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A "Reasonable" Expectation of Sexual Privacy in the Digital Age

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Two Criminal Code offences, voyeurism, and the publication of intimate images without consent, were enacted to protect Canadians' right to sexual privacy in light of invasive digital technologies. Women and girls are overwhelmingly targeted as victims for both of these offences, given the higher value placed on their non-consensual, sexualised images in an unequal society. Both offences require an analysis of whether the complainant was in circumstances giving rise to a reasonable expectation of privacy, and the use of this standard is potentially problematic both from a feminist standpoint and in light of the rapidly evolving technological realities of the digital age. This article proposes a feminist-inspired, technology-informed approach to the reasonable expectation of privacy standard in relation to these offences, and examines the extent to which the Supreme Court of Canada's recent voyeurism decision, R. v. Jarvis, aligns with this approach.

Deux infractions, le voyeurisme et la publication d'images intimes sans consentement, ont été ajoutées au Code criminel afin de protéger le droit des Canadiens à la vie privée en matière sexuelle à la lumière des technologies numériques envahissantes. Les femmes et les filles sont très majoritairement ciblées en tant que victimes de ces deux infractions, étant donné la plus grande valeur accordée à leurs images sexualisées et non consensuelles dans une société inégale. Les deux infractions exigent une analyse visant à déterminer si la plaignante se trouvait dans des circonstances donnant lieu à une attente raisonnable en matière de protection de la vie privée, et l'utilisation de cette norme peut poser problème tant du point de vue féministe que compte tenu de l'évolution rapide des réalités technologiques à l'ère numérique. Le présent article propose une approche d'inspiration féministe, fondée sur la technologie, à l'égard de la norme d'attente raisonnable en matière de protection de la vie privée relativement à ces infractions, et examine dans quelle mesure la récente décision de la Cour suprême du Canada dans l'affaire R. c. Jarvis s'inscrit dans cette approche.

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Introduction

Two Canadian criminal offences, voyeurism and the publication of an intimate image without consent (collectively, the “Sexual Privacy Offences”), require the victim to have been in circumstances giving rise to a reasonable expectation of privacy (REOP).¹ Both of these crimes involve significant harms to victims’ dignity, bodily autonomy, and sexual integrity. They are gendered crimes, and if they are not taken seriously by governments, courts, and the general public, they pose a serious threat to women’s and girls’ equality rights.² As such, it is worrisome that the legally amorphous concepts of “reasonableness” and “privacy” are central to each offence.

1. *Criminal Code*, RSC 1985, c C-46, ss 162(1), 162.1(1) [Code].

2. *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

This paper explores the significant interpretive barriers that the REOP requirement poses for judges tasked with determining whether the elements of the Sexual Privacy Offences have been met, as well as the problematic nature of this requirement from a feminist-informed, gender-equality standpoint, and in the light of the ubiquity of invasive digital technologies.³ I propose an approach to the REOP standard intended to address these concerns, which entails treating privacy as a positive right, and the REOP as a normative standard. The Supreme Court of Canada (SCC), in its recent decision *R. v. Jarvis*, articulated an approach to the REOP standard in relation to the voyeurism provisions that generally accords with these recommendations, though it fails to recognize the gendered nature of the Sexual Privacy Offences and their impact on women's and girls' equality rights.⁴ I argue that judges interpreting the REOP standard in relation to the Sexual Privacy Offences must apply and expand upon the approach set out in *Jarvis*, in order to account for the significant harms to victims' sexual privacy, and women's and girls' right to equality, occasioned by these offences.

I. *The "sexual privacy" offences—voyeurism and the non-consensual distribution of intimate images*

Voyeurism and the "publication, etc., of an intimate image without consent" (the "non-consensual distribution of intimate images" [NCDII]) are conceptually similar offences. They were both ostensibly enacted to protect Canadians from breaches of sexual privacy in the light of emerging technologies, they require an analysis of victims' REOP as an element of the offence, and they are gendered crimes. I will explore each of these similarities below.

1. *Protecting sexual privacy in a digital age*

The Sexual Privacy Offences were both enacted in response to developments in digital technology. The Department of Justice Consultation Paper on voyeurism highlights rapid technological developments of the previous years and their implications "for such basic matters as privacy and the role of the law."⁵ Bill C-13, which contained the NCDII provisions, was

3. Many of the ideas advanced this paper were developed while I was a member of a case committee for the Women's Legal Education and Action Fund [LEAF], in collaboration with other feminist academics, in relation to LEAF's intervener's factum in the appeal of *R v Jarvis*, 2017 ONCA 778 to the Supreme Court of Canada. See: *R v Jarvis*, 2018, SCC File No. 37833 (Factum of the Intervener Women's Legal Education and Action Fund), available online: <<http://www.leaf.ca/wp-content/uploads/2018/04/Factum-of-the-Intervener-Womens-Legal-Education-and-Action-Fund-Inc.-....pdf>> [LEAF Factum].

4. *R v Jarvis*, 2019 SCC 10 [*Jarvis* SCC].

5. Canada, Department of Justice, "Voyeurism as a Criminal Offence: A Consultation Paper"

framed by the Conservative government as addressing “cyberbullying,” considered by legislators and the public to be a pressing and disturbing issue arising out of the ubiquity of social media websites and smartphones, primarily impacting teenagers.⁶

The threats posed by these new technological innovations were viewed by legislators as harms to a particular form of sexual privacy. Danielle Keats Citron defines sexual privacy as “the social norms (behaviours and expectations) that govern access to, and information about, individuals’ intimate lives,”⁷ concerning concealment of naked bodies, seclusion of intimate activities, and personal decisions about intimate life. She identifies this form of privacy as crucial for sexual autonomy, identity formation, and equality.⁸ Canadian legislators appeared to have a similar interest in mind when debating and enacting *Code* provisions prohibiting both voyeurism and NCDII. The Legislative Summary of Bill C-2,⁹ containing the voyeurism provisions, describes the crime as “both a sexual offence and privacy offence,”¹⁰ and the Honourable Landon Pearson described voyeurism as prohibiting “breaches of sexual privacy”¹¹ at the Bill’s second reading in the Senate. A Department of Justice Consultation Paper on the creation of a voyeurism offence notes that the state’s interests in protecting individual privacy and preventing sexual exploitation coalesce in relation to voyeurism, which involves a breach of both privacy and sexual or physical integrity.¹²

(Ottawa: DOJ, 2002) at at 1 [Canada, “Voyeurism Consultation Paper”]. Advances in recording technologies in the early 2000s similarly prompted bans on video voyeurism in the United States (see Danielle Citron, “Protecting Sexual Privacy in the Information Age” in Marc Rotenberg, Julia Horwitz & Jeramie Scott, eds, *Privacy in the Modern Age: The Search for Solutions* (New York: The New Press, 2015) 46 at 46-47).

6. Jane Bailey, “Time to Unpack the Juggernaut: Reflections on the Canadian Federal Parliamentary Debates on Cyberbullying” (2014) 37:2 Dal LJ 661 at 663 [Bailey, “Juggernaut”]; Canada, Department of Justice, *Report to the Federal/Provincial/Territorial/Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-Consensual Distribution of Intimate Images*, by CCSO Cybercrime Working Group, Catalogue No J2-390/2013E-PDF (Ottawa: DOJ, 2013) at 14 [Canada, “Cyberbullying & NCDII”].

7. Danielle Keats Citron, “Sexual Privacy” (2018) Yale L J (forthcoming), at 4, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233805> (accessed 13 February 2019) [Citron, “Sexual Privacy”].

8. *Ibid* at 11-26.

9. Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess, 38th Parl, 2005.

10. Canada, Law and Government Division, Parliamentary Information and Research Service, *Legislative Summary of Bill C-2: An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, by Robin MacKay, Publication No LS-480E (Ottawa: Library of Parliament, 13 October 2004), at 5, online: <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/38-1/c2-e.pdf>>.

11. *Debates of the Senate*, 38-1, vol 142, No 73 (20 June 2005) at 1530.

12. Canada, “Voyeurism Consultation Paper,” *supra* note 5 at 8. See also Andrea Slane, “From

The NCDII provisions fill a gap left by the voyeurism provisions, which provide no sanctions for instances where non-voyeuristic sexualized recordings are subsequently distributed without the consent of the person(s) depicted.¹³ High-profile Canadian cases including the suicide deaths of Rehteah Parsons, Amanda Todd, and Todd Loik, which were framed by the media as resulting from “cyberbullying,” and growing public awareness and concern over activities such as “sexting” and “revenge pornography,” resulted in calls on legislators to criminalize NCDII.¹⁴ The final report of a Federal/Provincial/Territorial Working Group tasked with identifying gaps in the *Code* regarding cyberbullying and NCDII describes the proposed offence as protecting “similar privacy interests as the existing offence of voyeurism,”¹⁵ and clarified that the definition of “intimate image” was not intended to refer to images that are simply embarrassing or unflattering, but those that “relate to the core of a person’s privacy interest.”¹⁶

2. *Circumstances giving rise to a reasonable expectation of privacy*

Both voyeurism and NCDII were enacted out of a perceived need to protect a specific, core privacy interest related to sexual integrity. The centrality of the concept of privacy to each offence is demonstrated by the fact that both require an observation or recording to have taken place in circumstances giving rise to a REOP. While the concept of a REOP has received significant judicial analysis in the context of section 8 of the *Charter*, which guarantees the right to be secure against unreasonable search and seizure, no other *Code* offences require an analysis of victims’ REOP as an element of the offence.¹⁷

The voyeurism provisions require that the accused must have surreptitiously observed or recorded a person, in circumstances that give rise to a REOP, in one of the following circumstances:

- (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law” (2010) 48 Osgoode Hall LJ 543 at 573-574 [Slane, “Scanning”].

13. The printing, publication, etc., of voyeuristic recordings is prohibited by s 162(4) of the *Code*, *supra* note 1.

14. See Mylynn Felt, “The Incessant Image: How Dominant News Coverage Shaped Canadian Cyberbullying Law” (2015) 66 UNBLJ 137 at 137; Bailey, “Juggernaut,” *supra* note 6 at 663-664.

15. Canada, “Cyberbullying & NCDII,” *supra* note 6 at 17

16. *Ibid.*

17. Jane Bailey, “Framed by Section 8: Constitutional Protection of Privacy in Canada” (2008) 50:3 Can J Criminology & Crim Justice 279 at 280 [Bailey, “Framed by Section 8”]; *Jarvis* SCC, *supra* note 4, at para 118, Rowe J, concurring.

- (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
- (c) the observation or recording is done for a sexual purpose.¹⁸

The REOP standard is also incorporated into the NCDII offence as a central component of the definition of “intimate image.” An “intimate image” is defined as a visual recording of a person made by any means including a photographic, film, or video recording:

- (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
- (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a [REOP]; and
- (c) in respect of which the person depicted retains a [REOP] at the time the offence is committed.¹⁹

If an image or recording meets the definition of “intimate image,” then a person who knowingly publishes or distributes that image, knowing the person depicted did not consent to that conduct or being reckless as to whether or not the person gave consent to that conduct, will be guilty of NCDII.²⁰

Parliament gave no direction in the legislation about the meaning of “circumstances giving rise to a [REOP]” in relation to either of the Sexual Privacy Offences. The wording of the two provisions, and the interests at stake in each, are similar enough that judicial interpretation of what constitutes a REOP in relation to one offence will likely inform analysis of the other.²¹

3. *Gendered offences*

Before proceeding with an analysis of the Sexual Privacy Offences as gendered crimes, I note that people who are transgender, gender non-binary, two spirit, lesbian, gay, bisexual, or who otherwise do not conform to “traditional” Western gender or heterosexual norms, are likely

18. *Code*, *supra* note 1, s 162(1).

19. *Ibid*, s 162.1(2).

20. *Ibid*, s 162.1(1).

21. See Canada, Legal and Social Affairs Division, Parliamentary Information and Research Service, *Legislative Summary of Bill C-13: An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, by Julia Nicol & Dominique Valiquet, Publication No 41-2-C13-E (Ottawa: Library of Parliament, 11 December 2013) at 4, 16, n 7, online: <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c13-e.pdf>>.

to be victims of many forms of violence, including the Sexual Privacy Offences, at disproportionate rates.²² Crimes against LGBTQ+ individuals are often informed by the same patriarchal, misogynist, or heterosexist narratives that underlie gendered violence against (cisgender) women more generally.²³ In this paper I focus on the specific impact of the Sexual Privacy Offences on women and girls in general, as publicly available Statistics Canada data does not indicate whether victims of the Sexual Privacy Offences are LGBTQ+ persons, and the available Canadian case law involves overwhelmingly male perpetrators and female victims, frequently in the context of heterosexual intimate partnerships.²⁴ There is a pressing need for more research on how the Sexual Privacy Offences are carried out against and affect LGBTQ+ individuals, and the LGBTQ+ community more broadly.

Both voyeurism and NCDII are gendered crimes. They are each overwhelmingly committed by men and boys against women and girls.²⁵ Jane Bailey and Carissima Mathen categorize voyeurism and NCDII as variants of the wider phenomenon of technology-facilitated violence against women and girls, which involves the objectification of the victim and an appropriation of the victim's sexual integrity by the offender for his own ends.²⁶ They argue that the form of objectification inherent in these crimes uniquely merits criminal culpability.²⁷ Anastasia Powell similarly argues that NCDII must be considered as part of a continuum of

22. See Statistics Canada, *Violent Victimization of Lesbians, Gays, and Bisexuals in Canada, 2014*, by Laura Simpson, Catalogue No 85-002-X (Ottawa: Statistics Canada, 31 May 2013); Anastasia Powell, Adrian J Scott & Nicola Henry, "Digital Harassment and Abuse: Experiences of Sexuality and Gender Minority Adults" (2018) 0 Eur J Criminology 1.

23. Wirtz et al describe gender-based violence as "an umbrella term that refers to any physical, sexual, or other emotional violence perpetrated on the basis of socially ascribed gender differences." (Andrea L Wirtz, et al, "Gender-Based Violence Against Transgender People in the United States: A Call for Research and Programming" (2018) 0 Trauma, Violence & Abuse 1 at 1, citing United Nations, *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UNGAOR (20 Dec 1993). See also Powell, Scott & Henry, *supra* note 22 at 2.

24. See Moira Aikenhead, "Non-Consensual Distribution of Intimate Images as a Crime of Gender-Based Violence" (2018) 30:1 CJWL 117; Jane Bailey & Carissima Mathen, "Technologically-Facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) Ottawa Faculty of Law Working Paper No 2017-44 at 5, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043506>.

25. Between 2009 and 2016, at least 91 per cent of all persons charged with voyeurism were male (1.5 per cent of accused were female and 8 per cent are not classified as either male or female), and 90 per cent of victims were female (statistics obtained from Statistics Canada, on file with the author). In 2016, 92 per cent of reported cases of NCDII in Canada involved female victims, and 72 per cent of offenders in these cases were male (Aikenhead, *supra* note 24 at 122-123). See also Citron, "Sexual Privacy," *supra* note 7 at 46.

26. Bailey & Mathen, *supra* note 24 at 4-6, 21-22.

27. *Ibid* at 26-27.

gendered sexual violence and harassment targeting primarily women, as it constitutes a violation of the victim's sexual autonomy.²⁸

The sexual objectification at the core of the Sexual Privacy Offences arises out of structural gender hierarchization and social scripts of male entitlement to women's bodies.²⁹ In its 2017 report entitled *Taking Action to End Violence against Young Women and Girls in Canada*, the House of Commons Standing Committee on the Status of Women notes that cyber-violence against women and girls, like other forms of gendered violence, is used to "control women, to maintain men's dominance over women, and to reinforce patriarchal norms, roles, and structures."³⁰

Instances of the Sexual Privacy Offences that take place in the context of former or current intimate relationships constitute part of the "constellation of behaviours" present in abusive relationships, pursuant to which men seek to manipulate, intimidate, and control their intimate partners.³¹ In the prototypical case of "revenge pornography"³² a (typically male) person posts nude or sexualized images of his former intimate partner online, with a malicious motive to harm his former partner or exact revenge upon her for some perceived wrongdoing.³³ Andrea Slane and Ganaele Langlois note that the growing online market for non-consensually produced or distributed pornography is premised on "the larger mainstream, male-oriented, heterosexual online pornography

28. Anastasia Powell, "Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault" (2010) 43:1 *Austl & NZ J Crim* 76 at 77.

29. Nicola Henry & Anastasia Powell, "Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law" (2016) 25:4 *Soc & Leg Stud* 397 at 399 [Henry & Powell, "Sexual Violence"].

30. House of Commons, Standing Committee on the Status of Women, *Taking Action to End Violence against Young Women and Girls in Canada* (March 2017) at 32 (Chair: Marilyn Gladu).

31. See Isabel Grant, "Intimate Partner Criminal Harassment Through a Lens of Responsibilization" (2015) 52:2 *Osgoode Hall LJ* 552 at 558.

32. A growing number of academics, victims, and victims' advocates are critical of the use of the term "revenge pornography," arguing this wording may imply consent on the part of the victim to be depicted in a "pornographic" way, indicate the victim is somehow deserving of her victimization, or place undue focus on the pornographic nature of the images rather than the harm involved in their non-consensual distribution. See, e.g., Henry & Powell, "Sexual Violence," *supra* note 29 at 400-401; Clare McGlynn, "Call 'Revenge Porn' What It Is: Sexual Abuse," *Vox* (10 July 2017), online: <<https://www.vox.com/first-person/2017/7/8/15934434/rob-kardashian-blac-chyna-revenge-porn-abuse>>; Jason Haynes, "Legislative Approaches to Combating 'Revenge Porn': A Multijurisdictional Perspective" (2018) 39:3 *Stat L Rev* 319 at 320-321. I will use this term to refer to the specific prototypical case described above, as distinct from other forms of NCDII.

33. Women are disproportionately targeted for this form of NCDII (Peter W Cooper, "The Right to be Virtually Clothed" (2016) 91 *Wash L Rev* 817 at 819) and revenge pornography has been characterized in the academic literature as "an act of hate speech against women as a group" (Janice Richardson, "Spinoza, Feminism and Privacy: Exploring an Immanent Ethics of Privacy" (2014) 22:3 *Fem Legal Stud* 225 at 238) and a form of sexual wrongdoing similar to both criminal harassment and sexual assault (Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3:3 *Laws* 529 at 540).

industry—one that feeds specifically on the allure of the lack of consent and on the combination of voyeurism and misogyny.”³⁴ Revenge pornography websites exploit the additional “thrill” experienced by viewers over the images’ non-consensual nature and the inherent violation of the female victim’s autonomy and sexual integrity.³⁵

Individual instances of voyeurism and NCDII may result in a range of significant psychological, economic, and reputational harms for victims.³⁶ The harms of these offences are often magnified for women and girls as compared to men and boys, and lead to the collective equality interests of women and girls as a group suffering.³⁷ As more women have sexualized images of their bodies produced, consumed, and distributed against their will, the online market for non-consensual images will continue to grow, and the denial of women’s sexual agency may be perceived by consumers of this material as commonplace or appropriate, placing a greater number of women and girls at risk of victimization.³⁸ Powell and Henry describe the harms of online abuse and harassment as “embedded in the symbolic violence of gendered power hierarchies and inequalities, which are in turn normalized and are consequently less easily identified or remedied.”³⁹ Technology-facilitated violence against women and girls, including the Sexual Privacy Offences, can reinforce fear and promote social isolation and exclusion, contributing to and extending gender inequality.⁴⁰

The gendered nature of the Sexual Privacy Offences, and the centrality of digital technologies to each of these offences, render the required assessment of whether there were circumstances giving rise a

34. Andrea Slane & Ganaele Langlois, “Debunking the Myth of ‘Not My Bad’: Sexual Images, Consent, and Online Host Responsibilities in Canada” (2018) 30:1 CJWL 42 at 43.

35. See Andrea Slane, “Sexting and the Law in Canada” (2013) 22:3 Can J of Human Sexuality 117 at 120; Mary Anne Franks, “‘Revenge Porn’ Reform: A View from the Front Lines” (2017) 69 Fla L Rev 1251 at 1254. See also Powell, *supra* note 28 at 80.

36. See, e.g., Danielle Citron, *Hate Crimes in Cyberspace* (Cambridge, MA: Harvard University Press, 2014) at 7-8; Nicola Henry & Anastasia Powell, “Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence” (2015) 21:6 Violence Against Women 758.

37. Danielle Keats Citron & Mary Anne Franks, “Criminalizing Revenge Porn” (2014) 49 Wake Forest L Rev 345 at 353. See also Jane Bailey, “‘Sexualized Online Bullying’ Through an Equality Lens: Missed Opportunity in *AB v Bragg?*” (2014) 59:3 McGill LJ 709 at 728.

38. Bailey describes a similar process in relation to “obscene” pornography (involving the undue exploitation of sex, or of sex and any one or more of: crime, horror, cruelty and violence, as a dominant characteristic), the production of which can shape and feed discriminatory and violent attitudes towards women (Jane Bailey, “Missing Privacy Through Individuation: The Treatment of Privacy in the Canadian Case Law on Hate, Obscenity, and Child Pornography” (2008) 31:1 Dal LJ 55 at 71-72 [Bailey, “Missing Privacy”]). See also Franks, *supra* note 35 at 1255; Powell, *supra* note 28 at 79-80.

39. Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (London, UK: Palgrave MacMillan, 2017) at 67.

40. *Ibid.*

REOP distinctly problematic.⁴¹ I turn now to these concerns and potential interpretive difficulties.

II. *Critiques of legal privacy and reasonableness standards*

1. *A feminist perspective*

Feminist legal scholars have long expressed concern with legal deployments of “objective” tests and standards, such as “reasonableness,” in relation to crimes of violence against women. Rosemary Hunter notes that the legal system tends to incorporate such tests in areas “where the disjunction between the experience of claimants and the experience of those who frame the doctrine and make the decisions is at its widest,”⁴² such as gender-based violence, sexual assault, harassment, and discrimination. The *Code*’s criminal harassment provisions, for example, require that victims “reasonably, in all the circumstances...fear for their safety or the safety of anyone known to them.”⁴³ Isabel Grant argues that this requirement is problematic given that as harassment often forms part of a pattern of gendered intimate partner violence, women are likely to be uniquely attuned to the cues of their abusive partners, and judicial interpretations of the reasonableness of women’s fears often reflect discriminatory assumptions about how women should express and respond to fear.⁴⁴

It is not just the “reasonableness” aspect of the REOP standard that is problematic from a feminist standpoint. Privacy has always been a contentious concept in feminist legal scholarship, and feminist theory more generally. Early feminist activism in North America focused on making public the “private” issues of domestic abuse and sexual assault, as narratives of personal and territorial privacy served to justify state non-interference in this gendered violence.⁴⁵ Today, liberal conceptions of privacy continue to emphasize the importance of intimacy, the body, sex, and the home, all of which are concepts that have been central to certain feminist critiques of the abuses of power that take place in “private” spaces.⁴⁶ Privacy, when understood as a negative right to exclude others,

41. See Aikenhead, *supra* note 24 at 129.

42. Rosemary Hunter, “Law’s (Masculine) Violence: Reshaping Jurisprudence” (2006) 17:1 L & Critique 27 at 38-39.

43. *Code*, *supra* note 1, s 264(1).

44. Grant, *supra* note 31 at 587-588.

45. See Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989) at 35-36, 168-169, 190-194; Lise Gotell, “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2005-2006) 43 Alta L Rev 743 [Gotell, “Privacy is Not Enough”] at 747-750.

46. Richardson, *supra* note 33 at 227-228, citing MacKinnon, *supra* note 45.

remains a deeply masculine, classed, and individualized ideal.⁴⁷ It is rooted in the notion of a “retreat” from the reach of the state and society, and has frequently trumped women’s and girls’ rights to be free from violence and intimidation.⁴⁸ As a result, some equality-seeking reformers have expressed skepticism that a conception of privacy as a negative right to exclude could have any potential to promote women’s equality interests.⁴⁹

Where a legal right to privacy has been articulated in relation to women, it has traditionally been aimed at protecting a particular version of raced and classed feminine “modesty,” designed to shield women (and their male partners) from embarrassment and humiliation associated with sexuality.⁵⁰ Some contemporary feminist writers remain wary of social and judicial understandings of privacy that view disclosures related to women’s bodies or sexuality as harmful because they are inherently shameful.⁵¹ If sexualized images are understood in this way, it could result in judges adopting victim-blaming narratives in cases where women have consented to be photographed or recorded in a sexualized context, placing undue scrutiny on victims’ “risky” or “immodest” behaviour as diminishing the reasonableness of their privacy expectations.⁵²

While feminists have critiqued legal understandings of privacy rights for decades, writers from other disciplines have recently begun to raise significant concerns with the utility of privacy as a legal concept in the light of emergent technologies.⁵³ In the following section, I will highlight some of these concerns that are relevant to the judicial interpretation of the Sexual Privacy Offences.

47. Treating the right to privacy as existing only in private spaces means that this is a privilege only the affluent can enjoy (Elizabeth Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000) 50:3 UTLJ 305 at 343).

48. Emily Laidlaw, “Online Shaming and the Right to Privacy” (2017) 6:4 Laws 3 at 17 [Laidlaw, “Online Shaming”].

49. See Gotell, “Privacy is Not Enough,” *supra* note 45 at 747-750; Jane Bailey, “Towards an Equality-Enhancing Conception of Privacy” (2008) 31:2 Dal LJ 267 at 280 [Bailey, “Equality-Enhancing”].

50. Bailey, “Equality-Enhancing,” *supra* note 49 at 285-286, citing Anita Allen & Erin Mack, “How Privacy Got Its Gender” (1990) 10 N Ill U L Rev 441 at 477-478; Elizabeth M Schneider, “The Synergy of Equality and Privacy in Women’s Rights” (2002) U Chi L Forum 137 at 146.

51. See Citron & Franks, *supra* note 37 at 362; Bailey, “Missing Privacy,” *supra* note 38 at 70-71; Lise Gotell, “The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-Liberal Sexual Citizenship” in Dorothy E Chunn, Susan Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2008) at 140-141.

52. See Aikenhead, *supra* note 24 at 127, 129.

53. Bailey notes that it has taken new threats to privacy posed by emerging technologies to generate a more mainstream acceptance of a social or collective account of privacy, in contrast to the individualized, masculine account that has been at the centre of feminist critique for years (Bailey, “Equality-Enhancing,” *supra* note 49 at 289).

2. “Reasonable” privacy expectations in the digital age

For a large number of Canadians, online life is merging with offline life to the point of being nearly indistinguishable. For young people in particular, online interactions may be at the centre of social life.⁵⁴ Significant changes in how individuals interact with one another and go about their work and daily lives have taken place in recent years, as a result of the internet and rapidly developing digital technologies, and in many cases the law has struggled to keep pace.⁵⁵ As previously discussed, the Sexual Privacy Offences were enacted in an attempt to address some of these new realities.

These changes have led to a significant amount of writing in recent years about the challenges technology presents to privacy rights in relation to our personal information. The sheer volume of potentially permanent data that individuals now produce (intentionally and unintentionally), each time they pursue an activity online, the aggregation of this data, and other consequences of our networked world, have had significant implications for foundational concepts such as the public/private divide, and control and choice in relation to what we keep private.⁵⁶ While a comprehensive review of flaws in the legal privacy paradigm in the digital age is beyond the scope of this paper, I highlight three key developments that scholars and the courts have come to recognize as affecting privacy and the REOP standard, and which must inform any interpretation of what constitutes a REOP in relation to the Sexual Privacy Offences.

a. *Traditionally private spaces may no longer be private*

New technologies complicate what constitute “public” versus “private” spaces. The widespread use of handheld, internet-equipped digital technologies makes it such that formerly private activities can now be instantaneously recorded and broadcast to online audiences. Indeed, many people, particularly young people, intentionally allow dozens or hundreds of other individuals into their private spaces, such as their bedrooms, through the use of video-enabled smartphones or webcams. Given this reality, can we consider a person who is in their bedroom to be in a

54. Jacquelyn Anne Burkell, “Remembering Me: Big Data, Individual Identity, and the Psychological Necessity of Forgetting” (2016) 18:1 Ethics and Information Technology 17 at 20-21. See also Powell, *supra* note 28 at 78.

55. See Susan Magoitau, “Out of Sync: Section 8 and Technological Advancement in the Supreme Court Jurisprudence” (2015) 71 SCLR 501 at 501-502; Agnes Callamard, “Are Courts Re-Inventing Internet Regulation?” (2017) 31:3 Int’l Rev L Comp & Tech 323 at 324-325.

56. See, e.g., Ari Ezra Waldman, “Privacy as Trust: Sharing Personal Information in a Networked World” (2015) 69 U Miami L Rev 559 at 584-588; Daniel Solove, “Introduction: Privacy, Self-Management and the Consent Dilemma” (2013) 126:7 Harv L Rev 126; Daniel J Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York: NYU Press, 2004) at 1890 [Solove, *Digital Person*].

“private” space if they are broadcasting using Facebook Live, Snapchat, or YouTube? Indeed, it may not make sense to conceive of the activity being recorded as taking place in any physical location. The SCC recently touched on this interpretive difficulty in its section 8 decision *R. v. Marakah*, where McLachlin C.J., writing for the majority, remarked on the difficulty in determining the “location” of a text message conversation, given that an “interconnected web of devices and servers creates an electronic world of digital communication that, in the 21st century, is every bit as real as physical space.”⁵⁷ In this context, questions such as “where” an activity has taken place, and whether that place is public or private, will not yield straightforward answers when they involve recording or communication using digital technologies.

b. *Increased surveillance and recording in public spaces*

Whether one can expect any level of privacy in a public space, such as a park, busy street, or restaurant, has been a matter of debate since long before the current digital age. Some scholars have argued that social norms such as expecting not to be stared at, followed, recorded, or scrutinized, should confer a certain degree of privacy on persons in public spaces.⁵⁸ Individuals assess how “public” a situation is, and adjust their behaviour and privacy expectations accordingly.⁵⁹

While individuals may have historically expected a certain degree of privacy in public places, it is debatable whether that expectation can still be considered “reasonable” in the light of the growing ubiquity of CCTV surveillance and handheld digital recording technologies. Elizabeth Paton-Simpson views impermanence as a relevant factor in considering whether an expectation of privacy is “reasonable,” finding that privacy expectations can be violated by making a permanent record of what is revealed in public only briefly.⁶⁰ As such, she labels invasive technologies such as surveillance cameras, microphones, and scanning devices, a “rogue factor,” disrupting both normal expectations of public privacy, and the distinction between “public” and “private” places.⁶¹ The SCC recognized the threat surveillance technologies pose to personal privacy as long ago as 1990, when La Forest J., writing for the majority in the search and seizure decision *R. v. Duarte*, reflected that unregulated electronic surveillance

57. *R v Marakah*, 2017 SCC 59 at paras 27-28, [2017] 2 SCR 608. McLachlin C.J. noted further that location as a factor in the analysis of a REOP was developed in the context of territorial privacy interests, and was not an easy fit with digital subject matter (at para 26).

58. See Waldman, *supra* note 56 at 598-600; Paton-Simpson, *supra* note 47 at 326-329.

59. Paton-Simpson, *supra* note 47 at 322.

60. *Ibid* at 327.

61. *Ibid* at 321.

had the potential to annihilate any expectations of privacy as against the state in relation to personal communications.⁶²

Further complicating this landscape, surreptitious recording of private individuals by other private individuals is largely unregulated, and the average person's ability to undertake such recording is rapidly increasing. Given this reality, the argument could be made that private citizens no longer have any "reasonable" expectation of privacy in public spaces in relation to being either observed or recorded. In the context of section 8 *Charter* jurisprudence, the SCC has clarified that whether or not surveillance technologies are in common use or widely-adopted by the public should not be determinative of the reasonableness of citizens' privacy expectations.⁶³ A diminished subjective expectation of privacy (due, for example, to the prevalence of invasive surveillance technologies), should not automatically result in a lowering of constitutional protections.⁶⁴ Bailey argues that the understanding of privacy expressed by the SCC has the potential to maintain a robust protection of privacy in Canadian constitutional law, and that we must further develop an understanding of the implications of surveillance beyond those experienced by individual section 8 claimants.⁶⁵

c. *Decreased ability to control digital information*

A final, relevant, difficulty with traditional understandings of privacy in the digital age lies in individuals' inability to control their digital information, including recordings of their image, and the scope of the potential audience for that information if it is published online or disclosed to a third party.

In the not too distant past, one-on-one communication with another person could generally be assumed to be private, apart from the risk that the person would breach social conventions and disclose the contents of the conversation to others.⁶⁶ Even where conversations did not take place in-person, a third party gaining access to a private communication would require a telephone wiretap or physical interference with one's mail, both of which would be a seemingly obvious breach of a reasonable person's privacy expectations. This reality has begun to change, however, as digital intermediaries with access to the content of our communications have become central to nearly all forms of "one-on-one" digital interaction. Susan Magoitau notes that we can no longer exclude third parties from

62. *R v Duarte*, [1990] 1 SCR 30 at 44 [*Duarte*].

63. See *R v Tessling*, 2004 SCC 67 at para 57, [2004] 3 SCR 432 [*Tessling*].

64. *Ibid* at para 42. See also Bailey, "Framed by Section 8," *supra* note 17 at 293.

65. Bailey, "Framed by Section 8," *supra* note 17 at 303.

66. See *Duarte*, *supra* note 62 at paras 43-44.

our information, and the lack of control we exercise over our digital information in the hands of third parties is a social problem beyond the criminal law arena.⁶⁷

The SCC majority in the section 8 decision *R. v. Dyment* acknowledged that in modern society, individuals may wish or be compelled to share personal information with others, but that there are many situations where a person will retain a reasonable expectation that the information shared will remain confidential to the persons to whom and purposes for which it was divulged.⁶⁸ Communications technologies have evolved significantly since *Dyment*, and it is questionable what degree of privacy individuals can reasonably expect now that they are frequently required to agree to unilaterally-drafted Terms of Service Agreements to engage in “private” communications, which often provide intermediaries with access to vast swaths of personal information.⁶⁹

We have lost some further measure of control over our private communications, in the sense that it is now easy for recipients to share the contents of these communications with a potentially infinite audience. Consenting to be photographed, or sending a photograph to a friend or partner, inherently lowers one’s REOP in that photograph, since the existence of a digital recording factually diminishes one’s control over the image.⁷⁰ Anne S.Y. Cheung argues that it is no longer meaningful to differentiate the act of picture-taking from dissemination of information—if we allow another person to take our picture, or send that person a picture, we know that having that image broadly distributed online is as simple as the click of a button.⁷¹ Given this reality, can any expectation of privacy in one’s digitally-recorded image truly be considered reasonable?

The question of whether a person can have any REOP in relation to their digital image is even more acute in instances where they have chosen to disseminate that recording, rather than merely consenting to be photographed. As we have seen, the definition of “intimate image” in the NCDII provisions requires that the subject must retain a REOP at the time

67. Magoitau, *supra* note 55 at 506-507.

68. *R v Dyment*, [1988] 2 SCR 417 at para 22 [*Dyment*].

69. See Nicolo Zingales, “Accountability 2.0: Towards a Special Responsibility for Internet Intermediaries” (2013) GigaNet: Global Internet Governance Academic Network, Annual Symposium, online: <<https://ssrn.com/abstract=2809830>> at 32-33. See also Emily Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge, UK: Cambridge University Press, 2015) for a broader discussion of the control over information and expression exercised by “internet information gatekeepers,” the impact on the right to freedom of expression, and the law’s role in regulating these intermediaries.

70. Slane, “Scanning,” *supra* note 12 at 560.

71. Anne SY Cheung, “Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd” (2009) 1:2 J of Media L 191 at 206 [Cheung, “Rethinking Public Privacy”].

of the non-consensual distribution. This raises the question of whether a person's consent to some limited disclosure will automatically result in a loss of any and all REOP with regard to further dissemination.⁷² Waldman argues that traditional theories of privacy premised on ideas of separation, secrecy and exclusion, which would view privacy rights as extinguished upon disclosure, are a poor fit in the new digital context.⁷³

The current technological realities of the digital age are such that most Canadians are aware, or should reasonably be aware, that digital technologies can allow large audiences to view our activities in "private" spaces; that we will frequently be recorded in public via CCTV and other people's smartphones; that third party intermediaries have access to the contents of our personal communications; and that any information about ourselves, including images, that we share with others or allow to be recorded digitally, have the potential to be easily, widely, and permanently disseminated online. A strictly factual approach to assessing the existence of a REOP in the modern, networked world, would result in extremely limited circumstances where privacy can reasonably be expected.

III. *A feminist-inspired, technology-informed approach to privacy expectations*

Given the gendered nature of the Sexual Privacy offences and digital technologies' potential to erode privacy expectations, courts need to approach the Sexual Privacy Offences' REOP standard in a manner that is feminist-inspired (seeking to promote women's and girls' equality interests) and technology-informed (accounting for modern technological realities). Such an approach involves treating privacy as a positive right, and the REOP as a normative standard, requiring consideration of relevant values and interests such as women's and girls' *Charter* right to equality.

1. *Privacy as a positive right*

Understanding privacy as a positive right, as opposed to a negative right to exclude, preserves the value of privacy in the modern, digital age, where individuals are often required to choose between taking a minor risk of exposure, or forgoing an activity or association altogether.⁷⁴ This approach

72. The wording of the *Code's* NCDII provisions is such that one could argue that a person loses any REOP in relation to an intimate image once it has been disclosed to another person, even if that disclosure occurred non-consensually. For example, if an intimate partner sends an intimate image to a third party without the consent of the subject, and the subject becomes aware of the disclosure, the subject could be said to have lost her REOP in relation to the image with respect to any *further* dissemination, since, as others have viewed the image it is no longer private, and it can be easily and widely disseminated.

73. Waldman, *supra* note 56 at 613, 624.

74. See *ibid* at 588, citing Solove, *Digital Person*, *supra* note 56 at 87; Paton-Simpson, *supra* note

protects the competing desires of people to maintain privacy while participating socially, consistent with an interpretation of privacy as a set of norms enabling interaction, rather than a state of social withdrawal.⁷⁵

Treating privacy as a positive right in relation to the Sexual Privacy Offences would ensure that judicial determination of whether a REOP exists will not turn exclusively on the degree to which a person exercises control over their body or intimate images, which, as demonstrated above, may be increasingly difficult in the digital age.⁷⁶ Appearing in public, consenting to be photographed in a sexualized context, or sharing sexualized photographs with some limited audience will not result in an automatic waiver of all privacy expectations when privacy is understood as a positive right.⁷⁷ Consent to some level of observation or recording would be understood as limited to that particular activity or context.⁷⁸ This conception of privacy accounts for the differential harms inherent in particular observation or recording activities, such as the distinction between casual observation and focused staring, or incidental capture on CCTV and targeted recording for a sexual purpose.⁷⁹ Such distinctions are necessary in the digital age, where technology greatly increases the average person's ability to observe and record others, and where any resulting recordings can be disseminated easily and widely online.

Women's and girls' equality rights would be significantly undermined if the right to privacy were understood as a negative right to exclude others, extending only to "private" locations, areas of the body that are kept covered, or information or images over which an individual exercises total control. Such an understanding would require women and girls to take extraordinary measures to conceal their bodies in order to avoid being objectified and sexualized for consumption online, and is reminiscent of

47 at 338.

75. See Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 7, cited in Bailey, "Equality-Enhancing," *supra* note 49 at 273; Lisa Austin, "Privacy, Shame and the Anxieties of Identity" (2012), online: <<https://ssrn.com/abstract=2061748>>, cited in Laidlaw, "Online Shaming," *supra* note 48 at 20.

76. Slane, "Scanning," *supra* note 12 at 545, 560, 570, 582. See also James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113:6 Yale LJ 1151 at 1161-1162, 1189, 1198, who explains that the European Union takes a dignity-based approach to privacy rights, as these rights are grounded in an individual's ongoing right to control their public image, and a person's image (including their nude image) is not definitively alienable.

77. The European Court of Human Rights has recognized that going about one's daily life is private in nature, and one does not forfeit their right to privacy simply by existing out in the world (Laidlaw, "Online Shaming," *supra* note 48 at 16). See also Slane, "Scanning," *supra* note 12 at 570.

78. See Paton-Simpson, *supra* note 47 at 333.

79. See *ibid* at 327.

victim-blaming narratives in sexual assault cases, where a victim's clothing or "risky" behaviour is conceived of as contributing to her assault.⁸⁰

2. *A normative approach to privacy*

The second element of a feminist-inspired, technology-informed approach to privacy requires approaching the REOP as a normative standard. The SCC has previously articulated that the REOP is a "normative, rather than a descriptive standard" in the context of section 8 *Charter* jurisprudence.⁸¹ Pursuant to this approach, an analysis of whether a person had a REOP in certain circumstances must be assessed in the light of the competing values and interests at stake in the circumstances of a given case, rather than whether an expectation of privacy was subjectively present or factually reasonable.⁸² Such an understanding ensures that the lack of a subjective expectation of privacy on the part of the victim (due, for example, to the proliferation of privacy-invasive technologies) will not result in an automatic loss of a REOP.⁸³ Viewing privacy as lost when the risk of observation or recording factually exists would be particularly problematic in relation to the gendered Sexual Privacy Offences, as it would make the scope of women's and girls' privacy expectations contingent on the market demand for surreptitious recordings and recording technologies.⁸⁴

A normative approach to the REOP standard requires consideration of the values and interests at stake. In the context of section 8 jurisprudence, the SCC has identified human dignity as a core value protected by the right to privacy.⁸⁵ Numerous academics have also emphasized the crucial role privacy plays in protecting and preserving human dignity.⁸⁶ As previously noted, the Sexual Privacy Offences are aimed at protecting sexual privacy, premised on the understanding that human dignity, bodily autonomy, and

80. Bailey & Mathen, *supra* note 24 at 45. See also Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron L Rev* 865 at 879-882.

81. *Tessling*, *supra* note 63 at para 42.

82. See, e.g., *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at 159-160 [*Hunter*], cited in *R v Patrick*, [2009] 1 SCR 579 at para 14.

83. *Tessling*, *supra* note 63 at para 42.

84. See Paton-Simpson, *supra* note 47 at 340; Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford, CA: Stanford University Press, 2010) at 235.

85. See *Dymnt*, *supra* note 68 at paras 21-22; *R v Fearon*, 2014 SCC 77 at para 20, [2014] 3 SCR 621. The Court reasoned in *Schreiber v Canada* that the degree of privacy protected by the law "is closely linked to the effect that a breach of that privacy would have on the freedom and dignity of the individual" (*Schreiber v Canada (Attorney General)*, [1998] 1 SCR 841 at para 19).

86. See Cheung, "Rethinking Public Privacy," *supra* note 71 at 210-212; David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) cited in Laidlaw, "Online Shaming," *supra* note 48 at 9-10; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *EJIL* 655, cited in Anne Cheung, "Revisiting Privacy and Dignity: Online Shaming in the Global E-Village" (2014) 3:2 *Laws* 301 at 306.

sexual integrity are significantly undermined through the non-consensual nature of the observation, recording, or distribution at the heart of these offences.⁸⁷ Voyeurism and NCDII devalue victims' humanity through sexualized objectification, instrumentalization, and humiliation.⁸⁸

Sexual privacy is necessary for women's and girls' collective right to equality, in addition to individual dignity, bodily autonomy, and sexual integrity. Elizabeth Schneider argues that equality and privacy are inextricably linked and mutually dependent in cases involving women's rights, with concepts of equality being necessary for a robust understanding of privacy, and privacy necessary for the full realization of equality.⁸⁹ She claims that "[p]rivacy that is grounded in equality and is viewed as an aspect of autonomy, protecting bodily integrity and making abuse impermissible, is based on a genuine recognition of dignity and personhood."⁹⁰ Bailey argues that judges must take an equality-enhancing approach to privacy in the context of hate speech, obscenity, and child-pornography, which would place greater value on privacy when it produces substantive equality (such as women's right to sexual privacy in public spaces), and less value on those forms of privacy that produce substantive inequality (such as a right to privately abuse one's intimate partner).⁹¹

It is a presumption in statutory interpretation that Parliament intended to enact legislation in conformity with the *Charter*, and a constitutional reading is preferable over a reading that is unconstitutional.⁹² There has been no recognition of a link between privacy and the *Charter* right to equality in the section 8 jurisprudence. This is not surprising, given that search and seizure law is concerned with state surveillance in relation to law enforcement, rather than sexualised observation or recording by private citizens. It is the sexualised nature of the Sexual Privacy Offences that mark women and girls out as likely targets in a society that normalizes their objectification. For the REOP standard in the Sexual Privacy Offences to be read in a way that is consistent with women's and girls' right to equality, judges must take into account the fact that women and girls are overwhelmingly targeted as victims in these crimes on the

87. See Bailey, "Equality-Enhancing," *supra* note 49 at 277, who notes the significant impacts on victims' dignity, independence, and autonomy, resulting from the threat of uncontrollable ongoing circulation of a record of their abuse.

88. See Laidlaw, "Online Shaming," *supra* note 48 at 10, 13, who notes that "traditional" cases of revenge pornography will always involve humiliation and constitute an affront to dignity.

89. Schneider, *supra* note 50 at 138.

90. *Ibid* at 152.

91. Bailey, "Equality-Enhancing," *supra* note 49 at 295.

92. See *R v Sharpe*, 2001 SCC 2 at para 33, [2001] 1 SCR 45 [*Sharpe*]; *R v Jarvis*, 2018, SCC File No. 37833 (Factum of the Appellant) at para 39; LEAF Factum, *supra* note 3 at para 32.

basis of their gender, due to the same misogynistic narratives of male entitlement to women's bodies that underlie other sexual offences, and the negative impacts on women's and girls' right to equality occasioned by these offences.⁹³ The *Jarvis* decision presented the SCC with its first opportunity to make explicit the link between privacy and equality in relation to the Sexual Privacy Offences, and articulate an approach to the REOP standard reflective of the gendered nature of these offences and the significant threats to privacy inherent in the proliferation of invasive digital technologies.⁹⁴

IV. *R. v. Jarvis*

Jarvis involved a London, Ontario high school teacher who used a camera pen to surreptitiously film female students at his school, focusing on their chests and cleavage. As the recordings did not depict students who were nude or engaged in sexual activity, or in a place where nudity or sexual activity could be reasonably expected, Jarvis was charged under subsection 162(1)(c) of the *Code*, which prohibits voyeuristic observation or recording for a sexual purpose. At trial, Jarvis was acquitted because the trial judge was not satisfied beyond a reasonable doubt that the videos were recorded for a sexual purpose.⁹⁵ On appeal, Feldman J.A., writing for the majority of the Ontario Court of Appeal upheld the acquittal. While finding the recordings had been made for a sexual purpose, the majority disagreed with the trial judge's finding that the students were in circumstances that give rise to a REOP, given that they were in a location where they knew they could be observed and recorded by security cameras.⁹⁶

The only issue for determination before the SCC was whether the Court of Appeal erred in finding the students were not in circumstances giving rise to a REOP.⁹⁷ Jarvis argued that a person has a REOP: in a place where they expect not to be observed; in relation to parts of their body that are kept covered or hidden; or in relation to particular people who they do not expect to observe them in a given space, reflecting an understanding

93. See LEAF Factum, *supra* note 3 at paras 1, 3; Slane & Langlois, *supra* note 34 at 43.

94. See LEAF Factum, *supra* note 3 at paras 4, 34; *R v Jarvis*, 2018, SCC File No. 37833 (Factum of the Intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic), available online: <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM030_Intervener_Samuelson-Glushko-Canadian-Internet-Policy-and-Public-Interest-Clinic.pdf> [CIPPIC Factum] at paras 4, 18.

95. *R v Jarvis*, 2015 ONSC 6813 at para 77.

96. *R v Jarvis*, 2017 ONCA 778 at paras 53-54, 8, 94, 104-105, 139 OR (3d) 754 [*Jarvis* ONCA]. Feldman J.A. found that any REOP in a public space would extend only to "areas of the body that are kept covered or hidden" (at para 96).

97. *Jarvis* SCC, *supra* note 4 at para 4.

of privacy as a negative right to exclude.⁹⁸ A determination of whether a REOP exists would, on this interpretation, turn on the location where the person is observed, and the degree of control they have over who may obtain visual access to them in that space.⁹⁹ The Crown argued that whether a REOP exists must be interpreted broadly, based on the totality of the circumstances.¹⁰⁰

The SCC agreed with the approach recommended by the Crown, finding that circumstances that give rise to a REOP “are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred,”¹⁰¹ based on the entire context in which the observation or recording took place. Wagner C.J., writing for the majority, outlined a non-exhaustive list of considerations in determining whether a person was in circumstances that gave rise to a REOP for the purpose of the voyeurism provisions, including:

- The location where the person was observed or recorded;
- Whether the impugned conduct consisted of observation or recording (as recording may involve a greater violation of privacy);
- Awareness or consent to potential observation or recording;
- The manner in which the observation or recording was done;
- The subject matter of the observation or recording (including whether a specific person or persons were targeted, the activity they were engaged in, and the parts of the body on which the observation or recording was focused);
- Any rules, regulations or policies that governed the observation or recording;
- The relationship between the target and the person who did the observing or recording;
- The purpose of the observation or recording; and
- The personal attributes of the target of the observation or recording (such as their age).¹⁰²

Applying these factors to the facts of the case at bar, Wagner C.J. found that the students Jarvis recorded had been in circumstances giving rise to a REOP, and convicted Jarvis of voyeurism.¹⁰³ For the remainder of this section, I will analyze the extent to which the reasons in *Jarvis* accord with a feminist-inspired, technology-informed approach to the REOP standard,

98. *Ibid* at para 25.

99. *Ibid* at paras 25-26.

100. *Ibid* at para 27.

101. *Ibid* at para 5.

102. *Ibid* at para 29.

103. *Ibid* at paras 72-88, 92.

both in treating privacy as a positive right, and in understanding the REOP as a normative standard.

1. *Privacy as a positive right*

The majority reasons in *Jarvis* reflect an understanding of privacy as a positive right. Wagner C.J. relied on section 8 jurisprudence in reaching numerous conclusions supportive of this understanding, finding section 8 jurisprudence “represents a rich body of judicial thought on the meaning of privacy in our society”¹⁰⁴ and reflects Canadians’ shared ideals about privacy. The majority found that individuals may retain a REOP even in places where they know they can be observed by others, or from which they cannot exclude others, and whether a person has a REOP in relation to certain conduct cannot turn on whether there was a risk they would be observed or recorded.¹⁰⁵ Further, the majority’s reasons indicate that consent to or awareness of some level of observation or recording must not be understood as consent to all forms of observation or recording, finding that privacy is not an “all-or-nothing” concept.¹⁰⁶ Individuals may be in circumstances where they can expect to be the subject of certain types of observation or recording, but not the subject of other types.¹⁰⁷

The majority’s reasons highlight the fact that recording may represent a fundamentally different level of intrusion than observation, as it can capture a level of detail the human eye cannot, is subject to manipulation, and can result in ongoing harms as victims live with the awareness that a recorded image may continue to exist and be viewed by the accused or others.¹⁰⁸ Recordings, according to Wagner C.J., can be “shared with others—including others whom the subject of the recording would not have willingly allowed to observe her in the circumstances in which the recording was made.”¹⁰⁹ Such a distinction is crucial in the digital age, where the potential for privacy-related harms increases exponentially when a person or activity is recorded, given the significant potential for widespread dissemination of such recordings online.

2. *A normative approach*

The majority in *Jarvis* found that the question of whether a person reasonably expects privacy is “necessarily a normative question that is to

104. *Ibid* at para 59. Côté, Brown and Rowe JJ disagreed with this approach in their concurring set of reasons, finding that the conceptual framework of *Charter* rights and *Code* offences should remain distinct (at paras 93-106).

105. *Ibid* at paras 37-40, 61, 68.

106. *Ibid* at paras 41, 61.

107. *Ibid* at paras 38, 62.

108. *Ibid* at para 62, citing *Sharpe*, *supra* note 92 at para 92.

109. *Ibid* at para 74.

be answered in light of the norms of conduct in our society.”¹¹⁰ Increasing development and availability of digital recording technologies, and individuals’ awareness of these technologies, will not result in an automatic diminishment or waiver of privacy expectations, or a finding that retaining such expectations is unreasonable.¹¹¹ Indeed, Wagner C.J. notes that such a factual approach would render the REOP standard meaningless, undermining Parliament’s purpose in enacting the voyeurism provisions.¹¹²

The majority’s reasons recognize privacy’s inherent connection to a number of values and interests in the context of voyeurism, including human dignity, sexual integrity, and the right to privacy in one’s body.¹¹³ Wagner C.J. cites section 8 jurisprudence in finding that individual dignity and autonomy are particularly harmed through violations of personal and informational privacy, and that safeguarding information about oneself is of paramount importance in modern society, closely tied to the dignity and integrity of the individual.¹¹⁴ The majority’s reasons highlight the particularly harmful nature of sexualized privacy invasions, finding there exists “societal consensus that there is a sphere of privacy regarding information about our sexual selves that is particularly worthy of respect,”¹¹⁵ that sexualized interference or intrusion is uniquely pernicious, and that the voyeurism provisions’ purpose in protecting individuals from sexual exploitation militates against a narrow reading of the REOP standard.

While the majority’s reasons recognize the sexual privacy interests at stake in cases of voyeurism, Wagner C.J. emphasizes that the determination of whether a REOP exists “does *not* involve an *ad hoc* balancing of the value of the accused’s interest in observation or recording against the value of the observed or recorded person’s interest in being left alone.”¹¹⁶ The majority rejected the approach taken by Huscroft J.A. in his dissenting reasons at the Ontario Court of Appeal, in which he found that a normative approach to the REOP standard requires identifying the competing interests at stake, and finding a person has a REOP “is to conclude that his or her interest in privacy *should* be prioritized over other interests.”¹¹⁷

The approach taken by Huscroft J.A. is more consistent with a feminist-inspired, equality-enhancing approach to the REOP as a truly

110. *Ibid* at para 68, citing *Tessling*, *supra* note 63 at para 42.

111. *Ibid* at paras 63, 68, citing *Tessling*, *supra* note 63 at paras 16, 42.

112. *Ibid* at para 68, citing *R v Wong*, [1990] 3 SCR 36 at 45.

113. *Ibid* at paras 48-51, 65-67.

114. *Ibid* at paras 67, 66, citing *Dymment*, *supra* note 68 at 429.

115. *Ibid* at paras 52, 82.

116. *Ibid* at para 69 (emphasis in original).

117. *Jarvis ONCA*, *supra* note 96 at para 117.

normative standard. The concurring judges in *Jarvis* would have adopted Huscroft J.A.'s approach, finding the infringement of a person's REOP in the context of voyeurism "can be conceptualized as crossing a threshold where the law prioritizes the observed person's interest in protecting their autonomy and sexual integrity over the accused's liberty of action."¹¹⁸ The concurring reasons highlight the fact that voyeurism is a sexual offence, requiring an interpretation of privacy having regard to personal autonomy and sexual integrity, such that an observation or recording will occur in circumstances that give rise to a REOP when (a) it diminishes the subject's ability to maintain control over their image and (b) it infringes the subject's sexual integrity.¹¹⁹ Such an approach would require judges to specifically consider the impact of an offender's actions on a victim's sexual integrity as part of the REOP analysis, ensuring that the sexualized violation inherent in voyeurism is given specific consideration in each case.

Neither the majority nor concurring reasons is entirely consistent with an equality-enhancing, normative approach to the REOP standard, which would require consideration not only of an individual complainant's sexual privacy interests, but of the broader impact on women's and girls' equality rights, each time judges are tasked with determining whether a REOP existed in a given set of circumstances. While the majority in *Jarvis* considered the sexual privacy interests protected by the voyeurism provisions in electing to treat privacy as a positive right, and in finding that privacy expectations will not be waived or eroded simply because privacy-invasive technologies exist, they did not go so far as requiring judges to specifically consider the values and interests at stake each time a REOP is assessed.¹²⁰ Neither the majority nor concurring reasons in *Jarvis* mention the gendered nature of voyeurism, or highlight equality as a value implicated in the Sexual Privacy Offences. This represents a significant missed opportunity, and a seemingly intentional choice by the Court, given that both sets of reasons explicitly highlight other values at stake in voyeurism, and two separate interveners called on the Court to recognize the gendered nature of voyeurism and its impacts on women's and girls' equality.¹²¹ That is not to say that the gendered nature of these offences, or interveners' arguments for an equality-enhancing approach,

118. *Jarvis* SCC, *supra* note 4 at para 132.

119. *Ibid* at paras 118, 133.

120. Wagner C.J. emphasizes that "the only question to be asked in determining whether a person who is observed or recorded was in circumstances that give rise to a [REOP] is whether that person was in circumstances in which she would reasonably have expected not to be the subject of the observation or recording at issue" (*Ibid* at para 70).

121. See LEAF Factum, *supra* note 3 at paras 4, 34; CIPPIC Factum, *supra* note 94 at paras 4, 18.

did not inform judicial interpretation of the REOP standard in *Jarvis*. The majority's reasons reflect an awareness that it is women and girls who are disproportionately targeted by this crime, as the pronoun "she" is used consistently throughout the decision in reference to hypothetical victims of voyeurism.¹²²

The positive, normative approach to privacy and the REOP standard adopted by the majority will go a long way toward protecting the sexual privacy of potential victims of voyeurism, who are overwhelmingly women and girls. It has the result that women and girls will not be found, by virtue of appearing in public, consenting to be recorded in a particular context, consenting to sexual activity, or wearing "revealing" clothing, to have waived their dignity-based rights to sexual privacy.¹²³ Individuals who would choose to non-consensually objectify and instrumentalize women and girls for their own sexual gratification have now been given a clear message that such behaviour is not only harmful, but criminal when it involves surreptitious observation or recording. While the gendered nature of voyeurism was not specifically addressed, the majority's reasons recognize the significant values at stake in cases of voyeurism beyond a negative, control-based right to privacy, and have opened the door for judges in future decisions to ensure that women and girls can retain privacy expectations in relation to their own images and bodies in the vast majority of circumstances where they are non-consensually observed or recorded. In the final section of this paper, I outline some initial thoughts on how the majority's reasons in *Jarvis* may apply in the context of the other Sexual Privacy Offence, NCDII.

V. *Implications for the non-consensual distribution of intimate images provisions*

As previously noted, the approach to the REOP standard articulated in *Jarvis* is likely to be applied in relation to NCDII, given the significant conceptual similarities between the two Sexual Privacy Offences.¹²⁴ While both offences require an assessment of the complainant's REOP, the NCDII provisions incorporate this standard in such a way as to make direct application of the contextual factors outlined by the majority in *Jarvis* somewhat difficult. In order for a recording to meet the definition

122. *Jarvis* SCC, *supra* note 4 at paras 37-40.

123. See Bailey & Mathen, *supra* note 24 at 45.

124. While neither the majority nor concurring judgment in *Jarvis* discussed the implications of their interpretation of the REOP standard for the NCDII provisions, Rowe J's concurring reasons note that voyeurism and NCDII are the first offences in the *Code* to include a complainant's REOP as an element of the offence (*Jarvis* SCC, *supra* note 4 at para 118).

of “intimate image” under the NCDII provisions, judges must assess a complainant’s REOP at two distinct points in time: when the recording was made, and when it was non-consensually distributed.¹²⁵ If the recording was not made in circumstances giving rise to a REOP, or if the person depicted no longer retained a REOP at the time of distribution, the recording is not an “intimate image” and its non-consensual distribution will not constitute a criminal offence.

The first REOP analysis required by the NCDII provisions relates to the complainant’s privacy expectations at the time of recording, similar to the voyeurism provisions. In *Jarvis*, the majority found that a REOP in the voyeurism context is “an expectation that one will not be observed or visually recorded.”¹²⁶ This interpretation makes sense in the voyeurism context, where the observation or recording must be done surreptitiously in order to ground a conviction. The NCDII provisions, on the other hand, were specifically intended to apply to recordings that were initially made with the consent or participation of the person depicted.¹²⁷ This begs the question: what circumstances will give rise to a REOP in relation to a consensual sexualised recording?

The majority in *Jarvis* found that determining whether a person was in circumstances that give rise to a REOP “requires determining whether the person was in circumstances in which she would have reasonably expected to be free from the type of intrusion...that she experienced.”¹²⁸ In the context of NCDII, the recording itself may not be inherently intrusive, and as such an analysis of whether the recording was made in circumstances that give rise to a REOP should seek to answer whether the recording was made in circumstances in which the complainant would reasonably be expected to be free from the type of *non-consensual distribution* that ultimately occurred. This, like the REOP analysis in the voyeurism provisions, would require judges to take into consideration the entire context in which the observation or recording took place.

There may be a significant temporal gap between the time a recording is made (when the complainant’s initial REOP crystallizes), and the time of distribution. As a result, any circumstances that could erode or negate the complainant’s initial REOP arising between the time of recording and time of distribution can be accounted for in the second analysis of REOP required by the provisions: whether the person depicted retains a REOP at

125. *Code*, *supra* note 1 at ss 162.1(2)(b), 162.1(2)(c).

126. *Jarvis* SCC, *supra* note 4 at para 36.

127. Canada, “Cyberbullying & NCDII,” *supra* note 6 at 16.

128. *Jarvis* SCC, *supra* note 4 at para 71.

the time of distribution. Whether or not a person retains a REOP at the time of distribution can be answered by assessing whether a reasonable person would *continue* to expect that the recording would not be distributed in the manner that in fact occurred, in light of all the circumstances.¹²⁹

The non-exhaustive list of considerations set out by the majority in *Jarvis* for assessing whether a person was in circumstances that give rise to a REOP may serve as a starting point for judges in determining whether a person had or retained a REOP under the NCDII provisions. How each of these factors will be interpreted and applied in relation to both voyeurism and NCDII remains to be seen in the emerging case law. For now, what is crucial is that the broader approach taken by the majority in *Jarvis*, namely, treating privacy as a positive right and the REOP as a normative standard, is taken up and expanded upon by judges in cases of NCDII.

Given that the NCDII provisions are intended to cover recordings that were initially made with the participation or consent of the person depicted, privacy must be understood as a positive right in order to ensure that this initial consent is not understood as ongoing consent to subsequent dissemination of that recording. Similarly, this understanding can ensure that a person who appears nude or engages in sexual activity in a public or semi-public setting does not automatically lose any and all REOP with respect to any recording of that activity. This approach should apply regardless of whether the individual is aware simply of the risk they could be recorded, or are in fact aware that they are being recorded, as the majority in *Jarvis* noted that recordings that are made openly can breach a person's REOP (though such recordings would not be captured by the voyeurism provisions).¹³⁰ Understanding privacy as a positive right reflects the differential harms of recording, as opposed to observation, in a digital age.

That is not to say an individual's decision to appear nude or engage in sexual activity in a public space, while aware they are being or could be recorded, would not result in a diminishment of their REOP. Factors such as location and awareness or consent to observation or recording are part of the context that should inform a court's analysis of whether a person had or retained a REOP in relation to their sexualised images.¹³¹ However, it is crucial that judges applying the NCDII provisions reject a strictly location- or risk-based approach, in line with the majority's reasons in *Jarvis*. If being nude or engaging in sexual activity in a public setting *automatically*

129. See *ibid* at paras 5, 28, 91.

130. *Ibid* at para 33.

131. *Ibid* at para 29.

extinguished one's REOP in any resulting recordings, an individual who, for example, is filmed while being sexually assaulted in a semi-public space such as a house party would have no REOP, and distribution of those unquestionably harmful recordings would not constitute NCDII. Such a result would clearly be contrary to Parliament's intentions in enacting the NCDII provisions, and would significantly undermine the victim's sexual privacy, and women's and girls' collective right to equality.¹³²

Conclusion

The proliferation of handheld, internet-equipped, digital recording technologies has revealed latent ambiguities in our basic social and legal understandings of privacy.¹³³ Activities in "private" spaces may now be broadcast widely online, appearing in public carries with it a significant risk of being recorded, and personal information and recordings can be disseminated to a nearly infinite audience with the click of a button. How judges interpret the right to privacy in the digital age has significant potential to shape the future of the internet, and therefore society.¹³⁴

Women and girls are most likely to be victims of the Sexual Privacy Offences, as these offences are grounded in the same misogynistic narratives that underlie sexualized offending against women and girls more generally. The approach outlined by the majority in *Jarvis* highlights that women and girls can reasonably expect not to be non-consensually objectified, observed, and recorded in both traditionally "public" and "private" spaces, representing a crucial clarification in a society marked by gender inequality and invasive digital technologies. While neither the majority nor concurring reasons in *Jarvis* made explicit the link between the Sexual Privacy Offences and women's and girls' right to equality, by understanding REOP as a normative standard, the decision leaves open the possibility that future judges will adopt a truly equality-enhancing approach to the REOP standard in the digital age.

132. This example closely resembles the sexualized victimization of Rehtaeh Parsons, whose death by suicide after having her assault recorded and her subsequent bullying was an impetus for Bill C-13 (See Felt, *supra* note 14; Bailey, "Juggernaut," *supra* note 6 at 672).

133. In his seminal books on Internet Regulation, *Code* and *Code 2.0*, Lawrence Lessig notes the technologies of the internet reveal such ambiguities in constitutional law, and argues that the legal system must translate constitutional principles in this new context, rather than allowing private entities and market forces to shape online norms and social values (Lawrence Lessig, *Code*, Version 2.0 (New York: Basic Books, 2006) at 25, 157-168). See also Nissenbaum, *supra* note 84 at 118.

134. See Callamard, *supra* note 55.