Towards an Equality-Enhancing Conception of Privacy

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Canadian jurisprudence has explicitly recognized the impact of child pornography on the privacy rights of the children abused in its production. In contrast, it has generally not analyzed other forms of harmful expression, such as hate propaganda and obscenity, to be violations of the privacy rights of those targeted. In a previous article, the author suggested that this distinction in the jurisprudence reflected the relative ease with which the privacy interests of the individual children whose abuse is documented in child pornography meshed with the prevalent Western approach to privacy as a negative individual liberty against intrusion. Noting the historic role that the individualistic conception of privacy has played in perpetuating inequality, the author suggests that reliance on the prevailing paradigm is unlikely to prove useful in advancing the lived substantive equality of those targeted by hate, child pornography and obscenity. However, before the advancement of privacy claims by targeted members of equality-seeking communities is abandoned, the potential for revising the paradigmatic Western account of privacy should be explored. The author invokes the alternative accounts of privacy developed by Oscar Gandy, Priscilla Regan, and Julie Cohen, who analyze the implications of widespread digital data collection, aggregation, and social profiling. Their work may provide ways of fashioning an account of privacy intrinsically tied to producing substantive equality for groups targeted by and in hate propaganda, obscenity and child pornography, one which may also assist equality-seeking groups more generally.

La jurisprudence canadienne a explicitement reconnu l'incidence de la pornographie juvénile sur le respect de la vie privée des enfants exploités pour sa production. Par contre, la même jurisprudence n'a pas analysé d'autres formes néfastes d'expression, par exemple la propagande haineuse et l'obscénité, en tant que violations du droit à la vie privée des personnes qui en sont la cible. Dans un article précédent, l'auteure avance que cette distinction dans la jurisprudence reflète la facilité relative avec laquelle les droits à la vie privée des enfants dont l'exploitation est bien illustrée dans la pornographie juvénile a été assimilée à la conception de vie privée qui prévaut en Occident, soit une liberté individuelle négative, une liberté contre l'intrusion. Relevant le rôle historique joué par la conception individualiste du respect de la vie privée pour ce qui est de perpétuer l'inégalité, l'auteure avance qu'il est peu probable que le fait de se fier au paradigme prédominant soit utile pour faire avancer l'égalité véritable, dans leur vie quotidienne, des personnes ciblées par la haine, la pornographie juvénile et l'obscénité. Toutefois, avant que ne soit abandonnée la lutte pour le respect de la vie privée menée par les membres ciblés des communautés revendicatrices du droit à l'égalité, il y aurait lieu d'examiner la possibilité de revoir la notion occidentale paradigmaticque de vie privée. L'auteure cite les travaux portant sur la vie privée élaborés par Oscar Gandy, Priscilla Regan et Julie Cohen, ces derniers ayant analysé les incidences des pratiques généralisées de collecte de données numériques, de recouplement des données et de profilage social. Leurs travaux peuvent suggérer des façons d'élaborer une description de la vie privée qui serait intrinsèquement liée à la réalisation d'égalité véritable pour les groupes ciblés par la propagande haineuse, par l'obscénité et par la pornographie juvénile, description qui constituerait aussi une aide plus générale pour les groupes qui revendiquent l'égalité.

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Introduction

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Introduction

It is only in the context of child pornography that Canadian courts have explicitly recognized harmful expression as a violation of the privacy rights of its targets. In contrast, in the contexts of hate propaganda and obscenity, although Canadian legal decision-makers have referred to the dignity interests of the groups targeted by these forms of expression, they have not recognized them as privacy violations. This divergence does not, I suggest, reflect the fact that privacy is not in play for the targets of hate and obscenity, but rather that the case law adopts an unduly narrow conception of privacy as an individual right against intrusion (particularly by the state). Since the legal analysis of the harms of child pornography focuses largely on its impact on individual children—both those abused in its production and those who may be abused as the result of its message—privacy, envisioned as an individual right, meshes well with the analysis. In contrast, the harms of hate propaganda and obscenity have predominantly been cast as collective, group-based equality harms and therefore do not mesh well with the current individualistic analysis of privacy.

Although certain individual targets of hate propaganda and obscenity could arguably also craft arguments to assert claims within the
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individualistic paradigm, the historic shortcomings of such legal strategies suggest that this is unlikely to be an equality-enhancing proposition for socially disenfranchised groups and their members. Rather than re-shaping what are fundamentally group-based claims to fit the individualistic privacy paradigm, I suggest a re-visioning of the paradigm itself in a way that better reflects privacy's social and collective values, as well as the interdependence between the individual and the collective in the process of identity formation.

Collective perspectives on privacy developing in the context of concerns surrounding data management may be of some assistance in building an equality-enhancing conception of privacy upon which the groups targeted by hate, obscenity, and child pornography might draw. A growing body of literature focuses on the privacy implications of the escalating collection and aggregation of data about individuals that is being facilitated by emerging communications technologies. That literature may provide a useful analogy for thinking through both the individual and collective privacy-related harms of hate propaganda, obscenity, and child pornography. Of particular interest are the analyses within the literature that focus on the aggregation of data collected from and about individuals in order to produce group profiles later used by third parties to make judgments about members of those groups. I suggest that strands within this part of the literature that focus on the privacy harms of social sorting through group profiling may assist both in conceptualizing the collective privacy-related harms of hate propaganda, obscenity, and child pornography, and in evaluating strategies for addressing them. Like many of the authors dealing with data management, I suggest that intervention at the data collection stage is likely to be a crucial aspect of any strategy that seeks to minimize both discriminatory conduct and interference in self-definition.

The analysis will proceed in three parts. Part I summarizes the way in which privacy has been dealt with in Canadian case law on hate, obscenity, and child pornography, which was dealt with in detail in a paper published in the previous volume of this journal.¹ That summary is then placed within the context of a broader negative, individualistic conception of privacy pervading western legal and philosophical thought. I then go on to show how the privacy claims of certain individual targets of hate and obscenity could be fit within the confines of the individualized

privacy paradigm, just as the claims of the individual children abused in the production of child pornography have.

Notwithstanding that a feasible argument can be made to fit such claims within the individualized paradigm, in Part II I suggest that it is the mould itself that ought to be reconceptualized, rather than the claims of targets. My suggestion stems from a brief analysis of some historic examples of the pitfalls experienced by equality-seeking groups and their members who have relied upon the individualistic paradigm in asserting claims.

Part III explores some of the literature proposing alternative visions of privacy that could prove useful in articulating an equality-enhancing conception of that right for members of equality-seeking groups, for the groups themselves, and for the larger community. The Conclusion notes that both traditional, liberal approaches to privacy as negative liberty, as well as more social, collective approaches to privacy are arguably at play for target groups and their members, but suggests that the social approach offers greater potential for developing a more robust equality-enhancing conception of privacy and its related interests.

I. Development of the privacy paradigm

If one simply read Canadian case law on hate, obscenity, and child pornography in order to determine the nature and value of privacy, one would almost certainly conclude that it is primarily a control-over-information mechanism designed to protect the individual from the state in order to produce purely individual goods such as self-fulfillment, autonomy, and liberty. While much of the literature on privacy also reflects these themes, it also offers much richer and more diverse conceptualizations of privacy, which are more likely to fit with the rights, interests and needs of the members of equality-seeking groups than is the current individualistic paradigm. Included within these more promising alternatives are those that envision privacy as extending beyond control over information, as well as those that articulate a vision of privacy as a producer of collective social goods that transcend both the individual and individuals as an aggregate.

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2. It is important to note that the privacy "paradigm" referred to in this paper is specific to Western culture and quite different from the approaches to privacy in other cultures. See, for example, Fadwa El Guindi, Veil: Modesty, Privacy, Resistance (New York: Berg, 1999).
1. *Privacy Analysis in the Canadian Case Law on Hate Propaganda, Obscenity, and Child Pornography*

The Canadian case law on hate propaganda, obscenity, and child pornography approaches privacy as an individual right against intrusion in private spheres, with particular focus on intrusion by state agents. In all three contexts, privacy is analyzed predominantly from the perspective of those accused by the state of participating in hate propagation, obscenity, or child pornography. From this vantage point, the emphasis on limiting state intrusion on the sphere of the individual is understandable, as accused persons challenge the ability of the state to limit expression outside of the "public" realm, to conduct searches and seizures, and to require that certain information about convicted offenders be placed in government-maintained databases.

On the other hand, the privacy rights of those targeted by these forms of expression have only been explicitly recognized in the context of child pornography. Numerous Canadian courts have reflected upon the invasion of privacy experienced by children abused in the production of child pornography as the result of the recording and repeated dissemination of their abuse. Recognition of this individualistic conception of privacy within this body of case law is unsurprising, given its focus on the harms of child pornography to individual children, while paying little attention to its broader harms to the collective equality and dignity interests of children as a group.

In contrast, the case law on hate propaganda and obscenity focuses on the more collective harms of these forms of expression, including in relation to multiculturalism and equality. In this context, where the case law does discuss the rights and interests of targeted groups and their members, it does so by reference to dignity, autonomy, and equality—making no direct mention of privacy rights.

It might be concluded that privacy interests are recognized in the context of child pornography, but not in the contexts of hate and obscenity because privacy interests do not arise in the latter two situations. However, I suggest that the schism in the case law represents the incorporation of a specific individualistic conception of privacy that, although it has become paradigmatic in western legal and philosophical writing, need not be accepted as complete.

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3. The summary provided in this section is premised upon the more detailed analysis undertaken in the companion paper to this one, which was published in the previous volume of this journal.
2. *The Individualistic Paradigm*

Much of the current Canadian legal approach to privacy conceptualizes it as an aspect of the liberty to which thinkers such as John Stuart Mill argued every individual is entitled.\(^4\) The concept of privacy fit well with Mill's assertion that human liberty required drawing a line between individual independence and social control—between a sphere of self-regarding conduct within which one ought only to have to answer to oneself and a sphere of other-regarding conduct within which it was appropriate for society to intervene in order to prevent recognizable harm to other individuals.\(^5\)

For Mill, the primary function of privacy was the development of the individual as a thinking, independent, autonomous agent, rather than a being controlled by convention.\(^6\) Embedded in this account of privacy's value are its intrinsic merit as the province of humanity and its functional value in developing each person's faculties through being guaranteed a certain unintruded-upon space within which to make decisions having no effect on others.\(^7\) In this account, the intervention of society is characterized as a serious intrusion on the rational and independent decision-making powers of the individual; where the latter seems in every circumstance to be preferable to the former.

This approach, grounded in the sanctity of the individual, the notion of separable public and private spheres of activity, and production of individual goods, was readily adopted by liberal legal thinkers. In 1890, fully embracing an individual account of privacy that sought to separate that which was properly made "public" from that which was properly maintained as "private," Warren and Brandeis characterized privacy both broadly and negatively:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."

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4. Interestingly, Mill argued this not on the basis of individual rights but on the basis of social utility—that utility for all would be maximized by according sufficient freedom to each individual to self-determine what the good life would mean. Mill's approach was also a constrained one, though, arguing as it did for recognition of harm to others as the limit on individual choice: John Stuart Mill, *On Liberty*, 4th ed. (London: Longman, Roberts and Green, 1869) online: Bartleby.com <http://www.bartleby.com/130/index.html> c. 1 at 9-11.


7. In this regard, Mill's account is extremely difficult to accept. The line between self-regarding and other-regarding behaviour is excruciatingly difficult to draw and in an increasingly interactive, interconnected world very unconvincing. As noted by Allen, "Purely self-regarding conduct is, indeed, a myth": Anita Allen, *Why Privacy Isn't Everything: Feminist Reflections on Personal Accountability* (New Jersey: Rowman & Littlefield, 2003) at 44 [Allen, 2003].
Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”

Interestingly, Warren and Brandeis were not focused on “private” in the sense that government ought to be kept out, rather their concern was for “private” as between individuals or individuals and groups within society. In particular, they were concerned that the gossipy media ought to be reined in so as to keep other individuals out of what they considered to be highly personal aspects of the lives of society folks. They grounded the legal claim to privacy on the adaptation of legal protections for property, arguing the time was ripe to extend through common law a general individual right of control over the extent to which incorporeal interests, such as thoughts, feelings, and emotions were conveyed to others.

The concept of privacy as control over access to information about one’s self has come to play a central role in law and theory since at least 1967 when Alan Westin defined privacy as:

The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.

Westin described individuals as being “continually engaged” in self-adjustment to balance the desire to withdraw from society against the equally compelling desire for social participation (which he associated with disclosure and communication). His approach to privacy emphasized the significance of control over information, not simply in relation to individuals, but in relation to groups and institutions as well. Interestingly, the latter assertion—the idea that privacy could and should be defined in

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9. Ibid. at 196. Apparently, the press had covered the social gatherings of Warren’s wife in embarrassing and humiliating detail, including particularly sensitive coverage of his daughter’s wedding: see Doe v. Methodist Hospital, 690 N.E.2d 681 (Ind. 1997); 26 Media L. Rep. 1289 (Lexis), a recent case before the Indiana Supreme Court.
10. Warren & Brandeis, supra note 8 at 198.
12. Ibid.
relation to claims by collectives has received comparatively little attention from scholars, courts, and advocates.

References to collectives notwithstanding, it seems fair to say that Westin’s account of privacy’s function is primarily an individualistic one. Privacy, he argued, is ultimately fundamental for creation and maintenance of a liberal democracy. In explicating that claim, Westin asserted that privacy serves to protect the sanctity of the individual “as a creature of God” by assisting in the preservation of a core self of ultimate “secrets” to which no one else is admitted, thus allowing the individual to maintain his or her autonomy through an ability to control the gap between what he or she understands of him or herself and what the world understands him or her to be. More specifically, Westin asserted that privacy works to provide individuals with personal autonomy, emotional release, self-evaluation, and limited and protected communication.

Dissatisfied with both the vagueness of privacy defined as the “right to be let alone” and the undue narrowness of the “control over information” definition, scholars such as Ruth Gavison and Anita Allen have pressed for an understanding of privacy as a condition of inaccessibility of the

13. I say “primarily” here because, although the most-cited aspects of Westin’s account of privacy relate solely to promotion of individualism and social withdrawal, his account also encompassed social goods of two sorts. Social goods such as better rested and more thoughtful social participants might be characterized as derivatives of delivering privacy to individuals. Under this account, we protect privacy to protect individual rights to autonomy, emotional release, self-evaluation, and limited and protected communication because these rights build better individuals, which in turn builds a better society, where “better” connotes individuation. However, Westin’s account also referred to privacy’s role in enabling and furthering plurality through collectives, the ultimate value of which extended beyond their aggregate value to individual group members.
15. Ibid. at 33.
16. Ibid. at 32-39.
17. With respect to the Warren & Brandeis definition, Anita Allen has said that under this definition, “any form of offensive or harmful conduct directed toward another person could be characterized as a violation of personal privacy.” As a result, privacy in many cases would be indistinguishable from intentional acts like assault, which at a practical and conceptual level are not convincingly characterized as privacy violations: Anita Allen, Uneasy Access: Privacy for Women in a Free Society (New Jersey: Roman and Littlefield, 1988) at 7-8 [Allen, 1988]. Judith Jarvis Thomson, argued the Warren & Brandeis formulation was also too narrow in that it could be taken to suggest that police may watch you in your home using an x-ray device without interfering with your privacy because they have not physically interfered with your “aloneness”: Judith Jarvis Thomson, “The Right To Privacy” (1975) 4 Philosophy & Public Affairs at 295.
18. Allen, 1988, supra note 17 at 8. Allen has also criticized the access control theory for allowing for privacy to be defined according to how much privacy any individual chooses to have or to forego, and also for failing to suggest parameters on how much control individuals ought to be accorded over access to information about them: ibid. at 26.
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person. Allen has suggested the following restricted-access account of privacy:

[P]ersonal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others. To say that a person possesses or enjoys privacy is to say that, in some respect and to some extent, the person (or the person’s mental state, or information about the person) is beyond the range of others’ five senses and any devices that can enhance, reveal, trace or record human conduct, thought, belief, or emotion.21

Further, she underscored the connection between the individual goods deliverable by privacy and broader social benefits, as well as the inter-subjective nature of identity formation:

We “know ourselves as separate only insofar as we live in connection with others and ... we experience relationships only insofar as we differentiate others from self.” [reference omitted] Privacy signifies contexts of self-determination. It signifies conditions in which the “I” presupposed by “we” can be morally individuated, that is, in which individuals can develop character, personality and skills. These traits can enrich subjective experience and qualitatively enhance participation in intimate relationships and group life.22

In short then, Allen argued that one of the values of privacy was the way in which it functions to produce opportunities for self-definition and personhood, which in turn make individuals fit for social participation and contribution.23 A further derivative effect that she noted was promotion of formal equality—equality of opportunity to contribute made possible by providing women with meaningful opportunities for self-determination. Although her account fundamentally urged the importance of privacy in promoting “individuation” by ensuring each of us doesn’t simply “merge with the mass” by constantly having all aspects of ourselves subject to public scrutiny,24 it also drew attention to more collective moral imperatives of social participation and contribution:

21. Ibid. at 15.
23. Allen, 1988, ibid. at 42.
24. Ibid. at 46.
Not only the individuals extolled by liberals, but also the communities extolled by communitarians and socialists will benefit from opportunities for personal privacy.\(^{25}\)

Notwithstanding references to collectives and social participation in the privacy literature, the paradigmatic account of privacy both as individual in nature and as a producer of individual goods predominates. As Colin Bennett and Charles Raab have aptly summarized it:

The privacy paradigm rests on a conception of society as comprising relatively autonomous individuals. It rests on an atomistic conception of society; the community is no more than the sum total of the individuals that make it up. Further, it rests on notions of differences between the privacy claims and interests of different individuals. Individuals, with their liberty, autonomy, rationality, and privacy, are assumed to know their interests, and should be allowed a private sphere untouched by others.\(^{26}\)

3. **Shaping individual targets’ claims to fit the paradigmatic mould**

As discussed above in Part 1, the privacy rights of the individual children directly targeted in the creation of child pornography have been legally recognized. I will suggest that this reflects the shaping of these claims to fit the paradigmatic individual privacy mould. Likewise, claims for certain individuals targeted by hate propaganda and obscenity could also be shaped to fit that mould, even though these kinds of claims are not reflected in the case law. Ultimately, however, I will suggest that a reshaping of the mould, rather than of the claims of equality-seeking groups and their members is preferable in terms of promoting substantive equality.

The claims of children who are abused in the production of child pornography can be made to fit neatly within the individualistic privacy paradigm—although the privacy implications for those indirectly made targets as a result can probably only be advanced under a more social account of privacy. The individual children whose abuse is recorded in child pornography have suffered both an interference with their “right to be let alone” in a sphere traditionally considered to be highly private, “sexual” activity, and have lost control over this personal information.

\(^{25}\) Ibid. at 52. More recently, Allen has urged an even more balanced account of the individual and social aspects of privacy in which the claim to privacy is not understood as a license for freedom from social accountability within private spheres, saying “although privacy is important, accountability is important too. Both in their own way render us more fit for valued forms of social participation. Privacy is our repose and intimate accountability our engagement”: Allen, 2003, supra note 7 at 6.

about themselves. Their dignity, independence, and autonomy are deeply intervened upon by the abuse itself in a manner that is perpetuated by the threat of the uncontrollable ongoing circulation of the record of their abuse. Moreover, the potential notoriety associated with the imagery might be argued an invasion of the anonymity that both Westin and Allen characterized as one of the functions of privacy. Presumed within this framework is an absence of consent to the creation and distribution of the record to others,27 premised in large part on an assumption of the absence of consent to the sexually explicit representation or activity depicted.28 Under this account, we might also argue that the autonomy of these children may also be affected into adulthood due to the enduring public record of their abuse.

In a circumstance where an individual is explicitly targeted by hate propaganda, a privacy claim could be shaped to fit within the current paradigm. Interference with the incorporeal interests of the individual targeted in terms of their reputation could well be analyzed as an interference with Warren and Brandeis’s “right to be let alone.” Assuming they have not consented to be targeted,29 it might be argued that their rights to anonymity and seclusion have been infringed30—not to mention their ability to autonomously and independently self-define.

Privacy claims for the women featured in obscenity fit less easily within the individualistic paradigm, in large part because of underlying sexist presumptions about women’s ongoing sexual availability to men. Nonetheless, certain of these claims could be shaped to fit that mould. Claims could be advanced similar to those of the children abused in child pornography relating to the effect of the recording and production of highly private aspects of their existence on their dignity, independence,

27. The Supreme Court of Canada in R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45 at 116, 118 [Sharpe] seems to have made this element clear by excepting from the criminal prohibitions those consensual recordings of legal sexual activity between minors intended to be kept for their own personal use.
28. It seems necessary to say “in large part” in the Canadian context, since the prohibitions on child pornography relate to those 18 years of age and under, even though there is no legal presumption against those 16 and over consenting to engage in sexual activity in certain contexts: Criminal Code of Canada, R.S.C. 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 2; 2008, c. 6, ss. 13, 54.
29. Consent or waiver in these circumstances might be argued to undermine a privacy claim where the individual targeted has, for example, engaged in labelling him or herself using racist, sexist, or homophobic language in an effort to reappropriate the terminology. New York has recently passed regulations purportedly banning such conduct: “Things not to do when you’re in New York” The Ottawa Citizen (11 March 2007) B6 (Proquest).
30. Here I draw upon Allen’s analysis of sexual harassment, which she suggests constitutes an invasion of the privacy of those targeted even where conducted in public space in that such harassment undermines its target’s ability to enjoy the freedom of movement and anonymity others may enjoy: Allen, 1988 supra note 17 at 132.
and autonomy. The characterization of privacy as "control over access" to information presents special problems for many women directly targeted in obscenity because it invites an investigation of consent. On many accounts, adults featured in obscenity are taken to have consented both to the acts recorded and to the creation and circulation of that record. While some participants may in fact consent, the overall presumption of consent may well be misplaced—particularly if one insists upon informed consent, which implies the existence of available options, knowledge of those options, and a conscious choice in favour of participation. Nevertheless, under a "control over access to information" theory, one of the preliminary hurdles will be demonstrating the lack of consent to waive privacy in relation to the activity depicted.

From this perspective, Allen and Gavison's limited or restricted access accounts, grounded as they are in privacy being a condition of inaccessibility of the person, would not appear to present such a roadblock. An adult featured in obscenity could advance a claim to a privacy violation merely on the basis that they were subjected to the "senses or surveillance devices of others." As noted in the companion paper to this one, the Supreme Court of Canada was prepared to acknowledge that those depicted in obscenity might be consenting or appear to be consenting to the acts in question, but that this was not determinative in terms of whether the content itself constituted obscenity. Even so, given the Canadian experience in relation to the Criminal Code provisions on sexual history and counselling records, it is difficult to believe in the context of the current privacy paradigm that a court is likely to be convinced that a legally relevant privacy violation has occurred purely on the basis of access to the adult featured in the materials where there is any suggestion that he or she consented to both the conduct and its recording.

Where individuals are the non-consensual direct targets of hate propaganda, child pornography, or obscenity they could assert that the

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32. Allen, 1988, supra note 17 at 15.
34. These are discussed in detail in Part 2 below.
35. An account that would presume against consent might well be argued to risk infantilization of women by implicitly suggesting that even informed and engaged consent is legally irrelevant in determining whether the target's privacy rights have been violated. The restricted access account, however, does not necessarily suggest whether consent should be presumed or not. It simply makes it irrelevant.
“expression” itself infringes their privacy within the confines of the current individualistic paradigm—perhaps more successfully under a restricted access account than on one focusing on control over information. Like the claims advanced and accepted in the child pornography context, individual targets of hate and obscenity could advance arguments about intrusions on their “rights to be let alone,” including their interests in autonomy, anonymity, and seclusion. These forms of expression, it could be argued, undermine the values privacy is designed to serve, either by undermining the individual targets’ ability to control access to information about them or, in any event, by interfering with their ability to limit access to themselves. They might even be argued, in some cases, to interfere with the individual’s ability to form relationships because of the rush to judgment that might occur as a result of their being individually targeted. In the contexts of hate propaganda and obscenity, however, where adults are involved, overcoming presumptions about consent may prove difficult, making “control over access to information” models such as Westin’s generally difficult to manoeuvre, unless courts can be convinced to interrogate individual contexts further in order to determine whether truly informed consent has been given.

Even though such claims are possible within the current individualistic privacy paradigm, the fact is that in the contexts of hate propaganda and obscenity, they do not appear to be being advanced and certainly show no signs of being invited or endorsed by Canadian decision-makers. From an equality perspective, I would suggest that this is for the best. In a legal context such as ours, where what was once a fairly advanced conception of substantive equality is already under siege, there would appear to be very little to gain by advancing privacy claims steeped in the very individualism that has for centuries shielded domestic violence from public inquiry and permitted the blaming of disadvantaged individuals as victims of their own unfortunate “choices.” Indeed, the pitfalls for equality-seeking communities and their members associated with such claims have been made evident in the contexts of abortion and non-“modesty” based privacy claims by women, and even more amply demonstrated in the context of statutorily imposed directives relating to disclosure in sexual assault cases that mandate Canadian courts to consider privacy and substantive equality.

II. *Pitfalls of the individualistic paradigm for equality-seeking groups*

Privacy-based arguments have been strongly critiqued as inconsistent with the objectives of equality-seeking groups and their members from across a spectrum of feminist perspectives. This part explores three of these in an effort to highlight some of the key pitfalls associated with privacy-based arguments, together with practical examples of the ways in which these pitfalls have actually surfaced in the context of attempts by equality-seeking groups to rely upon legal privacy arguments to advance their interests. These critiques will then be relied on as a basis for informing the discussion in Part III of the potential for building an equality-enhancing conception of privacy.

Writing in the context of the right to abortion in 1989, Catharine MacKinnon stated:

> The liberal ideal of the private holds that, so long as the public does not interfere, autonomous individuals will interact freely and equally. Privacy is the ultimate value of the negative state. Conceptually, this private is hermetic. It means that which is inaccessible to, unaccountable to, unconstructed by anything beyond itself. By definition, it is not part of or conditioned by anything systematic lies outside of it. It is personal, intimate, autonomous, particular, individual, the original source and final outpost of the self, gender neutral. ... To complain in public of inequality within the private contradicts the liberal definition of the private. In the liberal view, no act of the state contributes to shaping its internal alignments or distributing its internal forces, so no act of the state should participate in changing it.

This epistemic problem explains why privacy doctrine is most at home at home, the place women experience the most force, in the family, and why it centers on sex. ... For women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as political. The private is public for those whom the personal is political. In this sense, for women there is no private, either normatively or empirically.

> Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered. For example, if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful. But the right to privacy is not thought to require social change. It is not even thought to require any social preconditions, other than nonintervention by the public.37

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This passage encapsulates three difficult and persistent critiques of the current western privacy paradigm that surface time and again in the case law relating to hate propaganda, obscenity, and child pornography: (a) privacy as an individualistic and atomistic right to control access to one’s self, (b) privacy as a negative right, and (c) privacy as inalterably gendered and raced. If privacy is to be even a remotely effective legal tool for equality-seeking groups (and conversely not be used as a tool for continuation and exacerbation of privately-effected inequalities) either we would have to achieve equality before attempting to engage privacy, or privacy would have to be reconceptualized to take account of systematically generated inequalities that go unnoticed under the current conception. In the latter case, as will be discussed in Part III, social or collective accounts of privacy might prove useful.

1. Privacy as an individualistic and atomistic right to control access

An account of privacy premised primarily upon the liberal vision of promoting each individual’s ability to control access to both their physical and psychological selves does not appear on its face to undermine promotion of equality where equality is conceptualized in terms of promoting and protecting the rights and interests of each individual member of an equality-seeking group. However, it can severely undermine efforts to understand inequality as a systemically reinforced social ill. Since traditional privacy analysis focuses on the particular situation of the particular individual claiming its protections, attention is all too often and too easily diverted from the discriminatory social context leading to that situation, and from the ramifications of the particular conception of privacy for the broader equality-seeking community. The risks to equality posed by the prevalence of this atomistic legal conception of privacy have been made evident in the context of judicial interpretation and application of the Criminal Code provisions that place limits on the introduction of evidence of complainants’ sexual history and counselling records in the context of criminal sexual assault trials.

In the late 1990s, members of the Canadian feminist legal community sought and achieved legislative amendments that required judges considering the admissibility of sexual history and counselling records to take into account both the privacy and equality implications of production—to contextualize the privacy interest at play within the

38. R.S.C. 1985, c. C-46, as am. [Code].
broader context of equality. In submissions to the Standing Committee on Justice and Legal Affairs in relation to one of the Code amendments, Sheila McIntyre asserted:

Almost everyone understands that the compelled disclosure of the kinds of records being sought in these proceedings is an invasion of privacy. That’s not the hard part. Everybody understands that privacy is a constitutionally protected interest, and most people understand that the harm of such an invasion is particularly serious in the context of legal proceedings that are intended to redress another invasion: a more deeply personal, psychic, emotional and physical invasion like that of sexual offences. There’s a double invasion in this sequence.

The massive invasion of privacy rights in sexual offence proceedings does require parliamentary redress, but this legally distinctive privacy violation is, at its core, a product, reflection and vehicle of reproducing inequality. It’s actually an equality issue. Lack of privacy is a manifestation of survivors’ inequality in a society, and it’s a compounding way of driving home their inequality in the eyes of the law.40

One central hope underlying the legislative reform was to drive home an inexorable link between privacy and equality—that predominantly women complainants were being asked to produce highly personal and confidential records and to publicly expose their sexual histories precisely because of false and discriminatory assumptions about what it means for a woman to have undergone counselling and to have previously engaged in consensual sexual activity. These assumptions included that those who seek counselling are necessarily less stable and reliable, that they are likely to have conjured up their accusations in counselling and that, if they had said “yes” before (to anyone), they probably said “yes” to the accused as well.41 Not only were these unequal assumptions feeding the request for this kind of information, the information retrieved would then be used to feed further false assumptions that, if adopted by the court (whether consciously or sub-consciously), could result in an acquittal of an otherwise guilty man. Finally, reliance on these kinds of assumptions and exposure of otherwise highly personal and private information would feed

broader inequality by discouraging survivors from seeking counselling and, certainly, by discouraging survivors from reporting a sexual assault to the authorities out of fear of triggering this kind of invasion.\textsuperscript{42}

Notwithstanding the explicit language in the amendments, Lise Gotell’s review of the case law arising from the relevant provisions revealed a persistently atomistic and individualistic assessment of the privacy interests of each particular complainant in each particular case, with little direct regard for equality considerations or the broader collective effect of production orders. Gotell placed the reversion to the atomistic individualistic conception of privacy in the face of clear statutory language to the contrary within the context of a broader neo-liberal agenda to re-privatize, individualize and depoliticize the highly-gendered reality of sexual violence:

The emptiness of privacy, its nothingness and negativity, when relied upon by courts to express concerns of sexual assault complainants, very often means that their needs will be subordinated to the rights of accused, viewed within the traditional framework of criminal law as more compelling and significant. Privatization, the shielding of intimate relations from legal regulation, continues to inhibit social and legal recognition of sexual violence as a serious social problem. And re-privatization within an era of neo-liberal governance has increasing transformed sexual violence from an object of political contestation into an issue of criminal law, privatized, individualized and depoliticized through this transformation.\textsuperscript{43}

In the context of the interpretation of these Code amendments, we get a glimpse of the way in which the historic legacy of an atomistic conception of privacy risks continuation of an analysis that pits individual against individual in a competition that reinforces the notion we are dealing with a completely individualistic and “private” realm, while ignoring the political realities which shape that realm, the imbalance of power between individuals within it and the legitimate public interest in intervening in an attempt to right the balance. As this example demonstrates, each assertion of a privacy claim risks becoming a platform for reinscribing an individualistic and atomistic account of privacy, thereby re-privatizing a prevalent social problem disparately disadvantaging members of particular social groups. The risks of re-privatization are perhaps even more significant when one reflects upon the prevalence of the legal conception of privacy as a negative right against the state within Canadian case law.

\textsuperscript{42} Gotell, \textit{supra} note 39 at paras. 42, 55.
\textsuperscript{43} \textit{Ibid.} at para. 15.
2. **Privacy as a negative right against the state**

Where privacy is conceptualized as an individual’s right against state interference in his or her “private” life, analyses of privacy claims will tend to be characterized by a relatively myopic focus on the threat to liberty and autonomy represented by the state—leaving intact and unspoken the well-known threats to liberty and autonomy presented by private actors. Without taking into account the privately-imposed component of restraints on liberty and autonomy, such as systemic discrimination and prejudice, these analyses are likely either to ignore the potential for state intervention as a tool for effecting liberty or to display outright hostility at the very suggestion. For those, such as the targets of hate propaganda, obscenity, and child pornography, who wish to assert the potentially positive role state regulation can play in the protection and development of their autonomy, freedom, and dignity, framing a privacy-based argument may be particularly problematic. Even if an equality-informed privacy argument is advanced, decades of engrained legal thinking of privacy as a negative right against state action may result in such arguments being skirted or ignored. The legal recognition of privacy-related rights to abortion provides a graphic example of the potential long-term inadequacies of advancing privacy claims on behalf of equality-seeking communities—graphically highlighting the somewhat pyrrhic victory associated with recognition of the empty right to be “free” from the state.

As Sanda Rodgers has pointed out,

For women in Canada, in theory at least, the determination to continue or to terminate a pregnancy is a right protected by sections 2 and 7 of the Charter. In fact, the cases that considered women’s control over continuation of a pregnancy are arguably amongst our greatest legal victories, providing legal protections that enhance women’s equality.

Despite these victories, many feminist scholars rightly have been sharply critical of the rights-based, neo-liberal, privatized argumentation that characterizes Supreme Court jurisprudence on reproductive autonomy. More worrisome still is the limited impact that these decisions have had on actual access to abortion for many Canadian women.

While the Supreme Court of Canada struck down criminal prohibitions on abortion, relying on an analysis that these restrictions unreasonably

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interfered with women’s s. 7 rights, the negative rights framework upon which the analysis was based has ultimately limited its value to equality-seeking communities. In failing to speak to the need for the state to make available the social support and medical facilities necessary for Canadian women to have a real choice about whether to continue a pregnancy, the privacy/autonomy victory has rung hollow as the number of publicly-funded facilities providing access to abortion services continues to shrink. As Gotell has noted in relation to privacy more generally, “this negativity renders the claim to privacy an unwieldy instrument for securing the provision of conditions that would enable meaningful control and autonomy.”

3. Privacy as inalterably gendered and raced

If individualism and a negative vision of the role of the state have permeated legal analyses of privacy, so too have its gendered and raced underpinnings, leading to the use of privacy claims as opportunities for reinforcing the public/private divide and racist stereotypes that have served as historic cornerstones for discrimination. Historically, as Anita Allen and Erin Mack have pointed out:

In the nineteenth century, popular views concerning women’s limited capacities, proper role, and special virtues were reflected in legislation and court opinions. The law of marriage and family contributed to the problem of women’s privacy within the home. That problem was too much of the wrong kinds of privacy - too much modesty, seclusion, reserve and compelled intimacy - and too little individual modes of personal privacy and autonomous, private choice.

... We must hope also that courts will turn self-consciously to the gender factor in privacy tort cases. Early jurists sometimes did so, but with an eye toward protecting their patriarchic visions of feminine modesty and domesticity.

46. R. v. Morgentaler, [1988] 1 S.C.R. 30. While a majority concurred in the finding of unconstitutionality, there was significant division in the reasons. While the reasons of Dickson C.J. and Lamer J., and those of Beetz and Estey JJ. focused on security of the person, and in the latter set of reasons, mainly on the procedural fairness of the Code provision in issue, only the reasons of Wilson J. adverted specifically to the provision’s interference with women’s liberty of choice in the context of private matters.


Where the account of privacy is gendered to emphasize the importance of maintaining feminine “modesty,” privacy simply becomes code for protecting women and in many cases their male keepers from embarrassment and humiliation associated with expressions of sexuality.  

Privacy as a form of protection of modesty was a very white, middle-class protection. As Gotell wrote:

If historically, privacy for women was equated with the protection of feminine modesty, it is also clearly apparent that privacy’s feminized subject was white. ... [T]he very construction of a white feminine, tied to sexual propriety was accomplished in opposition to the myths of the sexually promiscuous black woman and hypersexual black man ... [leaving black women] outside the realm of privacy’s tenuous protections, just as it rendered them vulnerable to sexual abuse and attack by white men. Through a parallel, if distinct, logic, Aboriginal women in Canada were rendered promiscuous and constructed as legitimate targets of sexual violence as part of the colonizing project.

As demonstrated in Gotell’s analysis of the case law relating to the Code provisions on sexual history and counselling records, the gendered and raced legacy of privacy continues to plague legal analysis of women’s privacy-related claims. The statutory language clearly demands that privacy and equality be taken into consideration, including the ways in which a production order might not only violate the privacy of the individual complainant, but might serve to perpetuate discriminatory myths and discourage future reporting. Despite this, Gotell identified several cases in which the “embarrassment” of being cross-examined on one’s sexual history according to a scale of the sexual activity involved preoccupied the legal analysis. The potential for privacy-related claims to be used as a basis for reinscribing feminine modesty has prompted specific calls for an understanding of the production of sexual history evidence as a wrong against equality, rather than against privacy per se.

Other feminist accounts of privacy and its equality-enhancing potential focus on the notions of privacy and private as integral to shaming and control. Hille Koskela has argued, for example, that agency and freedom may well be better achieved through explicit rejection of “privacy” and the

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50. See ibid. for examples where women’s privacy was protected in order to minimize the shame and humiliation of pregnancy outside of marriage and sexual violation of wives by persons other than their husbands.
52. Ibid. at para 45.
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regimes of order and shame associated with them than through assertion of privacy claims:

By the regime of order, I mean the ways in which society regulates individuals. Gathering knowledge is seen as a form of maintaining control, a look equates with a "judgmental gaze". By the regime of shame I mean individuals' internalisation of control, in the Foucauldian sense. The idea of having or doing something that cannot be shown. The basic 'need' for privacy. The regime of shame keeps people meek and obedient as efficiently as any control coming from outside. Rejecting it, is unacceptable and immodest. Further, these controls coming from outside and from inside are most effective when functioning together: the combination of fear and shame ensures submissiveness. The liberation from shame and from the 'need' to hide leads to empowerment. Conceptually, when you show 'everything' you become 'free': no one can 'capture' you any more, since there is nothing left to capture. 54

Given the risks to equality-seeking groups of reinscribing an individualistic, negative right steeped in a raced and gendered history that seems to have, to date, been all but impossible to shed, is there any merit in attempting to articulate a privacy-related claim for the targets of hate propaganda, obscenity and child pornography? Should equality-seeking groups even attempt to take up a tool "long used to defend the killers of women"? I want to explore whether privacy, if differently accounted for, might offer both strategic and substantive advantages to equality-seeking groups and their members that equality alone does not. Any hope for realizing these potential advantages, however, hinges upon advancing an account of privacy that is both intrinsically premised upon substantive equality and instrumentally tied to producing it.

Strategically, it is essential to recognize that regardless of whether equality-seeking communities and their members actually advance privacy claims on their own behalf, privacy claims that directly affect them are being and will continue to be advanced. Unless we begin to encourage Canadian courts to think otherwise, many of those claims will be assessed in criminal contexts where the very individualism of the current paradigm is valorized further through representations of the David and Goliath battle between the state and the individual. Occasionally within this context, substantive equality may be called upon as a justification for violating

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that individualistic norm, reinforcing the idea that privacy necessarily competes with substantive equality.

Substantively, it seems difficult to deny the personal and social goods that can arise for members of equality-seeking groups from having the meaningful choice to seek respite from pressures of social conformity, spheres within which one can reflect upon the world and one's relationship to it, and times where one can retreat from the scrutiny of the world—particularly for those easily scrutinized for “otherness” in settings dominated by white, colonialist, heterosexist, and patriarchal paradigms.\(^5\) These, I would suggest, are the kinds of goods that are not readily deliverable from substantive equality alone,\(^6\) although equality is almost certainly a foundational ingredient in equitably distributed access to and enjoyment of them.

Having admitted a predilection for the idea that members of equality-seeking groups ought to be able to enjoy some of the largely individual goods that privacy might deliver, I suggest that this individualistic notion of privacy need not occupy the entire account of privacy. As discussed in the preceding parts of this section, that particular account has been shown to be insufficient in the context of many attempts to assert privacy claims on behalf of equality-seeking groups. Moreover, from a political perspective, claims advanced on equality grounds are claims by individuals \(qua\) group members or on behalf of the interests of groups themselves. Claims about the harms of child pornography, hate propaganda, and obscenity are inextricably tied to groups and group membership. Squeezing them into the current individualistic privacy paradigm tends to de-politicize them, to re-characterize the problem as being between individuals or one individual and the state, rather than as part of a system that stereotypes others and singles out for disrespect and abuse whole groups of persons based on characteristics such as race, gender and sexual identity, thereby compromising fundamental aspects of the personhood of many individuals. In the context of hate propaganda, child pornography, and obscenity, while the individualistically based conception of privacy would suggest an interest by members of equality-seeking communities in avoiding being

\(^5\) As Allen put it in relation to women, “[w]omen's abilities to participate and contribute in the world as equals and on par with their capacities are limited where laws and customs deprive them of opportunities for individual forms of personal privacy ... [O]pportunities for privacy and the exercise of privacy promoting liberties [can] promote female well-being, self-determination, participation and contribution”: Allen, 2003, supra note 7 at 53.

\(^6\) One might validly argue, however, that in a world characterized by a lived substantive equality, freedom from scrutiny and pressures to conform to a white, straight, patriarchal standard would be unnecessary. In that regard, privacy might turn out to be something of a stopgap measure for members of equality-seeking groups.
recognized as members of a group, perhaps a more collective account would lead us toward an understanding of the ways in which recognized group membership can be an affirming, rather than constraining, aspect of an individual’s humanity.

What would an equality-enhancing conception of privacy look like? To my mind, Priscilla Regan’s social account of privacy, taken together with commentary by Oscar Gandy and Julie Cohen on the collective implications of digital data collection, could prove to be a useful starting point.

III. Towards an equality-enhancing conception of privacy

Rather than the simple assertion of privacy claims on behalf of individuals directly targeted by child pornography, hate propaganda, and obscenity, I envision a social account of privacy as one which would allow claims to be made by the members of groups indirectly targeted by these forms of “expression.” Working from a social account of privacy might allow us the opportunity to get clearer on the implications of discriminatory stereotyping and conduct for equality-seeking groups, their members, and the community at large.

Interestingly, it seems to have taken the technological threat to the privacy of mainstream North Americans to generate the beginnings of a truly social or collective account of privacy. Surveillance and a concomitant lack of privacy have been a fact of life for many equality-seeking groups and their members for some time, yet the push for a more collective account of privacy emanates primarily from concerns raised by more privileged masses of digital data creators and users who are feeling the threat of invidious distinctions premised on impersonal and de-contextualized analyses of data relating to them. Despite what might be viewed as the less-than-radical roots of the relatively recent push for a more social or collective account of privacy, the analyses of Regan and Cohen, and in particular the more critical perspective offered by Gandy with respect to digital data collection, analysis, and social sorting, shed important light on key aspects of a more social account of privacy that could prove useful in understanding and articulating the collective privacy-related harms of hate propaganda, child pornography, and obscenity.

1. Collective perspectives on privacy—Gandy, Regan and Cohen

Oscar Gandy has offered a socially contextualized account of privacy and surveillance. His account brings some clarity to the group-based discriminatory effects of decision-making premised on the sorting of individuals into classifications through analysis of aggregated individual data.
The panoptic sort is the name I have assigned to the complex technology that involves the collection, processing, and sharing of information about individuals and groups that is generated through their daily lives ... and is used to coordinate and control their access to the goods and services that define life in the modern capitalist economy.58

Gandy went on to argue that the sort functioned through identification (only in relation to those characteristics or issues that have administrative and instrumental relevance), classification (the assignment of individuals to conceptual groups), and assessment (comparing the individual to some administratively identified aggregate).59 He has noted, however, the degree to which these identifiers and the ways in which they are assessed come to be internalized in the identity of those targeted and to affect their perceptions and understandings of the groups to which they belong:

It is important to note that individual identities are formed in interaction with others. The characteristics of those interactions help to determine the salience, as well as the level of comfort with which different aspects of one’s identity co-exist. Self-esteem or how an individual feels about herself is determined, in part, by the ways in which her relevant reference groups are evaluated by others.60

Gandy further argued that the negative effects of the panoptic sort are exacerbated by the uni-dimensional data upon which assessments are based. Given that decisions are premised on incomplete and unreliable data that have often initially been collected for other purposes, there is a very serious risk that individuals and groups will be falsely evaluated.61 He predicted the results in the context of the corporate/consumer relationship would be devastating for those who are already socially disadvantaged:62

I see the panoptic sort as a kind of high-tech cybernetic triage through which individuals and groups of people are being sorted according to their presumed economic and political value. The poor, especially poor people of color, are increasingly being treated as broken material or

59. Ibid. at 15-17.
61. Ibid. at 12.
62. Curiously, in later work Gandy speculated that it was unclear whether the panoptic sort would ultimately result in an uneven distribution of privacy along current axes of identity and discrimination such as race and gender: Gandy, 2000, supra note 60. The idea may be that, if it is the most empowered members of society who enjoy access to the online environment then it is the privacy of the most empowered that is at stake in the debates surrounding digital data collection and surveillance: Bennett & Raab, supra note 26 at 33-34.
damaged goods to be discarded or sold at bargain prices to scavengers in the marketplace. 63

Like Gandy’s panoptic sort, Regan’s account of the social dimension of privacy appears to have developed in response to concerns about the impact of digital data collection and analysis. It was in the context of what she saw as disappointing legislative responses to these concerns that Regan explicitly asserted that privacy can and should be regarded as a social value:

Privacy has a value beyond its usefulness in helping the individual maintain his or her dignity or develop personal relationships. Most privacy scholars emphasize that the individual is better off if privacy exists; I argue that society is better off as well when privacy exists. I maintain that privacy serves not just individual interests but also common, public and collective purposes. If privacy became less important to one individual in one particular context, or even to several individuals in several contexts, it would still be important as a value because it serves other crucial functions beyond those that it performs for a particular individual. Even if the individual interests in privacy became less compelling, social interests in privacy might remain. 64

Privacy, Regan argued, is a common value in that the social consequences of privacy-related conduct extend beyond the individual and individuals as an aggregate. She noted that privacy’s contributions to diversity, tolerance, and pluralism were contributions to society as a whole. 65 She maintained that the common value in privacy was being made apparent in the context of digital information gathering and use by large institutions, which premise decisions about individuals on analyses of isolated data points taken and used outside of their context, without reciprocity in terms of the data subject’s ability to do likewise.

[I]n the late twentieth century, parts of every individual’s life are recorded in a number of computerized databases and exchanged with other organizations. Access to these bits of information gives, at best, a fragmented picture of an individual; the individual is not seen in a social context, no reciprocity exists, and no common perceptions are recognized. 66

65. Ibid. at 222-23. Regan referred to a conception of society that extends beyond the sum of individuals within it—to a potentially more organic conception that moves beyond emphases on the atomistic, isolated individual: Ibid. at 220.
66. Ibid. at 223-24.
Privacy is a public value, she argued, because it works to support the
democratic process—in the Emersonian sense of better enabling individuals
to live up to their social responsibilities and to more meaningfully participate
in public processes. Regan theorized that better social participation was
possible where individuals are able to occasionally separate from collective
pressures to conform.

A public value of privacy, then, is derived from its importance to the
exercise of rights that are regarded as essential to democracy, such as
freedom of speech and association, and from its importance as a restraint
on the arbitrary power of government. But does privacy itself have
independent value to the political system? ... Does privacy provide
something important in and of itself?

In response to questions about the intrinsic public value of privacy, Regan
turned to Hannah Arendt’s conclusion that privacy was necessary in order
for commonality to exist in the public realm. This analysis suggested
that some degree of non-disclosure is essential in order for people to find
common ground within the public realm without being consistently driven
apart by having too much knowledge of one another’s differences. This
is an aspect of Regan’s account that I would suggest is unlikely to be
helpful to equality-seeking groups in the long-term. Rather than an account
of privacy that valorizes it as a vehicle for social peace by concealing
differences, it seems preferable to work toward an account of privacy
steeped in an aspiration for equality and respect for integral aspects of
identity that have been socially constructed as “differences” used to justify
invidious discrimination.

Finally, Regan posited that privacy is a collective good in the sense
that it is indivisible and non-excludable because “no one member of
society can enjoy the benefit of [it] without others also benefiting.” In the
context of digital data collection processes, she noted the inefficacy of the
current individualistic approach to privacy and these processes’ potential
effect on the common good. Where third-party record holders have strong
incentives to collect, sell and re-distribute data and the data subjects have

67. Ibid. at 226.
68. Ibid. at 226-27.
69. As Gavison has pointed out, concealment may well be an important function of privacy for
members of equality-seeking communities for whom exposure may result in severe physical,
psychological and emotional injury: Gavison, supra note 19 at 452. Nonetheless, privacy through
concealment in that context is a “choice” coerced through discrimination. While privacy in those cases
may provide individual protection, it seems to me that conceiving of concealment of differences so
fundamental to one’s personhood and humanity as a central function of privacy is likely in the long
run to simply perpetuate the very inequality that compels concealment in the first place.
70. Regan, supra note 64 at 227.
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insufficient understanding of their rights and options in relation to data retention and use (and where disclosure is becoming increasingly essential to simply operate in the modern world) Regan predicted a "tragedy of the commons." Even leaving aside the prospect that individuals are not in any meaningful sense voluntarily forgoing or restricting access to and use of information about themselves, these individual choices can have profound effects on the privacy available to all, as well as on other aspects of common social life. As an example, she suggested that if many people opted out of health care out of concern for the lack of privacy in their health records, this could have profound effects on the health care system and on public health.\footnote{Ibid. at 228-29.}

As personal information continues to become a more and more valuable commodity with increasingly obvious effects on the collective good at large, Regan’s argument underscores the importance of re-characterizing privacy as something more than an individual right. Moreover, she noted the way in which this recharacterization could assist in public policy debates with respect to legislative reform by minimizing the individual right vs. societal right dichotomy that currently underpins privacy vs. security debates, and would also make evident the serious societal downsides to treatment of privacy as properly susceptible to individual “choice”:

If privacy is, or is becoming, a collective or public good, the weaknesses of policy solutions that establish a property right in personal information or that allow one to waive one’s privacy rights also would become clear. If one individual or a group of individuals waives privacy rights, the level of privacy for all individuals decreases because the value of privacy decreases.\footnote{Ibid. at 233.}

If privacy is to be re-characterized as more than an individual right in order to strengthen it in perceived competitions with other social values, such as security, the same re-characterization is likely to be used in balancing privacy with equality. As will be discussed in section 2 below, this is an important strategic reason to suggest a social account of privacy that incorporates equality as one of privacy’s instrumentalities. If we can accept that we should approach privacy as conducive to liberty, why not to equality too?

In order to advance the policy debate in favour of privacy, Regan called for a significant shift in approach:

\[M\]ost authors turn privacy inward and develop its importance

\[M\]ost authors turn privacy inward and develop its importance...
to individual self-development and the establishment of human relationships. Our thinking on privacy now needs to turn outward, to its importance to social, political, and economic relationships—rather than solely to personal relationships—and to our common or public life more generally.  

Julie Cohen, in responding to Jeffrey Rosen’s *Unwanted Gaze*, also took aim at the sufficiency of proposed individualistic responses to privacy invasions. She argued that the same individualistic liberalism that underlies the current privacy paradigm was also responsible for the vast accumulation and use of digitized information gathering and sorting processes. Premised upon the liberal model of the rational thinker, she suggested we have wrongly presumed that accumulation of more data and data processing sophistication will generate better information, which will in turn generate more truth. Like Gandy, Cohen argued that the data that are gathered do not simply generate decisions about individuals and the groups to which they belong (with lasting repercussions on their dignity in many contexts), they also affect acts reflexively—feeding back to the individual data object herself an image of who she is and what it is acceptable to be. As Cohen put it:

We may think what we please, but we respond to the information that we are shown and the ways that others treat us. Over time, this dynamic constructs and modifies habits, preferences and beliefs.

Like Regan, Cohen cast doubt on the prospect for protection of privacy through notions like individual control over waiver, noting the thin conceptions of consent that dominate common law legal analyses. From this perspective, Cohen asserted that individualistic liberal conceptions of privacy were unlikely to be productive in terms of responding to concerns about privacy depletion resulting from judgments premised on the digitized collection and sorting of data, stating:

Liberal ideology got us into this mess; it will not get us out. The conversation must proceed in some other way.

73. Ibid. at 242.
75. “The belief that more personal information always reveals more truth is ideology, not fact, and must be recognized as such for informational privacy to have a chance”: Julie Cohen, “Privacy, Ideology, and Technology: A Response to Jeffrey Rosen” online: (2001) 89 Geo. L. J. 2029 at 2036 Georgetown Law <http://www.law.georgetown.edu/faculty/jec/privacyideology.pdf> at 7-8.
76. Ibid. at 6.
77. Ibid. at 16.
78. Ibid. at 7.
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Where, then, might the approaches of Gandy, Regan, and Cohen take us in terms of the central problem addressed in this paper—attempting to articulate privacy interests of the individual and collective targets of hate propaganda, obscenity, and child pornography?

2. Advancing collective privacy claims for targets of hate, obscenity, and child pornography

(a) Identifying helpful strands from Gandy, Regan, and Cohen
Several strands from the work of Regan, Gandy, and Cohen provide useful instruction in articulating an equality-enhancing conception of privacy that could work for targeted groups and their members. First, Regan’s work suggests the possibility of articulating privacy as instrumental in the production of social goods and values, which ought to include equality. Second, Gandy and Cohen’s observations relating to privacy and identity formation cast doubt on the predominating perception within the paradigm that identities are formed “in private”—identifying the significance of societal interaction and prejudice on individual autonomy with respect to self-definition. Third, Regan and Cohen’s articulation of the collective dangers of conceptualizing privacy as something completely subject to individual definition and waiver contributes to the possibility of a vision of privacy less likely to be diverted by patriarchal assumptions about consent, particularly in the context of obscenity. Fourth, Regan, Gandy, and Cohen’s analyses of the way in which mere collection of information leads to the threat of decontextualized aggregation and discriminatory comparisons provides a useful analogy for thinking through the way that hate propaganda, obscenity, and child pornography work.

Regan, by arguing for a social account of the value of privacy, perhaps takes us closest to that objective. Privacy, she said, should be understood as a common value and a public value in that it can function to produce democratic goods that extend beyond the individual members of a liberal democracy. I would suggest, however, that an equality-enhancing conception of privacy would go further to place a greater value on privacy when it is a producer of another too-frequently unmentioned democratic good: substantive equality. Conversely, privacy that is a producer of substantive inequality ought to be understood as less democratically valuable. Evaluating the role that privacy plays in terms of substantive equality in any given circumstance will require analysis and understanding of the context in which privacy is alleged to operate.

79. Regan, supra note 64 at 213, 225.
Gandy's and Cohen's observations about the relationship between privacy and identity are integrally tied to recognition that privacy and substantive equality are, indeed, related. Their work provides an important platform from which to re-think the ways in which protection of one person's privacy can lead to discrimination and denial of an essential function of privacy to another. As they observed, individual autonomy over identity is never complete, since we are all acted upon by and, to some degree, internalize social cues about who we are and who it is safer/better/more acceptable to be. In pointing out the porous nature of the relationship between the self and society, their work provides important instruction on one aspect of identity formation that has been under-analyzed in Canadian case law. Rather than the current paradigmatic analysis that individuals need a place to retreat in order to self-define apart from society, the work of Cohen and Gandy demonstrates not only the ways in which information is used to define mainstream perspectives on the meaning of "other" identities, but also to highlight the way in which the imposition of socially constructed identities through public treatment and observation comes to be internalized in so-called private times of self-definition and reflection.

The approaches of Regan and Cohen to privacy and privacy violations provide a sound basis from which to question the relevance of traditional liberal solutions such as waiver and "consent" while minimizing the risk of undermining individual agency. Once the approach to privacy is reframed to extend the understanding of its value beyond the production of individual goods, the question of whether any individual has waived or consented to an intrusion upon his or her privacy ought to be considered less relevant in many circumstances. Where conduct is understood to threaten the privacy-related goods of whole groups and the community at large, any inquiry about whether privacy has been violated certainly cannot begin and end with an analysis of whether a directly targeted individual has consented to participate in that conduct and/or to waive his or her privacy. His or her purported waiver has a negative impact on the privacy of others, whose interests must also be taken into account.

The analyses of Regan, Gandy, and Cohen of specific problematic patterns in digital data collection and use provide a useful framework.

80. Cohen, supra note 75; Gandy, 2000, supra note 60 at 4-5.
81. The exceptions to this statement, of course, are several of the hate propaganda decisions in which Canadian courts and decision-makers, including the Supreme Court of Canada, have explicitly recognized the significant impact of external evaluations of the groups to which one belongs on one's own self-definition and desire to identify and be identified with those groups: R. v. Keegstra, [1990] 3 S.C.R. 697 at paras. 60-61 and Schnell v. Machianelli and Associates Enpicide Inc. (2002), 43 C.H.R.R. D/453 at paras. 78, 84.
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that more readily describes the basis for critique of social sorting through comparison to aggregates of individual data. Much of this critique, and the patterns made obvious as a result of it, provide a helpful framework for efforts to capture the privacy-related wrongs occasioned by hate propaganda, child pornography, and obscenity.

Regan and Gandy offered three specific critiques of contemporary digital data collection and use and the social sorting premised upon it. First, each noted the degree to which data collected in one set of circumstances and for one purpose are used as the basis for social sorting in a completely different context. Second, and related to the first, each identified the way in which data were collected and used in fragments, rather than as a whole. Finally, Regan emphasized the degree to which contemporary systems of digital data collection and use were non-reciprocal in nature. The lack of reciprocity for those about whom information was gathered and subsequently used undermined their ability to assert any degree of control over the process itself.

The work of Regan, Gandy, and Cohen suggests that if we had placed limits on the collection and dissemination of digital data in the first instance, we might have been in a better position to control its use and abuse. Instead, however, we confront a situation in which the risk of false results is magnified by the decontextualized use of fragments of information gathered in and for another set of circumstances, where there is no reciprocity between the data collector and the data object. Judgments about important aspects of individuals' social, commercial, and political lives are therefore being rendered on a faulty basis, with significant consequences for those individuals, the groups to which they belong, and society as a whole. Moreover, these judgments become a way of feeding back to the individuals so identified faulty messages about who they are, who they ought to be, and what they can reasonably aspire to.

I suggest that hate propaganda, obscenity, and child pornography operate in a similarly problematic fashion. These forms of "expression" collect and disseminate decontextualized fragments and outright false information about essential aspects of the humanity of target groups and their members. The fragments are absorbed into social profiles that

84. Regan, ibid.
85. Regan, ibid. at 219-220; Gandy, 1993, supra note 58 at 18; Cohen, supra note 75 at 7-8.
inform our behaviour toward and treatment of those “otherized” in the process—those seen to fall outside of the norm, the average. Moreover, as Gandy makes clear with respect to digital data, such decontextualized and fragmented decision-making in which the “other” is created relative to the “average” will almost always serve to disadvantage the already most disadvantaged communities. Invidious distinctions will be felt not only by individual members of those communities, but by those communities as a whole, as the otherized grapple with the relevance of these judgments and distinctions in working through their own processes of self-definition. As Regan, Gandy, and Cohen have suggested in the context of digital data collection, I suggest that it is likely to be more effective to impose limits on the collection and dissemination of these decontextualized fragments and misrepresentations rather than waiting to see whether we can impose effective limits on their (ab)use. My proposed analogy to this framework, however, is certain to meet with critique.

(b) Confronting the limits of the analogy
In 1980, Barbara Bryant argued that pornography violated all women’s privacy through degrading displays of what was purported to be female sexuality. She argued that the dignity, autonomy, and liberty of choice of all women were compromised and assaulted by the commercialized packaging and display of women’s bodies in pornography. Allen fundamentally rejected that argument, which is not unlike the one I seek to construct here, for reasons which I suspect would also be argued to undermine the viability of my analogy of hate propaganda, obscenity, and child pornography to Regan, Gandy and Cohen’s approaches to digital data collection and (ab)use. Allen rejected the assertion of a link between the consumption of and exposure to pornography and interference with women’s privacy, liberty, and autonomy for two fundamental reasons. First, she rejected the argument that when individual women encounter pornography they so strongly identify with the women depicted in it that they experience a sense of loss of privacy. She noted that not all women’s reactions were the same, making the phenomenon an individual one not applicable across the category “woman.” Second, she argued that while sexual harassment and assault were, themselves, forms of privacy invasion, the social science evidence was insufficient to support a direct link between consumption of pornography and the commission of the acts

86. Gandy, 1993, ibid. at 43.
88. Allen, 1988, supra note 17 at 140.
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As it seems likely that criticism along both of these lines would be advanced in relation to the privacy claims I propose relating to hate propaganda, obscenity, and child pornography, I will consider each in detail.

The first argument is premised upon an individualized account of privacy. Under this approach, whether a privacy violation occurs depends upon the individual reactions of target group members to encounters with hateful, obscene, and child pornographic materials. It might well be argued that not all individuals encountering one of these forms of expression claimed to target them and the groups to which they belong would experience a sense of lost privacy or autonomy, ruling out the viability of legislative responses premised on generalized assertions of lost privacy. However, if one approaches privacy as a social value the focus of inquiry would not be upon immediate individual responses or the aggregate of those responses, but on the impact of these forms of expression on our collective aspirations as a broader community. In this way we need not discount lived privacy loss experiences by certain individuals simply because others do not experience them as such. This may be particularly important because many members of otherized groups in our communities have little experience with “privacy”—particularly in terms of the absence of social scrutiny in public. In those circumstances, it seems rather unlikely that one would amass significant findings of individual perceptions of lost privacy among those for whom an absence of privacy is the norm. It seems reasonable to suggest that people are unlikely to report they have lost something they have rarely, if ever, had.

A second line of argument would likely focus on the absence or (at least) weakness of social science evidence supporting a connection between consumption of hate propaganda, obscenity, and child pornography, and conduct, such as hate crimes and sexual aggression, that interferes with a target group member’s ability to restrict access to his or her body. Here, it might be argued that the analogy to Regan, Gandy, and Cohen’s reasoning breaks down in that, in the case of digital data collection and use, there is evidence to show that organizations are basing often discriminatory decisions directly upon the data collected and disseminated. At best, it might be argued, exposure to these kinds of material might lead people to think about members of target groups in a certain way, but not necessarily

89. Ibid. at 139.

90. I would not wish to assert an account that forecloses the possibility of treating seriously an individual target’s experience of a privacy loss through encounters with these kinds of materials. However, the account I am suggesting extends beyond consideration of those individual experiences.
to act upon it in a way that materially interferes with target group members' ability to restrict access to themselves. Once they act upon the information in a provably discriminatory way, other legal regulations can be enforced to address that conduct. Before moving to some of the specific social science evidence that suggests a correlation (albeit without statistically establishing causation) between exposure to materials such as hate propaganda, obscenity, and child pornography and the commission of hate crimes and sexual offences, it seems important to point out some of the political implications of calling for proof of causation.

There are documented instances in which the connection between viewing and physical commission of specific acts has been made graphically clear, but they are often dismissed as anecdotal and, therefore, insufficient to establish the case for imposing restrictions on expression with any degree of scientific certainty. Also often dismissed as anecdotal are the stories of the lived realities told by the women and children used and abused in the production of obscenity and child pornography, and those who describe the ways in which their sexual abuse and assault were premised upon mimicking acts depicted or described therein. In a similar fashion, studies documenting the startlingly high percentages of men convicted of sexual assault and abuse who also owned extensive collections of pornography and child pornography are summarily dismissed.

Adopting the position that one must establish a causal connection between viewing materials and commission of specific acts referred to therein implicitly involves marginalizing other accounts, such as the

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91. I have found only one account in which simply watching or thinking about another without their authorization is characterized as a privacy violation. Ernest van den Haag argued that unauthorized watching or formation in one's mind of the image of another violated the other's privacy by interfering with her ability to assert control over her "psychic area, with such dimensions as living space, image, expression, mentation and communication." He asserted, "[o]thers may be excluded from observing, or utilizing, these dimensions, or from invading them with their own sounds, images, etc.; they many not control our image, or our experience and comfort": Ernest van den Haag, "On Privacy" in R. Pennock & J. Chapman, eds., NOMOS XIII: Privacy (New York: Atherton Press, 1971) 149 at 151.

92. Notably, the Supreme Court of Canada has not chosen proof of a causal connection between word and specific deed as the standard that must be met to justify the imposition of restrictions on hate propaganda, obscenity, and child pornography. Rather, the Court has required the government to establish an evidentiary basis for a reasonable apprehension of harm flowing from exposure to these materials: Butler, supra note 33 at para. 50, 103, 112. Sharpe, supra note 27 at paras. 198-210 and Keegstra, supra note 81 at paras. 285-88.


accounts of those who do experience a loss of privacy whether directly or indirectly targeted by the expression. Further, the imposition of this causal standard reflects a choice to search for short-term evidence of physical conduct when, as will be discussed below, the pathway to conduct is often paved by lengthy periods of dehumanization of targets through textual and pictorial indoctrination. Finally, where the causation analysis focuses on proof of subsequent repetition of the particular conduct depicted, it discounts the ways in which other kinds of pervasive discriminatory action against target groups and their members are made easier through years of dehumanizing representations. It also implicitly dismisses approaching the expression as a discriminatory act in and of itself. I now turn to some of the theoretical and social science accounts about how hate propaganda, obscenity, and child pornography work to pave the way for violence, discrimination, and inequitable interference with the autonomy of the members of target groups.

In support of his assertion that racist words themselves wound, Richard Delgado relied upon social science evidence that supported an immediate connection between target group members’ exposure to racial slurs and emotional distress, loss of dignity, and psychological harm. He argued:

Verbal tags provide a convenient means of categorization so that individuals may be treated as members of a class and assumed to share all the negative attributes imputed to the class. ... Racial slurs also serve to keep the victim compliant.

Social scientists who have studied the effects of racism have found that speech that communicates low regard for an individual because of race “tends to create in the victim those very traits of ‘inferiority’ that it ascribes to him.” Moreover, “even in the absence of more objective forms of discrimination – poor schools, menial jobs and substandard housing – traditional stereotypes about the low ability and apathy of negroes and other minorities can operate as self-fulfilling prophecies.”

Other research suggests that racial slurs made against members of minority groups can also have a profound effect on how members of in-groups evaluate a minority group member’s performance. Jeff Greenberg and Tom Pyszczynski concluded:

Evaluations of individual minority group members can be biased by overheard derogatory ethnic labels when the target’s behaviour is less than successful. In addition to the feelings of insult and degradation that ethnic slurs instill in minority group targets, it appears that they also encourage antiminority prejudice in in-group members who hear them.97

Further, as Kimberle Crenshaw pointed out, depictions of sexual and other kinds of violence against women frequently reinforce stereotypes not only in relation to gender, but race as well. By analyzing examples of stereotyped representations of women purveyed in mainstream media (i.e., without even having to move to the much smaller category of material actually prohibited through legal restrictions on obscenity) she ably demonstrated perpetuation of the myths of Black women as wild animals, Asian-American women as passive and submissive, and Aboriginal women as savages who enjoy being raped.98 She concluded:

In each of these cases, the specific image is created within the intersection of race and gender. Although some claim that these images reflect certain attitudes that make women of colour targets of sexual violence, the actual effect of images on behaviour is still hotly contested. Whatever the relationship between imagery and actions is, it seems clear that these images do function to create counternarratives to the experiences of women of colour that discredit our claims and render the violence that we experience unimportant.99

Building on the critical race scholarship of Delgado, Crenshaw, and others, Alexander Tsesis carefully documents the link between hate propaganda and active discrimination and atrocities against the Jews in Nazi Germany, slaves in Mauritania, and Blacks and Aboriginals in the United States.100 In order to respond to the asserted lack of proof of causal connection between word and deed, Tsesis turned to historic examples.

99. Ibid. at 120.
Historic analysis is crucial because it exposes the association between hate propaganda and discriminatory actions. Oppressors justify inequities by making their targets out to be less than human, unworthy of fair treatment or even for the mercy ordinarily shown to animals. Out-groups are portrayed as sexually depraved demons or unruly, childlike savages and the victims themselves are blamed for their own problems or destruction. Negative stereotypes and ideological schemas, designed to rationalize power in the hands of dominant groups, precede crimes against humanity such as genocide. Many lives may be ruined before the views of those who rebuff popular prejudices trickle into the community conscience.\textsuperscript{101}

Having drawn a connection between word and deed, premised upon historic examples, Tsesis then asserted the folly of an approach to hate propaganda that limits the possibility of legislative intervention only to those situations where harmful action is imminent. The road to intrusive physical conduct may well be a lengthy one,\textsuperscript{102} as representations are used to inculcate a way of thinking about members of targeted groups that rationalizes discriminatory treatment,\textsuperscript{103} negatively affects target group members’ ability to self-define and undermines the interests of the entire community in diversity, multiculturalism, and mutual respect. Numerous studies have demonstrated the ways in which stereotypes come to inform in-group interactions with members of out-groups, as well as the discourse used within those interactions.\textsuperscript{104}

Any causal connection between viewing child pornography and subsequent commission of sexual offences against children has also proven notoriously elusive to establish with scientific certainty.\textsuperscript{105} However, in the context of representations that involve real children, a direct violation of the dignity and privacy interests of those individuals is easily established. The negative impact of the representations on the dignity and

\textsuperscript{101} Ibid. at 3.
\textsuperscript{103} Supporting the contention that propaganda functions to distance in-groups from out-groups and that this is an important first step in the development of hatred, see: R. Sternberg, “Understanding and Combating Hate,” in Sternberg, \textit{supra} note 102 at 37.
privacy interests of children as a group and the collective interests of the community at large are supported by some evidence. Those convicted of sexual offences against children are also frequently involved in the child pornography trade. Use of child pornography is regularly an aspect of sexual offences against children as perpetrators use the representations to "normalize" the behaviour in the eyes of their victims. Recent studies of online child pornography have revealed some evidence that exposure to and involvement with this content in online communities can become a way of normalizing sexual abuse of children and allowing participants to convince themselves that children enjoy sexual abuse and are tradable commodities for others' consumptive pleasure rather than human beings. None of this establishes with any scientific certainty a causal connection between viewing child pornography and sexually assaulting children. It does, however, provide support for an understanding of child pornography as a mechanism for interfering with perceptions about the dignity and autonomy of the individual children abused in production and children as a social group—both with significant implications for community aspirations of equality.

As in the context of child pornography, whether there is sufficiently established social science evidence to support a link between viewing obscenity/pornography and subsequent commission of sexual offences is hotly contested. In arguing that pornography needed to be recognized as a political practice that occasioned harm, rather than as a moral vice that occasioned offence, MacKinnon asserted:

[P]ornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy, which fuses the eroticization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.

107. Sharpe, supra note 27 at para. 106 and Taylor & Quayle, supra note 95 at 75.
108. Taylor & Quayle, supra note 95 at 78.
109. MacKinnon specifically does not use the term "obscenity"—arguing it to be imbued with a legal definition in which a moralistic patriarchal perspective is imposed to determine which pornography is good (and therefore legal) and which pornography is "bad" and therefore illegal: MacKinnon, supra note 37 at 196.
110. Ibid. at 197.
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Here MacKinnon not only summarized her approach to the harms of pornography, but also the need to understand the way in which pornography interferes with intimate aspects of women’s identities and persons as intrinsically linked with the reality of the inequality in power between men and women in society. While arguing strongly that the need to establish some form of individuated physical harm resulting from pornography constituted a fundamental misunderstanding of the way that pornography works in an unequal society, MacKinnon pointed to then emerging bodies of research suggesting a correlation between viewing pornography and increased feelings of sexual aggression by men against women, decreased likelihood of perceiving circumstances involving rape as actually involving rape, and changes in men’s attitudes toward women, including “trivialization, dehumanization and objectification.”

Christopher Kendall has made a similarly compelling argument about the ways in which some gay male pornography serves to interfere both with sex equality and equality on the basis of sexual identity by reinscribing gendered and raced stereotypes of dominance and submission.

The U.S. survey results reported on by Pamela Paul in 2005 revealed some of the effects of the mainstreaming of heterosexual pornography and habituation to increasingly extreme imagery. Her work documented the ways in which many women within heterosexual relationships understand their expected sexual roles within those relationships as being increasingly shaped and defined by pornography—both through a process of external imposition and self-internalization.

111. MacKinnon asserted: “The trouble with this individuated, atomistic, linear, exclusive, isolated, narrowly tortlike – in a word, positivistic – conception of injury is that the way pornography targets and defines women for abuse and discrimination does not work like this. It does hurt individuals, just not as individuals in a one-at-a-time-sense, but as members of the group women. ... [P]ornography dehumanizes women in a culturally specific and empirically descriptive – not liberal moral – sense. In the same act, pornography dispossesses women of the same power in which it possesses men: the power of sexual, hence gender, definition. The power to tell one who one is and the power to treat one accordingly. Perhaps a human being, for gender purposes, is someone who controls the social definition of sexuality”: Ibid. at 208-09.


115. Ibid. at 127-33.
Even in the absence of any type of conclusive scientific evidence of causation, I would suggest that there is a reasonable basis to apprehend that hate propaganda, obscenity, and child pornography trigger interference with the privacy-related interests of the groups they target. As MacKinnon suggested in the context of pornography, these forms of "expression" invidiously infect the social identities constructed around equality-seeking groups, becoming purported mainstream truths about individuals on the basis of their membership in those groups. Misrepresentative messaging about equality-seeking groups then becomes a platform for the imposition of identities on individual group members—both through external force and discrimination and sometimes through the invidious process of internalization by many group members themselves.

Conclusion
The Canadian case law on hate propaganda, obscenity, and child pornography features numerous analyses and discussions of the right to privacy, almost exclusively in the context of the privacy claims of those accused of related offences. Shaped as they are by the contexts in which they are raised, these analyses tend to mirror the negative, individualistic, control-over-access-to-information paradigm that has dominated thinking on the issue for several centuries. Notwithstanding that the vast bulk of Canadian legal analysis focuses on the right of an individual accused against state intrusion on a "private" sphere of activity to the exclusion of consideration of the privacy-related rights of the targets of hate propaganda and obscenity, Canadian courts have recognized that child pornography intrudes upon the privacy-related interests of the individual children abused in its production. The failure to recognize that hate propaganda and obscenity trigger similar intrusions for the members of the groups they target need not be understood to reflect that no such intrusions are in fact triggered. I suggest that we ought to place that failed recognition in the context of the selection of an individualistic privacy paradigm that, by and large, is conceptually inadequate to capture the collective nature of the privacy-related harms occasioned by these forms of "expression."

Some individuals targeted directly by hate propaganda and obscenity could muster arguments to squeeze the related privacy intrusions they experience as a result of that targeting into the individualistic paradigm, as has been the case with the analysis of the privacy-related intrusions on the children abused in production of child pornography. In the case of hate propaganda, however, the typical modus operandi of hate purveyors avoids attacks on individuals, focusing on broad categories. In the case of obscenity, the individualistic control-over-access paradigm, combined with
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patriarchal presumptions that women should be assumed to have consented to sexual activity and abuse, is likely to impose a preliminary threshold of proof of non-waiver. Re-making what are essentially collectively-based claims into individual claims for the purpose of fitting the paradigmatic mould is unlikely, however, to form the basis of a meaningful long-term strategy for equality-seeking groups and their members.

The analyses of privacy in the contexts of abortion and the counselling records and sexual histories of complainants in sexual assault cases have tended to re-personalize political issues, undermine calls for affirmative state action, and reinscribe gendered and raced notions of privacy. Privacy-based arguments by the direct targets of hate propaganda and obscenity crafted to fit the paradigm may do the same. The privacy-related harms of hate propaganda, obscenity, and child pornography need also to be understood in the context of social inequalities that allow the empowered to constrain the autonomy of otherized individuals by limiting their opportunities for self-definition through presumptive social attribution of characteristics to the equality-seeking groups with which individual targets are identified. The personal intrusion is integrally and intrinsically related to systemic, group-based power imbalances. Claims framed within the individualistic privacy paradigm are more likely to bury that dynamic than to make it understood. Without that recognition, the potential role for state action to address those imbalances—or at least a call for state action reflecting a conscious choice not to reinforce those imbalances—is likely to be ignored.

Rather than trying to fit collectively-based harms into an individualistic paradigm, I suggest a re-thinking of the individualistic paradigm in a way that better reflects collective considerations by articulating privacy’s social value. The seeds for this idea were originally sown within other aspects of work by authors such as Westin, but were largely sidelined in the wake of an individualistic drive against state intrusion. They have since been replanted in the work of authors such as Allen and Gavison who have advocated privacy as a producer of social goods such as better democratic participants and contributors. However, the possibility of articulating privacy as a social value stems first and foremost from the work of authors such as Gandy, Regan, and Cohen in the context of rising concern as to the broad-ranging privacy implications of digital data collection and use. As fragmented individual data collected for one purpose are aggregated and re-used out of context as the basis for labelling and making judgments affecting individuals’ lives with very little opportunity for reciprocity on their part, the adequacy of individualistic models that focus on control over access to information has increasingly come under scrutiny.
The push, in the context of digital data collection and use, for recognition of privacy as a public value, a common value and a collective value and the potentially invidious collective forms of discrimination to which its inobservance can give way offers both threats and opportunities for members of equality-seeking groups. To the extent that those accused of offences relating to hate propaganda, obscenity, and child pornography could then bootstrap their individualistic privacy argument with one premised on societal interests, the competing equality-based interests of the members of target groups may be undermined. On the other hand, thinking collectively about the value of privacy opens up the opportunity to better articulate a more group-based conception of the privacy violation occasioned by perpetuation of group-based stereotypes prevalent in hate propaganda, obscenity, and child pornography. It suggests an opening to argue that privacy should not simply be conceived of as a producer of individualistic goods such as free expression, freedom of conscience, and liberty, but also the equally important but too frequently unmentioned democratic right to substantive equality.

In this paper I have begun the project of attempting to sketch the parameters of that collectively-based privacy argument. The project is premised on accounts of authors such as Delgado, Crenshaw, Tsesis, and MacKinnon on how hate propaganda, obscenity, and child pornography work to impose social constructions of inhumanity on targeted groups that are both externally reinforced and sometimes internalized in a way that provides presumptive access to target group members and interferes with their abilities to self-define. To the extent that these effects lead individuals to choose to dissociate or to attempt dissociation from the groups so targeted, both the groups themselves and society as a whole stand to lose; our aspirations for diversity, plurality, and mutual respect and tolerance are undermined.

If hate, obscenity, and child pornography are understood in this way, certain aspects of the current push for a social conception of privacy within the context of digital data collection can be usefully analogized. Simplistic data derived from these forms of “expression” are used to render social profiles of targeted groups that become a basis for imposed definitions not only on those groups, but their members as well. These socially constructed definitions then form the basis and purported justification for discriminatory action and treatment of individual members of those groups that are, in some cases, internalized within their own processes of self-definition.

The fragments of identity misrepresented in hate propaganda, obscenity, and child pornography are used to form the bases for social composites
that intrude both upon the definition of self and the understanding of self in relation to group. The social constructions produced authorize privacy intrusions that both reflect and reinforce substantive inequality. For equality-seeking communities, privacy understood entirely as a producer of purely individualistic goods such as free expression and liberty is an empty proposition. Privacy understood as a social value and producer of collective goods such as substantive equality seems more like something worth talking about.