

DISEMBODED DATA AND CORPOREAL VIOLATION: OUR GENDERED PRIVACY LAW PRIORITIES AND PREOCCUPATIONS

JESSICA LAKE*

Whether one is more (or less) concerned with issues of image rights or the use of online tracking mechanisms by retailers, the role of CCTV in city streets, the ability to access a safe abortion, the media's publication of salacious stories, the ability of government agencies to collect personal information, or the abuse and harassment of individuals in the home or online is likely to be influenced by social and historical experience. In this article I argue that such experience and consequent investments in 'privacy' are also gendered and should be recognised as such by legal scholars of privacy, legislators and courts. Privacy law relates inextricably to the self and calls into question how we (as individuals and groups) envision, articulate and perform our sense of self. It marks out boundaries between persons and perceived sources of power and oppression. This article examines three periods of heated privacy law debate (mid 19th century, turn of 20th century and 1960s/70s) and demonstrates that whereas men's privacy priorities primarily focused on controlling and concealing information about themselves; women's privacy issues mostly centred on protecting against violations of themselves. Masculine privacy focuses on the ways in which disembodied or abstract data – guarded by or as forms of property – poses challenges to professional and public reputations. Feminine constructions of privacy are preoccupied with invasions of the autonomy and dignity of embodied selves. In order to further develop privacy law in Australia, we must first recognize that gender fundamentally influences our paradigms and priorities of privacy protection – as seen in pressing debates about online consumer data protection and 'revenge pornography'.

* Dr Jessica Lake is a Lecturer in Law at Swinburne University of Technology. This article was partly researched and written while she was the Karl Loewenstein Fellow in Political Science and Jurisprudence at Amherst College, USA.

I INTRODUCTION

Whether one is more (or less) concerned with issues of image rights or the use of online tracking mechanisms by retailers, the role of CCTV in city streets, the ability to access a safe abortion, the media's publication of salacious stories, the ability of government agencies to collect personal information, or the abuse and harassment of individuals in the home or online is likely to be influenced by social and historical experience. In this article I argue that such experience and consequent investments in 'privacy' are also gendered and should be recognised as such by legal scholars of privacy, legislators and courts.

Since the mid 19th century (when 'privacy' was first articulated as a legal value) women have primarily advanced privacy interests and cases that are corporeal in nature – involving invasions of their bodies – whereas men's privacy priorities have predominantly focused on information – demanding its concealment from, or control by, the state, the press, the police, and policy makers. Repeated surveys and case law suggest that men today still care more about corporate and government surveillance than do women, while women are more concerned about being stalked, harassed and violated by other people. Yet, in Australia, despite numerous attempts at law reform, 'privacy law' only protects our information, not against incursions or invasions of personal integrity. This article examines the historical and contemporary gendered patterns within Anglo-American privacy jurisprudence and calls attention to the consequences. In recent decades, the seeming neutrality of information privacy law, a field of increasing interest to scholars and legislative reformers, has worked to obscure or negate the fundamental role of gender in privacy law's development and its current challenges.

Privacy law relates inextricably to the self and calls into question how we (as individuals and groups) envision and articulate our subjective sense of self. It marks out boundaries between persons and perceived sources of power and oppression. Legal and political debates about 'privacy' reflect fundamental battles over the ways in which people identify and address others – negotiations over the cultural representation and performance of our sexed, gendered and racialised bodies. They reveal the preoccupations and priorities at play within historically situated narratives and mythologies that still resonate.

As a particularly slippery and fluid concept, 'privacy' can be readily invoked in a wide variety of contexts.¹ It is therefore imperative to understand and identify

1 There is much scholarship debating the necessity or ability to define the meaning of 'privacy' within the legal and political domains. See, eg, Alan P Bates, 'Privacy – A Useful Concept?' (1964) 42 *Social Forces* 429; Julie E Cohen, 'What Privacy Is For' (2013) 126 *Harvard Law Review* 1904; Frederick Davis, 'What Do We Mean by Right to Privacy' (1959) 4 *South Dakota Law Review* 1; Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421; Ken Gormley, 'One Hundred Years of Privacy' (1992) *Wisconsin Law Review* 1335; Debbie V S Kasper, 'The Evolution (or Devolution) of Privacy' (2005) 20 *Sociological Forum* 69; David Lindsay, 'An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law' (2005) 29 *Melbourne University Law Review* 131; Helen Nissenbaum, 'Privacy as Contextual Integrity' (2004) 79 *Washington Law Review* 119; W A Parent, 'Privacy, Morality, and the Law' (1983) 12 *Philosophy & Public Affairs* 269; Richard B Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275; William L Prosser,

the exact circumstances in which it is employed – and in whose interest. Privacy can only masquerade as a neutral and coherent concept on the page of a law review.² Within law's practical applications, its use and abuse are specific, and reflect historically complex and intersecting interests of gender, race and class. In this article, I build upon my earlier study of the women who forged a right to privacy in the United States, *The Face that Launched a Thousand Lawsuits*,³ to make a different argument concerning the gendered patterns in privacy law during three important time periods: the mid-late 19th century, the turn of the last century and the 1960s and 70s. These points in time represent key moments in privacy law's development – when widespread social debates crystallised in landmark precedents or new pieces of legislation. These are periods that witnessed particular anxieties about changing gender identities and expectations. Legal discourses about 'privacy' spoke to uncertainties about the ways in which men and women were being redrawn in (and into) public space. I show that whereas men's privacy priorities have primarily focused on controlling and concealing information *about* themselves, women's privacy issues have mostly centred on protecting against violations *of* themselves. Masculine privacy concerns have focused on ways in which disembodied or abstract data – guarded by, or as, forms of property – posed challenges to their professional and public standing. Feminine constructions of privacy have been preoccupied with invasions of the autonomy and dignity of their embodied selves. Norms and discourses on gender continue to reflect and influence our paradigms of privacy protection – as seen in Australia where there has been considerable development of information privacy law compared to the relative lack of civil laws to protect against revenge pornography or other serious invasions of privacy.

This article thus opens up new ground in the scholarship on gender and privacy law. Previous work focused on the late 19th century has argued that common law privacy rights imposed duties of modesty on women (in line with traditional ideals of femininity) rather than conferring positive rights to decisional privacy or autonomy.⁴ Other scholars have shown how the quasi-proprietary nature of common law privacy rights facilitated the careers of women in the entertainment industries.⁵ Feminist legal philosophers have debated the value of 'privacy' when

'Privacy' (1960) 48 *California Law Review* 383; Janice Richardson, 'The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy' (2011) 21 *Minds and Machines* 517; Spiros Simitis, 'Privacy – An Endless Debate?' (2010) 98 *California Law Review* 1989; Daniel J Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1087; Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295; James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151.

2 Ruth Gavison argues that privacy should be regarded as a neutral and coherent concept that covers the three distinct but interdependent elements of anonymity, secrecy and solitude. See Gavison, 'Privacy and the Limits of Law', above n 1.

3 Jessica Lake, *The Face that Launched a Thousand Lawsuits: The American Women Who Forged a Right to Privacy* (Yale University Press, 2016).

4 See, eg, Anita L Allen and Erin Mack, 'How Privacy Got Its Gender' (1989) 10 *Northern Illinois University Law Review* 441; Caroline Danielson, 'The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in US Law' (1999) 25 *Feminist Studies* 311.

5 See, eg, Dorothy Glancy, 'Privacy and the Other Miss M' (1989) 10 *Northern Illinois University Law Review* 401; Jessica Lake, *The Face that Launched a Thousand Lawsuits*, above n 3; Michael Madow,

the public/private dichotomy, so entrenched in Western law and philosophy, has worked and still works to relegate and devalue women's labour and attributes traditionally associated with femininity.⁶

Constitutional analyses of the establishment of privacy rights in 1960s and 70s in the United States pointed to the limits of framing women's battles for reproductive liberties via the language of privacy; while others have sought to demonstrate the multifaceted nature of privacy that is at stake in decisions to terminate pregnancies.⁷ Some scholars have analysed the intersections of race and gender in privacy's history, to argue that whereas white women symbolised privacy (but could not access it), black women's historical commodification positioned them as incapable of possessing it.⁸ More recently, a number of scholars have demonstrated that privacy rights are better understood as a class privilege and that poor women experience especially intrusive practices of surveillance – such as unscheduled home visits, interrogations over intimate relationships, drug testing, strip searching, and audio/visual monitoring – that are either enabled, overlooked or inadequately addressed by current legal regimes.⁹ Little, if any scholarship, however, has examined the complex relationship between masculinity and privacy, nor attempted to link present privacy debates about the regulation of data with historically gendered patterns of privacy articulation and protection. Yet we should recognise that privacy law has not become post-gender in its priorities and preoccupations, despite the seeming gender neutrality of data protection laws.

This article focuses on historical patterns of privacy debate and protection, particularly within the United States ('US'), to demonstrate their relevance and significance for Australia today. Amongst common law countries, privacy law is an area pioneered and cultivated by American precedent. Discussions of privacy within the law began in both the US and the United Kingdom in the mid 19th century, but only in various US states did it quickly evolve into a distinct statutory cause of action and a tort. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,¹⁰ the High Court's most detailed consideration of whether Australia should recognise a tortious right to privacy, Justices Gummow and Hayne described the US as the 'fount of privacy jurisprudence'.¹¹ Each opinion of the

'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *California Law Review* 125.

6 Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press, 2nd ed, 1993); Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford University Press, 1989).

7 See, eg, Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988); Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002); Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989).

8 See Katherine Adams, *Owning Up: Privacy, Property, and Belonging in US Women's Life Writing* (Oxford University Press, 2009); Eden Osucha, 'The Whiteness of Privacy: Race, Media, Law' (2009) 24(1) *Camera Obscura* 67.

9 See Khiara M Bridges, *The Poverty of Privacy Rights* (Stanford University Press, 2017); Michele Estrin Gilman, 'The Class Differential in Privacy Law' (2012) 77 *Brooklyn Law Review* 1389.

10 (2001) 208 CLR 199 ('*ABC v Lenah Game Meats*').

11 Ibid 253.

bench referred to the common law and constitutional manifestations of privacy law in the United States. For example, on the issue of whether a corporation should have a right to privacy, Justices Gummow and Hayne stated: ‘the common law in Australia upon corporate privacy should not depart from the course which has been worked out over a century in the United States’.¹²

When it came to considering a future right to privacy in Australia and the ways in which current information privacy regulation is exercised, the High Court recognised that the origin story and preponderance of precedent for privacy within the law is American. This is also evident in the influence of American privacy law scholarship on the legislation of common law countries, as well as within our own law reform proposals. In 1960, William Prosser, wrote a soon to be famous article that reviewed 80 years of privacy jurisprudence and delineated hundreds of cases into four neat categories.¹³ These categories formed the basis of torts within the US, as well as statutory actions in Canada and New Zealand.¹⁴ They also influenced discussions of new statutory laws at state and federal level in Australia.¹⁵ Our ideas of privacy, its paradigm of legislative protection and future projections germinated in American soil. Any in-depth examination of gendered patterns within our own privacy laws must engage with over a century of American code, case law, ideas and precedent.

This article examines three periods of heated privacy debate within the law. Part II focuses on the mid to late 19th century, when privacy was still grounded in the bricks and mortar of the family home. The legal maxim ‘a man’s home is his castle’ guarded (white, middle-class) men from the invasions of outsiders; while women, children, servants and slaves were ‘protected’ as, and within, this privileged regime of private property. Law’s reinforcement of fences and walls

12 Ibid 257.

13 See Prosser, above n 1. Prosser identified four types of privacy tort operating within the case law that are now reflected in the American Law Institute, *Restatement (Second) of Torts* (1977) §§ 652A–E. These are: 1) intrusion upon the plaintiff’s seclusion or solitude; 2) public disclosure of embarrassing private facts about the plaintiff; 3) publicity that places the plaintiff in a false light in the public eye; and 4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

14 In *Jones v Tsige* [2012] ONCA 32, the Court of Appeal for Ontario recognised the existence of the tort of invasion of privacy in the context of intrusion upon seclusion. In *Doe 464533 v N.D.* [2016] ONSC 541, the Court stated at [44]:

Plainly, writing in 1960, Prosser was discussing events that might occur in a pre-Internet world, where the concepts of pornographic websites and cyberbullying could never have been imagined. Nevertheless, the essence of the cause of action he described is the unauthorized public disclosure of private facts relating to the plaintiff that would be considered objectionable by a reasonable person.

They recognised the tort of publication of private facts in the context of the ‘revenge pornography’ case. In *Hosking v Runting* [2005] 1 NZLR 1, the New Zealand Court of Appeal recognised the tort of unauthorised publication of private facts. In *C v Holland* [2012] 3 NZLR 672, the New Zealand High Court recognised the tort of intrusion into seclusion.

15 See, eg, Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010) which cites Prosser several times and proposes two statutory causes based upon intrusion into seclusion and the publication of private facts. See also Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report No 123 (2014) 76:

The ALRC recommends that, in Australia, a new privacy tort should be confined to two broad categories of invasion of privacy, similar to the first two of Prosser’s four categories and similar to Moreham’s two overarching categories: (1) intrusion upon seclusion; and (2) misuse of private information.

effectively controlled the flow of personal information about and interference with the home's residents, whilst leaving the corporeal boundaries of women and children legally permeable.

Part III of the article traces the shift to technologically driven fears about 'the press' and snapshot photography, with public men (such as editor Edwin Godkin) employing 'privacy' to advocate for the protection of one's reputation from prurient gossip and the publication of personal information. At the same time, women began to use 'privacy' to contest the use and abuse of photographic images of their faces and bodies. These cases resulted in the establishment of the first right to privacy in the common law world.

In Part IV, I move on to the 1960s and 70s and the establishment of a constitutional right to privacy in the United States in relation to women's reproductive lives. The decision of *Roe v Wade* established a right to privacy that legally sanctioned the attachment between a woman's autonomous mind and her uterus,¹⁶ freeing her from forced childbirth. Here I suggest, however, that this constitutional right to privacy should be read in parallel with the contemporaneous work of legal academics such as Alan Westin and Arthur R Miller, who were pressing the dystopian privacy perils posed by databanks and computers, and nurturing fears about the collection, storage, use and dissemination of information by government agencies. Heightened fears about 'databanks' during this time resulted in the passing of the US *Privacy Act of 1974*,¹⁷ and some years later, the *Privacy Act 1988* (Cth) in Australia.

In conclusion, I reflect on these patterns in light of present day debates about non-consensual pornography and online privacy. I suggest that men – as consumers, citizens and scholars – are concerned more by the collection of information *about* them by corporations and governments and construct this as the major threat to 'privacy'. This masculinist construction of privacy has come to dominate legislative agendas and scholarly attention in recent decades, eliding other fundamental forms of privacy invasion.

II PRYING EYES, PRIVATE PROPERTY AND PERMEABLE BODIES

'We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence' held Justice Reade in the 1868 case of *State v Rhodes* in the Supreme Court of North Carolina.¹⁸ When Elizabeth Rhodes was beaten by her husband 'without any provocation', the Court recognised and protected the privacy of the home and the sovereignty of 'family government' by affirming the lower court's decision that Mr Rhodes was not guilty of the crimes of assault and battery.¹⁹ The law strengthened and bolstered the bricks and mortar of houses by patrolling and sealing the boundaries of private property.

16 410 US 113 (1973) ('*Roe*').

17 5 USC §552a (1974).

18 61 NC 453, 459 (1868).

19 *Ibid* 454.

There was little confusion as to what kinds of interests were being privileged here: ‘however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber’.²⁰ The court weighed Elizabeth Rhodes’ physical harm lightly against the gravity of Mr Rhodes’ privacy violation by government scrutiny or public curiosity.

In the mid 19th century, the infliction of force against her body was not considered or conceived as an offence against her ‘privacy’. Her injuries were relevant only in so far as they exposed private information about him: that he was a wife-beater. The legally enforced boundaries of his home and his associated right to control its inhabitants and information about what happened there, under the banner of ‘privacy’, underlined the permeability of the boundaries of her body. This case demonstrates how the law, in shaping ideas of respectable white masculinity in the 19th century, understood the value of privacy as the ability to restrict and conceal certain information that might bring ‘disgrace and exposure’ to him.²¹ This was accomplished primarily by embedding intangible legal rules within the tangible environment of property and its ‘man-made’ structures.

The paramount privacy of the domestic residence was encapsulated by the legal maxim ‘a man’s home is his castle’.²² In his book on the history of privacy in colonial New England, David Flaherty demonstrates that the experience of privacy – usually termed ‘solitude’ in his primary sources – was largely physical in nature.²³ Colonial New Englanders experienced an increasing amount of so-called ‘privacy’ as their plots of land scattered further from town centres, the size of their landholdings grew, the number of rooms in their houses multiplied and new architectural features such as hallways helped screen the inhabitants of a home from outsiders and one another.²⁴

In 1743, when Ann Leonard of Boston accused her husband of beating her, the Leonards’ neighbour, John Milliken, was interrogated and replied: ‘said Henry had made Shutters to his Windows, but I have often heard a Quarrelling and after that

20 Ibid 457.

21 Ibid 458.

22 Sir Edward Coke, in *Semayne’s Case* (1604) All ER Rep 62, famously stated:

In all cases when the King is party, the sheriff may break the party’s house, either to arrest him, or to do other execution of the King’s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors ... The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

See also *Weeks v United States*, 232 US 383, 390 (1914) (discussing the influence of the maxim on US law). Also, for a discussion of the origins and significance of this maxim for American law, see Jonathan L Hafetz, “‘A Man’s Home is His Castle?’: Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries’ (2002) 8 *William & Mary Journal of Women and the Law* 175.

23 ‘Well-planned communities and large home lots made positive contributions to privacy throughout the colonial period. The plentifulness of land guaranteed the physical privacy of the family home. Fields, orchards, and trees created a sense of solitude. A man could take individual precautions further to ensure his privacy.’: David H Flaherty, *Privacy in Colonial New England* (University Press of Virginia, 1972) 33.

24 See *ibid* 44.

have heard a noise which I apprehended to be a Striking a person against a Wall'.²⁵ Even though sounds could sometimes reverberate and shadowy scenes could be spied between cracks, privacy generally increased for land owners from the late 18th century.²⁶ These physical structures not only allowed for greater solitude and secrecy, but informed a legal system premised on their protection. The primacy of private property within the common law informed a large body of doctrine, including criminal law, the law of trespass and nuisance, and the Fourth Amendment of the US Constitution.²⁷

As many feminist legal scholars have documented, the common law doctrine of coverture complemented the rules of private property and notions of domestic 'privacy' to permit violence against women and children within the home during the 19th century.²⁸ However, scholarship has yet to connect this history of 'marital chastisement' within the development of *information* privacy law. Existing as, and within men's property, women's bodies might be violated and their autonomy breached, but the eyes of the state were rendered blind. Government agencies often discouraged reporting of information from women behind the domestic 'curtain' and refused to prosecute allegations of abuse. Coverture and the entitlements of citizenship gave men the right to control and conceal 'private' information about themselves from authorities and others. Keeping such information private enabled the public reputations of individual men to be maintained, and also allowed the persistence of ideas of white propertied masculinity as pure, respectable, self-disciplined, rational and just.

When musing on the pains that would afflict society if the law lifted the veil of 'privacy' on family life to recognise the crime of spousal violence, Justice Reade observed:

Take a case from the middle-class, where modesty and purity have their abode but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. What could be more harassing to them, or injurious to society, than to draw a crowd around their seclusion. Or take a case from the higher ranks, where education and culture have so refined a nature that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin.²⁹

Justice Reade's judgment suggested that violence seldom occurred in middle-class homes, except in 'mysterious' circumstances, and that it did not abide in

25 Transcript of Proceedings, *Ann Leonard v Henry Leonard* (16 September 1743), quoted in *ibid* 42.

26 The construction of larger homes and increased partitioning made more and more privacy available in family life. Houses protected colonial families well from external observation. The layout of towns, the plentifulness of land, an agricultural way of life, low population density, and architectural improvements created a hospitable environment for privacy.

Flaherty, above n 23, 44.

27 See *Weeks v United States*, 232 US 383, 390 (Day J) (1914).

28 Most of the scholarship connecting privacy and domestic violence focuses on the United States. See Ruth H Bloch, 'The American Revolution, Wife Beating, and the Emergent Value of Privacy' (2007) 5 *Early American Studies* 223; Kirsten S Rambo, "Trivial Complaints": *The Role of Privacy in Domestic Violence Law and Activism in the US* (Columbia University Press, 2008); Elizabeth M Schneider, 'The Violence of Privacy' (1991) 23 *Connecticut Law Review* 973; Reva B Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2117.

29 *State v Rhodes*, 61 NC 453, 458 (1868).

upper-class, civilised, families at all. Between wealthy, white kin, one was cut by ‘a look’ not ‘a knife’; struck by ‘a word’, not a ‘hammer’.

It is difficult to determine whether wife beating was spread equally across classes during this time, but amongst legal elites there was a firm opinion that the poor were deviant in their brutality.³⁰ Justice Reade’s opinion confirmed fantasies of civilised white masculinity and wholesome family government. His comments reflected common views that violence within the home was primarily a problem amongst the ‘lower classes’. Writing on the issue of ‘marital chastisement’ in the late 18th century, William Blackstone stated:

in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege.³¹

In the United States, associations between wife beating and economic class also had racialised dimensions. As Ruth Siegel has argued, judicial attitudes to ‘marital chastisement’ began to shift in the 1870s, but they did so on problematic grounds. Judges became more ready to invade the privacy of the home, to condemn instances of wife beating and record a conviction where the case confirmed prejudices about the characters of non-white and immigrant husbands.³² In the northern states, members of immigrant groups (German or Irish Americans) were more likely to face court. In southern states, African-American men faced disproportionately high rates of prosecution. The landmark cases of *Commonwealth v McAfee* and *Fulgham v State* both repudiated the common law right of marital chastisement,³³ but the former involved the death of a woman at the hands of her Irish-American husband; and the latter involved the beating of an African-American woman by her African-American husband. The Courts instructed the accused men in the civilised values of modern, white masculinity, and in doing so distanced ideal masculinity from associations of criminality, passion and barbarity.

30 Siegel, above n 28, 2140 n 86:

It is difficult, if not impossible, to determine the frequency of wife beating during the nineteenth century, or to ascertain its incidence by class or race. Records of local law enforcement are scant ... and no public or private entities monitored the problem in a systematic fashion. Even if better records existed, a problem would remain: Class- and race-based beliefs about the “degraded” character of men who beat their wives could well bias law enforcement and monitoring practices.

See also Rambo, above n 28, 28:

Limited historical records make it impossible to know the extent to which these arrest patterns reflect or distort actual patterns of domestic violence incidents or reports. Nonetheless, other contemporaneous evidence suggests that such numbers are undoubtedly influenced by prevailing attitudes of the era that viewed wife-beating as the recourse of the “dangerous classes”.

31 Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (J B Lippincott, 1893) 445.

32 See Siegel, above n 28, 2139:

But while members of the social elite were certainly aware of marital violence within their ranks, in the closing decades of the nineteenth century, commentators increasingly depicted wife beating as the practice of lawless or unruly men of the “dangerous classes.” Statistics on arrests and convictions for wife beating in the late nineteenth century suggest that while criminal assault law was enforced against wife beaters only sporadically, it was most often enforced against immigrants and African-American men.

33 *Commonwealth v McAfee*, 108 Mass 458 (1871); *Fulgham v State*, 46 Ala 143 (1871).

In colonial Australia, the ‘private’ nature of domestic violence also shielded it from effective state intervention and criminal prosecutions also aligned with class hierarchies and racial stereotyping. Hilary Golder and Diane Kirkby observed that ‘wife-beating was widespread and taken for granted in nineteenth-century Australia’.³⁴ Kay Saunders has argued that despite the high incidence of family violence, ‘[t]he legal system itself regarded behaviour between cohabiting couples as private and effectively beyond its jurisdiction except in the most extreme forms of violence’.³⁵ Ideas of privacy were used to justify non-intervention at an institutional and individual level. This was particularly the case with middle and upper-class men. Saunders noted that although diaries and letters indicate violence occurred in homes of all classes, official case records from the Queensland criminal courts confirm the stereotype of the wife-beater as ‘a low income earner’.³⁶ Being a non-white man also made you more likely to be prosecuted and executed in colonial Australia. Caroline Ramsay has noted that ‘negative clichés about foreign men’s animalistic behavior also suffused the trials of defendants of color in Australia, and ... Australian juries declined to recommend mercy for dark-skinned males’.³⁷ When it came to white men, legal institutions and social norms rallied to enforce the distinction between public/private spheres and protect reputations. One middle-class white victim, Elizabeth Davies, explained her reluctance to inform the police of her husband’s extreme violence: ‘I told him I had no desire to expose him’.³⁸

Privacy norms that protected white masculinity in the criminal law of common law countries concealed the bruises and abrasions of women in multiple ways and imposed a harsh duty of secrecy upon them. The actions of their white husbands remained largely invisible, while non-white husbands became hyper-visible. The curtain of domestic privacy was lowered to conceal the crimes of certain men and lifted to exhibit the crimes of others. This action of dropping and raising the domestic curtain was not arbitrary. It controlled information in a way that maintained the political, spiritual and social superiority of white ‘respectable’ men, as individuals and as a social group.

In the late 19th century, as ‘privacy’ was receding as an explicit defence to criminal prosecution for wife beating, the meaning of privacy within the common law began to shift. *DeMay v Roberts* represents a transition between masculine notions of private property as information regulation and feminine calls for personal corporeal control.³⁹ In January 1880, a poor rural white woman, Alvira

34 Hilary Golder and Diane Kirkby, ‘Marriage and Divorce Law Before the *Family Law Act 1975*’ in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives of Law in Australia* (Oxford University Press, 1995) 150, 156. See also Margaret Anderson, ‘“Helpmeet for Man”: Women in Mid-Nineteenth Century Western Australia’ in Patricia Crawford (ed), *Exploring Women’s Past: Essays in Social History* (Sisters Publishing, 1983) 87–127.

35 Kay Saunders, ‘The Study of Domestic Violence in Colonial Queensland: Sources and Problems’ (1984) 21 *Historical Studies* 68, 83.

36 Ibid 72.

37 Carolyn Ramsey, ‘Domestic Violence and State Intervention in the American West and Australia, 1860–1930’ (2011) 86 *Indiana Law Journal* 185, 229.

38 Sarah Ailwood, Patricia Easteal and Jessica Kennedy, ‘Law’s Indifference to Women’s Experience of Violence: Colonial and Contemporary Australia’ (2012) 35 *Women’s Studies International Forum* 86, 89.

39 9 NW 146 (Mich, 1881) (*DeMay*).

Roberts was expecting the birth of her fourth child and sent her husband to ask the neighbour's son to fetch a 'professional man' – a doctor – for help.⁴⁰ The son found Dr John DeMay, who inspected Roberts and finding no signs of imminent labour, said he would return later. At midnight, after returning from a social outing, DeMay found a note urging him to return to the Roberts' house. He was reluctant, and convinced Scattergood (his friend, a jeweller) to go with him to help carry his things and provide company. The young (unmarried) men arrived, knocked, and entered the cabin. There was evidence given at trial as to the confusion regarding Scattergood's identity – the midwife, Roberts and her husband all assumed he was another physician. Roberts was now lying on a couch in the central part of the cabin. Scattergood took a seat by the stove, but when DeMay requested his assistance, Scattergood moved to sit by Roberts and held one of her hands to prevent her throwing her arms about in pain. Roberts later testified that she was 'exposed' during childbirth and saw Scattergood looking at her and 'noticed a smile on [his] face'.⁴¹

The baby was born alive and healthy, but two weeks later, Roberts' husband came upon DeMay in the street and in conversation, DeMay revealed that Scattergood was neither doctor nor medical student. Outraged by this news, Alvira Roberts took DeMay and Scattergood to court – in her own name – for fraud, assault and battery. However, in a strange moment of judicial creativity, the Michigan Supreme Court decided the complaint as follows:

It would be shocking to our sense of right, justice and propriety to doubt even but that such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation.⁴²

DeMay v Roberts was the first recorded instance in United States legal history in which a court enunciated and based its judgment upon a 'right to privacy'. The Michigan Supreme Court did not recognise a right to privacy as a separate tort (as state courts would later, beginning in 1905 with *Pavesich v New England Life Insurance Co*),⁴³ but they were moved to use the phrase when noting a stranger had entered private property on false pretences and touched and looked at a woman's exposed body.

The judgment called up a history of privacy within the common law premised on a physical demarcation between public and private domains. Roberts was entitled to the privacy of 'her apartment'. But the case was not about regulating information flow. There was no evidence admitted during the trial to suggest that Scattergood had told anyone what he had seen or that he might relay his experience to someone in future. He was simply there, touching and looking at Roberts. As Caroline Danielson has shown, this case presents a conception of privacy grounded

40 Ibid. See also Danielson, above n 4; Jessica Lake, *The Face that Launched a Thousand Lawsuits*, above n 3.

41 Danielson, above n 4, 322.

42 *DeMay*, 9 NW 146, 165–6 (Marston CJ) (Mich, 1881).

43 50 SE 68 (Ga, 1905).

in the ‘very tangible affronted female body’ rather than an intrusion for the purpose of broadcasting information.⁴⁴ Conceived alongside battery and assault, rather than trespass, slander, libel or breach of confidence, the case has a ‘corporeal referent’ as well as a proprietary one. Danielson and other scholars have argued that Roberts’ success was due, in part, to the strength of traditional notions of femininity; the case pointed to a ‘duty of modesty’ as much as a ‘right to privacy’ and thus her victory was an ambiguous one for the status of women.⁴⁵

Yet it should also be recognised that this case represented a fundamental turning point in the use of ‘privacy’ within the common law. A line can be drawn connecting *DeMay* and contemporary cases involving revenge pornography. Prior to *DeMay*, injuries to women’s autonomy, dignity and bodies had not been conceived as affronts to privacy – such injuries were only relevant as representations of ‘private’ information about men in the home. Privacy as a concept within criminal law, property law and constitutional law had worked to repress and thus regulate the circulation of information *about* white men and white masculinity. But the case brought by Alvira Roberts in 1881 annexed ‘privacy’ to the virtues of (white) womanhood – modesty, domesticity, reserve – as a way of protesting against a violation *of* her naked body, as a way of asserting her rights.

III PUBLICATIONS ABOUT MEN; PHOTOGRAPHS OF WOMEN

In their famous 1890 article, ‘The Right to Privacy,’ Warren and Brandeis advocated for a new legal right to privacy by identifying two pressing concerns: ‘the unauthorized circulation of portraits of private persons’ and ‘the invasion of privacy by the newspapers’.⁴⁶ To underline the need to regulate the publication of people’s photographic images, they cited the New York case of *Manola v Stevens*,⁴⁷ in which Broadway star Marion Manola sued her theatre manager and a professional photographer for surreptitiously taking photographs of her in revealing tights and publishing them on advertising postcards.⁴⁸ To support their argument that a new tort of privacy must combat ‘the press overstepping in every direction’ and publishing ‘idle gossip’, Warren and Brandeis referred to the work of a prominent contemporary journalist and editor Edwin Godkin and his essay on

44 Danielson, above n 4, 315.

45 Danielson also places this case within the history of the increased professionalisation of medicine, with John DeMay asserting expertise over Alvira’s birthing body in a way that sanctioned his presence but not Alfred Scattergood’s. She argues:

So, then, the right to privacy in DeMay comes together as a gendered right and as an amalgam of the physician’s expertise and the woman patient’s claim to authentic experience. The outcome of the case is ambiguous: Alvira Roberts won a right to privacy but on John DeMay’s terms ... privacy was taken to be both a description of womanly nature and a right that women could assert.

Ibid 336–7. See also Allen and Mack, above n 4, 455: ‘It was mainly because women were deemed to be creatures of special modesty and their husbands their rightful protectors that the court found for the Robertses’.

46 Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 195. (NY Sup Ct, 1890).

48 See Warren and Brandeis, above n 46.

‘The Rights of the Citizen: IV. To His Own Reputation’.⁴⁹ In it, Godkin stressed that for effective and functioning society, the ‘most valuable thing on earth’ for each man was to ‘enjoy the confidence and good opinion of his fellows’ and this was imperilled by the press publishing people’s private affairs.⁵⁰ Thus ‘privacy’ began to be employed within the law towards two divergent and gendered sets of interests, with women seeking control over photographic images of their faces and bodies; and men pushing for control over their public reputations.⁵¹

Edwin Godkin was a strong influence on the conception and articulation of Warren and Brandeis’s arguments. In their article, they wrote ‘the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer’ and footnote Godkin’s essay.⁵² They continue:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but had become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.⁵³

The physical and tangible barriers of walls, fences and land that protected privacy during earlier times were failing. Law’s bolstering of these material barriers via the sanctity of private property – within criminal law, tort and constitutional doctrines – was losing efficacy in securing domestic solitude and secrecy. Industrial changes, including the exponential growth of newspapers, magazines and print advertising were fostering a market in information. Revelations about a person’s sexual relations, family relations or personal behaviours began to escape from private homes. Warren and Brandeis’s pleas for decency and propriety expressed the priorities of a privileged class experiencing threats to their moral and social identities. As Harry Kalven put it, their arguments evince a ‘curious nineteenth century quaintness about the grievance, an air of injured gentility’.⁵⁴ They also contained an implicit recognition of different masculine and feminine privacy priorities.

Godkin’s treatise on the importance of reputation and ways to protect it provides us with a glimpse into the experience and interests of middle class white men in the United States.⁵⁵ He wrote that ‘no matter how far we go back’ in time,

49 See *ibid*; Edwin L Godkin, ‘The Rights of the Citizen: IV To His Own Reputation’ (1890) 8 *Scribner’s Magazine* 58.

50 Godkin, above n 49, 58.

51 The types of privacy cases brought by men and women in the early 20th century also demonstrates this trend. See Jessica Lake, *The Face that Launches a Thousand Lawsuits*, above n 3.

52 Warren and Brandeis, above n 46, 195.

53 *Ibid*, 196.

54 Harry Kalven Jr, ‘Privacy in Tort Law: Were Warren and Brandeis Wrong?’ (1966) 31 *Law and Contemporary Problems* 326.

55 On historical constructions of manhood during this period, see Marilyn Lake, ‘Socialism and Manhood: The Case of William Lane’ (1986) 50 *Labour History* 54; Gail Bederman, *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917* (University of Chicago Press, 1995); Michael Kimmel, *Manhood in America: A Cultural History* (Free Press, 1995); Kristin L Hoganson, *Fighting for American Manhood: How Gender Provoked the Spanish-American and Philippine-American Wars* (Yale University Press, 1998); Martin Crotty, *Making the Australian Male: Middle-Class Masculinity, 1870–1920* (Melbourne University Press, 2001).

‘the most valuable thing on earth’ to each man in ‘every community, civilized or uncivilized’ was his public reputation.⁵⁶ A good reputation provided a man with emotional comfort (it ‘surrounds a man with an atmosphere of peace and hopefulness’);⁵⁷ and ensured deference from others and thus influence (‘[a] man of good reputation is listened to with a deference which nothing but actual power can procure for a man of poor reputation’).⁵⁸ A good reputation was crucial to commercial success (‘[e]very man whose character is held in high estimation by his neighbors, can always command more credit than his visible means will warrant’).⁵⁹ Reputation was a multifaceted social and business asset. He identified privacy – as a social (at that time not distinctly legal) value – as one of the ways a man’s reputation could be protected. Privacy was presented as a comfortable accessory to privilege: ‘In no way does poverty make itself more painfully felt ... than in the loss of seclusion’.⁶⁰ However, unlike concern for reputation, which he extended to ‘primitive’ men, privacy was ‘a distinctly modern product, one of the luxuries of civilization’.⁶¹ In his view the ‘savage cannot have privacy, and does not desire or dream of it. To dwellers in tents and wigwams it must always have been unknown’.⁶² At the time of writing, American colonists were actively dispossessing Native Americans of even their ‘tents and wigwams’. The common law’s entrenched protection of privacy via private property established it as the prerogative of land owners.

The ability to retreat to a private space conferred the capacity to screen and conceal certain information. The threat to privacy envisaged by Godkin was not an intrusion on personal space, but the collection and circulation of one’s information. He wrote:

The right to decide how much knowledge of this personal thought and feeling, and how much knowledge, therefore, of his tastes, and habits, of his own private doings and affairs, and those of his family living under his roof, the public at large shall have, is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.⁶³

Godkin was incensed by the way in which information about a man – his tastes, habits, doings and affairs – could escape from his control, as if his home, his previously fortified ‘castle’, were now a leaky ship. His anxieties recall the landmark UK ‘privacy’ case, *Prince Albert v Strange*,⁶⁴ concerning family etchings of the royal nursery and their threatened publication. In deciding the case on the basis of a breach of confidential information, Knight Bruce V-C stated that ‘a *man* may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life’ by revealing aspects of himself

56 Godkin, above n 49, 58.

57 Ibid 60.

58 Ibid 61.

59 Ibid.

60 Ibid 65.

61 Ibid.

62 Ibid.

63 Ibid.

64 2 De G & SM 652; 64 ER 293.

‘squaring in no sort with his outward habits and worldly position’.⁶⁵ For this reason, the flow of confidential information – or, rather, information deriving from ‘the home (a word hitherto sacred among us)’⁶⁶ – needed to be controlled. For privileged men, privacy laws became essential to the construction and maintenance of their public reputations.

Godkin labelled curiosity the chief enemy of privacy, which the press had converted into ‘what economists call an effectual demand, and gossip into a marketable commodity’.⁶⁷ He was anxious about his information becoming a commercial asset. As Katherine Adams has noted, late 19th century masculine privacy discourses were driven by a lack of self-mastery and fear of being owned.⁶⁸ The panic about privacy as a crisis in ‘self-(non)possession’ on the part of a subject who was implicitly white, male and propertied. He needed distance from the market economy to maintain his ‘spiritual’ and authentic self, and yet not too much distance that would erode the public markers of his identity, authority and self-regard.⁶⁹

If white masculine conceptions of privacy at the turn of the last century centred on controlling information to consolidate reputation, white women’s ideas about privacy focused on fending off visual violations of one’s body and image. In her analysis of *DeMay*, Danielson noted: ‘Warren and Brandeis’s argument traces a trajectory from the injuries of slander and libel to privacy; [whereas] the opinion in *DeMay* moves on a trajectory from battery to privacy’.⁷⁰ Slander and libel sought to prevent and proscribe the publication of information that would defame a person’s reputation, but battery sought to punish corporeal violations. The cases that forged a legal right to privacy at the turn of the century were brought by women to protest against the use and abuse of images of their faces and bodies. Alvira Roberts took *DeMay* and *Scattergood* to court for ‘battery and assault’, but it was his look (the ‘smile upon his face’) that troubled her most. Being looked at, either directly or indirectly (via the photographic lens), became the definitive privacy complaint for women. They resented their appearance, their faces and figures (not their ‘tastes’, ‘habits’, ‘doings’), being turned into sights of titillation and entertainment.

65 *Prince Albert v Strange* (1849) 2 De G & SM 652, 694; 64 ER 293, 311–12 (emphasis added). For an illuminating discussion of the place of ‘privacy’ within this decision, see also Megan Richardson and Lesley Hitchens, ‘Celebrity Privacy and Benefits of Simple History’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 250.

66 *Prince Albert v Strange* (1849) 2 De G & SM 652, 698; 64 ER 293, 313.

67 Godkin, above n 49, 66.

68 Adams, above n 8.

69 Adams elaborates on the concept of self-(non)possession:

On one side, self-(non)possession refuses any possibility of a selfhood that is divisible from itself, susceptible to appropriation and circulation, or dependent on externally determined value. It strains toward a horizon of seamless self-unity and the perfect freedom of disembedded autonomy. On the other side, self-(non)possession defends against the opposite extreme: a self so unmediated that it lacks self-mastery, self-consciousness, or any self-relation at all.

See Adams, above n 8, 14.

70 Danielson, above n 4, 314.

In 1890, the year of Godkin's essay on reputation and Warren and Brandeis's seminal article, the *Ladies' Home Journal* warned its readers that:

While the great majority of professional photographers are men of honor and responsibility ... Women should always know the standing of the man to whom they entrust their negatives ... The negative once in his possession (if he is so disposed) he has the means of causing them great mortification by using it for base purposes.⁷¹

After the invention of photography in the 1830s and its 1880s transformation into an amateur pastime, led by New York entrepreneur George Eastman of the Kodak company, women were increasingly confronted with the unauthorised capture and circulation of images of their faces and bodies. This shift began to influence women's interest in the idea of privacy. Debates about how to best prevent and prohibit the use of their pictures by others without their consent proliferated in newspapers, political circles and among the legal fraternity.⁷² While these discussions were often couched in gender-neutral terms – 'the unauthorized circulation of portraits of private persons' as Warren and Brandeis put it⁷³ – it is clear from the vast majority of cases brought to court that the burgeoning 'privacy' debate about who should have the right to capture and exploit another's image had gendered implications.⁷⁴

The swiftly developing technology of photography meant that the kinds of harms occasioned to women through the use of their images by others also changed. Before cameras were transformed into portable devices, photography was an expensive and time-consuming pursuit requiring expert professional knowledge, complicated bulky equipment and the ambient conditions of light and stillness only generally achievable indoors within a studio setting. As the *Ladies' Home Journal* warning indicates, one of the first threats posed to women by photography was the unauthorised use of their studio portraits. On 20 September 1888, one of New York's most renowned photographers, 30-year-old Le Grange Brown, was arrested in his parents' Brooklyn home for exhibiting and offering for sale (in local saloons) photographs of 'undraped women'.⁷⁵ According to the police and the Society for the Prevention of Crime, Brown apparently took the

71 Abraham Bogardus, 'A Caution to Women Who Intend Sitting for Their Photographs' (1890) 7(9) *Ladies' Home Journal* 11.

72 See, eg, A Bill to Protect Ladies, HR 8151, 50th Congress (1888); 'A Chivalrous Congressman', *San Francisco Chronicle* (San Francisco), 5 March 1888, 1; 'A Handsome Card', *St Louis Post – Dispatch* (St Louis), 31 July 1886, 6; 'A Question of Personal Right', *The Sacramento Daily Record-Union* (Sacramento), 31 March 1888, 4; J A J, 'The Legal Relations of Photographs' (1869) 17 *American Law Register* 1, 8; 'Not Miss Halford's Picture', *Washington Post* (Washington DC), 29 August 1889, 2; 'Our Representative Women', *The Albany Journal* (Albany), 16 March 1888, 4; Charles Parker, 'A Danger Ahead' (1888) 25(319) *The Philadelphia Photographer* 218, 218; Moore V Rugg, 'Photographs: Use of Negative' (1890) 31 *Central Law Journal* 15, 292; Julius F Sachse, 'Photographic Jurisprudence in Germany: The Right of a Photographer to Exhibit Specimens of His Skill' (1891) 12 *American Journal of Photography* 12; 'Women in Politics' *St Louis Post – Dispatch* (St Louis), 8 April 1888, 23.

73 Warren and Brandeis, above n 46, 195.

74 See Allen and Mack, above n 4; Jessica Lake, 'Privacy, Property or Propriety: The Case of "Pretty Portraits" in Late Nineteenth-Century America' (2014) 10 *Law, Culture and the Humanities* 111; Jessica Lake, *The Face that Launched a Thousand Lawsuits*, above n 3.

75 'Brown's Trial Again Deferred: His Counsel Secures Delay on a Legal Technicality', *The Brooklyn Daily Eagle* (Brooklyn), 18 October 1888, 6.

photographs of hundreds of young society women and then, later, decapitated the negatives and seamlessly affixed their heads to the naked bodies of other women.⁷⁶ He was charged with the indictable common law offence of exhibiting an obscene picture.⁷⁷ This high profile incident, reported in the *New York Times*, could well have been one of the ‘base purposes’ referred to by the *Ladies’ Home Journal* and one of the first recorded incidents of ‘revenge pornography’. While the injury of such an offence was reputational, the experience of the violation was reportedly visceral – it happened *to* them rather than being *about* them.

So widespread was the problem of women’s pictures being used without their consent at the end of the 19th century, that a bill was introduced to the US House of Representatives in 1888 proposing to prohibit such practices.⁷⁸ ‘A Bill to Protect Ladies’ was initiated by Illinois Republican Congressman John Robert Thomas, who was incensed that the portraits of attractive ‘ladies’, such as First Lady Frances Folsom (the pretty young wife of President Grover Cleveland), were being used in advertisements and postcards without their knowledge and/or permission.⁷⁹ His Bill – which proposed that ‘the use of the likenesses, portraits, or representations of females, for advertising purposes, without consent in writing’ be punishable as a federal high misdemeanour by a \$500 to \$5000 fine – attracted the swift attention of professional photographers. Incensed that they would no longer be able to sell or use the pictures of women with the freedom they currently enjoyed, they incited action against the Bill in photographic periodicals.⁸⁰ One group of New York photographers even went so far as to officially lodge a petition against the Bill with their local representative, the Hon John M Farquhar.⁸¹ The Bill was referred to the House Judiciary Committee and never passed.

The Bill to Protect Ladies and associated debates about the use and abuse of women’s portraits in the 19th century, spoke to the gendered dimensions of burgeoning privacy debates about photography. While there were of course a few women who worked as photographers and some men whose images were used without permission, advertising and commentary recognised a general distinction between men as active photographers and women as photographic objects. The vast majority of professional photographers in the mid to late 19th century were men and even when photography was transformed into an amateur pastime in the

76 ‘Le Grange Brown’s Pictures’, *New York Times* (New York), 26 September 1888, 8. Brown denied the assertion that he had manipulated or collated the photographs and argued that the young women consented to posing for him naked. See ‘He Will Waive. Brown Not to be Tried by Justice Massey’, *The Brooklyn Daily Eagle* (Brooklyn), 28 September 1888, 6. See also ‘About Photographer Brown’s Rascality. How the Pictures of Disreputable Women Were Adorned by the Faces of Brooklyn Ladies’, *The Brooklyn Daily Eagle* (Brooklyn), 26 September 1888, 6; ‘Photographer Brown’s Pictures. Anthony Comstock Asks Permission to Destroy Them’, *The Brooklyn Daily Eagle* (Brooklyn), 9 November 1889, 6.

77 Before he was tried, Brown ‘skipped his bail’ and fled to Canada, where he died the following year. See ‘Died in Exile. La Grange Brown’s Demise in Canada’, *The Brooklyn Daily Eagle* (Brooklyn), 24 October 1889, 6.

78 A Bill to Protect Ladies, HR 8151, 50th Congress (1888).

79 See ‘A Chivalrous Congressman’, above n 72, 1; ‘A Handsome Card’, above n 72, 6; ‘Not Miss Halford’s Picture’, above n 72, 2.

80 See Charles Parker, above n 72, 218.

81 Letter from Petitioners to the Hon John M Farquhar, (Legislative Branch of the National Archives, Washington DC).

1880s, advertisements began to employ hunting and shooting metaphors to frame it as a masculine hobby.⁸² In 1889, an article by the *New York Times* spoke of amateur photographers as ‘young knights of the camera’ and ‘pretty girls’ as their ‘natural prey’.⁸³ The discussion connected the growing popularity of amateur photography with the question of women’s legal rights to have their images taken and circulated: ‘It is a question of debate what rights the amateur has in securing pictures, and of course there are some who consider a party of young women as free subjects of photography as the waterfall or clump of trees’.⁸⁴ The threat posed to women by photography in the late 19th century was not just the unauthorised use of their professionally taken portraits, but the ‘capture’ of their images by enthusiastic amateurs.

Surreptitious photography boomed in the late 19th century, aided by the vast range of hidden or ‘detective’ cameras available⁸⁵ and publicity accorded it in advertisements⁸⁶ and newspaper articles.⁸⁷ It was two cases involving surreptitious photography that spurred the establishment of a tort of ‘right to privacy’ in the United States. In the 1890 case of *Manola v Stevens*, comic opera star Marion Manola had her photograph surreptitiously snapped by the theatre manager and a professional photographer while she was performing on a Broadway stage in a revealing costume.⁸⁸ This picture was intended to be used on an advertising

82 See Robert E Mensel, ‘“Kodakers Lying in Wait”: Amateur Photography and the Right of Privacy in New York, 1885–1915’ (1991) 43 *American Quarterly* 24.

83 ‘The Woods Full of Them: Amateur Photographers All Over the Land’, *New York Times* (New York), 15 July 1889, 8.

84 *Ibid.*

85 Some detective cameras on the market in the late 19th century included E & H T Anthony & Co’s ‘Schmid’s Patent Detective Camera’ (1883), Tisdell & Whittlesey’s ‘T & W Detective Camera’ (1887), the Boston Camera Company’s ‘Hawk-Eye Detective Camera’ (1888), Eastman Kodak Camera (1888), Paul Nadar’s ‘Express Détective Nadar Tropical Model’ (1888), and the American Camera Co’s ‘Demon Detective Camera No. 1’ (1889). Other cameras were concealed or hidden by being styled in the shape of everyday objects, such as hip flasks (C P Stirn’s ‘Concealed Vest Camera No 2’, 1888), pocket watches (J Lancaster & Son’s ‘Patent Watch Camera’, 1886), a single book (H Mackenstein’s ‘Photo-Livre’, 1889) or stack of books (Scovill & Adams’ ‘Book Camera’, 1892), women’s purses (Charles Alibert’s ‘Kauffer Photo-Sac a Main’, 1895), wooden carrying boxes (Max Jurnick’s ‘Tom Thumb Camera’, 1889), men’s ties (E Block’s ‘Photo-Cravate’, 1890), binoculars (Geymet & Alker’s ‘Photo - Binocular’, 1867), photo albums (A Schaeffner’s ‘Photo-Album’, 1892), revolvers (A Briois’ ‘Thompson’s Revolver Camera’, 1862; E Enjalbert’s ‘Photo-Revolver de Poche’, 1882) and shot guns (Kodak’s ‘Gun Camera’, 1915). These are a selection of the cameras included in the Technology Archive held by the George Eastman House International Museum of Photography and Film (Rochester, New York). See Eastman Museum, *Technology* <<https://www.eastman.org/technology>>.

86 For example, an early 1890s Kodak advertisement in an Australian publication features an illustration of a well-dressed man and woman attending a formal public event. He exclaims: ‘Hang it, I’m sure I heard one of those confounded Kodaks!’ to which she replies: ‘Possibly; my brothers all have them, you know’. In another advertisement for the Boston Camera Company, a well-dressed woman passes a couple exiting a shop on a busy street. There is a mischievous glint in her eye and we see under her arm is a concealed camera with which she is secretly snapping their picture. These advertisements are included in the Kodak Historical Collection held by the Rush Rhees Library at the University of Rochester (Rochester, New York).

87 See, eg, ‘“Kodak” Manners’, *The Ladies’ Home Journal* (Philadelphia), February 1900, 16. This article is included in the Kodak Historical Collection held by the Rush Rhees Library at the University of Rochester (Rochester, New York). See also B F McManus, ‘Amateur Photographers’, *Wilson’s Photographic Magazine* (New York), 17 May 1890, 296; ‘The Woods Full of Them: Amateur Photographers All Over the Land’, above n 83.

88 *Manola v Stevens* (NY Sup Ct, 1890).

postcard for the theatre, but Manola took them to court. She protested that she did not want to become an object of the voyeuristic male gaze, for her picture to become, as she said, ‘common property, circulated from hand to hand, and treasured by every fellow who can raise the price demanded’.⁸⁹ As previously mentioned, Warren and Brandeis cited this case when they argued for the recognition of a right to privacy.⁹⁰

Some years later, another young woman, Abigail Roberson, had her image captured without her knowledge and plastered on packets of flour and other advertising material in the US and around the world for Franklin Mills Flour company.⁹¹ Distressed and angry, she took the company and its advertiser, Rochester Folding Box company to court.⁹² Drawing on Warren and Brandeis’s arguments, Roberson’s attorney and future champion for women’s suffrage, Milton E Gibbs, argued that the defendants had violated her right to privacy and her property right in her own beauty.⁹³ Roberson lost, but such was the outrage on the part of the community about the decision – among lawyers and lay people alike – that the New York legislature responded by enacting a statutory case of action for ‘a right to privacy’.⁹⁴

To highlight the gendered deployment of ‘privacy’ at the turn of the last century, the *Roberson* case, wherein a photograph of an unknown young woman’s face was used to sell flour, can be compared to the first case that established ‘a right to privacy’ as a common law tort in the United States: *Pavesich v New England Life Insurance Company*.⁹⁵ Paolo Pavesich, an artist by profession, brought an action for libel and breach of privacy against the New England Life Insurance Company, its general agent, Thomas Lumpkin, and photographer, J Q Adams in relation to an advertisement published in the Atlanta Constitution. It showed a photograph of Pavesich looking handsome, healthy and successful (under the caption ‘Do It Now’) alongside a photograph of a sickly and miserable looking man (under the caption ‘Do It While You Can’). Underneath the photographs were apparent testimonials from each man – the plaintiff allegedly stating: ‘In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies.’ Pavesich

89 ‘The Rights and Tights of an Actress’, *Baltimore Sun* (Baltimore), 19 June 1890, 5.

90 The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Warren and Brandeis, above n 46, 195–6.

91 For details of the back story, see ‘Her Picture on Flour Packages So Miss Abigail Roberson Brings Suit for \$15,000 Damages’, *Richmond Dispatch* (Richmond), 28 June 1900, 2.

92 *Roberson v Rochester Folding Box Co*, 64 NE 442 (NY, 1902) (‘*Roberson*’).

93 *Ibid*; Abigail M Robinson, ‘Brief of Respondent’, in *Roberson*, 3–4. Held in Special Collections at the New York State Library in Albany, New York.

94 See NY Laws ch 132 § 1 (1903). It subsequently became NY Civil Rights Law § 50 (McKinney 2004): ‘A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor’.

95 *Pavesich v New England Life Insurance Co*, 50 SE 68 (Ga, 1905).

claimed the advertisement was malicious and false, as he never made such a statement and never held a policy with the defendant's insurance company. Justice Cobb of the Georgia Supreme Court held for the plaintiff and established invasion of privacy as a tort in common law. His judgment expertly wove 'the liberty of privacy' together with the fundamental (white, masculine) American ideal of freedom and declared that an invasion of privacy was tantamount to 'slavery'.⁹⁶ Here, we see again white men's protest against their inability to control the publication of information about themselves, likened to slaves' lack of self-ownership.

After the enactment of privacy laws by New York State in 1903 prohibiting the use of an individual's name or likeness for trade or advertising purposes,⁹⁷ the number of cases for breach of privacy in relation to photographic images increased rapidly. The majority involved female plaintiffs. The relatively few cases brought by men were markedly different in content and argument, and referred to the use of a man's name or likeness as a symbol of his public or professional reputation and standing. In 1907, for example, the inventor Thomas Edison obtained an injunction against the Edison Polyform Manufacturing Company to restrain its breach of his 'right to privacy' when it used his name and likeness in connection with its corporate name and medicinal preparations.⁹⁸ In 1909, J P Chinn brought a case in Kentucky against the Foster-Milburn Company for using a false testimonial (alongside his picture) within an advertisement for its kidney pills.⁹⁹ Confirming the plaintiff's right to recover damages in such circumstances, Justice Hodgson of the Kentucky Court of Appeals stated in *Foster-Milburn Co v Chinn*:

It is a fraud on the public to publish indorsements of public men in publications of this character which are not genuine. A man has the right to complain when he is published in a directory having a circulation of 8 000 000 copies, as indorsing a patent medicine he has never seen.¹⁰⁰

The reference to 'public men' in *Foster-Milburn Co v Chinn* was telling. At this time a small number of notable public men were able to use the doctrine of 'a

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The knowledge that one's features and form are being used for such a purpose and displayed in such places as such advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.

Pavesich v New England Life Insurance Co, 50 SE 68, 80 (Cobb J) (Ga, 1905). Anita Allen argues that Justice Cobb's analogy to slavery and natural law arguments for the establishment of a tort of privacy are not merely rhetorical flourishes but crucially important to understanding the decision. She points out that Justice Andrew Jackson Cobb was from a prominent slave holding family in Georgia and that his father and uncle were both defenders of slavery as a moral and legal institution. She argues that his slavery analogy is both offensive and appealing. See Anita L Allen, 'Natural Law, Slavery, and the Right to Privacy Tort: The Natural Law Origins of the American Right to Privacy' (2012) 81 *Fordham Law Review* 1187.

97 See NY Laws ch 132 § 1 (1903). It subsequently became NY Civil Rights Law § 50 (McKinney 2004).

98 *Edison v Edison Polyform & Manufacturing Co*, 67 A 392 (NJ, 1907).99 *Foster-Milburn Co v Chinn*, 120 SW 364 (Ky Ct App, 1909).100 *Ibid* 432 (Hodgson J).

right to privacy' to protect their professional reputations and stop false information circulating about them. But these cases were not representative of the majority of plaintiffs or actions in privacy cases. In its early stages, the statutory or common law tort of 'a right to privacy' was forged and shaped by women who brought actions protesting against the use and circulation of unidentified images of their faces or bodies by others. Their images were not used in conjunction with testimonials or endorsements, and did not invoke their individual expertise or public achievements. Their images did not expose their 'habits', 'tastes', 'affairs' and 'doings'. In fact, their skills and personalities (as singers, actresses, or even divers) were irrelevant. They were reduced to anonymous attractive images. At the turn of the century, masculine privacy priorities focused on controlling information about men to protect their public reputation and standing; whereas women framed privacy as a way to counter unwanted photographic appropriations of their bodies and faces, to stop violations of their sense of self.

IV THE BIRTH OF DATABANKS AND THE TERMINATION OF PREGNANCY (OR 'THE COMPUTERISED MAN' AND THE WOMAN AS WOMB)

Although the development of 'privacy' within various areas of the law continued to evolve well into 20th century, it was not until the 1960s and 70s that privacy law once again became a topic of fervent debate. Any historical analysis of the frequency of the word 'privacy' in newspapers sees a definite spike in usage during this era.¹⁰¹ This sudden increase can be attributed to two major debates that began at this time: US Supreme Court battles over women's reproductive rights and transformational developments in computing that led to fears about 'databanks'. While these debates took divergent paths, were spearheaded by different groups of people and appealed to distinct interests, they were united in their invocation of 'privacy' as a primary legal defence.

In the realm of reproductive rights, the Supreme Court recognised a constitutional right to privacy in cases involving contraception and abortion.¹⁰² At the same time new fears about government databanks and the collection, use and storage of people's 'personal information' led to new 'privacy' legislation.¹⁰³ These debates were inflected by gendered preoccupations and priorities: women had a grave stake in the state's regulation of their bodies and reproductive

101 For example, mentions of the word 'privacy' in the *New York Times* increase each decade from the 19th century onwards and peak between 1970 and 1979, before decreasing from 1980 to the present day. There is a marked exponential increase between the 1950s and 1960s, when the number of mentions almost doubles from 15 831 to 29 915, which then increases to 32 656 in the 1970s. Analysis conducted using the ProQuest Historical Newspapers Database: ProQuest, *ProQuest Historical Newspapers* <<https://www.proquest.com/products-services/pq-hist-news.html>>.

102 See *Griswold v Connecticut*, 381 US 479 (1965) ('*Griswold*'); *Eisenstadt v Baird*, 405 US 438 (1972) ('*Eisenstadt*'); *Roe*, 410 US 113 (1973).

103 The first federal information privacy legislation in the United States (*Privacy Act of 1974*, 5 USC § 552a (1974), *Family Educational Rights and Privacy Act of 1974* 20 USC § 1232g (1974)) was the culmination of government and public debates about databanks during the 1960s.

capacities, while men (as scholars, lawyers, commentators and citizens) urged the community to heed the dangers inherent in the circulation of data. Both debates emerged around 1965 and culminated in significant privacy jurisprudence in the United States. In the next Part of my article, I bring these heretofore separate histories into the same analytical frame. Once again, we see how masculine claims to privacy centred on the collection of abstract disembodied data, while feminine and feminist discourse on privacy focused on bodily rights.

The same year in which the United States Supreme Court handed down the landmark decision *Griswold*, the Federal Government proposed to create a new national database of statistical information.¹⁰⁴ These two events pushed ‘privacy law’ to the front of national debate and social commentary. The proposal for a ‘national data center’ was led by social scientists who sought access to the increasing amount of data collected and stored by federal government agencies for research and policy purposes. Developments in computer technology led to a dramatic increase in the efficiency, ease and affordability of storing, accessing and processing records and public policy initiatives increasingly relied upon big data – in the areas of civil rights, housing, employment, welfare and education – to measure the effectiveness and impact of programs. In the late 1950s and early 1960s, the Census Bureau, with its enormous data holdings, began investigating ways in which its statistical information could be better linked and used by private researchers.¹⁰⁵ In 1964, the Advisory Committee of the American Economic Association submitted that the costs to academic researchers of the ‘special tabulations’ of data provided by the Census Bureau was too high and suggested the creation of ‘Census data centers’ at select universities.¹⁰⁶ The suggestion was not taken up due to concerns about confidentiality and cost, but social scientists continued to press for access to and analysis of government generated and held data.

In 1965, the Social Science Research Council’s Committee on the Preservation and Use of Economic Data noted that ‘the technological revolution has become so

104 See Rebecca S Kraus, ‘Statistical Déjà Vu: The National Data Center Proposal of 1965 and Its Descendants’ (Paper presented at the Joint Statistical Meetings, Miami Beach, Florida, 1 August 2011).

105 In 1957, the Office of Statistical Standards (‘OSS’), Bureau of the Budget and the American Statistical Association Advisory Committee began working together to draft a statement of principles to establish access to federal data sets by non-governmental researchers. The Director of the Census Bureau, Robert W Burgess, commented on the draft policy in a letter to Raymond T Bowman, Assistant Director for Statistical Standards, Bureau of the Budget, Executive Office of the President, on April 19 1957, noting:

Sometimes, the private research worker needs additional information not available in published form, and the Bureau believes that it serves the public interest when it makes a special tabulation and provides that information. With the expansion of its electronic facilities, it hopes to extend its services and provide more information to researcher workers ... On the other hand, we are just as firm in believing that it is in the public interest to protect the rights of respondents and to keep their replies confidential. Few research workers would wish to relax the disclosure rules to the extent that this would lower the quality of the statistics. In such an event, no one would be harmed more than the research people themselves, and many of them, realizing this, have urged us to protect information given in confidence.

Ibid 3. Notice the absence of discussions of ‘privacy’ within this appraisal – it was only introduced to such debates in the 1960s. The statement of principles was finalised in 1959 and reflected much of the Census Bureau’s existing policy.

106 Solomon Fabricant, ‘Report of the Census Advisory Committee’ (1965) 55(1/2) *American Economic Review* 619.

great that a re-examination of the organization of the Federal statistical system is urgently needed'.¹⁰⁷ Their report into the availability of data collected by government agencies and its use in research was released in April 1965 and known as the 'Ruggles Report' (after the chairman of the committee, Yale economist Richard Ruggles).¹⁰⁸ The Committee was concerned that the decentralisation of government data made it difficult, if not impossible, for researchers to access data or even know what data existed and where. They noted that twenty federal statistical agencies had over 600 major data sets that were stored on approximately 100 million punch cards and 30 000 computer tapes.¹⁰⁹ In response, they recommended the Federal Government establish a 'national data center' to preserve data collected by agencies and to make that data available to researchers within and outside the government. The Federal Bureau of Budget created a taskforce known as the Kaysen Committee after its chairman Carl Kaysen of the Institute of Advanced Study to examine the issue. The Committee agreed with the Ruggles report, recommended a 'national data center' and elaborated on its functions and form. They did not foresee the firestorm of panic about 'privacy' that would soon erupt in Congress and across the country. Administrative concerns about confidentiality transformed into concerted masculine fears of a surveillance state.

Various House and Senate Committees focused attention on the Kaysen Report's proposal for a 'national data center', framing it as a bureaucratic threat to individual privacy that could usher in a totalitarian state.¹¹⁰ One witness at the House Special Subcommittee on Invasion of Privacy (established in 1964), sociologist Vance Packard, noted: 'My own hunch is that Big Brother, if he ever comes to these United States, may turn out to be not a greedy power seeker, but rather a relentless bureaucrat obsessed with efficiency'.¹¹¹ References and allusions to 'Big Brother', the character in George Orwell's novel *Nineteen Eighty-Four*, became ubiquitous. An article by the *New York Times*, published in 1964, with the headline 'Experts Say Computers Could Aid a 'Big Brother'' reported

While expressing confidence in the merits of computers, the experts warned that their enormous capacities for fantastic ranges of information about families and individuals could without proper control convert society into the Big Brother regime predicted in '1984'.¹¹²

107 Social Science Research Council ('SSRC'), 'Report of the Committee on the Preservation and Use of Economic Data' (April 1965) 9.

108 Other members included five other men: Richard Miller, Wesleyan University, Secretary; Edwin Kuh, Massachusetts Institute of Technology; Stanley Lebergott, Wesleyan University; Guy Orcutt, University of Wisconsin; and Joseph Pechman, Brookings Institution.

109 Kraus, above n 104, 7.

110 Some of the legislative committees particularly concerned with the proposal for a national data centre were the Senate Committee on the Judiciary's Subcommittee on Administrative Practice and Procedure (chaired by Sen Edward V Long (Democrat-Missouri)) and the Subcommittee on Constitutional Rights (chaired by Sen Sam J Ervin, Jr (Democrat-North Carolina)) as well as the House Government Operations Committee, Special Subcommittee on Invasion of Privacy, chaired by Rep Cornelius E Gallagher (Democrat-New Jersey): *ibid* 14.

111 *Ibid* 15.

112 'Experts Say Computers Could Aid a 'Big Brother'', *New York Times* (New York), 4 October 1964.

A *Washington Post* article reporting the proposed ‘national data center’ explained: ‘They fear the data center could grow into a computerized King Kong with a thumb on every American’.¹¹³ And the next year the *Washington Post* warned: ‘Witnesses at the opening of hearings on proposals for a computerized Government data center assailed the plan as a “threat to individual liberty” a harbinger of Big Brother, and a mechanized suffocation of the American dream’.¹¹⁴ *The Wall Street Journal* echoed worries about the loss of liberty, stating: ‘it is a cardinal requirement of a free society that the people do not entrust their liberties to the whims of men in power but rely rather on wise laws to protect them from oppression’.¹¹⁵ Politicians and journalists agreed that that if government information about individuals was aggregated and made more accessible, this could be used by less democratic or benevolent leaders to oppress them.

Congressional and public debates about the ‘national data center’ stirred up related anxieties about existing government data gathering and evolving computer technology. As Priscilla Regan notes, these debates were more about anxieties, symbols and ideas than they were about specific policy proposals and competing interests.¹¹⁶ Government computers were siphoning information from the front door of family homes and storing it as a seemingly everlasting shadow of a man’s self. This shadow, distorted and disfigured by gaps, inaccuracies and mis-characterisations, threatened to replace the man himself as a citizen and creditor.¹¹⁷

In hearings on the ‘Federal Data Center’, Representative Cornelius Gallagher, Chairman of the House Special Subcommittee on Invasion of Privacy, stated:

It is our contention that if safeguards are not built into such a facility, it could lead to the creation of what I call ‘The Computerized Man.’ ‘The Computerized Man,’ as I see him, would be stripped of his individuality and privacy. Through the standardization ushered in by technological advance, his status in society would be measured by the computer, and he would lose his personal identity. His life, his talent, and his earning capacity would be reduced to a tape with very few alternatives available.¹¹⁸

We can note the explicitly gendered language here. While Gallagher might have assumed that his figure of the ‘Computerized Man’ was universal, his actual characterisation revealed the traditional masculine interests in ‘status in society’ and ‘earning capacity’ perceived to be under threat. The ‘Computerized Man’ would lose his individuality and privacy.

113 George Lardner Jr, ‘Center for Data On Everybody Recommended’, *The Washington Post* (Washington DC), 13 June 1966.

114 George Lardner Jr, ‘Data Center Hearing Warned on Privacy’, *The Washington Post* (Washington DC), 27 July 1966.

115 ‘Review and Outlook: Too Personal By Far’, *The Wall Street Journal* (New York), 5 August 1966.

116 Priscilla M Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (University of North Carolina Press, 1995).

117 ‘As people become increasingly aware that a substantial number of personal facts are being preserved “on the record”, they may start to doubt whether there is any meaningful existence apart from what is in the files’: Arthur R Miller, ‘The Computer Threat to Privacy’, *Los Angeles Times* (Los Angeles), 20 July 1969.

118 Evidence to Special Subcommittee on Invasion of Privacy of the Committee on Government Operations: *The Computer and Invasion of Privacy: Hearings*, US House of Representatives 89th Congress, 2nd sess, Washington DC, 26 July 1966, 2 (Representative Cornelius Gallagher).

The preoccupation with public status and control over information was clearly evident within this new debate about ‘privacy’. A 1966 article by the *Washington Post* cited Yale Professor on constitutional law Charles A Reich on the issue of the Federal Data Center: ‘A person has a right not to be defamed whether it’s by a machine or by a person’.¹¹⁹ Alan Westin and Arthur R Miller led discussions about the legal risks of computers and the ‘national data center’ and framed the debate in ways which would ultimately result in significant new legislation. Both scholars defined ‘privacy’ primarily in terms of the ability of an individual to control information circulated about them – not in terms of bodily integrity or violation. In a 1967 article for the *Los Angeles Times*, Miller stated:

lawyers and social scientists are concluding that the basic characteristic of an effective right to privacy is the *individual’s ability to control the flow of information relating to him*, a power that often is essential to social relationships and personal freedom. When the individual is deprived of control over the information spigot ... he in some measure becomes subservient to those who have gained control over it. A person whose life story can be bartered or sold is little more than a commodity.¹²⁰

This discourse – defining privacy as information control and equating the loss of privacy with lack of self-possession and commodification – echoes the masculine privacy preoccupations of the turn of the last century. The editor Godkin also thought privacy’s purpose was to control information about men and thus to secure their professional reputations and public status.¹²¹

Justice Cobb, from the 1905 Supreme Court of Georgia, had explicitly equated invasion of privacy with commodification and slavery. Legal scholar Alan Westin, in the introduction to his highly influential 1967 book *Privacy and Freedom*, stated definitively: ‘Privacy is the claim of individuals, groups and institutions to determine for themselves when, how and to what extent information about them is communicated to others’.¹²² Westin was clear that ‘privacy’ was about self-determination. More specifically, ‘privacy’ related to *information* about a person. While this narrow understanding has been challenged and expanded by legal scholars since, none have related these conceptions of privacy to historically gendered priorities and preoccupations. These priorities and preoccupations have also reflected privileges of class and race. Indeed, legal scholar Richard Ruggles defended the government’s need for information to tackle future social and economic challenges and noted that ‘privacy’ was the priority of a privileged few. In 1968 he explained: ‘the privileged groups are seeing their privacy eroded by the increasing information requirements of a growing bureaucracy’.¹²³

119 See Lardner Jr, above n 114.

120 Arthur R Miller, above n 117 (emphasis added).

121 Godkin, above n 49.

122 Alan Westin, *Privacy and Freedom* (Ig Publishing, 1967).

123 The privileged groups are seeing their privacy eroded by the increasing information requirements of a growing bureaucracy. Wealthy individuals may resent having to report all of their financial dealings to the government, and pure food laws, safety standards, fair employment practices, etc., are taken by many to be an invasion of privacy. There is a feeling that an individual should be free to run his own affairs as he sees fit without the interference of the government.

Richard Ruggles, John de J Pemberton Jr and Arthur R Miller, ‘Computers, Data Banks, and Individual Privacy’ (1968) 53 *Minnesota Law Review* 211.

Ruggles, Miller, Westin and others were among a group of legal scholars whose scholarship in the late 1960s focused on computers and data banks, and who helped reframe privacy law as concerned with the circulation of ‘personal information’ between individuals and organisations.¹²⁴ This scholarship was highly influential in shaping political debates and jurisprudence and was cited in a 1971 case in the United States Supreme Court, one of the first cases to tackle the issue of ‘privacy’ and data banks: *Tarver v Smith*.¹²⁵ This case involved a report detailing allegations of child neglect against a mother by the Department of Social and Health Services of the State of Washington and a recommendation that she be permanently deprived of custody of her children. The mother was subsequently exonerated by the court and the allegations proved false. However, the original incorrect report was retained in her file by the department. She sought to have the incorrect information amended or removed. The department argued that she would suffer no harm from the report being retained as it was just an opinion, the Court’s decree disproving the allegations was also included in her file and the documents were kept confidential. Her petition was denied by the United States Supreme Court. However, Justice Douglas gave a passionate dissent, stating:

The ability of the government and private agencies to gather, retain, and catalogue information on anyone for their unfettered use raises problems concerning the privacy and dignity of individuals. Public and private agencies are storing more and more data ... Private files amass similar irrelevancies and subjective information. Is he well regarded in his neighborhood as to character and habits? Does he have domestic difficulties? Is he ‘slow’ in paying his bills? The problems of a computerized society with large data banks are immense.¹²⁶

This case involved a mother. But the Court’s discourse picked up on traditional masculine fears about information control and public reputation. Like the newspapers feared by Godkin in the late 19th century, computerised data banks in Douglas’ formulation threatened to expose *his* habits, *his* character, *his* domestic difficulties and *his* financial dealings. In his judgment, Justice Douglas cited the work of Arthur R Miller and others, stating: ‘Law reviews have been devoting increasing attention to the problem’.¹²⁷ The ‘personal information’ debate spurred by the ‘national data center’ proposal of 1965 and framed by legal scholars as one concerning ‘privacy’ ultimately led to the enactment of the US *Privacy Act of 1974*, which amongst other measures, gave individuals rights of access, correction and knowledge about personal records in computerised and manual files held by government agencies.

While Westin, Miller and others were defining ‘privacy’ as a man’s control over the circulation of information about himself, the United States Supreme Court was at the same time articulating a very different kind of privacy within the law.

124 See, eg, Jeffrey A Meldman, ‘Centralized Information Systems and the Legal Right to Privacy’ (1969) 52 *Marquette Law Review* 335; Vern Countryman, ‘The Diminishing Right of Privacy: The Personal Dossier and the Computer’ (1970) 49 *Texas Law Review* 837; Arthur R Miller, ‘The Dossier Society’ (1971) 1971 *University of Illinois Law Forum* 154; Arthur Selwyn Miller, ‘Science vs Law: Some Legal Problems Raised by Big Science’ (1967) 17 *Buffalo Law Review* 591; *ibid*; Westin, above n 122.

125 402 US 1000 (Douglas J) (1971).

126 *Ibid* 1000–1.

127 *Ibid* 1005.

In deciding the case of *Griswold* six years before *Tarver v Smith*, Justice Douglas articulated ‘a right of privacy older than the Bill of Rights’; let alone the 1974 *Privacy Act*.¹²⁸ Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut and Dr Charles Lee Buxton, a doctor and professor at Yale Medical School, had been arrested and convicted for proffering information and medical advice about contraception devices and materials to a married woman in contravention of an 1879 law.¹²⁹ They challenged the constitutional validity of the law in the Supreme Court and won – the court recognising that ‘the right of marital privacy’ existed within ‘several fundamental constitutional guarantees’, particularly the First, Third, Fourth, Fifth and Ninth Amendments, though it was not mentioned by the text explicitly. Invading the ancient and sacrosanct space of marriage by imposing a law to regulate the ‘intimate relation of husband and wife’ and the ‘physician’s role in one aspect of that relation’ was intolerable to the judges.¹³⁰ ‘Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?’ Justice Douglas asked.¹³¹ ‘The very idea is repulsive to the notions of privacy surrounding the marriage relationship’ he stated.¹³²

To strike down a law that prevented married women from controlling their bodies and reproductive lives, the court paradoxically appealed to a type of marital and family privacy that had disenfranchised women for much of the 19th century. The 1879 law, held unconstitutional, had been passed at a time when the doctrine of marital chastisement was receding in the United States and the family was becoming subject to more state intervention and regulation. But in 1965, the Supreme Court resurrected notions of marital privacy to effectively guard the sovereignty of married women’s reproductive rights.

It seemed with *Griswold* that it was not a woman’s rights to control over her own womb that warranted constitutional protection, but rather the location of that womb, the womb of his wife, within a man’s home. However, the subsequent decisions of *Eisenstadt* and *Roe* seemed to shift this new constitutional right to privacy securely into the domain of women’s embodied autonomy. In 1972, Justice Brennan stated:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government

128 *Griswold*, 381 US 479, 486 (Douglas J) (1965).

129 Their actions breached a Connecticut statute from 1879 that stated:

any person who uses any drug, medicinal article or instrument for the purposes of preventing conception shall be fined not less than forty dollars or imprisoned not less than sixty days’ and further stated: ‘any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principle offender.

Ibid 480.

130 *Griswold*, 381 US 479, 482 (Douglas J) (1965).

131 Ibid 485.

132 Ibid 485–6.

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹³³

Roe extended this idea by determining that a right to privacy, whether founded in the Fourteenth Amendment or the Ninth, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹³⁴ In the late 1960s and early 1970s, as the legislative arm of government was conducting hearings about the privacy threat posed by databanks and the rise of the 'Computerized Man', the US Supreme Court chose the discourse of privacy, not liberty or equality, to discuss and determine the fate of women's wombs. These heated legal debates, side by side, once again signified the gendered priorities and preoccupations of privacy law. Men mostly focused upon the dystopian scenario of the theft of their public identities, while women dealt with potential invasions of their sexed bodies.

The decision to employ the language of privacy within the reproductive rights debate has been questioned by numerous feminist scholars sceptical of reliance upon the private/public distinction in aiding women's autonomy.¹³⁵ Perhaps most vehemently, Catherine MacKinnon criticised the Supreme Court's reliance on a constitutional right to 'privacy' as the basis for a woman's access to contraceptive devices and pregnancy termination procedures.¹³⁶ She rightly regarded the invocation of the private realm and its 'protection' from state interference via doctrines of privacy as responsible for women's historical and continuing inequality.¹³⁷ She argued that injuries arose for women within and because of the private sphere, not through its violation by the state.¹³⁸ For MacKinnon, privacy law protects the existing distribution of power and resources and promotes an idea of free and autonomous decision making (for white men), that has only ever been a fantasy for women.¹³⁹ The conception of privacy, as guarding the right to make disembodied, gender-neutral decisions, is the reason privacy law seemed ill-suited to addressing such embodied and intimate experiences as sex, pregnancy and birth.

133 *Eisenstadt*, 405 US 438, 453 (Brennan J) (1972) (emphasis altered).

134 *Roe*, 410 US 113, 153 (Burger CJ) (1973).

135 See, eg, Frances Olsen, 'Unraveling Compromise' (1989) 103 *Harvard Law Review* 105; Reva Siegel, 'Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261; MacKinnon, *Toward a Feminist Theory*, above n 7; Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987).

136 See MacKinnon, *Feminism Unmodified*, above n 135, 93–102; MacKinnon, *Toward a Feminist Theory*, above n 7, 184–94.

137 *Ibid.*

138 MacKinnon, *Toward a Feminist Theory*, above n 7, 193–4:

Observe that the very things feminism regards as central to the subjection of women – the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate – form the core of privacy doctrine's coverage. Privacy law assumes women are equal to men in there. Through this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor ... This right to privacy is a right of men "to be let alone" to oppress women one at a time.

139 'Privacy seems to stick to white upper-class men and follow them into the world, forfeited only under unusual conditions ... The existing distribution of power and resources within the private sphere are precisely what the law of privacy exists to protect': MacKinnon, above n 7, 191–2.

However, in response, privacy scholars have defended the concept of privacy and cautioned against metaphorically throwing the baby out with the bath water.¹⁴⁰ They submitted that the discourse of privacy rights can be beneficial for women and should be used in this context. Anita Allen argued that the reproductive rights cases protected not only decisional privacy for women – as an aspect of liberty – but also forms of privacy put at risk by the practice of mothering.¹⁴¹ Bearing and rearing children impeded woman's privacy at home – her ability to enjoy seclusion and solitude and attend to private responsibilities that impeded her public participation. Each pregnancy, according to Allen, represented a loss of paradigmatic privacy for women and threatened the quality of her private life and consequently her future employment and educational opportunities. Framing reproductive rights via a discourse of privacy is therefore fitting, Allen concluded, as it recognises that a woman must 'have a private life that is her own'.¹⁴²

There is a tension then for feminist privacy law scholars between the role of the public/private dichotomy within law in the historical and continuing disenfranchisement of women on the one hand, and the pragmatic invocation of privacy to enable women to access birth control, terminate pregnancies or control the circulation of their images (as previously discussed). How can the sword used to oppress women become the shield available to protect them?

One way to reconcile this apparent contradiction is to understand 'privacy's' legal relationship to women as a continuing conversation about their sense of physical violability. Historical and social conditions change, but the terms of the conversations remain largely constant. Whether a husband has the right to beat his wife or the state has the right to force her to give birth against her will, become conversations about the uses of privacy law as women continue to deal with their experiences as embodied sexual subjects. How much can a man disfigure and maim his partner before he is charged and condemned? In what circumstances can he photograph and display a woman's body or face in his advertisement? How long can a woman carry a child within herself, feeling nauseous and exhausted, before the state will mandate the baby's delivery via the always bloody, often traumatic, and usually physically scarring experience of vaginal or caesarean birth? To dwell on the ailments of pregnancy and the injuries of birth in this context, or even the photographs of dead fetuses so often used by abortion opponents, is not to gratuitously raise the emotional stakes. It is rather to signify the inescapably embodied and corporeal context in which these kinds of privacy rights are invoked.

140 Ruth Gavison defended the use of 'privacy' as the legal discourse in *Roe*, even if it was less than ideal. She wrote: 'the privacy rationale as formulated in *Griswold* and *Roe* was not intended to be the best formulation of feminism. It was meant to identify one *justification* for the decision to constitutionally the right of legal abortions. One can agree that privacy is not enough without concluding that the choice of privacy arguments in the *Roe* context was a setback for women.' Gavison, 'Feminism and the Public/Private Distinction', above n 7. See also Judith Wagner Decew, 'The Feminist Critique of Privacy: Past Arguments and New Social Understandings' in Beate Roessler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 85; Anita L. Allen, 'Coercing Privacy' (1999) 40 *William & Mary Law Review* 723; Allen, *Uneasy Access*, above n 7.

141 Allen, *Uneasy Access*, above n 7.

142 *Ibid* 122.

They directly impact and involve actual flesh and blood as well as vomit, sweat, excrement and bones.

At the same time that privacy rights were being newly legislated to guard against the advent of the ‘Computerized Man’ – that clean, cold and contained figure of Senator Gallagher’s imagination – they were working to help women avoid a different fate as unwilling maternal bodies subject to painful childbirth, making and leaking milk, putting the physical needs of others above their own. Privacy law was invoked in the 1960s to address men’s fear of eclipse by a disembodied data-based self and to problematise women’s fate as a reproductive vessel. The privacy debates waged in Congress and the Senate, and more broadly within the media and legal community, between 1965 and 1974 imagined a dystopian future for men, as oppressed citizens unable to control the circulation of information about them and guard their autonomy as self-determining individuals. Court cases adjudicating on contraception and abortion appraised the past stories of individual bodies – *Roe*, of course, gave birth before the case concluded – and consulted the legal history books on privacy laws to determine women’s present-day entitlements.

This is *not* to say of course that all women cared about reproductive rights or that all men were alarmed by the proposed databank, but rather that the discursive terms used to frame and define these privacy law debates were explicitly gendered and envisaged the entitlement of individuals in relation to gendered social identities and roles. It is not an accident that Westin and Miller defined ‘privacy’ as purely information privacy, for this was the kind of privacy that preoccupied them. However, it is significant and worrying that such a definition should become widely accepted in privacy law scholarship at a time when a new constitutional right to privacy for women was being established by the Supreme Court. The scholarly definition disclosed a disavowal of, or at least a distancing from, other forms of privacy, and a reluctance to understand privacy law as a claim to the integrity of women’s bodies. Westin, Miller and other like-minded scholars viewed the threat posed by computers in collecting and storing information about people as the pressing privacy priority, because, as white privileged men, it was the fear of losing control of the flow of ‘personal information’ from private to public realms, information that constituted their sense of self and underpinned public reputations, that played most on their imaginations.

V CONCLUSION AND IMPLICATIONS

In recent years, privacy law scholarship has become more focused on online data surveillance by government and corporations.¹⁴³ This is largely because the

143 For a useful overview of important scholarship regarding online privacy in the last two decades see ‘Regulating Computers, Internet Use and Data Flows’ in Anita L Allen and Marc Rotenberg, *Privacy Law and Society* (West Academic Publishing, 3rd ed, 2016) 1004–8. Only a very small handful of this scholarship discusses gender and privacy online. See, eg, Anita L Allen, ‘Gender and Privacy in Cyberspace’, 52 *Stanford Law Review* 1175; Ann Bartow, ‘Our Data, Ourselves: Privacy, Propertization and Gender,’ 34 *University of San Francisco Law Review* 633.

ability and prevalence of monitoring, measuring and tracking individuals via their digital traces has increased exponentially since Westin and Miller's interventions in the 1960s. Somewhere out there exist reams of data about each of us, gathered with or without our knowledge and consent, from banking transactions, medical records, passport applications, rental car bookings, Google searches, social media accounts, email messages, smart phone apps, GPS technology – and the list goes on. Right now, this data is likely being stored, hacked, manipulated, analysed, corrected, connected to other data, studied, packaged and sold. The consequences of this swirling data storm might be as serious as identity theft or as seemingly innocuous as a company trying to sell me products based on my online shopping preferences. An individual might be approved for a bank because she has a history of buying furniture coasters or her employment might be terminated when an employer discovers naked photographs of her online. The electronic circulation of personal information has particular implications for each individual, depending upon their social and political circumstances, their racial and gender identity.

Numerous studies show that men and women in the United States and Australia are equally concerned with 'privacy online'. But that is a wide field of concern, akin to asking people if they care about 'public safety'. Within these same surveys there is evidence that gender influences the kinds of privacy invasions and issues prioritised by different people. An Australian study in 2013 reported that men were significantly more likely than women to worry about their personal information being captured and handled by the government.¹⁴⁴ A 2015 survey by the Pew Research Center showed that women were more comfortable than men with government and corporate bodies retaining their personal information.¹⁴⁵ Historical and contemporary evidence suggests that men's privacy concerns focus on perceived/actual surveillance of them by organisations – whether state or corporate. The fears centre on the accumulation and retention of information – ie, information privacy – and ways this information might be used or misused to their detriment. Current concerns about consumer tracking or government phone tapping resonate with earlier fears that reputations and livelihoods might be compromised by a prosecution for domestic violence, or by the exposure of a man's 'tastes', and 'habits' or his own 'private doings and affairs' in a newspaper; or by the advent of 'Computerized Man' who would reduce '[h]is life, his talent, and his earning capacity' to a roll of tape.¹⁴⁶ Masculine privacy interests continue to focus on surveillance and the right of individuals to control the flow of information about them in the public domain.

144 Office of the Australian Information Commissioner, 'Community Attitudes to Privacy Survey' (Research Report, 2013) 18: 'Men were significantly more likely than women to worry about information being captured and handled by the government (5 per cent compared with 2 per cent)'.

145 Mary Madden and Lee Rainie, 'Americans' Attitudes About Privacy, Security and Surveillance' (Report, Pew Research Centre, 20 May 2015) 24:

Women are more likely than men to say that government agencies should retain their records 'as long as they need to' (34 per cent vs. 23 per cent). Women are more likely than men to say that credit card companies should retain their records 'as long as they need to' (27 per cent vs. 17 per cent).

146 See Godkin, above n 49, 65; Senator Gallagher quoted in US House Committee on Government Operations, above n 118, 2.

Women, on the other hand, according to recent research are more concerned than men with social media harassment and the circulation of their images online. A recent survey by Forbes magazine showed that women are more wary than men about their privacy on social media.¹⁴⁷ But their wariness relates more to the conduct of other *individuals*, than it does about the surveillance of an *organisation* – in this instance, the platform provider. A Pew Research Center study on ‘Online Harassment’ in 2017 shows that men and women’s attitudes to, and experience of, online harassment (as a form of privacy invasion) differ significantly. Women – and especially young women – encounter sexualised forms of abuse at much higher rates than men.¹⁴⁸ Some 21 per cent of women aged 18 to 29 reported being sexually harassed online, more than double the percentage of men in the same age group (9 per cent).¹⁴⁹ Furthermore, 83 per cent of women aged 18 to 29 describe online harassment as a major problem, a substantially larger share than either men in the same age group (55 per cent), women 30 and older (66 per cent) or men 30 and older (53 per cent).¹⁵⁰ Overall, women are more likely than men (by a 70 per cent to 54 per cent margin) to say that being harassed or bullied online is a major problem.¹⁵¹ This harassment and abuse commonly takes the form of sexualised comments about their bodies, insults and threats and/or the sharing of naked or otherwise explicit images of them without their consent – all forms of privacy invasion. In general, the evidence suggested that men view the exposure of their identities online (their loss of anonymity) as the greater privacy violation. A 2017 PEW study on ‘Online Harassment’ shows that men are substantially more likely than women to say it is more important for people to be able to speak their minds freely but anonymously: 56 per cent of men choose this option, compared with 36 per cent of women.¹⁵² By contrast, women are much more likely to say that people should be able to feel welcome and safe in online environments: 63 per cent of women say this, compared with 43 per cent of men.¹⁵³

Such evidence suggests that women, particularly young women, worry more than men about individuals invading their privacy online via abuse or harassment directed at their sexualised bodies, whereas men worry more about information being collected and stored about them by government agencies and other organisations. The specific type of privacy invasion matters just as much or more than where it occurs – such as on social media websites.

In recent years, two types of privacy invasions related to these concerns have dominated the minds and time of legislators: ‘image-based abuse’ and consumer

147 Kevin Murnane, *How Men and Women Differ in their Approach to Online Privacy and Security* (11 April 2016) Forbes <<https://www.forbes.com/sites/kevinmurnane/2016/04/11/how-men-and-women-differ-in-their-approach-to-online-privacy-and-security/>>.

148 Maeve Duggan, ‘Online Harassment’ (Report, Pew Research Centre, 22 October 2014).

149 Maeve Duggan, *Men and Women Experience and View Online Harassment Differently* (14 July 2017) Pew Research Centre <<http://www.pewresearch.org/fact-tank/2017/07/14/men-women-experience-and-view-online-harassment-differently/>>.

150 *Ibid.*

151 *Ibid.*

152 Maeve Duggan, *Online Harassment 2017* (11 July 2017) Pew Research Centre, 8 <<http://www.pewinternet.org/2017/07/11/online-harassment-2017/>>.

153 *Ibid* 7–8.

data surveillance. Known colloquially as ‘revenge porn’, image-based abuse involves a person circulating a naked or otherwise explicit photograph or footage of another (usually online) without their consent. Such conduct has occurred since the beginnings of photography, as mentioned earlier, but has intensified with the growing popularity of smart phones and social media.¹⁵⁴ All it takes is the tap of a finger and a few seconds to capture an image of someone and publish it to the world, where it can go ‘viral’ and be viewed millions of times by others. Recent research by the Office of the eSafety Commissioner in Australia found that women are twice as likely to experience image-based abuse as men.¹⁵⁵ This problem has serious consequences, including loss of employment, loss of future career prospects, damage to relationships, anxiety, depression and suicide.

The law’s redress for ‘revenge pornography’ is patchy and inadequate. In the United States, privacy laws, forged in wake of Warren and Brandeis’s article and the *Roberson* case, can be useful in addressing certain types of non-consensual pornography in the United States, as can other torts such as defamation, intentional infliction of emotional distress, and intellectual property laws such as copyright. In 2013, a group of women and their attorneys initiated a campaign (Cyber Civil Rights Initiative) to criminalise revenge porn, which has thus far led to laws against revenge porn in thirty eight states (and Washington, D.C.).¹⁵⁶ On 28 November 2017, US Senator Kamala Harris, and Congresswoman Jackie Speier introduced a Bill entitled ‘Ending Nonconsensual Online User Graphic Harassment’ (‘ENOUGH’ Act) making ‘revenge porn’ a federal crime.¹⁵⁷ It currently awaits consideration by the Senate Judiciary Committee.

In Australia, most states have recently introduced legislation criminalising ‘revenge pornography’ and a Bill is currently being considered by the House of Representatives that would create a regime of civil penalties for the distribution of an intimate image of a person without their consent online.¹⁵⁸ Since the High Court decision of *ABC v Lenah Game Meats*, the most important privacy or breach of confidence cases have involved either the filming or distribution of naked images of women, instances of women being stalked by men known to them, or exposing

154 For a discussion contextualising non-consensual pornography within a history of image-based offences against women, see Jessica Lake, ‘Watching Women: Past and Present Legal Responses to the Unauthorised Circulation of Personal Images’ (2016) 21 *Media and Arts Law Review* 383.

155 Office of the eSafety Commissioner, ‘Image-Based Abuse: National Survey’ (Summary Report, October 2017) 3–4.

156 See Cyber Civil Rights Initiative <<https://www.cybercivilrights.org>>. For a discussion of the need to criminalise ‘revenge porn’, see Danielle Keats Citron and Mary Anne Franks, ‘Criminalizing Revenge Porn’ (2014) 49 *Wake Forest Law Review* 345.

157 Elana Schor, *Lawmakers Target ‘Revenge Porn’ in Bipartisan Bill* (28 November 2017) Politico <<https://www.politico.com/story/2017/11/28/congress-revenge-porn-bill-263539>>.

158 See *Summary Offences Act 1966* (Vic) s 41DA; *Summary Offences Act 1953* (SA) ss 26B–C; *Crimes Act 1900* (ACT) s 72C; *Crimes Act 1900* (NSW) s 91Q; *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) ss 10G, 61. On 6 December 2017, the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2017 (Cth) was introduced into the Senate by the Assistant Minister to the Prime Minister, Senator James McGrath. See *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth).

them as victims of rape.¹⁵⁹ However, despite women bringing these cases and law reform bodies calling for a statutory right to privacy, Australian legislators have been decidedly sluggish. Australia still lacks a cause of action for invasion of privacy that would address these women's concerns in a comprehensive way.

On the other hand, laws relating to the regulation of data privacy and surveillance have experienced a boom over the past couple of decades. Since the first *Privacy Act* was passed in Australia in 1986, regulating 'the collection, handling and use by Commonwealth departments and agencies of information about individuals',¹⁶⁰ there have been over fifteen separate Acts passed amending or updating the *Privacy Act*, such as extending its reach to private organisations.¹⁶¹ The Australian *Privacy Act* only relates to information privacy, a state of affairs emphasised in 2010 when the independent Office of the Privacy Commissioner was amalgamated into the Office of the Information Commissioner (OAIC). Recent statements of OAIC concern the collection and retention of 'My Health Records', the new 'Consumer Data Right' and the Facebook/Cambridge Analytica scandal. It is significant that our 'privacy' legislation covers only one specific – and historically masculine – type of privacy concern. Edwin Godkin would be delighted with the legislation that protects information about a man's 'tastes', 'habits', 'doings' and 'affairs'. Cornelius Gallagher would be relieved that the advent of 'Computerized Man' has been challenged – 'his status in society' might still be 'measured by the computer' but at least now he can access, amend and lodge a complaint about the digital information held about him.

But what of those privacy injuries that have historically and disproportionately affected women, those occurring to our persons and bodies: the acts of violence that violate, the visual incursions, the visceral threats of rape and assault online? Without the development of a general privacy tort (as occurred in the United States 100 years ago, and Canada and New Zealand in recent decades), Australian privacy law has largely pushed women's privacy priorities (focused on bodily safety and integrity) to the margins. So connected are our ideas of 'privacy' with 'information' in Australia, that situations of revenge pornography and harassment are now considered as 'crimes', but not civil infringements of 'privacy'. Refusing to conceptualise such offences as violations of 'privacy' also means that we fail to comprehend that different kinds of violations of privacy are related to one another: revenge pornography is often encouraged by the ability of perpetrators to protect their anonymity and information privacy.

Judges stretch ill-equipped equitable doctrines, like breach of confidence, to try and encompass particular instances of intrusion; coroners recommend reviews of rigid information privacy laws to better assist victims of family violence;¹⁶² and

159 See *Giller v Procopets* [No 2] (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15; *Davis v Mann* [2010] VCC 1402; *Power v Mann* [2010] VCC 1401; *Grosse v Purvis* [2003] Aust Torts Reports 81; *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.

160 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 1986, 2656 (Lionel Bowen, Attorney-General).

161 See Office of the Australian Information Commissioner, *History of the Privacy Act* <<https://www.oaic.gov.au/about-us/who-we-are/history-of-the-privacy-act>>.

162 On 28 September 2015, Victorian State Coroner Judge Ian Gray recommended a legislative review of the *Privacy and Data Protection Act 2014* (Vic) as its rigid protection of information privacy was highlighted

legislators consider and craft technologically and culturally specific laws – ‘upskirting’,¹⁶³ ‘revenge porn’¹⁶⁴ and ‘cyberbullying’.¹⁶⁵ But the ways in which women’s bodies can be invaded, exploited and abused by individual men will continue to change. Taking the privacy priorities of women seriously means considering them together, as *privacy* invasions, and interrogating their deep similarities and central themes. Only then can we begin to advance an overarching principle or legal framework of privacy protection in Australia that encompasses the full diversity of gendered experiences.

as a factor that led to the death of 11-year-old Luke Batty by his father. See *Finding into Death with Inquest: Luke Geoffrey Batty* (2015) Coroner’s Court Victoria (28 September 2015) (Gray J); ‘Luke Batty Inquest: Perpetrators of Family Violence Must be Made Accountable, says Rosie Batty’, *Australian Broadcasting Corporation* (online), 28 September 2015 <<http://www.abc.net.au/news/2015-09-28/rosie-batty-on-inquest-findings/6809906>> (Rosie Batty stated in response to the Coroner’s report: ‘We have to look at the issues around privacy, we have to look how to work in a more integrated [way]. We absolutely have to make perpetrators accountable’).

163 ‘Vic to Introduce Laws Against Upskirting’, *Sydney Morning Herald* (online), 27 May 2007 <<https://www.smh.com.au/national/vic-to-introduce-laws-against-upskirting-20070527-f2v.html>>; *Summary Offences Act 1966* (Vic) ss 41A–C.

164 See, eg, *Summary Offences Act 1966* (Vic) s 41DA.

165 A recent Senate inquiry into the efficacy of existing laws to capture ‘cyberbullying’ discussed numerous submissions showing that cyberbullying disproportionately affected women: Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying* (2018) 22–4 [2.42]–[2.52].