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#### Citation Information

Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 Yale L.J. F. 454 (2021), <https://www.yalelawjournal.org/forum/agonistic-privacy-equitable-democracy>, available at <https://scholar.law.colorado.edu/articles/1391/>.

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## Agonistic Privacy & Equitable Democracy

*Scott Skinner-Thompson*

**ABSTRACT.** This Essay argues that legal privacy protections – which enable individuals to control their visibility within public space – play a vital role in disrupting the subordinating, antidemocratic impacts of surveillance and should be at the forefront of efforts to reform the operation of both digital and physical public space. Robust privacy protections are a touchstone for empowering members of different marginalized groups with the ability to safely participate in both the physical and digital public squares, while also preserving space for vibrant subaltern counterpublics. By increasing heterogeneity within the public sphere, privacy can also help decrease polarization by breaking down echo chambers and enabling the healthy contestation of ideas.

### INTRODUCTION

Privacy is paramount to ensuring that the public sphere is an equitable, heterogeneous environment where ideas can be contested, democracy realized, and society enhanced.<sup>1</sup> As it stands, both the physical public square and the digital public sphere are characterized by unequal access, harassment, surveillance, and violence.<sup>2</sup> The harms originating in each context rebound and intensify as the

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1. As used here, the terms public square and public sphere refer to “a set of physical or mediated spaces where people can gather and share information, debate opinions, and tease out their political interests and social needs with other participants.” Catherine R. Squires, *Rethinking the Black Public Sphere: An Alternative Vocabulary for Multiple Public Spheres*, 12 *COMMUN THEORY* 446, 448 (2002).

2. See Monica Bell, *Anti-Segregation Policing*, 95 *N.Y.U. L. REV.* 650, 717 (2020) (documenting the many forms of violence and control that work to exclude Black people from certain physical spaces); DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 13-17 (2014)

law often fails to appreciate the interconnectedness between digital and physical space.<sup>3</sup> For example, surveillance of physical space can lead to online harassment<sup>4</sup> or doxing,<sup>5</sup> which can in turn create tangible harms such as anxiety, mental-health injuries, and loss of employment.<sup>6</sup> When used by government actors, digital surveillance of physical space can lead to (often baseless) incarceration and the chilling of expressive liberties.<sup>7</sup> This cycle harms individuals, particularly those who belong to marginalized groups.<sup>8</sup> But it also imposes group harms, pushing and erasing entire segments of society from the hegemonic public sphere, contributing to homogeneity of identities in public.<sup>9</sup> This in turn creates societal-level harms to democracy, including conformity of ideas within the dominant public sphere, with marginalized groups effectively segregated from that space – ultimately contributing to political polarization by reinforcing echo chambers rather than increasing heterogeneous interactions.<sup>10</sup>

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(documenting use of nonconsensual pornography as means of harassment against women); Ari Ezra Waldman, *Law, Privacy, and Online Dating: “Revenge Porn” in Gay Online Communities*, 44 L. & SOC. INQUIRY 987, 988 (2019) (noting that queer men are disproportionately victimized by revenge porn).

3. Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 245 (2007) (cataloging debates about whether cyberspace is exceptional and/or distinct from physical space, while emphasizing that our networked activities create embodied impacts and effects, further exposing “the constructedness of embodied space”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607, 1644-46 (1999) (underscoring examples where the lack of digital privacy erodes physical privacy).
4. Alice Chapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1546 (2003) (describing use of video cameras to capture images of women entering women’s health clinics followed by online harassment).
5. Colin J.A. Oldberg, Note, *Organizational Doxing: Disaster on the Doorstep*, 15 COLO. TECH. L.J. 181, 183 (2016) (defining doxing as the posting of personally identifiable information about a person on the internet for purposes of galvanizing social opprobrium).
6. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 69-71 (2009).
7. E.g., Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> [<https://perma.cc/4XPT-4MVC>].
8. Such groups include queer folk, racial minorities, immigrants, religious minorities, the economically subjugated, and others. Mary A. Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441 (2017); SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 17-44 (2021); KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 5, 12 (2017).
9. BRIDGES, *supra* note 8, at 96; cf. Franks, *supra* note 8, at 429 (“[S]urveillance based on pernicious and illegitimate prejudices towards certain groups inflicts discriminatory social harms on society in addition to individual harms.”).
10. See generally Alfredo J. Morales, Xiaowen Dong, Yaneer Bar-Yam & Alex ‘Sandy’ Pentland, *Segregation and Polarization in Urban Areas*, 6 ROYAL SOC’Y OPEN SCI., Oct. 23, 2019.

As I argue in this Essay, legal privacy protections – which enable individuals to control their visibility within public space – play a vital role in disrupting this subordinating, antidemocratic process and should be at the forefront of efforts to reform the operation of both digital and physical public spaces. Although visibility comes with risks for members of marginalized groups,<sup>11</sup> *controlled* visibility through privacy protections has the potential to serve important antisubordination goals and lead to broader societal participation of entire communities in the public square. Given that public space may deny the existence of nonnormative identities, that participation may by itself be radical and politically transformative.<sup>12</sup> Robust privacy protections are a touchstone for empowering members of different marginalized groups with the ability to participate safely in both the physical and digital public squares,<sup>13</sup> while also preserving space for vibrant “subaltern counterpublics.”<sup>14</sup> Such subaltern spaces can take the form of “enclave[s]” where “counterhegemonic ideas and strategies” are developed, or more outward-facing “counterpublic[s]” which engage in debate with wider publics” in order to influence those publics.<sup>15</sup>

Mitigating the exclusion of marginalized groups is by itself, of course, more than sufficient to normatively justify robust legal privacy protections. But the benefits of ensuring that marginalized groups can participate safely in the public sphere flow to everyone.<sup>16</sup> Indeed, ensuring their participation is critical to a

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11. E.g., Morgan M. Page, *One from the Vaults: Gossip, Access, and Trans History-Telling*, in TRAP DOOR: TRANS CULTURAL PRODUCTION AND THE POLITICS OF VISIBILITY 135, 143 (Reina Gossett, Eric A. Stanley & Johanna Burton eds., 2017) (“As happened during previous periods of increased media visibility for trans people, we are currently experiencing a crackdown on the everyday lives of trans people by both the government and the general population . . . . Visibility, this supposed cure-all, might actually be poison.”).
  12. Marquis Bey, *The Trans\*-ness of Blackness, the Blackness of Trans\*-ness*, 4 TSQ: TRANSGENDER STUD. Q. 275, 277 (2017) (explaining that because of “a hegemonic grammar that utterly disallows the very possibility of transgender” in gender-normative spaces, the existence of “trans\* and nonnormative bodies is, by virtue of their inhabitation of public space, radical” and that the same could hold true “with black bodies occupying space implicitly coded in and through whiteness”).
  13. SKINNER-THOMPSON, *supra* note 8, at 103 (emphasizing the role of surveillance in furthering subordination and exclusion of marginalized groups from civic participation).
  14. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 67 (1990); MICHAEL WARNER, PUBLICS AND COUNTER-PUBLICS 57 (2002).
  15. Squires, *supra* note 1, at 448.
  16. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (explaining that while, normatively, principles of racial equality ought to have formed the basis for desegregation, desegregation was likely aided by the fact that it began to serve the white majority’s political and economic purposes); Franks, *supra* note 8, at 430 (advocating for an “enlightened interest convergence” approach to privacy that

well-functioning democracy. Political and democratic theories—ranging from deliberative democracy<sup>17</sup> to civic republicanism<sup>18</sup> to agonistic pluralism<sup>19</sup>—underscore (in different ways and with distinct points of emphasis) that ensuring space for the exchange of ideas and contestation in the informal public spheres where ideas and viewpoints are debated is not something to fear, but something to embrace.<sup>20</sup> Friction creates fire, but not always in the form of hatred and polarization. Rather, it can fuel the forge where healthy communities and egalitarian societies are melded.

But privacy is a precondition for that democratic, participatory friction because it allows marginalized groups to be a part of the public, preventing fragile majority monocultures and exclusionary groupthink to take hold. And while privacy protections should be implemented top-down—that is, from the government and other institutional powers, such as information capitalists<sup>21</sup>—members of marginalized groups have for a long time created friction and materially enhanced their living conditions by developing their own methods of privacy, demonstrating its importance.<sup>22</sup> That is, while privacy scholars have underscored privacy’s ability to enable participation, members of marginalized groups have used privacy itself to create agonist, participatory friction. They have done so by deploying obfuscation technologies that interfere with surveillance mechanisms;<sup>23</sup> by wearing masks, head veils, and hoodies; and by using public restrooms that correspond with their gender expression or identity, rather than

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foregrounds the insights and experiences of marginalized groups, which will ensure that surveillance’s manifold harms are fully dismantled for everyone).

17. Deliberative democracy underscores the importance of rational deliberation by members of a polity as key to a functioning democracy. JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 85 (Thomas Burger trans., MIT Press 1991) (1962).
18. Civic republicanism emphasizes the role of citizen participation as a check on government tyranny. PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 5 (2012).
19. Agonistic pluralism foregrounds the role of horizontal contestation among different elements of society as a critical element of a functional public sphere. CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 92 (2013).
20. See *infra* Part II.
21. Joshua Cohen & Archon Fung, *Democracy and the Digital Public Sphere*, in *DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY* 23, 43 (Lucy Bernholz, H el ene Landemore & Rob Reich eds., 2021) (arguing that “[b]uilding a more democratic public sphere will require vigorous democratically oriented and concerted action by, among others, governments, private companies, nongovernmental organizations, and citizens themselves”).
22. SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 520-25 (2019) (advocating for the creation of friction as a means of raising the operating costs for surveillance capitalists).
23. See generally FINN BRUNTON & HELEN NISSENBAUM, *OBFUSCATION: A USER’S GUIDE FOR PRIVACY AND PROTEST* 8-42 (2015) (cataloguing examples of technological obfuscation).

their sex assigned at birth.<sup>24</sup> As each of these examples shows, privacy performances *are* participation through which marginalized groups challenge the homogeneity of the public square while protecting themselves from violence.

Appreciating privacy's manifold agonistic and participatory benefits, along with its expressive, First Amendment pedigree, will be a critical component of any efforts to rectify the problems besetting our public sphere.<sup>25</sup> Privacy helps people from marginalized groups appear in public on their own terms by mitigating the surveillance tools used to track them, thereby avoiding the violence and harassment that surveillance enables. In turn, it helps them enrich and shape the public sphere through the inclusion of their identities<sup>26</sup> and their ideas—often through acts of surveillance resistance and privacy performances.<sup>27</sup>

Marginalized groups' efforts to maintain privacy operate as a form of friction-creating expression, shaping societal norms around privacy, identity, participation, and modes of public self-expression. This is a benefit separate and apart from any subsequent agonistic insights that individuals will proffer once permitted greater access to the square. And that agonistic friction, if safeguarded through privacy protections, may also help decrease some of the dangerous polarization plaguing the American political landscape.<sup>28</sup>

Or so this Essay argues in three parts. Part I briefly highlights some of the group-based harms of privacy violations. Part II expounds on how legal protections for privacy can enable marginalized communities to fully participate in and shape the public sphere, in turn helping our society live up to its democratic, pluralistic, and equitable potential. Part III concludes with a discussion of how understanding the agonistic, participatory role of privacy could influence current reform discussions around regulation of not just the internet, but of traditional public squares as well.

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24. Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1695-1720 (2017) (documenting acts of privacy resistance by members of different marginalized groups and characterizing such resistance as instances of performative, expressive privacy).

25. James P. Nehf, *Recognizing the Societal Value of Information Privacy*, 78 WASH. L. REV. 1, 69 (2003) (arguing that broader appreciation for privacy's societal or public value as "necessary to the proper functioning of a democratic political system" will help advance legal privacy protections); Joshua A.T. Fairfield & Christoph Engel, *Privacy as a Public Good*, 65 DUKE L.J. 385, 425 (2015) (underscoring that data-privacy violations cause social, not just individual, harms).

26. Bey, *supra* note 12.

27. Skinner-Thompson, *supra* note 24, at 1695-1720.

28. See CHANTAL MOUFFE, FOR A LEFT POPULISM 22 (2018) (suggesting that engagement and contestation will more effectively combat right-wing extremism than will demonization).

I. SURVEILLANCE AS EXCLUSION

Surveillance excludes.<sup>29</sup> It pushes members of targeted communities – often from marginalized groups – out of the public square to avoid the devastating consequences of being surveilled, including state-sanctioned physical violence.<sup>30</sup> Surveillance thereby operates as a key mechanism for keeping “members of marginalized groups out of deliberative fora in which critical decisions are being made about problems that affect them,” excluding them from “spaces of political consequence.”<sup>31</sup>

Perhaps counterintuitively, while marginalized groups are disproportionately subjected to surveillance and privacy violations,<sup>32</sup> such involuntary publicity can lead to less diversity in the public square.<sup>33</sup> That is, while a privacy violation may create momentary visibility, it is not visibility that allows the privacy victim to control their public identity. Therefore, on balance, such violations deter members of targeted groups from appearing in public on their own terms.<sup>34</sup> This contributes to the appearance of a homogenous society and conforming viewpoints – within effectively segregated, exclusionary communities – while

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29. Franks, *supra* note 8, at 431 (“The fear of surveillance inhibits individual freedoms of expression and association, which in turn undermines the possibility of an open and democratic society.”).
30. *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System*, SENT’G PROJECT 3 (Mar. 2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [<https://perma.cc/RHY7-5UTZ>].
31. Seeta Peña Gangadharan, *Digital Exclusion: A Politics of Refusal*, in DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY, *supra* note 21, at 113, 115 (discussing the effects of other means of exclusion, such as geographical, informational, and material barriers to participation).
32. VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE POLICE, AND PUNISH THE POOR* 6 (2018).
33. Rebecca Green & Michele Gilman, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L & SOC. CHANGE 253, 260 (2018) (explaining that certain surveillance systems push people out of view, forcing invisibility that may, depending on the context, be harmful).
34. BRYCE CLAYTON NEWELL, *POLICE VISIBILITY: PRIVACY, SURVEILLANCE, AND THE FALSE PROMISE OF BODY-WORN CAMERAS* 33 (2021) (explaining that “surveillance of public spaces also likely affects some categories of citizens disproportionately, with the potential for increasing stigmatization and more frequent criminalization of those members of society who are already more visible”); cf. Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 493-509 (2015) (arguing that surveillance encourages individuals to conform their opinions to perceived group norms).

further compounding political polarization<sup>35</sup> and allowing society to ignore our collective responsibility to those that have been marginalized.<sup>36</sup>

This Part analyzes three overlapping types of surveillance mechanisms that accomplish exclusion: privatized-technological surveillance, administrative surveillance, and carceral surveillance.

#### A. Privatized-Technological Surveillance

As used here, privatized-technological surveillance refers to the use of a digital technology by private individuals or corporations to surveil physical public space or to privacy violations that occur online.

For example, increasingly widespread privatized video surveillance of public space can be used to document a range of political and personal activities, including entering an abortion clinic,<sup>37</sup> participating in political canvassing,<sup>38</sup> or attending a protest.<sup>39</sup> Videos can then be posted on the internet, allowing those who appear in them to be identified through crowdsourcing or facial-recognition technology.<sup>40</sup> Once identified, those individuals can subsequently be doxed and harassed online, pushing them from the digital public sphere and chilling their

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35. Benjamin R. Warner & Astrid Villamil, *A Test of Imagined Contact as a Means to Improve Cross-Partisan Feelings and Reduce Attribution of Malevolence and Acceptance of Political Violence*, 84 COMM'N MONOGRAPHS 447, 457-62 (2017) (documenting how even imagined contacts between members of different groups can reduce polarization); cf. Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 134-38 (2016) (comparing the popularity of media portrayals of lesbian and gay people to the dearth of portrayals of people exercising reproductive freedom as a partial explanation for the advancement of gay rights and the erosion of reproductive rights).
  36. LOÏC WACQUANT, *PUNISHING THE POOR*, at xxi-xxii, 108, 288 (2009); Torin Monahan, *Regulating Belonging: Surveillance, Inequality, and the Cultural Production of Abjection*, 10 J. CULTURAL ECON. 191, 192-95 (2017) (underscoring the state's efforts "to invisibilize the homelessness problem," thereby alleviating society of their "collective ethical responsibility" toward each other).
  37. Yochi J. Dreazen, *Abortion Protestors Use Cameras, Raise New Legal Issues, Lawsuits*, WALL ST. J. (May 28, 2002, 12:01 AM ET), <https://www.wsj.com/articles/SB1022539371607091560> [<https://perma.cc/YJ6Q-8C42>].
  38. Angela K. Evans, *Initiatives Canvassers Report Harassment*, BOULDER WKLY. (July 28, 2016), <http://www.boulderweekly.com/news/initiatives-canvassers-report-harassment> [<https://perma.cc/DB58-4ZL2>].
  39. Nellie Bowles, *How 'Doxing' Became a Mainstream Tool in the Culture Wars*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/technology/doxing-protests.html> [<https://perma.cc/UW9E-5FFQ>].
  40. Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOY. L. REV. 33, 50-51 (2020) (explaining that facial-recognition technology threatens to chill the public actions of minority groups).



embodied physical participation.<sup>41</sup> Although the relative anonymity of the public square once protected participation in such embodied activities,<sup>42</sup> privatized technology has eroded it.<sup>43</sup>

Privatized-technological surveillance can also constitute sexual harassment. Weak privacy tort laws<sup>44</sup> and Section 230 of the Communications Decency Act shield websites that host nonconsensual pornography from accountability.<sup>45</sup> In doing so, they allow stigmatized images of women and queer folk to be used as weapons that shame both female sexuality and nonnormative gender identities and create obstacles to both gender and sexual minorities' full enfranchisement in society, including employment barriers when current and potential employers view nonconsensual images.<sup>46</sup>

Such examples of internet harassment underscore what Paul Schwartz predicted decades ago: without informational-privacy protections online, many people will decide not to participate in the digital public square, undermining the ability of the internet to function as a meaningful democratic forum.<sup>47</sup> The harms of digital privacy violations thus reverberate back and forth into physical public space, undermining targets' ability to participate as they desire in both political activities and quotidian activities essential to human flourishing, such as work.

### *B. Administrative Surveillance*

Administrative surveillance is the use of government systems of classification and recordkeeping to surveil, control, and shape people's lives and identities.<sup>48</sup>

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41. Micah Lee, *How Right-Wing Extremists Stalk, Dox, and Harass Their Enemies*, INTERCEPT (Sept. 6, 2017, 5:24 PM), <https://theintercept.com/2017/09/06/how-right-wing-extremists-stalk-dox-and-harass-their-enemies> [<https://perma.cc/8JGD-699E>].
42. Cf. JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 65-66 (1990).
43. Scott Skinner-Thompson, *Recording as Heckling*, 108 GEO. L.J. 125, 159-60 (2019).
44. See Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2069-74 (2018).
45. Mary Anne Franks, *Section 230 and the Anti-Social Contract*, LAWFARE (Feb. 22, 2021, 10:36 AM), <https://www.lawfareblog.com/section-230-and-anti-social-contract> [<https://perma.cc/UK5E-Z8ZF>].
46. Anastasia Powell, Adrian J. Scott & Nicola Henry, *Digital Harassment and Abuse: Experiences of Sexuality and Gender Minority Adults*, 17 EUR. J. CRIMINOLOGY 199, 215-17 (2020); CITRON, *supra* note 2, at 13-14.
47. Schwartz, *supra* note 3, at 1611, 1650.
48. DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 29 (2011) (explaining that "administrative norms or regularities create structured insecurity and (mal)distribute life chances across populations").

In some jurisdictions, if a transgender or gender-variant person wants their name officially changed, they must file a court petition and publish the name change in a local newspaper, leaving public and often digital paper trails.<sup>49</sup> Similarly, some states forbid modification of the gender marker on someone's birth certificate outright or require medical or surgical interventions before a person can obtain an accurate gender marker.<sup>50</sup> These medical interventions may be inaccessible or unneeded for many trans people.<sup>51</sup> When an individual is asked to produce their birth certificate, intimate details regarding their body and gender identity may be revealed. This forced "outing" serves as a barrier to obtaining proper identification,<sup>52</sup> which is a critical part of entering the public sphere on one's own terms without being subjected to violence and harassment.<sup>53</sup>

Administrative surveillance of those seeking state financial assistance is also pervasive and increasingly digitized, in what John Gilliom has described as the "digital poorhouse."<sup>54</sup> Under the pretense of ensuring that those seeking aid from means-tested programs meet the eligibility requirements, the government collects vast amounts of personal information about people's lives, including their intimate relationships, sometimes through invasive home visits.<sup>55</sup> In reality, the questioning operates as a form of social control whereby the administrative state polices the poor because it views them as morally suspect.<sup>56</sup> Increasingly, this information is aggregated and shared among government agencies (including, at times, law enforcement), rendering the lives of impoverished people completely transparent to the government.<sup>57</sup>

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49. *E.g.*, N.Y. CIV. RIGHTS LAW §§ 60-65 (McKinney 2021).

50. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400-01 (2013).

51. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 291 (2013).

52. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 192 (2015).

53. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754-57 (2008).

54. JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 35 (2001).

55. *Id.* at 43.

56. BRIDGES, *supra* note 8, at 9 (2017).

57. *See* EUBANKS, *supra* note 32, at 121.

### C. Carceral Surveillance

And of course, carceral surveillance—the deployment of the state’s law-enforcement powers to document and criminalize a vast array of activity—also excludes marginalized groups.<sup>58</sup>

Such surveillance in the form of police scrutiny of trans women of color and the criminalization of “walking while trans” further pushes trans people from the public square and into prison.<sup>59</sup> Racial profiling, as embodied in New York City’s unconstitutional stop-and-frisk policy, targets Black and Brown people and renders them subject to search and arrest merely for their presence in particular overpoliced neighborhoods.<sup>60</sup> Immigrant profiling, such as the unconstitutional Arizona Senate Bill 1070, authorized local law enforcement officers to arrest anyone without a warrant if the officers had probable cause to believe that they were removable under federal immigration law.<sup>61</sup> This policy served to brand people as suspicious and criminal based on the color of their skin or their ability to speak English. Such profiling (which continues notwithstanding intermittent court victories)<sup>62</sup> deters racial, immigrant, and gender minorities from entering the public square lest they be observed, searched, and arrested.

Anticamping or sit-lie laws are another example of carceral surveillance. These laws criminalize the presence of homeless people in public by forbidding them from creating makeshift shelters on public land or even lying down in public space, empowering the government to destroy people’s dwellings and invade their privacy.<sup>63</sup> This pushes homeless people away from central public spaces to remote and undesirable corners (such as underpasses or woods) where they are further isolated from sources of sustenance and public participation and where

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58. Cf. WACQUANT, *supra* note 36, at 41 (explaining that a penal state has gradually replaced a welfare state, further criminalizing marginalized groups).

59. Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5, 5-6 (2017).

60. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding New York City’s stop-and-frisk policy unconstitutional).

61. See *Arizona v. United States*, 567 U.S. 387 (2012) (ruling that federal law preempted three of the four provisions of Arizona Senate Bill 1070).

62. E.g., Alice Speri, *The NYPD Is Still Stopping and Frisking Black People at Disproportionate Rates*, INTERCEPT (June 10, 2021, 7:00 AM), <https://theintercept.com/2021/06/10/stop-and-frisk-new-york-police-racial-disparity> [<https://perma.cc/SU9Z-QQFY>].

63. E.g., DENVER, COLO., REV. MUN. CODE § 38-86.2 (2021) (prohibiting unauthorized camping); S.F., CAL., POLICE CODE art. 2, § 168(b) (2021) (prohibiting sitting or lying down on public sidewalks during the day).

they are ignored and forgotten.<sup>64</sup> Indeed, laws regulating public space criminalize the very *existence* of homeless people – an exclusion that Jeremy Waldron has described as “one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.”<sup>65</sup>

With the proliferation of digitized criminal records<sup>66</sup> and online mugshot databases,<sup>67</sup> once a person is criminalized, they are always criminalized. Indeed, the policing of physical space follows people online in perpetuity. This digital documentation of the criminalization of certain identities within public space allows potential employers, landlords, or social connections to learn of people’s interactions with law enforcement<sup>68</sup> – interactions that may well have been the product of racist, transphobic, and xenophobic police practices. And, much like facial recognition technology, the digitized criminal-record databases may not always be accurate, and can include individuals who are not ultimately convicted but merely arrested.<sup>69</sup>

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These examples of privatized-technological, administrative, and carceral surveillance illustrate that privacy violations are not only felt by the individuals being surveilled at any given moment (significant as that individual impact is). Privacy violations also systematically operate as a form of social control that helps prop up hegemonic forces of white supremacy, patriarchy, heteronormativity, and neoliberalism – while subjugating different marginalized groups, rendering them abject.<sup>70</sup> As powerfully put by Torin Monahan:

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64. Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 556-60 (2006).
65. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 301-02 (1991).
66. Sarah Esther Lageson, *The Purgatory of Digital Punishment*, SLATE (June 24, 2020, 10:59 AM), <https://slate.com/technology/2020/06/criminal-justice-records-online-digital-punishment.html> [<https://perma.cc/8VUV-H8ZK>].
67. E.g., FIND MUGSHOTS, <https://www.findmugshots.com> [<https://perma.cc/C637-TK5B>].
68. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html> [<https://perma.cc/VLF8-KPTT>].
69. Marina Duane, Nancy G. La Vigne, Mathew Lynch & Emily Reimal, *Criminal Background Checks: Impact on Employment and Recidivism*, URB. INST., at V (2017), [https://www.urban.org/research/publication/criminal-background-checks-impact-employment-and-recidivism/view/full\\_report](https://www.urban.org/research/publication/criminal-background-checks-impact-employment-and-recidivism/view/full_report) [<https://perma.cc/XR65-WRSM>]; Nicole Weissman & Marina Duane, *Five Problems with Criminal Background Checks*, URB. INST.: URB. WIRE (Mar. 13, 2017), <https://www.urban.org/urban-wire/five-problems-criminal-background-checks> [<https://perma.cc/R5M5-9JPV>]; see also Hill, *supra* note 7 (documenting a series of wrongful arrests based on facial recognition technology).
70. Monahan, *supra* note 36, at 194-95.

Surveillance plays an important role in policing bodies and maintaining boundaries between inside and outside, self and other. Moments of unwanted visibility or presence – of the poor, the homeless, the refugee – seem to compel mechanisms of intensified control. Such control mechanisms delineate parameters of temporary existence for the compliant, while excluding those marked as dangerous or socially illegible. Therefore, through categorization and sorting, surveillance enacts forms of structural and symbolic violence against marginalized Others.<sup>71</sup>

Consequently, social efforts to create a more just and equitable society must include commitments to privacy protections – including agonistic privacy performances – along with drastic reductions of the state- and private-surveillance infrastructure.

## II. PRIVACY AS AGONISTIC PARTICIPATION

In contrast to the often-exclusionary impact of surveillance, legal safeguards for individual privacy help people be seen and heard on their own terms, allowing them to contribute to the social tableau and democratic governance. While it has many different patinas, any definition of a functioning democracy depends on meaningful participation of the people.<sup>72</sup> Such participation can occur in informal fora or formal representative ones. But whether it be deliberative democracy, agonistic pluralism, or even civic republicanism, popular participation is the linchpin of many theories of democracy.<sup>73</sup>

Democratic theories may differ in terms of the emphasis they place on how and why participation matters, but they almost all agree that it does. For example, deliberative democracy often foregrounds the role of rational consensus as a critical goal of public participation.<sup>74</sup> As leading scholar of deliberative

71. *Id.* at 192.

72. Mike Ananny has observed:

Although the term *participation* is central to much of democratic theory, it is still highly contingent and debatable in both form and aims. It means different things in different contexts, often presumes different democratic ideals, and carries with it different assumptions about what role individual and collective actions play in democratic institutions.

Mike Ananny, *Presence of Absence: Exploring the Democratic Significance of Silence*, in DIGITAL TECHNOLOGY AND DEMOCRATIC THEORY, *supra* note 21, at 141, 154. My goal here is not to resolve these debates (a tall order), but rather to underscore the role of privacy in both facilitating and directly serving as a form of agonistic participation (however defined).

73. See *supra* notes 17–19 for definitions of each theory.

74. For a thorough yet succinct overview of theories of deliberative democracy and their shortcomings, see EDWINA BARVOSA, DELIBERATIVE DEMOCRACY NOW 1–16 (2018).

democracy Jürgen Habermas described, the effectiveness of civil society and deliberative democracy historically “stood or fell with the principle of universal access. A public sphere from which specific groups would be . . . excluded was less than merely incomplete; it was not a public sphere at all.”<sup>75</sup>

In contrast to deliberative democracy’s emphasis on consensus building, civic republicanism centers on what Philip Pettit describes as a “contestatory citizenry” — one that is “committed to interrogating all the elements of government and imposing itself in the determination of law and policy” to ensure that the government does not become totalitarian.<sup>76</sup> In other words, contestatory participation under a republican model underscores the role of participation aimed at the government itself (i.e., vertically).

Like civic republicanism, agonistic pluralism distinguishes itself from deliberative democracy by underscoring the value of contention over consensus.<sup>77</sup> But under an agonistic pluralist veneer, participation in the public square is critical because “the public space is where conflicting points of view are confronted without any possibility of a final reconciliation.”<sup>78</sup> Horizontal tension (among the people and corporatist, neoliberal powers) is acceptable — and indeed necessary — because the lack of reconciliation can underscore the hegemonic forces operating with the public square and can also help ensure continued vigilance in the face of many ultimately short-term political victories.<sup>79</sup> Or, as put by Chantal Mouffe, an agonistic approach to public discourse “consists in making visible what the dominant consensus tends to obscure and obliterate, in giving a voice to all those are silenced within the framework of the existing hegemony.”<sup>80</sup>

In short, Habermas emphasized the purported role of rational decisionmaking within the deliberative process; Pettit and Mouffe underscore the importance

75. HABERMAS, *supra* note 17, at 85.

76. PETTIT, *supra* note 18, at 5.

77. MOUFFE, *supra* note 19, at 92 (“And what distinguishes the agonistic approach to the public space from other approaches? Its main characteristic is that it challenges the widespread view that, albeit in different ways, informs most visions of the public space. According to the expected view, the public space is the terrain where one aims at creating consensus.”).

78. *Id.*

79. BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 14-15, 205 (2016) (underscoring that while the “perpetuity of contest is not easy to celebrate,” it serves as a realist recognition that political contests “engender remainders and that, if those remainders are not engaged, they may return to haunt and destabilize” the contests that were mistakenly believed to be settled or closed, with the displacement of contestation as disempowering the most marginalized identities who stand to benefit from further contestation).

80. MOUFFE, *supra* note 28, at 17 (explaining that “[o]ne of the fundamental symbolic pillars of the democratic ideal — the power of the people — has been undermined because post-politics eliminates the possibility of an agonistic struggle between different projects of society which is the very condition for the exercise of popular sovereignty”).

of contestation or agonism as a key characteristic of participatory deliberations. But a core tenant unifying all these theories is popular sovereignty through participation by the people, suggesting that unless we safeguard such participation, we risk undermining our democracy altogether.

And as privacy-law scholars have noted, actionable legal rights against privacy incursions serve as a critical first-order right by helping people access and influence the public square – both physical and digital – in a meaningful way. For example, as Paul Schwartz powerfully argued, without strong privacy protections, “cyberspace’s civic potential will never be attained.”<sup>81</sup> According to Schwartz, lack of privacy on the internet both (1) “discourage[s] unfettered participation in deliberative democracy” and (2) “can harm an individual’s capacity for self-governance,” limiting meaningful contributions to public discussion.<sup>82</sup> As Schwartz highlighted, privacy aids deliberative democracy because without it, “the underlying capacity of individuals to form and act on their notions of the good” are limited and chilled, and surveillance also chills the coming together of communities to hash out their views.<sup>83</sup> Relatedly, as detailed by Julie Cohen, privacy violations “harm individuals, but not only individuals” in that they also quash “[d]ynamic, emergent subjectivity—the sort of subjectivity upon which liberal democracy and innovation both rely.”<sup>84</sup> According to Cohen, unencumbered surveillance will prevent individuals from having “the ability to form and pursue meaningful agendas for human flourishing.”<sup>85</sup> Or, as characterized by Neil Richards, privacy is necessary to incubate new ideas and foster intellectual freedom, in turn advancing democratically supported First Amendment speech values.<sup>86</sup> In short, as put by Joel Reidenberg, “Privacy is fundamental to constitutional democracy affecting a citizen’s ability to participate in deliberative democracy and to engage in robust governing dialogues.”<sup>87</sup>

In addition to privacy’s instrumental role in fostering identity and ideas and facilitating subsequent democratic participation, efforts to maintain privacy can themselves serve as a form of agonistic friction and participation, as many

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81. Schwartz, *supra* note 3, at 1611.

82. *Id.* at 1647.

83. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 560-61 (1995).

84. Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1906 (2013).

85. *Id.* at 1912.

86. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408-25 (2008).

87. Joel R. Reidenberg, *Privacy in Public*, 69 U. MIA. L. REV. 141, 152 (2014); *see also* Joel R. Reidenberg, *The Transparent Citizen*, 47 LOY. U. CHI. L.J. 437, 449 (2015) (“The overexposure of citizens reduces the checks and balances on the exercise of government powers and diminishes citizens’ trust and commitment to law.”).

members of different marginalized groups have demonstrated.<sup>88</sup> That is, while privacy scholars have rightly emphasized privacy's role in *enabling* participation, less emphasis has been placed on how privacy performances *are* participation.

For Hong Kong civil-rights protestors, for example, wearing masks both allows them to evade facial recognition technology and effect a participatory critique of the surveillance regime.<sup>89</sup> Similarly, wearing a hoodie can signal a refusal to be surveilled, particularly by Black people who are disproportionately subject to surveillance. Indeed, wearing a hoodie is often read by the state as an expressive statement of resistance.<sup>90</sup> Relatedly, people of any gender may subvert gender surveillance by refusing to comply with and be outed by restrictive gender-identification laws or other laws that enforce sex or gender stereotypes. In this context, noncompliance keeps aspects of a people's gender-related identities private, and simultaneously operates as a performative disavowal of the state's ability to surveil and define queer bodies.<sup>91</sup> Indeed, the state understands privacy performances as a form of expressive, participatory resistance, and it has specifically targeted efforts to maintain privacy by imposing additional regulation or criminalization. Consider, for example, the so-called Unmasking Antifa legislation introduced in Congress targeting protestors who wear "intimidat[ing]" masks,<sup>92</sup> in addition to the application of antimask laws of much older vintages to civil-rights protestors.<sup>93</sup>

These privacy performances are acts of expressive resistance to surveillance regimes that "communicate and signal opprobrium of surveillance, shine a

88. For discussion of how principles of agonism or contestation should be incorporated into the design state of machine-learning processes to better protect privacy and overdetermination by algorithmic decisionmaking, see Mireille Hildebrandt, *Privacy as Protection from the Incomputable Self: From Agnostic to Agonistic Machine Learning*, 20 THEORETICAL INQUIRIES L. 83 (2019).

89. Paul Mozur, *In Hong Kong Protests, Faces Become Weapons*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/technology/hong-kong-protests-facial-recognition-surveillance.html> [<https://perma.cc/3SN4-9C87>].

90. Cf. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA 102 (2013) (observing that "as a matter of both socialization and formal or informal political advice, African Americans are encouraged to signal cooperation by giving up their privacy" when confronted by law enforcement).

91. Cf. First Amended Complaint for Declaratory and Injunctive Relief, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 16-CV-00236) (arguing that North Carolina's bathroom bill, H.B. 2, invades the privacy of transgender people, exposing them to harassment and violence).

92. Unmasking Antifa Act of 2019, H.R. 4003, 116th Cong. § 2(a) (2019).

93. Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 848-50 (2013) (documenting several examples of antimask laws); SKINNER-THOMPSON, *supra* note 8, at 69-70 (discussing application of antimask laws to antiracism protestors).



critical spotlight on that surveillance, and in so doing, offer a reimagined place for privacy in our social structures.”<sup>94</sup> They are an embodied example of what Bernard Harcourt might label “critical praxis,”<sup>95</sup> or what Judith Butler characterizes as the

plural and performative right to appear, one that asserts and instates the body in the midst of the political field, and which, in its expressive and signifying function, delivers a bodily demand for a more livable set of economic, social, and political conditions no longer afflicted by induced forms of precarity.<sup>96</sup>

Put differently by Seeta Peña Gangadharan in her work on the willful (as opposed to coerced) self-exclusion of different marginalized groups from dominant modes of tech-based interactions, “when marginalized people refuse technologies, they imagine new ways of being and relating to one another in a technologically mediated society.”<sup>97</sup>

So conceived, privacy performances are an embodied example of agonistic participation that, pursuant to contestatory theories of participation, form a critical component of democracy in action. As noted above, under agonistic, pluralist conceptions of participatory democracy, “a central task of democratic politics is to provide the institutions which will permit conflicts to take an ‘agonistic’ form, where the opponents are not enemies but adversaries among whom exists a conflictual consensus.”<sup>98</sup> Without such confrontation of political positions, “there is always the danger that this democratic confrontation will be replaced by a confrontation between nonnegotiable moral values or essentialist forms of identifications.”<sup>99</sup> Paradoxically, according to Mouffe, “[t]oo much emphasis on consensus, together with aversion towards confrontations, leads to apathy and to a dissatisfaction with political participation.”<sup>100</sup> As “cultural and artistic practices,” privacy performances “can play a critical role by fostering agonistic public

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94. SKINNER-THOMPSON, *supra* note 8, at 62.

95. BERNARD E. HARCOURT, *CRITIQUE & PRAXIS* 442-45 (2020).

96. JUDITH BUTLER, *NOTES TOWARDS A PERFORMATIVE THEORY OF ASSEMBLY* 11 (2015).

97. Gangadharan, *supra* note 31, at 113; *see also id.* at 120 (describing technological refusal as a method of “self-creation”); Ananny, *supra* note 72, at 142 (arguing that “absence is a type of public participation that – when seen and valued – offers new ways to think about what’s being communicated”).

98. MOUFFE, *supra* note 19, at XII.

99. *Id.* at 7.

100. *Id.*

spaces where counter-hegemonic struggles could be launched against neo-liberal hegemony.”<sup>101</sup>

Appreciating privacy’s directly participatory or agonistic role is critical because it provides a powerful normative reason to protect privacy as participation. It can also shift perceptions of privacy performances from suspicious to time-honored expressive practices.<sup>102</sup> In the current polarized public square, both the state and many private individuals demonize antisurveillance practices and associate them with criminal behavior.<sup>103</sup> Understanding privacy performance/resistance as participatory, expressive engagement could help ratchet down the rhetoric and appreciate such practices for what they often are: principled efforts to shape the public sphere as one hospitable to all kinds of different identities and ideas.<sup>104</sup> So while privacy scholars have long appreciated that privacy matters in that it enables participation, it is just as important to understand that privacy can operate as a form of agonistic participation in and of itself – privacy is an end, not just a means, of participation.

### III. IMPLICATIONS FOR REFORM

Better appreciating that privacy serves not just as an instrumental tool or precondition for democratic participation, but also as a form of agonistic participation itself that shapes public values and norms has several implications for current privacy-reform discussions.

In particular, the participatory-privacy paradigm provides a powerful riposte to those who rely on a simplistic and formalistic approach to the First Amendment and its role as democratic lodestar. As widely documented and critiqued, deregulatory agendas have been advanced by formalist and reductionist approaches to the First Amendment wherein a vast array of conduct is characterized as speech or speech-facilitating. If taken to the extreme, such conduct, understood as expression, would be largely insulated from government regulation.<sup>105</sup> This approach, known variously as First Amendment Lochnerism,<sup>106</sup> the

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101. *Id.* at XVII.

102. MOUFFE, *supra* note 28, at 93.

103. DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 21-22 (2011).

104. SKINNER-THOMPSON, *supra* note 8, at 85.

105. Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1645-50 (2021).

106. Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 432-35, 457-58 (2006).

Imperial First Amendment,<sup>107</sup> or the weaponized First Amendment,<sup>108</sup> has been deployed in contexts ranging from challenges to LGBTQ+ antidiscrimination laws<sup>109</sup> to consumer protection legislation,<sup>110</sup> but is also increasingly raised to combat modest privacy protections.

For example, surveillance companies like Clearview AI invoke First Amendment Lochnerism to defend their practice of scraping social-media photos to train facial-recognition software, which they then hawk to law-enforcement agencies.<sup>111</sup> According to Clearview AI, the practice is a form of information gathering protected by the First Amendment.<sup>112</sup> But to the extent the First Amendment often operates as a constitutional shorthand for all manner of key ingredients for meaningful democracy,<sup>113</sup> understanding that people who assert their right to obscure their identity from Clearview AI and other surveillance capitalists are engaged in an act of agonistic expression helps to provide a compelling government justification for regulating privacy-invading actions.<sup>114</sup> Given the Supreme Court's sensitivity to social context in determining whether conduct is expressive or symbolic speech,<sup>115</sup> a strong argument can be made that those who seek to guard aspects of their identity through privacy resistance (be it through online obfuscation techniques, physical barriers, or the like) are engaged in an expressive enterprise, one that rebukes widespread surveillance.

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107. Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1209-10 (2001).
108. *Janus v. Am. Fed'n of State, Cnty & Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
109. Cf. Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 882-83 (2018) (discussing, for example, arguments that merchants' refusal to serve queer customers is a form of protected expression).
110. See, e.g., *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).
111. Kashmir Hill, *Facial Recognition Start-Up Mounts a First Amendment Defense*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2020/08/11/technology/clearview-floyd-abrams.html> [<https://perma.cc/PV6S-K7SF>].
112. *Id.* I have joined an amicus brief in opposition to Clearview AI's claim that its surveillance practices are insulated from regulation by the First Amendment. See Brief of Amici Law Professors in Opposition to Defendant's Motion to Dismiss, *ACLU v. Clearview AI, Inc.*, No. 2020-CH-04353 (Ill. Cir. Ct. Nov. 2, 2020).
113. For example, speech, thought, assembly, association, and information gathering on the government are such key ingredients. See BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* 59-72 (2015) (discussing manifold democratic values protected by the First Amendment).
114. Margot E. Kaminski & Scott Skinner-Thompson, *Free Speech Isn't a Free Pass for Privacy Violations*, SLATE (Mar. 9, 2020, 2:53 PM), <https://slate.com/technology/2020/03/free-speech-privacy-clearview-ai-maine-isps.html> [<https://perma.cc/AWR7-NAL7>].
115. *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (emphasizing the role of "surrounding circumstances" in determining whether conduct is expressive).

Similarly, Section 230 of the Communications Decency Act, which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,”<sup>116</sup> has often been interpreted broadly by courts to provide blanket immunity to platforms or websites for hosting hateful, discriminatory, or privacy-invading messages.<sup>117</sup> This immunity is defended as a key adjuvant to the First Amendment and as a critical means of fostering speech online. According to Section 230 defenders, if internet platforms (ranging from Facebook to websites hosting revenge pornography) could be held liable for the acts of website users, then the platforms would not exist and the internet’s speech potential would be curtailed.<sup>118</sup> For this reason, Section 230 is often regarded as “a kind of sacred cow – an untouchable protection of near-constitutional status.”<sup>119</sup>

But as scholars and advocates such as Danielle Keats Citron and Mary Anne Franks have underscored, that unfettered immunity – supposedly needed to facilitate a robust digital public sphere – has also been used to silence, shame, and humiliate many people from marginalized groups (including women and queer folk), pushing them from the public square.<sup>120</sup> As explained by Olivier Sylvain, the broad construction of Section 230 that currently prevails among courts “effectively underwrites content that foreseeably targets the most vulnerable among us.”<sup>121</sup> As debates about legislatively amending or judicially reexamining Section 230 grow, understanding the role of agonistic participation in creating meaningful democratic exchange and privacy in facilitating that participation can buttress calls for reform. Holding accountable certain pernicious websites (such as those that directly encourage and profit from harassment) would encourage platforms to change their practices and more robustly scrutinize the harmful and hateful content they host. Just as a broader view of privacy’s democratic function could justify regulating surveillance companies like Clearview AI, a broader, less formalist view of the democratic values that internet-platform regulation serves could justify Section 230 reform.

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116. 47 U.S.C. § 230 (2018).

117. Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, in *THE PERILOUS PUBLIC SQUARE* 200, 201 (David E. Pozen ed., 2020).

118. See, e.g., Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 *NOTRE DAME L. REV. REFLECTION* 33, 36-44 (2019) (describing the substantive and procedural benefits of Section 230).

119. Citron, *supra* note 117, at 200.

120. Olivier Sylvain, *Discriminatory Designs on User Data*, in *THE PERILOUS PUBLIC SQUARE*, *supra* note 117, at 181, 181; Danielle Keats Citron & Mary Anne Franks, *The Internet as Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 *U. CHI. LEGAL F.* 45, 54-55 (2020).

121. Sylvain, *supra* note 120, at 182.

As a final example, laws that force the economically subjugated from the public square, such as anticamping laws, rely on the faulty notion that there ought to be no right to privacy in public.<sup>122</sup> We might instead understand someone who establishes a makeshift home on public property as engaging in agonistic, participatory privacy.<sup>123</sup> Such a home affords its inhabitant a modest degree of privacy from the public, while simultaneously putting economic inequality and social precarity on full display. Penalizing people for constructing makeshift homes and existing in public space could then be understood as an affront to First Amendment participatory values. Similar arguments were proffered in the context of organized camping movements, such as Occupy.<sup>124</sup> They are just as applicable to individualized, agonistic efforts at survival and refusal to be cast out of public view.

#### IV. CONCLUSION

A deeper appreciation for privacy's role in both facilitating participation and being a form of participation could help transform it from a boogeyman for those suggesting that people with nothing to hide have nothing to fear into a critical component of our democracy. In turn, this shift would help justify regulations that would truly make the physical public square and digital public square equitable and democratic spaces, open to all. It may also decrease polarization by reducing the segregation of both digital and physical spaces, leading to greater points of interaction and providing for candid, yet compassionate, exchanges of views.

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122. See *Violations of the Right to Privacy for Persons Experiencing Homelessness in the United States: A Report to the Special Rapporteur on the Right to Privacy*, NAT'L L. CTR. ON HOMELESSNESS & PRIV. (May 31, 2017), <https://nlchp.org/wp-content/uploads/2018/10/Special-Rapporteur-Right-to-Privacy.pdf> [<https://perma.cc/EG2P-UNTW>].

123. *Id.* at 1 (arguing that the right to privacy extends to any form of dwelling, “whether it be a shanty, a tent, a tarp, or just a blanket”).

124. Cf. Bernard E. Harcourt, *Political Disobedience*, in OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 45, 53 (W.J.T. Mitchell, Bernard E. Harcourt & Michael Taussig eds., 2013) (arguing that Occupy represents “a new paradigm of political disobedience” which can “only be ‘heard,’ syntactically, from its place of occupation”); see also *Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 293 (1984) (assuming that camping in connection with a demonstration is a covered First Amendment activity).

*participating in this Collection. The Knight Foundation exercised no control over the contents of this Essay. At times, this Essay refines and expands on certain themes from my recent book, Privacy at the Margins (2021), explaining in greater detail how and why privacy is critical to an agonistic and equitable democracy.*