2012), United States v. Nosal, 676 F.3d 854, 852–63 (9th Cir. 2012), United States v. Valle, 807 F.3d 508, 528 (2d Cir. 2015). For an in-depth account of the so-called "narrow interpretation," see Jonathan Mayer, *The "Narrow" Interpretation of the Computer Fraud and Abuse Act: A User Guide for Applying United States v. Nosal*, 84 GEO. WASH. L. REV. 1655 (2016).

376. EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 583–84 (1st Cir. 2001); Int'l Airport Ctrs., L.L.C. v. Citrin, 440 F.3d 418, 420–21 (7th Cir. 2006); United States v. John, 597 F.3d 263, 272 (5th Cir. 2010); Brown Jordan Int'l, Inc. v. Carmicle, 846 F.3d 1167, 1174–75 (11th Cir. 2017), *all abrogated by* Van Buren v. United States, 940 F.3d 1192 (11th Cir. 2019).

of the internet—such as lying in social media profiles,[377] sharing passwords for streaming services,[378] and even scraping websites[379]—could amount to CFAA violations. The law later garnered national attention for its breadth after the death of internet activist Aaron Swartz, who was prosecuted under the law.[380]

Several scholars have written about the scope of the CFAA.[381] But existing work overlooks an unexplored trend among high-profile CFAA cases: prosecutors stretching the CFAA to tackle technology-fueled harassment targeting girls and women. Moore's harassment happened to involve the kind of hacking squarely in the CFAA's crosshairs, but the harassing behaviors of suburban mothers, law enforcement officers, and police sergeants were less so. Prosecutors brought CFAA charges against each of those people anyway. And they failed.

When Lorri Drew created a Myspace profile in 2006, it wasn't for herself.[382] She was a mother living in O'Fallon, Missouri—the account was for a fictional

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The expansive circuits seemed well aware that their position was contested. EarthCam, Inc. v. OxBlue Corp., 703 F. App'x 803, 808 (11th Cir. 2017) ("We decided Rodriguez [628 F.3d 1258] in 2010 without the benefit of a national discourse on the CFAA. Since then, several of our sister circuits have roundly criticized decisions like Rodriguez because, in their view, simply defining 'authorized access' according to the terms of use of a software or program risks criminalizing everyday behavior . . . . Neither the text, nor the purpose, nor the legislative history of the CFAA, those courts maintain, requires such a draconian outcome. We are, of course, bound by Rodriguez, but note its lack of acceptance.").

377. Orin Kerr, Testimony, "Cyber Security: Protecting America's New Frontier," House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Nov. 15, 2011), http://volokh.com/wp/wp-content/uploads/2011/11/Testimony-of-Orin-S-Kerr.pdf ("In the Justice Department's view, the CFAA criminalizes conduct as innocuous as using a fake name on Facebook or lying about your weight in an online dating profile. The situation is intolerable.").

378. Staff Editor, *Is Using a Shared Netflix Password a Federal Crime?*, J. INTELL. PROP. & ENT. L. BLOG (Apr. 23, 2018), https://blog.jipel.law.nyu.edu/2018/04/is-using-a-shared-netflix-password-a-federal-crime/.

379. For a thorough chronological catalog of every CFAA scraping case through 2018, see Andrew Sellars, *Twenty Years of Web Scraping and the Computer Fraud and Abuse Act*, 24 B.U. J. SCI. & TECH. L. 372, 378–79 (2018).

380. For a deeper dive into the life of Swartz, who killed himself while being prosecuted under the CFAA, see THE INTERNET'S OWN BOY: THE STORY OF AARON SWARTZ (Luminant Media 2014).

381. *See, e.g.*, Orin Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003) (representative of multiple articles about the CFAA); David Thaw, *Criminalizing Hacking, Not Dating: Reconstructing the CFAA Intent Requirement*,103 J. CRIM. L. & CRIMINOLOGY 907 (2013); Andrew Sellars, *Twenty Years of Web Scraping and the Computer Fraud and Abuse Act*, 24 B.U. J. SCI. & TECH. L. 372, 378–79 (2018).

382. Decision on defendant's F.R.Crim.P. 29(c) motion, United States v. Drew, 259 F.R.D. 449, at 3 (C.D. Cal 2009) (No. Cr. 08-0582-GW). https://storage.courtlistener.com/recap/gov.uscourts.cacd.415703.162.0.pdf. Orin Kerr, who has discussed the CFAA at length,

teen named Josh Evans.[383] Masquerading as Evans, Drew began flirting with a girl named Megan Meier, a classmate of her daughter.[384] This went on for weeks until "Evans" told Megan that he no longer liked her and that "the world would be a better place without her in it."[385] Later that day, Megan died by suicide.[386] Prosecutors responded by charging Moore with violating the CFAA, alleging that she breached the Myspace Terms of Service (TOS), which, in part, required representation that "all registration information you submit is truthful and accurate."[387] Under their theory, Moore's violation of the TOS amounted to unauthorized access of the website.[388]

While the District Court was hypothetically open to some TOS violations amounting to CFAA violations, it found that "[t]reating a violation of a website's terms of service, without more, to be sufficient to constitute [a CFAA violation] would result in transforming § 1030(a)(2)(C) into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent internet users into misdemeanant criminals."[389] Judge Hu declined to do so and granted Drew's motion for a judgment acquittal.[390]

New York Police Department (NYPD) officer Gilberto Valle engaged in a different type of harassment. He lived with his then-wife and baby daughter in Forest Hills, Queens.[391] He also had an active late-night second life where he graphically chatted with strangers about "kidnapping, torturing, cooking, raping, murdering, and cannibalizing various women," including his wife and other women the couple knew.[392] After discovering images of dead women on the couple's shared laptop, Valle's wife deployed the sort of spyware used to surveil victims of intimate partner violence and discovered Valle's messages.[393]

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was part of Lori Drew's defense team. *See* All Things Considered, Fighting the Pseudonym Cyberwar, NPR (Nov. 19, 2011), https://www.npr.org/2011/11/19/142550202/fighting-the-pseudonym-cyberwar. The District Court cited Kerr's scholarship in its decision. Decision on defendant's F.R.Crim.P. 29(c) motion *United States v. Drew*, 259 F.R.D. 449, at 18 (C.D. Cal. 2009) (No. Cr. 08-0582-GW).

383. Decision on defendant's F.R.Crim.P. 29(c) motion at 3, United States v. Drew, 259 F.R.D. 449, at 3. She also used an unknown teen boy's photograph without his consent. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* People considering suicide can call the National Suicide Prevention Lifeline at 1-800-273-TALK (8255).

387. *Id.* at 6–7.

388. *Id.*

389. *Id.* at 29.

390. *Id.* at 32.

391. United States v. Valle, 807 F.3d 508, 512 (2d Cir. 2015).

392. *Id.*

393. *Id.*

She alerted law enforcement about her findings.[394] During the investigation, it was uncovered that Valle violated NYPD policy by accessing a program that enables searches of restricted databases containing sensitive information such as home addresses.[395] He searched one woman's name with no law enforcement purpose.[396] Prosecutors charged Valle with "exceeding unauthorized access" in a companion provision to § 1030(a)(2)(C) focused on obtaining information from departments or agencies of the United States.[397]

Until the investigation, most of the women were unaware that Valle brutally fantasized about them online, but they were nevertheless victims of harassment who likely felt that their safety was threatened.[398] As Judge Parker explained, "fantasies of violence against women are both a symptom of a contributor to a culture of exploitation, a massive social harm that demeans women."[399] However, he continued, "in a free and functioning society, not every harm is meant to be addressed with the federal criminal law."[400] Valle claimed that because he was authorized to access the law enforcement program as part of his job, his lack of law enforcement purpose was irrelevant.[401] Rejecting an Eleventh Circuit interpretation—in which a bureaucrat was found guilty of violating CFAA to surveil a string of women[402]—Judge Parker determined that the CFAA was ambiguous, and concluded that the Second Circuit was compelled by the rule of lenity to adopt Valle's narrow interpretation of the CFAA.[403]

While Drew and Valle targeted real women, an imaginary one was the subject of Georgia police sergeant Nathan Van Buren's attempted harassment.

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394. *Id.*

395. *Id.* at 512–13.

396. *Id.* at 524, 537.

397. *Id.* at 524.

398. *Id.* at 512. This is particularly true of Valle's ex-wife, who sought a divorce. *See* Alexander Abad-Santos, *What the Cannibal Cop's Wife Knew Is What No Wife Ever Wants to Know*, ATLANTIC (Feb. 26, 2013), https://www.theatlantic.com/national/archive/2013/02/cannibal-cop-wife-testimony/317976/.

399. United States v. Valle, 807 F.3d 508, 511 (2d Cir. 2015).

400. *Id.* at 511.

401. *Id.* at 523–24.

402. United States v. Rodriguez, 628 F.3d 1258, 1261–62 (11th Cir. 2010). Rodriguez's invasive behavior was extensive: he accessed his ex-wife's salary information, an ex-girlfriend's personal information sixty-two times, a former co-worker's daughter's information twenty-two times, a waitress' information twenty times, and multiple women from his church study group's information anywhere between ten and thirty-four times; he also used that illicit information offline in social interactions. *Id.* His is a rare case in which harassment of women led to a successful CFAA conviction, though it would likely no longer stand under *Van Buren*. *Id.*

403. Valle, 807 F.3d at 526–27.

Through his job, Van Buren encountered a man named Andrew Albo.[404] The two developed a rapport—Van Buren handled disputes between Albo and various women, and in turn Van Buren asked Albo for a personal loan for $15,368.[405] Unbeknownst to Van Buren, Albo surreptitiously recorded their conversation and presented it to the local sheriff's office.[406] The tape wound its way to the Federal Bureau of Investigation (FBI), which wondered just how far Van Buren would go for money.[407]

To find out, the FBI asked Albo to ask Van Buren to search the Georgia law enforcement computer database for the license plate of a woman that Albo supposedly met at a strip club—he claimed to be concerned that the woman was an undercover officer.[408] Given that several colleagues warned Van Buren about Albo's volatility, one can imagine the danger in which a real woman undercover officer might find herself.[409] Van Buren ignored department policy and accessed the database from his patrol car using his valid credentials, searched for the falsified license plate provided by Albo, and texted Albo that he'd uncovered information.[410] But before Van Buren could get his reward, he was charged with a felony for exceeding authorized access under § 1030(a)(2)(C) of the CFAA.[411]

After decades of the CFAA's interpretive schism, the Supreme Court confronted this slippery law. Echoing Valle's arguments, Van Buren claimed that misusing access does not amount to exceeding it.[412] Justice Barrett interrogated the absurdity of the government's argument, observing that "[i]f the 'exceeds authorized access' clause criminalizes every violation of a computer-use policy, then millions of otherwise law abiding citizens are criminals."[413] The Court declined to adopt such an interpretation, finally clarifying that violating TOS or computer use policies do not amount to federal crimes.[414]

404. Van Buren v. United States, 940 F.3d 1192, 1197 (11th Cir. 2019).
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.* Albo offered Van Buren $5,000 for his trouble. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 1198.
412. Van Buren v. United States, 141 S. Ct. 1648, 1653 (2019).
413. *Id.* at 1661.
414. *Id.* The Court did not, however, invoke the rule of lenity. It also remains unclear how far the narrow interpretation extends. *See id.* at 1659 n.9 ("For present purposes, we need not address whether this inquiry turns only on technological (or "code-based") limitations on access, or instead also looks to limits contained in contracts or policies."); *cf.* Brief for Orin Kerr as *Amicus Curiae* 7 (urging adoption of code-based approach).

Consistently, courts bent the bounds of the CFAA beyond hacking when it came to competing travel agencies, disgruntled personnel, and nosy employees, but not when it came to protecting the safety of girls and women.[415] And, perhaps counterintuitively, that's a good thing. The Supreme Court's decision to adopt a narrow interpretation of the CFAA creates opportunities to combat oppression in ways that would otherwise be criminalized. It enables researchers to investigate race and gender disparities on employment websites.[416] It empowers journalists to scrape data needed to report on racial discrimination, police misconduct, and anti-competitive behavior.[417] It resists the temptation of carceral feminism by declining to rely on criminal law to promote feminist goals. And it reserves a range of non-carceral responses, such as civil lawsuits, adverse employment action, and medical interventions. However, the CFAA remains the key law used to prosecute Hunter Moore, which radical and other feminists would herald as a necessary invocation of criminal law against misogynistic abuse.

V. CONCLUSION

While Ringley launched Jennicam and Barlow penned his manifesto, Judge Easterbrook spoke at a symposium about Property in Cyberspace.[418] He observed that any effort to create a course collecting varying strands of law relating to horses, from sales to torts, into a so-called Law of the Horse would be "doomed to be shallow and miss unifying principles."[419] So too, he said, of the law of cyberspace.[420] He was wrong, but not for the reason other scholars

415. *See, e.g.*, EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 583–84 (1st Cir. 2001) (scraping website by competitor violated CFAA); Int'l Airport Ctrs. L.L.C. v. Citrin, 440 F.3d 418, 420–21 (7th Cir. 2006) (installing program that deleted files violated CFAA); Brown Jordan Int'l, Inc. v. Carmicle, 846 F.3d 1167, 1174–75 (11th Cir. 2017) (reading others' emails violated CFAA); all abrogated by United States v. Van Buren, 141 S. Ct. 1648 (2021). The CFAA creates civil and criminal penalties for the same provisions, and a fair number of broad interpretations were in the civil context.

416. Sandvig v. Barr, 451 F. Supp. 3d 73 (D.D.C. 2020) (violating employment websites' TOS not CFAA violation).

417. Brief for The Markup as Amicus Curiae Supporting Petitioner, Van Buren v. United States, 593 U.S. ___ (2021) (No. 19-783), https://www.supremecourt.gov/DocketPDF/19/19-783/147271/20200708180752488_19-783%20-%20the%20markup%20amicus%20brief%20for%20e-filing%207-8-2020.pdf.

418. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (1996). The theory of the law of the horse was originated by Karl N. Llewellyn. *See generally* Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

419. Frank H. Easterbrook, *Cyberspace and the Law of the Horse, Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996).

420. *Id.*

stated.[421] One unifying principle of cyberlaw is feminism. Cyberlaw is constantly amplifying and abridging the feminist values of consent, accessibility, and safety. Cyberlaw also engages with feminist goals, like preventing intimate partner violence, protecting sex workers, and preserving the privacy of pregnant people. And cyberlaw, viewed through a feminist lens, urges the emergence of legal practices that could create a more truly feminist cyberlaw. Feminism offers a means of making sense of cyberlaw. But, to be clear, cyberlaw is not feminist—yet.

Hopefully, scholars, advocates, and legislators will take an active role in developing feminist cyberlaw practice. Academics can center feminist cyberlaw perspectives in scholarship that influences law and policy. Practitioners can integrate feminist cyberlaw approaches into client counseling and advocacy. And lawmakers can prioritize legislation that embraces the feminist values of consent, accessibility, and safety to create a fourth category of cyberlaws: feminist cyberlaws that serve the overarching feminist goal of dismantling oppression. Contemporary cyberspace may feel bleak,[422] but feminist cyberlaw can provide a playbook for a better future.

421. *See, e.g.*, Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1997) (offering unifying principles for technology law); Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (developing a case for cyberlaw); Ira Steven Nathenson, B*est Practices for the Law of the Horse: Teaching Cyberlaw and Illuminating Law Through Online Simulations*, 28 SANTA CLARA HIGH TECH. L.J. 657 (2012) (making a pedagogical case for cyberlaw); Meg Leta Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, J.L. TECH. & POL'Y (2018) (disconfirming technological exceptionalism as an approach to cyberlaw); Alicia Solow-Niederman, *Emerging Digital Technology and the "Law of the Horse,"* UCLA L. REV. DISC.: LAW MEETS WORLD (2019) (connecting cyberlaw topics to fundamental legal principles); BJ Ard & Rebecca Crootof, *Structuring Techlaw*, 34 HARV. J.L. & TECH. 347 (2021) (defining the adjacent field of "techlaw"); Margot E. Kaminski, *Technological 'Disruption' of the Law's Imagined Scene: Some Lessons from Lex Informatic*a, 36 BERKLEY TECH. L.J. 102 (2022) (revisiting unifying principles offered by Joel Reidenberg); *cf.* JAMES GRIMMELMANN, INTERNET LAW: CASES AND PROBLEMS (Semaphore Press 2023) ("What if Internet law is no longer a 'specialized area of law' because all law is Internet law now?").

422. *See generally* WILLIAM GIBSON, NEUROMANCER 5 (Ace 1984) (ironically not coining the term "cyberspace"). The term "cyberspace" was coined by artist Susanne Ussing in the late 1960s. Jacob Lillemose & Mathias Kryger, *The (Re)invention of Cyberspace*, KUNSTKRITIKK (Aug. 24, 2015), https://kunstkritikk.com/the-reinvention-of-cyberspace/.