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Sexuality's Promise for Sexual Privacy

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Sexuality's Promise for Sexual Privacy

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Date : August 30, 2023

Brenda Dvoskin, *Speaking Back to Sexual Privacy Invasions*, 98 **Wash. L. Rev.** __ (forthcoming 2023), available at [SSRN](#) (March 6, 2023).

Thanks in part to the ardent work of dedicated [activists](#) and [scholars](#), there is a growing body of law and industry self-regulation governing violations of individuals' [sexual privacy](#), such as the unconsented distribution of another's intimate images online. In her thoughtful piece, *Speaking Back to Sexual Privacy Invasions*, scholar Brenda Dvoskin powerfully argues that a key example of such regulation—many internet platforms' self-imposed total ban on nudity—goes too far and is in many ways counterproductive to the goals of sexual privacy. As Dvoskin explains in her effort to deepen sexual privacy legal theory and make its application more consistent with its professed values of fostering (consensual) sexual expression, any effort to completely abate the harms flowing from sexual privacy violations requires not just preventing unconsented disclosures ex ante, “but also transforming the meaning of public representations of sexuality.”

Dvoskin argues that one of the principal harms flowing from unconsented disclosures originates in the social stigma associated with nudity. If self-authorized nudity became more commonplace via deregulation, the social harm of having one's body seen might be decreased (albeit not eliminated). Put succinctly by Dvoskin, “[p]ublic representations of sex are an essential tool to destabilize the meaning of unwanted exposures and, in turn, reduce the harms experienced by victims of privacy losses.” As conceptualized by Dvoskin, diminishing the negative social meaning ascribed to nudity reduces the power of privacy invaders to inflict any harm and, in that view, is an intervention that more fully captures feminism's emancipatory potential.

Importantly, Dvoskin acknowledges that unconsented sexual privacy violations cause autonomy harms that are critical to address. She also, however, explains how sexual privacy theory has, at times, incorporated the social harms associated with nudity as the normative justification for prohibiting privacy violations. That is, scholars and lawmakers have relied upon the social interpretation of the nudity as shameful to justify the regulation. Or, as put by [Judith Butler](#) when discussing gender performances, “the anticipation conjures its object,” or, in this case, the harm.

Instead, Dvoskin advocates for a regulatory path that creates space for consensual sexual expression, instead of reifying the idea that sexual expression necessarily results in unanswerable harms. This, in turn, will help destigmatize the social harm of sexual privacy violations and, in that way, reduce the power of privacy violators. Dvoskin's position stands shoulder to shoulder with other social/law reform efforts that have [prioritized destigmatization](#), such as movement calls to “Shout Your Abortion” and “come out” as queer in order to harness the power of social contact theory as a means of changing social attitudes toward marginalized identities/behaviors.

To illustrate her point, Dvoskin aptly draws from the queer theory notion of “scripts” and explains that the harm of sexual privacy is both scripted (meaning that the social interpretation of nudity helps create the harm) and script (meaning that legal/regulatory reaction to the privacy loss further entrenches the meaning of the nudity as somewhat negative). As such, law and policy must be attentive to the way they may be reinforcing the very harms they aim to prevent.

Dvoskin recognizes that in the context of online sexual expression and sexual privacy, striking the right regulatory balance is difficult. She acknowledges that regulatory regimes that require ex ante consent before platforms permit a posting would be onerous and require more work on the part of platforms and regulators. But innovative approaches, including notice-and-takedown regimes, that allow those whose rights are violated to efficiently have the infringing image removed by platforms, are not without precedent such as in the Digital Millennium Copyright Act copyright infringement context. And Dvoskin rightly notes that nuance is a virtue rather than vice and can, perhaps, serve as a model for more calibrated content moderation in other contexts as well. Indeed, as the Supreme Court has noted in the context of prohibited sex discrimination, “[administrative convenience](#)” is not a sufficiently compelling justification. Nor is it an idealized form of governance. And Dvoskin’s piece is a powerful riposte in favor of a more bespoke approach to the governance of sexual expression and sexual privacy online.

The article is as superbly written as it is carefully conceptualized and, although focused on a very specific and important context, serves as a cautionary tale across regulatory regimes, reminding us both that laws are discourses that can perpetuate the very harms they are seeking to prevent and that we should be skeptical of bright line rules, which are both over- and under- inclusive in terms of achieving regulatory aims. Moreover, while not Dvoskin’s principal focus, implicit in the article is also a critique of platforms’ approach to sexual expression as an example of, in essence, “[privacy washing](#)”: platforms trumpet the puritanism and overregulation of sexual expression of their websites in part to distract from their abysmal approaches to content moderation and privacy in other contexts, such as their failure to meaningfully regulate false political and medical information. All told, as Dvoskin explains, sexual expression should not be sacrificed either on the altar of either sexual privacy or in the name of convenience.

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