# DOES THE INTERNET LIMIT HUMAN RIGHTS PROTECTION?

## SEXUAL PRIVACY ONLINE AND THE LIMITS OF THE LAW

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# Contents

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# Abstract

This thesis examines the balance between protections of privacy and free expression in online environments, specifically, the issue of 'sexual privacy' and the unauthorised sharing of intimate or sexual material online. The growth of the Internet has consequences for the human rights obligations of states bound by the European Convention on Human Rights to protect privacy online. Evidence shows that violations of sexual privacy, and other forms of online abuse, are highly gendered - most victims are female and most perpetrators are male. Victims report that criminal justice systems are ineffective handling their cases. Yet, poor responses from police and prosecutors are incompatible with the human rights obligations of the state.

To examine the question of sexual privacy, the thesis uses four modes to explore the current shape of the internet and the challenges of regulation - normative shifts in protections of privacy online, technical architectures, the role of markets, and the limitations of the law to safeguard sexual privacy online. The methodology, which reflects the legal, societal, and technical backdrop of the research, employs a doctrinal legal analysis of the layered rules governing the framework for online expression and privacy. A case study from Iceland builds on domestic and international law together with an analysis of case law from 2008 to 2019. Empirical research comes from elite interviews with the Icelandic police, prosecutors, Europol and NGOs that work in the field of online abuse.

The thesis proposes a victim-centric legal redress, based in human rights, for violations of sexual privacy that frames violations of sexual privacy as sexual offences. Measures developed from this doctoral research are already being implemented by the Icelandic government, so the thesis includes research strategies to track effective application of the legislation by police, victim support and technology platforms.

# Introduction

## The Problem Defined

The Internet is an important and integrated part of modern life.[1] Businesses and public authorities rely on Internet-based infrastructure for their operation and services, meanwhile, online platforms have transformed the scope, form and content of public and private discourse, actively blurring the borders between the spheres.[2] The deployment of smart technology has transformed phones into personal communications centres that facilitate the commodification of privacy that Cohen calls Informational Capitalism.[3] This development also shifted norms in interpersonal communication because intimacy is increasingly exercised in online environments.[4] The recent Covid-19 pandemic has further stimulated the growth of online communication in work and social situations. [5]

The Internet is not the promised land of rights and freedoms envisaged by early adopters of the technology.[6] Core existential questions about who we are and what we do are socially, culturally and individually changing because online and offline worlds are merging.[7] This development is illustrated in the way the Internet is utilised to maintain and conduct gendered abuse and sexual offences.[8] Women and marginalised groups are disproportionally victimised in cases of online violations of sexual privacy and, in the vast majority of cases, the perpetrators are male.[9] This pattern

[1] European Commission, 'Digital Economy and Society Index (DESI) 2020 - Use of Internet Services' (European Commission 2021).

[2] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books 2010); Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019); Ian Brown and Christopher T Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press 2013).

[3] Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

[4] Nicola Henry and Anastasia Powell, 'Beyond the "Sext": Technology-Facilitated Sexual Violence and Harassment against Adult Women' (2015) 48 Australian & New Zealand Journal of Criminology 104; Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25 Feminist Legal Studies 25.

[5] epra.org, 'Covid-19: Overview of Key Initiatives at European Level' (*European Platform of Regulatory Authorities*, 14 April 2020) <https://www.epra.org/news_items/covid-19-overview-of-some-initiatives-at-european-level> accessed 20 August 2021; United Nations, 'E-Government Survey 2020 - Digital Government in the Decade of Action for Sustainable Development. (With Addendum on COVID-19 Responses)' (United Nations Department of Economic and Social Affairs 2020); Andrew Keane Woods and Jack Goldsmith, 'Internet Speech Will Never Go Back to Normal' [2020] *The Atlantic* <https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/> accessed 20 August 2021.

[6] John Perry Barlow, 'A Declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*, 20 January 2016) <https://www.eff.org/cyberspace-independence> accessed 20 August 2021.

[7] Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (With a New afterword by the author Edition, Princeton University Press 2011); John Palfrey and Urs Gasser, *Born Digital: How Children Grow Up in a Digital Age* (Revised, Expanded edition, Basic Books 2016).

[8] Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 Oxford Journal of Legal Studies 534.

[9] María Rún Bjarnadóttir, 'Kynferðisleg friðhelgi - umfjöllun og ábendingar til úrbóta' (Forsætisráðuneytið 2020); Conor Pope, 'Pandemic Has Increased Risk of Online Abuse for Young Women, Says Charity' *The Irish Times*

of gendered abuse was happening long before the Internet existed.[10] The harms inflicted by online violations of sexual privacy have been shown to have detrimental effect on victims and their life, moreover, the harm can also have wider societal implications.[11]

While many governments conduct extensive surveillance and use the online sphere for invasive actions against citizens, victims of online sexual privacy violations report a lack of response from their criminal justice systems.[12] The extremes of both excessive and insufficient responses to harmful online conduct raises questions about the legal framework, its efficiency and its application. The decentralised architecture of the Internet challenges the traditional jurisdiction of states, meanwhile, private entities play a significant role in the Internet infrastructure, which has led to calls for more 'flexible and innovation-friendly' models of regulation.[13]

As technology transforms modern day societies, discussions about regulation and the protection of privacy are at the heart of the ensuing debate.[14] [15] This thesis offers a contribution to a narrow part of that debate, which concern matters of violations of sexual privacy online. The aim of my research is firstly, to examine how far the state is required under human rights obligations to protect the most intimate parts of privacy online and, secondly, to provide evidence-based reform proposals to benefit a victim-centric approach to safeguarding fundamental rights online. My examination of the interaction of law and technology follows the perspective of the positive human rights obligations of states bound by the European Convention on Human Rights (ECHR). I position the discussion between a strong theoretical framework that is balanced with a contextual approach to the issues under discussion.[16] Finally, my approach bears in mind Bernal's advice to look at the Internet "with warts and all".[17]

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<https://www.irishtimes.com/news/ireland/irish-news/pandemic-has-increased-risk-of-online-abuse-for-young-women-says-charity-1.4484736> accessed 20 August 2021.

[10] Henry and Powell, 'Beyond the "Sext"' (n 4).

[11] McGlynn, Rackley and Houghton (n 4); McGlynn and Rackley (n 8).

[12] *Big Brother Watch and others v the United Kingdom* [2021] European Court of Human Rights Applications no. 58170/13, 62322/14 and 24960/15; 'Revelations | Courage Snowden' <https://edwardsnowden.com/revelations/> accessed 20 August 2021; Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen, 'Online Violence against Women in the Nordic Countries' (Kvenréttindafélag Íslands 2017).

[13] Christopher Marsden, 'Transnational Internet Law', *Oxford Handbook of Transnational Law* (Oxford University Press 2020); Julia Hörnle, *Internet Jurisdiction Law and Practice* (Oxford University Press 2021).

[14] Brown and Marsden (n 2) 2–17.

[15] Regulation of the European Parliament and of the Council on the protection of natural persons with the regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC 2016.

[16] Helen Nissenbaum, 'Respecting Context to Protect Privacy: Why Meaning Matters' (2018) 24 Science and Engineering Ethics 831; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Seventh Edition, Oxford University Press 2017).

[17] Paul Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge University Press 2018) 1.

# Research Question

The borderless nature of the internet[18] means that the scope of state interference regarding individuals and their actions online has become ever more relevant. The Internet not only connects people and services across national borders, it also brings about challenges in respect to the scope, application and enforcement of national legislation.[19]

The online environment challenges the public-private dichotomy both on personal and structural levels.[20] The phenomenon of non-consensual sharing of intimate material online raises questions about state responsibility to protect individuals from the harms caused by such actions. From a European perspective, the positive obligations states bear under the European human rights framework need examination, asking where the tipping point lies in balancing the obligation to uphold effective protection of core elements of privacy and the obligation of not interfering with the exercise of freedom of expression. Furthermore, such an inquiry requires contextual analysis into the extent of state obligations to respond to harm inflicted on an individual level. Even if the Internet architecture challenges the effectiveness and enforcement of domestic criminal responses to the aforementioned phenomenon, does this mitigate the underlying obligation states bear to safeguard against violations of sexual privacy and provide effective remedies to victims? Privacy invasion is increased and encouraged by a multitude of stakeholders in modern communication, uptake of services, and the normalisation of capitalist surveillance, so the role of the states to safeguard individuals from invasive online harms is compelling.[21]

The research question of this thesis considers whether the Internet limits the human rights protection obligations that nation states bear under the normative international human rights framework. Privacy enjoys different levels of protection under different frameworks. My focus is the European Convention on Human Rights (ECHR)[22] and the element of sexual autonomy within rights to privacy. Thus, the thesis draws attention to the criminal framework put in place to safeguard privacy, and the efficiency of the application and enforcement of such legal instruments in the interconnected and trans-border nature of the internet architecture.

[18] David R Johnson and David G Post, 'Law and Borders - the Rise of Law in Cyberspace' (Social Science Research Network 1997) SSRN Scholarly Paper ID 535 <https://papers.ssrn.com/abstract=535> accessed 20 August 2021
[19] Brown and Marsden (n 2) 4–7.
[20] Helen Nissenbaum, 'A Contextual Approach to Privacy Online' (2011) 140 Daedalus 32; Palfrey and Gasser (n 7).
[21] 'Revelations | Courage Snowden' (n 12); Zuboff (n 2).
[22] European Convention on Human Rights ETS. No. 5 1953.

# Methodology

## 1. Introduction

To reflect the complex legal, societal, and technical background of the research, there are two strands to the methodology. Firstly, there is a doctrinal legal analysis of the layered rules governing the framework for online expression and privacy. The methodology has been described as a two-part process of identifying the relevant sources of law before analysing and contextualising the text of the law.[23] Secondly, empirical evidence has been collected by conducting interviews with police officers, prosecutors and key stakeholders to reflect real life application of the rules governing sexual privacy online.

The mixed methodology is, as suggested by Hutchinson, increasingly used in legal scholarship to strengthen the foundations for reform recommendations.[24] As I am contributing to discussions on the protection of privacy in an increasingly interconnected world, I utilize the empirical research output to inform my doctrinal analysis, which will provide a more complete and deeper overview of the issue.

By adopting a doctrinal examination of the interdisciplinary legal frameworks in play, I facilitate a systematic exposition of the layered rules governing privacy online. I highlight how strengths and flaws in the interconnection of the rules governing the online sphere form both a challenge and an opportunity from a human rights perspective, and suggest improvements to the current regime.[25] As the topic and its context are complex, a doctrinal approach is appropriate as it emphasises coherence and unity, allocating value to how the issues in question are formed, which is important in examining the nuanced framing of privacy and freedom of expression.[26] I examine the issue primarily under the ECHR regime, while drawing on comparative lessons from the United States of America in light of the historical roots of the Internet as discussed in chapter two. The substance and consequences of the varied approaches to online sexual privacy will be discussed both in a comparative and a normative context. In consideration of the appropriate state measures to uphold

[23] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 110.
[24] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review 130.
[25] Leon E Trakman, 'Law and Learning: Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council of Canada' (1983) 21 Osgoode Hall Law Journal 554, 566.
[26] Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings', *Legal Research Methods: Principles and practicalities* (Clarus Press 2016) 2.

the protection of sexual privacy online, I present a case study from Iceland, which is a small state with a lengthy and strong tradition of upholding speech rights and privacy. Iceland is a member of the Council of Europe, and is engaged in several critical judicial decisions in the European Court of Human Rights. The Icelandic legislative framework and judicial practices draw on international comparisons, notably with the England and Wales system in the Council of Europe, suggesting improvements that can be made in the domestic legal system to better respect the privacy rights of vulnerable Internet users.

The empirical data, first and foremost, serve the purpose of providing a deeper insight into the application of the current legal framework.[27] The empirical part of the research comprised interviews that inform the Icelandic case study and provide an insider perspective on the issues at hand. The purpose of the interviews was:

- to seek first-hand information about the relevant legal frameworks,
- to discover how the frameworks are applied,
- to learn about any jurisdictional challenges to the application of the relevant frameworks,
- to examine whether that application considers the gendered aspect of privacy-invasive acts, such as image-based sexual abuse and revenge porn.

Further, the interviews assist in identifying enforcement factors (other than the legislative framework) contributing to the police´s lack of effectiveness in dealing with cases of sexual privacy as described by people affected.[28]

## 2. Doctrinal Research Methodology

At the crux of the doctrinal research methodology lies the endeavour to identify and analyse primary sources of law and establish its nature and parameters.[29] It is aimed at explaining, making coherent or justifying a segment of the law a part of a larger system of law,[30] and is at its core a structural approach to synthesise the context of the law in a way that focuses on analysing and interpreting the text.[31]

The protection of online privacy in a human rights context demands an analysis of a layered legislative framework, ranging from international obligations to the enforcement of domestic

[27] Bob Matthews and Liz Ross, *Research Methods: A Practical Guide for the Social Sciences* (1st edn, Pearson 2010) 221.
[28] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[29] Hutchinson and Duncan (n 23).
[30] Trischa Mann, 'Doctrina'; Hutchinson and Duncan (n 23) 84.
[31] Terry Hutchinson, 'Doctrinal Research. Researching the Jury', *Research Methods in Law* (2nd edn, Routledge 2018) 13.

legislation. In light of Internet architecture and the prevalence of platforms in the online economy, this analysis also calls for an examination of the rules and standards set out by private players in the online ecosystem in the form of terms and conditions of online platforms. By adopting the doctrinal methodology, I expose the layered rules governing privacy online, and analyse them in the context of the human rights regime. The methodology allows for a wide-ranging examination of sources that include sources such as statutory texts, conventions, and general principles of law, as well as authoritative sources such as case law and legal writings.

The doctrinal method is pertinent for examining sexual privacy online because the methodology provides a grounding for research into the law and legal concepts, while allowing for a conceptual analysis of law, proving suitable for complex and layered legal analysis as is vital when researching a topical issue about online sexual privacy.[32] The development of human rights obligations is examined with a particular focus on the European legal frameworks and legal protection of privacy, in light of the impact regional conventions have on domestic legislation in Europe. In this respect, the jurisdictional dilemmas and questions of uniform application of human rights the internet architecture raises will be discussed from a European perspective informed by North American discourse on the issue. As decisions by international and regional bodies shed light on evolving human rights practices, the examination of the human rights layer will partly rely on case law. While the topics examined by this thesis have a global reach, I have chosen to analyse them from a European perspective in light of the ECtHR's *dynamic interpretation* of the ECHR, as discussed further in chapter three, and the constant dialogue on human rights in a wide context, underlying all activities of the Council of Europe.[33]

[32] Hutchinson and Duncan (n 23) 105.
[33] Also referred to as the principle of evolutive interpretation. See: Rainey, Wicks and Ovey (n 16) 76–80.

## 3. Elite Interviews

Ten semi-structured interviews were conducted in the Reykjavík area of Iceland and the Europol Headquarters in The Hague, Netherlands from 20 September 2017 to 8 May 2018. Nine interviewees were police officers and public prosecutors who work in various departments and at different levels of the chain of command; all have professional experience with breaches of sexual privacy. By interviewing both domestic police officers and staff from Europol, the cooperative body for police forces in Europe, I sought to gain a deeper insight into the trans-border aspect of policing in the digital sphere. Nine interviews took place within professional settings and one in a personal setting. The interview duration ranged from 40 minutes to three hours. Two interviewees were interviewed together, the others separately.

In November 2015, before the ten listed elite interviews, five exploratory interviews were conducted with members of the Icelandic police. These served as a background for the semi-structured interviews and informed the interview protocol for the elite interviews.[34] They provided a valuable background for the main issues at hand, the functioning of the processes and chain of command internally. One of the interviewees in the formal interviews was also interviewed in this informal round of conversations. The exploratory interviews proved valuable to identify knowledgeable interviewees within the police and prosecutor's office. I gained enhanced access to the exploratory interviewees in part due to my former position within the Icelandic Ministry of the Interior where I worked with representatives of the police on several occasions and established strong personal contacts. To counter any possible misrepresentation due to the entry points being based on my professional contacts, I drew on a wider network facilitated by my supervisors, to reflect a 'multiple entry points' methodology.[35] On that basis, I adapted the snowballing method for the sampling.[36]

The main reason for adopting the semi-structured format was to allow for an in-depth interview while creating a space for the interviewees to discuss the topic in their way.[37] The approach is suitable for this research as the interviewees hold different levels of rank and position within the judicial system, so do not have uniform experience in dealing with cases of sexual privacy violations.

[34] Matthews and Ross (n 27) 227–230.
[35] Andrew Herod, 'Reflections on Interviewing Foreign Elites: Praxis, Positionality, Validity, and the Cult of the Insider' (1999) 30 Geoforum 313, 313–327.
[36] Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 415.
[37] Matthews and Ross (n 27) 220–221.

By adopting an interview protocol, I drove the focus of the interview to my area of research but also allowed flexibility to adapt each interview, as appropriate, while it was in progress.[38]

The interview protocol was not shared with any of the interviewees, although I discussed the research question of the thesis at the beginning of every conversation. The protocol was as follows:

1) Domestic legislation criminalising revenge porn.
    a. Is the legislation working?
        i. Is criminalisation key?
        ii. Would civil legislation be better?
    b. If not, what components need to be adjusted?
    c. Are the investigative methods that current legislation provides sufficient to investigate and, when relevant, prosecute cases of revenge porn?
    d. Would other legislative measures, in particular, civil law, provide a better outcome for victims of revenge porn?
    e. What are the foundations of the relevant clauses in domestic law? Human rights or other?
    f. Does it matter what interests the legislation in question is aimed at protecting?
        i. Impact on police efforts
        ii. Impact on the cooperation of private entities operating in the online sphere
2) Role of private entities.
    a. Are private entities taking on a role as the gatekeepers of human rights online?
    b. Is there a democratic deficit in the handling of the internet?
    c. Are terms and conditions, privacy policies, and other community guidelines for the entity in question sufficient?
        i. Where are the borders between domestic law and private platform regulation?
3) Online policing?
    a. Are police officers confident in dealing with online violence such as revenge porn?
    b. Are police officers knowledgeable about the online sphere? Are they sufficiently equipped in dealing with online violence such as revenge porn?
    c. Is there a difference in handling, competence, and knowledge depending on jurisdiction?
    d. Is the current system outsourcing policing to private entities?
4) Gendered issue?

[38] Adrianna Kezar, 'Transformational Elite Interviews: Principles and Problems' (2003) 9 Qualitative Inquiry 395.

a. To what extent does the data suggest that revenge porn is a gendered issue, both in terms of perpetrators and victims?
b. Is gender a factor in the assessment of how to investigate or process cases of revenge porn?
c. Is the privacy policy of the private entities gender-sensitive?

Eight interviews were recorded and transcribed, although I took written notes as well. In two interviews the recording equipment failed so I relied only on written notes from those interviews. As most of the interviews took place in Icelandic, I could not rely on transcription software but transcribed the interviews shortly after conducting them.[39] I approached the analysis from an exploratory perspective and conducted open coding to process and examine the data.[40]

## 4. Limitations of the Methodology and Responses

The aim of gaining an 'objective reality' viewpoint of the law before interpreting it has been a contested issue in legal scholarship.[41] Hutchinson and Duncan point out that in its essence, the notion of a legislative norm or statutory law to be 'neutral' is somewhat flawed. They highlight that law is in its nature the result of a legislative process that infers a context contingent on the law. Further, the second phase of the legal analysis is bound to be conditional on the 'expertise, views and methods of the individual researcher'.[42]

As pointed out by Watkins and Burton, the 'world view' of a researcher will affect both their research and choice of methodology.[43] Creswell and Creswell highlight the importance of identifying both the researchers´ general philosophical orientation as well as the direct impact of their outlook on the research in question.[44] During my own work experience as a Senior Legal Adviser for the Icelandic Government, where I led and contributed to drafting and implementing a national public policy on governance of the internet, I developed a worldview of the role of governments, the Internet and issues of privacy and rights. The research question in this thesis was directly born out of issues and perspectives that I encountered in my professional employment. My own position reflects Creswell

[39] This was beneficial, as it allowed me to familiarise myself with the data, initiating the analytical process.
[40] Matthews and Ross (n 27) 222; Bryman (n 36) 574.
[41] Hutchinson and Duncan (n 23) 110.
[42] ibid.
[43] Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (1st edition, Routledge 2013) 2; Latour, Bruno and Woolgar, Steve, *Laboratory Life: The Construction of Scientific Facts* (Princeton University Press 1979).
[44] John W Creswell and J David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (5th edn, Sage 2018) 5.

and Creswell's, categorisation of the 'Pragmatic Worldview', which is uncommitted to any one system of philosophy, applicable for mixed methodology and considers that research always occurs in social, historical, political and other contexts.[45]

As Hutchinson and Duncan point out, criticism has been attributed to adopting doctrinal methodology due to it holding an unclear place on the 'spectrum of scientific and social research methodologies used in other disciplines'.[46] Despite this, the doctrinal methodology is a valuable method on which to base a complex legal analysis. As stated in the CALD Statement on the nature of Legal Research, doctrinal research involves the 'making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary material.'[47] It could be argued that it would be unsuitable to adopt a 'traditional methodology' for research that focuses on evolving concepts in a fast-developing area of law, however, when infused with empirical data, the doctrinal approach provides a firm foundation for the layered legal analysis that the subject matter demands.

The research topic is a global issue, which is examined from a European perspective, with a case study of a small Nordic country. The scope of examination is wide but the methodology does not allow for assumptions that a local situation in Iceland automatically applies to the global picture. Nevertheless, there are factors that carry beyond the Icelandic context.

Due to Iceland being a part of the EEA, all EU regulatory frameworks regarding the internal market apply in Iceland. Thus, the case study can contribute to a larger European context. The social and economic settings of Icelandic society present a sphere where, for the last decade, gender equality has been measured as the highest in the world, and the socio-economic setting facilitates a highly skilled and educated population with extensive access to high-speed internet connections and sufficient financial means to gain quick access to emerging technologies. Despite its small population, the socio-economic factors of the Icelandic society provide a valuable setting for case studies of emerging topics.

As regards the elite interviews, the risks included a small qualitative data set and hurdles of validity. The small population of Iceland does have a limiting effect on the sample size of the qualitative data set. As discussed by Bryman, another way to perceive a small sample size is to think of the sample size in relative rather than absolute terms.[48] In the context of this thesis, focusing on what the

[45] ibid 10.
[46] Hutchinson and Duncan (n 23) 85.
[47] 'Council of Australian Law Deans, CALD Statement on the Nature of Research' (2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> Last accessed 20 August 2021.
[48] Bryman (n 36) 183.

interviewees represent and what role they play within the national criminal system, rather than how few they are, provides a view from key players within the Icelandic justice system and provides strong insight into the functioning of the system.

I was wary that I might encounter some of the hurdles of validity and reliability as discussed by Berry.[49] To counterbalance this risk, I used triangulation, drawing on other sources such as case law and reports from individual entities. As regards the definition of the interviews as 'elite', the term is somewhat dependent on context and subjective views on power. As described by Smith, elite interviews have emerged as a concept to describe interviews when the interviewee is in a relatively powerful position, as opposed to the interviewer who is in a relatively disempowered position.[50] Although I feel distanced from what McDowell describes as an 'ignoramus', because of my professional background,[51] a person that is seeking information from another is by default in a less powerful position as highlighted in Dexter's theory as presented by Kezar.[52]

Kezar highlights the transformative approach to an elite interview, claiming that the interview could impact the individuals in the study, including in terms of consciousness-raising, advocacy, action research, and demystification, and states that these are all moral commitments for the researcher.[53] As this does not impose methodological limitations in itself, I aimed to conduct the interviews in a manner that steered from a transformative approach, because I felt that the impact of my findings would have a greater transformative value when presented in combination with the findings drawn out with the doctrinal methodology.

Bryman points out that language is important in any qualitative research.[54] That impact of language is compounded in legal research because of the importance already attributed to legal terminology and concepts. In the context of my research, this presents a challenge since all but two of the interviews were conducted in Icelandic, while the majority of the literature review and secondary resources are in English. Furthermore, the thesis is written in English. This confluence of languages requires careful attention to ensure the appropriate use of terminology, and at times, a contextual interpretation of the transcribed interviews.

[49] J Berry, 'Validity and Reliability Issues in Elite Interviewing' (2002) 35 Political Science and Politics 679.
[50] KE Smith, 'Problematizing Power Relations in "Elite" Interviews' (2006) 37 Geoforum 643.
[51] L McDowell, 'Elites in the City of London: Some Methodological Considerations' (1998) 30 Environment and Planning 2133.
[52] Kezar (n 38).
[53] ibid.
[54] Bryman (n 36) 525.

# Limitations, Gaps and Problems in Previous Research

In debates about internet regulation, a long dominant discourse holds to the notion of a free and open Internet that acts as a marketplace of ideas. This position is fused into non-regulatory approaches to the Internet, which are supported by academics and state legislators alike, thereby affecting law-making and enforcement of national law.[55] The *cyberlibertarian* roots of Internet regulation framed state-based regulation of the Internet (or parts the Internet) as an attack on rights rather than an attempt to protect rights. These worries have not been without merit, as examples show that some states have engaged in limiting citizens' access to the Internet contrary to the right to free expression.[56]

Until recently, there was a lack of research and reporting of positive human rights obligations of states in online contexts. Due to the nature and architecture of the Internet, the right to privacy raises pressing questions on the extent that states have positive obligations to ensure "respect" for the right to privacy.[57] The obligation entails a duty to maintain, and use sufficient means to protect, individuals from harm. Case law suggests that the European Court on Human Rights (ECtHR)[58] and the European Court of Justice (ECJ)[59] are placing greater emphasis on the positive obligations of states (bound by the European framework for human rights) to ensure privacy rights of individuals under their jurisdiction. Following recent decisions from ECtHR,[60] insightful academic work has been published on platform law,[61] focusing on how to regulate the operations of multinational platforms whose technologies and practices impact how and what information is shared.[62] In relation to the *Draft Online Safety Bill*,[63] which is being prepared by the United Kingdom government, the question has been raised if platforms have a

[55]For a discussion on early stages of internet regulatory discourse see i.e.: Marsden, *Internet Co-Regulation* (Cambridge University Press 2011); Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (Oxford University Press 2006).
[56] *Ahmet Yldrim v Turkey* [2012] European Court of Human Rights Application no. 3111/10.
[57] Timothy Garton Ash, *Free Speech - The Principes for a Connected World* (Atlantic Books 2017) 284; Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20).
[58] *KU v Finland* [2008] European Court of Human Rights Application no. 2872/02.
[59] *EUR-Lex - 62012CJ0131* (European Court of Justice).
[60] *Delfi v Estonia* [2015] European Court of Human Rights (GC) Application no. 64569/09; *Magyar Kétfarkú Kutya Párt v Hungary* [2020] European Court of Human Rights Application no. 201/17.
[61] Rikke Frank Jørgensen (ed), *Human Rights in the Age of Platforms* (The MIT Press 2019) <https://direct.mit.edu/books/book/4531/Human-Rights-in-the-Age-of-Platforms> accessed 20 August 2020; Daphne Keller, 'State and Platform Hybrid Power over Online Speech' Stanford University 40; Chris Marsden, Trisha Meyer and Ian Brown, 'Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?' (2020) 36 Computer Law & Security Review.
[62] Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' [2018] Harvard Law Review <https://harvardlawreview.org/2018/04/the-new-governors-the-people-rules-and-processes-governing-online-speech/> accessed 20 August 2021.
[63] Minister of State for Digital and Culture, Draft Online Safety Bill 2021.

duty of care towards their users if they are harmed while using the platform.[64] The distribution of revenge porn is amongst the harms acknowledged under this framework and it has also been the subject of specific examination by the Law Commission.[65]

The weight of academic discourse considers the regulatory role of online platforms - there is far less discussion about what concrete actions the state should have in place to respond to violations of online sexual privacy. In these debates about regulation and online harms, the rights and roles of the affected individuals often become marginalised.

Academic literature that does focus on the state's role towards victims of online sexual abuse has rapidly developed during the time of writing this thesis and much of it is highly insightful. Seminal work from McGlynn, Rackley, et. al. conceptualises image-based sexual abuse, highlighting the harms caused by such violations and offering important analysis and framing of the issue from a criminal law perspective.[66] Powell, Henry, Flynn et. al., who work in an Australian context, approach the issue as a manifestation of gender-based sexual abuse and outline the connection between domestic violence and digital violations of sexual privacy.[67] In the United States, Citron and Franks drive the debate, calling for criminalisation on state and federal level; Franks has even authored a model law for the offence.[68] In her seminal 2019 paper, Citron frames the issue of sexual privacy online in a compelling way, highlighting that arguments against criminalisation in the name of free speech stand on weak grounds.[69]

The literature focusing on the state's role to ensure privacy online, as defined under European human rights standards, is underdeveloped. Instead, the focus of European regulatory discourse on online privacy is mostly guided by the data protection framework developed by the European Union.[70] Nevertheless, for substantive and structural reasons, the data protection framework is unsuitable for violations of online sexual abuse.

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[64] The issue is highly debated. Woods and Perrin are some of the main authors of the approach, while Smith has raised concern about the approach and possible harmful implications of the protection of freedom of expression and other fundamental rights. See: Lorna Woods and William Perrin, 'Online Harm Reduction – a Statutory Duty of Care and Regulator' (Carnegie UK Trust 2019) <https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf> accessed 20 August 2021; Graham Smith, 'Harm Version 3.0: The Draft Online Safety Bill' (*Inforrm's Blog*, 31 May 2021) <https://inforrm.org/2021/06/01/harm-version-3-0-the-draft-online-safety-bill-graham-smith/> accessed 20 August 2021.

[65] Great Britain and Media and Sport Department for Culture, *Online Harms White Paper.* (2019); 'Taking, Making and Sharing Intimate Images without Consent | Law Commission' <https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/> accessed 20 August 2021.

[66] McGlynn and Rackley (n 8).

[67] Henry and Powell, 'Beyond the "Sext"' (n 4).

[68] Citron and Franks (n 28); Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard UP 2014); Federal Revenge Porn Legislation | Public Law | Government Information; 'CCRI Model State Law | Cyber Civil Rights Initiative' <https://www.cybercivilrights.org/model-state-law/> accessed 20 August 2021.

[69] Danielle Keats Citron, 'Sexual Privacy' (2019) 128 Yale Law Journal 1870.

[70] Regulation of the European Parliament and of the Council on the protection of natural persons with the regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

## Contribution of my Research

I approach the topic recognising that the Internet facilitates both democratic potential and possible harms - a position that Laidlaw refers to as '*cyberrealist*'.[71] Further academic research is needed to advise states on the balance between their positive and negative human rights obligations. This research, which builds on existing literature and on domestic and international law and practice, aims to find a balanced, practical way forward.

In this thesis, I argue that states bound by the ECHR have an underlying duty to protect sexual privacy online. Their responsibility is not mitigated because structures and operations in online spheres make it difficult to develop and enforce effective national legislation. Rather, as privacy invasive behaviour is ever more normalised and encouraged by a multitude of stakeholders in the Internet ecosystem, the state's role to safeguard individuals' sexual privacy online has never been more potent.

I approach the issue from a dual legal perspective of Internet law and human rights, informed by the normative reality of gender-based online abuse. The analysis takes note of both criminal and comparative law, while drawing on findings rooted in communications studies and criminology. Building from this position, I propose reform of criminal law and policy that safeguards sexual privacy online in alignment with evolving standards of privacy and gender equality. I offer a tailored, victim-centric approach that is rooted in a wide theoretical framework and informed by empirical evidence from a national case study.

My contribution to the field therefore holds both theoretical and practical value. I examine the state´s role safeguarding sexual privacy online through the lens of positive obligations under European human rights standards, so presenting a holistic perspective on a pressing global issue. The practical contribution of my doctoral research has already had an impact at a national level: in February 2021, an adaptation of my proposals went into the Icelandic General Penal Code and, in April 2021, the National Commissioner of Police in Iceland implemented my policy proposals.

## Chapter Summary

[71] Emily B Laidlaw, *Regulating Speech in Cyberspace* (Cambridge University Press 2015) 6.

This thesis explores the issue of online sexual privacy from a European standpoint and argues for a layered approach to protect the sexual privacy of individuals. This includes a co-regulatory approach that demands, at its core, respect for human rights and further calls for states to take multi-faceted legislative and policy actions.

The first chapter unpacks the evolving framing of online sexual privacy in the academic discourse, highlighting how this issue is entangled with larger social structural issues of gender disparity. I reveal statistics that map out the scope of the issue and illustrate how women and marginalised groups are disproportionally victimised, while the vast majority of perpetrators across jurisdictions are male. This gender imbalance is further reflected in the discussion about the harms caused by violations of sexual privacy online. Drawing on existing literature, I propose a definition of sexual privacy, which also forms the basis for my reform proposals on criminal law and policy.

In chapter two, using Lessig´s concept of a four-fold regulation of the Internet, I explore how the Internet challenges safeguards for sexual privacy online. I argue that none of Lessig's four modes have successfully constrained violations of sexual privacy online.

In chapter three, I examine the scope and limits of state responsibility to protect sexual privacy online under the European convention framework. I focus on the case law of the European Court of Human Rights (ECtHR) to explain the evolving standards of obligations that states bound by the convention should adhere to if they are to provide adequate protection for sexual privacy online.

The fourth chapter of the thesis describes the case study I conducted in Iceland on digital sexual privacy. The case study illustrates the practical, legal and theoretical challenges involved in protecting sexual privacy in the digital realm and explores opportunities for improvement. The case study was conducted with: i) a mixed methodology, including elite interviews; ii) a review of legislative standards and academic literature; and iii) a case law analysis on all levels of the court system. During the process of writing the thesis, I was commissioned by the Government of Iceland to author a White Paper, based on my doctoral research, that proposed legislative and policy changes to respond to online violations of sexual privacy in Iceland. I led consultation on these proposals and drafted a bill on sexual privacy that came into law in February 2021. The National Commissioner of Police has further been tasked with leading the adaptation of the policy measures I proposed from April 2021.

In my conclusion, I underline that neither the architecture nor governance of the Internet frees the state from obligations to effectively protect the fundamental rights of their citizens. I set out my recommendations for state-based responses to online violations of sexual privacy and offer some reflections on both the form and content of such a legal response. This discussion on the legal

parameters is followed with my recommendations for policy measures, which align with the measures being adopted in Iceland.

# Chapter One - Conceptualising Sexual Privacy

In this chapter, I first discuss the evolving academic, legal and normative framing of the actions and the interests at stake when dealing with unauthorised online disclosure of intimate or sexual material. Next, I discuss the gendered aspect of digital violations of sexual privacy. I then examine the harms inflicted, as described in the academic literature, reports focussed on voicing victims' viewpoints, and in case law examined within the Icelandic case study. Finally, drawing on this analysis, I propose a definition of sexual privacy that underpins the legislative reforms discussed in chapter four and propounded in chapter five.

## 1. Evolving Conceptualisation

The importance of clear terminology in law can hardly be overstated, particularly in the context of criminal law due to the interests at stake. From a human rights perspective, it is paramount that limitations in the exercise of Convention rights, such as freedom of expression, meet adequate standards.[72] Creating or sharing sexual content, stemming from oneself or others, can be an exercise of the right to freedom of expression. As discussed in chapter three, any limitation to such exercise requires a justified interference with a basis in law, similar to other rights protected under articles 8 – 11 of the ECHR. This criterion has further evolved in the case law of the European Court of Human Rights (ECtHR), demanding that the legal basis of the interference meets a threefold test. The interference must have some basis in national law, the law must be accessible and formulated in a way whereby a person can reasonably foresee the consequences a certain action could entail.[73] The legal basis must be compatible with the rule of law, implying that there must be adequate safeguards against arbitrary interference by public authorities.[74]

The act of non-consensual sharing of private, intimate or sexual images has neither been uniformly conceptualized, in public discourse, academic discussion, nor legislative or policy initiatives. Framings include, 'digital sexual violence',[75] 'non-consensual pornography' (NCP),[76] 'image-based

[72]See discussion on the limitations of rights that enjoy the protection of Art. 8 – Rainey, Wicks and Ovey (n 16) 341–368.
[73] Also referred to as the 'test of foreseeability' and the 'quality of law test' ibid 343.
[74] *Malone v The United Kingdom* [1984] European Court of Human Rights Application no. 8691/79; *Olsson v Sweden (No 1)* [1988] European Court of Human Rights Application no. 10465/83.
[75] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[76] Rachel Hill, 'Cyber-Misogyny: Should "Revenge Porn" Be Regulated in Scotland, and If so, How?' (2015) 12 SCRIPTed 117.

sexual abuse',[77] 'involuntary pornography',[78] 'non-consensual sharing of intimate images',[79] 'sextortion'[80], 'image-based sexual exploitation'[81] and 'revenge pornography' or 'revenge porn'.[82] As some of the terms carry preconceived notions, the framing can reflect underlying attitudes and social norms that could also be affected by a regional and contextual understanding of sexual privacy, both in a normative and a prescriptive sense. An example of this is the legal framing in Iceland until February 2021, which recognised the breach of sexual privacy as a violation of modesty, and only as a privacy violation when deemed as a form of domestic abuse.[83] This framing does not match the cultural understanding that increasingly acknowledges the harmful nature of online violations of sexual privacy as a type of sexual violence.[84]

The framing, whether it be 'sexting', 'sextortion' or 'image-based sexual abuse', reveals how the act of breaching someone's sexual privacy using digital means can be classified, depending of the specific circumstances and how they relate to already known and established behaviour, criminal or not. Henry and Powell describe that legal, moral and social norms and idiosyncrasies impact this taxonomy.[85] These influences have a bearing both in academic discourse and in public responses.

Examples of this affect is found in the England and Wales Crown Prosecution Service (CPS) report on violence against women and girls for 2015-2016. This was the first year a specific revenge porn clause criminalising the behaviour was in place. In the report the CPS chose to place the offence with pornography and obscenity rather than with stalking and harassment.[86] Thus, the offence is classified with situations where the vested interest aimed at protection within the clause is of public or societal interest, rather than as a core element of an individuals' privacy. The same taxonomy is evident in the application of penal law in Iceland up until 2021 and is discussed further in chapter four.[87]

[77] McGlynn and Rackley (n 8).
[78] A Burns, 'In Full View: Involuntary Porn and the Postfeminist Rhetoric of Choice', *Twenty-first Century Feminism: Forming and Performing Femininity* (2015).
[79] Jamie Robertson, '2nd Report, 2016 (Session 4): Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill' (17 March 2016) <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/95775.aspx> accessed 4 June 2018.
[80] Europol, 'Internet Organised Crime Threat Assessment 2019' (European Union Agency for Law Enforcement Cooperation 2019).
[81] N Henry and A Powell, 'Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research' (2018) 19 Trauma, Violence, and Abuse 195, 201.
[82] Citron (n 68).
[83] Bjarnadóttir (n 9).
[84] ibid.
[85] Henry and Powell, 'Beyond the "Sext"' (n 4) 106.
[86] Crown Prosecution Service, 'Violence against Women and Girls. Crime Report 2015-16' (2016).
[87] Bjarnadóttir (n 9).

Personal and legal definitions do not always reflect a nuanced conceptualisation of online abuse.[88] An overlapping framing of similar actions can influence a certain level of fluidity in empirical research on the scope, nature and harms of different forms of online abuse. This applies in terms of legal, normative and prescriptive senses.[89] Furthermore, an overlapping framing of similar actions can create discrepancies in the numbers of self-reported cases of various forms of online abuse.[90] Henry and Powell mention sexual harassment in this context, and consider how the varied conceptualisations of the term resulting in behaviour clearly classified as harassment under the law are not perceived as such by the victims.[91]

Blurry terminology and interchange of terms for similar, but not the same, behaviours can prove counterproductive and, rather than clarify, contribute instead to a fuzzy cultural and normative understanding. The lack of standardised, uniform definitions can limit research in the field as a variety of behaviours can be associated with a term.[92] Therefore, reflective use of terms is important as imprecise use of terminology and taxonomy risks minimising the violation and the harm it can cause. Clear terminology is not only important from a legislative perspective and for academic accuracy when examining the underlying rights and legal issues. It is also a significant issue from social and cultural perspectives that impact public discourse, legal framing and responses to violations of sexual privacy.[93]

## a. Revenge Porn

Early academic literature calling for the criminalisation of invasions of sexual privacy referred to the issue as revenge porn.[94] 'Revenge porn' has, as stated by McGlynn and Rackley, become a "catch-all phrase to include a wide variety of non-consensual image-based harms" as the term seems resonates with the public and the media are able to easily adapt the expression to cover a number of stories.[95] It has been used in public discourse as an acronym for unconsented distribution of sexual or intimate material, sometimes with personal information attached, and with or without intent to inflict harm or damage to the person depicted.[96] The term is defined in the Oxford dictionaries as 'revealing or sexually explicit images or videos of a person posted on the Internet, typically by a former sexual

[88] Henry and Powell, 'Beyond the "Sext"' (n 4) 198–199.
[89] ibid 201.
[90] Helgi Gunnlaugsson and Jónas Orri Jónasson, 'Is Digital Crime Victimization Increasing in Iceland - May the Me-Too Movement Influence How Victimization Is Experienced?' (2020) 1 Nordisk Tidskrift for Kriminalvidenskab 24.
[91] Henry and Powell, 'Beyond the "Sext"' (n 4) 199.
[92] Adriane VAN DER Wilk, 'Cyber Violence and Hate Speech Online against Women' (European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs 2018) PE 604.979 20.
[93] Henry and Powell, 'Beyond the "Sext"' (n 4) 108.
[94] Citron and Franks (n 68).
[95] McGlynn and Rackley (n 8).
[96] Citron (n 68) 17.

partner, without the consent of the subject and in order to cause them distress or embarrassment'.[97] Rightly, this highlights that revenge is not always a key component of the act, revealing that the term is problematic because it carries preconceived notions regarding both *revenge* and *pornography*.

Revenge indicates that, somehow, the former actions of the person depicted called such acts upon her.[98] Cases show that the underlying intent to harm sometimes comes from an ex-lover scorned by the end of an intimate relationship with the person depicted.[99] The material may have been produced with or without the consent or knowledge of the person depicted, its sharing intended for personal use and not for wider distribution, and with or without malicious intent of the distributor. This wide variation in circumstances has led to criticism of the term 'revenge porn' claiming it to be misleading,[100] resulting in calls for a different terminology.[101]

The word 'pornography' carries strong cultural notions. McGlynn and Rackley state that this has permeated into the legal response offered in England and Wales, as the regulation is dependent on the image being 'pornographic', or that the act was played out for the sexual gratification of the perpetrator.[102] The pornography framing indicates that nudity or sexual motives automatically amount to pornography, something that should be contested with both a reference to gendered double standards and individual freedoms of expression. This gendered double standard is not only reflected in domestic legislation, but also in the different standards set out for female and male gender expression under the terms and conditions of online platforms that permit the uploading of imagery content. Users of online platforms have mobilised against such gender bias, for example, when the terms and conditions of Instagram and Facebook led to a revolt under the '#freethenipple' campaign, during which young women protested that their naked breasts were a violation of the terms and conditions of online platforms, while the nipples of a man were not.[103]

The dictionary definition of *revenge porn* refers to it as a phenomenon of the Internet. This interpretation is somewhat misleading. Most of the acts and expressions that the Internet provides have been a part of human society for a long time, but the velocity and global nature of the Internet has allowed distribution of content to take place on a wider scale than before.[104] This applies to

[97] 'Revenge Porn | Meaning of Revenge Porn by Lexico' <https://www.lexico.com/definition/revenge_porn> accessed 20 August 2021.
[98] McGlynn and Rackley (n 8) 534; María Rún Bjarnadóttir, 'Does the Internet Limit Human Rights Protection? The Case of Revenge Porn' (2017) 7 JIPITEC.
[99] McGlynn and Rackley (n 8) 535–536; Hill (n 76) 118.
[100] 'Revenge Porn: Enough Still Isn't Being Done to Stop It' *The Independent* (2 July 2014) <http://www.independent.co.uk/life-style/health-and-families/features/revenge-porn-enough-still-isnt-being-done-to-stop-it-9578892.html> accessed 20 August 2021.
[101] Hill (n 76).
[102] McGlynn and Rackley (n 8) 536.
[103] Annadís G Rúdólfsdóttir and Ásta Jóhannsdóttir, 'Fuck Patriarchy! An Analysis of Digital Mainstream Media Discussion of the #freethenipple Activities in Iceland in March 2015' (2018) 28 Feminism & Psychology 133.
[104] See discussion on the nature of online distribution in *Delfi v Estonia* (n 60).

breaches of sexual privacy as well as many other forms of behaviour. In the 1970s, the US magazine Hustler dedicated a specific section in their publications to the publishing of photos sent in by its readers and depicted naked women along with personal information such as their names and addresses, and as cases showed, sometimes this was done without the consent of the women depicted. The publishing of such photos in the magazine ceased in the 1980s after one of the featured women sued the magazine because she had not given her consent for publishing.[105] This only differs from revenge porn in terms of the platform the material is shared on, but the nature of the act in question remains the same.

The term revenge porn, thus, refers to the specific circumstances of violations of sexual privacy. The terminology carries problematic, preconceived societal notions that harm the framing of the issue rather than advance it. Therefore, the term is too unreliable to form the basis of a definition of sexual privacy for future legal reforms that this thesis seeks to present.

## b. Image-Based Sexual Abuse

McGlynn and Rackley have offered the term 'image-based sexual abuse' as a definition for 'non-consensual creation and/or distribution of private sexual images', arguing that such a definition steers clear of the pitfalls that the revenge porn definition produces.[106] The definition highlights individual harm and focuses on the act as a sexual violation, rather than connecting it to pornography. In order to capture the essence of the harm and the reasoning necessary for legislative responses, a core element of their definition is the focus on behaviour around the image, rather than the content of the image, as a form of sexual abuse.[107] The term is also prevalent in scholarly discourse and policy from Australia and New Zealand,[108] but also in public guidance to victims.[109] The concept is used as a kind of umbrella term to identify a range of related violations. Under the terminology, sharing of intimate material due to a breakdown of a romantic relationship could be framed as revenge porn, while *up-skirting* and *down-blousing* would apply in cases of taking pictures of genitals or other body parts without clothing and consent. Image-based sexual abuse is a wider term used to describe creating, catching, stealing or disseminate sexual imagery from others without their consent, or threatening to do so. It has also been used even when the material in question is fake or has been modified in some way. Perpetrators may be former or current spouses,

[105] *Lajuan and Billy Wood vs Hustler Magazine* [1984] 5th Circut 736, F 2d 1084.
[106] McGlynn and Rackley (n 8) 534.
[107] McGlynn and Rackley (n 8); McGlynn, Rackley and Houghton (n 4).
[108] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81).
[109] 'How We Handle Image-Based Abuse Reports' (*eSafety Commissioner*) <https://www.esafety.gov.au/report/image-based-abuse/how-we-handle-reports> accessed 20 August 2021; 'Online Abuse Targeting Women' (*eSafety Commissioner*) <https://www.esafety.gov.au/women/online-abuse-targeting-women> accessed 20 August 2021.

acquaintances, or strangers, and their various motives include, forcing conduct, extortion, revenge, sexual pleasure, joking, social recognition, humiliation, and financial incentives.[110] This distinction of terminologies is useful, not least in a theoretical context, where the motives, conditions and consequences of each conduct are identified separately. However, such terminology may also be restrictive, for instance when violations of sexual privacy occur by disseminating sexually explicit information other than graphical, for example by text message.[111]

### c. Technologically Facilitated Abuse

Henry, Flynn and Powell discuss image based sexual abuse as one of many manifestation of technology-facilitated sexual violence (TFSV).[112] The term refers to a range of behaviours where digital technologies are used to facilitate both virtual and face-to-face sexually based harms. Such behaviours include online sexual harassment, gender- and sexuality-based harassment, cyberstalking, image-based sexual exploitation, and the use of a communication service to coerce a victim into an unwanted sexual act.[113] They agree with McGlynn, Rackley, and Houghton, who draw on Liz Kelly's theory of the continuum of sexual violence to show that that graphic sexual violence is part of a larger picture of sexual offences.[114]

Continuum framing is also used by Henry and Powell. This approach creates a clear distinction between consensual and non-consensual cases leaving space between those two poles for acts of coercive behaviour and other forms of TFSV.[115] Employment of continuum framing further highlights the sexual abuse character of the violations and their intersection with gender-based abuse, in the wider sense, as an issue happening on a global scale.

### d. Sexting

The Miriam-Webster dictionary definition of 'sexting' refers to the sending of sexually explicit messages or images by cell phone.[116] This definition excludes coerced material, as does a similar definition from the US National Centre for Missing and Exploited Children. Some academic

[110] Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' 19 Police Practice & Research 565.
[111] See for example the findings of case S-670/2018 where the court found comments on a social media platform constitute violations of decency (Art. 209) and domestic abuse (Art. 233b.) [2019] Héraðsdómur Reykjavíkur S-670/2018.
[112] Henry and Powell, 'Beyond the "Sext"' (n 4); Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81).
[113] Henry and Powell, 'Beyond the "Sext"' (n 4).
[114] McGlynn, Rackley and Houghton (n 4).
[115] Henry and Powell, 'Beyond the "Sext"' (n 4) 107.
[116] 'Definition of Sexting' <https://www.merriam-webster.com/dictionary/sexting> accessed 25 November 2020.

literature distinguishes between 'experimental sexting', where young people take intimate images and share with friends or intimate partners, and 'aggravated sexting, which involves criminal or abusive elements.[117] Framing the issue as teenage experimental behaviour contributes to trivialising the harm sexting inflicts through unauthorised sharing of content'.[118]

## e. Sexual Privacy

Since publishing the 2014 seminal work, 'Criminalizing Revenge Porn' (co-written with Anne Mary Franks),'[119] Danielle Citron continued her methodical examination of the interaction between law and society in light of online sexual abuse and, in 2019, developed the term 'sexual privacy' in a publication of the same name.[120] She argues that 'sexual privacy' is a distinct privacy interest that serves as a cornerstone for sexual autonomy and is a fundamental aspect of intimacy and consent. For Citron, traditional privacy laws lack efficiency in dealing with violations of sexual privacy and so ignore the harms caused by such violations, such that the vested interest warrants both the recognition and the protection of the law.

The conceptualisation of sexual privacy allows for a framing that captures the twofold layers of the issue; sexual violations and invasion of privacy.[121] As demonstrated by Citron, sexual privacy lies at the core of privacy, or viewed from another angle, at the top of the hierarchy of privacy values.[122] It is central to identity development and foundational in the ability to form and maintain intimate relationships.[123] This creates the necessary space to make personal decisions on sexual and intimate expressions and relations that are of essence for individuals to define their 'concept of existence, of meaning, of the universe, and of the mystery of human life'.[124]

Citron, a U.S. scholar, grounds her research in the U.S. Constitution and legal framework, but the work is also applicable to a European context. Although legislation and judicial branches are local or regional, international human rights are an international issue. The differences in legal and normative approaches under the different legal systems do not render Citron's scholarship obsolete in the discussion under the ECtHR remit, as is evident in cross-fertilisation between the ECtHR and the U.S. Supreme Court and many other institutes that deal with fundamental rights.[125]

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[117] Henry and Powell, 'Beyond the "Sext"' (n 4) 107.
[118] David S Wall, 'Crime, Security and Information Communication Technologies: The Changing Cybersecurity Threat Landscape and Its Implications for Regulation and Policing', *The Oxford Handbook of the Law and Regulation of Technology* (1st edn, Oxford University Press 2017) 12.
[119] Citron and Franks (n 68).
[120] Citron (n 69).
[121] ibid; McGlynn and Rackley (n 8); Clare McGlynn, 'More than a Breach of Privacy: Image-Based Sexual Abuse and the Irish Law Reform Commission on Harmful Communications' (2017).
[122] Citron (n 69) 10.
[123] ibid 12.
[124] *Lawrence v Texas* [2003] US Supreme Court 539 US 558.
[125] Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 The Journal of Legal Studies 547.

## 2. Defining Elements of Sexual Privacy

As discussed in part one of this chapter, digital violations of sexual privacy can manifest in a range of ways and have different motives. Examples from the media range from 'leaked celebrity photos',[126] to the distribution of a recording of a sexual assault,[127] and a live broadcast of consensual sex without the knowledge of someone participating in the sexual act.[128] Media reports further demonstrate that violations can take place in a range of relationships between the perpetrator and the victim, whether referring to an intimate partner abuse taking place within an interpersonal relationship[129] or a series of cases directed at unconnected people as a part of organised crime.[130] Building on the framing of the continuum of image-based sexual abuse by McGlynn et. al., the defining elements of 'sexual privacy' will be drawn out and discussed in a bid to refine the framing of the term.[131]

### a. Nature of the Content

As established, the circumstances of online violations of sexual privacy vary. Both the violations themselves, and what are deemed appropriate legal or criminal responses to such violations, are significantly impacted by social and cultural norms. The impact of moral and social norms is particularly evident when considering how the protection of the law should apply to different types of intimacy, not least when assessing the possible extension of criminal law.

Historically, privacy has been a deeply gendered concept, both in a legal and normative setting, as discussed briefly in chapter three. The fact that the victims are overwhelmingly women and marginalised groups further entrenches the notion that the slow recognition of harm may be rooted in a wider context than just legal considerations. This is exemplified in the findings from a 2015 focus group study of Icelandic university students that found that 'boys were more active in sending

[126] Adrienne Massanari, '#Gamergate and The Fappening: How Reddit's Algorithm, Governance, and Culture Support Toxic Technocultures' (2017) 19 New Media & Society 329.
[127] Connor Simpson, 'The Steubenville Victim Tells Her Story' (*The Atlantic*, 16 March 2013) <https://www.theatlantic.com/national/archive/2013/03/steubenville-victim-testimony/317302/> accessed 20 August 2021.
[128] Bonnie Malkin, 'Australian Military Hit by Film Sex Scandal' *The Telegraph* (6 April 2011) <https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/8431859/Australian-military-hit-by-film-sex-scandal.html> accessed 20 August 2021.
[129] George Chesterton, 'Domestic Abuse: "I Was Gripped by Terror He Would Share Something so Intimate"' *British GQ* (5 August 2020) <https://www.gq-magazine.co.uk/politics/article/domestic-abuse-revenge-porn> accessed 20 August 2021.
[130] David Lee, ''Sextortion Botnet Spreads 30,000 Emails an Hour'' *BBC News* (16 October 2019) <https://www.bbc.com/news/technology-50065713> accessed 20 August 2021.
[131] McGlynn, Rackley and Houghton (n 4).

naked photos, but that it was mostly girls who were shamed by these pictures, and also that girls were more often subjected to non-consensual sharing of images'.[132]

### a) Sexual Content

Sexual expression enjoys the protection of both freedoms of expression and privacy and can be an important part of shaping individuals' identities.[133] While judgements differ about what is 'sexual', McGlynn and Rackley suggest that abuse occurs if it exploits the victims' sexual identity and harms their sexual dignity and autonomy.[134] Yet, as Henry and Powell point out, the line between sexual and non-sexual behaviour is not always clean cut.[135]

Communication increasingly takes place in an online context, via apps or traditional communication services like phones. In light of the ongoing Covid-19 pandemic, online communication has become a mainstream medium of communication. Online environments dominate communication both in informal, social interaction and formal, professional relationships. It is unrealistic to assume that technological advancements in communication do not affect the form and content of sexual relations between individuals, just as with other aspects of human communication. To reduce the risk of getting infected by Covid-19, the Irish public health authority, even advised the public to consider online sexual activity as alternative to physical sexual activity with partners.[136] Yet, this apparently innovative public health strategy failed to consider reports of the pandemic creating conditions that would increase the risk of online abuse for women.[137]

In order to provide an adequate legal framing to safeguard the private nature of intimate communication, McGlynn and Rackley find that "[t]he focus should be on the choices of the individual depicted both in terms of who sees the image and the circumstances in which the image is taken, rather than on whether the sexual act or particular body part is one that is 'ordinarily seen in public'".[138] An image can be sexual, but not private, such as a photograph in a pornographic magazine. By contrast, a 'sext' is a sexual and private image that should not be shared without the consent of the depicted.

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[132] Vigdís Fríða Þorvaldsdóttir, 'Stöðvum Hrelliklám: Löggjöf Og Umræða' (2015).
[133] Citron (n 69).
[134] McGlynn and Rackley (n 43) 541; see similar discussion by Kolbrún Benediktsdóttir and Þorbjörg Sigríður Gunnlaugsdóttir, 'When the Private Turns Public: Challenges in Prosecution of Revenge Porn' (Scandinanvian Reseach Council for Criminology 2015).
[135] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81) 196.
[136] 'Sex and Coronavirus (COVID-19)' (*sexualwellbeing.ie*) <https:/www.sexualwellbeing.ie/sexual-health/sex-and-coronavirus/sex-and-coronavirus-covid-19-.html> accessed 20 August 2021.
[137] Conor Pope, 'Pandemic Has Increased Risk of Online Abuse for Young Women, Says Charity' *The Irish Times* <https://www.irishtimes.com/news/ireland/irish-news/pandemic-has-increased-risk-of-online-abuse-for-young-women-says-charity-1.4484736> accessed 20 August 2021.
[138] McGlynn and Rackley (n 8) 541.

### b) Nudity

Nudity is, and has been throughout history, been regulated under both normative and legislative frameworks. Examples of this are the criminalisation of pornography and public decency clauses aimed at protecting the moral social code rather than personal interests of the people that are nude in public or other settings. Under the ECHR, people can enjoy a right to privacy whether in a public setting or on occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner.[139] This assessment is, however, not a binary choice between a person being covered or naked. It relies on a person's reasonable expectations of privacy.[140]

In order to avoid over-criminalisation, while capturing a range of violations of sexual privacy, a nuanced analysis of the content in question is required. In other words, a clearer framing of the issue should not limit the nature of the content to categories of 'sexual', 'intimate' or nudity in order to reach the threshold of the protected interest of sexual privacy.

## a. Consent

Consent to disclosure is not a binary choice of either giving permission to disclose or not.[141] There may be mitigating or aggravating circumstances, people with limited ability to take informed decisions and images that are results of coercive behaviour. There is a common denominator distinguishing content violating sexual privacy from other sexual material online - in the former, the person depicted has not provided consent. When a consensual creation and distribution of a sexual private image takes place, no harm arises. It is the lack of consent that creates the harm. Due to the lack of consent, the material can be used to pressure the individuals depicted or cause them harm, as the publishing of intimate material can have serious reputational and academic or professional consequences for those portrayed.[142] At the heart of the issue of consent, as highlighted by Nissenbaum, is the importance of a contextual understanding of online privacy.[143] Even if the material had been shared with a partner as part of an intimate relationship, that does not mean that the material has been made available to the general public, nor does it imply consent that the material can be posted online.[144] Citron and Franks discuss this within the framing of the 'Consent Conundrum' in cases of revenge porn. They stress that consent to share information in one context

[139] *Peck v United Kingdom* [2003] European Court of Human Rights 44647/98.
[140] 'Guide on Article 8 of the European Convention on Human Rights- Right to Respect for Private and Family Life, Home and Correspondence' (Council of Europe/European Court of Human Rights 2020).
[141] Alisdair A Gillespie, '"Trust Me, It's Only for Me": "Revenge Porn" and the Criminal Law' (2015) 11 Criminal Law Review 866.
[142] Citron (n 69) 1–17.
[143] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20); Nissenbaum, *Privacy in Context* (n 2).
[144] Hill (n 76) 123.

does not directly translate to a consent to share this information in another content, contrary to what they state opponents of criminalisation of revenge porn have claimed. They explain that '[c]onsent is contextual; it is not an on/off switch'.[145] Rather, as Nissenbaum suggests, individual and societal expectations of privacy are tailored to specific circumstances.[146] Citron and Franks highlight that, outside of sexual practices, most people recognize that consent is context-specific and set against evolving social norms. They consider the reluctance to recognise the contextual nature of consent in the case of revenge porn and question whether it stems from a moral disapproval of intimate photographs where the depiction is deemed outside the morally accepted perimeters.[147]

The contextual nature of consent is a staple of information privacy laws. The United States have the Fair Information Practice Principles, one of which states sharing information for one purpose does not equal a consent to share for other uses.[148] Under the General Data Protection Regulation (GDPR), this is clear and a core element of the protection the regulation provides.[149] The application in interpersonal communication is not the intended focus of the framework, and the scope clause provides unreliable grounds for interpersonal claims.

Increasingly, there has been a focus on the issue of consent in relation to legislative responses to sexual violence. This has notably been highlighted in connection with the legal redress to rape.[150] In recent years, Iceland, Sweden and Denmark have all amended their rape clause legislation to put consent at the heart of the legal framing of rape, rather than focussing on the *modus operandi* of the assault.[151] It would thus be fitting, and in line with the legal developments in the field, to appreciate consent, or a lack thereof, as a core element of online violations of sexual privacy.

### b. Digital Format

Capturing and distributing nudity has taken place alongside technological advances in photographic and video technology. Long before the internet developed, intimate images of women were shared across cultural and geographical borders. The distribution happened without their consent and with the aim of defaming or belittling them. This has happened on an interpersonal level, on a commercial basis and through publications.[152]

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[145] Citron and Franks (n 68).
[146] Nissenbaum, *Privacy in Context* (n 2).
[147] Citron and Franks (n 68); Nissenbaum, *Privacy in Context* (n 2).
[148] Citron and Franks (n 68).
[149] Regulation of the European Parliament and of the Council on the protection of natural persons with the regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
[150] 'Rape and Sexual Offences - Chapter 6: Consent | The Crown Prosecution Service' <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> accessed 20 August 2021.
[151] Stina Holmberg and Lars Lewenhagen, 'The New Consent Law in Practice. An Updated Review of the Changes in 2018 to the Legal Rules Concerning Rape' (The Swedish National Council for Crime Prevention (Brå) 2020) English summary 2020:6.
[152] *Lajuan and Billy Wood vs. Hustler Magazine* (n 105).

However, the digital factor in today's violations means that the distribution potential of the material is far greater than pre-internet times. Thus, the consequences for victims of violations is also, likewise, greater than before. Henry and Powell identify that there is a troubling extension of gender-based violence in online spheres, which extends to more than general bullying or harassment behaviour. The online manifestation of gender-based sexual violence does not constitute new harms, but the reach, nature and duration of these, combined with a gap in legal redress available to victims, makes them both insidious and difficult to respond to.[153] So even if the harm is not dependent on the digital element of violations of sexual privacy online, the online nature of such acts can magnify the scope of the harm posed by the act.[154] On the other hand, as Powell reports, recordings can be important for evidence gathering and establishing that sexual violence took place.[155]

Considering the rapid developments in technology, it is fair to assume that challenges to protecting intimate and private actions will remain on both normative and legislative grounds.[156] The digital element of violations of sexual privacy must, therefore, be recognised. At the same time, a targeted analogue distribution of sexual and private images can also cause grave harm.[157] The framing of violations of sexual privacy cannot exclude cases that take place in an analogue setting. Thus, even if the digital dimension of the acts has a substantial impact on the scope and nature of an offence, the evidence does not suggest that they are an essential component of the defining elements of violations of sexual privacy even during a digital age.

### c. The Perpetrator's Intent

Rackley et. al. identify the motivation behind image-based sexual abuse to be control, as well as misogyny, men's entitlement and 'laddish' attitudes.[158] Rackley and McGlynn claim the motivation can be explained by hurt male pride,[159] and Hill states non-consensual pornography (NCP) is just one form of cyber misogyny, whose sole purpose is to humiliate, intimidate, silence and degrade women. Using a feminist perspective, Hill describes NCP as 'an online example of gendered hatred,

[153] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81).
[154] *Egill Einarsson v Iceland* [2017] European Court of Human Rights Application no. 24703/15; *Delfi v Estonia* (n 60).
[155] Anastasia Powell and Nicola Henry, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social & Legal Studies.
[156] Thomas Macaulay, 'New AR App Will Let You Model a Virtual Companion on Anyone You Want' [2020] *Neural | The Next Web* <https://thenextweb.com/neural/2020/06/01/new-ar-app-will-let-you-model-a-virtual-companion-on-anyone-you-want/> accessed 20 August 2021; Carlotta Rigotti, 'Sex Robots and Human Rights' (*openDemocracy*, 8 May 2019) <https://www.opendemocracy.net/en/democraciaabierta/sex-robots-and-human-rights/> accessed 20 August 2021.
[157] Benediktsdóttir and Gunnlaugsdóttir (n 134).
[158] Erika Rackley, Clare McGlynn and Kelly Johnson, 'Shattering Lives and Myths: A Report of Image-Based Sexual Abuse' (2019).
[159] McGlynn and Rackley (n 8) 544.

harassment and abuse'.[160] Henry, Flynn and Powell highlight that perpetrators can have a varied connection to the victims; they can know each other intimately, casually or not at all, and that their motives can vary greatly. Such motives include coercion, extortion, revenge, sexual pleasure, humour, social recognition, humiliation, intent to harm, or financial motives.[161] Nor does motive need to be direct, specific websites have been set up for the sole purpose of sharing sexual content by others without permission. The purpose of the site owner is to profit financially, without knowing the victims per se.[162] Similar sites have been designed to make content accessible and with filters for geographical location of victims, for example, residents of a particular village or territory.[163]

The current criminal provision in England and Wales puts the perpetrator's intent and motives at the heart of the offence, leaving both gaps and overlaps in the legal framing of image-based sexual abuse.[164] As illustrated by McGlynn and Rackley, this provision provides poor protection for victims, as the personal consequences suffered can extend further than the intention of the original violation.[165] This problem has been recognised in the ongoing Law Commission reformation of the existing criminal law framework on image-based sexual abuse.[166] The proposals put forward in their consultation paper assume that the intent to harm will be removed as a core aspect of the violation, creating a 'base' offence that is grounded in a victim-based approach. Furthermore, the proposal includes a more serious offence that accounts for when the perpetrator had an intent to cause harm.

As stated by one interviewee,'...often, the consequences are much more serious than intended by the perpetrator'.[167] Considering the evidence, experience of existing criminal provisions and the difficulties often involved with proving intent to harm, it does not seem essential to include motives of perpetrators as a defining factor in violations of sexual privacy. A harm-based victim-centric approach would be more likely to produce a comprehensive conceptualisation of the interests and issues at stake in cases of unauthorised sharing of intimate material, rather than focusing on the perpetrators' intentions.

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[160] Hill (n 76).
[161] Henry, Flynn and Powell (n 110).
[162] 'Man Who Operated "Revenge Porn" Website Pleads Guilty In Hacking Scheme That Yielded Nude Photos From Google Email Accounts' (Department of Justice US Attorney´s Office, Central District of California, 25 February 2015) <https://www.justice.gov/usao-cdca/pr/man-who-operated-revenge-porn-website-pleads-guilty-hacking-scheme-yielded-nude-photos> accessed 20 August 2021.
[163] 'Victim's Warning after Finding Revenge Porn from "Every UK City"' *BBC News* (17 May 2019) <https://www.bbc.com/news/uk-scotland-48306203> accessed20 August 2021.
[164] '"Upskirting" and "Revenge Porn": The Need for a Comprehensive Law – Erika Rackley and Clare McGlynn' (*Inforrm's Blog*, 16 June 2018) <https://inforrm.org/2018/06/17/upskirting-and-revenge-porn-the-need-for-a-comprehensive-law-erika-rackley-and-clare-mcglynn/> accessed 20 August 2021.
[165] McGlynn and Rackley (n 8) 555.
[166] 'Taking, Making and Sharing Intimate Images without Consent | Law Commission' <https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/> accessed 20 August 2021.
[167] 'Interview 3' (19 October 2017).

# 3. The Gendered Dimension

## i. Male Perpetrators - Women and Minority Group Victims

Empirical evidence shows women and girls are the main targets of online digital sexualized violence, and men represent the majority of perpetrators.[168] Non-consensual distribution of sexual images disproportionately victimizes women, irrespective of the victims' age, jurisdiction or a specific region or culture.[169] Statistics further suggests that the distribution of sexually explicit images without consent is a form of sexual abuse that young people are particularly susceptible to and young women are most likely to be victimised.[170] Young women and teenage girls are also the group most likely to be pressured or coerced into sending sexual or explicit images of themselves.[171] The cases of such victimization are increasing and have a negative impact on the wellbeing of women.[172] Double standards that exist surrounding female sexuality contribute to the stigma and shame related to digital violations as well as its production and prevalence.[173]

Even though the global picture overwhelmingly shows women as the predominant victim of violations, men and boys are also victims of digital forms of sexual abuse who also are seriously affected by the impact of the violations. The empirical evidence suggests that this may also be rooted in gendered norms, particularly in a homophobic context, with most perpetrators, once again, being men.[174] Statistics, judicial decisions and academic literature further establishes that there is a strong relation between domestic abuse and image-based sexual abuse across jurisdictions, with digital intimate images used as a mean of coercion.[175]

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[168] Citron (n 48); Rannsóknir og greining, *Klám Og 'Sexting' - Ungt Fólk* (2021) <https://www.youtube.com/watch?v=5fjQblBYNpE> accessed 20 August 2021; Henry and Powell (n 51); Bjarnadóttir (n 49); Hill (n 42) 119.

[169] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81); Citron (n 68).

[170] A generational difference in the uptake of Internet services may also contribute to this. Rannsóknir og greining (n 168); Henry and Powell, 'Beyond the "Sext"' (n 4).

[171] Michelle Drouin, Jody Ross and Elizabeth Tobin, 'Sexting: A New, Digital Vehicle for Intimate Partner Aggression?' (2015) 50 Computers in Human Behavior 197; Rannsóknir og greining (n 168).

[172] Yanet Ruvalcaba and Asia A Eaton, 'Nonconsensual Pornography among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men' (2020) 10 Psychology of Violence 68; Pew Research Center: internet, Science & Tech, '73% of Teens Have Access to a Smartphone; 15% Have Only a Basic Phone' <https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2015/04/PI_2015-04-09_teensandtech_06.png> accessed 20 August 2021.

[173] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81) 202; Powell and Henry (n 155) 399; McGlynn and Rackley (n 8).

[174] Citron (n 68); Henry, Flynn and Powell (n 110); Bjarnadóttir (n 9).

[175] Henry and Powell (n 47); Benediktsdóttir and Gunnlaugsdóttir (n 102); Drouin, Ross and Tobin (n 139); 'Love, Relationships, and #SextRegret: It's Time to Take Back the Web' (*McAfee Blogs*, 4 February 2013) </blogs/consumer/consumer-threat-notices/love-relationships-and-sextregret-its-time-to-take-back-the-web/> accessed 2o August 2021.

## ii. Harmful Societal Issues Translate onto the Online Sphere

McGlynn and Rackley highlight the connection between the statistics on female victims of digital violations and the larger palate of gender imbalance in societies.[176] Despite the prevalence of cyber violence against women, online gendered abuse and sexist hate speech, these violations are not clearly defined harms recognised to the full extent in law, or international standards, as a part of a continuum of violence against women.[177] McGlynn and Rackley, cite the work of Nussbaum when they propose that online objectification of women can be seen as some men´s attempt to 'restore the patriarchal world before the advent of sex equality'.[178] The patriarchal world can be described as a 'historically constructed social pattern of power relations between men and women and definitions of femininity and masculinity.'[179] Those harmful norms are recognised as a contributing factor in the prevalence of violence against women[180] that seem to particularly fester and nourish on parts of the internet that are frequented by young men who are deeply immersed in online gaming culture.[181]

Sexual violence and harassment are globally recognised as human rights issues through international standards, domestic law and social norms.[182] Forms of sexual violence have been labelled as gender-based violence, not only as it manifests in particular against women, but due to the fact that the behaviour is rooted on a social context of gender inequality and normative expectations surrounding gender stereotypes.[183] Society has a poor track record in addressing harms that take women and girls as their primary targets.[184] This applies on an international scale with no country exempt.[185] There is a continuous issue of women struggling with legal and social disregard of their sexual boundaries,[186] and the digital dimension seems to further entrench these harmful norms and practices, rather than disrupting them.[187] This entrenchment of harmful norms and

[176] McGlynn and Rackley (n 8) 544.
[177] Wilk (n 92) 11–20.
[178] McGlynn and Rackley (n 8) 544.
[179] R. W. Connell, *Gender and Power: Society, the Person, and Sexual Politics* (Polity Press in association with BBlackwell 1987).
[180] An example of this is this paragraph from the preamble to the Council of Europe Istanbul Convention: "Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women" 'Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence ETS No. 210'.
[181] Alice E Marwick, 'Scandal or Sex Crime? Gendered Privacy and the Celebrity Nude Photo Leaks' (2017) 19 Ethics and Information Technology 177, 188–189; Massanari (n 126) 331–333.
[182] Henry and Powell (n 47); Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 11); 'Violence against Women' (*who.int*, 9 March 2021) <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> accessed 20 August 2021.
[183] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81).
[184] Citron and Franks (n 68).
[185] 'Violence against Women' (n 182).
[186] Citron (n 69); Citron and Franks (n 68).
[187] Anastasia Powell and others, 'Image-Based Sexual Abuse: The Extent, Nature, and Predictors of Perpetration in a Community Sample of Australian Residents' (2019) 92 Computers in Human Behavior 393, 398.

practices is exemplified in definitional dilemmas regarding the term 'sexting'. Henry and Powell highlight the discrepancy between Australia's legislative response to sexual behaviour of young people under child pornography clauses compared to the lack of legislative response to TFSV and harassment of adult women. They maintain that consensual, digital, sexual communications between young people has been overly regulated, while the law has failed to respond to the harm experienced by victims of unauthorised making or distribution of sexual images. Insufficient attention is given to the ways in which new technology is used to facilitate or perpetrate sexual violence and harassment against adult women.[188] The Icelandic case study, discussed in chapter four, highlights similar findings from the Icelandic legal and criminal justice responses to online violations of sexual privacy.

## 4. Addressing the Harm

The harm principle coined by John Stuart Mill is designed to restrict the scope of criminal law and government restrictions on personal liberty. The limits posed to the actions of individuals are merely warranted when balanced against the rights of others.[189] Just as demonstrated in Mill's framing, harm is an important tipping point in the modern-day justice system. Generally, it can be claimed that when the threshold of harm is reached, an act starts being experienced by a victim as a crime rather than a technical victimisation.[190] In the context of sexual privacy the negotiating elements can be boiled down to intimacy and harm.

At a personal level, victims describe a range of harms that are not suited to frame on a linear scale.[191] This particularly applies in cases of online violations of sexual privacy, as the victim can be unaware the violations have even taken place or learn about them much later.[192] At a structural level, the academic literature maps out the harms online sexual privacy violations can cause, but the literature is dependent on domestic contexts and existing social norms, and thus ill-suited for continuum framing. McGlynn and Rackley address this twofold harm towards individuals and towards society. They describe individual harms as manifested by violations of mental and physical identity, dignity, privacy and sexual expression. The societal harm they outline is its contribution to a culture 'in which women´s consent is systematically ignored'.[193] Citron and Chesney also explain that the harm

[188] Henry and Powell, 'Beyond the "Sext"' (n 4) 105.
[189] John Stuart Mill, *On Liberty* (Electric Book Company 2000).
[190] Wall (n 118) 11–13; Mill (n 189).
[191] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[192] Kate Isaacs, 'Pornhub Needs to Change – or Shut Down' *the Guardian* (9 March 2020) <http://www.theguardian.com/global-development/2020/mar/09/pornhub-needs-to-change-or-shut-down> accessed 20 August 2021.
[193] McGlynn and Rackley (n 8) 551.

can be recognised on a twofold level, a safety issue and a security issue. They propose that the individual harm caused by violations of sexual privacy online poses a safety issue risking the safety, health and wellbeing of victims. On a wider scale, digital violations of sexual privacy can be used as pressure points that can be exploited and present as a security issue; even a national security issue depending on the position the person affected holds.[194]

Henry and Powell argue that legislative and policy responses frequently treat existing and new technology as a tool of abuse and ignore the unique ways victims can experience harm.[195] Citron highlights that a narrow focus on harms can be detrimental when shaping a response to sexual privacy violations. As she describes '[o]ne day, the discussion centres on non-consensual pornography; the next, it concerns sextortion; and so on. Because the full breath of the harm is not in view, the impact of any given setback seems small.'[196]

Thus, in order to build a holistic framework to underpin recommendations, proposed in chapter five, it is necessary to explore the harms caused by violations of sexual privacy.

## a. Individual Harms

### i. Traditional Harm

The harm caused by violations of sexual privacy, whether in the form of image-based or other forms of sexual violence, can be serious, especially when images are shared with additional information about the person, such as name, address or social media account. These consequences can be more serious in a small community such as Iceland. The breach of confidentiality involved in disclosing content, which was initially shared within a trusted setting in an interpersonal capacity, could, when shared out of context, affect the victim's reputation, employment status, personal relationships and even his or her entire life.[197] McGlynn and Rackley outline that violations can harm multifaceted interests that, depending on the individual case, manifest in different ways and can have profound consequences in a personal context.[198] Some of the known harms will be further discussed here.

#### *Integral Personal Issues*

McGlynn and Rackley demonstrate that some of the personal harms caused by image-based sexual abuse strike at the core of the right to privacy. In this context they specifically highlight moral and physical integrity, dignity, privacy and sexual expression of the victim.[199] Danielle Citron believes

[194] Robert Chesney and Danielle Keats Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 California Law Review 1753.
[195] Nicola Henry and Anastasia Powell, 'Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence' (2015) 21 Violence against Women 758; Powell and Henry (n 155).
[196] Citron (n 69) 5.
[197] Benediktsdóttir and Gunnlaugsdóttir (n 134).
[198] McGlynn, Rackley and Houghton (n 4).
[199] McGlynn and Rackley (n 8) 545–549.

the consequences can also have long-term effects on individuals' ability to shape their self-image, sexual boundaries and ability to form and maintain close relationships.[200] As discussed by Citron, intimate relationships are built on mutual vulnerability and self-disclosure. This is particularly important for queer people who, in light of regressive social norms that exist across the world, often need a safe space to explore and come to terms with their sexuality or gender identification. As Citron emphasises, "[w]ithout sexual privacy, we may be unable to forge relationships of love and trust"[201]

*Physical and Psychological Harms*

Online violations of sexual privacy can translate into offline harms, and create concrete physical danger for victims.[202] They raise the risk of other harm, such as offline stalking and physical attack, in particular when the images are shared with other personal information such as addresses or social media accounts.[203] There are reports of victims that have feared for their life.[204] The online sphere has facilitated a new avenue for domestic abuse whereby a party in a relationship can be coerced to produce material that is subsequently used to pressure the victim into behaviour by threatening to distribute the content.[205]

Victims of online sexual violence from Denmark, Norway, and Iceland report physical symptoms such as anxiety, unexplained pain, lack of energy and fatigue as a result of their intimate images being shared online.[206] Icelandic court cases, from the case studies discussed in chapter four, report consequences such as anxiety, depression, isolation, shame, and difficulties in conducting daily tasks.[207] Furthermore, victims describe how the violations aggravate pre-existing issues such as anxiety.[208] As discussed by Bates, survivors of online sexual violence suffer from a number of mental health issues following their assault. They have trouble trusting, show signs of post-traumatic stress disorder and suffer from anxiety, depression and suicidal thoughts. These findings reveal the seriousness of online sexual violence, as well as the similarities between sexual assault and online sexual violence.[209] The consequences are described by victims that are unknown to the public as well as celebrity women who have fell victim for disclosure of their intimate images or videos of them engaging in sexual acts. They have stated that they felt that they had been violated and victimized,

[200] Citron (n 69) 12–17.
[201] ibid 25.
[202] Citron and Franks (n 68).
[203] ibid.
[204] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[205] Citron and Franks (n 68).
[206] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12) 21.
[207] Bjarnadóttir (n 9).
[208] [2019] Héraðsdómur Reykjaness S-158/2018.
[209] Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2017) 12 Feminist Criminology 22.

some equalled the events to been raped.[210] Others called for non-consented sharing of images to be classified as a sex-crime.[211]

*Professional and Financial Consequences*

Depending on the legal routes and support services available, victims can incur a direct financial cost as a result of image-based sexual abuse or other forms of violations of sexual privacy. This can include costs like legal fees and treatment costs.[212]

A reported effect of digital sexual violations is the withdrawal of victims from online activities, which in employment context constitutes a professional harm because of how influence or suitability in a professional context can be linked to their online presence.[213] This can also manifest in victims not seeking out professional opportunities as they are nervous the internet search history linked to their online information could draw attention to the violations and, consequently, impact their employment possibilities.[214] Moreover, there is a socio-economic aspect to this problem because digital reputation management comes at a financial cost, making it more easily attainable for wealthy victims and less so to those without the financial means to mitigate the damage.

### ii. Social Rupture

The harm suffered on an individual level by victims of online violations of sexual privacy, irrespective of the underlying framing of the act, can be regarded as twofold; the traditional harm already discussed, and as social rupture.[215] Rackley et. al. discuss and define social rupture as a harm in the context of image-based sexual abuse. Their definition of social rupture caused by image-based sexual abuse includes:

- a major devastation that drastically alters all aspects of victim-survivors' lives
- an extreme unsettling and intrusive violation
- victim-survivors distinguishing their lives and sense of self-worth into 'before' and 'after' their experiences

[210] 'Paris Hilton Did Not Feel Empowered After Her Infamous Sex Tape Leaked' <https://www.refinery29.uk/2018/04/197696/paris-hilton-sex-tape-like-rape-meme-documentary> accessed 20 August 2021.

[211] 'Jennifer Lawrence on Naked Photograph Hacking: "It Is a Sexual Violation. It's Disgusting" | The Independent' <https://www.independent.co.uk/news/people/jennifer-lawrence-on-nude-photo-hacking-it-is-a-sexual-violation-it-s-disgusting-9780162.html> accessed 20 August 2021.

[212] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12) 22.

[213] Citron (n 69); Palfrey and Gasser (n 7).

[214] Citron and Franks (n 68).

[215] Citron (n 69); Henry and Powell, 'Embodied Harms' (n 195); McGlynn and Rackley (n 8).

In short, social rupture describes the totality of experienced harms that radically alter everyday life experiences, relationships and activities, causing harm in the personal, professional and digital-social aspects of victims' lives.[216]

The experiences expressed by victim survivors highlights the wide-ranging implications of the digital aspect of image-based sexual abuse, as detailed in the 'Shattered Myths and Lives' report in which McGlynn et. al. draw on the lived experience of survivors when proposing legal reform in the United Kingdom.[217] These experiences include the sense of permanence of the abuse that leaves the survivors feeling isolated and their world being 'narrowed down'.[218] Research from the Nordic countries describes similar victim experiences, with victims having a nervous breakdown, losing their job, and isolating themselves from the outside world.[219] Similar descriptions can also be found in the Icelandic case study discussed in chapter four. An example of this is the *Landsdómur case 79/2018*, in which the victim (a man) had sex with another man unaware that another person was filming their sexual encounter. Sometime later, following his successful completion of a drug rehabilitation program, the victim started a family with a female spouse. When he refused to concede to the perpetrator's threats to pay him money, the perpetrator shared the film and still images from the recording with other people online, as well as printing out the pictures and enclosing them with a USB stick with the filming and sending the material to the victim's new spouse. The disclosure of his former homosexual encounters disrupted his relationship and unravelled the family he had built with his new spouse. Consequently, he relapsed and spiralled back into drug use.[220] Moreover, the self-destruction of victims is not confined to drug use, reports have shown that there may be a link between suicides and being a victim of image-based sexual abuse online.[221]

The statistics are not clear as to what extent victims suffer social rupture because of violations of sexual privacy, even if there are reports, from academic research, judicial findings and media reports, of this amounting to a clear harm. It is important to recognise these harms when framing a response to online violations of sexual privacy.

[216] Rackley, McGlynn and Johnson (n 158).
[217] ibid.
[218] ibid 10.
[219] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12) 21.
[220] *Ákæruvaldið gegn X* [2018] Landsréttur 79/2018.
[221] 'Police Investigate Suicide of Woman after "Revenge Porn" Sex Tape' (*The Local Spain*, 29 May 2019) <https://www.thelocal.es/20190529/police-investigate-suicide-of-woman-after-revenge-porn-sex-tape/> accessed 20 August 2021.

## b. Societal Harms

### i. Moving and Embedding Harmful Norms

McGlynn and Rackley explain that complacency towards image-based sexual abuse can have detrimental effects on social attitudes and lead to a culture that accepts image-based sexual abuse and diminishes the consequences it can have on an individual basis. They consider this effect to appear, among other things, in the contexts of the normalization of sexual violence, and undermining of the notion of consent in sexual relations. They further warn that such attitudes can contribute to a 'mob mentality' of anonymous men collectively mobilising to stalk, vilify and threaten women that are pictured.[222] As discussed by Wall, the mob mentality is one of the online elements that feed into new modes of crimes. The power of the Internet means that one can harm the many and the many can join to harm the few, as exemplified in cases of bullying and sextortion.[223]

Image-based sexual abuse is a gendered harm, with many victim-survivors experiencing devastating harms because of the social and political context of the sexual double standard and online abuse of women.[224] Moreover, as argued by Manne, the long–term implications of the sharing of imagery on the internet are yet to come into light. As she suggests, this may lead to a shift in norms that will be more accepting of female nudity. Nevertheless, Manne also warns that history would suggest that less progressive attitudes will continue because misogyny and gender based discrimination persist within social structures.[225] The theoretical foundation for a claim of the harmful implications of violations of sexual privacy online on *social* norms is thus compelling, but as argued by Manne, the evidence has still not emerged to back up that claim.

### ii. Undermining of Trust in Public Authorities

In 2017, three Nordic NGO´s carried out a comparative assessment about how the experiences of survivors and definitions of online violence against women. The study approaches digital violence in broad strokes but the majority of the victims interviewed were victims of online sexual violence; i.e. unauthorised sharing of intimate images.[226] It described survivors' experiences of digital violence, in Iceland, Denmark, and Norway, and how they sought support from their criminal justice

[222] Michael Salter and Thomas Crofts, 'Responding to Revenge Porn : Challenges to Online Legal Impunity', *New Views on Pornography: Sexuality, Politics, and the Law* (2015); McGlynn and Rackley (n 8) 550–551.
[223] Wall (n 118).
[224] Rackley, McGlynn and Johnson (n 158).
[225] Kate Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press 2018).
[226] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).

systems. The report outlines responses from police and legal actors that have worked in the field of online abuse.[227]

The study highlights the lack of response from the criminal justice system and, in particular, the police. Most of the victims felt that the investigatory tools and interpersonal attitudes of the police towards their case failed to recognise the harm incurred.[228] Similar problems with policing are found elsewhere. In March 2017, Bond and Tyrell surveyed police officers across the United Kingdom and found a limited understanding of revenge pornography legislation and lack confidence both in investigating cases and in effectively responding to victims. They concluded that there was an urgent need for training across police forces to ensure that cases of revenge pornography were met with appropriate responses, victims were safeguarded and offenders brought to justice.[229] As established in chapter three, the vested interest at stake when confidence in the criminal justice system falters is both the protection of the rights of citizens, and also a wider interest of upholding the rule of law and human rights through public institutions.[230] Therefore, as Wall highlights, the police must respond to evolving technological challenges in order to maintain the integrity of the criminal justice systems.[231]

#### iii. Democratic Cost of Retreating Female Participation

Victims of online sexual abuse, whether it be image-based sexual abuse or other forms of sexual privacy violations, are withdrawing from the online sphere.[232] Even though this retreat is symptomatic of harm on a personal level, the implications stretch further. McGlynn and Rackley warn that a lack of response to image-based sexual abuse might contribute to a culture and norms that can have a negative, long-term impact on women's participation in the online sphere.[233] This can constitute a societal harm in itself, in particular, in the context of democratic discourse that increasingly takes place online.[234]

# 5. Defining Sexual Privacy

[227] ibid 7.
[228] ibid 23.
[229] Emma Bond and Katie Tyrrell, 'Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales' [2018] Journal of Interpersonal Violence.
[230] *MG vs Turkey* [2016] European Court of Human Rights Application no. 646/10.
[231] Wall (n 118) 19.
[232] Citron (n 68).
[233] McGlynn and Rackley (n 8) 551.
[234] Lumi Zuleta and Rasmus Burkal, 'Hadefulde ytringer in den offentlige online debat' (Institut for Menneskerettigheter 2017).

For Diggelmann and Cleis, privacy neither holds a uniform nor universal meaning.[235] There are variations in the framing of privacy and how it is valued at personal and social levels. As discussed in prior sections in this chapter, aspects of privacy, such as sexual privacy, carry normative preconceptions that often feed into the cultural and personal understanding of the concept. Nissenbaum points out that the core issue of consent revolves around the importance of a contextual understanding.[236] What is appropriate in one context can be used in a different way when taken out of that context and put into another. However, the easy transfer of context is at the core of the technological revolution that fuels online communication, because various forms of information travel between platforms, or more precisely for the discussion it travels between contexts. When we take something out of context it can either lose its meaning or take on a completely different meaning that can cause harm to the people involved. Context is a core factor in assessing the scope and appropriateness of infringements of privacy as established in ECtHR case law.[237] As regards sexual content, the main context that affects the framing of the act in question is firstly, the nature of the content and secondly, the levels of consent attached to that.

It is important to recognise the sexual violence foundation of the offences. McGlynn warns against conceptualising or responding to the issue solely within the privacy framework as that does not consider more nuanced elements at play.[238] I thus propose the framing of *sexual privacy* in a victim-centric approach, grounded in recognising harms rather than focusing on perpetrators intent, and taking into account the range of manifestations in play. A violation of sexual privacy constitutes the creation of an image, text or similar material of nudity or sexual conduct of another person, including falsified material that is either acquired for themselves or others, distributed or published, and, at any time in the process is carried out without consent of the person or persons depicted.

# 6. Conclusion

In this chapter, I have presented an overview of the academic, legal and normative framing of the actions and the interests at stake when dealing with unauthorised online disclosure of intimate or sexual material. I have highlighted the way that some of these framings have been helpful in conceptualising the nuanced circumstances where violations of sexual privacy take place. In addressing the varied components that are central in the academic framing, I assessed what commonalities needed to be included in the framing of sexual privacy for the purpose of this thesis.

[235] O Diggelmann and MN Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 Human Rights Law Review 441, 442.
[236] Nissenbaum, *Privacy in Context* (n 2).
[237] Nissenbaum, 'Respecting Context to Protect Privacy' (n 16); Nissenbaum, *Privacy in Context* (n 2); *Delfi v Estonia* (n 60).
[238] McGlynn (n 121).

By establishing the harms involved with violations of sexual privacy, I established the importance of a victim-centric approach for the purpose of framing. Finally, I proposed a definition of sexual privacy for this thesis that also underpins the legislative reforms discussed in chapter four and proposed in chapter five.

# Chapter Two – How the Internet Challenges the Protection of Sexual Privacy Online

In this chapter, using the lens of Lessig's four-sided regulatory framework for the online sphere (norms, markets, infrastructure and law), I will outline how the Internet poses challenges for protections of sexual privacy. Purposefully, I do not centre the argument on the individual and, thus, I also move away from anchoring that individual as either a pathetic dot, a network of dots or a prosumer. The reason for my direction is based upon the contingency of the state's responsibilities under a human rights framework (described further in chapter three) that does not depend on a binary approach "to regulate or not to regulate". A human rights framework brings into play a wider set of markers that call instead for a structural discussion around protections for sexual privacy online.

I start by exploring the normative shifts brought about by the effect of the Internet on interpersonal and social communication, and consider how this shift urgently requires effective protections for sexual privacy in the digital age. I specifically discuss the ongoing erosion of the public-private binary, highlighting Nissenbaum's theory of contextual integrity for protecting privacy online. I then discuss the normative shifts facilitated by digital communication, the commodification of privacy and the normalisation of pornography and how this contributes to the normative challenges of safeguarding sexual privacy online.

Next, I move on to markets, addressing the pivotal role played by private companies in the regulation of the Internet. Private entities facilitate and regulate online environments far beyond just the management of internet content, such that regulatory models governing the online sphere will require re-designing if they are to remain relevant. Drawing on Marsden's theories of co-regulation and prosumer law, I explain how the market has challenged effective regulatory responses to online violations of sexual privacy.

Following this discussion, I employ the perspective of code as law to explore how technology restrains digital violations of sexual privacy. In consideration of Lessig's and Reidenberg's idea that technology promotes or perishes values, I show how technology and other modes of regulation are not neutral capacities. While private actors in the Internet ecosystem deploy code to perform their operations they are governed by platform owners who pursue financial interests and structure these platforms, and the regulation thereof, to sustain or expand their businesses. Additionally, although there are high-profile examples of code deployment aimed at countering sexual privacy violations, their effectiveness is unproven and there are practical and theoretical issues concerning their deployment.

Finally, I address the traditional regulatory mode of the law, asking how far the Internet limits legal responses to online violations of sexual privacy. This question reveals how the Internet's distributed architecture transcends geographic borders and produces an "out-of-reach problem" that challenges policing and the enforcement of national legislation. This is particularly relevant for sexual privacy online, because the platform where content is shared can be hosted within a different jurisdiction to the victim or the accused.

In conclusion, I demonstrate that each of the four regulatory modes of the Internet fail to provide effective protections for sexual privacy online. The market reigns, commercial interests shape the online realm creating normative shifts that contribute to outdated modes of privacy and equality rather than forging new progressive paths. Regulatory responses have been slow and the process is hampered by a discourse that warns of the slippery slope of regulation and cautions against the risk of falling into authoritarian practises.

# 1. Four Modes of Regulating Online Environments

The initial stages of what we now know as the Internet came together in cooperation between academia, military research projects and industry-led initiatives in the United States that were infused with libertarian ideology.[239] In the name of refraining from stifling the potential of this new technology, non-regulation and United States standards of free speech became fundamental features of the Internet with support from government and industry alike.[240] Franks outlines the "straight, white, male" roots of the fundamental values and laws of the Internet and how these translated to the norms and culture of the "digital natives", the original settlers of the Internet.[241] She highlights the 1996 *Declaration of Independence in Cyberspace* and how this manifesto reflects language of the 1776 U.S. Declaration of Independence, rejecting "privileges and prejudice accorded by race, economic power, military force, or station of birth"; notably this list omits gender.[242]The declaration was one of the formative writings of the *cyberliberitarian* school of thought that favoured self- or non-regulatory approaches to the Internet.[243] Despite all its progressive promise, the online sphere has not become a utopian design, instead, it is yet another space where women face disproportionate

[239] For an overview of early years regulatory issues online see i.e 'Brief History of the Internet' (*Internet Society*) <https://www.internetsociety.org/internet/history-internet/brief-history-internet/> accessed 20 August 2021; Marsden, *Internet Co-Regulation* (n 55) 6–14; Goldsmith and Wu (n 55) 29–46.
[240] A number of legislative efforts and judicial findings addressing the issue of online regulation did come forward in the U.S. up until the mid-1990s, but the reigning principles remained free speech. For a detailed discussion see: Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press 2019).
[241] Mary Anne Franks, *The Cult of the Constitution* (Stanford University Press 2019) 160–164.
[242] ibid 161; Barlow (n 6).
[243] Marsden, *Internet Co-Regulation* (n 55) 6–7.

abuse.[244] Instead of contributing to gender parity or promoting equality, the human rights concerns during the formation of the Internet revolved around a United States styled message of free speech message that prioritised commercial and corporate interests.[245]

In a seminal work, Lessig observed that the fast-developing importance of the Internet in nearly all aspects of modern-day life brought about a connected world that relies no less on computer code than legislation in terms of fundamental principles.[246] Law, he claimed, is one of four modes regulating the Internet, and thus constraining online action.[247] The other three are social norms, the market, and Internet architecture. Murray explains that Lessig's theory, which stresses the importance of broad regulatory powers online, is a fundamental notion in the *cyber paternalistic* school of Internet regulation, due to the emphasis Lessig proposes on broad regulatory powers of governments online.[248] Lessig introduces *the east coast* and *the west coast* codes regulating the Internet; East Coast referring to Washington as the capital of law making, while the West refers to Silicon Valley as cradle of code making. He calls for a stronger involvement from the government to regulatory issues of the Internet.[249] The geographic constraint of Lessig's analogy serves as a reminder of the limited discourse on the regulation of the Internet -despite its highly interconnected function and global reach, his regulatory framework discussion is nevertheless confined to North America.

Lessig's theory of the four regulatory modes of the Internet fundamentally differs from the *cyberlibertarian* discourse specifically, it assumes the state should play avital role in maintaining structure and efficiency of the online sphere.[250] Murray, building on Lessig's four-sided regulatory mode for the Internet, promotes the *Network Communitarian Regulatory Discourse* that focuses on the nature of regulation. For Murray, irrespective of the differences between online or offline realms, regulation is always "a process of discourse and dialogue between the individual and society."[251] The object of the regulation, the individual, is not a static '*pathetic dot*', *as* portrayed in Lessig's theory, instead, there are many *dots* that form networks and actively contribute to regulatory models through their choices and actions.[252]

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[244] Citron (n 68); Franks (n 241); 'Violence against Women' (n 182); Zuleta and Burkal (n 234).
[245] *Reno v American Civil Liberties Union* [1997] US Supreme Court 96-511, 521 844; Kosseff (n 240); Franks (n 241).
[246] Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (2nd Revised ed. Edition, Basic Books 2006).
[247] The Berkman Klein Center for Internet & Society, *ILaw 2004: Lawrence Lessig on Regulation* <https://www.youtube.com/watch?v=EXOv1doHp88> accessed 20 August 2021.
[248] Andrew D Murray, 'Internet Regulation' [2011] London School of Economics and Political Science 8–12.
[249] ibid.
[250] Mark Leiser and Andrew Murray, *The Role of Non-State Actors and Institutions in the Governance of New and Emerging Digital Technologies*, vol 1 (Roger Brownsword, Eloise Scotford and Karen Yeung eds, Oxford University Press 2016) 5.
[251] Murray (n 248) 20.
[252] ibid 20–21.

Marsden further recognises the multidimensional role individuals hold in the online sphere and highlights that effective Internet regulatory responses will have to recognise this diversity.[253] As individuals are increasingly sharing and producing content online, he proposes the *prosumer* framing over the dots, pathetic or not.[254] As he persuasively argues, in the current online ecosystem most Internet users take on a range of roles that come with rights and responsibilities that deserve recognition. An example of this is an individual that utilises social media platforms to sell their products as well as to participate in political discourse. Thus, Marsden proposes a 'Prosumer Law' that draws on existing regulatory spheres such as competition, human rights, and technology regulation with the aim to ensure "a fair and neutral deal for digital prosumers and citizens."[255]

## 2. Normative Shifts Challenging the Protection of Sexual Privacy Online

Lessig described how social norms impact all behaviour and communication, on- and offline.[256] The Internet is increasingly ingrained in social structure, services and business across the globe.[257] This development has significant impacts on human communication as well as on local and global conditions.[258] Internet-based technical solutions are promoted in public and private contexts alike, including an increase in the uptake of online banking services and many interfaces of public services moving online.[259] The interconnected nature of the Internet and the services offered to the public on a global scale has brought people together and been a catalyst (rather than a cause) for cultural and national revolutions.[260] At the same time, the Internet has contributed to large-scale disinformation and facilitated the spread of terrorist propaganda.[261] The profound effect of the Internet on interpersonal and social communication is not completely unique. With every progressive leap in

[253] Chris Marsden, 'Prosumer Law and Network Platform Regulation: The Long View Towards Creating OffData' (2018) 2 Georgetown Law Technology Review 376, 377.
[254] ibid.
[255] ibid 378–379.
[256] Lessig (n 246) 24.
[257] European Commission, 'Digital Economy and Society Index (DESI) 2020 - Use of Internet Services' (European Commission 2021); 'ITU | 2017 Global ICT Development Index' <https://www.itu.int/net4/ITU-D/idi/2017/index.html> accessed 20 August 2021.
[258] Franks (n 241) 166.
[259] European Commission, 'Digital Economy and Society Index (DESI) 2020 - Use of Internet Services' (n 1); United Nations (n 5).
[260] Rúdólfsdóttir and Jóhannsdóttir (n 103); Gadi Wolfsfeld, Elad Segev and Tamir Sheafer, 'Social Media and the Arab Spring: Politics Comes First' (2013) 18 The International Journal of Press/Politics 115.
[261] European Commission, 'Final Report of the High Level Expert Group on Fake News and Online Disinformation' (*Shaping Europe's digital future - European Commission*, 12 March 2018) <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation> accessed 2 July 2020; 'Christchurch Call | to Eliminate Terrorist and Violent Extremist Content Online' <https://www.christchurchcall.com/> accessed 20 August 2021.

communication development, the parameters of public discourse are extended and challenged.[262] Like other technological advancements before it, the disruptive element of the Internet carries with it possibilities and challenges for progress on an individual and social level.[263]

Social norms can differ depending on the context so that what is highly inappropriate in one context is, nevertheless, welcomed in another.[264] Lessig highlighted that the online contexts produce a setting that can normalise actions which would otherwise be considered inappropriate in the offline setting where the person engaging in the online interaction is physically located. [265] The anonymity and interconnectivity of the Internet contribute to a situation in which social norms have not developed in a uniform manner online. Rather, norms for online communication are significantly affected by the platform on which the communication takes place on and the formal and informal rules that apply therein.[266] Massanari lays out how platform design and policies contribute to fostering or deterring culture and norms.[267] Murray warns that entering cyberspace can drive people to shed their social responsibilities and duties.[268] Marwick and Massanari have both discussed the normative shifts that occur in relation to *geek culture* and *geek masculinity* online, and the way these shifts contribute to violations of online sexual privacy.[269] Their research exposes a online subculture of mainly young men that are highly engaged in online activities, and subscribe to heteronormative masculity ideas that they manifest by claiming a monopoly or 'mastery' of technology, even if their physical persona usually does not meet the hyper masculine norms, but are somewhat outsiders or 'geeks'.[270] Recent examples connect geek culture to the *Incel movement*, a loosely connected community of misogynistic online forums frequented by heterosexual men who desire sex but find themselves unable to attract a sexual partner and blame women and the women's rights movement for men's failure. [271] As discussed in chapter four, platforms dominated by men unconnected to the Incel movement still foster a culture of online violations of sexual privacy, and contribute to a normative shift that has consequences off-and online.[272]

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[262] Goldsmith and Wu (n 55) vii.
[263] Laidlaw (n 71) 8.
[264] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20).
[265] Lessig (n 246) 17.
[266] Marwick (n 181); Massanari (n 126).
[267] Massanari (n 126) 336–338.
[268] Murray (n 248) 2.
[269] Massanari (n 126); Marwick (n 181).
[270] Marwick (n 181) 160.
[271] Fred Nadis, 'What Happens When Society Decides That Nerds Are Dangerous?' [2014] *Vanity Fair* <https://www.vanityfair.com/culture/2014/06/return-of-nerd-culture> accessed 20 August 2021; Nicole Kobie, 'After the Toronto Attack Don't Explain Incel Ideology, Ban It' [2018] *Wired UK* <https://www.wired.co.uk/article/toronto-attack-incel-alek-minassian> accessed 20 August 2021.
[272] Hildur Friðriksdóttir, 'Mynd Segir Meira En Þúsund Orð. Hinar Ýmsu Birtingarmyndir Hrellikláms.' [2016] *Árskrit Kvenréttindafélags Íslands* 71; Presented by Rachel Humphreys; produced by Elizabeth Cassin, Axel Kacoutié; executive producers Archie Bland and Phil Maynard, 'The Plymouth Attack and Misogynist "Incel" Culture – Podcast' *The Guardian*

As with the Industrial Revolution, the Informational Age is prompting another large shift in what it means to build and manage one's own personal and social identity.[273] The communication opportunities available to anyone with a smartphone and Internet connection, via a range of platforms and online services, shape an environment that produces different and sometimes separate spheres of social norms and standards in communication.[274] The connection between the online self-image and the physical self is symbiotic, with people increasingly failing to distinguish between their online and offline identity.[275] This merger of the online and the offline self is further perpetuated by online communication decreasing an individual's ability to control their social identity or how they are seen by others online.[276] Unlike the established professionals, researchers and policymakers of today, a younger generation have grown up in this digitally connected world from birth. Mistakes and misbehaviour, which have always been a part of teenagers' and young people's growth, no longer fade as a memory of younger times. The memories of contemporary Western teenagers are stored on computer clouds, on hard drives and uploaded to social media platforms accessible to everyone, anywhere, at any time.[277] The durability of content and the possibilities to archive content in a digital format further enhances the risks involved with digital communication, in particular intimate communication.[278]

The interface between sexuality and technology has growing relevance in the field of interpersonal communication. People can engage in intimate and sexual communication without establishing a prior physical relationship that matches the intimacy of the digital communication. In an Australian study, Henry and Powell observed that technologically facilitated sexual abuse is an increasingly common practice,[279] unfortunately, similar digital violations of sexual privacy extend much further than the national borders of Australia. As women's organisations, police, and researchers report, cyber violence against women is increasingly common[280] and "email, the internet and mobile phone technologies are being used as a tool to harass, intimidate, humiliate, coerce and blackmail women".[281]

(19 August 2021) <https://www.theguardian.com/news/audio/2021/aug/19/plymouth-attack-misogynist-incel-culture-podcast> accessed 20 August 2021.

[273] Palfrey and Gasser (n 7) 19.

[274] Marwick (n 181); Daithí Mac Síthigh, 'The Mass Age of Internet Law' (2008) 17 Information & Communications Technology Law 79.

[275] Palfrey and Gasser (n 7) 19–24.

[276] ibid 20.

[277] Mayer-Schönberger (n 7) 85.

[278] Citron (n 69).

[279] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81); Henry and Powell, 'Beyond the "Sext"' (n 4).

[280] 'Cyber Violence against Women and Girls. A World-Wide Wake up Call.' (The Broadband Commission for Digital Development 2015); Wilk (n 92).

[281] Henry and Powell, 'Beyond the "Sext"' (n 4) 115.

The full scope of the impact the Internet has had on communication will not be discussed in the context of this thesis, due to the sheer amount of extra-legal issues such a discussion raises. Some socio-legal elements of this development are nevertheless essential when mapping out the issues the Internet raises in the context of digital violations of sexual privacy, and will be examined briefly here, before moving on the three main normative shifts facilitated by the Internet.

*Anonymity*

Franks describes anonymity online as one of the moral hazards of the Internet. Her analysis suggests anonymity is used to facilitate a range of abusing behaviours online, including violations of sexual privacy.[282] However, online anonymity is a widely respected as an important aspect of both freedom of expression and privacy, proving its benefits for whistle-blowers and allowed people freedom to explore and express their identity.[283] Citron and Waldman remind that anonymity in online sexual communication has been particularly important for LBGT+ people and other marginalised groups to explore their identity.[284]

*Scale*

Some of the factors that are core elements of the functioning of the Internet are subsequently reflected in the character and consequences of digital forms of abuse. For example, when leveraged by mobs to conduct harassment, the large scale of online communication can quickly become overwhelming for a victim.[285] Although the Internet leaves the basic concept of communication unaltered, it has affected the amount of communication. Increasing amounts of sexual or otherwise intimate material is digitally captured and stored on smartphones, now ubiquitous amongst teenagers.[286] Such devices have made video recording and photographing ourselves and others, with or without their knowledge or consent, an everyday event.[287] A contributing factor to the scalability of content online is the velocity of online communication. Information does not only travel globally, but also relatively rapidly, online. These functions that are fundamental elements of online communication further makes it difficult for respondents to effectively respond to harmful content, as the scale content can spread on is immense, causing challenges to tracing and authenticating content online.[288] It is viral in its global reach.

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[282] Franks (n 241) 166.
[283] Palfrey and Gasser (n 7) 19; Giovanni Ziccardi, *Resistance, Liberation Technology and Human Rights in the Digital Age* (Springer 2013).
[284] Citron (n 69); Ari Ezra Waldman, 'Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities' (2019) 44 Law & social inquiry 987.
[285] Franks (n 241) 166; Wall (n 118).
[286] Pew Research Center: internet, Science & Tech (n 172).
[287] McGlynn and Rackley (n 8) 535.
[288] Robert Spano, 'Intermediary Liability for Online User Comments under the European Convention on Human Rights' (2017) 17 Human Rights Law Review 665, 666; *Delfi AS v Estonia* [2015] European Court of Human Rights Application

*User generated content*

User generated content online has created what Mac Síthigh in 2008 described as the *mass age of Internet law*.[289] Through platforms with a global reach, which rely on user-generated content, individuals have gained direct access to the public sphere, bypassing the gatekeepers (e.g. newspapers, broadcast media) who restricted earlier generations.[290] This levelling of access has particularly affected the media landscape, upsetting their revenue models and challenged the *Overton Window*.[291] An individual that has cultivated a large following on social media platforms can have wider reach than a national media outlet, and one does not have to be employed by a media company to perform an act of journalism.[292] Further, the flood of user generated content (UGC) online has created pressing questions regarding liability of harmful content and the efficiency of the law to respond to harmful online content as will be discussed in chapter three.[293] Large platforms rely on the rules governing intermediary liability online to facilitate the sharing of UGC, as some platforms have thousands of different UGC items shared every minute.[294] As is implicit in people's freedom of expression, digital forms of user generated content can be sexual, intimate or private in nature even if it is shared with a partner or in a controlled setting.[295] The online environment can easily upset this as it can be utilised to remove context quickly and without great effort. As Nissenbaum has explained; context controls the appropriateness of content.[296]

*Trust*

As described in the case of *Duchess of Argyll v Duke of Argyll, t*rust is a core factor in privacy is

"*…the intimate nature of a personal relationship between two people may give rise to a relationship of trust and confidence such that, without express statement to that effect, private and personal information passing between those people may in certain circumstances be imbued with an equitable obligation of confidence.*"[297]

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no. 64569/09 110; David S Wall, 'Policing the Internet: Maintaining Order and Law on the Cyber-Beat', *The Internet, Law and Society* (Pearson Education Ltd 2002).

[289] Síthigh, 'The Mass Age of Internet Law' (n 274).

[290] Daithí Mac Síthigh, *Medium Law* (1 edition, Routledge 2017).

[291] 'Facebook and Google News Law Passed in Australia' *BBC News* (25 February 2021) <https://www.bbc.com/news/world-australia-56163550> accessed 10 August 2021; Mark MacCarthy, 'Lessons for Online Platform Regulation from Australia vs. Facebook' (*Brookings*, 10 March 2021) <https://www.brookings.edu/blog/techtank/2021/03/10/lessons-for-online-platform-regulation-from-australia-vs-facebook/> accessed 10 August 2021; Camille François, 'Actors, Behaviors, Content: A Disinformation ABC. Highlighting Three Vectors of Viral Deception to Guide Industry & Regulatory Responses.' (Transatlantic Working Group 2019).

[292] David Goldberg, Gavin Sutter and Ian Walden (eds), *Media Law and Practice* (Oxford University Press 2009) 58.

[293] Spano (n 288).

[294] Daniel Angus, Paula Dootson and TJ Thomson, '3.2 Billion Images and 720,000 Hours of Video Are Shared Online Daily. Can You Sort Real from Fake?' (*The Conversation*) <http://theconversation.com/3-2-billion-images-and-720-000-hours-of-video-are-shared-online-daily-can-you-sort-real-from-fake-148630> accessed 19 August 2021.

[295] Citron (n 69).

[296] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20).

[297] *Duchess of Argyll v Duke of Argyll* [1967] CH 302.

The Internet challenges trust in communications.[298] This distrust is created through a range of essential and non-essential elements of the Internet, as it functions now, including surveillance and how easily content is shared without consent or even the knowledge of the relevant parties.[299] Examples of this practice includes photos on smartphones and screengrabbing on computers. In this context, the nudging mechanisms built into social media platforms can severely impact both what, and how, content is communicated.[300]

I will now highlight three examples of how the Internet has forged normative shifts, thereby amplifying the challenges faced by online violations of sexual privacy. These normative shifts are the blurring of the public and the private realms, the commodification of privacy, and the ubiquity of pornography.

## a. Erosion of the Private and Public Binary in Online Contexts

The Internet's reshaping of the private and public self, from the physical to the digital, has challenged the notion of privacy on a normative and legal level.[301] This kind of normative rupture has happened before, as technological advancements always impact how people express themselves, the distribution of ideas and the flow of information.[302] The corrosion of borders between the public and the private challenges personal and structural understandings of privacy, which gradually puts pressure on privacy and its protection.[303] In the context of online sexual privacy, the core issue is the unauthorised transfer of information, act or image, from the private to the public. The intentions and expectations of the person represented in an image should be central to the assessment of its privacy, but as cases of online sexual privacy violations demonstrate, this is not the case.[304] Garton Ash argues: "[w]hile the greatest opportunity of cosmopolis lies in the public sharing of knowledge, opinions, images, and sounds, its largest danger is the loss of privacy."[305]

[298] Citron (n 69); Helen Nissenbaum, 'Toward an Approach to Privacy in Public: Challenges of Information Technology' (1997) 7 Ethics & Behavior 207 <http://www.tandfonline.com/doi/abs/10.1207/s15327019eb0703_3> accessed 9 February 2021; Chesney and Citron (n 194).
[299] Zuboff (n 2); Citron (n 69); James Williams, *Stand Out of Our Light: Freedom and Resistance in the Attention Economy* (Cambridge University Press 2018).
[300] *Ákæruvaldið gegn X* [2015] Hæstiréttur Íslands 18/2015; Zuboff (n 2).
[301] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20) 33.
[302] Síthigh, *Medium Law* (n 290); Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20) 33–34.
[303] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20) 34–35.
[304] McGlynn and Rackley (n 8) 542.
[305] Garton Ash (n 57) 283.

The distinction between private and public has long held value in human society.[306] From the Greek Agoras[307] to Habermas's public sphere,[308] to the modern day Facebook walls; the borders between the public and the private not only shape what is found 'appropriate' in cultural and moral contexts, but also legal context.[309] Actions in the public carry different value and weight, than actions and communication that takes place in a private setting.[310] As Citron and Richards claim: "[f]or better or worse, the public-private divide is foundational to our modern rights jurisprudence."[311] Therefore, in both legal and normative settings, there has been a tendency to focus on the the demarcation of what counts as public.

This border between public and private has never been a neutral line and has historically benefitted perpetrators of gendered abuse, distancing women from the public sphere and confining them to the private realm of life.[312] As Beard explains, even the early Greek societies, the 'cradle of democracy', were inherently sexist as well as slave-owning, and excluded women from participating in the public business of the agora: democratic discourse, education and politics.[313] The public exclusion issue formed a substantial part of the discourse of second wave feminism, which called for accountability of gender-based and sexual abuse in both private and public spheres.[314] As the statutory protection of privacy has been historically gendered ("the house of every one is to him as his Castle and Fortress"[315]), privacy protection facilitated domestic abuse and other forms of violence against women rather than providing protection for the privacy of (mainly) women affected.[316]

Habermas discussed how the distinction between the home or the private sphere, was separated from the public, not only physically or in terms of ownership, but also with regards to social norms and standards.[317] He explained that in terms of content, scrutiny and physicality, public opinion and

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[306] Christopher P Dickenson, *On the Agora: The Evolution of a Public Space in Hellenistic and Roman Greece (c. 323 BC – 267 AD)* (Brill 2016).
[307] Agoras were the place of debate, politics and philosophical discussion in Ancient Greece. Entry and participation in this 'public' sphere was reserved for men only. ibid.
[308] Jürgen Habermas, *The Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society: An Inquiry Into a Category of Bourgeois Society* (Polity 1992).
[309] Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (n 3) 49; *Delfi v Estonia* (n 60); Naomh Gibson, 'Intimacy, Confidentiality and Power: Kiss and Tell as a Feminist Critique of Privacy Law' (2015) 3 IALS Student Law Review 7, 9.
[310] Daithí Mac Síthigh, 'Virtual Walls? The Law of Pseudo-Public Spaces' (2012) 8 International Journal of Law in Context 394, 396; Citron (n 68) 22; Gibson (n 309) 9.
[311] Danielle Keats Citron and Neil M Richards, 'Four Principles for Digital Expression (You Won't Believe #3!)' (2018) 95 Washington University Law Review 1353, 1372.
[312] Citron (n 68).
[313] Mary Beard, *Women & Power* (Profile Books, London Review of Books 2018).
[314] Citron (n 68); Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale UP 1979).
[315] Sir Edward Coke in Semayne's Case (1604) quoted and reproduced in Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke*, vol 1 (Liberty Fund 2003).
[316] Marwick (n 181); MacKinnon (n 314); Gibson (n 309) 9; Citron (n 68).
[317] Habermas (n 308).

public discourse is different from the private opinion and discourse. The development of the public market place was not only driven by the social good or a sign of increased prosperity in societies, it was also rooted in the needs of the capitalistic market that required logistics and structure to build reliable markets for products. Habermas claimed the underlying foundation for the public sphere and the distinction between what is acceptable in public and in private is, at least in part, reliant upon the economic foundations rather than the rights of the individuals partaking. Even though Habermas' theory discussed the public sphere in a historic context without any direct reference to the online sphere, his conceptualisation is applicable to the public-private binary online.[318] His application is particularly noticeable in the pivotal role private entities play in the infrastructure of the Internet, the market regulation of the Internet and how these entities shape the online sphere into a pseudo-public space.[319]

Using the public forum doctrine, the United States Supreme Court *Reno v. ACLU* ruling in 1997 distinguishes between public and private online spheres, following the premise that public space, such as streets and parks, is a place with open access.[320] *Reno v. ACLU* was a significant development in the regulation of the Internet, with implications that extended beyond the United States.[321] In the case, the Court struck down parts of the Communications Decency Act as violating the first amendment.[322] The Court considered that the Internet was the "modern Public Square" and place of democratic discourse, information and opportunities.[323] In his opinion for the majority, Justice Anthony M. Kennedy described "cyberspace" as an important a venue to free speech as a street or a park, wherein social media platforms served as special areas of public discourse that provided "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[324] Because the Internet had so convincingly improved access to the public sphere, the Court found the justifications for regulation of broadcast media should not apply to the "vast democratic forums of the Internet".[325] The Internet's underlying value was to be found in the positive and promotional effect it had on the public square, and by extension the possibilities of enhanced democratic discourse and development.

As Citron and Richards explain, the modern Internet is a far cry from the virtual town square described by the court in *Reno v. ACLU* and some twenty years later in the 2017 case *Packingham v. North Carolina*.[326] The assessment in *Packingham*, just as in *Reno*, is more focused on the public nature

[318] Rikke Frank Jørgensen, *Framing the Net. The Internet and Human Rights* (Edward Elgar Publishing 2013) 81–89.
[319] Síthigh, 'Virtual Walls?' (n 310) 404.
[320] Citron and Richards (n 311) 1360.
[321] Kosseff (n 240).
[322] *Reno v. American Civil Liberties Union* (n 245).
[323] *Packingham v North Carolina* [2017] US Supreme Court 15-1194 1738.
[324] ibid 1735–1737.
[325] *Reno v. American Civil Liberties Union* (n 245) 868.
[326] Citron and Richards (n 311) 1359; *Packingham v. North Carolina* (n 323).

of the Internet than the private nature of online communication. In the case, the Court was again faced with a question on the scope and effect of the First Amendment on the regulation of the Internet. Citron and Richards found that the court took a "remarkably similar approach" to the earlier *Reno v. ACLU* case, even though substantial technological shifts had taken place online in the time between the two cases.[327] The majority opinion focused on the vast untapped democratic potential of the Internet, repeating that it held the same place as the "modern public square" and that, despite the possible antisocial use of the Internet in the future, any regulatory intervention to the Internet had to be very cautious.[328]

The assessment in the *Packingham* case is arguably out of touch with modern-day reality, an internet connection is a ubiquitous feature of so many aspects of daily life. Comparison of the Internet to physical structures such as a "global village" or "global city" builds on *prima face* commonalities with aspects of community, infrastructure and human interaction, however these aspects emerge within specific histories and parameters.[329] The framing of cyberspace as a singular place with uniform norms and values fails to recognise the nuances in online spaces, both in regard to infrastructure and interpersonal communication.[330] The Internet cannot be reduced to a public place: its function is not only public interaction but also private communication. Arguably, the Court's assessment in the *Packingham* case conflates the notion of the Internet with social media and, crucially, ignores the importance of context online and the various elements of the online sphere.[331]

Solove explained that a pragmatic conception of privacy posits context as central to understanding and addressing contemporary privacy problems. He moved from defining 'privacy' towards addressing contextual privacy problems. He warned against too much contextual focus because it offers insufficient direction to policymaking and legal decision-makers.[332] His emphasis on the contextual interpretation of privacy corresponds well to Nissenbaum's argument that privacy is not a binary concept. She argues that information is never wholly private or public but depends on contextual interpretation and social norms.[333] Nissenbaum's concept of 'privacy in public' states that an "adequate account of privacy should neither neglect the non-intimate realm nor explicitly exclude it from consideration".[334] In other words, an act or information in a public realm should not automatically be exempt from the protections of the private.[335] Strahilevitz' social network theory of privacy highlights a similar point that privacy protection is still relevant when sharing between a

[327] Citron and Richards (n 311) 1355.
[328] *Packingham v. North Carolina* (n 323).
[329] Garton Ash (n 57) 18–19.
[330] Lessig (n 246) 63.
[331] Citron and Richards (n 311) 1383.
[332] Daniel J Solove, *Understanding Privacy* (Harvard University Press 2008).
[333] Nissenbaum, *Privacy in Context* (n 2) 144.
[334] Nissenbaum, 'Toward an Approach to Privacy in Public' (n 298) 208.
[335] McGlynn and Rackley (n 8) 542; Nissenbaum, 'Toward an Approach to Privacy in Public' (n 298).

significant number of people because a group's internal norms of information disclosure play a crucial part in determining privacy expectations.[336]

This contextual framing of privacy fits with the criteria the ECtHR established through case law that balances safeguarding wide margins of public debate, with safeguarding the individual's right to privacy (as will be discussed further in chapter three).[337] This distinction also applies under the European framework for data protection, as laid out by the European Court of Justice (ECJ) in a 2017 case in which the sharing, via YouTube, of a recording from inside a police station constituted the processing of personal data. The Court found that although the disputed recording took place within a police station this location did not automatically entail that the recording was either private or public in nature. To make that decision, a contextual interpretation of the setting and the objective with the disclosure would have to take place.[338]

Similar to earlier influential technologies like the telegram and printing press, the infrastructure and ideology behind the Internet challenges the traditional public private-binary.[339] When individuals are empowered by gaining access to the public sphere through the Internet questions are raised about the limits of the public and the private and, consequently, normative and legal borders between the two realms become more uncertain and fluid. Nissenbaum's claim that 'ultimately our aim should be to generate an alternative theoretical framework, or an extension of existing theory, that would meet these new challenges' has gained traction, although it is worth noting that she believes that such reshaping will not happen in one leap.[340]

## b. Commodification of Privacy

Zuboff's foundational works capture the essence of the commodification of privacy being a 'built in' feature in the dominant models of online platforms.[341] This commodification of data facilitates micro-targeting and similar strategies to reach Internet users.[342] Regarding the protection of sexual privacy, commodification can take place, for example, when people use privacy exposure as a means to gain income . Commodified privacy exposure happens on a personal level through mainstream

[336] Lior Strahilevitz, 'A Social Networks Theory of Privacy' (2005) 72 University of Chicago Law Review <https://chicagounbound.uchicago.edu/uclrev/vol72/iss3/3>.
[337] Spano (n 288); *Delfi v Estonia* (n 60).
[338] *Sergejs Buivids* [2019] European Court of Justice C–345/17.
[339] Nissenbaum, 'A Contextual Approach to Privacy Online' (n 20) 33–34.
[340] Nissenbaum, 'Toward an Approach to Privacy in Public' (n 298) 212–213.
[341] Cohen (n 3); Zuboff (n 2).
[342] Nathalie Maréchal, Rebecca MacKinnon and Jessica Dheere, 'Getting to the Source of Infodemics: It´s the Business Model.' (Open Technology Institute 2020); Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' *the Guardian* (17 March 2018) <http://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 20 August 2021.

platforms like Instagram and YouTube, and also in the context of nudity and pornography through platforms like OnlyFans and Pornhub.[343]

From the late 2000´s, online platforms like YouTube and Instagram were part of a cultural shift that normalised the commodification of privacy, a trend that has been traced back to the rise in television reality shows in the 1990s.[344] Taking advantage of the levelling of access that is created by mainstream platforms, individuals who are branded as 'content creators', 'streamers', 'YouTubers' or 'influencers', have made commercial or economic gains by allowing curated access to their private lives. Marwick discusses '*micro-celebrities*' as people that leverage social media platforms to build an audience of fans, rather than friends and family, through sharing insights from their daily life.[345] Even if the content shared with the audience is often curated or edited, it sets out to give a sense of authenticity and intimacy between the creator and the viewer. This intimacy can be created through the setting, such as streaming a make-up review from a bedroom, or by performative aspects like speaking directly into the camera about the intimate details of a personal relationship.[346] The interactive nature of platforms allows creators to connect directly with the fans that follow them, further adding to the blurring of the line between influencers and their followers. Some creators leverage the interaction with fans for economic gain, such as sending personalised greetings or selling tickets for fans to meet with them.[347] Monetizing ones image through a fan base is not a new phenomenon, and was a part of celebrity culture before to the Internet era. The Internet has facilitated the extension and normalisation of this "Zsa Zsa Gabor" practice to a much wider group of people. Research indicates that online influencers are influencing children that follow them to the extent of children aspiring to, or becoming influencers themselves.[348] A study conducted in China, the United Kingdom and the United States showed that 29% of 8-12 year old children expressed the ambition of becoming a YouTuber.[349] Ofcom, the broadcasting regulator in the United Kingdom,

[343] Noel Titheradge and Rianna Croxford, 'The Children Selling Explicit Videos on OnlyFans' *BBC News* (26 May 2021) <https://www.bbc.com/news/uk-57255983> accessed 19 August 2021; Tony Dokoupil, Michael Kaplan and Cassity McDonald, 'In a New Lawsuit, More than 30 Women Accuse Pornhub of Profiting from Videos Posted without Their Consent' *CBS News* (17 June 2021) <https://www.cbsnews.com/news/pornhub-lawsuit-nonconsensual-videos/> accessed 20 August 2021.

[344] Alice E Marwick, 'You May Know Me from YouTube: (Micro-) Celebrity in Social Media', *A Companion to Celebrity* (John Wiley & Sons 2016).

[345] ibid 337.

[346] Dusty Baxter-Wright, 'Zoella's Career Timeline: How the YouTuber Became a Household Name' *Cosmopolitan* (13 September 2017).

[347] Kevin Webb and Reece Rogers, 'Cameo Lets You Hire Celebrities to Create Personalized Videos for Any Occasion — Here's a Full Breakdown of How the Service Works' *Business Insider* (16 July 2021) <https://www.businessinsider.com/what-is-cameo> accessed 20 August 2021.

[348] Revealing Reality, 'Children's Media Lives - Wave 6. A Report for Ofcom' (2020) <https://www.revealingreality.co.uk/wp-content/uploads/2020/02/cml-year-6-findings.pdf>.

[349] PR Newswire, 'LEGO Group Kicks Off Global Program To Inspire The Next Generation Of Space Explorers As NASA Celebrates 50 Years Of Moon Landing' <https://www.prnewswire.com/news-releases/lego-group-kicks-off-global-program-to-inspire-the-next-generation-of-space-explorers-as-nasa-celebrates-50-years-of-moon-landing-300885423.html> accessed 20 August 2021.

warns children's social media behaviour is significantly influenced by online influencers and "carries a range of risks that have been little explored."[350] Their 2020 findings echo the joint 2015 study by the Internet Watch Foundation and Microsoft, which highlights that children are increasingly gaining online attention by posting questions and gamified or sexualised content.[351] In the 2015 study, children as young as seven were found to make and share self-generated sexual material. Over a three-month period, the study considered 269 cases, discovering that in 90% of the cases the content had been forwarded or re-disseminated.

[350] Revealing Reality (n 348).

[351] 'Emerging Patterns and Trends Report #1 Online-Produced Sexual Content' (Internet Watch Foundation in partnership with Microsoft 2015) <https://www.iwf.org.uk/sites/default/files/inline-files/Online-produced_sexual_content_report_100315.pdf> accessed 20 August 2021.

## c. Ubiquity of Pornography

Singer and Friedman point out that online access to pornography both has and continues to facilitate new group of users online, and new services and amenities in the online ecosystem.[352] They further point out that this pornographic contribution has stimulated the growth of the Internet´s infrastructure and economy. Any reluctance to accept the integral role of the pornographic industry in the history of Internet development may be rooted in the wider United States moral discussion about pornography, and its impact on society and groups within it.[353]

As explained by MacKinnon and Dworkin, from a legal perspective, pornography has traditionally been understood as a question of "private virtue and public morality, not personal injury and collective abuse."[354] This framing is reflected in law across the globe, notably in Iceland, the setting of the case study in chapter four.[355] A discussed in chapter one, there must be a clear distinction between violations of sexual privacy and pornography, in both legal and normative aspects. Although this thesis does not explore the moral or legal justifications for regulating pornography, or access to pornography, it is relevant to highlight the intersection of sexual privacy and pornography online, and the normative implications that unlimited access to online and extreme pornography has on violations of sexual privacy and other forms of gender-based abuse.

In their analysis of mainstream online pornography sites, Vera-Grey et. al. found evidence of sexual violence serving as a normative script, in mainstream online pornography that is available for free and without access restrictions to everyone with an internet connection.[356] They focused their study on three highly profitable online pornography sites: *XHamster*, *XVideos* and *Pornhub.* Pornhub claims to have 130 million daily users globally.[357] They analysed content on the front page of the sites, and categorised it to reflect the sexual script it represented. 12% of the content described activity constituting sexual violence, with *teen* as the most frequently used word in descriptions of content across the platforms.[358] Four forms of sexual violence were most common; incestuous sexual activity between family members being most frequent, followed by physical aggression and sexual assault,

[352] PW Singer and Allan Friedman, *Cybersecurity and Cyberwar What Everyone Needs to Know* (Oxford University Press, USA 2014) 20–21.
[353] Catharine A MacKinnon and Andrea Dworkin, *Pornography and Civil Rights. A New Day for Women's Equality* (1988); Singer and Friedman (n 352).
[354] MacKinnon and Dworkin (n 353) 24.
[355] Ragnheiður Bragadóttir, *Nauðgun og önnur brot gegn kynfrelsi fólks* (Bókaútgáfan Codex 2018); Gillespie (n 141).
[356] Fiona Vera-Gray and others, 'Sexual Violence as a Sexual Script in Mainstream Online Pornography' [2021] The British Journal of Criminology 1, 12.
[357] Pornhub, 'The Pornhub Tech Review – Pornhub Insights' (April 2021) <https://www.pornhub.com/insights/tech-review> accessed 20 August 2021.
[358] Vera-Gray and others (n 356) 7.

then a range of forms of image-based sexual abuse, and finally "reality based" coercion and exploitation.[359] Content representing image-based sexual abuse constituted 2,2% of the total 2,966 titles examined. This included titles like 'Upskirted in the train' and 'Pharmacy Store Bathroom Hidden cam', with Vera-Grey et. al. highlighting that the sexual script of content constituting description of image-based sexual abuse was focused of the "*creation*, rather than the distribution of images."[360]

The Vera-Grey findings are not least important to highlight that unlawful material is not only available in niche fringe sites, but on mainstream pornographic platforms.[361] Pornhub in fact is in fact so mainstream, a Danish politician ran an ad campaign on the platform in the run up to a national election, as he wanted to reach the voters "where they are" online.[362]

Access to mainstream commercial pornography platforms, has become a topic of regulatory controversy regarding children's access to pornography online. The Children's Commissioner for England warns the readily available pornography platforms are partly to blame for normalising sexism and sexual abuse in schools, as the content on the platforms shapes children's expectations of relationships and sexual acts.[363] A 2017 study supports the Commissioner's concerns, prioritising pornography as the most important issue facing children within online environments. It found that exposure to pornography does have adverse effects on children and young people's sexual beliefs, and there was evidence that extreme porn may be associated with sexually deviant or coercive behaviour.[364]

From an Icelandic perspective, no clear evidence of a correlation between the use of online pornography and committing sexual offences has been found, as the issue has not yet been examined directly. What research does show, however, is a highly gendered reality. A 2019 study of male Icelandic college students showed that pornography has a substantial impact on their idea of what is expected of them in sexual relations, and that many of them try and meet those expectations. Moreover, they think that the parameters of what is acceptable sexual conduct are wider for male than women.[365] Studies further show that boys and men watch much more porn than women and

[359] ibid 7–12.
[360] ibid 10.
[361] ibid 12–13.
[362] Martin Selsoe Sorensen, 'Danish Politician Puts Ad on Pornhub, Seeking Voters "Where They Are" - The New York Times' *New York Times* (15 May 2019) <https://www.nytimes.com/2019/05/15/world/europe/denmark-joachim-olsen-pornhub.html> accessed 20 August 2021.
[363] Rachel Hall and Michael Savage, 'Children's Access to Online Porn Fuels Sexual Harassment, Says Commissioner' *the Guardian* (13 June 2021) <http://www.theguardian.com/culture/2021/jun/13/childrens-access-to-online-porn-fuels-sexual-harassment-says-commissioner> accessed 20 August 2021.
[364] Sonia Livingstone and others, 'Children's Online Activities, Risks and Safety' (UK Council for Child Internet Safety 2017) 47.
[365] Kolbrún Hrund Sigurgeirsdóttir, Þórður Kristinsson and Þorgerður Einarsdóttir, 'Kynlífsmenning Framhaldsskólanema Frá Sjónarhorni Ungra Karla' [2019] Netla.

girls. Men are the perpetrators in 95% of all sexual offence cases reported to the Icelandic police, and they are in a wide majority of perpetrators of online violations of sexual privacy in Iceland, as in other countries as discussed in chapters one and four.[366] A 2016 study of college students' use of pornography showed 95% of male college students viewed pornography on online pornography sites, with 70% of them watching online porn a few times a week or more. 82.9% of the female respondents had seen pornography online, but only 12.5% of them visited such a site a few times a week or more. 66,9% of male respondents found pornography gave a false representation of sex and 75% of the female students. 33.4% of the male respondents had seen sexual acts in pornography that they tried acting out, and 25% of the female respondents.[367]

## d. Summary

In this section I have discussed normative shifts the Internet has facilitated and connect to sexual privacy online. I summaries some of the general normative shifts that contribute to the power and persuasiveness of the online sphere, but can also contribute to online violations of sexual privacy and other forms of gender-based abuse. I then discuss three fundamental shifts that affect sexual privacy online. The first is the blurring of borders between the public and the private sphere, and how this development is contributing to a larger shift in mass-, and interpersonal communications calling for a contextual understanding of privacy as explained by Nissenbaum. Second, I highlight the commodification of privacy and how this may contribute to a gamified and increasingly sexualised sharing of content. Third, I outline the pivotal role access to online pornography has had in the Internet ecosystem. I discuss research findings that call into question the relationship between online pornography and sexual violence, and raise concern that pornography is playing out as a script for sexual violence as found by Vera-Grey et. al. Relying on Lessigs model of modes of regulation, it can be concluded that norms are not a 'constraint' of digital violations of sexual privacy.

[366] Bjarnadóttir (n 9).
[367] Guðbjörg Hildur Kolbeins, 'Klámnotkun Íslenskra Framhaldsskólanema' [2016] Rannsóknir í félagsvísindum XVII.

# 3. Market Failure to Protect Sexual Privacy Online

Non-state actors play a key part in regulation of cyberspace.[368] Leiser and Murray categorise four groups: business actors such as Microsoft or Disney that have the ability to influence design or code of emerging technologies; transnational multi-state actors like global initiatives from the European Union and the United Nations; transnational private actors such as the Internet Archicture Board (IAB) and the Internet Corporation for Assigned Names and Numbers (ICANN), and civil society groups that work across the spectrum of digital rights.[369]

Internet intermediaries, which include hosting providers, search engines, payment platforms and participatory platforms (such as social media platforms) exercise critical functions in their role as gatekeepers in the online environment.[370] They "give access to, host, transmit and index content originated by third parties or provide Internet-based services to third parties".[371] Because of their technical capabilities, internet intermediaries are in a pivotal position to police online content.[372] Laidlaw explains that due to their intermediary role, such as Internet Access Providers or search engines, intermediaries have become proxy regulators for the interests of others.[373] Private and public powers both constitute a threat to privacy; but according to Garton Ash, when those powers are combined they pose the biggest threat of all, for example, in the case of the Snowden revelations.[374] Meanwhile, online content is increasingly regulated and censored via private contracts, which offer limited transparency and accountability.[375] The influential Section 230 of the Communications Decency Act 1996 in the United States will be discussed in relation to the regulatory prism of the law. Leiser and Murray highlight that the clause was specifically passed to encourage internet intermediaries to play a regulatory role in the online sphere.[376] As private stakeholders increasingly shape the regulation of the online sphere, the necessity to continually assess the balance of power between private and public bodies is moving into the spotlight.[377] Private power over digital expression should be paired with a responsibility to the public.[378]

In many ways, multinational corporations behind some of the biggest mainstream platforms in world hold greater power over the exercise of users' free speech than some governments. Citron and

[368] Leiser and Murray (n 250) 24.
[369] ibid 6–7.
[370] Laidlaw (n 25).
[371] OECD, 'The Economic and Social Role of Internet Intermediaries' (2010) 6.
[372] Article 19, 'Internet Intermediaries: Dilemma of Liability' (Article 19 2013) 2.
[373] Laidlaw (n 25).
[374] Garton Ash (n 67) 284.
[375] Article 19 (n 372) 4.
[376] Leiser and Murray (n 250) 9.
[377] ibid 25.
[378] Citron and Richards (n 311) 1383.

Richards argue that, in practice, it is more likely that censorship enforcement is is carried out by private entities controlling digital infrastructures than from state, local or federal, governments.[379] As Klonick illustrates, speech is indeed limited by platforms though terms and conditions, community guidelines, and a range of content moderation policies enforced through automated and human review.[380] The mainstream platforms take ever more proactive measures to guide and curate communication. This development has partly been due to self-regulatory schemes introduced by the European Union,[381] public or media backed calls for action[382] or commercial self-interest.[383]

These observations about the power of the market highlight how commercial interest lies at the basis of the decision making of online platforms. Citron and Richards explain the impact of corporate interest that shape the online sphere, claiming the "central battleground for free speech and privacy will be fought in corporate boardrooms rather than in the courts."[384] As they argue, it is not the First Amendment of the United States Constitution that is the core legal instrument shaping and governing online speech, but rather contract law which, through the terms and conditions of platform and similar private parties, plays a key role in maintaining the Internet.[385] There are indications that the terms and conditions and the 'rules of engagement' of the platform in question have a 'nudging' factor on the type and scope of expression and interaction taking place within that space. The former United Nations Rapporteur on Freedom of Expression argues that the commercial model of the platform in question is a stronger guide for what is acceptable than norms rooted in human rights.[386]

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[379] ibid 1372.

[380] Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' [2018] Harvard Law Review <https://harvardlawreview.org/2018/04/the-new-governors-the-people-rules-and-processes-governing-online-speech/> accessed 20 August 2021.

[381] European Commission, 'Code of Practice on Disinformation' (*Shaping Europe's digital future - European Commission*, 26 September 2018) <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation> accessed 20 August 2021.

[382] Casey Newton, 'It's Time to Deplatform Trump' *The Verge* (6 January 2021) <https://www.theverge.com/2021/1/6/22217894/deplatform-trump-twitter-ban-facebook-youtube-congress-capitol-riots> accessed 4 July 2021; Kate Isaacs, 'Pornhub Needs to Change – or Shut Down' *the Guardian* (9 March 2020) <http://www.theguardian.com/global-development/2020/mar/09/pornhub-needs-to-change-or-shut-down> accessed 20 August 2021.

[383] Olivia Solon, 'Google's Bad Week: YouTube Loses Millions as Advertising Row Reaches US' *the Guardian* (25 March 2017) <http://www.theguardian.com/technology/2017/mar/25/google-youtube-advertising-extremist-content-att-verizon> accessed 20 August 2021.

[384] Citron and Richards (n 311) 1357.

[385] ibid.

[386] David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019).

With slogans such as "don't be evil"[387] and mission statements to "bring the world closer together",[388] the prominent corporate players in the internet ecosystem have demonstrated Lessig's thesis of the four regulatory modes of the Internet by expanding their operations throughout and across the layers of the Internet while disrupting stale models with innovation and technology.[389] Simultaneously, the now less visible motto of Facebook founder Mark Zuckerberg, "move fast and break things", describes the state of affairs painted by Chesney and Citron.[390] They argue that technological innovation and competitive markets, which produced the interconnected world, have expanded at the expense of other design processes where products and systems rely on information technology.[391] Safety measures and the mitigation of harmful uses of the technology are often ignored and, if addressed, these are as design afterthoughts, for example, cases of disinformation and election influence, live streaming of terror attacks and challenges experienced by individual users such as violations of sexual privacy.[392] As technology becomes more deeply embedded into the modern-day, global, social fabric; transforms private communication, business and public services,[393]regulatory arguments from such as Chesney and Citron have been transported from fringes to the mainstream of United States Internet regulatory discourse.[394] This shift, even if slow, has allowed for a more nuanced discussion, moving away from what Wall and Walden refer to as the "regulators vs cyber libertarians"[395] binary to increased calls for harm based regulatory response

[387] Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (Oxford University Press 2006) 9; Anthony Cuthbertson, 'Google Quietly Removes "Don't Be Evil" Preface from Code of Conduct' *The Independent* (21 May 2018) <https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-dont-be-evil-code-conduct-removed-alphabet-a8361276.html> accessed 20 August 2021.

[388] 'Facebook - Resources' <https://investor.fb.com/resources/default.aspx> accessed 20 August 2021.

[389] The stack of protocols that enable end-to-end signalling of communications traffic, facilitating the operation of the Internet as we know it is referred to as the open systems interconnect model (OSI layers model). See: Ian Brown and Christopher T Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press 2013) 7–10; For examples of disruptive elements of Internet based technology on important points of society, see: Jacques Bughin and others, 'Tech for Good: Smoothing Disruption, Improving Well-Being' (McKinsey Global Institute 2019).

[390] Hemant Taneja, 'The Era of "Move Fast and Break Things" Is Over' [2019] *Harvard Business Review* <https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over> accessed 24 July 2021; Jonathan Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (Illustrated edition, Hachette USA 2017).

[391] Chesney and Citron (n 194).

[392] Chris Marsden and Trisha Meyer, 'Regulating Disinformation with Artificial Intelligence: Effects of Disinformation Initiatives on Freedom of Expression and Media Pluralism' (2019); Camille François (n 53); 'Christchurch Call | to Eliminate Terrorist and Violent Extremist Content Online' (n 23); Kari Paul, 'Pornhub Removes Millions of Videos after Investigation Finds Child Abuse Content' *the Guardian* (14 December 2020) <http://www.theguardian.com/technology/2020/dec/14/pornhub-purge-removes-unverified-videos-investigation-child-abuse> accessed 20 August 2021.

[393] 'Measuring Digital Development. Facts and Figures 2020' (International Telecommunications Union) <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2020.pdf>.

[394] For a discussion on the foundations and development of the internet regulatory discourse see i.e.: Goldsmith and Wu (n 1) 1–46; Brown and Marsden (n 151) 3–20.

[395] Wall (n 288) 162–3; Ian Walden, *Computer Crimes and Digital Investigations* (Second Edition, Oxford University Press 2016) 6.

to online activity,[396] both to instances of individual and societal harm.[397] The discourse is also divided on to what extent the initiative and enforcement should be a task for public authorities or for the private entities governing the online sphere.[398]

The financial incentive to profit from the exposure of women and their bodies is a long standing practice that predates the Internet.[399] Viewed through the lens of Lessig's four sided regulatory mode, there have been little evidence of the market contributing to constraint of digital violations of sexual privacy. On the contrary, as Vera-Grey et. al. reveal, there are commercial interests for certain players in the Internet ecosystem to maintain a vague self-regulatory response to such violations,[400] which is especially true is the case of online pornography sites. McGlynn and Rackley contend that website operators and social media applications, which host private sexual images that are created or distributed without consent, facilitate the harassment and abuse and play a significant role in the harm caused by such actions, even though the platforms might avoid *legal* responsibility for the damage.[401] Even when pornography platforms have rules that prohibit sharing or distribution of material amounting to violations of sexual privacy, Vera-Grey et. al. discovered that the three largest mainstream online pornography sites failed to enforce of their rules and continued to host content in flagrant violation of their own terms and conditions.[402] Recent pressure from financial transaction providers did lead to Pornhub, the largest online pornography platform, to re-evaluate their content and remove Child Sexual Abuse Material and revenge porn from their platform. However, the trigger for this remedial action was not in Pornhub's hands, rather it came from the companies that provided their financial transaction services applying due leverage to change Pornhub's practices.[403] There are also pending civil lawsuits against the platform from women who have had their content shared on the platform without their consent, and, yet, denied requests to remove the content despite it being in breach of the platforms terms and conditions.[404]

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[396] The most recent national effort to regulate "online harms" is the Online Safety Bill in England and Wales: Great Britain and Media and Sport Department for Culture, *Online Harms White Paper.* (2019); See also: Marsden, *Internet Co-Regulation* (Cambridge University Press 2011).

[397] 'Instagram Eating Disorder Content "out of Control"' *BBC News* (20 March 2019) <https://www.bbc.com/news/uk-47637377> accessed 13 July 2021; 'Christchurch Call | to Eliminate Terrorist and Violent Extremist Content Online' (n 261).

[398] Klonick (n 142); Daphne Keller, 'Internet Platforms: Observations on Speech, Danger, and Money' 1807 Hoover Institution <https://www.hoover.org/research/internet-platforms-observations-speech-danger-and-money> accessed 15 June 2018; Goldsmith and Wu (n 1).

[399] For a discussion on "the male gaze" see: Laura Mulvey, 'Visual Pleasure and Narrative Cinema' (1975) 16 Screen 6 <https://doi.org/10.1093/screen/16.3.6> accessed 20 August 2021

[400] Vera-Gray and others (n 356) 12.

[401] McGlynn and Rackley (n 49) 538.

[402] Vera-Gray and others (n 356) 13.

[403] Paul (n 392).

[404] Dokoupil, Kaplan and McDonald (n 343).

## 4. Code and Online Sexual Privacy

As Guadamuz explains, up until the late 1990s, the Internet´s governing principles were a mix of cyber libertarianism, code and half-hearted legislative solutions.[405] Singer and Friedman outline that the Internet has "always been recognized as a space that defies tradition governance models" and cite the dictum introduced by software engineer (and the last Chief Internet Architect as he abolished his own role) David Clark in 1992: "We reject kings, presidents and voting. We believe in: rough consensus and running code."[406] They also mention that despite the wide distribution of Clark's quote, the next slide in Clark's presentation is a necessary complement to the argument Clark was making with his statement. It said: "What are we bad at? Growing our process to match our size"[407], hinting at the wider social impact of Internet architecture and the software code it runs on.

Central to Lessig's framing of the regulation of the Internet was his acknowledgement of the regulating power held in the technical functions enabling and governing the flow of information.[408] He highlighted that this power lies in controlling the underlying pipe works and the protocols and codes needed to make the Internet technically functional.[409] In his influential work, Reidenberg had earlier emphasised the same point, the design of network protocols may even be more effective regulatory instruments than traditional state-based law.[410]

Since Reidenberg and Lessig's foundational works were published, in the early phases of Internet access for the masses, the online sphere has grown in importance for individuals across the globe, providing access to information and services. In the development of the Internet, private entities play a crucial role as already discussed in relation to markets as a mode of regulation of the online sphere.[411] This is partly because the infrastructure the Internet runs on is generally privately owned, but also on the application and content layer of the Internet, through platforms and companies that have through their innovative business plans, and not least, through code, overthrown structures and normalised a new reality[412]. Seminal examples of this are the impact of the Google search engine,

[405] Andrés Guadamuz, 'Networks, Complexity and Internet Regulation: Scale-Free Law' [2011] Networks, Complexity and Internet Regulation: Scale-Free Law 89.
[406] David Clark, 'A Cloudy Crystal Ball: Visions of the Future' (Plenary presentation at 24th meeting of the Internet Engineering Task Force, Cambridge, Mass, 13 July 1992) <https://groups.csail.mit.edu/ana/People/DDC/future_ietf_92.pdf> accessed 20 August 2021.
[407] ibid; Singer and Friedman (n 352) 30.
[408] Lessig (n 246).
[409] Guadamuz (n 405) 87; Lessig (n 246).
[410] Joel R Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' Texas Law Review (1997-1998) 43, 565.
[411] Julie E Cohen, 'The Regulatory State in the Information Age' (2016) 17 Theoretical Inquiries in Law 369.
[412] Guadamuz (n 405).

and the impact Amazon has had on electronic and physical commerce, as well as more traditional infrastructure like postal services and information storage.[413]

Technology platforms do not deploy code or similar technology as neutral communication pipelines. Lessig emphasizes that code inherently carries values and can be used to protect or reject principles.[414] The code is always shaped by the operational model of the platform which, like other commercial entities, is operating to maintain a sustainable or profitable business. Currently, this includes promoting social and engaging content, as the incentive is the measurable output of content that also servers to affirm people's positions in their own real-life social networks.[415] Yet, what values should be promoted through code as a regulatory mode, and who should decide on that prioritisation? Lessig accepted that the decentralised architecture of the Internet makes it difficult for governments to regulate online behaviour. He therefor proposes governments should regulate the architecture rather than the content on the Internet.[416] This approach stands in close connection to the co-regulatory approach Marsden persuasively argues for.[417]

Irrespective of their motivations, leading private entities in the Internet ecosystem have tried to develop and implement proactive approaches that use technology to fight against violations of sexual privacy. In 2015, Google updated their policies to help remove intimate images that were available on their search engine without the consent of the person depicted.[418] The aim was to minimise the harm such violations inflict on victims.[419] Facebook launched the *Not Without My Consent* project in March 2019. This initiative aims to improve their responses to digital violations of sexual privacy and better support victims.[420] In 2021, Apple announced their plans to proactively scan for Child Sexual Abuse material on Iphones in a bid to enhance children's safety on- and offline. By deploying a detection technology "neuralMatch" in the imminent release of iOS15, all images stored on Iphones would be scanned to see if the match know child abuse sexual material, automatically reported to the National Center for Missing and Exploited Children (NCMEC).[421]

These examples show that it is not only important, but possible to harness technology to engage the potential of the Internet to regulate. Nevertheless, both the Google and Facebook projects are

[413] Critical reflections on Google and Amazon operational models: Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 The Yale Law Journal 564; Williams (n 299).
[414] Lessig (n 246) 6.
[415] Claire Wardle and Hossein Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making' (Council of Europe 2017) DGI(2017)09.
[416] Lessig (n 246) 43.
[417] Marsden (n 1); Brown and Marsden (n 151).
[418] Google Search Help, 'Remove Non-Consensual Explicit or Intimate Personal Images from Google' <https://support.google.com/websearch/answer/6302812?hl=en> accessed 20 August 2021.
[419] Citron (n 6).
[420] 'A Research-Based Approach to Protecting Intimate Images' (*About Facebook*, 15 March 2019) <https://about.fb.com/news/2019/03/protecting-intimate-images/> accessed 20 August 2021.
[421] 'Child Safety' (*Apple*) <https://www.apple.com/child-safety/> accessed 20 August 2021.

individual projects that apply only within certain parameters, and are only available to victims that have technical skills, latest models and support to engage with the process of removal. The Apple project raises concerns on the normalisation of surveillance and the protection of privacy that demand further examination.

# 5. The Law and its Limits in the Online Sphere

By 1996, Johnson and Post had predicted that states would be unable to effectively and legitimately regulate emerging technology.[422] Marsden notes that states have a multi-faceted role when it comes to the regulation of components of the internet.[423] Despite wielding limited power over the internet's infrastructure, one of those roles is to maintain human rights. As will be discussed in chapter three, states bound by the ECHR have an obligation to play this role under the Convention system, and, as Kaye argues, that duty extends to a wider set of international human rights obligations.[424] The extent of this obligation may, however, vary depending on the issue at stake.[425]

Woods and Goldsmith claim the nonregulatory approach in the early years of the Internet was a part of American expansionism whereby the Internet was "a vehicle for spreading U.S. civil and political values", augmenting forums of speech "which in turn would lead to democratic revolutions around the world."[426] This approach has not proved fully successful, as authoritarian regimes utilise the surveillance possibilities built into the online infrastructure to further entrench non-democratic norms rather than adapting to democratic principles.[427] They have "embraced digital technologies to monitor, surveil, and oppress their people".[428] As Rid explains, the openness of democratic orders is their best feature, but also their weakness.[429] Nor should it be forgotten that democratic regimes and their agents have also engaged in extensive surveillance, some have surveilled in the name of efficiency, others in the name of protecting national security.[430] Williams considers that the Internet

[422] David R Johnson and David G Post, 'Law and Borders - the Rise of Law in Cyberspace' (Social Science Research Network 1997) SSRN Scholarly Paper ID 535 <https://papers.ssrn.com/abstract=535> accessed 20 August 2021.
[423] Marsden (n 1).
[424] Kaye (n 386); David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and and expression, 'Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (United Nations, 13 June 2018) <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf>.
[425] Spano (n 288).
[426] Andrew Keane Woods and Jack Goldsmith, 'Internet Speech Will Never Go Back to Normal' [2020] *The Atlantic* <https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/> accessed 20 August 2021.
[427] Daithí Mac Síthigh and Mathias Siems, 'The Chinese Social Credit System: A Model for Other Countries?' (2019) 82 The Modern Law Review 1034; Zuboff (n 2).
[428] Citron and Richards (n 311) 1375.
[429] Thomas Rid, *Active Measures* (Macmillan 2020).
[430] Nicolas Kayser-Bril, 'At Least 11 Police Forces Use Face Recognition in the EU, AlgorithmWatch Reveals' (*AlgorithmWatch*, 18 June 2020) <https://algorithmwatch.org/en/face-recognition-police-europe> accessed 20 August

is an '*attention economy*', shaping the way people consume digital content, and how it is shared, with major implications for media and communication in general.[431] The metric nature and the commercialisation of people's attention means "[t]he commercial Internet has become the most surveilled zone of human activity in history" according to Citron and Richards.[432]

As explained in earlier sections of this chapter, the digital revolution in the means of communication, private and public, now largely takes place within or with the intermediation of private entities.[433] This engagement is partly necessary for individuals to participate in modern society actively, or as referred to by Jørgensen and Laidlaw, the *Information Age*.[434] This situation is also the result of increased automation and the economic, social, and personal benefits linked to active online participation.[435] In light of this complexity, it is paramount that any legal or policy reform to protect sexual privacy must simultaneously protect individuals from harm, without encroaching on the right to enjoy free expression.[436]

Freedom of expression is a fundamental element of democratic principles.[437] The scope of state intervention to regulate the actions of individuals' online pivots around the core issue of freedom of expression. One of the main arguments against states implementing legal safeguards, is the belief that that categorical restrictions on the freedom of expression will undermine the free nature of the Internet leading to its fragmentation and, eventual collapse.[438] In short, although well intentioned, regulation could prove to be a slippery slope towards censorship on the Internet.[439] Some governments have tried forms of Internet censorship to create "national" intranets in line with national borders, which maintain their legal and sovereign powers online as well as offline.[440] Although these restrictions have been hard to implement, the technological challenges have not dissuaded states from pursuing such initiatives on a domestic and international levels.[441]

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2021; *Big Brother Watch and others v the United Kingdom* [2021] European Court of Human Rights Applications no. 58170/13, 62322/14 and 24960/15.

[431] Williams (n 299).

[432] Citron and Richards (n 311) 1375.

[433] Julia Hörnle, *Internet Jurisdiction Law and Practice* (Oxford University Press 2021) 33.

[434] Laidlaw (n 71) 9; Jørgensen, *Framing the Net. The Internet and Human Rights* (n 318) 17–18.

[435] For a deeper reflection on the impact the metric nature of online engagement has in a wider context see: Palfrey and Gasser (n 7) 54; Síthigh and Siems (n 427).

[436] Henry and Powell (n 41) 115.

[437] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Seventh Edition, Oxford University Press 2017) 279.

[438] Danielle Keats Citron and Benjamin Wittes, 'The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity' University of Maryland Francis King Carey School of Law Legal Studies Research Paper 2017–22.

[439] See for example the Internet Governance Principles accepted at the Netmundial Conference in Brazil 2014 Netmundial, 'Internet Governance Principles' (2014) <https://document.netmundial.br/1-internet-governance-principles/> accessed 20 August 2021.

[440] This includes blocking and filtering. See i.e. *Ahmet Yldrim v Turkey* [2012] European Court of Human Rights Application no. 3111/10.

[441] The International Telecommunications Union met in Cairo in 2012 with the intention to update several of its treaties. A draft treaty intended to ensure stronger governmental influence in the regulation of internet infrastructure in the

The most significant legal rule applied to the online sphere is the rule of *intermediary liability.* Due its impact it has been researched in a comprehensive literature, on domestic, regional and international levels, that will not be fully explored here.[442] In the United States a legal framework established with the *Communications Decency Act*[443] and the *Digital Millennium Copyright Act*[444], describes how intermediaries will not be held accountable for user-generated material on their sites unless upon notification that material was a copyright infringement or criminal act. They must thus put in place an effective notice and takedown system to relieve an infringement.[445] The burgeoning debate about the regulation of social media platforms has led to public figures and politicians to call an overhaul of section 230 with the aim of holding global social media platforms accountable for harmful content.[446]

Similarly, the EU adopted the e-Commerce directive which was more or less consistently transposed into domestic legislation within the Single Market (The European Economic Area) excluding liability of intermediaries who merely run a technical operation for third party content.[447] The directive states that a *notice and takedown* system must be in place to respond to "illegal activities", but takes into consideration the protection of free expression. While the directive prohibits member states from imposing generic monitoring obligations on intermediaries, the European Court of Justice has found that the liability exemptions under the directive do not preclude states from enacting legislation entailing civil liability for defamation for online news outlets. The Court stated that:

> "*The limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31 do not apply to the case of a newspaper publishing company which operates a website on which the online version of a*

name of better upholding national legislation was not approved. Charles Arthur, 'Internet Remains Unregulated after UN Treaty Blocked' *the Guardian* (14 December 2012) <http://www.theguardian.com/technology/2012/dec/14/telecoms-treaty-internet-unregulated> accessed 20 August 2021.

[442] For a comprehensive overview of Internet intermediary liability law on a global scale see the Stanford World Intermediary Liability Map'Wilmap' <https://wilmap.law.stanford.edu/about>; 'Who Do You Sue? State and Platform Hybrid Power Over Online Speech' (*Lawfare*, 29 January 2019) Leading legal scholars researching Section 230 are Daphne Keller at Stanford University and Eric Goldman at Santa Clara University. See examples of their work here: <https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech> accessed 20 August 2021; Eric Goldman, 'An Overview of the United States' Section 230 Internet Immunity' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3306737 <https://papers.ssrn.com/abstract=3306737> accessed 20 August 2021.

[443] Communications Decency Act 1994 (47 USC 230).

[444] The Digital Millenium Copyright Act 1998 (Pub L 105-304).

[445] Kosseff (n 82); 'World Internet Intermediary Liablity Map' <https://wilmap.stanford.edu/> accessed 20 August 2021.

[446] Abram Brown, 'What Is Section 230—And Why Does Trump Want To Change It?' (*Forbes*) <https://www.forbes.com/sites/abrambrown/2020/05/28/what-is-section-230-and-why-does-trump-want-to-change-it/> accessed 20 August 2021; 'Section 230's Challenge to Civil Rights and Civil Liberties | Knight First Amendment Institute' <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties> accessed 20 August 2021.

[447] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce' 2000 1.

*newspaper is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has knowledge of the information posted and exercises control over that information, whether or not access to that website is free of charge*."[448]

These findings were cited in the ECtHR case *Delfi vs. Estonia* case, when the Grand Chamber of the Court upheld the findings of the Estonian Supreme Court, stating that an Internet news outlet, *Delfi*, could be held liable on civil grounds for a defamatory comment posted on the site by a third party. Notably, the Court did not base the findings on the e-Commerce directive, because the Estonian Supreme Courts found the relevant domestic legislation transposing the E-Commerce directive inapplicable and based its findings on the company's breach of the Obligations Act.[449]

Both the cases concerned the civil liability of a private entity operating in a wider capacity than merely technical, meaning that they could be held liable for defamatory material generated by third party. In light of the findings of the above mentioned cases from the ECJ and ECHR it is interesting that case law from European countries does not indicate that service providers have been challenged to bear liability in cases of violations of sexual privacy.

The reigning normative framework of human rights is based on the concept of the sovereign state bound by borders governing jurisdictions so, somewhat inevitably, the borderless nature of the Internet generates tensions in law-making and produces enforcement difficulties. As the validity of legislation and the capacity of domestic enforcement are challenged, victims are left feeling unprotected and let down by their domestic justice system.[450] Underlying the debate is a jurisdictional obstacle that Hörnle describes as the "out-of-reach" problem, whereby enforcement of domestic legislation is confronted by the global nature of internet architecture.[451]

Citron warns that law can be a blunt instrument if it is not sufficiently tailored to its use and overreaches.[452] Experience from the U.S. shows that although some legal safeguards are in place, they may not be effective.[453] In 74% of Web Index countries, the Web Foundation found that domestic justice systems are failing to take appropriate actions for violence against women online - revenge porn being listed as an example of such violence.[454] An extensive, 2015, Swedish study on crimes committed via the Internet found 96% of cases reported to the police failed to advance

[448] *Papasavvas* [2014] European Court of Justice C-291/13.
[449] *Delfi v Estonia* (n 71); María Rún Bjarnadóttir, 'Does the Internet Limit Human Rights Protection? The Case of Revenge Porn' (2017) 7 JIPITEC.
[450] Citron (n 6); Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen, 'Online Violence against Women in the Nordic Countries' (Kvenréttindafélag Íslands 2017).
[451] Hörnle (n 195) 33.
[452] Citron (n 69).
[453] Citron (n 6).
[454] 'Cyber Violence against Women and Girls. A World-Wide Wake up Call.' (n 280) 39.

through the criminal justice system any further than the police investigation.[455] The main problem that prevented police from providing sufficient evidence to proceed through the courts was a lack of technical information that could have established the identity of the perpetrator. According to the police, social media and ISPs withheld the information even though such evidence was a necessary component of the investigation. Companies outside of Swedish jurisdiction were the least cooperative, in particular, those companies under United States jurisdiction.[456] As is discussed in chapter four, these are similar to issues reported by stakeholders within the Icelandic justice system who find the jurisdictional challenges impede on their ability to properly investigate online violations of sexual privacy. Despite relying on the international legal assistance scheme, they report running into the same barriers as their Swedish counterparts. An Icelandic Police officer summed up the situation stating: "Cases like these are difficult for the police, in particular when the websites are foreign. We cannot control the Internet."[457]

As Cohen explains, technological advancement has created existential challenges for regulatory models that align to industrial rather than informational regulatory issues.[458] The regulatory models emerging from the informational structure differ in many ways from the reigning industrial ones and are 'procedurally informal, mediated by networks of professional and technical expertise that define relevant standards, and financialized.'[459] The regulation of the online sphere is thus increasingly a combination of public and private.[460] Cohen highlights this regulatory combination presents weaknesses that manifest in the regulatory responses being prone to capture as well as being opaque.[461]

As early as 2006, Lessig highlighted how the Internet is just as much a place for commercial transactions as communal conversations, warning that a romanticised view of the original Internet is unhelpful when considering long-term regulatory models for the online sphere.[462] Fifteen years later, Citron and Richards call for a similar approach in application of law in the online context. They criticise the U.S. Supreme Court´s findings in both *Reno v. ACLU* and *Packingham v. North Carolina* because the rulings are built on the *idea* of the Internet and how it could or should function rather than on 'a grounded and realistic assessment of what the Internet actually is and functions at the

[455] 'Polisanmälda hot och kränkningar mot enskilda personer via internet - Brottsförebyggande rådet' (Brottsförebyggande rådet) text 2015:6.
[456] ibid 90.
[457] 'Lögreglan máttlaus gagnvart nektarmyndum á netinu - Vísir' *visir.is* <https://www.visir.is/g/2014709089991> accessed 20 August 2021.
[458] Cohen, 'The Regulatory State in the Information Age' (n 411).
[459] ibid.
[460] Laidlaw (n 25).
[461] Cohen, 'The Regulatory State in the Information Age' (n 411).
[462] Lessig (n 246) 64.

time of examination.'[463] Like Lessig, they stress that policy should be shaped "for the Internet and society that we actually have, not the Internet and society that we might want, or that we believed we would get twenty years ago."[464] As Cohen argues, in our Information Age, we need to pay "more careful attention to naming and demystifying emerging patterns of legal power and privilege".[465]

# 6. Conclusion

In this chapter, I have used Lessig's prism of four-sided regulation of the Internet to explore how the Internet presents challenges for protecting sexual privacy online. I examined each of Lessig's modes - norms, market, code and law - asking how far they contributed to, or impeded, the protection of sexual privacy online.

First, I discussed the normative implications the Internet had on communication, emphasizing the issue of sexual privacy. A full exploration of the normative shifts resulting from the advent of the Internet would demand more examination, so I highlighted the impact of the Internet on anonymity, scale, user-generated content and trust. I then focused the discussion on three key factors - the erosion of the public-private binary, the commodification of privacy and the normalisation of pornography. In this discussion, I considered the limits of the binary approach, presenting Nissenbaum's theory on the contextualisation of public privacy as an important response to the ongoing erosion between public and private spheres. I discussed how the commercialisation of privacy has been expedited by the Internet, so widening the normative parameters of curated access to private and intimate areas of people's lives and identities. The Internet and the pornography industry have a long-standing mutually beneficial relationship that manifests in unfettered access to pornography, even though that content skewers ideas of sex and sexuality, and presents sexual violence as a socially acceptable sexual script.

In my discussion on the market as a regulator for online actions, I drew attention to the commercial foundations of the contemporary Internet and the powerful role the market continues to play. As the function of the Internet is reliant on private parties, non-state actors exercise a significant influence shaping the regulation of the Internet. Some of these actors are multinational corporations whose power over the regulatory discourse arguably surpasses those of states. The limits of online action is affected as much by boardroom decisions as by courtroom decisions. Under a commercial

[463] Citron and Richards (n 311) 1357.
[464] ibid 1377.
[465] Julie E Cohen, 'The Zombie First Amendment' (2015) 56 William & Mary Law Review 41, 1157.

structure that financially profits from the male gaze, sexual privacy has been treated as an afterthought rather than a fundamental design consideration.

The infrastructure of the Internet, and the processes and procedures that govern the parameters of information flow online, are vital for the functioning of online activities. As I discussed, these functions are not neutral, instead, as Lessig observes, they are an effective tool to preserve or perish values. In the current Internet framework, these values are steered by market decisions that facilitate rather than limit abuse such as violations of sexual privacy. There are some promising signs of change is this regard that show how multinational corporations ruling the Internet are beginning to recognise the value in using technology to respond to online abuse.

Finally, I discussed the limitations of the traditional legal framework in the provision of regulatory responses to violations of sexual privacy online. I addressed the multifaceted role of states regulating the online sphere, describing how both autocratic and democratic states have utilised technology for intrusive surveillance of citizens online. The important rule of intermediary liability was briefly addressed alongside the jurisdictional issues facing states trying to enforce domestic legislation in online environments. In this regard, I proposed that the prospects and promises of a less regulated Internet should no longer drive the discourse. Rather than follow the ideological hopes of what the Internet *could* become, the regulatory response should be built upon a sober, pragmatic assessment of what the Internet *has* become.

# Chapter Three – The Scope and Extent of States' Human Rights Obligations to Protect Sexual Privacy Online

In this chapter, I explore the scope and extent of state obligation to protect sexual privacy online. I do this through the lens of the European Convention system, as described in the first section of the chapter. First, I discuss the right to privacy as it has developed and been defined by the Strasbourg court. In this discussion, I highlight what has been established through case law for privacy in a digital context. I then describe the obligations of state parties to the Convention and what measures must be in place for a state to uphold their obligation. In this context, I specifically discuss the nature of laws that provide sufficient standards of protection for sexual privacy online. Finally, I rely on the Court's case law to extract a summary of the issues that states must take note of when testing the balancing between the freedom of expression and the right to privacy in the online sphere.

## 1. Framing the Discussion

The international framework for the promotion and protection of human rights takes place in several contexts. First, the overarching role of the United Nations (UN) has the *international bill of rights* at its core. They promote and protect human rights under the ambit of the UN Human Rights Council and treaty bodies. This system stretches to every aspect of the global UN system.[466] Second, regional cooperation in human rights has become a substantial part of the drive towards strengthening human rights in domestic legal contexts. Following the establishment of international and regional organs such as the UN in the mid-20th century, there has been a trend towards institutionalising human rights[467] and increased emphasis on enforcing existing obligations and standards[468] across regions.[469]

In Europe, cooperation within the Council of Europe and the development of the *Convention system* was a response to the atrocities of the first half of the 20th century.[470] These initiatives aimed to foster

[466] Helen Keller and Geir Ulfstein, 'Introduction' in Geir Ulfstein and Helen Keller (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 1–4.
[467] Ed Bates, 'History', *International Human Rights Law* (2nd edn, Oxford University Press 2014) 29.
[468] Keller and Ulfstein (n 466) 3.
[469] Vincent O Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions* (Brill Nijhoff 2001) <https://brill.com/view/title/10877> accessed 20 August 2021.
[470] The Convention system refers to the human rights framework of the Council of Europe with the European Convention on Human Rights at its helm. See for example the language used in the statement announcing the EU accession the ECHR: "T*he EU's accession to the Convention, which is a legal requirement under the Lisbon Treaty, will further strengthen human rights protection in Europe. Accession will help to guarantee coherence and consistency between EU law and the Convention system"* European Commission, 'EU's Accession to the European Convention on

peace and democratic stability in the region by promoting shared values and individual rights.[471] The Convention describes in Article 1 that states are bound to afford everyone within their jurisdiction the rights of the ECHR.[472] Although not explicitly stated in the Convention, the Convention system is built on the two principles of *solidarity* and *subsidiarity*.[473] The solidarity is exercised through arriving at a common consensus on human rights standards developed in the Council of Europe. The subsidiarity principle is visible in acknowledging that states adopt those standards in line with their domestic settings, allowing states a *margin of appreciation*. Another representation of the subsidiarity principle is that the Strasbourg Court does not have the function of an appeals court but a 'subsidiary mechanism for reviewing Convention compatibility.'[474]

The Convention system is the framework for my discussion on the scope and extent of state obligations to protect sexual privacy online.[475] This perspective does not guide states' human rights obligations globally; the ECHR currently binds only the 47 states. However, with its dynamic interpretation and progressive approach to human rights, the Court has contributed to legal and normative standard settings across the member states of the Council of Europe. The membership of the Council of Europe extends beyond the scope of the European Union, and influential instruments of the Council, like the Cybercrime convention, have a global reach.[476]

This discussion does not focus on the ongoing regulatory efforts taking place under the auspices of the European Union in the field of data protection and, more recently, e-privacy.[477] The framework for these efforts is the digital single market that aims to 'open new opportunities' as it removes key differences between online and offline worlds, breaking down the barriers to cross-border online activity.[478] The Convention system allows for an examination of the application of human rights as

Human Rights' (*European Commission - European Commission*, 29 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1748> accessed 20 August 2021.

[471] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Seventh Edition, Oxford University Press 2017) 4–5.

[472] European Convention on Human Rights 1953.

[473] Rainey, Wicks and Ovey (n 6) 84.

[474] Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional Law Review 27, 33.

[475] European Convention on Human Rights.

[476] Also referred to as the Budapest Convention. The Convention was the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and interceptionCouncil of Europe Convention on Cybercrime ETS No. 185 2004.

[477] European Commission, 'Proposal for a Regulation on Privacy and Electronic Communications | Shaping Europe's Digital Future' (10 January 2017) <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-privacy-and-electronic-communications> accessed 20 August 2021.

[478] European Commission, 'Digital Economy and Society in the EU - What Is the Digital Single Market About?' (*Digital technologies and in particular the internet are transforming our world and the European Commission wants to make the EU's single market fit for the digital age – moving from 28 national digital markets to a single one.*) <http://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html> accessed 20 August 2021.

a focal point of the rules and norms in question, rather than following the interests of the European internal market.

My focus on the scope of state obligations does not disregard the significant role platforms play in shaping privacy, freedom of expression, and other fundamental rights in the online sphere. International and regional bodies have issued human rights standards for private parties operating in the Internet ecosystem, notably the UN 'Ruggie Principles'[479] and the Council of Europe recommendation on the 'roles and responsibilities of internet intermediaries.[480] This area of research, although relatively recent, is being explored by scholars like Kaye, who promotes the use of international human rights standards in platform content moderation, and Douek, who is critical of the actual contribution that such an approach will have for the rights of platform users.[481] Laidlaw has examined the role of platforms, ISPs and other Internet intermediaries in the context of corporate social responsibility (CSR)[482], and Jørgensen explains the privatised standard-setting online through content moderation and enforcement of terms and conditions as 'privatised law-enforcement'.[483]

## 2. The Right to Privacy

Article 8 of the Convention stipulates the right to respect for private and family life. It reads:

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*[484]

The first paragraph establishes the right to respect for his private and family life, his home and his correspondence, and the second paragraph explains under what conditions this right can be limited. In order for a case to be examined by the Court the facts of the case will have to interfere with the right as protected under the Article. In order to assess this, the Court has applied the reasonable

[479] 'Guiding Principles on Business and Human Rights. Implementing the United Nations "Proterct, Respect and Remedy" Framework' (United Nations Office of the High Commissioner on Human Rights 2011) HR/PUB/11/04 <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 20 August 2021.
[480] 'Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (Committee of Ministers 2018) CM/Rec(2018)2 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14> accessed 20 August 2021.
[481] David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019); Evelyn Douek, 'The Limits of International Law in Content Moderation' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3709566 <https://papers.ssrn.com/abstract=3709566> accessed 20 August 2021.
[482] Emily B Laidlaw, *Regulating Speech in Cyberspace* (Cambridge University Press 2015).
[483] Rikke Frank Jørgensen, 'Human Rights and Private Actors in the Online Domain' in Molly K Land and Jay D Aronson (eds), *New Technologies for Human Rights Law and Practice* (1st edn, Cambridge University Press 2018) 244.
[484] European Convention on Human Rights ETS. No. 5.

expectation test. The concept of reasonable expectation of privacy is not a clearly worded rule in the Convention, rather a test has developed in the Courts application and its 'judicial creativity'.[485] Although the Court does not cite the United States Supreme Court, the principle was first developed in the Washington court in the pivotal case *Katz v United States*.[486] The threshold test determines whether an individual will have a reasonable expectation of privacy in respect of the disputed action, for example, the unauthorised sharing of intimate images. If this is found to be the case, the next consideration is whether that right to privacy is overridden by any other competing right, in particular, the Art 10 right to freedom of expression, as will be discussed in section four of this chapter. In weighing this balance, the Court will focus on the facts of the case and examine if the limitations in question have a basis in law, are necessary in a democratic society, and if they are proportionate in relation to the legitimate aim the limitation pursues. The principles set out in the second paragraph have further developed in the Courts application and are discussed as threefold test.[487]

The right to privacy does not refer to a fixed idea.[488] From the formation of the right under both the UN framework and the European Convention system, it has carried a progressive notion. During the formalising period of human rights after World War II, privacy became a recognised human right under the international human rights framework. The right was formulated and enacted at a time when few, if any, states had complete constitutional protection of privacy.[489] As Diggelman and Cleis outline, the right to privacy was a contested issue among those drafting the conventions forming the international human rights bill, as well as within the member states normative and legal frameworks.[490] In the mid-20th century, when the drafting of the Convention took place, the discourse around the greatest threats to individual privacy focused on the invasive oppression of populations under the rule of authoritarian states, so privacy rights were equated with privacy protections, including protection from state interference.[491] In terms of the right to privacy, the main focus was on the states negative obligation to respect and refrain from interfering with the individual,[492] or as first framed by Warren and Brandies, the individuals' 'right to be alone'.[493]

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[485] Nina Persak, 'Chapter 7. Positive Obligations in View of the Principle of Criminal Law as a Last Resort' in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2021) 147.
[486] *Katz v United States* [1967] Supreme Court of the United States of America 389, US 347.
[487] For a detailed discussion of the threefold test see: Rainey, Wicks and Ovey (n 16) 343–368.
[488] Diggelmann and Cleis (n 235) 458.
[489] ibid 441, 451.
[490] ibid 446–449.
[491] Persak (n 485) 147; Diggelmann and Cleis (n 235) 453.
[492] Persak (n 485) 147–148.
[493] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193 <https://www.jstor.org/stable/1321160> accessed 21 February 2021.

The right to privacy as stipulated under ECHR is shaped by the case law of the ECtHR and its predecessor the Human Rights Commission. As early as 1976, the Commission established in *X. v. Iceland*, that the right to privacy includes the right to live as one wishes, protected from publicity, but 'also […] to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's personality.'[494] Nevertheless, this right did not apply to all the relationships that an individual makes. The Commission stated that it could not 'accept that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings, insofar as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationship within the private sphere.'[495]

Through the Court's case law, the right to privacy has been extended to reflect modern challenges to the right. In this endeavour, the Court has applied an approach meant to build on the solidarity principle of the Convention system, and used shifts in normative trends to underpin progressive interpretation of the Convention.[496] The Court has applied this approach in cases where rights and moral intersect, such as in matters regarding gender identity and sexuality.

In tandem with the impact of technology on society, the EctHR has increasingly dealt with cases regarding the digital sphere and how it aligns with the obligations of states set out in the Convention under Articles 8 and 10.[497] As has been established through standard setting and accepted by the Court, human rights apply equally online and offline.[498] The Court equally acknowledges the risks the Internet poses to the exercise and enjoyment of rights guaranteed in the Convention, particularly the right to respect private life. In *Egilsson v Iceland*, the Court explicitly states that in the context of Article 8 rights, the risk *of harm posed by content and communications on the Internet "is certainly higher than that posed by the press"*[499]*, highlighting the challenges involved with safeguarding privacy in online interpersonal communication.* Moreover, the Court has established that in light of its "accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general", thereby outlining the inherent clash of the right to privacy and freedom of expression the Internet facilitates.[500]

[494] *X v Iceland* [1976] European Court of Human Rights 6825/74.
[495] ibid.
[496] Rainey, Wicks and Ovey (n 16) 430.
[497] ibid 400.
[498] Council of Europe, 'Recommendation of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users' (Committee of Ministers 2014) CM/Rec(2014)6 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d5b31> accessed 20 August 2021.
[499] *Egill Einarsson v. Iceland* (n 154) § 46.
[500] *Delfi AS v. Estonia* (n 288) § 133.

# 3. State Obligations to Protect Sexual Privacy Online

With respect to human rights, the role of states has been described as a threefold obligation to respect, protect and fulfil human rights.[501] The reigning human rights framework acknowledges states as the main guarantors, enablers, and also, possible violators of human rights within their jurisdiction.[502] The territorial extent of this jurisdiction has been examined by the Court regarding extradition of prisoners, actions during armed conflicts or occupancy and in 'break-away' regions.[503] There are obligations for states to protect their citizens under the human rights regime, subsequently, lack of enforcement due to cross-jurisdictional aspects in such cases may affect states' human rights obligations. States bound by the Convention must give full effects to the rights it enshrines in national law and the effective implementation of those.[504]

The extent of state obligations is not limited to refraining from actions that violate the rights of individuals. States bound by the ECHR have a positive obligation to secure respect for private life, even in the sphere of the relations of individuals between themselves.[505] The *Belgian Linguistics Case*[506] and *Marckx v Belgium*[507] were significant cases in establishing states' positive obligations under the Convention and Article 8. The positive obligation of the state induces the horizontal effect of the Convention whereby the provisions of the Conventions may apply in action between two parties without the direct interference of the state.[508] On this principle, the state can be held to account under the Convention system for a violation of the Convention committed by a private individual. The principle applies when the state has made the violation possible or probable, either through 'simple negligence or benign tolerance.'[509] In *Hatton v UK*, the Grand Chamber of the Court indicated that the extent of positive obligations was essentially the same as the of states not interfere with rights, or their negative obligation.[510]

The result is that the case law of the Court has 'inferred an obligation for states to ensure, through appropriate legislative, administrative and judicial frameworks, that violations of the Convention

[501] Oliver De Schutter, *International Human Rights Law. Cases, Materials, Commentary.* (2nd edn, Cambridge University Press) 427.
[502] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism.* (Oxford University Press 2011) 30.
[503] Rainey, Wicks and Ovey (n 16) 90–107.
[504] ibid 85–86.
[505] *Online Publication Claims: A Practical Guide* (Hugh Tomlinson QC and Guy Vassall-Adams QC, Matrix Chambers 2017) 135.
[506] *Belgian Linguistics Case* [1968] European Court on Human Rights Series A No. 5 1968.
[507] *Marckx v Belgium* [1979] European Court of Human Rights Application No. 6833/74.
[508] Colm O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 Hibernian Law Journal 77, 79–81.
[509] Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 583.
[510] Rainey, Wicks and Ovey (n 16) 404.

are not committed in relations between individuals.'[511] Even if the state does not engage directly in violating individuals' sexual privacy online, the state does carry an obligation to have in place a framework to prevent such violations taking place. That raises the question on what kind of measures would have to be in place to meet this obligation.

## a. Must Legal Responses Involve Criminal Law to Meet the Threshold of Article 8?

A criminal response may not always be the most appropriate response when legislating against harmful conduct. At the same time, criminalisation can be appropriate and necessary to convey the proper level of social condemnation for behaviour.[512] Furthermore, as highlighted by McGlynn, it is important that any legal response to digital violations of sexual privacy recognises the two-fold harm in question, acknowledging both the harm against sexual autonomy and the violation of privacy.[513] In their call for criminalisation of digital violations of sexual privacy, Benediktsdóttir and Gunnlaugsdóttir remind that any legislative response should address the severity and substance of harm.[514]

The ECtHR has not specifically dealt with a case on digital violations of sexual privacy, but the case law of the Court offers guidance on issues of state obligation to safeguard privacy.[515] Guidance asks to ensure effective means of investigation for criminal acts that take place online,[516] have effective remedies in place for victims of violations of sexual privacy[517] and test the balance when responding to collusion of equally protected rights, like the right to privacy and freedom of expression online.[518] This does not, however, entail that a legislative response to online violations of sexual privacy must be based in criminal law to meet the obligations of states to safeguard sexual privacy online.

In contrast to criminalisation, a civil route which can include copyrights, breach of confidence and defamation or tort, also comes with its own constraints. Under the jurisdictions examined, the civil route presents mutual structural weaknesses. Citron claims current civil law remedies under tort and the copyright framework do not provide sufficient protection for individuals, as the financial cost of civil suits makes them an unrealistic choice for some.[519] The civil case demands a certain

[511] Tulkens (n 509) 583.
[512] Citron and Franks (n 68).
[513] McGlynn (n 121).
[514] Benediktsdóttir and Gunnlaugsdóttir (n 134) 209.
[515] *Peck v. United Kingdom* (n 139).
[516] *K.U. v. Finland* (n 58).
[517] *Söderman v Sweden* [2013] European Court of Human Rights (GC) Application No. 5786/08.
[518] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60).
[519] Citron (n 68) 122.

financial standing to make access to court a practical alternative. Due to the nature of civil remedies, access to justice may be directly connected to the financial situation of the victim. Citron and Franks discuss the different situation for a victim that can afford legal representation and a victim that does not.[520] Icelandic victims raise this as a real barrier. There are examples of victims that have been unsuccessful in seeking justice through the civil route who have been faced with paying not only their own legal fees but the legal costs of the perpetrator too.[521]

The issue of access to justice is not limited to monetary grounds, but is also procedural. The fundamental principle of justice demands that court proceedings take place in the open and the parties to the case must reveal their identity. This has been described by Citron and Franks as presenting a possible re-victimisation.[522] Moreover, a civil case against the perpetrator may not facilitate the relieve victims are looking for. Many victims report that monetary damages are not at the top of their priorities, when seeking redress. Rather, they are interested in removing the content from where it has been made available without their consent and prevent further distribution of the content.[523] Yet, a civil court order that prescribes the perpetrator to undertake such action is ineffective unless the perpetrator had another connection to the platform in question other than just being a user uploading content.[524] Thus, the claim by Citron and Franks that civil actions are inadequate in cases of sexual privacy violations appears applicable not only in the context of the United States but on a wider scale.[525]

The states positive obligations can extend beyond legal measures as the Court addressed in *Opuz v Turkey*. In the landmark case regarding violence against women, the Court found the Turkish state in violation of their obligations under Articles 2 (the right to life), 3 (inhuman or degrading treatment or punishment), and combined with Art. 14 (non-discrimination) as the application and enforcement of the criminal provisions on domestic abuse had been severely lacking.[526] This indicates it does not suffice for a state to criminalise, but that legislation must be efficiently enforced.

[520] Citron and Franks (n 68) 7; Citron (n 68).
[521] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[522] Citron and Franks (n 68) 7.
[523] ibid; Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12); Henry, Flynn and Powell (n 110) 577.
[524] An example of this are the terms and conditions a user on the PornHub platform signs up to when sharing content on the platforms. By sharing the content they sign over all rights to the content in question to PornHub, including any means to remove the content at a later stage. 'Site Information - FAQ, Privacy Policy, Advertising And More | Pornhub' <https://www.pornhub.com/information#terms> accessed 28 March 2020.
[525] Citron and Franks (n 68) 6.
[526] *Opus v Turkey* [2009] European Court of Human Rights Application No. 33401/02.

# 4. Balancing Conflicting Rights Online

In its case-law, the Court has established that Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information.[527] This has applied to video sharing platforms, video hosting services, websites of traditional media and apps specifically designed and set up in the context of elections.[528] In the case, the ECtHR referred to the Von Hanover (no. 2) case, and stated a photograph taken of a ballot paper falls within the freedom of expression concerning the publication of photographs.[529] Moreover, providing a mobile application for the purposes of publishing photographs constitutes a means of dissemination also protected by Article 10.[530]

Drawing on the ECtHR findings it can therefore be stated that Art. 10 protects both content and means to disseminate content.[531] In reaching this conclusion, the Court also held that the freedom of expression concerning the content of the photograph and the freedom of expression of the content provider were closely intertwined in the circumstances of this case.[532] The Court does not address whether the operator for the said app, in this case a political party, should in any way monitor or address the content shared on the said application. As this aligns with the traditional understanding of human rights obligations only applying to state parties, it is interesting that the Court does not address the core of the content. The facts of the case involve a resistance that can have a limiting effect on the democratic process in the domestic setting, but the Court does not assess the type of political content, only that it is a part of a political party's political communication. Drawing on these assumptions in the context of platforms that are set up to facilitate abuse and other malicious behaviour, raise questions about whether ECHR protection is contingent on the type of harms facilitated on the platform.

In three recent findings, the European Court of Human Rights has dealt with intermediary liability for online comments by a third party. The common issues dealt with in the cases reveal that, depending on the type of platform, there are different levels of obligations regarding human rights in the online sphere.

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[527] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60); *Ahmet Yldrim v. Turkey* (n 56) para 50.
[528] *Ahmet Yldrim v. Turkey* (n 56); *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60); *Delfi AS v. Estonia* (n 288); *Cengíz and others v Turkey* [2015] European Court of Human Rights Applications nos. 48226/10 and 14027/11).
[529] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) 86; *Von Hannover v Germany (No 2)* [2012] European Court of Human rights Applications nos. 40660/08 and 606441/08.
[530] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) 87.
[531] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60).
[532] ibid § 91. Para 91.

In the case of *Delfi v. Estonia,*[533] the applicant was a large news outlet that permitted third party comments under news articles on the website. The company operated a 'notice and takedown system', warning on the comments section that illegal speech was prohibited and would be removed from the section Nevertheless, despite the this provision and the deletion of comments at their discretion, the Court found that when a third party posted hateful comments that incited violence the company was still liable - the Estonian courts had not ruled in breach of the applicant's freedom of expression as protected under Article 10 of the Convention.

In Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v. Hungary (*MTE v. Hungary*)[534] there were two applicants. The first was the self-regulatory body of Hungarian Internet content providers and the second was a company owning one of the major Internet news portals in Hungary. Both ran platforms that allowed third party comments with warnings like the Delfi platform and a 'notice and takedown system'. The Court found that the Hungarian Courts in the case had not performed an exercise between the competing rights of freedom of expression as protected under Article 10 and the right to personal integrity as protected under Article 8, resulting in too strict an application of liability of third party comments and constituted a breach of the protection awarded to the applicants under Article 10.

The Court declared the application in *Pihl v. Sweden* inadmissible.[535] The applicant had been the subject of a defamatory anonymous comment posted on an online blog run by a small not-for-profit association. When he notified the association about the comment, they reacted swiftly to take it down. The application sought redress from Swedish courts, claiming that the association should be held liable for the defamatory comments. The Court found that in rejecting his claim, the Swedish courts had struck a fair balance between the colluding rights protected under Article 8 and Article 10. The Court stated that the comments had not amounted to hate speech or an incitement to violence and took into account the size of the blog that was run by a non-profit association which had reacted swiftly to take down requests, moreover, the blog had only been online for nine days.

In all cases, the domestic courts did not decide on the '*mere conduit*' rule derived from the e-commerce directive[536], which relieves intermediaries of responsibility for the actions of third party. Nor did the Court reassess the grounds the cases were found on, stating that it was a task for states and not the Court to decide "*the appropriateness of methods chosen by the legislature […] to regulate a given field.*"[537]

[533] *Delfi v Estonia* (n 60).
[534] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60).
[535] *Pihl v Sweden* [2017] European Court of Human Rights Application no. 74742/14.
[536] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce' 31.
[537] *Delfi v Estonia* (n 60) §90.

The Court's findings have contributed to ongoing discussion about the role of online intermediaries and the scope of responsibility with regard to third party expression. Is it an intermediary's role to ensure that speech that may be found unlawful under certain jurisdictions will not appear on the internet? The Court seems to be aware of the debate in the MTE case stating that:

> *"[…] the decisive question when assessing the consequence for the applicants is […] the manner in which Internet portals such as theirs can be held liable for third-party comments. Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet."*[538]

As established in the Court's case law, chilling speech is neither a goal for the Convention nor the Court. This may be the reason for the emphasis on analyzing the content of the speech in the cases in question. The Court found that the severity of the comments in the *Delfi* case constituted hate speech and incitement to violence, assessing the comments to be manifestly illegal and, therefore, not under the protection of the Convention.[539] Thus, despite the efforts the news outlet had made to ensure that the comments uploaded to the commenting section were within the law, the Estonian courts did not violate their rights under Article 10 by holding them liable for the comments. "*However,*" the *MTE* case was "*[…] different. Although offensive and vulgar […], the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence.*"[540] The same applied in the case of *Pihl*.[541] The Court found that the measures in the latter two cases to prevent illegal comments were sufficient, entailing that the applicants' liability for third party comments was in breach of their rights as protected under Article 10. The measures the applicant had in place in the *Delfi* case are described as: "*[…] a note on its Internet site to the effect that comments were not edited, that the posting of comments that were contrary to good practice was prohibited, and that the applicant company reserved the right to remove such comments. A system was put in place whereby users could notify the applicant company of any inappropriate comments.*"[542] In the *Delfi* and *Pihl* cases, the applicant removed the content following complaints. The Court also pointed out that the complainant in the *Pihl* case could not have foreseen the comment in question. Although a news outlet like *Delfi* could anticipate heated comments in the context of certain news articles, hate

[538] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) §87.
[539] *Delfi v Estonia* (n 60) § 140, § 136.
[540] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) § 64.
[541] *Pihl v Sweden* (n 535) § 25.
[542] *Delfi v Estonia* (n 60) § 26.

speech in the reporting of the closing of an ice road in a remote part of the country, as happened in the *Delfi* case, would be hard to anticipate.

The platforms in the respective cases were news companies and not-for profit associations. The Court makes a distinction between the obligations of for-profit and not-for-profit platforms.[543] Unlike not-for-profit platforms, for-profit entities operating online have monetary interests that can benefit from increased circulation when boundaries are pushed by hosting material such as hate speech. This raises two issues that the Court has not dealt with.

First, considering the measures the applicant had in place in the *Delfi* case, it is hard to see what other practical measures the applicant could have taken to prevent the liability imposed on them, other that screening or filtering the comments before them being posting. Still, the Court claims in the MTE case that prior filtering of comments would require "*[…] excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.*"[544] These are somewhat mixed messages as to what practical measures are appropriate.

Second, a distinction between for-profit and not-for-profit platforms raises the question of possible responsibility of not-for profit platforms that host 'unlawful' speech uploaded by anonymous third parties. The findings leave open scope for non-profit platforms to distribute material for non-monetary interests without liability, whereas a for-profit platform would be liable for distribution of the same material. Such a situation would provide less protection to the rights of individuals who find their Article 8 rights have been infringed online.

## 5. Conclusion

In this chapter, I have discussed the issue of digital violations of sexual privacy from the perspective of the European Convention system with the aim of establishing the scope and extent of obligations of member states to protect sexual privacy online. After identifying the core issues of privacy, as defined under the Convention, I described that the advent of the Internet has increasingly led to the Court dealing with fundamental rights in a digital context. Drawing on the Court's case law and principles, which have developed through the Court's rich jurisprudence, I established that member states must have in place a framework that ensures both an effective remedy for individuals who have their sexual privacy violated and sufficient investigative powers for authorises to respond to such violations. I highlighted that in light of the subsidiarity principle, the Court does not establish

[543] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) §62; *Delfi v Estonia* (n 60) § 113; *Pihl v Sweden* (n 535) § 37.
[544] *Magyar Kétfarkú Kutya Párt v. Hungary* (n 60) § 82.

if measures available should be based in criminal law or civil law. Finally, I rely on the Court's case law to summarize the issues that states must take note of when testing the balancing between the freedom of expression and the right to privacy in the online sphere.

# Chapter Four - An Icelandic Case Study

In this chapter, I describe a case study, which I conducted on digital sexual privacy in Iceland that illustrates the practical, legal and theoretical challenges involved in protecting sexual privacy in the digital realm. I carried out elite interviews, undertook a literature review of legislative standards and academic literature, and conducted a case law analysis on all levels of the court system. In addition to this, I authored commissioned work for the Government of Iceland on the issue, wrote a White Paper proposing legislative and policy changes, led consultations on these proposals and drafted a bill on sexual privacy that came into law in February 2021. Because of the consultative work and consequent legal amendments, my case study reflects a wider and richer set of parameters than initially intended.

In part one, I introduce and outline the fundamental aspects of the Icelandic legal order relevant for the case study., including, the constitutional framework and national legislation and its relevance to the international human rights framework, in particular as regards the ECHR. I then discuss the legal and social situation that makes Iceland a useful model for a case study on the issue. This includes factors such as the expansive uptake of internet and information technology, world-leading standards on gender equality, strong adherence to international human rights standards, and high confidence in institutional frameworks like the police.

Part two examines the scope of digital violations of sexual privacy in Iceland, highlighting how the available data, even though somewhat sparse, corresponds to statistics from other countries. It further draws on testimonies from victims of sexual privacy violations, underlining that the harms, discussed in chapter one, apply internationally as well.

Part three recounts research interviews that I held with core stakeholders within the Icelandic criminal justice system in 2017 – 2018 whereby I examine their attitudes towards the current legal framework and its application. As described in the methodology section of the introduction, these include police officers, public prosecutors, representatives from Europol and leading NGOs working in the field.

Part four outlines the findings of my analysis of available cases regarding digital violations of sexual privacy in 2008 - 2019, covering all instances of the judiciary in Iceland and the application of law in those cases. It reveals gaps and overlaps in the legislation and supports the argument that there needs to be criminal law reform. I provide an overview of the white paper I was commissioned to write by the government, which proposes such reforms on a national level. Finally, I look at the

threefold policy measures that have subsequently been put in place, including criminal law reform enacted in 2021.

Part six summarises the findings of the case study. Despite its world leading track record on gender equality, the pattern of digital violations of sexual privacy in Iceland is similar to other parts of the world, with the majority of victims represented by women who are targeted by men. Victims report lack of support and responses from the criminal justice system, and the qualitative evidence exposes a lack of training, structure, and competence within the police to deal with cases of online sexual privacy, as well as indications of outdated mind sets bordering on victim blaming. Seven out of the ten interviewees found the legal framework was insufficient for the task, and that reform of criminal law reform was necessary. The examination of case law exposes gaps and overlaps in the legal framework used to address digital violations of sexual privacy in Icelandic jurisprudence. As I demonstrate below, with a reference to the case law review, the legal provisions up until February 2021 were not fit for purpose.

## 1. Iceland - A Brief Overview

Iceland is an island state in the Nordic region with a small but predominantly urban population with high digital literacy and use. It is a representative democracy and a parliamentary republic that gained its independence from Denmark in 1944.[545] Iceland is a well-established and functioning democracy with sound governance and strong respect for the rule of law.[546] The nation's oldest and highest institution is the parliament.[547] The Icelandic Constitution sets out that State power is exercised by Althingi (the parliament), the President of Iceland, the Government and the Judiciary. Parliament and the President are jointly vested with legislative power, while the President and the Government are vested with executive power. Icelandic legal traditions are closely connected to Danish, and in general Nordic, legislation and legal history.

With a population of 369,000, the country does not have a military and, within international relations theory, is classified as a small state.[548] As a member of the European Economic Area (EEA), Iceland

[545] Stjórnarskrá lýðveldisins Íslands 1944.
[546] 'Communication from the Commission to the European Parliament and the Council. Iceland 2012 Progress Report' <https://primarysources.brillonline.com/browse/human-rights-documents-online/communication-from-the-commission-to-the-european-parliament-and-the-council;hrdhrd46790058> accessed 20 August 2021.
[547] 'Althingi' (Alþingi 2018) 6 <https://www.althingi.is/pdf/Althingi2018_enska.pdf>.
[548] 'Small states are dependent on the economic, political, and societal shelter provided by larger states and international organizations to survive and prosper.' Baldur Thorhallsson, *Small States and Shelter Theory: Iceland's External Affairs* (Routledge 2019).

is a part of the European Internal Market, with ensuing rights and obligations.[549] Iceland is also a member of the Schengen agreement, allowing border-free movement within and between the member states.[550] In its capacity as a member of Interpol and Europol, the Icelandic police force has access to regional and international cooperation and, additionally, works as part of a wider group of Nordic police.[551]

Despite its size, Iceland is an active participant in international cooperation, recently taking a seat in the United Nations Human Rights Council.[552] It has a strong record of upholding human rights standards.[553] Iceland generally adapts the dualist approach to international obligations,[554] which entails international or regional human rights obligations that Iceland accepts will not be directly applicable under national law. Parliament is left to implement the changes needed to comply with the international obligations, usually by adapting the relevant national statutes to reflect international obligations. On a few occasions, however, a different approach has been taken, for example, the European Convention on Human Rights was enacted into domestic law in 1994 allowing it the same standing as national law.[555] The Convention further formed the basis of the revision of the human rights section of the Constitution as approved in 1995. As the explanatory report to the bill states, the purpose of the revision was to update the chapter to better reflect the international human rights obligations undertaken by Iceland.[556] The instruments are closely interrelated, giving the ECHR a special standing in the interpretation of fundamental rights in Iceland.[557]

## a. Relevant Legal Issues

### i. Privacy

Article 71 in the Icelandic constitution stipulates everyone shall enjoy the right to privacy, home and family. The protection provides that it is not permitted to "*conduct a physical examination or search of*

[549] Christian NK Franklin and Halvard Haukeland Fredriksen, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 Common Market Law Review 629; Sven Norberg, 'The Agreement of a European Economic Area' (1992) 29 Common Market Law Review 1171.
[550] European Commission, 'Schengen Area' (*Migration and Home Affairs - European Commission*, 6 December 2016) <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en> accessed 20 August 2021.
[551] 'Erlent samstarf' (*Lögreglan*, 25 November 2014) <https://www.logreglan.is/logreglan/rikislogreglustjori/althjodadeild/erlent-samstarf/> accessed 20 August 2021.
[552] 'Iceland to Take Vacated US Seat on Human Rights Council' (*UN News*, 13 July 2018) <https://news.un.org/en/story/2018/07/1014672> accessed 20 August 2021.
[553] 'Report of the Human Rights Council on Its Thirty-Fourth Session' (Human Rights Council 2018) A/HRC/34/2 <https://www.ohchr.org/EN/HRBodies/UPR/Pages/ISindex.aspx>.
[554] JG Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 British Year Book of International Law 66.
[555] Davíð Þór Björgvinsson, 'Mannréttindasáttmáli Evrópu. Meginatriði, skýring og beiting', *Mannréttindasáttmáli Evrópu* (Bókaútgáfan Codex, Mannréttindastofnun Háskóla Íslands, Lagadeild Háskólans í Reykjavík 2017) 53; 62/1994: Lög um Mannréttindasáttmála Evrópu 1994.
[556] Frumvarp til stjórnarskipunarlaga [389/1994].
[557] Björgvinsson (n 555) 53.

*a person, a search of his premises or objects, except under a court ruling or a special legal authority. The same applies to the investigation of documents and postal items, telephone calls and other telecommunications, as well as any similar restriction on a person's privacy*".[558] In the third paragraph of the provision, however, it concedes that the law may impose further restrictions on privacy, home or family if there is an urgent need due to the rights of others. The explanatory report accompanying the bill, which became the Constitutional Act no. 97/1995, states that privacy includes first and foremost the right of people to control their lives and bodies and to enjoy peace over their way of life and private affairs.[559] The provision has a direct reference to Art. 8 ECHR and both the wording and framing of the paragraph take note of this.

The privacy of individuals, including their reputation and dignity, has enjoyed legal protection in Icelandic law for longer than the government has participated in the cooperation of international institutions such as the Council of Europe. In Jónsbók, the law book from the Althingi dating from 1281, a section was dedicated to personal and private rights, outlining penalties and damages for violations of "qualities of man and emotions that are closest to his person, his life and limbs, dignity or reputation and […] private life."[560] Since then, the legal protection of aspects of the privacy of individuals and measures to respond to violations of privacy have been variously described in Icelandic law. This has not only been under the rules of tort law on compensation for damage, but also within criminal protection as discussed in Chapter XXV of the current General Penal Code (GPC). Chapter XXV provides, among other things, criminal protection against threats, defamation and violations of restraining orders. There are also provisions (Art. 228 and 229 GPC) for unauthorized access to houses, ships and other offline real life places, as well as provisions intended to ensure the privacy of people's private affairs, both in terms of access and distribution. The provisions have not changed extensively since 1940. In connection with Iceland's ratification of the Council of Europe Cybercrime Convention,[561] the provision of Art. 228 GPC was modified to include material stored in computerized form. One of the objectives of the agreement is to provide citizens with criminal protection against illegal conduct committed through the use of information technology or the Internet.

In line with obligations under the EEA, the General Data Protection Regulation (GDPR) has been adopted into Icelandic law.[562] This allows for enhanced protection of privacy under Icelandic law and is partly aimed at the implications of an ever-increasing digital reality. Art. 4 describes that the

[558] 33/1944.
[559] Frumvarp til stjórnarskipunarlaga (n 556).
[560] Páll Sigurðsson, *Mannhelgi - Höfuðþættir Almennrar Persónuverndar* (Bókaútgáfan Codex 2010) 42.
[561] Council of Europe Convention on Cybercrime ETS No. 185.
[562] Regulation of the European Parliament and of the Council on the protection of natural persons with the regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC; Lög um persónuvernd og vinnslu persónuupplýsinga 2018.

processing of interpersonal communications primarily for personal use falls outside of the scope of the legislation. This somewhat limits the potential efficiency of the clause in cases of digital violations of sexual privacy that often take place within these same settings that Art. 4 excludes. Furthermore, the resources available to the Icelandic Data Protection Authority are mainly limited to administrative sanctions. As is stated in the explanatory report to Art. 48 of the legislation, the penal sanctions are reserved for cases of extensive unauthorised distribution for profit.

### ii. Sexual Offences

The Sexual Offenses Chapter of the GPC is the chapter that has most often and thoroughly been revised.[563] In 1869, Iceland implemented its first comprehensive criminal law system that was largely based on the Danish Penal Code of 1866.[564] Thus, the law maintained a conservative view, which was expressed, among other things, in the fact that men were not protected by the provisions of the law on rape, only women and girls who, in turn only, enjoyed varying degrees of criminal protection depending on how modest a reputation they had. The official Evangelical Lutheran Church had a strong influence, for example, through provisions enacted to protect the sanctity of marriage.[565] The GPC 1940 was again modelled on Danish criminal law, specifically, the 1930 penal code in Denmark. Changes in attitudes towards women's sexual freedom and their position within marriage were to some extent reflected in the reforms that seeped into the Icelandic code.[566] Among these were changes aimed at ensuring the sexual freedom of individuals, including decriminalising homosexuality in 1940. As Bragadóttir highlights, all the provisions of the sexual offence chapter have in common an underlying focus on sexual life. Many are aimed at protecting the sexual freedom of women and others at protecting children and adolescents. The chapter also contains provisions rooted in a more morally framed set, including preventing promiscuity as a source of income, protecting morality or punishment for an act that causes general scandal.[567] Since the chapter was enacted in 1940, no further amendments were made to it until 1992, although society had undergone major changes, not least in terms of the status and rights of women. Bragadóttir points out, this lack of reform was not limited to Iceland. It was not until the middle of the last century that sexual harassment was fully identified and recognised, and in most western countries the legislature was slow to respond to this.[568] The 1992 amendments were substantive and introduced the criminalisation of sexual harassment, but they also addressed the framing of sexual offences by changing the title of chapter XXV from 'chastity' to 'sexual offences'. Bragadóttir explains the explanatory memorandum stated it was more appropriate to focus on 'the

[563] Ragnheiður Bragadóttir (n 355) 18.
[564] Almenn hegningarlög handa Íslandi 1869.
[565] Ragnheiður Bragadóttir (n 355) 27–31.
[566] ibid 34.
[567] ibid 20.
[568] MacKinnon (n 314); Ragnheiður Bragadóttir (n 355) 354.

characteristics of the conduct rather than the effect it has on the victim or rather on the public's moral attitude towards the victim.'[569]

Major sections of the GPC sexual offences chapter were revised with the 61/2007 Act on sexual offences, which included a particular focus on sexual assault, rape and forms of sexual abuse against individuals. The section containing clauses protecting common interests, such as decency, pornography and prostitution were excluded from the reform.[570] In 2012, the sections of the chapter addressing sexual abuse of children was updated and revised in line with state obligations under the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse 2010.[571] The reworking included specific clauses on grooming and child sexual abuse material that reflected the technological aspect of such violations. The age of consent in Iceland is 15, but young people are considered children in the eyes of the law up until 18 years of age. In 2018, the clause on rape was revised to reframe the issue of consent at the heart of the violation.

## b. The Criminal Justice System

Case law of the ECtHR has had a major impact on the national legislation and legal order in Iceland. Two of the most notable cases led to major changes to the structure of the judicial system in Iceland. The first is the case of *Kristinsson v. Iceland (1990)* wherein a member of the police force both investigated a traffic violation and handed down a verdict in that same case.[572] The applicant claimed that the legal system of the time did not meet the requirements of an independent judiciary as described in ECHR Art. 6, para 1, and constituted a violation of their rights as protected under the clause. The legal system had been built from historic foundations that placed official power in rural Iceland in the hands of a local sheriff. The process of the case led to a major restructure of the Icelandic justice system, separating the judicial and investigative powers of sheriffs by law.[573]

The second case was *Arnarson v. Iceland (2003)*.[574] Up until 2016, there were two levels to the court system, District Courts and a Supreme Court. Under that system, the Supreme Court could not hear statements of witnesses and defendants, which raised concerns about the right to a fair trial under Art. 6. In the *Arnarson* case, the ECtHR found that due to the circumstances of the case, the assessment of the Supreme Court was in nature re-evaluating factual issues and not only matters of law. Thus, the rights of the applicant to a fair and impartial hearing were found to have been

[569] Ragnheiður Bragadóttir (n 355) 22.
[570] Frumvarp til laga um breytingu á almennum hegningarlögum, nr. 19 12. febrúar 1940 (kynferðisbrot) 2006 [20].
[571] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201 2010.
[572] *Jón Kristinsson v Iceland* [1990] European Commission of Human Rights 12170/86.
[573] Lög um aðskilnað dóms og umboðsvalds í héraði 1989 (182); Björgvinsson (n 555).
[574] *Sigurþór Arnarson v Iceland* [2003] European Court of Human Rights 44671/98.

violated.[575] Although the ECtHR did not find the whole system to be incompatible with the Convention, the case was a contributing factor in the restructuring of the Icelandic judicial system and a new Act on the Judiciary was passed in May 2016.[576] The law came into action on 1st January 2018 and established a separate Court of Appeal. Under this new system, there are two instances when the Court is able to hear statements of witnesses and defendants with the Supreme Court acting as the highest judicial power, but not a general appellate court.[577]

The police in Iceland operate under the Police Act 1996.[578] The office of the National Commissioner for Police serves as the top-level administration of the police, with the Commissioner serving at its helm. There are nine police districts, each led by a district commissioner. Of these, the capital region police district is the largest, covering about 60% of the Icelandic population. Other regions are geographically larger but with fewer inhabitants, about 40% or 135,000 people across eight districts, which creates operational challenges for law enforcement in rural and remote areas of the country.[579]

The prosecution authority in Iceland has the Director of Public Prosecutions (DPP) as the head of their office and they hold the supreme prosecution power under the Act on Criminal Procedure 2008.[580] The branches of the prosecution authority are further divided between the District Prosecutor as well as the district commissioners of the nine police districts. The DPP conducts all criminal cases on behalf of the prosecution authority before the Court of Appeal and the Supreme Court of Iceland and decides whether to appeal cases. The District Prosecutor deals with the most serious offences in the GPC that come before District courts, including sexual violence and bodily harm. All other cases before District Courts are prosecuted by the district commissioner of police in the relevant district. The DPP issues guidelines and instructions regarding the handling of prosecutions at all stages and can also issue instructions to other prosecutors on individual cases that they are obligated to follow. The DPP also reviews decisions by the commissioners of police and the District Prosecutor to close case files (i.e. not to issue indictments) based on a complaint in a particular case.

## c. Additional Factors that Support Using Iceland as a Case Study

In addition to the general alignment of national law and international human rights standards, socioeconomic factors, like advanced adoption of gender equality and information technology, make Iceland a strong candidate for the case study in this thesis. The adherence to international

[575] ibid.
[576] Frumvarp til laga um dómstóla 2015 [1017].
[577] Lög um dómstóla 2016.
[578] Lögreglulög 1996.
[579] Guðmundur Oddsson and Andrew Hill, 'Mannekla Lögreglunnar Og Mjúk Löggæsla í Dreifbýli' (2021) 12 Íslenska þjóðfélagið 41, 42.
[580] Lög um meðferð sakamála 2008.

human rights standards and the status of the ECHR in domestic law also make the legal framework in Iceland a strong candidate to understand how the borderless character of the internet impacts human rights obligations of states bound by the Convention. Icelandic authorities are parties to international conventions and standards in the field of human rights in several spheres, including both the UN and the Council of Europe, as well as in topical areas of rights, such as within the International Labour Organisation.[581]

The country has topped the World Economic Forum's Global Gender Gap Index for over a decade and is a world leader in promoting gender equality on a national and international level.[582] This achievement is due, in part, to the strong presence over many years of women's rights issues within mainstream politics, which has led to a progressive adaptation of equal rights through the legal system, including suffrage for women in 1915, and holistic legislation on gender equality in 1976.[583] The Gender Equality Act was enacted following a demonstration by women, in October 1975, in what is still considered the largest protest rally in the country's history, when 25,000 women in Iceland (approximately a third of the then national adult female population) gathered on the streets of Reykjavík to demand gender equality.[584] The law aimed to shift the existing societal attitude of gender equality and 'speed up the realisation of real equality between the two genders'.[585] Despite great progress in the field of gender equality in Iceland, there is still a political will to "do better". Gender equality is an issue that is important in political discourse and a policy that has cross-political implications.[586]

In comparison to the international picture, and similar to other Nordic countries, the police in Iceland enjoy some of the highest levels of trust from the population. This phenomenon is associated with socioeconomic factors of the Nordic welfare state model, equality and the strong social integration of police forces in the region.[587]

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[581] 'Search on States and International Organisations - Treaty List for Iceland' (*Treaty Office*) <https://www.coe.int/en/web/conventions/search-on-states> accessed 20 August 2021.
[582] 'World Economic Forum's Global Gender Gap Index' (World Economic Forum 2021) <http://www3.weforum.org/docs/WEF_GGGR_2021.pdf> accessed 20 August 2021.
[583] Brynhildur G Flóvenz, 'Jafnréttislög í 30 ár' (2007) 1 Úlfljótur 5, 7–9.
[584] 'Kvennasogusafn.Is' (*Kvennafrídagur 24. október 1975*) <https://kvennasogusafn.is/index.php?page=kvennafri_1975> accessed 20 August 2021.
[585] Flóvenz (n 583) 12.
[586] This can be seen, among other things, in the fact that before the 2017 parliamentary elections, seven of the nine political parties nationally discussed gender equality in one way or another in their policy statements. See 'Kosningar 2017' (*Kvenréttindafélag Íslands*) <https://kvenrettindafelag.is/kosningar2017/> accessed 20 August 2021.
[587] Oddsson and Hill (n 579) 43.

Iceland is one of the world's most advanced information societies.[588] In 2017, Iceland was ranked top of the ICT Development Index, followed by South Korea and Switzerland.[589] The Icelandic population is quick to adapt to new technologies and the penetration rates for fixed and mobile services are well above the European average. It is world-leading in internet use, with over 98% of the population using the internet regularly. The European and Global averages are just below 80% and 46% respectively.[590] Although global statistics indicate the uptake of information technology is a highly gendered issue, with more men than women using the internet, this gender bias does not exist in Iceland because men and women use the internet in equal measure.[591]

## 2. Digital Violations of Sexual Privacy

### a. Scope

Iceland's crime rate is lowest against other Nordic countries and among the lowest in the world.[592] Icelandic criminologists, consider that the country is a typical case of a close-knit and homogeneous society where strong social cohesion prevents crime.[593]

As discussed in the case law review, digital violations of sexual privacy have been addressed through a range of legal provisions. Since 1999, the National Commissioner of Police has gathered statistics that respond to the relevant provisions of criminal law, however, statistics do not indicate whether the offence in question has a digital element or not.[594] Therefore, official crime statistics do not reflect the scope or extent of digital violations of sexual privacy. Researchers have provided insights into this problem. Þorvaldsdóttir reveals a feeling among professionals working in the field that digital violations of sexual privacy are severely underreported in Iceland, as they are elsewhere in the world.[595] From discussions with police representatives, Þorvaldsdóttir discovered that three to four cases of digital violations of sexual privacy were reported to the Icelandic police every week, but charges would only be issued in a fraction of those cases.[596] In 2020, Jónasson and Þórisdóttir

[588] 'Measuring the Information Society Report Volume 2. ICT Country Profiles' (International Telecommunications Union 2018) <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-2-E.pdf> accessed 20 August 2021.
[589] 'ITU | 2017 Global ICT Development Index' <https://www.itu.int/net4/ITU-D/idi/2017/index.html> accessed 20 August 2021.
[590] ibid 79.
[591] Data from Statistics Iceland from 2003 – 2014 on the use of internet in Iceland 'Tíðni Tölvu- Og Netnotkunar Einstakling 2003-2019' (*Hagstofa Íslands - Talnaefni*) <http://px.hagstofa.is/pxispxis/pxweb/is/Atvinnuvegir/Atvinnuvegir__visinditaekni__Upplysingataekninotkuneinstaklinga__ict_lykiltolur/SAM07103.px/> accessed 20 August 2021.
[592] Hildigunnur Ólafsdóttir and Ragnheidur Bragadóttir, 'Crime and Criminal Policy in Iceland: Criminology on the Margins of Europe' (2006) 3 European Journal of Criminology 221; 'Iceland 2020 Crime & Safety Report' (OSAC 2020) <https://www.osac.gov/Content/Report/1212e167-4d1e-47b6-9974-195ba55f2c43> accessed 20 August 2021.
[593] Ólafsdóttir and Bragadóttir (n 592) 222.
[594] ibid 227.
[595] Þorvaldsdóttir (n 132) 9–10.
[596] ibid 49.

examined the scope, nature and extent of sexual images registered in the Icelandic police central system. Their findings indicate that there was not a uniform procedure in place to register and classify cases of digital violations of sexual privacy.[597] These insights show that a lack of available data is compounded with underreporting and failure to pursue cases.

With regard to the government's policy on network and information security, in 2016, the National Commissioner of Police conducted a special risk assessment to formally define the main threats in the field of network and information security.[598] Digital forms of sexual violence or abuse were not ranked among the main threats. The assessment mentions examples of what they term 'revenge pornography' when 'spouse or ex-spouse shares sexual material on the internet without permission on hidden networks', but there is no discussion on the scope or number of cases.[599] Two cases are mentioned where the footage was used for extortion, whether to get the person in question to participate in sexual activity or to hand over money. In the opinion of the National Commissioner of Police, such cases fell under organised criminal activity because foreign parties linked to organised crime obtained intimate footage of victims and used to blackmail the victims.[600] This description is in line with what has been referred to as 'sextortion',[601] but is not specifically addressed in Icelandic law, although in some cases the conduct could be attributed to the provisions of the GPC around threats or extortion.

In their 2016 study, Jónasson and Gunnlaugsson set out to measure the scope and frequency of cybercrime and map digital crime victimisation in Iceland.[602] 13% of the respondents identified as a victim of cybercrime. Out of those, one in five revealed their image had been shared without approval within the last three years.[603] The study was repeated two years later, in 2018, when 20% of respondents reported digital victimisation, with a notable increase in the sexual harassment of women. Despite the rise in victimisation, just one in five victims revealed their image had been shared without their consent, the same figure as in 2016.[604]

[597] Jónas Orri Jónasson and Rannveig Þórisdóttir, 'Birtingarmyndm Eðli Og Umfang Kynferðislegra Myndbirtingar í Gögnum Lögreglu' (Löggæsla og samfélagið - University of Akureyri Annual Policing Conference, Akureyri, Iceland, 19 February 2020).
[598] 'Tölvu- og netglæpir' (Greininardeild Ríkislögreglustjóra 2016) Áhættu- og ógnarmat.
[599] ibid 20.
[600] ibid 21.
[601] 'The National Strategy for Child Exploitation Prevention and Interdiction' (US, Department of Justice 2016) Report to Cogress 74–76 <https://www.justice.gov/psc/file/842411/download> accessed 20 August 2021.
[602] Jónas Orri Jónasson and Helgi Gunnlaugsson, 'Tíðni og tegund netbrota á Íslandi', *Þjóðarspegillinn Ráðstefna í félagsvísindum XVII* (2016) 3.
[603] Jónasson and Gunnlaugsson (n 602).
[604] Gunnlaugsson and Jónasson (n 90) 34.

Benediktsdóttir and Gunnlaugsdóttir report that, in their experience as Icelandic prosecutors, most of these cases of digital violations of sexual privacy are committed within intimate relationships or after those relationships have ended.[605]

Recent reporting by the Icelandic Media Commission reveals 2.6% of the population had their images shared online without consent and 1.3% had been coerced to send images or other personal information about themselves, with no significant differences between responses from men and women.[606] Nevertheless, a more gendered picture emerged once the age of the respondents was considered. Young people were particularly affected by these issues, in people aged between 15 and 17, 17% of girls and 14% of boys had their image shared without consent, compared with 5% of the adult population being affected.[607] 23% of teen girls said they had been pressured to send such images, while 6% of boys and less than 5% of adults have been in the same situation. A 2018 study exploring the behaviour of 13-16-year-olds in Iceland found that just over 15% of teenage boys had asked someone to send them a nude image, compared to just under 10% of girls. 87% of boys and 82% of girls had never sent a nude selfie to someone else, although 3% of girls and 1.6% of boys had done so 20 times or more often.[608] In 2021, 46% of girls had been asked for a nude photo digitally, compared to 16% of boys who had been asked the same. Nearly 9% of girls and just under 5% of boys had shared a sexually explicit or nude 'selfie' digitally in return for payment.[609]

The unauthorised distribution of intimate images takes place in different digital spheres. Focus groups from research conducted by the Women's Rights Organisation indicated that Snapchat was a common medium for sharing intimate material.[610] In research conducted in 2015, Friðriksdóttir found the 'Chansluts.com' site contained a specific message board dedicated to sharing images of Icelandic people, mainly women and girls.[611] The board was set up in May 2014 and due to the sheer amount of content, Friðriksdóttir's content analysis had to be limited to 10 out of the 56 pages on the board. All communication on the message board took place in Icelandic and the communication regarding the depicted persons suggested that a lot of their personal information was known to the persons sharing the material, including information regarding the school they attended, where they lived, and their age. On the 10 pages, the research found 483 pictures were available, 148 thereof were nudes. 97% of those depicted were female and, in the 33 instances where the age of the depicted

[605] Benediktsdóttir and Gunnlaugsdóttir (n 134).
[606] Unpublished findings 2021. On file with author.
[607] Unpublished findings 2021. On file with author.
[608] Hrefna Pálsdóttir and others, 'Ungt fólk 2018' (Rannsóknir og greining 2018) 26.
[609] Rannsóknir og greining (n 168).
[610] Þorvaldsdóttir (n 132) 16.
[611] Hildur Friðriksdóttir (n 272).

was clearly stated, 25 declared that the pictures were of girls under the age of 18, and in 12 of the pictures the age was under 15. Because the Icelandic language differentiates words depending on the gender of the discussant, the conversation between users on the message board revealed that they were male.[612] The focus group participating in the mapping for the 2015 Women's Rights Organisation report about revenge porn also exposed a gendered aspect to digital violations of sexual privacy in the Icelandic context. They found that, in comparison with pictures that depict females, in particular teenage girls, when boys digitally shared intimate material with others, there were lower levels of stigma or judgements connected to that kind of image.[613]

To sum up, Icelandic data and information about the scope of digital violations of sexual privacy indicate that Iceland follows a similar pattern to other countries, as discussed in chapter one. In the majority of cases, the victims are female and the perpetrators are male. Groups particularly at risk are young people, LGBT+ people, and domestic, current or former partners. The violations and groups most at risk occur against a backdrop in which Iceland has an impressive track record on legal and social standards on gender equality, LGBT+ rights, and a progressive social rights agenda, as well as strong socioeconomic status and high uptake of ICT in Iceland.

## b. Victim's Voices

The consequences of violations of sexual privacy are compounded when images are shared with additional 'doxing' (or 'doxxing'),[614] that is, information about the person depicted, such as name, address or information about social media accounts. In a small interconnected community, like much of Iceland, the repercussions for the reputation of the victim, their employment status, personal relationships and other aspects of the person's life are amplified.[615]

In a pan-Nordic study of victims' experiences of digital sexual violence and the criminal justice system, there were several differences between how victims responded to the consequences of the offences.[616] The victims all had in common a fear of suffering re-victimisation due to further distribution of the content online. They also described physical effects, such as memory loss, lack of energy, anxiety and unexplained pain. One person described to have suffered a nervous breakdown following the offence and another feared for their life.[617] In some of the Icelandic cases that have gone to court, victims have described consequences such as anxiety, depression, isolation, shame or

[612] Hildur Friðriksdóttir, 'Hrelliklám' (Verkmenntaskólinn á Akureyri, 17 October 2016) <https://prezi.com/ye03rgki6rce/hefndarklam/> accessed 20 August 2021.
[613] Þorvaldsdóttir (n 132) 14.
[614] Citron (n 48) 53; 'What Is Doxing – Definition and Explanation' (*www.kaspersky.com*, 5 July 2021) <https://www.kaspersky.com/resource-center/definitions/what-is-doxing> accessed 20 August 2021.
[615] Benediktsdóttir and Gunnlaugsdóttir (n 134).
[616] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[617] ibid 16.

difficulties navigating daily life.[618] Victims have further described that the violations had a strong detrimental effect on existing conditions, such as anxiety and social skills.[619] There are even examples of what Rackley et. al. describe as a 'social rupture',[620] which includes unauthorized distribution of sexual material causing a breakdown in the victim's relationships and causes a major rupture in their daily life.[621]

Victims of digital forms of sexual privacy violations have stepped into the public sphere calling for criminal reform, increased support for victims and better handling of cases that enter the justice system.[622] Building on the voices of individual victims, grassroots efforts such as the ´Slutwalk´[623] and the 2012-14 #freethenipple campaign called into question the gendered manifestations of digital violations of sexual privacy and demanded a comprehensive response from public authorities.[624] Icelandic calls for action also took note of public statements from victims who were protesting that when they reported digital violations of sexual privacy to the Icelandic police, they were met with attitudes of victim-blaming and a lack of understanding of the interests at stake for the victim.[625] In a country with a reputation for high levels of trust in the police, Jóhannsdóttir et. al. discovered that many victims of digital violations of sexual privacy in Iceland did not trust the police to effectively handle their case, consequently deterring them from even reporting their case to the police and seeking support from the judicial system.[626]

## 3. Research Interviews in 2017-18

In my review of the interviews conducted in 2017 - 2018, I incorporate the framework of the semi-structured interviews to highlight four key issues. First, the current legislation and need for legal reform, second, the role of private entities in the online enforcement of national legislation, third, the jurisdictional challenges of online policing, and fourth, the extent that gender affects cases of sexual privacy violations that enter the criminal justice system.

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[618] (n 111).
[619] (n 208).
[620] Rackley, McGlynn and Johnson (n 158).
[621] *Ákæruvaldið gegn X* (n 220).
[622] 'Ekki í lagi að dreifa myndum', *visir.is* (29 September 2014) <https://www.visir.is/k/vtvec5062e0-0b1b-45e6-a5a5-2a45f4461ab8> accessed 20 August 2021.
[623] Begun in Toronto, Canada in 2011. Joetta L Carr, 'The SlutWalk Movement: A Study in Transnational Feminist Activism' (2013) 4 16.
[624] Rúdólfsdóttir and Jóhannsdóttir (n 69); 'Druslugangan gegn stafrænu kynferðisofbeldi' *Mbl.is* (Reykjavík, 29 July 2017) <https://www.mbl.is/frettir/innlent/2017/07/29/gengid_gegn_stafraenu_kynferdisofbeldi/> accessed 20 August 2021.
[625] 'Fékk nektarmyndir af dóttur sinni inn um lúguna' *RÚV* (25 February 2021) <https://www.ruv.is/frett/2021/02/25/fekk-nektarmyndir-af-dottur-sinni-inn-um-luguna> accessed 20 August 2021.
[626] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).

## a. Legislation

All interviews were initiated with questions about the legal framework in place at the time. I sought to draw out views on the current legislation, about both its efficiency and application. I also wanted to see the extent that interviewees assessed a need for a revision of the law and, in particular, if such a legal response might better be framed as a civil remedy rather than a criminal provision.

### i. The Legal Framework is Not Fit for Purpose

Seven out of the ten interviewees found the legal framework severely lacking or lacking, and considered that reform of criminal law reform was a necessary remedy. They provided a range of reasons including: victims' rights, human rights obligation of the state, and that law had to keep up with technology to prevent social rifts. One interviewee found the legislation somewhat outdated, but not to an extent that called for legal reform. Two did not want to comment on the quality of the legislation but did highlight the importance of clear criminal provisions when dealing with harmful behaviour in the digital sphere. Despite the current ambiguity in the legal framework, some found the provision on lewd conduct to be fairly efficient in cases of sexual privacy, leading one interviewee to say:

> *"It is incredible how well this provision has worked, even if it is old fashioned and has not changed since 1940, we have been grateful for the clause as it has proved remarkably effective. Until better legislation is in place we can at least use this."*[627]

There was strong support for maintaining the clause in the legislation, even though most interviewees agreed that it was not the best clause to protect sexual privacy. Four interviewees mentioned the clause to be very important in cases regarding voyeurism, and similar behaviour, as that was the original intent of the provision in the law. Six interviewees highlighted the importance of the clause and warned against removing it.

In the interviews, the digital aspect of violations of sexual privacy was a central theme that either reinforced more generalised views or dealt with specific technological conditions. Four interviewees raised a concern about the Icelandic criminal legislation not being fit for purpose in an ever-increasing digital reality. All found it important for the criminal legislation to stay more up to date with technological development and most felt that digital violations of sexual privacy were a flashpoint for bigger issues of the intersection of law and technology. For instance, one interviewee observed that:

[627] 'Interview 3' (n 167).

> *"We have to put a focus on cybercrime in general, at least make sure that the behaviour is criminal, that is the bare minimum but we are not even there […] neither in legislation nor enforcement, but the two go together and the law has to come first."*[628]

These issues led to discussion on the international nature of cybercrime, making it important for small countries, like Iceland, to ensure the legal framework was synchronized with international standards to enable international or regional cooperation when enforcing legislation.

### ii. The Need for Legal Reform

The majority of the interviewees found the application of the current legal framework in need of updating and there was a consensus that any legal response to violations of sexual privacy should be framed as a sexual offence. Their thinking was partly motivated by the current setup of legal representation in Iceland. All victims of sexual offences are offered the *pro bono* service of a legal spokesperson to represent their interest during the processing of the case by the criminal justice system. Another important factor in calling for the violations to involve the sexual offences section was the importance of recognizing the acts as sexual offences.[629] The seven interviewees who found criminal legal reform necessary also noted that such a reform would have to acknowledge the sexual offence at the heart of the violations. Three interviewees highlighted the importance of a twofold legal redress, recognizing both the sexual offence and privacy violation the actions caused:

> *"It is important to look at the interests we are protecting with the law, what is the nature of these violations? It is totally clear in my mind that these are violations of privacy, but also sexual offences. What we need in the legislation is a clause on this in both chapters of the penal code."*[630]

Four interviewees were concerned that the legal framework was deficient around protections for children and young people. Because the age of sexual consent in Iceland is 15-years old, two interviewees mentioned the legislation did not allow room for consensual sexual communication between young people aged 15–17. They found this could prove counterproductive to the importance of consent in sexual communication and potentially over-criminalise the sexual expression of young people.[631] The interviewees in question were particularly concerned about how

[628] 'Interview 7' (23 February 2018).
[629] Mcglynn et.al. highlight the importance of recognising the twofold harm at play, in cases of image based sexual abuse. McGlynn and Rackley (n 8); Benediktsdóttir and Gunnlaugsdóttir (n 134).
[630] 'Interview 3' (n 167).
[631] Similar concerns are expressed by Henry and Powell that discuss the risk of over criminalisation of consensual sexual behaviour between youth in legal responses to technology facilitated sexual abuse Henry and Powell, 'Beyond the "Sext"' (n 4) 108.

the issue around age and consent affected LGBT+ youth that needed room to explore their sexuality.[632]

As regards the possibility of a legal review, two interviewees warned against introducing legislation on a moving topic like digital communication, without a comprehensive follow up and awareness-raising about the legal reform. This cautionary, more integrated, approach applied not only for the general population, but for the police:

> *"[Police officers] don´t subscribe to updates from the parliamentary website, so when some super progressive change in law takes place and [police officers] are meant to enforce that, [police officers] have to know about it. Just like what happened with the domestic abuse bill, [police officers] would get called to a house and the woman would ask for the man to be removed from the house because that had been put in the law but nobody told [the police officers]! So, there were media reports about the police not following this new fancy law, but nobody had told the police about the law!"*[633]

All interviewees felt it was important for digital violations of sexual privacy to be adequately protected in criminal law, such that any legal reform should first and foremost be based on criminal law rather than civil law. This perspective was rooted in the notion that police needed to be involved with the cases and that, when drawing on international or regional police cooperation, it was important to have a clear criminal framework to build upon. In this context, to ensure effective responses, all the interviewees mentioned the importance of sufficient and effective investigative powers afforded to the police in cases of digital violations of sexual privacy.

### b. The Role of Private Entities

The interview protocol allowed for wide margins of discussion points regarding private entities and their role in digital violations of sexual privacy. This was in part due to the wide range of roles private entities occupy in the internet ecosystem, but also to allow for personal reflections of the interviewees based on their professional experiences. The interviews were conducted in September 2017 – May 2018 and, thus, do not reflect the more recent critical discourse that has taken place in the mainstream of global and regional context regarding platforms and their impact in, and on, democracy.[634] The questions posed focused on the role platforms should play in keeping people safe on their platforms. In cases of digital violations of sexual privacy, that could mean taking action to protect the rights of an individual that was perhaps not even a user of the platform. Five

[632] These points are also raised by Citron and Waldman respectively Citron (n 69); Waldman (n 284).
[633] 'Interview 2' (17 October 2017) 2.
[634] Marsden, Meyer and Brown (n 61); Zuboff (n 2).

interviewees discussed the increasing power that private companies hold over interpersonal communication online. They had concerns that the platforms were not doing enough to make their services safe and that both individuals and police officers lacked skills and understanding of the platform structures to meaningfully engage with the platforms' terms and conditions. Consequently, the *de facto* power to decide what should 'stay up' online, and what should not, was in the hands of the private entities rather than the police. In particular, the issue of malignant platforms was raised by most interviewees, which included expressions of powerlessness in police responses regarding what they could do about such platforms. The interviewees referred to platforms or web services that not only ignored requests or efforts on behalf of public entities like the police but also had a vested interest in maintaining the content in circulation.[635]

All interviewees emphasised that private entities should do more to prevent abuse on their platforms, cooperate better with police in criminal investigations and make available support or resources for victims through their services. Six interviewees complained that platforms were not accessible for police to request measures to take down material or request information for criminal investigations.

All but one interviewee further discussed the related issue of anonymity online. Three acknowledged that anonymity online could be beneficial for informants or people in need of sealing their identity in some way, but that the harm caused through anonymous online communication by far outweighed the advantages of the system.

### c. Online Policing

As discussed in chapter two, the advent of the Internet has produced challenges for policing. In order to gain access or information that stems from a local context, public bodies such as the police must increasingly rely on private entities that operate transnationally.[636] This is discussed as the "out-of-reach" problem by Hörnle and is a manifestation of the jurisdictional challenges the Internet brings to the enforcement of domestic legislation online.[637] The impact these jurisdictional challenges have on cases of digital violations of sexual privacy was, thus, an important discussion point in the

[635] The site chansluts.com was specifically mentioned repeatedly in this context as being popular to spread this kind of content and for not responding to police requests regarding content on the platform. See also the site MyEx that was shut down by the Federal Trade Commission after a federal court found the operations violated federal law by charging women whose images had been shared on the platform considerable "takedown" fees. 'FTC, Nevada Obtain Order Permanently Shutting down Revenge Porn Site MyEx' (22 June 2018) <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-nevada-obtain-order-permanently-shutting-down-revenge-porn> accessed 20 August 2021.
[636] Wall refers to this as 'glocalizing'. The term is attributed to Sony founder Akio Morita 'Glocality Wall (n 118); 'Glocality – Wayne Visser' <http://www.waynevisser.com/blog/glocality> accessed 15 July 2021.
[637] Hörnle (n 13).

interviews because it highlights the practical and operational issues police face in the investigations of online violations of sexual privacy. Two main themes were evident in the interviews, firstly, the jurisdictional challenges and importance of international cooperation, and secondly, structural issues within the Icelandic police that came up as a hampering factor in the efficient investigation of online crimes in general, including violations of sexual privacy.

### ii. Jurisdictional Challenges and the Importance of International Cooperation

The topic of jurisdictional challenges arose in every interview and was a central theme in many concerns about digital violations of sexual privacy. As addressed in chapter two, the Internet poses significant jurisdictional challenges to the enforcement of domestic legislation through its decentralised architecture. As the decentralised infrastructure of the Internet does not follow the borders of nation states, police must rely on tools for international cooperation when investigating online violations. A Mutual Legal Assistance Treaty (MLAT) describes procedural and operational processes that allow for such cooperation. As so many Internet platforms are based in the United States, notably Silicon Valley, police outside of the United States will often have to rely on a MLAT process to gain access to evidence.[638] The interviewees discussed MLAT as a blunt instrument that was not fit for purpose because it is so time-consuming:

> *"[The criminal justice system has] used the MLAT, but we are completely reliant on the Americans finding the case in question as important as we find it, and that is not always the case. These processes are so slow it is a nightmare. I remember a case where the victim produced the information [the police] was trying to obtain through MLAT, and the case was investigated, processed, prosecuted, and decided by the district court before we got a "no" back from the Americans on the MLAT! […] and there is a major problem [because of] how long our criminal justice processes are, and if there is a conviction in the case before we even get a response back through the MLAT, well, I mean, that is a long waiting period for a no."*[639]

The Icelandic police rely heavily on the support of Europol in dealing with a range of crimes, particularly transnational crime.[640] Further, the interviews highlighted the importance of professional development available to Icelandic police officers through Europol, regarding cyber-related and other crimes. Despite the praise for this professional training, these courses, and other Europol initiatives, were not well promoted within the force, subsequently leading to low uptake of those educational opportunities.

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[638] Lawrence Siry, 'Cloudy Days Ahead: Cross-Border Evidence Collection and Its Impact on the Rights of EU Citizens' (2019) 10 New Journal of European Criminal Law 227, 229.
[639] 'Interview 5' (20 February 2018).
[640] International cooperation is especially important for small states. See: Thorhallsson (n 548).

### iii. Structural and Internal Issues within the Icelandic Police

A repeated topic of concern among interviewees were the underlying structural issues in the police handling of digital violations of sexual privacy. Four interviewees described the chain of command, internal procedures and operational guidelines as unclear, fuzzy or unstructured. They explained how these problems limited the efficiency and quality of investigations of violations of sexual privacy. These examples of internal and operational issues within the police also expose a risk of inconsistency in the processes and handlings of cases of digital nature, as discussed by five interviewees.

With respect to dealing with all types of cyber-related matters, five interviewees cited insufficient training and technical skills for the police as a cause for concern. When asked what needed to change to improve effective handling of digital violations of sexual privacy in the Icelandic criminal justice system, interviewee three replied:

> *"[f]irst and foremost there needs to be a change in mindsets, and that is happening, we see there is a better understanding now about this being a criminal issue. I don´t think we need stronger investigative powers […] we need a change in mindsets and we also need a higher level of understanding technology. We focus on the cyber in cybercrime, and I am not sure that is the main thing. We live in a digital world, what criminal cases investigated by the police do not have a cyber-element to them? It may be evidence in the form of communication, images, data; [police] look at phone records, phone data, and situate people based in the phones […] we have to be mindful that a personal technology capacity of a police officer can impact what they think is possible […] they may think, I have never heard of this so there is nothing [police] can do. We have to change this."*

As previously highlighted in this chapter, victims of digital violations of sexual privacy did not trust Icelandic police handling of their cases.[641] Mind-sets within the police force, combined with reported lack of training and lack of technical skills and knowledge may have been a contributing factor to the negative experiences and expectations of victims.[642]

## d. Gendered Issues

As discussed in chapter one and in part two of this current chapter, the manifestation of digital violation of sexual privacy is gendered. The majority of perpetrators are male, the majority of victims are female. Where victims are male, the majority of perpetrators are also male.[643] The main groups

[641] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[642] Similar issues were found to be at the heart of lack of police responses to technology facilitated sexual abuse in Australia and revenge porn in England and Wales. Henry, Flynn and Powell (n 110); Bond and Tyrrell (n 229).
[643] Waldman (n 284); Citron (n 69); Bjarnadóttir (n 9).

at risk of becoming victims are young people, LGBT+ people, or people that are victims of domestic abuse. The aim of the questions regarding gender and its role in digital violations of sexual privacy was to outline the extent that the criminal justice system is gender-responsive in the handling of these types of cases. All interviewees were aware of a gendered deficit in the statistics. The consensus that this was a worrying fact produced a range of views about the kind of responses the gendered reality of the violations warranted. Nine interviewees mentioned the importance of prevention, awareness-raising and, in particular, education for children and young people on the potential harms caused by violations of sexual privacy. Four mentioned the close connection of the violations to domestic abuse and has serious concerns about threats of unauthorised sharing of sexual material being used to control and coerce women as a form of domestic abuse.[644]

These digital violations continue to assimilate and reproduce existing biases and stereotypes. As four interviewees mentioned, there are indications that this modern form of sexual offences is entrenching gender stereotypes and reawakening outdated attitudes like victim-blaming and slut-shaming. One interviewee questioned how thinking around gender appeared to be regressing:

> *"We have come a long way with gender equality, but then we fall back into old habits with new things like this – just like wearing a short skirt and getting raped and why are you sending nude selfies, you only have yourself to blame. It is the same thing and it is so annoying we are falling back into approving this notion that it is the victims' fault for being violated."*[645]

## 4. Case Law Analysis

In lieu of a specific clause, a range of criminal statutes has been applied to cases of unauthorized sharing of intimate material online or similar manifestations of digital violations of sexual privacy. To map the effectiveness of current law in the context of sexual privacy violations, I examined practices in the Icelandic courts. I relied on search engines available on the websites of the district courts, the Appellate Court and the Supreme Court.[646] The Supreme Court has made cases available on its website from 1999, and the District Courts from 2014. The Appellate Court has operated from 1 January 2018 and made findings of the Court available on the website from that time onwards.[647] It should be noted, however, that not all handed down judgments are available on the courts'

[644] Henry and Powell, 'Beyond the "Sext"' (n 4); McGlynn, Rackley and Houghton (n 4).
[645] 'Interview 3' (n 167).
[646] 'Hæstiréttur Íslands' <https://www.haestirettur.is/> accessed 20 August 2021; 'Landsréttur' <https://www.landsrettur.is/> accessed 20 August 2021; 'Héraðsdómstólar Íslands' <https://www.heradsdomstolar.is/> accessed 20 August 2021.
[647] 'Dómstólasýslan' <https://domstolar.is/> accessed 14 May 2021; Lög um breytingu á ýmsum lögum vegna stofnunar millidómstigs 2016 (1818).

websites, especially in sensitive cases such as domestic violence or violence against children, which are situations where sexual privacy can be violated. Although I sought out complementary case law through the interviews conducted with Icelandic prosecutors and police officers and in academic literature, the case law examination under discussion is not an exhaustive examination of all Icelandic case law.[648]

Of the cases that have reached judgment in the judicial system, most have been addressed as lewd conduct through the provisions of Art. 209 GPC, or sexual harassment through Art. 199 GPC. As outlined by Benediktsdóttir and Gunnlaugsdóttir, in cases where the victim and the perpetrator are deemed to be in an intimate relationship, for example between current or former spouses, Art. 233b GPC on domestic abuse has been applied separately or in conjunction with other clauses.[649] This application also pertains to the derivative manifestations of violations, images or videos, although, in some cases, the provisions of Art. 210 GPC (prohibiting pornography) and Art. 210a GPC (relevant to child sexual abuse material) have been applied. In cases where the victim is under 18 years old, defendants have been prosecuted for violations of the Child Protection Act from 2002. Thus, a search was carried out, using the search engine of each judicial level, on each of the aforementioned provisions. The results were examined by reading the summary of the case, keywords listed by the relevant search engine, and the section of the findings that outline the facts of the case. All cases involving a digital aspect were then collected and analysed. The analysis focused on cases that included a "digital" aspect, such as when the *modus operandi* of the violation depended on social media to spread content or smartphones were used to create content. Thus, I made an additional word search for "stafrænt /stafrænn/ stafrænu/ stafrænum/ stafræna" (which translates as "digital") and "nektarmynd" (which translates as "nude image").[650] All cases resulting from the searches were analysed to identify the criminal action and their application under the relevant criminal law provision. It should be noted that a case may contain more than one aspect that would be logged in the review, for example, where both a computer and social media are used to store and distribute content.

### Case Law Analysis Table

The case law analysis revealed how the law had been applied. The following two tables outline facts of the cases examined and how similar actions have been covered by different clauses. As the main focus of this thesis is the online violations of sexual privacy where the victim is an adult, it was important to distinguish between cases with adult victims and child victims

[648] Ragnheiður Bragadóttir, *Kynferðisbrot - Dómabók* (Bókaútgáfan Codex 2009).
[649] Benediktsdóttir and Gunnlaugsdóttir (n 134) 198.
[650] *Íslensk - Ensk Orðabók*.

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| **Adult victims**<br>**Icelandic case law (all instances)**<br>**2008 – 2019** | Art. 209 GPC<br>Lewd conduct | Art. 209 combined with Art. 20 GPC Attempt of Lewd Conduct | Art. 233b GPC Domestic Abuse | Art. 199 GPC Sexual Harassment |
|---|---|---|---|---|
| Make others expose themselves via webcam/take nude/sexual photos of themselves | | | | |
| Produce a nude/sexual image of another person | **X** | | **X** | **X** |
| Show a nude/sexual image to someone else than the person depicted | **X** | | **X** | |
| Distribute a sexual image to a third party (share/publish) | **X** | | **X** | |
| Attempt to take a naked or sexual picture of another person. | | **X** | | |
| Expose themselves naked or sexually to others | **X** | | | **X** |
| Sexual/pornographic communication (varied means of communication) | **X** | | | **X** |

Table 1. Application of existing law. Adult victims of digital violations of sexual privacy. Icelandic case law 2008 – 2019.

| **Child victims (under 18)**<br><br>**Icelandic case law (all instances)**<br><br>**2008 - 2019** | Art. 209 GPC Lewd conduct. | Art. 210a GPC Child Sexual Abuse Material. | Art. 99, para 3 CPA Indecent act towards a child. | Art. 202, para 2 GPC Sexual Harassment of a child | Art. 194 and Art. 20 GPC Attempt of rape | Art. 199 GPC Sexual Harassment | Art. 233b GPC Domestic Abuse | Art. 201, para 2 GPC Other forms of Sexual Harassment of a child |
|---|---|---|---|---|---|---|---|---|
| Make a child expose themselves via webcam/take nude/sexual photos of themselves | **X** | | **X** | **X** | | | | |
| Produce a nude/sexual image of a child | **X** | **X** | **X** | **X** | | | | **X** |
| Show a nude/sexual image of a child to someone else than the child depicted | **X** | | **X** | | | | | |
| Distribute a sexual image of a child to a third party (share/publish) | **X** | **X** | **X** | | | | | |
| Expose themselves naked or sexually to a child | **X** | **(X)** | **X** | | | | | |
| Sexual and/or pornographic/indecent communication with a child (varied means of communication) | **X** | | **X** | **X** | | **X** | **X** | |
| Show a child sexual and/or pornographic image | **X** | | **X** | | | | | |
| Threaten a child to distribute to third party sexual images of the child if it will not have sex with the perpetrator | | | | | **X** | | | |

Table no. 2.  Application of existing law. Child (under 18) victims of digital violations of sexual privacy. Icelandic case law 2008 – 2019

## a. The Provisions at Play

### i. Lewd Conduct

The Supreme Court's search engine contains 63 cases concerning Art. 209 GPC from 1st January 1999 to 15 August 2019. Of these, 15 are cases that include a digital element, for example, because a phone was used to take pictures or distribution took place via social media. Considering the amendments to the sexual violations chapter of the GPC in 2007, it can be surmised that 45 of the 63 cases in the search engine concerned the current provisions of law. The Appellate Court's search engine contains 10 cases concerning Art. 209 GPC during the period 1 January 2018 to 15 August 2019. Of these, four cases are rulings that do not involve a substantive conclusion, but the subject matter of all of them concerned digital sexual offences in one way or another. The facts of the case in two of the six judgments concern digital elements. In one case, Art. 209 GPC was the secondary charge, but the case was decided on the primary charge as a violation of Art. 199 GPC on sexual harassment. The search engine of the District Court contains 26 cases concerning Art. 209 GPC from 8 April 2014 to 15 August 2019. The facts of the case in 12 of these cases concern digital manifestation in one way or another. In seven cases, a mobile phone was involved and there were seven cases that concerned social media. In one case, the disputed content was stored on a USB stick.

Article 209 GPC provides that any person who, "through lewd conduct, offends people's sense of decency or causes a public scandal, shall be imprisoned for up to 4 years, or up to 6 months or fined if the offence is minor." Similar provisions intended to protect individuals from unsolicited nudity or sexual conduct have long been a part of western criminal law. As Citron highlights, these provisions were highly gendered and contributed to upholding gender-stereotypical norms, as the law was aimed at 'protecting women from the public gaze', and they also prevented women from embracing their empowered sexuality.[651]

The Icelandic term for lewd conduct is *lostugt athæfi* or as directly translated: *lustful act*. With the enactment of the GPC 1940, the original wording "*dirty*", dating from 1869, was replaced with "*lustful*". No substantial changes have been made to the clause since. When the provision was amended in 1992, the explanatory report to the bill noted that the clause was intended to cover other kinds of conduct than inappropriate sexual touching or fondling, for example, window peeping, stripping, exhibitionism, or obscene talking over a telephone.[652] There are no obvious criteria for what is "*lustful*" within the meaning of Art. 209 GPC nor guidance on the matter in the explanatory

[651] Citron (n 69) 6, 22–23.

[652] See in particular discussion on Art. 15 of the bill. Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940 (kynferðisbrot) 1991 [58].

reports to subsequent law reforms. Ólafsdóttir considers that the condition covered by Art. 209 GPC is of a sexual nature and refers to acts that provide sexual pleasure.[653]

The lewd conduct clause, which catches the weakest violations of sexual integrity, is placed in the section of the sexual offences act that addresses pornography and prostitution, significantly for this thesis, it is not in the section that involves violations against individuals.[654] It has been applied in some cases regarding digital violations of sexual privacy in Iceland, where courts found that the unauthorised distribution or taking of intimate images of others violated the decency of the person depicted. In some cases, the conviction is not only on the grounds of Art. 209 GPC but also includes other relevant provisions such as Art. 233b GPC in the case of intimate relationships, and the Child Protection Act in the case of young people and children.[655] For the courts to apply Art. 209 GPC on lewd conduct, it has not been deemed necessary to show that a person's decency has been subjectively violated. Case law shows that it has been deemed sufficient if someone´s decency *might* have been violated.[656] Individuals can violate the provision both by actions and inactions, for example, when a person undertakes acts that are deemed in violation of the provision and do not discontinue when they realize that someone has noted or is witnessing their actions.[657] Case law further suggests that there must be a witness to the conduct in question for the provision to be applied.[658]

The provision has also been found to cover multiple actions. In a 2007 case, a man took an intimate picture of a girl who had passed out from alcohol consumption and showed the image to others. The Supreme Court held that it could not agree with the defendant's argument that the victim had given consent to the photo being taken. The Court concluded that both the act of taking the photo under these specific circumstances and the following display of the photo to other people was a violation of Art. 209 GPC.[659]

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[653] Svala Ísfeld Ólafsdóttir, 'Refsiákvæði sem varða kynferðisbrot gegn börnum', *Hinn launhelgi glæpur: kynferðisbrot gegn börnum* (Háskólaútgáfan 2011).
[654] Ragnheiður Bragadóttir (n 355) 260.
[655] Benediktsdóttir and Gunnlaugsdóttir (n 134) 204; *312/2015* (Hæstréttur Íslands); *548/2013* (Hæstiréttur Íslands).
[656] A man had sent three girls 16-17 years old sexual videos and pictures of himself. The Court found that this did not violate the girl's decency, and was not likely to have done so in general. He was convicted for a violation of Art. 210 a GPC prohibiting the distribution of pornography.
*Ákæruvaldið gegn X* [2008] Héraðsdómur Norðausturlands S-14/2008.
[657] Jónatan Þórmundsson, *Afbrot og refsiábyrgð I* (Háskólaútgáfan 1999) 85.
[658] *Ákæruvaldið gegn Róberti Árna Hreiðarssyni* [2008] Hæstiréttur Íslands 539/2007. In the case the Court found that as it could not be proved that the receiver of the images had indeed seen them, the defendant was acquitted of violating Art. 209 GPC on lewd conduct.
[659] *Ákæruvaldið gegn X* [2007] Hæstiréttur Íslands 242/2007.

### ii. Sexual Harassment

The Supreme Court's search engine contains 41 judgments concerning Art. 199 GPC on sexual harassment. Of these, four cases have a digital element, two involve social media and two the use of a computer or smartphone. The Appellate Court's search engine contains six cases concerning Art. 199 GPC, wherein one case referred to Art. 209 GPC as a secondary charge. One ruling of the court concerns police investigative powers in connection with the investigation of a mobile phone. The search engine of the District Courts contains 21 judgments concerning Art. 199 GPC, of which three cases have a digital connection. As was with the Supreme Court, two cases involve the use of social media and two the use of smartphones.

Sexual harassment was introduced to the GPC with legal amendments in 1992. Conduct like fondling and sexual photography had earlier been covered by Art. 209 on lewd conduct.[660] In 2007, the clause was revised in a bid to better define punishable actions caught by the clause and to clarify that it applied in any circumstances, private or public.[661] Under the clause, sexual harassment entails stroking, fondling or caressing another person's genitals or breasts under or through clothing, as well as symbolic behaviour or rhetoric that is very hurtful, repeated, or likely to cause fear. A violation is punishable with a maximum of two years' imprisonment. In the context of online sexual harassment, the clause has been applied in case law. In a case from 2013, a man was convicted for sexual offences, which included sexual harassment against 12 young girls.[662] Via Facebook, he contacted one of the girls, who was 15-years old at the time, repeatedly asking her sexual questions and requesting that she posed in her underwear in front of a webcam. She did not respond to his communication and the man's actions were found to amount to sexual harassment.

### iii. Domestic Abuse

The Supreme Court has issued eights judgements and two rulings concerning Art. 233b GPC on large-scale defamation in close relationships. In four judgments and both rulings the facts of the case included a digital element, including the use of email, social media, phones and USB sticks. In the Appellate Court, none of the seven judgments heard on Art. 233b GPC concerned digital issues. Out of the eleven judgments that concern the article, and are accessible in the search engine of the District Courts, six cases contain a digital element, of which five concern violations of sexual privacy. In five cases social media was used, one case a web page, one case a USB stick and two cases discussed images captured on a smartphone.

[660] Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940 (kynferðisbrot) (n 652).
[661] Frumvarp til laga um breytingu á almennum hegningarlögum, nr. 19 12. febrúar 1940 (kynferðisbrot) (n 570).
[662] *548/2013* (n 655).

The following tables provide an overview to map out which aspects of violations of sexual privacy are addressed under the current legal framework.

Article 233b GPC was introduced in 2006 and was targeted against domestic violence.[663] It provides that in cases where the offence is considered to constitute "serious defamation, a person who insults or denigrates his or her spouse or ex-spouse, child or other closely related people shall be imprisoned for up to two years."

Icelandic prosecutions of digital violations of sexual privacy include instances where the material in question was initially created with the consent of the victim as a part of an intimate relationship. The key issue in such cases is the subsequent unauthorised distribution of the material.

An example of this is a District Court case, from 2015, where the defendant and the victim were ex-partners and, in the wake of the separation, the defendant shared with others material of her performing sexual acts. He was prosecuted and convicted for violating both Arts. 209 GPC on lewd conduct and 233b GPC on domestic abuse. His actions were found to amount to both a sexual offence and a violation of privacy.[664] By contrast, a case, from 2012, involved a divorced man who sent a letter to members of his ex-wife's family. Significantly, the letter, which contained pictures of his ex-wife having consensual sex with other people, was sent to his ex-wife's father.[665] The woman had consented to the pictures being taken as they were intended for the personal use of the couple, but not to the sharing of the images. The man was only prosecuted on the grounds of Art. 233b GPC, and not Art. 209 GPC. The Court stated that by sending these photographs to his former in-laws, specifically addressed to his former father-in-law, it was obvious that the only purpose behind the act was for the victim's father to see these pictures. By doing so the defendant had insulted and denigrated his former wife in violation of Art. 233b GPC. When compared to the 2015 case, it is difficult to find merit for only applying 233b GPC in the case and not also 209 GPC on lewd conduct.

At the time of the case law revision, cases under Art. 233b GPC were prosecuted by public authorities. These cases followed the Act on Criminal Procedure, not the Act on Civil Procedure as is the case with other provisions concerning defamation.

### iv. Rape

Rape is a sexual offence under Icelandic legislation. With Act. No. 61/2007, the GPC chapter on sexual violations was amended. This entailed amendments to Articles 194-199, which cover rape and other offences against the sexual freedom of the individual, and to Articles 200-202, which deal

[663] Frumvarp til laga um breyting á almennum hegningarlögum, nr. 19 12. febrúar 1940 (heimilisofbeldi) [365].
[664] The case contained sensitive information. The proceedings were held in private and the court's decision was not made public Benediktsdóttir and Gunnlaugsdóttir (n 134) 204.
[665] *Ákæruvaldið gegn X* [2012] Héraðsdómur Reykjaness S-199/2012.

with sexual offences against children. The Act broadened the definition of rape to cover a range of forms of sexual coercion, including the exploitation of a victim's vulnerable state or inability to realise the significance of the actions taken.[666] In 2018, the clause was further amended with the view of centring the provision on explicit consent rather than descriptive *modus operandi*.[667]

The offence of rape has had limited digital relevance in its practical application although there are signs that this could soon change. A recent case, which gained much media attention and societal discussion, concerned a teenage girl who accused five teenage boys (of similar age to her) of having gang-raped her.[668] The boys were acquitted of charges of rape, but one of them was charged with violating Art. 209 GPC on lewd conduct, because he had violated the girl's decency when he showed friends at their school the pictures he had taken of her during the incident. He was convicted in the District Court, but the Supreme Court found that the evidence regarding the charge needed to be reassessed by the District Court. The Supreme Court, therefore, established that, under law, the recording of a sexual act and the sexual act in question can constitute separate acts

Another case of relevance for digital aspects of rape regards a man who pretended to be 17-years-old when communicating with a 15-year-old boy via the social media platform Snapchat. He groomed the boy to send him sexual selfies. This was found to violate Art. 209 GPC on lewd conduct and Art. 99, para. 3 CPA. He then proceeded to threaten the victim to expose him by publishing their communications and the pictures publicly online, unless the victim would agree to have sex with him by 11 PM that same night. For this part of the case, the accused was convicted for attempted rape. The majority of the Supreme Court found that the intent of the defendant was proved beyond doubt, as the threats were repeated and had a major impact on the victim. The defendant was sentenced to two years' imprisonment, and to pay the victim non-pecuniary damages.[669] The findings of the case highlight the range of sexual harm that can be caused without physical contact and, therefore, emphasises how important it is for the criminal justice system to recognise the extent and potential of similar harms.

### v. Child Sexual Abuse Material

The ratification of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse in Iceland called for criminal reform to ensure that domestic

[666] Ragnheiður Bragadóttir (n 355).
[667] Lög um breytingu á almennum hegningarlögum, nr. 19/1940, með síðari breytingum (kynferðisbrot). 2018 (638).
[668] The second largest online media outlet published 29 individual reports on the case. The victims' mother gave a televised interview and all larger newspaper ran stories on the case. 'Ákærðir fyrir hópnauðgun' *Mbl.is* <https://www.mbl.is/frettir/malefni/akaerdir_fyrir_hopnaudgun/> accessed 20 August 2020; *Ákæruvaldið gegn X* [2016] Hæstiréttur Íslands 35/2016.
[669] *441/2016* (Hæstiréttur).

legislation reflected the obligations undertaken by the Convention.[670] This entailed several amendments to protect children from sexual abuse and sexual violence, not least in light of the fast developments presented by the digital revolution. The measures included criminalisation of grooming and efforts to engage a child to take part in a display of nudity or pornographic display. The legislation introduced a new Art.210a GPC, explicitly criminalizing production, distribution and making available child sexual abuse material (CSAM) such that where the victim is under the age of 18, the clause should by definition apply.

Some cases regard online sharing or downloading of content that is discovered following technical forensic work by the police. In a Supreme Court case from 2015, the Court made a distinction between the CSAM, which the defendant had stored on a hard drive, and the same kind of content that was accessible through a temporary internet file on his web browser.[671] As the content on the web browser was only accessible when the file was opened via the browser, and because the content was not downloaded to his computer, he was only convicted for viewing that material, rather than have it in his possession; whereas he was convicted for the possession of the material he had on the hard drive.

### vi. Indecent Behaviour Towards a Child

Article 99, paragraph 3 of the Child Protection Act No. 80/2002 provides that any person who subjects a child to aggressive, abusive or indecent behaviour or hurts or insults him/her is liable to fines or imprisonment for up to two years. This provision has been applied in cases regarding online activity.

In March 2015, a District Court in Iceland convicted the 18-year-old ex-boyfriend of a 17-year-old girl for publishing naked photos of the girl on his Facebook page for a few minutes before deleting them again.[672] The girl had taken the photos herself and sent them to the defendant during their relationship. He confessed to the act and was sentenced to 60 days suspended imprisonment for violations of Art. 209 GPC and Art. 99.3 CPA.[673]

[670] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No. 201; Lög um breytingu á almennum hegningarlögum, nr. 14/1940, með síðari breytingum (samningur Evrópuráðsins um vernd barna gegn kynferðislegri misneytingu og kynferðislegri misnotkun) 2012.
[671] *366/2015* (Hæstiréttur Íslands).
[672] *S-36/2014* (Héraðsdómur Austurlands).
[673] *312/2015* (n 655).

## b. Gaps and Overlaps in Legislation

Examining the case law exposed both gaps and overlaps in the legal framework used to address digital violations of sexual privacy in Icelandic jurisprudence. The focal part of the research is the situation of adult victims of violations of sexual privacy. In light of this, the analysis focuses on the suitability of the three appropriate penal code provisions as illustrated by the case law analysis; Art. 209 on lewd conduct, Art. 199 on sexual harassment, and Art. 233b on domestic abuse.

### i. Lewd Conduct - an Inadequate Provision

Although the provisions of Art. 209 GPC are old in origin and reflects somewhat outdated attitudes, it has been applied in case law and its interpretation has developed and changed to some extent in line with societal developments. Nevertheless, as revealed by the case law review, there are weaknesses in the provision that make it ineffective in providing criminal protection of sexual privacy in the age of digital communication. The weaknesses in the law are primarily raised on the question of what constitutes lewd conduct under the provision, and the contradiction of attributing both conduct pertaining to lewd conduct and violations of sexual privacy under the same provision.

#### *Assessment of what Constitutes Lewd Conduct*

The main questions that Icelandic courts have looked to when assessing whether or not actions described in a case are lewd can be summed up as:

- Is the action of sexual nature that does not go as far as intercourse or other sexual interaction?[674]
- Did the victim consent to the action?[675]
- What was the intent of the offender?[676]
- What is the court's objective assessment concerning the facts of the case?[677]

As the following examples demonstrate, the case law analysis exposes inconsistencies in the application of these questions, which is particularly evident when two or more points are contradicting.

*The intent of the defendant appears to outweigh the proof of consent or consequences for the victim.* This position is found in Supreme Court case no. 523/2005 wherein the defendant claimed his intention was only to 'fool around' and was not of sexual nature, meanwhile, the victim experienced the act as a grave violation of her privacy, felt disgraced and was worried the images would be leaked online. The court accepted the defendant's stance and found his photographing of the victim, who was relieving herself in a closed bathroom stall, did not constitute lewd conduct.

[674] *Ákæruvaldið gegn X* (n 659).
[675] ibid.
[676] *Ákæruvaldið gegn X* [2006] Hæstiréttur Íslands 523/2005.
[677] *Ákæruvaldið gegn X* [2015] Hæstiréttur Íslands 309/2015.

*The intent of the defendant can impact the courts' objective assessment of what constitutes lewd conduct*. In case 242/2007, the Supreme Court found that sharing nude images of an ex-girlfriend was lewd conduct. In this case, the act was intended to take revenge on the girl as the defendant was very angry and upset, but that the act was not itself of 'a sexual nature'. The Court found that sharing close-up images of the girl's genitals on a Facebook page objectively amounted to lewd conduct. By contrast, the Reykjanes District Court found in case S-158/2018, that taking and sharing an image of a naked ex-girlfriend as she slept in her bed did not amount to lewd conduct. The intention of the defendant was judged not of sexual nature, but out of anger and to have tangible proof of her actions, should she later deny that she was naked in her bed with another man at the time.

*Proof of consent can impact the court's objective assessment.* In Supreme Court case no. 242/2007, a man had taken a picture of a naked young woman and showed the image to a third party. The District Court found that the action violated the victim's decency, but as the action was not of "a sexual nature" it did not amount to lewd conduct. The Supreme Court revised this as the victim had not given her consent for the actions and found the actions to objectively amount to lewd conduct.[678]

*Contradicting Actions Applied under the Same Clause*

The intended purpose of the clause on lewd conduct was rooted in one-sided action such as indecent exposure, voyeurism and other forms of unwanted nudity or sexual conduct.[679] The Court of Appeals addressed this issue in case 670/2018, where it found the disputed action was directed at the victim personally and was not "one-sided conduct" of the kind considered by Art. 209 on lewd conduct.

Although, in some cases, the advent of digital technology has translated indecent exposure into digital forms, it can hardly be disputed that "flashing" will be correctly applied to Art. 209 on lewd conduct whether it takes place digitally through social media or out on the street. In this context, unsolicited genital images via social media or other digital social media will be covered by this provision because it is only a change in the form of the same conduct, new types of offence are not being committed. This view was strongly expressed in one interview study, and most of the ten interviewees believed that the provision played an important role to protect people from unsolicited sexual images. In the case of unauthorized taking or publication of sexual images, the communication is two-way, involving an invasion of the privacy of the victim. Thus, these are interests that interfere with the feelings or sexual morals of individuals and, additionally, are a violation of their sexual privacy, potentially causing complicated and extensive harm.

[678] *Ákæruvaldið gegn X* (n 659).
[679] Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940 (kynferðisbrot) (n 652).

Some commonalities exist between cases of indecent exposure and violations of sexual privacy, such as that the disputed conduct often takes place without physical contact. It is what differs that makes the distinction between legal responses so important. In the case of indecent exposure, the person exposed is willing and consenting to the action. On the contrary, in cases of violations of sexual privacy the person exposed does not consent to the action, whether it is the exposure or distribution of the image at a later stage. The lack of consent creates a context that the legislator must recognise. That recognition does not come through applying the same provision to such different contexts. Further, using the same provision to respond to different actions is not conducive to strengthening the public's understanding of violations of sexual privacy.

### ii. Ambiguities in the Law

The case law analysis exposes that similar cases are caught by different provisions of the law and that, when cases lie on the borders between the clause on sexual harassment and lewd conduct, there is some discrepancy in the application of the law. As discussed by Bragadóttir, there is a gradual approach built into the chapter on sexual offences where the clause on lewd conduct would be seen as less serious than sexual harassment.[680]

Art. 209 GPC on lewd conduct and Art. 199 GPC on sexual harassment have both been applied to the taking and sharing of sexual images without consent by. In two cases from 2018, the Court of Appeals found that unauthorised filming of sexual actions amounted to lewd conduct, while the Reykjavík District Court found photographing a woman's genitals without consent amounted to sexual harassment.[681] Another example of this is the findings of the Supreme Court in cases 152/2005 and 18/2015 respectively. Both cases involved adult men sending sexual text messages to teenage girls. In case no. 152/2005, a primary school teacher was convicted for lewd conduct under Art. 209 GPC for having sent his female students several sexual messages. In case no. 18/2015, the Court found that sending a teenage girl sexual messages via text or Facebook amounted to sexual harassment.

Sending unsolicited nudity or sexual messages to others has also been attributed to both lewd conduct and sexual harassment in Icelandic case law. In the judgment of the Reykjavík District Court in S-123/2019, the accused confessed to sending the victim unsolicited sexual images as well as unsolicited sexual and pornographic messages. These acts were considered lewd conduct. On the other hand, in case S-25/2017, sending unsolicited sexual images and messages, *in addition* to asking the victims to send nude photos, amounted to sexual harassment. Given the nature, content and

[680] Ragnheiður Bragadóttir (n 355) 260.
[681] *Ákæruvaldið gegn X* (n 220); *Ákæruvaldið gegn A* [2017] Héraðsdómur Reykjavíkur S-242/2016; *Ákæruvaldið gegn X* [2018] Landsréttur 509/2018.

repetition of the message, the court held that the accused should have been clear that it constituted harassment of the victim.

The Court of Appeal stated in case no. 670/2018 that:

> 'the concept of sexual harassment will not be limited to physical contact, but lewd language and unilateral actions without physical contact would "generally" fall under Article 209. This applies when there is no repeated conduct towards the same person.'

Art. 199 on sexual harassment demands conduct to be repeated to an extent it "could be likened to bullying" or conduct that is suited to cause the victim fear or concern. Recent findings of the Court of Appeals support this position, for example, in case 207/2018 where the court found that repeated sending of unsolicited pictures of genitalia and offers to buy sexual services from a woman amounted to sexual harassment.[682]

The decision of recognising conduct as lewd or as sexual harassment seems to depend not only on the awareness and attitude of the victim towards the conduct but also on the extent of the conduct. The fact that contact does not necessarily take place between the victim and the perpetrator also weight digital forms of sexual communications towards the provisions on lewd conduct than sexual harassment. Nevertheless, repeated acts of lewd conduct are considered to amount to sexual harassment and a 'more serious' offence. This formulation raises serious questions when it comes to sentencing because there is a lack of correspondence between repetitive conduct and a single instance offence. The former carries a lower maximum penalty than the latter: the maximum penalty for sexual harassment is two years' imprisonment but lewd conduct carries a four-year maximum term.

### iii. Lack of Privacy Protection

As established in chapter one, digital violations of sexual privacy can be a part of a bigger pattern of harmful behaviour such as domestic abuse or coercive relationships.[683] As established in the findings of the Supreme Court, in case 508/2015, the unauthorised sharing of intimate and sexual material with a third party can amount to a sexual offence under both Art. 209 GPC on Decency and Art. 233b GPC on domestic abuse. The court did not accept the defendant's defence that the clauses applied to the same issue and, therefore, could not be jointly applied. The finding is an important recognition of the twofold harms at stake - sexual offence and privacy violation.[684] The domestic abuse clause only applies in cases where the court deems the relationship between the victim and

[682] *Ákæruvaldið gegn Elvari Daða Guðjónssyni* [2019] Landsréttur 670/2018.
[683] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81); McGlynn, Rackley and Houghton (n 4); Benediktsdóttir and Gunnlaugsdóttir (n 134).
[684] McGlynn (n 121).

the perpetrator to fall within the scope of the clause, therefore, there are limits on the extent of feasible extrapolation and application of the findings.

The explanatory report to Art. 233b GPC sets out that the protection afforded by the clause is aimed at a wider set of relationships than solely between current spouses. The protection applies to actions that take place within "a close social relationship" that will be defined by common standards as intimate, for example, the relationship between former spouses or between a parent and estranged child. Court of Appeal case 79/2018 provides an example of this interpretation, whereby the Court looked at both the duration of the relationship as well as the nature of the relationship. Even if the defendant and the victim were not considered spouses, it was established that the victim had resided at the defendant's home and that they had a sexual relationship. The facts of the case further exposed a power imbalance between the parties and that the victim had been financially dependent on the defendant.

The distinction between whether a relationship enjoys the protection of the domestic abuse clause, or not, has been assessed in the jurisprudence on the duration of the relationship. On this issue, there is no clear line as exemplified in three cases discussed below. In all the cases, the relationships between the victim and the accused had lasted around a year. The courts took note of other factors in the relationships, such as whether the parties had lived together, but the application of the relevant clauses was not fully consistent. In Supreme Court case 312/2015, a one-year relationship between an 18-year-old boy and a 17-year-old girl was not found to amount to a close relationship because of the relatively young age of the parties. He was thus found not to have violated Art. 233b GPC by sharing sexual images of the girl on his Facebook page. In the findings of Reykjanes District Court, in case S-158/2018, the parties had been in a relationship and had lived together for one year. Even if their relationship had recently ended, they were found to be in a close relationship that triggered the application of the domestic abuse clause. He was on the other hand not found in violation of the lewd conduct clause as his motives for sharing an intimate image of his former girlfriend was anger, not sexual gratification. In the Reykjavík District Court findings in S-670/2018 the parties had been boyfriend and girlfriend for a year, meeting regularly but never living together. The defendant had posted degrading comments about his girlfriend and shared intimate images of her without consent. This was found to amount to violations of both lewd conduct and domestic abuse.

As discussed in chapter two, technology has had a strong impact on interpersonal communication, not least in the context of dating and other intimate communication.[685] People can engage in very intimate and sexual communication without having established a physical relationship that matches the intimacy of the digital communication.[686] At the same time, the jurisprudence indicates a digital violation of sexual privacy will only be recognised as both a privacy violation and a sexual offence in cases where the Court deems a relationship between the parties sufficiently intimate. Thus, it is the court's assessment of the parties' relationship that decides the scope of criminal protection, rather than the nature of the communication that has taken place between the parties. Until February 2021, if a victim wanted recognition that their privacy had been violated, and that violation had not taken place within a longstanding relationship, they would have had to issue private criminal charges on the grounds of Art. 228 GPC. This limitation raises concerns about the criminal provision on privacy. Irrespective of the nature of the communication that has taken place, protection is limited to parties deemed by the courts to be in a close relationship. The legal framework, thus, only affords fragmented protection of the right to privacy, which does not consider the challenges brought by the advent of digital communications.

### c. Summary

The findings of the case law review support the thesis of the legal framework being inadequate to protect the sexual privacy of individuals. There are both gaps and overlaps in the legislation. This results in a fragmented and inconsistent application of the law and could be a contributing cause of victims' lack of trust in the criminal justice system, as described by Jóhannsdóttir et. al..[687] As highlighted by most the interviewees and discussed in the case law analysis, there is uncertainty within the police about the application of law which might in turn be a result, rather than a cause, of an inconsistent legal framework. Benediktsdóttir and Gunnlaugsdóttir, who assess the prosecution of digital violations of sexual privacy, come to similar conclusions when they recommend a specific clause on the issue.[688] As I demonstrate below, with a reference to the case law review, the legal provisions up until February 2021 were not fit for purpose and called for criminal law reform.

## 5. Act no. 8/2021 on Sexual Privacy

[685] Palfrey and Gasser (n 7); Waldman (n 284).
[686] Henry and Powell, 'Beyond the "Sext"' (n 4); Rannsóknir og greining (n 168).
[687] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12).
[688] Benediktsdóttir and Gunnlaugsdóttir (n 134) 429.

## a. Earlier Legislative Efforts

Until February 2021, the Icelandic General Penal Code did not contain a specific clause criminalising the unauthorised distribution of sexual or intimate content. Two bills were each presented twice to parliament to amend this from 2015–2020. Björt Ólafsdóttir, MP for the 'Bright Future' Party, twice presented a bill aimed at criminalizing revenge porn to the Parliament, most recently in January 2016. The commentary to the draft bill states that it draws on the UK Criminal Justice and Courts Law enacted in April 2015.[689] It further stipulated that the presentation of the bill to parliament was rooted in the notion that such serious attacks on a person's integrity, which was protected under human rights, could not be left unaddressed by the criminal legislation. Although current legislation allowed some protection, further legislative actions were needed to provide victims of revenge porn sufficient protection to personal integrity and privacy as enshrined in the European Convention on Human Rights.[690] Neither of the bills were passed as legislation because, during the parliamentary consultation process, concerns were raised regarding their effectiveness in practice.

Helgi Hrafn Gunnarsson, MP for the Pirate Party, also twice submitted a bill to introduce a specific clause in the GPC to address digital violations of sexual privacy. Both bills enjoyed cross-party support. The first was presented in 2018 and was aimed at clearly stipulating the criminality of unauthorised online sharing of intimate images. It was proposed that the provision would become Art. 210c in the section of the sexual offence of the GPC. The explanatory note to the bill discussed the distinction between the conduct in question and pornography as is prohibited to distribute under Art. 210 GPC. The bill did not progress through the parliamentary process.[691] In the next parliamentary session, the MP introduced a bill with the same title and the same purpose, but containing some substantial amendments that reflected comments received during the parliamentary deliberations of the previous bill. As stated in the explanatory memorandum to the bill, it built on recent Swedish legislation, including the different levels of guilt. It also provided a six-year penalty framework for serious violations, with the intent to ensure adequate police investigative powers. During the consultative stage of the parliamentary process, the content of the bill drew, on the one hand, strong support from NGOs working in the field while, on the other hand, the State Prosecutor and academics raised serious formal and legalistic issues. Subsequently, the bill did not progress through parliament.

[689] 'Criminal Justice and Courts Act 2015' <https://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted> accessed 20 August 2020.
[690] Frumvarp til laga um breytingu á almennum hegningarlögum, nr. 19/1940 (bann við hefndarklámi) 2015.
[691] Frumvarp til laga um breytingu á almennum hegningarlögum, nr. 19/1940 (stafrænt kynferðisofbeldi) 2017.

## b. White Paper and Consultation

In October 2018, I was commissioned by the Icelandic Prime Minister's Office to write a report on image-based sexual abuse in Iceland and propose reform. The report partly relied on my research conducted for this thesis, but I expanded my research from the legal framework to include information about policy measures. For this purpose, I interviewed representatives of stakeholders in England and Denmark who provide support services for victims of digital forms of sexual violence and gender-based violence. In England, I consulted the *SPITE* project at Queen Mary University of London that offers free legal aid to victims of image-based sexual abuse and the *Revenge Porn Helpline*, a UK service supporting adults who experience intimate image abuse.[692] The consultations took place over the phone, in email communication and physical meetings in London in 2019. In Denmark, I consulted with *Danish Women's Rights* and the organisation *Digital Ansvar*. In April 2019, I was invited to speak at the *Digital Ansvar* annual meeting in Copenhagen to discuss my doctoral research and the consultative work for the Icelandic government. I also had telephone meetings with the Danish Chapter of *Save the Children* regarding their hotline and support service for child victims of online sexual abuse.

The preliminary findings of my report concluded that the legislative protection of sexual privacy (under the legislation existing at that time) was not up to date considering the technological advancement in communication. Consequently, people had insufficient protection, even though they should enjoy an effective level of protection under the European human rights framework. I reported that such conditions warranted a mixture of legislative and policy responses. The preliminary findings, presented at an open event at Reykjavík University on 18 February 2019, called for a new clause on image-based sexual abuse, amendments to the clause on child sexual abuse material and a range of other policy measures. A range of stakeholders attended the event, allowing for feedback from prosecutors, government officials, Members of Parliament, academics, students, and staff from women's shelters and victims support centres.

The final report was published in January 2020 and includes recommendations for policy and legislation.[693] It recommends a tailored legislative response built on a dualistic framing of the issue that recognises both the violation of privacy and the sexual nature of the crime. Proposed changes in the GPC thus affect the chapter on both sexual and privacy violations. Two changes are suggested to the chapter on sexual violations: a new clause 199a on sexual privacy and amendments to clause 210a on CSAM. A revision is proposed of clauses 228 and 229 on privacy, including an amendment

[692] 'Revenge Porn Helpline - 0345 6000 459' <https://revengepornhelpline.org.uk/> accessed 20 August 2021; 'Images Based Sexual Abuse (SPITE) - Legal Advice Centre' <http://www.lac.qmul.ac.uk/clients/advice/revenge-porn-free-legal-advice/> accessed 20 August 2021.
[693] Bjarnadóttir (n 9).

of clause 242 on public prosecution for privacy violations. Finally, amendments are proposed to Art. 88 in the Code of Criminal Procedure to allow for police investigatory powers in sexual privacy violation cases.

Any amendments to the legal framework need the support of strong policy reform to ensure efficient implementation and enforcement of the legislation. This also contributes to the wider societal impact of the legislation and potential preventive effects. Focused training, education and prevention that is directed at both possible victims and perpetrators might reduce the number of violations taking place. To this end, a threefold policy reform was recommended.

1) Age appropriate information and preventive material should be made available building on knowledge, current institutional frameworks and in cooperation with NGOs. In this context, thought must be given to underlying harmful views that may manifest in breaches of sexual privacy as well as enhancing digital security skills among citizens of all generations.

2) A three-part system update within the criminal justice system. First, this entails both professional and practical training of staff within the criminal justice system to ensure a basic level of skills as well as better informed personal and specific cultural attitudes with regards to violations of sexual privacy. Second, the system update should include revision of protocols and internal guidelines. Streamline protocols in terms of investigation, evidence gathering and communication with third parties such as online intermediaries or online content hosts. Third, a supported roll-out within the system. Those working within the criminal justice system need to be introduced to the nature and content of the legal amendments and any subsequent policy changes, especially regarding updates of internal protocols and support for victims.

3) Comprehensive support for victims. Establishing legal, technical and psychological support for victims that builds on existing support frameworks within the criminal justice system. Advice should be made available to the public, including access to information about the next possible steps for victims, irrespective of if they choose to take their case through the criminal justice system or not.

The policy proposals were accepted by the Icelandic Government who instructed the National Commissioner of Police to implement the proposals as a whole from 2021 onwards.[694]

[694] Félagsmálaráðuneytið and Dómsmálaráðuneytið, 'Fara í viðamiklar aðgerðir gegn stafrænu ofbeldi' *Stjórnarráðið* (Reykjavík, 28 April 2021) <https://www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2021/04/28/Fara-i-vidamiklar-adgerdir-gegn-stafraenu-ofbeldi-/> accessed 20 August 2021.

## c. The Sexual Privacy Act no. 8/2021

In the summer of 2020, I was commissioned by the Icelandic Minister of Justice to draft legislation based on my recommendations for criminal law reform. The Sexual Privacy bill proposed amendments to both the chapters on sexual violations and privacy violations in the GPC.[695] In line with the Minister's request, the bill did not include my proposal for amending the clause on CSAM.[696][697] The amended bill passed into law in February 2021 as Sexual Privacy Act no. 8/2021.

The bill proposed a new Art. 199a, situated after Art. 199 on sexual harassment in the sexual violations section of the GPC. The positioning means that the violation is classified as a sexual offence by placing it in the relevant chapter but still addresses the privacy core of the violation in its framing. The sexual offence classification ensures victims access to legal aid and recognises the socio-cultural context of sexual harm. The clause is two-tiered, allowing for a harsher sentencing framework in cases of malignant, targeted or mass violation of sexual privacy. It neither demands that the perpetrator had intent to cause harm, nor indeed that direct harm was caused by their action. It takes note of the possibilities presented by 'deep-fakes'[698] and, to address the underlying interests at stake, approaches technology and other associated media in a neutral way. Additionally, the framing is targeted at personal rights that the clause aims to protect, rather than the social and moral context the provisions (which were scarcely applied) rely on.

The amendments to Art. 228, 229 and 242 of the GPC mean that victims of digital violations of privacy do not have to pursue their case through the criminal justice system themselves because public prosecution will apply to cases of privacy violations. As I stated in the report, the current criminal protection offered to privacy rights in Icelandic legislation are outdated and do not consider the impact of electronic communication in the last decades, nevertheless, such discussion and subsequent legal reforms to correct this problem fell outside the remit of the report. Though a comprehensive review of the GPC chapter is timely, it is important that current frameworks provide minimum safeguards for sexual privacy, as was proposed in the bill. The statutory distinction between injured parties, which depends on their relationship with their perpetrator, should be

[695] Frumvarp til laga um breytingu á almennum hegningarlögum (kynferðisleg friðhelgi) 2020 [296].
[696] This was due to an ongoing revision of the clause by the standing committee on penal issues. The revision resulted in a bill proposing a revised Art. 210 c on CSAM that included my proposal on decriminalising consenting sexual communication between 15 – 18 year olds. It did not progress through parliamentary review before the end of the parliamentary session in the spring of 2021. Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940 (barnaníðsefni, hatursorðræða, mismunun o.fl.) 2020 [1189].
[697] Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940 (barnaníðsefni, hatursorðræða, mismunun o.fl.) 2020 [1189].
[698] Chesney and Citron (n 194).

eliminated. Serious violations of privacy should be prosecuted under the public prosecution system and should not rely on the injured party taking action.

The course of the bill followed the prescribed process, including public consultations and parliamentary scrutiny. The Minister of Justice, Áslaug Arna Sigurbjörnsdóttir, presented the bill to the Althingi on November 17, 2020, gaining cross-political support in the first plenary discussion. She highlighted the impact of technology on interpersonal and mass communication and stated that the bill was aimed at ensuring adequate legal protection in an increasingly digital world.[699] During parliamentary consultations, the bill received favourable comments from stakeholders, including NGOs and the Prosecutors Association. The District Prosecutors office called for amendments to the CSAM provision in addition to the bill and, to ensure better synergy between the proposed clause and the wording of the CSAM provision, offered minor changes to the wording of the proposed Art. 199a.[700] The State Prosecutor welcomed the bill and suggested amendments to the wording of Art. 199a. She further submitted the maximum sentence for sexual harassment should be raised from 2 to 4 years, and that the amendments to the privacy section in the bill should be subject to more substantial discussions, before progressing through the parliamentary process.[701]

Following the second reading of the standing committee, amendments were made to the wording of Art. 199a to reflect the points highlighted by the State Prosecutor. No substantial changes were made. The committee's designated member, Ævarsdóttir, proposed the bill with the amendments on 3rd February 2021. After its third plenary discussion, the bill was enacted into law as the Sexual Privacy Act on 22nd February 2021.[702]

# 6. Conclusion

In this chapter I have discussed the case study I conducted in my native Iceland. I started by introducing fundamental issues about the country: how state power is divided and the impact of the ECHR on the Icelandic judicial and legal system. Then I explained the feasibility of Iceland as a case study for the issue and how it is an active participant in international and regional human rights cooperation and is bound by main international and regional legal instruments such as ECHR (through the Council of Europe) and the European Internal Market (the result of regional conventions). The socio-economic factors are favourable for a study about digital issues, legal

[699] *Umræður um 267. mál á 21. fundi, 151. löggjafaþingi, 17. 11. 2020* (2020) <https://www.althingi.is/altext/upptokur/lidur/?lidur=lid20201117T153432> accessed 20 August 2021.
[700] District Prosecutor, 'Comments to the Standing Committee on Judicial and Education Affairs' (2 December 2020) <https://www.althingi.is/altext/erindi/151/151-788.pdf> accessed 20 August 2021.
[701] State Prosecutor, 'Comments to the Standing Committee on Judicial and Education Affairs' (3 December 2020) <https://www.althingi.is/altext/erindi/151/151-820.pdf>.
[702] Lög um breytingu á almennum hegningarlögum, nr. 19/1940 (kynferðisleg friðhelgi). 2021.

recourse and gendered contexts because Iceland has the highest per capita ICT use in the world, strong public trust in institutions and is a world leader in gender equality.

I explored the relevant legal framework and academic literature, conducted an extensive case law review on all levels of the judiciary and collected and analysed empirical evidence on the application of the legal framework with elite interviews. I assessed the existing legal responses to digital violations of sexual privacy to be insufficient, with gaps and overlaps in the criminal legislation and a lack of structural power and specific provisions to provide appropriate legal protection.

Based on this work, I was commissioned by the government to draft a white paper on the gaps and overlaps I had found and to submit suggestions for reform on a national level. I proposed criminal law reform followed up by threefold policy measures. Subsequently, I was commissioned to draft a legislative bill based on my proposals. These were proposed to parliament in November 2020 and enacted into law in February 2021. My policy recommendations have been funded by the Icelandic Government who tasked the National Commissioner of Police to lead their implementation by the end of 2022.

The chapter thus reflects a case study of the issue but also addresses the knowledge exchange and legislative impact of the case study. Additionally, it details the outcome of work that ran in close parallel with the writing of this thesis.

# Conclusion

In this conclusion, I primarily offer my recommendations for state responses to violations of sexual privacy online. I begin by discussing my proposals for legal reform, which is consistent with the Icelandic legislation on sexual privacy discussed in chapter four.[703] I explain why victim-centric criminal reform based in human rights is the most appropriate legal response to violations of sexual privacy online. To ensure effective implementation of the legal reform, I then recommend policy measures to go alongside the criminal reform. The actions I propose relate to a wider context, normative impact of the legislation, including an awareness raising campaign, updating relevant protocols and guidelines, and strengthening the support available to victims of violation of sexual privacy online. Finally, to get a sense of emerging issues in this field, I also address future research areas and upcoming research projects.

## 1. Responding to Violations of Sexual Privacy Online – a Holistic Approach

### a. Criminal Law Reform

In chapter one, I propose the framing of *sexual privacy* in a victim-centric approach, which is grounded in recognising harms rather than focusing on the intent of perpetrators, that accounts for a range of manifestations in play. I argue that a violation of sexual privacy constitutes the creation of an image, text or similar material of nudity or sexual conduct of another person, including falsified material that is either acquired for themselves or others, distributed or published, and, at any time in the process is carried out without consent of the person or persons depicted. Such action amounts to a two-fold violation of the right to privacy as defined by the European Convention system. Concerning the positive obligations of states bound by the ECHR, I argue that effective legal safeguards must be in place to offer redress to victims of violations of sexual privacy online. The Convention system is based on a subsidiary approach, leaving it to states to afford the appropriate legal protection in line with domestic legal and normative frameworks. Thus, states that do not offer a criminal response to online violations of sexual privacy can approach the issue from a civil law perspective, including tort-based responses. My findings, nevertheless, suggest that a criminal response is the most effective approach for a state to meet their obligation to safeguard against online

[703]An English summary of proposals for the Icelandic Government is available at: María Rún Bjarnadóttir, 'Kynferðisleg friðhelgi - umfjöllun og ábendingar til úrbóta' (Forsætisráðuneytið 2020) 10–12; the legislation is available in Icelandic at: Lög um breytingu á almennum hegningarlögum, nr. 19/1940 (kynferðisleg friðhelgi). 2021.

violations of sexual privacy, preferably one that is followed up with policy measures, as discussed in section two of this chapter.

The reasoning for this approach is not only rooted in the positive obligations of states bound by the European Convention system but also, as discussed in chapter two, because clear and tailored criminal legislation is the most effective response to the multifaceted challenges the Internet creates for safeguarding sexual privacy online,. Criminalisation through domestic legal reform can constrain such violations further than the immediate face of legal consequences and, thus, can impact on all four of Lessig's modes, that is, regulation, norms, markets and code (the protocols governing the flow of information online).

Criminalisation has a deterring effect and contributes to a normative shift towards a victim-centric human rights. A criminal statute protecting sexual privacy online provides stronger tools of enforcement to respond to market fuelled violations of sexual privacy online, creating an incentive for platforms to facilitate the protection, rather than violations, of such rights. I do recognise this will not have a 'constraining' effect on bad faith actors in the Internet ecosystem. This however does not have an adverse impact on my proposals. In the online ecosystem, just as in any other area that operates on market terms, there is a risk of market players that wilfully subvert regulatory frameworks. This should not deter the state in performing their role in protecting and promoting effective exercise of fundamental rights in the online sphere. It further warrants a specific discussion on how to curb bad faith players operating in the online ecosystem, irrespective of the safeguarding of sexual privacy online. Additionally, as discussed on chapter three, the ECtHR has already recognised that states can hold platforms to different standards of liability due to their actions.[704] Furthermore, clear guidance through criminal statute can help shape the parameters of code. I agree with Lessig that code is law, but law can also shape code. To adapt Lessing's analogy, the traffic flow is not a one-way street from *west code* (makers of internet architectures and infrastructures) to *east code* (the legislative institutes), instead, it is a two-way street: the discourse and actions of one side will affect and shape the other side.

## b. Legal Responses

In drafting a criminal response to online violations of sexual privacy, I am mindful of Citrons warning that 'Law´s potential to combat sexual privacy invasion is important yet modest. Law is a blunt instrument – society is not better off if law overreaches.'[705] I also take note of what McGlynn and Rackley highlight, that ad hoc legislation or a legislative response to a specific issue can fail to

[704] *Delfi v Estonia* (n 60); Spano (n 288).
[705] Citron (n 69).

meet the objective of the legislation.[706] Government responses must assess the domestic context from a cultural, social and legislative perspective. Any response that is disproportionate runs the risk of missing the mark, and may even prove counterproductive.[707] An overzealous approach could pose a threat to the protection of free expression, while an insufficient response can undermine the significance of the violations. Therefore, legislative responses should be tailored to the purpose, and must simultaneously protect individuals from harm without encroaching on their rights to enjoy free expression.[708]

The criminal framing of the legal response also brings challenges. Henry and Powell argue that evidence indicates that gaps in legislative responses to newly emerging harms rooted in the digital revolution does not adequately capture the scope, nature or intersections of harms[709] and that this is specifically evident in cases of online abuse and harassment.[710] They argue that criminal law provisions used in cases of online sexual privacy violations are ill-equipped to tackle the gendered harms arising from such behaviours due to the lack of law in comparison to technology, which leaves the legal redress ill-fitting, outdated, inconsistent and poorly enforced.[711] Their concerns are valid and important to take note of. I build on this point to argue for a criminal response, as it is essential that legislation keeps track of technical advancements in society. Computer crimes are evolving phenomena with a variety of criminal conducts ranging from computer abuse to cybercrime alongside the introduction of a similar variety of new terminologies.[712] Walden even proposes that such a framing can contribute to bring attention and urgency to the issue.[713] If a state does not respond to the challenges the online sphere presents for harmful acts, such as violations of sexual privacy, the law risks deterioration or loss of meaning through lack of enforcement. This further highlights that a criminal reform aimed at safeguarding fundamental rights in the online sphere should be approached with the same standards of care as the enforcement of other criminal provisions. The police must exercise caution and adhere to the assumption of innocence unless proven otherwise. Sentencing guidelines must consider what is efficient and what will create further problems down the line. These are risks that can be mitigated by careful drafting of the statute, not least through effective follow up and training of the police about the legal reform, as I propose in section two of this chapter.

[706] McGlynn and Rackley (n 8).
[707] 'The Trouble with "Hate", by Liz Kelly at @strifejournal' (*A Room of Our Own*, 18 September 2017) <http://www.aroomofourown.org/the-trouble-with-hate-by-liz-kelly-at-strifejournal/> accessed 20 August 2021.
[708] Henry and Powell, 'Beyond the "Sext"' (n 4) 115.
[709] Powell and Henry (n 155).
[710] Henry and Powell, 'Technology-Facilitated Sexual Violence' (n 81).
[711] Henry and Powell, 'Beyond the "Sext"' (n 4); Powell and Henry (n 155).
[712] Walden (n 395) 11.
[713] ibid 9.

Criminal law reform aimed at safeguarding sexual privacy online should take note of the following issues.

**Human Rights Foundation**

It is paramount to shift the foundation for the legislation from moral impediments into a rights-based approach. A fundamental factor in this assessment entails framing the offence as a violation of privacy, not as a moral issue such as pornography or decency, but the issue of freedom of expression should not be forgotten. Sexual images should not automatically be considered violations of the privacy of those depicted. Sexual expression enjoys the protection of both freedom of expression and privacy, and can be an important part of shaping individuals' identities.[714] It is unrealistic to assume that technological advancements in communication will not affect the form and content of sexual relations between individuals, just as with other aspects of human communication. Thus, care must be taken that legal responses to protect sexual privacy do not restrict sexual relations that occur with consent, will and awareness of all concerned.

The rights of young people should further be given due attention in this context. As discussed in chapter one, there is a risk of over criminalising consensual sexual communication between teenagers by a well-meaning approach to safeguard the children from any sexual communication. Despite the clear importance of safeguarding children on- and offline, they also have a freedom to express themselves, and sexual expression can play a fundamental part in shaping identity and self-image that enjoy the protection of the right to privacy. This is particularly important for LGBT+ youth. A criminal response to online sexual privacy should thus be age responsive and take a balanced note of the rights of young people, not only the obligation to safeguarding them.

**Victim- Centric Approach**

McGlynn and Rackley say that 'an individual´s awareness of a picture being taken, or even taking it oneself, is not determinative of consent',[715] because 'consent to one course of action is not consent to another.'[716] Placing a firm focus on the consent of the victim also allows for the criminalisation of further violations. An example of such violations is the subsequent distribution of content that violates the sexual privacy of others. By emphasising consent, a person who is forwarded intimate content from others will have to seek the consent of the person depicted, or otherwise be faced with possible criminal sanctions. A consent focused approach further contributes to placing consent at the centre of all sexual offences, highlighting that the interest at stake is sexual autonomy, a core aspect of privacy as a fundamental rights.

[714] Citron (n 69).
[715] McGlynn and Rackley (n 8). 543.
[716] ibid 544.

McGlynn and Rackley rightfully identify the issue as gendered and place it on the 'the continuum of sexual violence'. By placing the issue on the continuum it is framed as a part of structural violence against women and, consequently, calls for legal and policy reform that acknowledges the 'seriousness' of the acts.[717] This can be echoed in the legal response by framing the violations as a sexual offence, and by shifting the focus of the offence from the perpetrators intention and to the effect the violation has on the victim.

**Forward Thinking Framing**

As discussed in chapter two, the 'male gaze' has proved a useful perspective in expanding and solidifying the strong position the Internet holds in modern day societies. As the evidence shows, and as discussed in chapters one and two, this development has come at a cost for women and marginalised groups that are adversely affected by digital manifestations of sexual abuse. The ongoing development and deployment of Virtual Reality (VR) and Augmented Reality (AR) examples of progressive technological solutions that can be utilised to re-enforce outdated, harmful norms and actions. Other potent examples of this development are deep-fakes and other means of content editing that can be used to produce harms related to online sexual privacy, subverting the legislative framing of the issue. It is therefore vital that criminal reform aimed at safeguarding online sexual privacy is framed in a way that is future-proof with respect to technological development.[718] This can be done by refraining from references to specific platforms or means of communication in the legislation because they can quickly become outdated. Rather, the framing should take note of traditional conceptualisation in law.

## c. Policy Measures

As Henry and Powell highlight, a criminal law intervention against digital violations of sexual privacy are important, but that it is not in itself a sufficient measure. The persuasively argue equal attention must be given to policies and practices of educators, law enforcement agencies, online communities and social media networks to fulfil the promise of equal and ethical digital citizenship.[719] As was mentioned by interviewees in the Icelandic case study, legal reform does not mean an automatic change in attitude. This applies both to the attitudes of the public and in terms of the police force. To facilitate a successful implementation of criminal law reform, I propose that legal reform is followed up with policy measures that support the goal of the legislation and contribute to reshaping normative understandings of sexual privacy online, improving the criminal

[717] McGlynn and Rackley (n 8); McGlynn, Rackley and Houghton (n 4).
[718] McGlynn and Rackley (n 8).
[719] Powell and Henry (n 155).

justice systems handling of sexual privacy violations, and better supporting victims. The policy measures are aimed at contributing to the wider societal impact of the legislation and the possible deterrence effect of the legislation. Focused training, education and prevention directed both at possible victims and perpetrators could also reduce the number of violations taking place. To this end, a threefold policy reform is proposed. The measures are the same as I proposed to the Icelandic government in connection with the criminal reform enacted in February 2021. Although cultural, social or other specific circumstances could warrant an adapted version of the structure or roll out of the recommendations, the fundamental approach allows for a holistic response to online violations of sexual privacy.

**Age responsive information and prevention systematically made available**

Because online interpersonal communication will continue to take place, including in intimate settings like dating, age responsive information and preventive material should be made available on a continued basis and not just as a one-off awareness-raising campaign. The normative shifts discussed in chapter two, and the gender -ased harms discussed in chapter one highlight that, if not addressed, harmful gender stereotypical ideas will continue to flourish online and can contribute to digital violations of sexual privacy. In light of the statistical evidence, specific measures should be deployed that target teenage boys and young men educating them about the harms caused by violations of sexual privacy. If successful, such efforts would contribute to safer use of technology in intimate communication, and reduce demand for distribution of content that violates the sexual privacy of others. Awareness raising may also deter violations of sexual privacy by raising awareness of the new legislation and the sentencing guidelines of the law.

As discussed in chapter two, there is no evidence that establishes a link between using online pornography and violating the sexual privacy of others online. Nevertheless, as Vera-Grey et. al. highlight, violations of sexual privacy serve as a sexual script in online pornography.[720] Because men are the main perpetrators of such violations, and by far highest consumers of online pornography, awareness raising might help teenage boys and young men to conceptualise their use of online porn and contextualise the harms caused by the unauthorised sharing of content to such platforms.

For effective deployment and efficient use of resources, it will be important for public authorities involved in awareness raising initiatives to build on institutional frameworks and ensure cooperation with NGOs that operate in the field.

**System update within the criminal justice system**

[720] Vera-Gray and others (n 356).

The elite interviews, discussed in chapter four, revealed that, internal procedures, training, and protocols in the handling of sexual privacy cases were all lacking within the Icelandic criminal justice system. Similar findings have been reported from police in Sweden, Australia and the UK, indicating an institutionalised skills and knowledge gap that may be contributing to the failing standards of handling cases of violations of sexual privacy online.[721] As discussed in chapter one and two, signs indicate the online will continue to be a prevailing area of policing. It is important to respond to skills, knowledge and procedural gaps in order to prevent an even bigger gap that might prove even more difficult to bridge later on.[722] The measures aimed at strengthening the handling of cases within the police are threefold:

- *Training of staff within the criminal justice system*. This both applies to professional and practical training to ensure a basic level of skills within the criminal justice system, as well as personal and specific cultural attitudes with regards to violations of sexual privacy. Ideally, the training would be available for police, prosecutors and judges.
- *Revision of protocols and internal guidelines.* Streamline protocols in terms of investigation, evidence gathering and communication with third parties such as online intermediaries or online content hosts. Revised classification of online violations would provide a stronger statistical foundation to build on with regards to estimates of recourses that, in turn, would contribute to more effective handling of cases. Standardising protocols across the police districts should facilitate a more uniform handling of cases that could help build victims trust in police handing of their cases and so move away from the negative expectations victims described, in 2017, to Jóhannsdóttir et. al..[723]
- *Supported roll-out within the system*. Those working within the criminal justice system need to be systematically introduced to the nature and content of the legal amendments and any subsequent policy changes. This particularly applies to support available to victims and updates of internal protocols. Innovative and interactive methods for information sharing can be harnessed in order to create active engagement from the staff.

**Comprehensive support for victims**

Establishing legal, technical and psychological support for victims that builds on reigning support frameworks within the criminal justice system. The public should know where to seek advice and access to information about next possible steps for victims, irrespective of whether they choose to take their case through the criminal justice system or not. As victim support is both sensitive and

[721] Bond and Tyrrell (n 229); Henry, Flynn and Powell (n 110); Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 12); 'Polisanmälda hot och kränkningar mot enskilda personer via internet - Brottsförebyggande rådet' (n 455).
[722] Wall (n 118); Walden (n 395).
[723] Ásta Jóhannsdóttir, Hari Helenedatter Aarbakke, Randi Theil Nielsen (n 35).

vital, it is important to seek cooperation with experts and NGOs working in the field when designing and deploying any support arrangements for victims.

# 2. Implications and Future Research

## a. Effects of criminal reform and policy measures

In cooperation with the research department for the National Commissioner of Police, I will be monitoring the effects of the implementation of the adopted legal and policy measures. The results will be published towards the end of 2022. The research monitors two specific parameters:

1) Police capacity to deal with online violations:

   The study monitors the correct implementation and effective use of the new measures and policies through a series of initiatives.

   - Every April in Iceland, police officers complete an annual survey. In 2021, the survey included questions of their capacity and understanding of a) digital violations of sexual privacy and b) investigation of digital crimes/violations in general. The questionnaire goes out again in April 2022 with the same questions to identify whether the measures are bringing about changes in understanding and implementation of the law together with associated training.
   - Better guidance for police in how to register violations of sexual privacy in the central police registration system (LÖKE). This includes peer-to-peer video training and central support.
   - A training series given by Internet platforms to increase police awareness of platforms and how they work (the four primary platforms in Iceland - Facebook, Instagram and TikTok have all agreed to participate)
   - Specialist training for investigators of digital sexual abuse with a focus on the new law and its application
   - New investigative protocols put in place to deal with child sexual abuse material and digital investigations

2) The reporting of online violations of sexual privacy

A nationwide prevention campaign aimed at young people will be rolled out in October 2021. It is intended to prevent online violations of sexual privacy and raise awareness about the issue with the public. To see how the new policies and measures affect the reporting of offences, the study:

- Compares the amount of reported cases against the amount of cases where victims seek assistance from support groups
- Measures reported cases before, during and after the campaign, with a further follow-up six-months later.

The thesis offers baseline parameters that can benefit in assessing the uptake and impact of the measures proposed and implemented in Iceland. The aim of measuring the effect of the legal and policy measures adapted is both to assess the real-life impact of the research and the measures enacted, but also to identify further areas of research. As the thesis builds on a multifaceted evidence base, including legal analysis, elite interviews and case law analysis, the replicability of the research allows for comparative analysis over the span of time going forward, helping to form an evidence based responses to criminal reform and the implementation of policy measures regarding other pressing social issues.

## b. Wider research issues

Technological developments, commercial interests, and regulation are fluid, interconnected arenas alongside normative public understandings of the boundaries of freedoms and privacy the public and the private, and online and offline. Sometimes change is rapid with far reaching consequences. The circumstances of violations of sexual privacy addressed in this thesis will, inevitably, change in time, perhaps quite soon. The following section extends the discussion to briefly consider a few issues that will be features in the landscape of coming debate.

As people make less distinction between their online and offline selves, the concept of privacy will be challenged and necessitate further examination of harms and responses. For example, the technological development and commercial success of virtual or augmented reality environments adds further complexity to the issue of 'rape in cyberspace'[724] because, as it blurs the borders between the public and private, it also blurs the line between what is virtual and what is real. This will raise issues of rights and responsibilities that can draw on existing discussion about the use of

[724] Julian Dibbell, 'A Rape in Cyberspace' *The Village Voice* (18 October 2005) <https://www.villagevoice.com/2005/10/18/a-rape-in-cyberspace/> accessed 20 August 2021.

Artificial Intelligence and automation in spheres of life usually dominated by human specific characteristics like imagination and creativity.[725]

With the rise of platforms like OnlyFans, where content creators provide sexually explicit material of themselves in return for monthly subscriptions, highlights issues of commodified content and the level of protection. Individuals who sell access to their content have a financial and personal interest in limiting re-distribution of that content. Would subsequent unauthorised sharing of this kind of content constitute a sexual offence harm? Must a person who sells limited access to their sexually intimate content recognise that the content does not enjoy any protection other than possible copyright (if it meets the originality test threshold) if distributed in a wider context? Behind today's headlines about freedoms to provide sex work other questions are waiting that concern how far the commodification of privacy removes privacy protection of sexual or intimate content.

The criminal response proposed in this thesis includes protection for victims of *deep-fake* violations of sexual privacy.[726] The efficiency of this specific legal redress remains to be explored and may not be appropriate in every jurisdiction. Guadamuz raises an interesting point about the possible revamp of image rights to respond to deep-fake pornography images that provides a firm ground for further discussion about regulatory responses to deep-fake images.[727]

The case law from the ECtHR regarding the contextual assessment of platform liability for user-generated content whether all platforms bear the same kind of liability. This question is particularly potent in the case of a 'bad faith' platform whose operation is not driven for financial gain. As discussed in chapter two, some of the efforts aimed at regulating online platforms may facilitate what I have framed as *the verified platform issue* that calls for deeper examination and research. The co-regulatory approach to regulating platforms demands a certain level of robustness within the organisation that takes on a platform role, something that will be more difficult for small entities and new players on the market. Similar concerns have been raised in relation to the recent Australian legislation that forces platforms to pay media companies for distributing their content.[728] How do we mitigate the risk of strengthening monopolies and current strong players, something that may hinder innovation and plurality in the online sphere? On the other hand, this may encourage privacy and respect for democratic principles by design, not only in the context of community guidelines and one-sided privacy policies and terms and conditions, but through a more robust self-regulatory

[725] A Guadamuz, 'Do Androids Dream of Electric Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works'.
[726] See discussion in chapter two: Chesney and Citron (n 194).
[727] Andres Guadamuz, 'Revamp Image Rights to Fight Deepfakes' (*TechnoLlama*, 29 December 2020) <https://www.technollama.co.uk/revamp-image-rights-to-fight-deepfakes> accessed 20 August 2021.
[728] Zoya Sheftalovich, '4 Takeaways from Facebook's Australian Brawl' *Politico* (2 March 2021) <https://www.politico.eu/article/4-takeaways-facebook-australia-brawl/> accessed 20 August 2021.

framework for platforms that form a part of the co-regulatory solution. Nevertheless, the Chan sites of cyberspace will neither disappear nor adopt a human rights based framework to self-regulate. Will this mean we will end up with verified and non-verified platforms?

Challenges to policing the online sphere continue to call for further research. The tools and resources available to police must, as far as possible, keep up with technology, however, there are tensions between efficient monitoring and investigation by police (and similar policing partnerships with Internet platforms) and the protection of human rights. The recent decision by Apple to restrict sweeping for images for sexual abuse to files stored on user accounts on their cloud service, rather than the files stored on private iPhones, is an early navigation of this field. Further questions are raised by the combined use of facial recognition and AI software installed in public places.[729] These are issues that demand further exploring.

The research avenues leading from this thesis are layered, much like the thesis itself. The nexus between technology, norms related to sexual privacy online in relation to virtual reality, deep-fakes and the commodification of privacy demands a robust regulatory discussion. To avoid further entrenching norms of harmful gender stereotypes, regulatory responses must be rooted in a rights based approach rather than a moral one. The impact regulation has on 'good faith' and 'bad faith' platforms and their operation in the online sphere also calls for further examination from a legal and market perspective. The challenges of policing the online sphere will remains a rich field for future research for many years to come.

[729] Orla Lynskey, 'Criminal Justice Profiling and EU Data Protection Law: Precarious Protection from Predictive Policing' (2019) 15 International Journal of Law in Context 162 <http://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/criminal-justice-profiling-and-eu-data-protection-law-precarious-protection-from-predictive-policing/10FD4B64364191B619FBCB864CD40A7F> accessed 20 August 2021; Rashida Richardson, Jason Schultz and Kate Crawford, 'Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3333423 <https://papers.ssrn.com/abstract=3333423> accessed 20 August 2021.

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