An Expressive Theory of Privacy Intrusions

Craig Konnoth[*]

ABSTRACT: The harms of privacy intrusions are numerous. They include discrimination, reputational harm, and chilling effects on speech, thought, and behavior. However, scholarship has yet to fully recognize a kind of privacy harm that this Article terms "expressive."

Depending on where the search is taking place and who the actors involved are—a teacher in a school, the police on the street, a food inspector in a restaurant—victims and observers might infer different messages from the search. The search marks the importance of certain societal values such as law enforcement or food safety. It can also send messages about certain groups by signaling the immaturity of children, the ignorance of women who seek abortions, the untrustworthiness and moral inferiority of prisoners, probationers, and parolees, and the danger of those with certain diseases. Conversely, searches emphasize the special social trust held by schools, parents, prison wardens, policemen, and the American public. The Supreme Court has, in many instances, recognized these effects.

By applying expressive theories of law to privacy law for the first time, this Article demonstrates how privacy intrusions help modulate and texture the status of groups in society. Furthermore, in the specific case of mass surveillance, expressive intrusions can alter the relative status of citizens and the government. The Article ends by providing a range of remedies, varying from ending the intrusion to (counterintuitively) making the intrusion routine or secret.

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[*] Sharswood Fellow and Lecturer in Law, University of Pennsylvania Law School. J.D., Yale Law School; M.Phil., University of Cambridge. My thanks to the participants of CrimFest 2016, the 2016 Privacy Law Scholars Conference, Loyola University Chicago School of Law Faculty Workshop, the Sixth Annual Constitutional Law Colloquium, Ben Barton, Alex Boni-Saenz, Julie Cohen, Laura Donahue, Dov Fox, Chris Griffin, David Hoffman, Margaret Hu, Chris Le Coney, Seth Kreimer, Wayne Logan, Sandra Mayson, Katherine Strandberg, Alex Tsesis, and Maggie Wittlin for helpful comments; to Taylor Goodspeed, Brian Ruocco, and Jeremy Carp for research assistance; and to Benjamin Meltzer for Bluebooking assistance.

I. INTRODUCTION

Intrusions upon our privacy have harmful consequences. As a result of intrusions, the information that is discovered can be put to uses that harm individuals, subjecting them to discrimination, identity theft, and reputational loss.[1] The information can be used in ways that stymie an individual's ability to curate her image, construct her identity, and develop and differentiate relationships.[2] In the long run, privacy harms can undermine democratic

1. Examples of this are far too numerous to list. Many are collected in exhaustive detail in HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 78 (2010) (explaining that internet use may cause an increase in identity theft and misuse of information).

2. *See* Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968) (arguing that privacy is fundamental for furthering relationships, including respect, love, and trust); Ferdinand Schoeman, *Privacy and Intimate Information*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 406 (Ferdinand D. Schoeman ed., 1984).

functioning itself:[3] The threat of scrutiny and the misuse of information renders an individual fearful of developing or expressing non-conforming thoughts or behaviors,[4] which can in turn prevent individuals from developing into mature citizens.[5]

Apart from these well-documented concerns, however, intrusions also have the capacity to harm even when no damning information is collected, where there is no chilling effect, and where the information once collected remains protected. Instead, the very act of intrusion sends a message about the values society holds dear and the status that particular individuals have in society.[6] Thus, certain searches—police frisks on the street, military investigations into sexuality, or government surveillance of welfare recipients—are harmful even if no damning information is found.[7]

This Article is the first to systematically identify these expressive harms of intrusions, by situating privacy theory within the literature on expressive theories of law. These theories claim that in addition to deterring certain activities through penalties, state action affects behavior because of the values it expresses.[8] For instance, segregating individuals or putting a crèche in the public square signal racism or pro-Christian preferences, which ultimately affect behavior.[9] While these theories have been applied to multiple subjects including property, tort, trade secrets, and tax, they have never been considered within the context of privacy law.[10]

This Article claims that privacy intrusions also have an expressive function, especially when carried out by the state. Law and custom recognize that, as a general matter, all individuals possess some kind of privacy right by default. Consequently, government actors frequently emphasize that departure from this privacy baseline occurs *only if* the victims of the intrusion somehow depart from the norm or lack social standing, or if the intruders

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3. *See* NISSENBAUM, *supra* note 1, at 75 (explaining Ruth Gavison's argument that privacy is necessary to cultivate "political judgments").

4. *Id.* at 82.

5. *Id.* at 87 (explaining Priscilla Regan's assertion that privacy has a "public value" and is important for supporting democracy); *see also* PRISCILLA M. REGAN, LEGISLATING PRIVACY 225 (1995) (explaining that privacy has a "public value" related to democratic goals); Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1927 (2013) ("Privacy furthers fundamental public policy goals relating to liberal democratic citizenship."); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 442 (1980) (explaining that privacy creates, inter alia, a liberal and democratic society).

6. *See infra* Part II.B (detailing the ways in which privacy intrusions signal certain societal values and individual status).

7. Surveillance and searches are both means of collecting information, among other things. What follows refers to the information gathering aspects of both, and this Article does not distinguish between them.

8. *See infra* Part II.A (describing the aspects of an expressive theory of law).

9. *See infra* Part II.A.

10. *See infra* note 44 and accompanying text (describing how expressive theories of law have been applied to various areas of law).

themselves have special social standing.[11] Observers who believe that state actors follow conventional behavior might therefore reasonably read state-sponsored disruptions as marking a special social status for the relevant groups.

Depending on where these searches take place and who the actors involved are—a teacher in a school, the police on the street, a food inspector in a restaurant—victims and observers might infer different messages from the search. The search marks the importance of certain values such as law enforcement or food safety. But a search can also send messages about certain groups: It can signal the immaturity of children, the ignorance of women who seek abortions, the untrustworthiness and moral inferiority of prisoners, probationers, and parolees, and the danger of those with certain diseases. Conversely, the search also emphasizes the special social trust held by schools, parents, prison wardens, policemen, and the American public.

State intrusions therefore powerfully shape the relative social position of the surveilled and the surveillors and their relationship with one another.[12] This relationship is intrinsically hierarchical: Instead of a two-way flow of information between intimates, information is extracted from one group (the surveilled) and consumed by the other (the surveillors). The intrusion therefore signals disrespect to its victims and suggests to others that the victim lacks social standing and regard relative to other groups and institutions in society. A victim who is conscious of the intrusion may find it violative because it signals that the state does not respect the boundaries that define her selfhood.[13] Furthermore, when the state is the intruder, the intrusion can affect the way she sees herself and her relationship with the state.

Finally, even if the victim is not conscious of the intrusion, systematic intrusions affect the perceived status of an individual in the eyes of observers.[14] When the intrusions target a particular social group, the status of the entire group—and the individuals within them—can be affected. The status of

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11. *See infra* Part III (detailing how privacy intrusions create status harms). Some may object to the fact that relative social standing sometimes justifies privacy intrusions does not necessarily mean that intrusions always express social standing. Just because social standing (S) sometimes implicates intrusion (P) does not mean that P implies S. Key to my argument, therefore, is the strict privacy baseline that society recognizes in usual circumstances. Except in rare circumstances, we justify departure from this privacy baseline *only if* questions of relative social standing in a particular context are at stake. In such a case, social norms develop such that privacy intrusions do in fact always, or nearly always, express questions of social standing. Finally, social standing questions only sometimes implicate privacy intrusions. On my account, it is possible for society to recognize that entities have different social standing without authorizing privacy intrusions. Hence, the logical equivalence only goes one way: $P \rightarrow S$; but $S \nrightarrow P$. *See infra* Part III.A (detailing how privacy baselines enable status harms).

12. *See infra* Part II.B (detailing how privacy intrusions may create specific harms).

13. *See infra* Part III.C (detailing how individuals and the public may internalize particular status expressions from privacy intrusions).

14. *See infra* Part II.B.2 (explaining how privacy intrusions impact how others see and judge the group surveilled).

individuals who never themselves suffer intrusions might be affected simply because they are members of the targeted group. Depending on the circumstances surrounding the intrusion, the status harm is more or less serious.[15]

Whether or not readers share these intuitions or are persuaded by the limited empirical work in the area,[16] as this Article shows, scattered constitutional case law has recognized these expressive harms.[17] This Article helps systematize and contextualize these observations.

The insights of this Article prove important for various purposes. First, conceptualizing the expressive harms helps respond to a set of scholars and policymakers who argue that data *collection* poses no harm if the data is kept secure. They advocate limiting only *use* of data.[18] Internet and privacy commentator, Michael Seemann, for example, argues that we should focus on "the true danger zones" where the use of data harms individuals, such as "[a]uthoritarian border controls, racist police cohorts, homophobic social structures, inequality in health and welfare systems, and institutional discrimination."[19] Similarly, Craig Mundie, former Chief Research and Strategy Officer and now Senior Adviser to the CEO at Microsoft, claims that "controlling the collection and retention of personal data ... is ... impractical" and "potentially cut[s] off future uses ... that could benefit society."[20]

In the policy context, proponents of restricting only use, rather than collection of information, are "steadily gathering momentum in the academy,

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15. *See infra* Part II.C (explaining how the scope, intent, and repetition of a privacy intrusion impacts the strength of the message being expressed).

16. *See infra* note 176 and accompanying text (detailing some of these empirical pieces).

17. *See infra* Part II.B (explaining how Fourth Amendment case law suggests that a majority of the Supreme Court recognizes the expressive harms caused by privacy intrusions).

18. Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 213–14 (2012) ("[T]he solutions put forward by privacy scholars tend to impose stringent restrictions at the dissemination and use stages of information flow."). Bambauer is one of the few to seek to impose limitations at the point of collection. *Id.* at 211. But apart from allusions to the "offensive" nature of intrusion, to satisfy the requirements of the intrusion tort, the harms she identifies generally arise from the misuse of information. *See id.* at 244–46 (describing the parameters of the tort of intrusion); *see also* Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2058 (2004) (explaining that property theories should be used to protect information privacy, which is primarily focused on "the use, transfer, or processing" of personal data).

19. MICHAEL SEEMANN, DIGITAL TAILSPIN: TEN RULES FOR THE INTERNET AFTER SNOWDEN 22 (2015).

20. Craig Mundie, *Privacy Pragmatism: Focus on Data Use, Not Data Collection*, FOREIGN AFF. (2014), https://www.foreignaffairs.com/articles/2014-02-12/privacy-pragmatism. *See also generally* Bert-Jaap Koops, *On Decision Transparency, or How to Enhance Privacy after the Computational Turn*, *in* PRIVACY, DUE PROCESS AND THE COMPUTATIONAL TURN: THE PHILOSOPHY OF LAW MEETS THE PHILOSOPHY OF TECHNOLOGY 8 (Mireille Hildebrandt & Katja De Vries eds., 2013) (arguing that people should cease to regulate data processing ex ante and should instead regulate decision-making ex post).

information industries, and public policy."[21] An important 2014 report released by the President's Council of Advisors on Science and Technology, *Big Data and Privacy: A Technological Perspective*, argues that "[p]olicy attention should focus more on the actual uses of big data and less on its collection and analysis," and dismisses "policies focused on the regulation of data collection" as "unlikely to yield effective strategies for improving privacy."[22] Philosopher Helen Nissenbaum similarly recounts attempts to shift Fair Information Practice Principles that guide privacy policies for state and private entities to focus on information misuse rather than intrusions themselves.[23] Existing legal doctrine also appears largely blind to the harms of mere information collection. Therefore, by showing how data collection itself can impose distinct status harms, this Article illustrates that limitations on use, by themselves, cannot address the harm of privacy intrusions.

The second insight this Article provides relates to equality theory. By arguing that intrusions carried out on the basis of specific characteristics help separate individuals into groups, and label those groups with ignominy, this Article demonstrates a vital link between privacy and equality. There is, to be sure, a literature that *incidentally* links inequality and privacy intrusions—for instance, scholars have shown how minorities such as women, especially those of color, and welfare recipients suffer intrusions.[24] However, while these

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21. Helen Nissenbaum, Must Privacy Give Way to Use Regulation (December 24, 2016) (unpublished manuscript) (on file with author).

22. EXEC. OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., REPORT TO THE PRESIDENT: BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE, at xiii (2014), https://bigdatawg.nist.gov/pdf/pcast_big_data_and_privacy_-_may_2014.pdf.

23. *See, e.g.*, FRED H. CATE ET AL., DATA PROTECTION PRINCIPLES FOR THE 21ST CENTURY: REVISING THE 1980 OECD GUIDELINES 8–11 (2014), https://www.oii.ox.ac.uk/archive/downloads/publications/Data_Protection_Principles_for_the_21st_Century.pdf. Ira S. Rubinstein, *Big Data: The End of Privacy or a New Beginning?*, 3 INT'L DATA PRIVACY L. 74, 81–83 (2013); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 256 (2013).

24. *See generally, e.g.*, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988); JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY (2001); CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA: FROM SLAVERY TO THE WAR ON TERROR (2003); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987 (2014); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011); Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389 (2012); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). But this approach does not truly link stigma and surveillance. In all these accounts, the harm of privacy invasion is usually conceptually quite unrelated to discrimination. Stopping the intrusion does not alleviate the underlying stigma. The minority remains stigmatized, but simply with one less burden to deal with. One exception to this general rule is Kimberly Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539 (2014), for whom the deprivation of privacy is what leads to concrete harms. But she also focuses largely on information misuse: "[P]oor people of color have limited opportunities in the creation of their life plans, participation in mainstream political discourse,

accounts are rich and complex, as a general matter, they present inequality or stigma as the root problem, which causes a range of negative consequences, such as denial of employment, housing, and civic participation, among others. Privacy intrusions are incidental to, and may or may not number among, these many harms. This Article shows that causality also works in the opposite direction: The root problem is the privacy intrusion while the equality harm is inevitably and integrally linked to the intrusion.[25]

Third, some scholarship, especially in the criminal context, has argued that courts and commentators pay far too much attention to privacy rather than dignity interests.[26] Sometimes borrowing from Fourteenth Amendment decisional privacy jurisprudence, many of these scholars have sought to uncouple dignity and privacy, arguing that while they overlap they are distinct concepts. They argue that we should focus on protecting dignity rather than privacy. This Article's goal is to show how information-based privacy protection ultimately redounds to dignitary interests. Harming informational privacy in turn harms social standing and dignity; protecting informational privacy preserves dignity.

Although this Article links privacy intrusions to social stigma and status harms, it does not claim that all intrusions must be eliminated. Sometimes utilitarian considerations require obtaining information even if the collection imposes status harms or stigma. Indeed, some scholarship has recommended that the stigma that comes from surveillance should be a kind of punishment, so-called "shaming sanctions."[27] However, as a general matter, the insights of this Article will add to the considerations that counsel *against* surveillance and intrusions. While legitimate reasons may exist for privacy intrusions, the costs they impose in the form of disrespect and status based harms must be more fully appreciated before these mechanisms are set in motion.

Finally, while legal dictum recognizes expressive harms, legal *doctrine* fails to address these harms. This Article therefore gestures at a set of solutions to help address these harms. Judicial and policy remedies can take various forms. First, we may cease all intrusive behavior towards stigmatized groups. For

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and access to social capital." *Id.* at 1539. She notes in passing an "expressive aspect . . . [is] the message that the state does not trust these individuals," but apart from this passing reference does not expand on it. *Id.*

25. *See infra* Part II.B.2.

26. *See, e.g.*, John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 655 (2008); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 371–72 (2003) (describing how privacy acts to define personhood); Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. JEFFERSON L. REV. 1, 11 (2007); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1021 (1995).

27. Dan Kahan, once the most prominent proponent of shaming sanctions, has since recanted his support of these sanctions, but others have taken up the mantle. For a good overview of the ongoing debate, see Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2077–81 (2006). *See also* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 195 n.45 (2012).

various reasons, this Article does not believe this will be possible.[28] Another approach is to lower socially recognized privacy baselines for all individuals so that stigmatized groups will not be marked by a special, lower privacy baseline. Alternatively, intrusions themselves can occur in secret, so that the humiliating signs that those signals send cannot be observed by and influence the rest of society, including the individual herself. In other words, secret surveillance may sometimes be a good, rather than a bad, thing.[29]

Part II situates privacy intrusions within expressive theories of law. As this Article explains, intrusion identifies certain values as important to society and creates social hierarchies. This message can be modulated in various ways depending on the scope, intent, and repetition of the intrusion. Part III specifically addresses the *status* harms that intrusions can create, and explains how individuals internalize them. Finally, Part IV examines solutions to expressive harms that arise from privacy intrusions.

II. EXPRESSION THROUGH INTRUSIONS

Privacy intrusions impose status harms on individuals at the time of the intrusion. This Part explains the basic dynamic of expressive privacy intrusions and shows that they already have nascent recognition in our law. It demonstrates how intrusions can signal important social values and the relative status of individuals in society. It explores the factors that modulate the expressive effect of intrusions.

A. *EXPRESSIVE THEORIES OF LAW*

Laws achieve results by penalizing or providing resources to enable certain behavior. According to expressive theories of law, however, the power of legal mandates goes beyond these functional or material effects. Law also sends certain messages and should be assessed for its expressive aspects as well.[30]

Scholars have discussed various approaches to determining the meaning of legal expression.[31] But at base, similar to other kinds of

28. *See infra* Part IV.A.

29. *See infra* Part IV.C.

30. *See* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 13 (2015) (stating that law produces compliance through its expressive power to inform the beliefs of and coordinate the behaviors of its subjects); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000) (positing that "modern Supreme Court constitutional decisions often cloak expressive considerations in non-expressive terms"); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026–27 (1996) (arguing that the "expressive function of law" concerns itself with "individual interest in integrity"—i.e., that people support a law because they believe in the intrinsic value of the law's "statement").

31. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 195 (2014) (reviving Karl Llewellyn's notion of "situation sense"); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 21 (2000) (arguing that judges should

expression, the meaning of law relies on social conventions. Just as communication through language relies on social conventions that attach meanings to certain spoken sounds and written symbols, so too can conventions imbue meaning into other actions. Slamming a door, or certain hand signals, can be loaded with meaning.[32] Similarly, when the government assigns penalties for failing to wear seatbelts, it sends a message that seatbelt wearing is desirable, even if no one explicitly states as much.[33]

Establishment Clause jurisprudence provides a good example. For Justice O'Connor, the validity of state practices under that Clause depends on whether, per social conventions, those practices "convey[] a message of endorsement or disapproval" of a certain religion.[34] *Brown v. Board of Education* likewise determined that segregating groups of individuals based on race sent a message that the state believes that one group of individuals is inferior to another.[35] Similarly, philosopher Joel Feinberg argues that punishment expresses "attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[36]

These legal meanings draw, in part, from the purported function of a law. The functional effect of a law setting aside resources to erect a crèche in the public square is that a crèche is constructed. But the historical conventions

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examine state actions in order to appreciate the expressive character of that action); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 813, 891–96 (2004) (prescribing a multi-part, expert-evidence-based process for analyzing legal expression); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3091, 3103 (2014) (suggesting trial may be a crucial way to "establish the existence of institutionalized humiliation"). Whatever methods are used, recent empirical work suggests that

> judges . . . [have] a specialized form of cognitive perception—what Karl Llewellyn called "situation sense"—that reliably focuses their attention on the features of a case pertinent to its valid resolution. . . . [E]xperiment[al] [results] support the conclusion that "situation sense" is sufficiently robust to fix judges' attention on such decision-relevant features.

Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55 (2016) (footnote omitted).

32. Many non-verbal actions are expressive in nature. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (finding that the burning of the American flag is expressive conduct "sufficiently imbued with elements of communication" to merit First Amendment protection (citation omitted)); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (recognizing the expressive nature of a sit-in by blacks in a "whites only" area to protest segregation); Bad Frog Brewery, Inc. v. N.Y. Liquor Auth., 134 F.3d 87, 91 n.1 (2d Cir. 1998) ("The gesture, also sometimes referred to as 'flipping the bird,' . . . 'connotes a patently offensive suggestion,' . . . Hand gestures signifying an insult have been in use throughout the world for many centuries. The gesture of the extended middle finger is said to have been used by Diogenes to insult Demosthenes.").

33. Sunstein, *supra* note 30, at 2033–34 (positing that the law expresses normative desires, especially in areas involving dangerous behaviors, such as when it mandates seatbelt usage).

34. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see also* Anderson & Pildes, *supra* note 30, at 1531–32 (discussing expressive theory in Equal Protection and Establishment Clause cases).

35. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

36. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

regarding the role that public squares play in civic life mean that this construction sends a message that the government endorses religion. Similarly, while the functional effect of a segregating law is to separate the races, social conventions imbue separation with social meaning. In the context of race-relations, conventions dictate that separation connotes a fear of pollution or defilement.

Much like language, the meaning of a law can be more or less vague depending on context (though non-verbal behavior is less legible than language as a general matter). Furthermore, different segments of the community may attach different meanings to state action depending on their own background. Affirmative action is a good example.[37] But as a general matter, in a democratic society where state officials and their constituents share similar social and cultural norms and conventions, meanings often align.[38]

Finally, by creating social meaning either deliberately or inadvertently, government action can produce concrete effects. Cass Sunstein promotes using the expressive power of law "to reconstruct existing norms."[39] By enacting laws on seatbelts, the environment, and occupational safety and health, law tells society that certain behaviors are good and others are bad, and people act accordingly. Richard McAdams has similarly argued that the meanings law creates can change beliefs and attitudes by providing a "focal point" around which people's expectations coalesce, which, in turn,

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37. Because of the variety of social contexts and conventions that may affect social meaning, expressive theorists usually distinguish between speaker meaning, sentence meaning, and audience meaning. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374, 1387–88, 1438–39 (2000). To take a controversial example, by enacting affirmative action mandates, legislators may intend (apart from the non-expressive effects of the law) to send a message signaling the importance they place on racial equity due to a history of inequality of which they may be particularly aware. *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1961) (establishing the President's Committee on Equal Employment Opportunity and expressing that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government"). However, the majority of society who may be less cognizant of this history may see this policy as denoting preference for the specific minority. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299, 310–15 (1990). Furthermore, the minority in question may see the legislature's action as showing a lack of confidence that the minority could succeed without its assistance. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2432 (2013) (Thomas, J., concurring) (arguing that affirmative action "stamp[s] [blacks and Hispanics] with a badge of inferiority" by tainting the accomplishments of those admitted under affirmative action programs and those of the same race admitted regardless of these programs (quoting Adarand Constructors v. Pena, 515 U.S. 200, 241 (1995) (alterations in original))).

38. *See generally* Alberto Alesina et al., *Fractionalization*, 8 J. ECON. GROWTH 155 (2003) (ranking United States low on competing measure of diversity); James D. Fearon, *Ethnic and Cultural Diversity by Country*, 8 J. ECON. GROWTH 195 (2003) (listing the United States as lower than other nations on measures of cultural diversity).

39. Sunstein, *supra* note 30, at 2031.

influences behavior.[40] In a recent book, he applies this insight to multiple areas ranging from theories of process and adjudication to gun regulation.[41]

None of this is to say that laws should be primarily or only assessed depending on what they express and the results of the expression.[42] Laws have non-expressive effects as well. For instance, laws penalizing a failure to wear seatbelts would be desirable even if no one derives any message from them, and simply wore seatbelts to avoid penalties. These expressive theories of law have been applied to areas as diverse as tax, securities fraud, corporations, property, trade secrets, and trusts and estates, but never to privacy.[43]

B. *EXPRESSION THROUGH INTRUSION*

Imagine you see a search occurring. Depending on where the search is taking place and who the actors involved are—in a school by a school teacher, on the street by the police, in a restaurant by a food inspector, or at a TSA checkpoint—you might infer different messages from the search. As with language or other forms of expression, the nature of the message depends on social conventions that apply to the particular context.

Importantly, government intrusions are not the only kind of invasion that are legible through social conventions. Intrusions carried out by private individuals can also signal disrespect and can be designed to humiliate. However, expressive theories of law recognize the power of government to

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40. MCADAMS, *supra* note 30, at 9–10.

41. *Id.*

42. *See* Memphis v. Greene, 451 U.S. 100, 123–27 (1981) (finding that a city has the authority to close a two-lane street traversing a white neighborhood because of anticipated traffic safety problems despite alleged expressive harm to residents of the adjoining black neighborhood, who would have to use an alternative street for certain trips to the center city); Anderson & Pildes, *supra* note 30, at 1524 (finding that *Greene* shows that "judgments concerning whether laws create unconstitutional 'stigma' are not controlled by the experiential response of the alleged targets of those laws, even if those judgments take such responses into account among other considerations").

43. *See, e.g.*, Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 208 (2002) (examining expressive theories of law in relation to property law); Eli K. Best, *Atypical Actors and Tort Law's Expressive Function*, 96 MARQ. L. REV. 461, 474–76, 483–84 (2012) (arguing that the imposition of punishment or liability in tort has an expressive function); Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 573–76 (2011) (discussing the expressive force of securities fraud actions); Yuval Feldman, *The Expressive Function of Trade Secret Law: Legality, Cost, Intrinsic Motivation, and Consensus*, 6 J. EMPIRICAL LEGAL STUD. 177, 177 (2009) (examining "the expressive impact that results when trade secrets are 'primed' on [certain] factors"); Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 679–87 (2012) (theorizing that tax compliance and norm formation under high-penalty regimes is bolstered by mutually reinforcing relationships between the compliance mechanisms of deterrence, separation, and reputation signaling); Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 1030–31 (2006) (arguing that directors and officers might internalize beneficial governance norms that Delaware judges urge); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 645 (2014) (positing that the exercise of freedom of disposition at death is the decedent's "final expressive act").

shape opinions in ways that other entities cannot. As Justice Brandeis observed of government wire-tapping that he deemed unconstitutional in *Olmstead v. United States*, "[o]ur government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[44] Few other entities have similar power.

As with other forms of legal expression, the messages privacy law sends depend in part on the functions it is supposed to serve. Privacy protections keep individuals safe from the misuse of the information. Thus, protective laws demonstrate that the state—and by extension, society as a whole—holds the beneficiaries of these protections in sufficient esteem to protect them. State behavior that intrudes on an individual's privacy, suggests less regard.[45]

Supreme Court Fourth Amendment case law is instructive. These cases present a range of interests, actors, and scenarios. More importantly, and as shown below, it is usually in these cases that judges explicitly note (without formal doctrinal recognition) that intrusions express the state's values, its attitudes towards certain subjugated groups, and its trust in actors that collect the information.[46] Even those who do not share these intuitions can see that intrusion based status harms have a nascent recognition in the law and deserve further systematization and exploration.

In drawing from Fourth Amendment case law, however, this Article does not mean to suggest that the dynamic it identifies is isolated to the Fourth Amendment. Indeed, examples and empirical work focusing on the expressive aspects of privacy intrusions extend far beyond Fourth Amendment jurisprudence even if judicial opinions do not. For instance, the theater of McCarthy era trials,[47] the military investigations into individuals' sexual orientation,[48] and the surveillance of the private lives of welfare recipients, minorities, and women all exhibit similar dynamics.

1. Signaling Values

The state carries out searches to fulfill certain functions.[49] Searches curtail liberty and expend resources. Convention dictates that the state would incur such burdens only to achieve desired goals and important social values.

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44. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

45. Further, intrusions can take place at various levels of government. Accordingly, legislatures may enact a law that demands intrusion with or without executive enforcement. With or without legislative approval, the executive branch may enforce a policy that is intrusive, and courts may express approval of these various intrusions carried out by other entities.

46. *See infra* Part II.B (explaining how Fourth Amendment case law illustrates that the Court has informally recognized the harms caused by privacy intrusions).

47. *See* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 166–93 (2008).

48. *Id.* at 73–99.

49. *See supra* Part II.A (explaining expressive theories of law).

Members of the Supreme Court have frequently commented on this expressive aspect of surveillance. As Justice Scalia observed in a case involving the search of employees, the state had demonstrated a "symbolic opposition to drug use" by its "immolation of privacy and human dignity" of its employees.[50]

> What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from . . . drug use, but it will show to the world that the Service is "clean," and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society![51]

In another case, Justice Ginsburg noted that the "undoubted purpose" of school district student searches was "to heighten awareness of its abhorrence of, and strong stand against, drug abuse."[52]

The abortion line of cases arguably presents another example. Although abortion rights are protected under the decisional privacy line of cases, intrusive regulations also pose informational privacy harms. Because of these burdens—both decisional and informational—these kinds of intrusive regulations send a message that the state disapproves of abortion. Indeed, in dictum, the Court acknowledged as much in *Planned Parenthood v. Casey*, noting: "[T]he State may enact rules . . . designed to encourage [pregnant women] to know that there are philosophic and social arguments . . . in favor of continuing the pregnancy to full term. . . . '[T]he Constitution does not forbid a State or city . . . from *expressing a preference* for normal childbirth.'"[53]

Apart from historic regulation of individual abortion decisions,[54] states have also enacted so-called TRAP (Targeted Regulation of Abortion Provider) laws that some argue are designed to prevent abortions.[55] These laws mandate

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50. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting); *see also* Chandler v. Miller, 520 U.S. 305, 321 (1997) (noting that the State sought to demonstrate its "commitment to the struggle against drug abuse").

51. *Von Raab*, 489 U.S. at 686 (1989) (Scalia, J., dissenting).

52. Bd. of Educ. v. Earls, 536 U.S. 822, 854 (2002) (Ginsburg, J., dissenting) (comparing the groups in this case to those in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995)).

53. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) (second alteration in original) (emphasis added) (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989)).

54. *See, e.g.*, *id.* at 873 ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.").

55. *See* Amalia W. Jorns, Note, *Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy*, 105 COLUM. L. REV. 1563, 1568–69 (2005) (TRAP laws "single out physicians' offices and outpatient clinics where abortions are performed, and subject them to wide-ranging medical, administrative, and facility requirements that are not imposed on comparable medical facilities."). *See generally* Jennifer S. Hendricks, *Undue Burdens in Texas*, 127 HARV. L. REV. F. 145 (2014); Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and a Common-Ground*

privacy intrusions: testing patients for STDs, physical examinations of employees, and surprise inspection regimes to ensure compliance with standards concerning "everything from elevator safety to countertop varnish to the location of janitors' closets."[56] Some of these regulations were challenged in *Whole Woman's Health v. Hellerstedt*.[57] As one amicus argued, the regulations that do not protect the health of women serve only to express "animus" toward abortion: "It is one thing for the State to express a preference for life. But it is another thing for the State to sanction animus against abortion and engage in a campaign to bully, stall, and coerce women out of an effective, timely choice to obtain an abortion."[58]

2. Victims

Legal (and social) conventions dictate that individuals or groups are usually only searched when there is some probability that they are engaged in illicit behavior.[59] In the Fourth Amendment context, the function of searching a particular individual or group generally is to find contraband or evidence. Thus, while a search may be used to demonstrate the state's commitment to a certain value without much concern about the group involved (such as the war against drugs), a search may *also* create a narrative that suggests that the individual or group undermines important values.[60]

Alternative, 118 YALE L.J. 1356 (2009); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865 (2007); Emma L. Brackett, Comment, *"Trapped":* Greenville Women's Clinic v. Commissioner, South Carolina Department of Health & Environmental Control *and the Proliferation of Targeted Regulation of Abortion Providers*, 34 SW. U. L. REV. 511 (2005).

56. Greenville Women's Clinic v. Commissioner, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 371 (4th Cir. 2002).

57. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

58. Brief for Jane's Due Process, Inc. as Amicus Curiae Supporting Petitioners at 5, Whole Women's Health v. Cole, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 67621 at *5. It continues: "[I]f a regulation serves only to express the state's interest in potential life and does not in fact improve or protect women's health, then the regulation essentially picks a side in moral and religious debate." *Id.* at 7.

59. The Fourth Amendment protects the right of people to be free from "unreasonable searches and seizures" except for when there is "probable cause." U.S. CONST. amend. IV. The lawfulness of a warrantless search thus turns on whether it is "based upon probable cause." United States v. Watson, 423 U.S. 411, 430 (1976) (Powell, J., concurring). However, the doctrine allows warrantless searches of various groups when there are "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 620 (1989) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987)). Thus, for someone who assumes that law enforcement behaves appropriately, one might infer that their search of someone indicates that some kind of special need is present.

60. It bears observing that the accusatory message may, in many cases, be accurate just as sending a message that not wearing a seatbelt is dangerous is also accurate. Students and arrestees as discussed below, may indeed be guilty. My focus here is excavating the different variety of messages—whether accurate or not—that gets sent regarding the victims of the search.

For example, in *Vernonia School District 47J v. Acton*, a school defended warrantless drug testing of student athletes.[61] As Justice O'Connor noted in dissent, the "testing program . . . searches for conditions plainly reflecting serious wrongdoing," namely, drug use.[62] By searching student athletes, the conventions that govern searches linked the students to the wrongdoing, rendering the searches, as the majority admitted, "accusatory" and imposing "a badge of shame" upon those tested.[63] Or as Justice O'Connor explained, "[suspicionless testing] *sends a message* to children that are trying to be responsible citizens . . . that they have to prove that they're innocent."[64]

In *Vernonia*, Justice O'Connor was clearly concerned that *individual students* would feel accused.[65] However, a search can also impugn an entire group.[66] In *Maryland v. King*, for example, a bare majority of the Court approved buccal swabs of arrestees for DNA analysis.[67] According to the Court, such searches satisfied the important function of "identification" of arrestees.[68] This, in turn, would allow law enforcement to identify "inordinate 'risks.'"[69]

However, as the dissent noted, legal convention requires that "suspicionless searches . . . be justified, always, by" special considerations.[70] Searching arrestees therefore linked them in a special way to "inordinate risk." The Court's opinion reinforced that narrative. With little evidence, it claimed that "[i]t is a common occurrence that '[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.'"[71] For evidence, it relied on anecdotes: "Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate," "serial killer Joel Rifkin for the same reason," and "[o]ne of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days

61. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995).

62. *Id.* at 683 (O'Connor, J., dissenting).

63. *Id.* at 663 (majority opinion).

64. *Id.* at 682 (O'Connor, J., dissenting) (alteration in original) (emphasis added). Consider also the recent surveillance of welfare recipients to encourage "personal accountability" and stop "subsidiz[ing] drug addiction." Aliyah Shahid, *Florida Gov. Rick Scott Signs Law Requiring Welfare Recipients to Take Drug Test, ACLU Objects*, N.Y. DAILY NEWS (June 1, 2011, 11:36 AM), http://www.nydailynews.com/news/politics/florida-gov-rick-scott-signs-law-requiring-welfare-recipients-drug-test-aclu-objects-article-1.130360; *see also* Doktor Zoom, *Wisconsin's F*ck-The-Poor Food Stamps Bill Will Cost Millions, Totally Worth It*, WONKETTE (May 7, 2015, 2:00 PM), http://wonkette.com/584932/wisconsins-fck-the-poor-food-stamps-bill-will-cost-millions-totally-worth-it.

65. *Vernonia*, 515 U.S. at 678–79 (O'Connor, J., dissenting).

66. *See supra* note 60 and accompanying text.

67. Maryland v. King, 133 S. Ct. 1958, 1980 (2013).

68. *Id.*

69. *Id.* at 1972 (quoting Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1512 (2012)).

70. *Id.* at 1981 (Scalia, J., dissenting) (emphasis omitted).

71. *Id.* at 1971 (majority opinion) (quoting *Florence*, 132 S. Ct. at 1520).

before hijacking Flight 93."[72] The Court's opinion thus reinforced the message that linked arrestees to violence or deceit.

Searches can also link groups to other narratives besides danger and deceit. For example, in *Vernonia*, the Court offered another reading of the search: Searches may send a message that the state believes that the search victims are merely immature rather than malicious.[73] The Court noted that schoolchildren have "substantially fewer 'rights' than legislatures and courts confer upon them today" because of their immaturity.[74] Because they are still "maturing," the Court reasoned that schoolchildren need "care and direction" in order to make appropriate decisions.[75]

Searches can also sometimes express a belief that their victims are culturally undeveloped because they do not understand the value of privacy. As E.L. Godkin put it in his famous essay, privacy is "one of the luxuries of civilization, which is not only unsought for but unknown in primitive or barbarous societies."[76] We again see this message in *Vernonia*. While the search there concerned the legitimacy of athletic *drug* testing, the Court discusses privacy sensibilities in the *locker* room. "School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards."[77] Hence, the Court concluded, because jocks exhibit these underdeveloped privacy instincts, "[l]egitimate privacy expectations are even less with regard to student athletes."[78]

In a later case, some on the Court appeared to distinguish these undeveloped jocks from more sensitive and refined students, who understand (and therefore deserve) privacy. Explaining why the searches of students involved in other activities would not be appropriate, Justice Ginsburg opined: "Competitive extracurricular activities other than athletics, however," (activities with which the Justices are perhaps more familiar and sympathetic)

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72. Maryland v. King, 133 S. Ct. 1958, 1971 (2013). *King* of course is merely one of several examples. Searches need not involve the danger from violence solely. There is the fear of danger caused by contagion, espionage, or other eventualities. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 669–70 (1989) (noting that customs officers are likely to be dishonest); United States v. Montoya De Hernandez, 473 U.S. 531, 544 (1985) ("[T]he detention of a suspected alimentary canal smuggler at the border is analogous to the detention of a suspected tuberculosis carrier at the border: both are detained until their bodily processes dispel the suspicion that they will introduce a harmful agent into this country."); Bell v. Wolfish, 441 U.S. 520, 559 (1979) ("A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence."); *id.* at 559–60 (holding that prisoners may be searched because they can deceptively import contraband).

73. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995).

74. *Id.* at 665 n.4.

75. *Id.* at 661–62.

76. E.L. Godkin, *The Rights of the Citizen: To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 65 (1890).

77. *Vernonia*, 515 U.S. at 657.

78. *Id.*

"serve students of all manner: the modest and shy along with the bold and uninhibited."[79] Justice Ginsburg sympathized with these "'more modest students' [who found] other ways to maintain their privacy."[80] For example, "[m]any of them have figured out how to [change] without having [anyone] . . . see anything."[81]

Searches can therefore dehumanize a group, placing them "outside of the bounds of the shared community," even of humanity.[82] Depending on the context, they can send a message not only that the group in question is dangerous or immature, but that they are too much outsiders, too far beyond the shared understanding of social conventions to even recognize the indignity of the search.

Finally, surveillance can modulate a particular individual's status depending on how extensive it is. In the criminal context, there is "a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."[83] Depending on the punishment to which they are subject, groups occupy a corresponding place on the continuum—as Joel Feinberg contends, the level of punishment denotes the level of deviance.[84]

Likewise, the extent of the privacy intrusions imposed on a person can also demarcate where one falls on this continuum of deviance. At one end are the "law-abiding citizens" whose privacy rights are the greatest and will rarely be subject to intrusions.[85] However, "[o]nce an individual has been arrested . . . expectations of privacy and freedom from police scrutiny are reduced."[86] "[U]nlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy."[87] Of comparable status are the probationer and parolee. "[B]y virtue of their status alone, probationers 'do not enjoy' the absolute liberty to which every citizen is entitled."[88]

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79. Bd. of Educ. v. Earls, 536 U.S. 822, 847 (2002) (Ginsburg, J., dissenting).

80. *Id.* at 848.

81. *Id.* at 848 n.1 (alterations in original).

82. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 968 (1989).

83. Samson v. California, 547 U.S. 843, 848 (2006) (quoting United States v. Knights, 534 U.S. 112, 119 (2001)).

84. *See generally* Feinberg, *supra* note 36.

85. Maryland v. King, 133 S. Ct. 1958, 1978 (2013).

86. *Id.*

87. *Id.* Though some privacy rights remain inviolate even then. "Some searches, such as invasive surgery, or a search of the arrestee's home, involve either greater intrusions or higher expectations of privacy than are present in this case." *Id.* at 1979.

88. *Samson*, 547 U.S. at 848–49. Though parolees seem slightly further down the continuum than probationers. *Id.* at 855 ("[P]arolees, in contrast to probationers, 'have been sentenced to prison for felonies and released before the end of their prison terms' and are 'deemed to have acted more harmfully than anyone except those felons not released on parole.'" (quoting United States v. Crawford, 372 F.3d 1048, 1077 (9th Cir. 2004) (Kleinfeld, J., concurring))).

At the far end of the continuum are prisoners: "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social[,] criminal, and often violent[] conduct."[89] Therefore, prisoners have very few privacy rights.[90] However, as Justice Stevens has explained, privacy intrusions of prisoners send messages and affect status. They "tell[] prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to . . . protection."[91] Only a "trivial residuum" of privacy, "may mark the difference between slavery and humanity."[92] Stripping prisoners of this residuum affects status: "[A]n inmate" becomes "a mere slave," divested of the "ethical tradition that accords respect to the dignity and intrinsic worth of every individual."[93]

3. Searchers and Surveillors

Apart from impugning the searched and surveilled, privacy intrusions also mark the authority of the surveillor. The search or surveillance, which separates the watcher and the watched is not the two-way exchange of information that characterizes friends or intimates. Rather, it is the disclosure of information by an inferior to a superior. Thus, in *Terry v. Ohio*, the Court recognized the possibility that "the 'stop and frisk' of youths or minority group members [may be] 'motivated by the officers' perceived need to maintain the power image of the beat officer" which in turn is "accomplished by humiliating anyone who attempts to undermine police control of the streets."[94] A search can thus embody an unsettling "show of authority."[95]

Those who carry out the search are often characterized using metaphors demonstrating their authority. Parole inspectors and school teachers are like parents, their status partially marked by their ability to search their charges. Parole inspectors have special "supervisory responsibilities" in order to provide "individualized counseling and . . . monitor . . . progress."[96] Similarly, "[t]he primary duty of school officials and teachers . . . is the education and training of young people."[97] This in turn "permit[s] a degree of supervision and control that could not be exercised over free adults."[98] Thus, the authority of

89. Hudson v. Palmer, 468 U.S. 517, 526 (1984).

90. *Id.*

91. *Id.* at 558 (Stevens, J., concurring in part and dissenting in part).

92. *Id.* at 542.

93. *Id.* at 557 (quoting United States ex rel. Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973)).

94. Terry v. Ohio, 392 U.S. 1, 15 n.11 (1968).

95. *Id.* at 19 n.16.

96. Samson v. California, 547 U.S. 843, 857 (2006) (Stevens, J., dissenting) (citing Griffin v. Wisconsin, 483 U.S. 868, 876–77 (1987)).

97. New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring).

98. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

the searcher and the need for supervision of the victim are both embodied in the search. Just as "parental custodial authority would be impaired by requiring judicial approval for search of a minor child's room," so too must a school's authority remain untrammeled.[99]

Yet, sometimes a search can signal not just the authority of the searchers, but also their hostility and adverseness to the victims of the search. Thus, in *Vernonia*, the dissenting Justices argued that the searches shape school teachers' roles in inappropriate ways. Among the "ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse . . . is not readily compatible with their vocation."[100] "There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature."[101] However, the message that a search sends renders it so.

C. *MODULATING EXPRESSION*

As explained above, state intrusion expresses messages regarding society's hopes and fears, its goals, and its attitudes towards various groups. As this subsection will detail, this message can range in intensity and clarity depending on various factors, including the scope, intent, and repetition of the intrusion.

1. Scope of the Intrusion

As a general matter, the greater the scope of the intrusion, the more emphatic its message. The scope of the intrusion is measured by the extent to which the intrusive practice departs from the usual limits that apply to the information collection.[102]

Under Helen Nissenbaum's well-known theory of privacy as contextual integrity, information flows in social contexts depending upon the rules of that context. Contexts are characterized by different kinds of activities and values—a doctor's office is different from an employer's office for example.[103]

> When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. . . . [A] parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who . . . has such a portion of the power of the parent committed to his charge" . . . school authorities act . . . with the power and indeed the duty to "inculcate the habits and manners of civility."

Id. at 654–55 (citations omitted).

99. Griffin v. Wisconsin, 483 U.S. 868, 876 (1987).

100. *Vernonia*, 515 U.S. at 664.

101. *Id.* (quoting Goss v. Lopez, 419 U.S. 565, 594 (1975) (Powell, J., dissenting)).

102. *See supra* Part II.B.

103. NISSENBAUM, *supra* note 1, at 143.

Contextual rules regarding the following characteristics determine how the information can flow: (1) the actors involved in the context; (2) the process, that is, how the information or decision is accessed or controlled;[104] (3) the frequency of the access; and (4) the purpose of the access.[105]

Privacy is violated when limits are breached—that is, when the access occurs in the wrong context, by the wrong actors, in the wrong way, over-frequently, or for the wrong purposes. Social and legal norms determine when such inappropriate access has taken place. Thus, while parents may be informed about the reproductive decisions of their minor children within their custody,[106] individuals cannot similarly access the decisions of their adult spouses.[107] Similarly, a doctor can access information in the medical context to treat a patient with the patient's informed consent,[108] but if the doctor accesses the information for non-medical reasons or without consent, or if the hospital janitor accesses the information, or if the employer demands the information in the work context, privacy norms would be violated.[109] Context, actors, process, frequency, and purpose therefore all help determine whether privacy has been violated or respected.

The degree of the breach depends upon the extent to which information flow has departed from the norm. Thus, when a good friend accidentally learns of your health information, an intrusion occurs, because usually only medical staff may access the information. If an employer overhears the information, then the intrusion feels worse—a friend, at least, is often privy to confidential information; employer access deviates even further from the norm.

The greater the intrusion, the stronger the message. Thus, for example, as the Court has observed, "[p]hysically invasive inspection is simply more

104. For example, the access may occur in a way that is forced, voluntary, mutual, unidirectional, etc. *See id.* at 145.

105. *See* Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 411 (2014) ("Privacy should not be thought of merely as how much is secret, but rather about what rules are in place (legal, social, or otherwise) to govern the use of information as well as its disclosure."); Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689, 722–24 (2013) (discussing, *inter alia*, the importance of context and professional relationship to assessing confidentiality of personal information); Neil M. Richards, *Gigabytes Gone Wild*, AL JAZEERA AM. (Mar. 2, 2014, 8:00 AM), http://america.aljazeera.com/opinions/2014/2/gigabytes-gone-wild.html ("When you go to see doctors or lawyers, you don't expect that the information you give them is theirs to use any way they want.").

106. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992).

107. *Id.* at 897 (discussing the violence that may arise from spousal notification).

108. Security and Privacy, 45 C.F.R. § 164.506(b) (2016).

109. *See* 45 C.F.R. §§ 164.506–164.510 (discussing the "Privacy of Individually Identifiable Health Information").

intrusive than purely visual inspection."[110] More "serious intrusion[s] upon the sanctity of the person," will inflict "great indignity."[111]

Social and legal norms determine the privacy rules that apply to various areas. In cases implicating the right to informational privacy under the Constitution, for example, courts identify areas involving sexual intimacy and health as protected areas. Similarly, privacy tort cases offer higher protection to certain kinds of information.[112] Finally, Fourth Amendment cases similarly rely on norms of social behavior to determine whether an intrusion or search has occurred. For example, in *Georgia v. Randolph*, the Court notes that the Fourth Amendment reasonableness inquiry depends not on the law of property per se, but rather on "widely shared social expectations" which, in turn, are constituted by social norms.[113]

Finally, note that searches are not intrusive only if they involve private spaces. Searches can send strong messages—perhaps even more so—when they occur in a public space. Public searches are more visible, and therefore more effectively communicate the government's message. There is therefore a continuum of intrusion, resulting in a continuum of status harms.

2. Intent

Along with the scope of the intrusion, the intensity of the state's message often depends, by social convention, on the state's agent's intent: "A malicious intention can turn an otherwise innocent action or remark into an insult."[114] This is not to say that speaker intent is dispositive. It is merely one of the many other criteria that we look to in determining the meaning of a particular action or, for that matter, word.

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110. Bond v. United States, 529 U.S. 334, 337 (2000).

111. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995) ("[T]he degree of intrusion depends upon the manner in which production of the urine sample is monitored."); Camara v. Mun. Court, 387 U.S. 523, 530 (1967) (stating that "a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime"); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1688–89 (1998). Colb explains that outside the context of so-called special needs searches we see in *Vernonia*, and with a few exceptions such as *Terry v. Ohio*, the Court does not balance the state interest versus the degree of the intrusion; rather, all but the most grievous intrusions are permitted simply when there is probable cause to suspect a crime and advocates a tiered or sliding scale approach. Current doctrine generally does not formally calibrate scrutiny to the degree of invasion involved. Nonetheless, some cases show sensitivity to deprivation of privacy in certain situations as Colb has argued. *Id.* at 1684–87.

112. Lawrence v. Texas, 539 U.S. 558, 578 (2003); Whalen v. Roe, 429 U.S. 589, 599 (1977). *See generally* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015) (collecting cases).

113. Georgia v. Randolph, 547 U.S. 103, 111 (2006); *see also* Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013) (referring to "easily understood . . . daily experience" and the "habits of the country" as determining Fourth Amendment parameters, protections, and harms (quoting Oliver v. United States, 466 U.S. 170, 182 n.12 (1984) and McKee v. Gratz, 260 U.S. 127, 136 (1922), respectively)).

114. JEROME NEU, STICKS AND STONES: THE PHILOSOPHY OF INSULTS 10 (2008).

Intent falls on a spectrum. The Model Penal Code, for example, recognizes four kinds of intent that may lie behind a criminal action: purpose,[115] knowledge,[116] recklessness,[117] or negligence.[118] The intent behind a message can similarly vary. The message a state sends when it carries out an intrusion only for compelling reasons, upon a high degree of evidentiary showing, after exhausting other options, sends quite a different message than arbitrary and whimsical intrusions. The former may reaffirm certain values as compelling to society, but does not aim to harm or insult certain individuals. The latter, however, deliberately insults certain groups.[119] Where the state's reasoning seems shoddy, therefore, justices often infer intent to insult and are less forgiving of privacy intrusions.

Thus, in *Chandler v. Miller*, which concerned the drug testing of political candidates, Justice Ginsburg carried out a "close review of [the State's] scheme" and concluded that it served no functional purpose.[120] Candidates knew ahead of time where and whether a test would take place and could easily circumvent it.[121] Nor did the State "assert[] [any] evidence of a drug problem among the State's elected officials."[122]

Accordingly, Justice Ginsburg concluded, "[w]hat is left" is merely "the image the State seeks to project."[123] The search was valued, on Ginsburg's account, only as an intentional expression of the state's "commitment to the struggle against drug abuse."[124] In other cases, Justices made similar

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115. *See* MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1962) (stating that, except when absolute liability is imposed by statute, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense"); *id.* § 2.02(2)(a) ("A person acts purposefully" if "it is his conscious object to engage in conduct of that nature or to cause such a result" and, if there are "attending circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.").

116. *Id.* § 2.02(2)(b) ("A person acts knowingly" when "he is aware that it is practically certain that his conduct will cause such a result" and he is aware of any attendant circumstances.).

117. *Id.* § 2.02(2)(c) ("A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." The disregard must involve a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

118. *Id.* § 2.02(2)(d) ("A person acts negligently . . . when he should be aware of a substantial and unjustifiable risk that the material element exists or will result form his conduct." Again, "[t]he risk must be of such a nature and degree that the actor's failure to perceive it . . . involves a gross deviation" from the normal standard of care.).

119. Indeed, this is the reasoning behind the Court's tiered equal protection reasoning. The greater the scrutiny satisfied, the surer we are that there is no impermissible intent behind the legislature's action. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 433 (1997).

120. Chandler v. Miller, 520 U.S. 305, 320–22 (1997).

121. *Id.* at 319–20.

122. *Id.* at 321.

123. *Id.*

124. *Id.*

observations. In *Hudson v. Palmer*, for instance, Justice Burger observed that searches carried out with no clear purpose may serve "solely to harass or to humiliate" prisoners.[125]

Various other factors will determine whether a particular intrusion intentionally seeks to send a message, and therefore the intensity of that message.[126] For instance, one may consider the historical context of the decisions.[127] A history of state messages on a particular point, including through means other than privacy intrusions, will reveal intent.[128] In a neighborhood where the police have a history of disproportionately targeting minorities for arrests or violence and of subjecting individuals to stop-and-frisks, an intrusive search would code as more intentionally humiliating than in a community where the police were more evenhanded.

Similarly, departures from normal treatment accorded to analogous behavior or groups suggest an intentional effort to impugn an activity or those who engage in it.[129] Thus, imposing greater privacy intrusions for abortion procedures when other medical procedures are not subject to such requirements or adopting special public health surveillance for HIV send messages about abortion and HIV.[130] As Justice Kagan succinctly put it in the recent oral arguments over Texas' TRAP legislation: "[A]s the law is now . . . Texas is allowed to set much, much higher medical standards . . . for abortion facilities than for facilities that do any other kind of medical work, even much more risky medical work . . . And I guess I just want to know, why would Texas do that?"[131]

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125. Hudson v. Palmer, 468 U.S. 517, 521–22 (1984).

126. *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). The indicia of intent listed here largely track the *Arlington Heights* factors. However, while the latter seeks to investigate whether an actor holds invidious animus towards a group, the factors here seek to ascertain whether a particular intrusion intentionally seeks to humiliate, whether on a group basis or not.

127. *Id.* at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

128. *Id.* at 268.

129. *Id.* at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

130. Harlon L. Dalton, *Criminal Law, in* AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 242, 250–55 (Scott Burris et al. eds., 1993); *see also* Transcript of Oral Argument at 22–23, Whole Women's Health v. Hellerstedt, 136 S. Ct. 1001 (2016) (No. 15-274) (recording Justice Sotomayor's observation that "[dilation and curettage] are performed in offices for lots of other conditions besides abortion. . . . [However,] this law was targeted at abortion only"); *id.* at 41 (recording Justice Ginsberg's questioning as to why a treatment consisting only of administering pills must be done in an ambulatory surgical facility).

131. Transcript of Oral Argument, *supra* note 130, at 63.

Finally, intent may also be revealed by "[t]he legislative . . . history[,] . . . where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[132]

Justices have shown aversion to situations where the state deliberately seeks only to communicate a message by a search, rather than to achieve some concrete result. For example, Justice Scalia believed that "the impairment of [privacy rights] cannot be the means of making a [solely communicative] point."[133] Similarly, in *Terry v. Ohio*, the Court was troubled by the possibility that "the 'stop and frisk' of youths or minority group members [may be] 'motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.'"[134]

Yet, it bears reemphasizing that intent is not the only or even key indicator of the strength of expression through privacy intrusions. In *Vernonia*, it is quite possible that the school had no desire to impugn its student athletes. Nonetheless, the message that Justice O'Connor took from the school searches was one of humiliation and distrust.[135]

3. Repetition

Repetitive or continuous privacy intrusions send clearer messages. First, repetition may be necessary to attribute behavior to the state. When a legislature passes a law that mandates intrusive behavior—for example, investigations into sexuality of service members—the intrusion can be attributed to the state.[136] But a single stop-and-frisk by one bad officer would, arguably, not constitute a message from the entire state. In order for individual officer behavior to transform into state action, with its concomitant effects, there must be a "pattern and practice" of intrusions.[137] Generally a

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132. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

133. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting); *see also* Bd. of Educ. v. Earls, 536 U.S. 822, 854–55 (2002) (Ginsburg, J., dissenting) ("[T]he desire to augment communication of this message does not trump the right of persons—even of children within the schoolhouse gate—to be 'secure in their persons . . . against unreasonable searches and seizures.'" (quoting U.S. CONST. amend. IV)).

134. Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968) (quoting LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 47–48 (1967)).

135. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 682–84 (1995) (O'Connor, J., dissenting).

136. *See* McVeigh v. Cohen, 983 F. Supp. 215, 219–20 (D.D.C. 1998) (finding that the wiretapping of a service member to determine his sexual orientation constituted a violation of the Electronic Communications Privacy Act).

137. Only the practices of state officials that are "permanent and well settled" count as a "custom or usage" to trigger liability under 42 U.S.C. § 1983. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970)); *cf.* MCADAMS, *supra* note 30, at 185–87 (requiring aggregation among state actors); Mary E. Corbett, *Municipal Liability Under 42 U.S.C. § 1983:* Monell v. Department of Social Services of the City of New York, 21 B.C. L. REV. 505, 508 (1980) (observing *Monell*'s holding that

state-backed message has more power to change social norms than that of just single actors.

Second, repetition also makes the meaning of the action legible. Actions are not as clear in their message as words are. In order to send clear messages, intrusions therefore may need to operate repetitively across multiple contexts. Further, intrusions may also combine with other state behavior.[138] Thus, legislatures may pass laws mandating segregation of minorities, law enforcement may engage in unmerited intrusions of minorities, and the judiciary may approve the behavior of both as constitutional. This multiple reinforcement across state institutions through a variety of methods makes clear the meaning of particular intrusions.

Finally, repetition helps preserve the message and its effects. Like all social norms, the effects of intrusion-based-messaging can dissipate, shift and transform over time.[139] Repeated intrusions, combined with other forms of messaging, recall the state's values and message to existing members of society and teaches them to newcomers.

III. STATUS EXPRESSION THROUGH INTRUSIONS

The previous Part explained how privacy intrusions send messages about individuals and social values. This Part turns to how privacy intrusions send messages about entire *groups* of individuals. In that way, when the state targets, and sends a message about, a certain group, all individuals in that group are affected, whether or not they personally suffer intrusions.

Law attributes certain privacy baseline protections to certain groups but then allows deviation from that baseline in certain contexts to send messages about that group. In such cases, the law often allows non-state actors to commit the intrusions, which, in turn, highlights the powerlessness of the group vis-à-vis those non-state actors in those contexts. By targeting certain groups, the government creates three separate statuses through three different kinds of protections. First, there is the baseline level of privacy and respect that most individuals enjoy. Second, there is the lower status of groups that experience various degrees and types of government intrusion and surveillance. Finally, there are those who are given special responsibility for supervising this group.

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municipalities cannot be held liable for the unconstitutional conduct of their employees on the basis of *respondeat superior*, but that they may be held liable if "the unconstitutional action clearly . . . resulted from the application of an official policy").

138. This point underlies the claim demonstrated in Professor Tracey Meares's recent essay. *See* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 165 (2015) ("[M]any of those who are stopped—the majority of them young men of color—do not experience the stops as one-off incidents. Young men of color experience the stops as a program to police them as a group . . . .").

139. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 939–40 (1996).

A. EXPRESSION AND THE IMPORTANCE OF PRIVACY BASELINES

Privacy intrusions can mark status, not just of individuals, but entire groups. Law and norms often mark certain areas of individuals' lives—the home, sexual information, or medical information—as significant, protected by strong privacy standards. At the same time, laws permit or even encourage certain entities to violate those privacy standards when it comes to certain groups. These violations become legible as violations only because the information is treated as, and understood to be, private—if no one thinks of a piece of information as private in the first place, the collection of the information would not constitute a privacy *violation*. By allowing certain entities to violate the protections, the law therefore creates a hierarchy: Those who can violate the rights of the groups are marked as having higher status than individuals in the group. Furthermore, by emphasizing these protections in other contexts, the law makes the violation more blatant when it happens.

Consider *De May v. Roberts*, an 1881 case in which the Michigan Supreme Court introduced the right of privacy into American jurisprudence by articulating a specific privacy baseline for women.[140] The case involved the right of privacy a pregnant woman enjoyed in giving childbirth in her bedchamber. Dr. De May had tended to Mrs. Roberts during labor.[141] Because of bad roads, weather, and his own ill health, the doctor brought a friend with him "to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions."[142] The friend "could hear at least, if not see all that was said and done."[143] Since he was not a physician himself, the court held that this violated Mrs. Roberts's "legal right to the privacy of her apartment."[144] In so doing, it identified a new legal right.[145]

The decision itself vindicates the privacy right of the woman. It was also consonant with the conception of women as creatures of the private realm, protected by social norms and laws that preserved their modesty against outsiders.[146] Yet, as Anita Allen observes, these protections are often "Janus-faced."[147] As her survey of cases and social rules at the time show, these

140. De May v. Roberts, 9 N.W. 146, 148–49 (Mich. 1881); *see also* Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441, 454 (1990) ("The court's declaration that 'the plaintiff had a legal right to the privacy of her apartment' was a first in American privacy jurisprudence." (footnote omitted) (quoting *De May*, 9 N.W. at 149)).

141. *De May*, 9 N.W. at 148.

142. *Id.* at 147.

143. *Id.* at 148.

144. *Id.* at 149.

145. *Id.*

146. *See* ALLEN, *supra* note 24, at 19–21.

147. Allen & Mack, *supra* note 140, at 452.

protections served to keep women in private spheres, preventing them from participating in public life.[148]

Importantly, even as the woman enjoyed privacy from the outside world, she lacked any such privacy with respect to her husband. As Allen observes, *De May* was likely as much about an "affront to the husband's household authority" as it was about "the woman's presumed modesty."[149] The privacy rules that govern the context would thus protect women from scrutiny from the world, but keep her open to scrutiny by her husband.

This creation of a privacy baseline—female modesty—permitted subsequent breaches with respect to certain groups, namely by husbands, fathers, or other male relatives and caretakers. It also helped texture the woman's position in society and marked her as subject particularly to these male relatives, and to no one else. In this way, it helped mark and maintain traditional gendered social hierarchies.[150]

This phenomenon is, of course, not particular to the case of gender relations. Consider a different context—that of HIV surveillance. Within a few years of the virus's discovery, states enacted the first public health privacy laws designed specifically to protect people living with HIV.[151] For example, before the 1986 Control of Sexually Transmissible Disease Act, venereal disease legislation in Florida lacked privacy protections. The 1986 Act required for the first time that "information and records held by the department . . . are strictly confidential."[152] In many states, the protections applied specifically to HIV results or records as opposed to all venereal or other diseases more generally.[153]

These privacy baselines served to protect people living with HIV from casual intrusions by the state or the public in general. Yet, in certain contexts, these individuals are stripped of privacy protections. In particular, if they know that they are HIV positive and wish to engage in intimate relations, many states have criminal laws that require them to disclose their HIV status to their partners. Non-transmission of the virus or the use of a condom is no defense in most states with these laws, and the penalty is a felony.[154]

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148. *Id.*

149. *Id.* at 454.

150. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2165–70 (1996) (explaining how judges claimed inability to interfere with domestic abuse because of the privacy of the home, thus subjugating women to their husbands).

151. *See* Hermes Fernandez, *Is AIDS Different?*, 61 ALB. L. REV. 1053, 1074 (1988).

152. FLA. STAT. ANN. § 384.29 (2014).

153. *See* Herman A. Marshall, III, *Health Care Law*, 23 U. RICH. L. REV. 663, 674 (1989).

154. *See* J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 1001 tbl.1 (2014) (providing results of a criminalization study that includes five states whose laws do not apply to sexual behavior generally, but does not include Alabama, which does have a statute specific to

Most of these laws were passed at the height of the epidemic when scientific understanding about the virus was limited. However, legislators in most states with these laws continue to resist efforts to change them. Public health scholars are unanimous that the laws serve no purpose, are counterproductive, and may result in even more transmission. Specifically, HIV transmission may take place when individuals do not know their status,[155] and such laws often actually deter individuals from getting tested and finding out about their status.[156] They also send the message to HIV-negative individuals that it is the responsibility of the HIV-positive individual to disclose and ensure that protection is used.[157]

Taken together, these privacy/criminalization laws express a hierarchy. The privacy laws protect people living with HIV from intrusions by medical professions and the state. However, when it comes to putatively HIV-negative partners, HIV-positive individuals are stripped of this privacy and are instead required to confess their status. Furthermore, the steps HIV-positive individuals may adopt through their own efficacy to prevent transmission, such as using condoms, or taking medication, are treated as worthless by the laws, even if they render transmission nigh impossible.[158] By operating at the site of this interaction and by exposing HIV-positive individuals to their putatively HIV-negative partner, the law puts into place a particular hierarchy, subjecting the rights and needs of the HIV-positive partner to the right to know of the HIV-negative partner.

This two-step, where the law gives privacy with one hand and takes it away with the other, is necessary to mark certain groups. Continuous intrusions upon groups in areas where most individuals expect the greatest privacy protections—in their home, on their person, in their sexual or medical information—will most effectively create the power play that delineates hierarchy. Unless a robust privacy baseline generally applies to a particular area, the collection of information about certain groups will be an

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sexual conduct). *See generally* LAMBDA LEGAL, HIV CRIMINALIZATION: STATE LAWS CRIMINALIZING CONDUCT BASED ON HIV STATUS (2010).

155. Karen E. Lahey, *The New Line of Defense: Criminal HIV Transmission Laws*, 1 SYRACUSE J. LEGIS. & POL'Y 85, 89 (1995).

156. Adeline Delavande et al., *Criminal Prosecution and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J.L. & ECON. 741, 743 (2010); Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV*, 31 DALHOUSIE L.J. 123, 156 (2008); Lahey, *supra* note 155, at 90; Patrick O'Byrne, *Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-Based Gay Men's Sex Survey*, 24 J. ASS'N NURSES AIDS CARE 81, 85 (2013); Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, 111–12 (1988); Thomas Fitting, Note, *Criminal Liability for Transmission of AIDS: Some Evidentiary Problems*, 10 CRIM. JUST. J. 69, 97 (1987); Erin McCormick, Note, *Strengthening the Effectiveness of California's HIV Transmission Statute*, 24 HASTINGS WOMEN'S L.J. 407, 417 (2013); *see also* N. Crepaz & G. Marks, *Serostatus Disclosure, Sexual Communication and Safer Sex in HIV-Positive Men*, 15 AIDS CARE 379, 384–85 (2003) (noting that disclosure alone does not necessarily lead to safer sex).

157. Grant, *supra* note 156, at 158.

158. *See supra* note 156.

unremarkable non-event. It is the continuous creation and reinforcement of the privacy baseline that makes a hierarchy legible.

In particular, shoring up the privacy baseline that the group itself enjoys against much of the world will bring into relief their subjugation to certain individuals against whom they lack these protections. Thus, delineating status through privacy intrusions is a complicated, discursive endeavor that intertwines privacy maintenance with its simultaneous evisceration.

B. INTRUSION AND OTHER KINDS OF STATUS EXPRESSION

Intrusion-based status expressions are one among many other status-expressive practices the state may adopt. Indeed, privacy intrusions are often combined with other forms of status expression, such as explicit messaging by the state, that specifically identify certain groups as undesirable. Segregation is another quintessential example of expressive behavior. Intrusion therefore usually works in tandem with these other practices, helping maintain hierarchies where they already exist.

But there are three reasons to think that, under certain circumstances, the unique characteristics of privacy intrusions render them more urgent than segregative practices.

First, intrusions and surveillance are inherently confrontational and hierarchizing. They always, or nearly always, involve a hierarchical dyadic relationship: inherent in the act of surveillance are roles for the surveillor and the surveilled. The police, guard, doctor, or teacher hold a higher social position than the minority, prisoner, patient, or student.

By contrast, segregation involves merely separating groups of individuals. Such separation without more does not create a hierarchy. To be sure, the particular historical phenomenon of racial segregation clearly signified inequality and was correctly invalidated. However, such segregation was accompanied by other factors including unequal allotment of resources and historical norms of white supremacy. As the Court's tiered equal protection doctrine itself recognizes, classification by itself does not invite the conclusion that invidious social hierarchies are being created unless other factors, such as a history of discrimination or lack of political power, are involved.[159]

The dyadic nature of surveillance results in a second troublesome effect—continuous hierarchization. As long as intrusion or surveillance is maintained, it is more likely to enforce a hierarchy continuously than other social practices. Segregation usually involves creating separate communities. As long as they avoid interaction with the outside world, individuals in the oppressed group can escape consciousness of the hierarchical dynamic to

159. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (finding that classifications based on "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts" did not invite exacting scrutiny).

some extent at least.[160] Indeed, historians of LGBT communities point out that ghettos are often self-chosen: By staying in the ghetto and interacting only with other LGBT individuals, sexual minorities can escape homophobia and transphobia.[161]

With the dyadic relationship inherent in surveillance, however, the primary relationship of the surveilled is not with others in their own community but rather with the surveillor. Individuals may form relationships with others who are surveilled. However, at base, especially in cases of continuous surveillance, the surveilled can never escape the consciousness of the relationship and the role in which they are inferior. Thus, in a prison, perhaps the most discussed example of continued surveillance,[162] even while prisoners might form relationships with each other, they do so under the continuous surveillance of the guards.

Third, surveillance gives the surveillor who helps maintain the surveillance the appearance of superior knowledge, which in turn, reinforces the perceived justifications of the hierarchy. Through constant (dyadic) interaction with and supervision and study of the surveilled, the surveillor can claim greater familiarity with the dangers that allegedly necessitate the surveillance. Their position as "knowers" elevate their social status, and help perpetuate the surveillance system—in the criminal law context, for example, the very law enforcement officers that carry out the privacy intrusions claim the expertise to determine whether an intrusion is necessary because of the knowledge they gain in the process of the intrusion.[163] There is no counterpart to this in the segregation context.

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160. *See generally* Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, *in* 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 391 (2001); Steven N. Durlauf, The Memberships Theory of Poverty: The Role of Group Affiliations in Determining Socioeconomic Outcomes (2000) (unpublished manuscript) (on file with author).

161. Gay neighborhoods, where high concentrations of LGBT people live, are often safe spaces for members of the LGBT community to escape or avoid discrimination. While these neighborhoods and spaces are not entirely safe, LGBT individuals tend to self-restrict and police their behavior outside of these zones. "Outside the gay neighbourhood or gay establishments, more than 80 per cent [of gay men] avoid shows of affection, physical contact with other men, speech patterns or vocabulary considered stereotypical, and clothes or other signs that they are gay." Wayne D. Myslik, *Renegotiating the Social/Sex Identities of Places: Gay Communities as Safe Havens or Sites of Resistance*, *in* BODY SPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY 156, 165 (Nancy Duncan ed., 1996). However, in gay "ghettos" or neighborhoods, LGBT individuals can define their own spaces. Gay residents and visitors to a gay neighborhood can "construct a social world for themselves." GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890–1940, at 239 (1994).

162. *See, e.g.*, JEREMY BENTHAM, *Panopticon, or, The Inspection-House, & C.*, *in* 4 THE WORKS OF JEREMY BENTHAM 39, 39 (John Bowring ed., 1843); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1995).

163. *See, e.g.*, Floyd v. New York, 959 F. Supp. 2d 668, 672 (S.D.N.Y. 2013) ("Eliminating the threat that blacks and Hispanics will be targeted for stop-and-frisks is also an important interest. In addition to the significant intrusion on liberty . . . , increased contact with the police

Ironically, what evidence there is suggests that the individuals who claim the greatest knowledge because of their positions are most likely to be subject to bias. Law enforcement officers, for example, are likely to overestimate the occurrence of deviance and danger in the population they supervise. It is unclear whether these biases arise from subconscious self-interest, or whether their surveillance results in cognitive miscalculations.[164]

Apart from these primary reasons, it is also possible that intrusions and surveillance are cheaper than other forms of status creation.[165] Segregation, for example, requires doubling resources in inefficient ways—two water fountains or two sets of bathrooms. Surveillance, however, can be carried out using fewer and fewer resources as technology improves. Indeed, as Michel Foucault famously observed, actual surveillance is unnecessary—all that is required is to create a *perception* among individuals and other relevant parts of society that someone is being surveilled.[166]

C. *INTERNALIZATION OF STATUS EXPRESSION*

Privacy intrusions create social meaning that affect status. This status can in turn impact how individuals see themselves. Individuals identify with various groups and identity categories whose status and meaning is shaped, in part, by the law.[167] Thus, *Brown v. Board of Education* notes that "the policy of

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leads to increased opportunities for arrest, even when the reason for the arrest was not the reason for the stop. As a result, targeting racially defined groups for stops—even when there is reasonable suspicion—perpetuates the stubborn racial disparities in our criminal justice system."); N.R. Kleinfield & J. David Goodman, *For Bratton and Kelly, Linked Legacies and Locked Horns*, N.Y. TIMES (Jan. 1, 2016), http://www.nytimes.com/2016/01/02/nyregion/for-bratton-and-kelly-linked-legacies-and-longstanding-tension.html (reporting that Raymond W. Kelly, the longest-serving police commissioner in New York history, believes that constraints on stop-and-frisk caused an increase in the city's murder rate).

164. Justin Baer & William J. Chambliss, *Generating Fear: The Politics of Crime Reporting*, 27 CRIME, L. & SOC. CHANGE 87, 88 (1997) ("The extent to which the U.S. Department of Justice and its law enforcement bureaucracies, especially the Federal Bureau of Investigation (FBI) and the National Institutes of Justice misrepresent data on crime has not been widely acknowledged.").

165. *Cf.* United States v. Jones, 132 S. Ct. 945, 955–56 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . . [It] is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004))).

166. *See* FOUCAULT, *supra* note 162, at 204.

167. To take Judith Butler's example of gender identity, upon birth the doctor exclaims about a child: "it's a girl." So it also says on the birth certificate. The child's name, toys, room color, playmates, all reinforce this identity of girl-ness. The social norms that create these identity categories exist independent of any one specific individual. *See* JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 34 (1997). The identity norm must preexist the individual for the individual to lay claim to it, or for the identity to be foisted upon the individual.

separating the races is usually interpreted as denoting the inferiority of" African-Americans.[168] Marking the status of African-American identity as a whole, in turn, affects the experiences of those individuals who belong to the group.[169]

These internalized status effects operate in two ways, either definitionally or causally.[170] Within contexts in which the law sets the norms of interaction to a greater degree,[171] the statuses of certain identity categories—the student in the school, the prisoner in the prison—are defined by the law. When the law redefines the category by insulting the group, it does not *cause* a change in the identity category. Rather, the effect is definitional: because the category is defined through the law, the change in the legal statement *itself* constitutes the change in the status of the group in that legal context. Thus, in *Vernonia*, as a result of the message sent by warrantless school searches, the identity category of schoolchildren, which is defined by the law, goes from being that of "responsible citizens" to that of a suspected group who must "prove that they're innocent."[172]

Such definitional effects can be powerful. Like segregation, searches place the minorities in *Terry*, the children in *Vernonia*, or prisoners being

168. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

169. This focus on groups is not meant to take away the effect of insults through intrusions on the individual. A person may feel disrespected and upset at the loss of status at the individual level—indeed, that is perhaps the primary means by which many of us experience the harms of information collection. But the group dynamics that intrusions produce deserve further attention.

170. For this distinction, I borrow from J.L. Austin's seminal work, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisà eds., 1962). In relevant part, Austin distinguishes between three kinds of statements. *Id.* at 103. First, there are constative statements that are simply descriptive. *Id.* at 110. The statement is assessable by some truth criterion—it describes some facet of the world exterior to the statement. *Id.* Thus, the statement "the cow is brown" can be assessed by whether the cow is actually brown. Second, there are illocutionary statements. *Id.* at 117. These statements are words that also constitute an action. *Id.* Thus, words such as "I promise" or "I vow" do not just describe the state of the world or intent, they also constitute an act. The speaking of the word constitutes both conduct and expression—indeed, the expression here is conduct, and vice versa. The effect of the language is produced, not by the expression, separate from it, but lies in the expression itself. Illocutionary effects are different from perlocutionary effects, which are consequences of the statement separate from the expression itself. Thus, my vow or promise may enhance my reputation, incite fear among my opponents, or strengthen my resolve. Thus, the statement "there is a bull in the field," is constantive describing the fact of there being a bull in the field. It may also have the effect of warning someone. The statement about the bull does not cause the warning—it is in itself the warning and therefore illocutionary. But then, it may result in a range of perlocutionary effects independent of the statement itself. Thus, the warning may induce a suicidal person or risk-taker to run towards the bull, or it may induce a risk averse person to run away.

171. The distinction between these illocutionary and perlocutionary effects can be "unstable" in practice because it may never be clear to what extent identity is shaped by social norms or by legal expression. *See* BUTLER, *supra* note 167, at 44 (observing that the distinction between illocutionary and perlocutionary acts of speech is not always stable).

172. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 682 (1995) (O'Connor, J., dissenting).

surveilled by prison guards in *Hudson*,[173] within a hierarchy. The search demonstrates the authority of the police, teachers, and guards and the powerlessness and lack of social standing of their charges. Information is extracted from one group and consumed by the other. The messages that intrusions send reshape identity categories that are formed in part or fully as the result of state policies, placing some categories above others.

Along with definitional affects, legal expression can also affect identity categories causally. In most contexts, roles and status are largely determined by non-legal norms.[174] However, government action can alter these norms, thereby affecting the status of those identities. In a recent book, Richard McAdams presents three explanations for how law changes social norms through its expressive effects.[175] Limited empirical work suggests that privacy intrusions in particular have expressive effects on status under all three scenarios.[176]

First, state expression informs individuals what social norms exist.[177] Individuals then follow the norm to avoid costs such as social disapprobation and reputational harms.[178] Ryan Goodman's study of the effects of mostly unenforced sodomy laws in South Africa provide a good example of this phenomenon as it relates to privacy intrusions.[179] These sodomy laws, like the

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173. Hudson v. Palmer, 468 U.S. 517 (1984).

174. *See generally* CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2006) (describing norms as a "grammar" or set of rules which an individual or group recognizes as guiding the behavior of community members). In addition to expressive theorists, others make this argument. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS 32 (2000) (noting that government actors can serve as powerful "norm entrepreneurs" by creating, for example, holidays, memorials, and ideologies); FREDERICK SCHAUER, THE FORCE OF LAW § 10.2 (2015) ("[L]aw can have a causal effect on the development, enforcement, internalization, and reinforcement of norms . . . .").

175. *See* MCADAMS, *supra* note 30, at 63–67.

176. Beyond the privacy-specific research I discuss, other studies show that legal expression can change norms. This provides evidence to support the expectation that privacy intrusions will produce expressive effects. *See generally* Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419 (2011). One study evaluated whether individuals would respond to "law" conditions that would not be enforced. *See* MCADAMS, *supra* note 30, at 63–67 (2015). In two experiments, participants responded to imaginary scenarios in either "law" or "no-law" conditions. The participants were told that the law would not be enforced—i.e., the police would not get involved and neither party could afford to sue in court. *Id.* When the scenarios did not involve coordination between the parties (i.e., the conditions were in the form of a one-shot prisoners' dilemma), there was no statistically significant difference between participants' responses in "law" and "no-law" scenarios. *Id.* However, when there was coordination between the parties, there was a statistically significant difference between participants' responses depending on whether or not there was a "law." *Id.* Thus, the existence of law—apart from enforcement mechanisms—has an expressive effect on individuals.

177. MCADAMS, *supra* note 30, at 45.

178. *Id.* at 50.

179. *See generally* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001).

law in *Lawrence v. Texas*,[180] codified intrusions into the private lives of individuals, interfering with both their informational and decisional privacy.[181] Goodman found that the laws set "the background rules that define [gay] sociopolitical position[s] within the community."[182] Specifically, the laws appeared to strengthen the perception of many people that gay individuals lacked status even in non-legal contexts.[183]

State intrusions into non-legal contexts present a similar scenario. For instance, as the Supreme Court observed in one case, the presence of a social worker "undermine[s] the mother's authority in her home."[184] This is precisely because visits by social workers constitute an intrusion into the mother's life.[185] The mother is usually the ultimate supervisor at home—the person in charge. State supervision of her undermines and reshapes the social norms that grant her authority: "[P]arental custodial authority [is] impaired."[186] This creates a "power ambiguity" that a child who sees "the government monitor[ing] his parent[] . . . might exploit."[187]

Second, state privacy intrusions can affect norms through risk signaling.[188] Individuals may believe that the law offers us information about actual risk in the world. Thus, for example, when the state picks certain groups to surveil—Muslims, minorities, schoolchildren or welfare recipients—

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180. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (overturning a statute criminalizing homosexual sodomy).

181. *See* Goodman, *supra* note 179, at 697.

182. *Id.*

183. *Id.* A limitation of Goodman's work is that many of the scenarios Goodman's interviewees envisaged ended with arrest under the law. It is, therefore, unclear to what extent Goodman's interviewees were deterred from full social engagement because of social norms as expressed by the law, and to what extent they were simply deterred from certain behavior by criminal penalties. Accordingly, to test for the expressive effects of sodomy laws, we might study the effects of unenforceable sodomy laws. Several states maintain their sodomy laws on the books even after *Lawrence v. Texas* rendered them unenforceable. *12 States Still Ban Sodomy a Decade after Court Ruling*, USA TODAY (Apr. 21, 2014, 6:42 PM), http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025. Two states, Virginia and Montana, repealed their laws. *Id.* Studying how individuals view social norms regarding homosexuality before and after a highly publicized repeal campaign may be more instructive, as individuals would not be concerned about the possibility of enforcement. Nonetheless, the laws themselves might hold less expressive power because of their constitutional invalidity.

184. Colb, *supra* note 111, at 1721.

185. *See generally* GILLIOM, *supra* note 24; Douglas Q. Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U. PA. L. REV. 1188 (1970).

186. Griffin v. Wisconsin, 483 U.S. 868, 876 (1987) (discussing parolees).

187. Colb, *supra* note 111, at 1720.

188. *Cf.* MCADAMS, *supra* note 30, at 45 (arguing that individuals coordinate choices based on "what is likely to be mutually perceived as the salient solution" and once "there is common knowledge of the psychological prominence of a particular solution[], rational self-interest encourages the [individuals] toward its selection").

it sends messages that these groups are dangerous.[189] Similarly, Supreme Court Justices have observed more than once that drug surveillance, while often ineffective, signals the risk of drug use.[190] Studies have also found that the unique forms of surveillance to which HIV-positive individuals are subjected enhances the stigma of HIV as dangerous.[191]

Third, individuals may internalize the legal norm because they find it authoritative, shifting their own preferences or value system, and thus altering their behavior.[192] This may include victims, who internalize self-hatred as a result of the intrusion. Empirical work on such internalization is limited. Some experts believe that anti-sodomy laws of the variety struck down in *Lawrence* created internalized homophobia. For instance, as the American Psychological Association opined in its brief in *Bowers v. Hardwick*, gay individuals often internalize the lessons the law seeks to inculcate by ferreting out homosexual behavior.[193]

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189. When Donald Trump made anti-Muslim statements in late 2015, there seemed to have been a little bit of an (anecdotal) uptick in violence against Muslims, and commentators attributed this uptick to his statements. Matt Ferner & Alissa Scheller, *There Were More Anti-Muslim Hate Crimes Last Year Than Any Year Since 2001*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/hate-crimes-muslims-since-911_us_57e00644e4b04a1497b59970 (last updated Sept. 20, 2016, 5:29 PM) ("Researchers are asking whether Donald Trump's hateful rhetoric has anything to do with [the rise in anti-Muslim hate crimes]."); Dean Obeidallah, *America, Look at What Donald Trump is Doing to Us*, DAILY BEAST (Dec. 22, 2015, 12:00 AM), http://www.thedailybeast.com/articles/2015/12/22/america-look-at-what-donald-trump-is-doing-to-us.html (pointing to violence against other minorities, such as Latinos).

190. *See supra* note 51 and accompanying text.

191. Scott Burris, *Disease Stigma in U.S. Public Health Law*, 30 J.L. MED. & ETHICS 179, 182–83 (2002); Michael J. Stirratt, *I Have Something to Tell You: HIV Serostatus Disclosure Practices of HIV-Positive Gay and Bisexual Men with Sexual Partners*, *in* HIV + SEX: THE PSYCHOLOGICAL AND INTERPERSONAL DYNAMICS OF HIV-SEROPOSITIVE GAY AND BISEXUAL MEN'S RELATIONSHIPS 106 (Perry N. Halkitis et al. eds., 2005); *see also* John B. v. Superior Court, 137 P.3d 153, 172 (Cal. 2006) (Kennard, J., concurring in part and dissenting in part) (arguing that sexual history is relevant in a civil case).

192. The scholarship offers three motives for changing behavior in this way. Many individuals look to sources they consider authoritative in developing their sense of obligations. They shape their own moral universe and their sense of what is right or wrong in imitation of the norms that that authority expounds without further rationalizing. MCADAMS, *supra* note 30, at 140–41. Although this relies in part on the ontology of the law itself, the crux of this account is in the behavior change that results *from* the law. Alternatively, individuals may become habituated. *See generally* Stefan Voigt & Daniel Kiwit, *The Role and Evolution of Beliefs, Habits, Moral Norms, and Institutions*, *in* MERITS AND LIMITS OF MARKETS 83 (Herbert Giersch ed., 1998). Finally, Robert Cooter argues that individuals may shift their preferences for Pareto optimization given existing resource and normative constraints. Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 586, 598–601 (1998).

193. Brief for American Psychological Association & American Public Health Association as Amici Curiae Supporting Respondents at 8, 29, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720445, at *8, *29. The APA's brief cites no empirical work. However, Ilan H. Meyer does show how discrimination more generally can internalize homophobia. Studying internalized homophobia before and after repeal of the unenforceable sodomy laws described above would also provide information about this effect. *See generally* Ilan H. Meyer, *Prejudice, Social*

Both definitional and causal effects create further downstream consequences by affecting the identity categories with which individuals are identified. Thus, in *Hudson v. Palmer*, Justice Stevens relied on empirical work to argue that the message privacy intrusions send to prisoners results in them "devalu[ing] themselves."[194] This, in turn, made them "more prone to violence toward themselves or others."[195] Ultimately, "[w]ithout the privacy and dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished."[196]

D. MASS SURVEILLANCE

So far, this Article has considered cases involving demarcation of specific groups within society. However, more recently, the question of secret mass surveillance, which potentially subjects *all* citizens to privacy intrusions, has received prominent attention. The secret mass surveillance this Article addresses is best imagined as a hypothetical, simplified program that involves government telephone metadata collection of all citizens, rather than the specific NSA mass surveillance program that has received notoriety: The details of the latter program are complicated and would muddy my more general points about mass surveillance. I do, however, draw from the scholarly, media, and press reactions to the NSA program as relevant to demonstrate how mass surveillance generally is perceived and the messages it may send.

Secret mass surveillance turns the normal information practices of a democratic society on its head, undermining the usual status relations between citizen and government. In a normal democratic society, a citizen is in charge—she supervises the government, but, in turn, usually enjoys privacy rights against the government. The program flips this relationship around—the citizen becomes the supervised, the government the supervisor.

A defining characteristic of a democratic society is citizens' ability to supervise government.[197] For some, this is part and parcel of an overall framework in which the government holds only delegated power: Its officials are our agents.[198] Political officials by law or norms lay bare (within certain

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Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 PSYCHOL. BULL. 674 (2003).

194. Hudson v. Palmer, 468 U.S. 517, 552 (1984) (Stevens, J., concurring in part and dissenting in part).

195. *Id.*

196. *Id.* at 522 (quoting Paul C. Giannelli & Francis A. Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045, 1069 (1976)).

197. CRAIG FORCESE & AARON FREEMAN, THE LAWS OF GOVERNMENT, 481–84 (2005); *see also* Bryce Clayton Newell, *The Massive Metadata Machine: Liberty, Power, and ~~Secret~~ Mass Surveillance in the U.S. and Europe*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 481, 521–22 (2014).

198. Theories of government in systems with democratic representation classically rely on two different models. The first, and most commonly touted model is the delegate model of representation I describe above. The alternate model of representation is the trusteeship

limits) matters that for others would be considered private.[199] Once in government, officials and politicians are subject to supervision under freedom of information and transparency laws.[200] First Amendment case law is designed to ensure that citizens get the maximum possible information to aid in democratic decision-making and debate.[201] Furthermore, even though open meeting policies do not necessarily produce favorable effects, and, if anything, encourage rent-seeking,[202] "[t]he public has a recognized interest" in being able to supervise the behavior of elected officials.[203] Some scholars term this "sousveillance," that is, surveillance from below.[204] On the flipside, individuals enjoy (within reason) privacy protections against the government. These information practices mark citizens as in charge—the government works for the people.

Secret mass surveillance turns these democratic practices upside down, depriving citizens of the status they once had. As the *Washington Post* editorial

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model. On that account, politicians and their agents do not always act according to the views of the electorate. Rather, they work to achieve the long-term good of society as a whole, as determined by them for the period of time that they are in office. On some accounts, they draw their authority not from the populace but from the office itself. In practice, representation oscillates between these extremes. To some extent government tries to represent the views of the electorate. But politicians often operate independently, pursuing projects that their electorate may not always agree with, to further the good of society as a whole. *See* Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971, 973–76 (2007) (describing competing theories of government in systems of democratic representation).

199. *See, e.g.*, *Statements of Economic Interests—Form 700*, CAL. FAIR POL. PRACTICES COMM'N, http://www.fppc.ca.gov/Form700.html (last visited Apr. 3, 2017); State Ethics Commission, *Conflict of Interest Law Disclosure Forms*, MASS.GOV, http://www.mass.gov/ethics/disclosure-forms (last visited Mar. 24, 2017); TAX ANALYSTS, *Tax History Project: Presidential Tax Returns*, http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns (last visited Mar. 24, 2017); *cf.* Chandler v. Miller, 520 U.S. 305, 309 (1997) (discussing—and striking down—a Georgia law requiring political candidates to undergo drug tests).

200. Freedom of Information Act of 1966, 5 U.S.C. § 552 (2012); *Fact Sheet: New Steps Toward Ensuring Openness and Transparency in Government*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (June 30, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency.

201. *Cf.* Citizens United v. FEC, 558 U.S. 310, 325 (2010) (defending the standards of the First Amendment that protect rather than stifle speech).

202. *See* Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 644–45 (2007) (reporting that the effectiveness of open meetings laws is limited by the public's general unawareness of the acts, "the inequality that can arise where only certain members of a community are aware of such an act's existence," limited community participation, and whether the open meetings are actually where the decisions are made); Kevin D. Karty, *Membership Balance, Open Meetings, and Effectiveness in Federal Advisory Committees*, 35 AM. REV. PUB. ADMIN. 414, 427–30 (2005) (noting that open meeting laws decrease effectiveness).

203. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 462 (1977).

204. *See generally* Jean-Gabriel Ganascia, *The Generalized Sousveillance Society*, 49 SOC. SCI. INFO. 489 (2010); Steve Mann et al., *Sousveillance: Inventing and Using Wearable Computing Devices for Data Collection in Surveillance Environments*, 1 SURVEILLANCE & SOC'Y 331 (2003).

page explained, such surveillance deprives "the public"—those who are supposed to have the ultimate power in government—of the "ab[ility] to make a reasonable assessment of whether these programs are worth the security benefits."[205] Similarly, the *New York Times* editorial page quoted from a letter sent by certain Senators to the Attorney General: "[I]t is impossible to have an informed public debate about what the law should say when the public doesn't know what its government thinks the law says."[206] Only the "oversight" of the people or their appropriately elected representatives could restore this balance of power.

The power imbalance is enhanced by the fact that it proceeds unidirectionally. The citizen becomes a mere object, a metaphorical lab rat subject to observation.[207] The power dynamics appropriate for democratic society are therefore symbolically upended, with the supervisor now the supervised. This harms individuals' perceptions of themselves as citizens in a democratic society: As USA Today observed about the NSA's mass surveillance program, "to gather so many records so indiscriminately in such secrecy sounds more like the actions of China and Iran."[208]

One may object that the status harm in a situation where the government intrudes upon the privacy of an entire population is different from when the government intrudes upon only some of the population. However, the difference is one of degree rather than kind. As I note above, when only some groups are surveilled, the government creates three separate statuses: normal individuals who enjoy baseline privacy and respect, the lower status surveilled groups, and higher status surveillors.[209] When *all* citizens are secretly surveilled, however, the government is imagined as a monolith, itself impervious to supervision. In turn, the 'people' are deprived of the baseline level of respect they have as citizens, becoming subjects of a non-democratic regime. Although a mass surveillance program sweeps a much larger group of individuals, the fundamental status harm remains similar, vis a vis the

205. Editorial Board, *The Government Needs to Explain about the NSA's Phone Data Program*, WASH. POST (June 6, 2013), https://www.washingtonpost.com/opinions/the-government-needs-to-explain-about-the-nsas-phone-data-program/2013/06/06/521f4ec2-ceed-11e2-9f1a-1a7cdee20287_story.html.

206. The Editorial Board, *President Obama's Dragnet*, N.Y. TIMES (June 6, 2013), http://www.nytimes.com/2013/06/07/opinion/president-obamas-dragnet.html.

207. For a fuller explanation of how status-harms (or stigmatic harms) create standing, see Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 431–33 (2007) (explaining that *Allen v. Wright* leaves open the possibility for stigmatic harm when the government action directly affects the individual).

208. The Editorial Board, *Massive Secret Surveillance Betrays Americans: Our View*, USA TODAY (June 6, 2013, 9:51 PM), http://www.usatoday.com/story/opinion/2013/06/06/nsa-phone-records-verizon-internet-editorials-debates/2398819.

209. *See supra* Part III.A.

government. As the *New York Times* put it, such a program expresses a "fundamental[] shift[] [in] power between the individual and the state."[210]

The visceral harm this creates is captured in popular culture. Consider government surveillance that occurs in TV shows including *The Good Wife*, *Homeland*, *Scandal*, and even the acclaimed movie *The Lives of Others*. In *The Good Wife*, NSA technicians seek reasons to surveil the protagonist—not to find information to use against her, but because they find it entertaining, or as one reviewer put it, "their favorite soap opera."[211] The harm of mass surveillance then lies not in the potential use of information, but the indignity of the intrusion itself. In the other cases, although there are peripheral concerns about the misuse of collected information, the focus is on the indignity of the governmental intrusion itself. For instance, *Scandal* and *Homeland* involve highly personal and targeted surveillance where the government acts as an omnipotent voyeur.[212] Similarly, in *The Lives of Others*, potential misuse of information by the totalitarian state is overshadowed by the painstakingly detailed account of how one citizen's most intimate experiences are unknowingly documented and reduced to a just another government dossier.[213]

Finally, by extending supervision across a group of individuals, the message surveillance sends also gets transformed. Because the surveillance applies to a vast, disparate group of individuals, it can no longer imbue certain groups with the particular characteristics this Article has so far described—danger, immaturity, dishonesty.[214] In those cases, we know that the victim is inferior *because* the surveillance signifies dishonesty, for example. But with mass surveillance, no other value intermediates inferiority. The act of surveillance by itself marks citizens as subject to the state.

IV. REMEDIES FOR INTRUSION BASED EXPRESSION

Constitutional solutions for expressive privacy intrusions are unlikely to be achieved in the short term. However, while judicial solutions will require courts to fold expressive harms into constitutional jurisprudence, and the evolution of that jurisprudence is hard to prescribe or predict, there are two

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210. The Editorial Board, *supra* note 208.

211. Noel Kirkpatrick, The Good Wife *"Lies" Review: Everything All at Once*, TV.COM (Nov. 9, 2015), http://www.tv.com/shows/the-good-wife/community/post/the-good-wife-season-7-episode-6-lies-review-1446939875 28; *see also The Good Wife: Lies* (CBS television broadcast Nov. 8, 2015) (depicting NSA analysts eager to once again tap the protagonist's phones simply because they are curious about her personal life).

212. *See, e.g.*, *Scandal: Hunting Season* (ABC television broadcast Oct. 18, 2012) (depicting an intelligence operative in his living room watching a closed circuit feed of the president's former mistress as she undresses in her apartment); *Homeland: Grace* (Showtime television broadcast Oct. 9, 2011) (depicting a CIA operations officer sitting in her living room watching a closed circuit feed of a believed war hero as he engages in intercourse with his wife).

213. THE LIVES OF OTHERS (Sony Pictures Entertainment 2006).

214. *See supra* Part II.B.2.

possibilities. First, litigants have sued the government under the Due Process Clause for privacy intrusions.[215] As a doctrinal matter, however, such litigation does not fall within the decisional jurisprudence of cases like *Roe*,[216] *Casey*,[217] and *Lawrence*.[218] While most courts do not permit cases to go forward unless the intrusion is followed by some harm that burdens decisionmaking ability,[219] litigants could well highlight the humiliation and expressive harm that some informational intrusions create.

A better alternative or additional route is the Fourth Amendment, where case law already recognizes the indignity of intrusions.[220] While this recognition carries no doctrinal weight, litigants could at least cite this case law and explicitly argue that any intrusion that is humiliating is unreasonable and violates norms of equality, decency, and mutual respect. This is implicitly the reasoning in cases like *Terry* and the dissents in *Vernonia* and *Hudson* described above.[221] If litigants identify expressive harms as a distinct thread in Fourth Amendment doctrine, solutions might gain some traction.

But whether solutions come from courts (unlikely), or from legislative enactments or executive policies (far more likely), what should remedies look like? The answer may seem simple—end the intrusion. Statutes prohibiting information collection clearly treat that solution as the most straightforward remedy. Yet, that solution is not without its limitations, as explained below, and numerous other solutions—including solutions that *expand* privacy intrusions—may in fact be superior.

A. END THE INTRUSION

As this Article has demonstrated, intrusions cause harms that are both material and expressive. The most straightforward response to these harms is to end intrusions, since with no intrusions there can be no harm. Courts can therefore issue injunctions to end the intrusions.

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215. While the Supreme Court has never squarely addressed whether individuals enjoy a right to informational privacy, dictum in *Whalen v. Roe*, 429 U.S. 589, 599 (1977), suggests there exists a right against the "disclosure of personal matters."

216. Roe v. Wade, 410 U.S. 113 (1973).

217. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

218. Lawrence v. Texas, 539 U.S. 558 (2003).

219. Those circuit courts that have taken *Whalen* to grant a right of privacy require "the potential for harm[ful]" use. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980). This test was subsequently adopted by other courts. *See, e.g.*, Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000); *In re* Crawford, 194 F.3d 954, 959 (9th Cir. 1999). This means that a mere expressive intrusion might not be cognizable.

220. Although Fourth Amendment jurisprudence and scholarship sometimes appreciate the indignity that intrusions visit, such recognition carries no doctrinal weight. *See supra* Part II.B; *see also* Sherry F. Colb, *Profiling with Apologies*, 1 OHIO ST. J. CRIM. L. 611, 623–24 (2004) (recognizing searches can "insult"); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 108–09 (2011) (stating that the harm of punitive targeting is that it is coercive).

221. *See supra* Part II.B.

But this solution is limited. First, in cases involving past intrusions, injunctions provide no remedy. Second, from an expressive standpoint, minimization may produce mixed results. In some cases, the functional, non-expressive benefits of the intrusion may remain so high—preventing mass terrorism for example—that even if the state would prefer to avoid the expressive harm of the intrusion, it has no choice but to carry out the intrusion. Even if courts and policymakers police intrusions strictly and end them in the vast majority of cases, in those rare cases where intrusions continue to occur, they may communicate a message that is even more insulting and stigmatizing than before.

To see why this is the case, we must return to the observation earlier in this Article that intrusions carry a stigmatizing message primarily because they deviate from a baseline according to which individuals generally enjoy privacy.[222] Specifically, social convention dictates that we only deviate from the baseline when there is a good reason—therefore, deviation from the baseline sends a message.

In contexts where intrusions are infrequent, the baseline is a more rigid one so that deviations become even more noteworthy. For instance, in *Vernonia*, responding to Justice O'Connor's suggestion that only certain suspected students be tested, the majority argued, "testing based on 'suspicion' of drug use would not be better, but worse."[223] This would render testing even more "accusatory," more of a "badge of shame," and would allow "teachers [to] impose testing arbitrarily upon troublesome but not drug-likely students" in order to harass those students.[224] Because expression derives from the functional interests behind the intrusion, allowing intrusions only when these interests are strong sends a more forceful message when intrusions do occur. Accordingly, even where injunctions (or policies) minimizing collection provide some remedy, the effects may be counterproductive in the long run.

Rather than stop the search altogether, courts can instead minimize the harm by decreasing the extent of the intrusion by altering the factors described in Part II.C above. Thus, frequent violent searches of a woman by a male officer can be made less intrusive if it is carried out infrequently and gently by a female officer.[225] Mandating training procedures is also important.[226] However, if more limited intrusion becomes the baseline, forcible searches will then, of course, carry greater stigma for the same reasons discussed above.

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222. *See supra* Part III.A.

223. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995).

224. *Id.* at 663.

225. *See supra* Part II.C.

226. Memorandum Regarding Instructional System Design Model for Search and Seizure and Bias-Free Policing Training, United States v. City of Seattle, No. C12-1282-JLR (W.D. Wash. Sept 2, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/10/23/spd_docket176.pdf.

B. CHANGE PRIVACY NORMS

Social norms determine when access to an individual becomes a privacy *intrusion*.[227] For example, while asking about sexual orientation is intrusive among some social groups, among others, it is not as intrusive, since norms around sexuality have changed.[228] Altering the norms surrounding certain information or activities may therefore shift our perception of whether the government action in question is a privacy intrusion, and therefore insulting.

To persuade society that certain information or activities are public, or at least, not that private, the government would have to strip the privacy protections surrounding the issue to make this claim believable. At first, as long as the information remains understood as private, the loss of legal protections may cause harms. But over time, we may get used to this shifted privacy baseline. This is the mirror image of the argument made above—there, tightening the privacy baseline would make any government access even more intrusive.[229] Here, loosening the baseline makes government access less intrusive and therefore less insulting.

The outing campaigns that activist Andrew Sullivan and others launched to decrease the stigma of homosexuality by changing the privacy norms around being gay is a useful example of this phenomenon.[230] Activists in other contexts have also argued that the stigma of information collection should be dissipated by shifting privacy norms. Ronald Bayer famously argued in the early 1990s that privacy exceptionalism with respect to HIV increases the stigmatizing potential around the disease.[231] He therefore argued for fewer privacy protections at the time of testing.[232] The CDC adopted these suggestions in 2006 and made "HIV screening" routine "in all health-care settings."[233] Similarly, abortion activists have argued that women should publicly acknowledge if they have had abortions.[234]

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227. *See supra* Part II.B.1.

228. *See generally* Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711 (2010). Admittedly, part of the reason privacy norms around homosexuality have changed is because homosexuality has slowly lost negative connotations. Whether this in turn is caused by shifting privacy norms is a complex question.

229. *Supra* Part III.A.

230. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 78 (1995) (arguing that outing "challenge[s] the boundaries of private and public which have been historically used to cordon off homosexuality from 'public' life by casting it as a 'private' activity, a source of shame and discretion"). *See generally* Allen, *supra* note 228 (arguing that courts are currently less willing to entertain privacy tort claims).

231. *See generally* Ronald Bayer, *Public Health Policy and the AIDS Epidemic: An End to HIV Exceptionalism?*, 324 NEW ENG. J. MED. 1500 (1991).

232. *Id.*

233. *See* Bernard M. Branson et al., *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings*, CDC (Sept. 22, 2006), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm. For the history of this initiative, see generally Douglas J. Koo, Editorial, *HIV Counseling and Testing: Less Targeting, More Testing*, 96 AM. J. PUB. HEALTH 962 (2006). *See also*

While policymakers can clearly effectuate a shift in norms, courts can do the same. In *Vernonia*, for example, the Court reasoned, "a broad-based search regime . . . dilute[d] the accusatory nature of the search."[235] However, the Court could have diluted the message even further. Rather than subjecting only student athletes to searches, the Court could have ordered a policy that subjected all students to searches. By subjecting all groups to the search regime, the Court could potentially shift privacy norms in the long run. Indeed, equal protection doctrine takes a similar approach: As a remedy, the state may *deny* benefits to all groups equally instead of providing benefits equally.[236]

But this approach has its problems, rendering courts ill-equipped to provide this kind of norm-shifting remedy. Even if it is desirable to change privacy norms so that government access does not code as intrusive and insulting, we must be careful in how we achieve this goal. Thus, stripping all students of privacy or outing individuals may decrease the sting of information collection in the long term, but harm many individuals in the short term. A far better solution is to launch campaigns to decrease stigma around an issue, and to empower individuals to speak without a sense of shame. Individuals can voluntarily pick and choose how to gradually integrate this shifting norm in their everyday life in a self-empowering way. For example, the CDC started a public campaign to decrease the stigma that surrounds HIV in the summer of 2014: "Start Talking. Stop HIV."[237] The focus is on portraying HIV as a subject that can be appropriately discussed in intimate relationships.

Furthermore, even if the government adopts good norm-shifting methods, three challenges remain. First, there is the obvious objection that privacy norms are sticky and trans-contextual. In *Vernonia*, Justice O'Connor did not buy the Court's "dilution" claim.[238] Even if *all* students were subject to searches, the privacy norms they enjoyed in other areas of their lives—at

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Lawrence O. Gostin, *HIV Screening in Health Care Settings: Public Health and Civil Liberties in Conflict?*, 296 J. AM. MED. ASS'N 2023, 2024 (2006) (arguing that universal testing is "less stigmatizing because it does not single out vulnerable populations and applies equally to all socioeconomic classes and racial groups"); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1527 (2009).

234. *See, e.g.*, Carmen Fishwick, *Why We Need to Talk About Abortion: Eight Women Share Their Experiences*, GUARDIAN (Oct. 9, 2015), http://www.theguardian.com/world/2015/oct/09/why-we-need-to-talk-about-abortion-eight-women-share-their-experiences; Tamar Lewin, *#ShoutYourAbortion Gets Angry Shouts Back*, N.Y. TIMES (Oct. 1, 2015), http://www.nytimes.com/2015/10/02/us/hashtag-campaign-twitter-abortion.html.

235. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting); *see also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (discussing sobriety checkpoints).

236. *See generally* Palmer v. Thompson, 403 U.S. 217 (1971) (jurisdiction could close swimming pool instead of giving access to it to both races).

237. Jonathan Mermin, *CDC Launches New Campaign—Start Talking. Stop HIV.—for Gay and Bisexual Men*, AIDS.GOV: BLOG.AIDS.GOV (May 21, 2014), http://blog.aids.gov/2014/05/cdc-launches-new-campaign-start-talking-stop-hiv-for-gay-and-bisexual-men.html.

238. *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting).

home, in extracurricular contexts—would mean that testing in the student athlete context would come across as accusatory.[239]

Second, expanding searches beyond the suspected subgroup can be expensive. It may be cost prohibitive to start searching *all* lockers so that those students who would otherwise be targeted for the search would not feel (justly or unjustly) a status harm.

Third, privacy provides several functional benefits. Schools may put a glass door on a locker—but a glass door on a toilet stall is quite another matter. Reducing the scope of privacy norms too far would result in a loss of sense of individuality and self-determination. Thus, most would agree that it is undesirable to change privacy norms so that government regulation over all areas of one's life would be considered acceptable.[240] Accordingly, we must be careful in the degree to which we loosen privacy baselines across society as a whole.

C. *PREVENT EXPRESSIVE EFFECTS*

Even if an intrusion cannot be stopped, nor its meaning changed, courts and policymakers might still minimize the expressive effects of an intrusion through other means. In his recent comprehensive overview of expressive theories of law, McAdams argues that three conditions must hold for action by the state to have expressive effects.[241] By negating each of these factors, the expressive effects of the intrusion can be neutralized.

One condition is what McAdams calls expertise or risk aggregation.[242] The state entity that sends the message must have sufficient institutional heft such that individuals regard the message it sends as authoritative.[243] An enacted law will generally attract such regard because it represents the aggregated expertise of all legislators. Similarly, executive policies that are routinely carried out in the relevant community may also command respect among some elements of the community. However, those who see the relevant body as lacking expertise, impartiality, or good faith are less likely to regard the message as authoritative. Thus, those who question the legitimacy of police departments are less likely to absorb the stigmatizing message stop-and-frisk policies targeting minorities send.

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239. *Id.* at 683–84. One may argue that the NSA program presents another example of this phenomenon as *all* individuals are subject to surveillance; hence it stigmatizes no particular group, and changes the privacy baseline. My intuition is that such individuals, with some justification, see the government as a "them" putting in place a program that supervises "us," its citizens. For them, the government is a monolith rather than made up of specific individuals who are *also* subject to surveillance.

240. Phillip E. Reiman, *Cryptography and the First Amendment: The Right to be Unheard*, 14 J. MARSHALL J. COMPUTER & INFO. L. 325, 325–26 (1996).

241. MCADAMS, *supra* note 30, at 179–80.

242. *Id.* at 186–87.

243. *Id.*

Accordingly, undermining the authority of the government institution carrying out the intrusion can limit its ability to shift norms. Let me be clear: I am not suggesting wholesale undermining of law and government actors. However, their expertise and authority in certain contexts can be questioned based on higher order principles. Thus, police action can be questioned under statutes and constitutional principles that guarantee civil rights. Legislatively mandated intrusions can likewise be questioned under constitutional principles.[244] Undermining legitimacy in this manner can limit the power of the government action to diminish the status of minorities.

Courts are particularly well positioned to achieve this because of their power to issue declaratory relief.[245] Simply declaring a law unconstitutional or a police practice invalid can vitiate the power of the relevant institution to inflict status harm.[246]

Second, McAdams argues, the intrusions must be public to some degree.[247] The law's expressive message and effects will only be as strong as the audience that hears it. An under-publicized or secret law or state program may have concrete effects that are not expressive. Thus, individuals of Muslim background were regularly subject to surveillance without their knowledge, resulting in many being placed on no-fly lists.[248] However, the state message produced actual effects only on those individuals who knew of this program.[249]

Accordingly, we may change the publicity of the government intrusion. Where intrusions serve an important purpose, courts can require that intrusions take place with minimum fanfare, to maintain the dignity of the individuals involved. Where intrusions happen on the street, or are embodied

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244. *See, e.g.*, Idaho v. Mubita, 188 P.3d 867, 874–76 (Idaho 2008), *abrogated by* Verska v. Saint Alphonsus Reg'l Med. Ctr., 265 P.3d 502 (Idaho 2011) (discussing Fourth Amendment concerns); People v. Russell, 630 N.E.2d 794, 795–96 (Ill. 1994) (discussing First Amendment concerns); State v. Musser, 721 N.W.2d 734, 742–45 (Iowa 2006) (discussing First Amendment concerns); State v. Gamberella, 633 So. 2d 595, 601 (La. Ct. App. 1993) ("[Plaintiff] claims the court should have declared the intentional exposure of the AIDS virus statute unconstitutional on the grounds of unconstitutional vagueness, violation of the right to privacy, denial of due process, and denial of equal protection of the law."); State v. Gonzalez, 796 N.E.2d 12, 21–23 (Ohio App. 1 Dist. 2003) (discussing Eighth Amendment and vagueness concerns); State v. Stark, 832 P.2d 109, 115–16 (Wash. Ct. App. 1992) (discussing vagueness concerns); *Developments in the Law: Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680, 1785–88 (2014) (discussing animus-related issues).

245. *See generally* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091 (2014).

246. Note that the *Lyons* standing requirements apply to declaratory relief as well. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

247. MCADAMS, *supra* note 30, at 179–80, 183–85.

248. *See* Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1319–30 (2016); *see also Witness in "No-Fly" Trial Finds She's on "No-Fly" List Too*, PAPERS, PLEASE!, https://papersplease.org/wp/2013/12/02/witness-in-no-fly-trial-finds-shes-on-no-fly-list-too (last visited Mar. 24, 2017).

249. *See* Goodman, *supra* note 179, at 689–94 (discussing how knowledge about sodomy laws influences compliance with them).

in law, they are public, and more likely to influence social perception and norms regarding the values and victims of the intrusion; they are more likely to be seen as an insult by the victim. If the intrusion remains out of sight, then the intrusion is unlikely to significantly influence norms. Thus, if the government surveils certain groups of individuals in secret, it is unlikely to shift public perception of that group of individuals.

But this solution, also, has its limits. The first limit is a practical one—based on current technology, even with secret surveillance, some number of officials will know of the surveillance. They may internalize the norms that undergird the surveillance and become hostile to the surveilled group. They may then transmit those values to those they interact with in other contexts. Thus, someone who has surveilled Muslim-Americans may develop a sense of disrespect towards them that she evinces in other areas of life and may transmit those values to others she can influence.[250]

Further, limiting government transparency also sends problematic messages. It signals that the government can remain inviolable and insulated from its citizens and that citizens no longer have the power to supervise and alter the government. In other words, it undermines the democratic vision of a government subject to the people as described above.[251] While limited pockets of government secrecy may be acceptable, especially to protect the privacy of government workers in their *individual* capacity,[252] allowing the government to evade supervision in general is problematic.

Finally, preventing status harms is not the only important social value. Maintaining democratic government has intrinsic value that would be undermined if the government carried out any tasks secretly.

McAdams's final condition is that the meaning of the government action must be decipherable.[253] Therefore, the government may garble the message of the intrusion to render it indecipherable, so that the intrusion does not send a clear message of disdain towards the targeted individual.

Courts and policymakers could adopt a range of possible solutions here. For example, Bernard Harcourt and Tracey Meares have argued for randomized searches among individuals who satisfy a certain level of

250. FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 52 (2015). Nonetheless, one can imagine that technology might develop algorithms that determine whom to surveil. These algorithms will identify certain individuals to law enforcement based on methods that will always remain unclear. Not knowing what groups the algorithm focused on and how it came to its result, even law enforcement would be unable to identify any "values" to derive from such algorithmic surveillance. *See id.* at 140–88; W. Nicholson Price II, *Black-Box Medicine*, 28 HARV. J.L. & TECH. 419, 448–54 (2015) (discussing the development of predictive algorithms and data sets in personalized medicine).

251. *See supra* Part III.D.

252. As FOIA allows. *See FOIA Guide, 2004 Edition: Procedural Requirements*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/foia-guide-2004-edition-procedural-requirments (last updated July 23, 2014).

253. MCADAMS, *supra* note 30, at 180–83.

suspicion. As they explain, "[w]hen we require a certain level of suspicion, it turns out, we have identified a group of individuals—generally, a group that contains individuals of different races, ethnicities, gender, and so on."[254] Importantly, while that approach reduces the harms of profiling that Harcourt and Meares identify, it will also prevent disdainful messages from being expressed, since multiple, random groups will be subject to surveillance.

D. COUNTERACT EXPRESSIVE HARM

A modified version of McAdams's last approach is for the state to engage in expression that counteracts the status harm its intrusions create. The basis of this argument lies in the work of political philosopher Jean Hampton on expressive theories of retribution in the realm of criminal punishment.[255] Hampton begins with the premise that crimes express disdain towards the victim:

> They are ways a wrongdoer has of saying to us, . . . "I can use you for my purposes," or "I am here up high and you are there down below." Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us—and thus it involves a kind of injury that is not merely tangible and sensible.[256]

State punishment, according to Hampton, ameliorates this harm by decreasing the status of the offender and increasing that of the victim.

> The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is "What you did to her, she can do to you. So you're equal." The one who acted as if he were the lord of the victim is humbled to show that he isn't lord after all. In this way, the demeaning message implicit in his action is denied.
>
> Therefore, just as the crime has symbolic meaning, so too does the punishment. The crime represents the victim as demeaned relative to the wrongdoer; the punishment "takes back" the demeaning message.[257]

Recent empirical work by Kenworthey Bilz confirms these claims. Bilz used interviews to test how punishment affected the perceived social standing of

254. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 815 (2011).

255. *See generally* Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992).

256. *Id.* at 13 (quoting JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 25 (1988)).

257. *Id.*

victims and offenders.[258] She found that "[t]he victim gained social standing and offenders lost it when the offenders were punished. When the offenders were not punished, the victim lost social standing and offenders gained."[259]

Hampton and Bilz are, of course, focused on counteracting the status harms of private action, through one specific approach—punishment. In theory at least, however, the status harm of state action can also be ameliorated by contrary state messages perceived as sincere and honest. Other kinds of state expression, apart from punishment, should also be able to achieve this effect.

Thus, even if status-harming intrusions end up targeting certain groups out of necessity, state expression that counteracts these effects may be helpful. Again, judges are well suited to achieve this remedy. A declaration that a search, whether statutory or otherwise, is invalid, vitiates the message it sends. Other remedies may include damages as a form of "apology."[260]

The exclusionary rule itself can be seen as a way to expressively counteract the harm of the search. By turning its back on the fruits of the search, the court further diminishes the legitimacy of the search, more than a mere declaration of invalidity. The rule signals that an invalid search should be abjured in all respects, thereby counteracting any status harm it inflicted.

Even in circumstances when courts cannot or will not intervene to criticize past intrusions, political leaders, civil servants, and others can publicly comment in order to raise the status of those groups subject to intrusions. Thus, even as Muslims suffered targeted intrusions and the derivative status harms in the months following 9/11, President Bush made efforts to point out that "[o]urs is a war not against a religion, not against the Muslim faith. But ours is a war against individuals who absolutely hate what America stands for."[261] While it is doubtful that these solutions will be significantly effective, especially in the face of ongoing intrusions, it may somewhat blunt their status-harming effects.

V. CONCLUSION

Privacy intrusions send messages no matter who wields them. Intrusions by peeping toms, acquaintances, family members—any of those can insult us and make us feel disrespected. However, it is easier to shrug off some messages than others. State intrusions can fundamentally reshape an individual's or group's social existence. It places them in a relation of subservience to those who surveil them, and at a comparative disadvantage to the rest of society. Victims who recognize that they have been intruded upon

258. *See generally* Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL L. STUD. 358 (2016).

259. *Id.* at 366.

260. *See* Colb, *supra* note 220, at 623–24.

261. *Backgrounder: The President's Quotes On Islam*, WHITE HOUSE, http://georgewbush-whitehouse.archives.gov/infocus/ramadan/islam.html (last visited Mar. 24, 2017).

see the status affront as undermining their relationship with the state and as violative of their self-perception. And even if victims do not know they have been surveilled, privacy harms may impose social stigma in the eyes of other observers.

Adopting this expressive approach to privacy intrusions also addresses key problems in privacy theory and helps reshape doctrine in key ways. Existing privacy doctrine focuses almost exclusively on the misuse of information that intrusions yield. A jurisprudence that halts the collection of information at the outset can more properly provide protections and stem the indignity of intrusions.

There is no easy solution to address the expressive harms of intrusions. The government will continue engaging in surveillance even if it intends no status harms, and inadvertent harms are inevitable. While limiting the restrictions that privacy norms place on access, and carrying out intrusions in secret may help address these harms, the reach of these solutions are necessarily limited.

Picking among solutions will require a delicate balance of competing considerations. In some cases, we may just make the kind of information that is sought less private or shameful. This may pertain to abortions, sexuality, or even HIV status. By treating this information as non-stigmatizing we can lessen the expressive harm of the intrusion. That approach may prove the most lasting and robust. But it is also hard—until we diminish stigma around those issues, or rethink our approach to sex and medicine, we may wish to insulate people from government intrusions by preventing them. When this, in turn, is impossible due to the functional uses of the intrusion, we should change the way in which we carry out the intrusion to render it less expressively harmful. For example, we can engage in routine and randomized stops as Meares and Harcourt propose. We can also counteract the expressive harm by apologizing for the harm as a way to enhance the status of the surveilled. On the other hand, bringing attention to the expressive harm in an effort to counteract it might well backfire, and exacerbate the humiliation. Thus, in certain limited circumstances, we might even conduct intrusions in secret. However, that must only be done after fully weighing the competing values that counsel against secret intrusions. Consideration of those competing values will in most (maybe even all) cases prohibit secret surveillance. Ultimately, however, privacy intrusions by the State and also by various private actors will continue to number among the many other status-creating mechanisms in society that lends it its texture and variety.