FOUR PRIVACY STORIES AND TWO HARD CASES

PRIVACY AT THE MARGINS. Scott Skinner-Thompson.* New York, N.Y.: Cambridge University Press. 2021. Pp. ix + 220. $99.99 (Hardcover), $32.99 (Paperback).

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Scott Skinner-Thompson's new book, *Privacy at the Margins*, is what I would call a "fourth-generation" study of privacy law. Privacy's contours and justifications have been debated over the course of the twentieth century, first to establish it as a matter deserving legal protection (roughly the first half of the twentieth century),[2] then to iterate its various common law and constitutional variations (starting in the 1960s),[3] and since the computer and internet revolution of the 1990s, to reevaluate privacy's growing importance but waning presence in the digitally-networked age.[4] The third-generation of privacy

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1. Professor of Law, Boston University School of Law. Thanks to Ari Waldman and Bill McGeveran for helpful conversations while working on this Review.

2. Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

3. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the constitutional right to privacy between a patient and her doctor for the purposes of prescribing birth control, drawing on cases from the 1920s and 1930s regarding child-rearing, and on the penumbra of the Bill of Rights, including the First, Third, Fourth, Fifth and Ninth Amendments).

4. ALAN WESTIN, PRIVACY AND FREEDOM (1967); Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006); Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000); ANITA ALLEN, UNPOPULAR PRIVACY: WHY MUST WE HIDE? (2011); Paul Schwartz, *Property, Privacy and Personal Data*, 117 HARV. L. REV. 2055 (2004); JULIE COHEN, RECONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE (2012); Joel Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L. J. 877 (2003); WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES (2018). For discussions of "privacy" as a concept outside legal scholarship, see SARAH IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA (2018) (a historical analysis); EVAN SELINGER & BRETT FRISCHMANN, RE-ENGINEERING HUMANITY (2018) (a philosophical inquiry).

scholarship has been a fast-growing area in the past two decades, combining the study of tort-based privacy scholarship with information and data privacy concerns endemic in the internet age. And it set the stage for a fourth-generation of privacy scholarship, which considers the intersection of privacy law and equality along the dimensions of gender, race, sexual orientation, and economic class.[5]

As an example of third-generation privacy scholarship on which Scott-Skinner Thompson's book builds, consider the recently published *Why Privacy Matters*, by Neil Richards. Richards begins his new book with the sentence "Privacy is dead."[6] This is a set-up, because, as the book's title indicates, Richards argues forcefully that privacy matters a lot. Privacy promotes identity formation, intellectual freedom and democracy, and it protects us as consumers and employees in the lopsided "power asymmetries caused by the industrial econom[ies]" of the twentieth and twenty-first centuries.[7] Despite starting the book with a false prophecy, Richards gets to the truth and the brunt of his argument when he writes in the first sentence of Part 1 ("How to Think About Privacy") that "Privacy is everywhere you look."[8] Richards, a leading scholar in privacy law and regulation, demonstrates in this set-up and straight-forward reveal the conflicting and complex narratives of privacy in contemporary culture that make it both a ubiquitous and contentious subject of study and conversation.

Despite predating Richards' book by several months, Skinner-Thompson's *Privacy at the Margins* is a next step in privacy law and policy. Skinner-Thompson is part of a growing cadre of privacy law scholars focusing on the intersection of privacy and inequality, especially regarding the unequal treatment of marginalized communities. His book addresses the

5. *See, e.g.,* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE THE POLICE AND PUNISH THE POOR (2017); ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE (2018); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS (2015); MARY FAN, CAMERA POWER: PROOF, POLICING PRIVACY, AND AUDIOVISUAL BIG DATA (2019). Many of these scholars also had formative influences in the third generation of privacy scholarship as well; my generational classifications are about the scholarship, not the scholars.

6. NEIL RICHARDS, WHY PRIVACY MATTERS 1 (2021).

7. *Id*. at 8.

8. *Id*. at 13.

disparate needs and effects of privacy regulation for racial minorities, queer communities, women, people who are economically disadvantaged, and religious minorities (pp. 17–44). *Privacy at the Margins* directly follows and develops the arguments made by Khiara Bridges and Danielle Citron, among others, whom Skinner-Thompson liberally cites for their identification of the problem that the law's failure to protect privacy for the most vulnerable exacerbates their powerlessness and marginalization. Privacy invasions for these communities are more common (think policing and surveillance) and also more devastating, because it is less easily remediable and often has more profound, material consequences. As Mary Ann Franks observes (as quoted in Skinner-Thompson's opening pages), "[t]he surveillance of marginalized populations has a long and troubling history. Race, class, and gender have all helped determine who is watched in society, and the right to privacy has been unequally distributed according to the same factors" (p. 16).[9]

Skinner-Thompson's focus on privacy at the margins is to find a doctrinal path through what is essentially inhospitable legal precedent to a more robust form of privacy for marginalized people and communities. The book's arguments are grounded largely in case analysis and doctrinal narrative; he aims to tell coherent stories about sets of cases which, if pursued by lawyers or judges, would lead to more just outcomes for litigants. And by "just" Skinner-Thompson explicitly means equal justice, that is, marginalized communities would no longer be the "have nots" in the famous description of the court system in which the "haves [always] come out ahead."[10] Notably, this is not a book about policy (which laws should be passed), although it does articulate the virtuous reasons for pursuing certain judicial outcomes, such as enhancing democracy and reducing the precarity of marginalized individuals' lives. Instead, *Privacy at the Margins* provides doctrinal tools and road maps to reach those outcomes, which may be useful to both lawyers and legal decisionmakers when faced with the growing number and range of privacy complaints.

One of the ways Skinner-Thompson deftly makes his

9. Mary A. Franks, *Democratic Surveillance*, 30 HARV. J. L. & TECH. 425, 441 (2017).

10. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 1 (1974).

arguments for doctrinal change is by reconfiguring existing accounts of privacy into new narratives, or emphasizing old stories in these new contexts to highlight their special relevance for marginalized communities. As many have explained, it is the force of the story that convinces a judge or jury about the truth of the facts; doctrine may provide guardrails for the range of possible stories, but compelling narratives win cases.[11] And what *Privacy at the Margins* accomplishes is to concretize several privacy stories that, while not necessarily new at their most basic, deserve the detailed substantiation that Skinner-Thompson provides in his book, because of the effect of privacy (or its lack) at the margins of society. These stories especially need substantiation and retelling in the digital age when what privacy means and, in Neil Richards' phrasing, "why privacy matters" is all the more urgent. Our internet-networked realities have added new dimensions to our conversations and debates about privacy, and *Privacy at the Margins* incorporates the digital age affordances into its analyses not as an extra feature but as an inevitable fact of everyday life, which it is.

Below, I discuss both the doctrinal pathways Skinner-Thompson suggests should be followed, which I found intriguing but not entirely convincing, and the innovations in what I'm calling privacy narratives, which I think deserve emphasis for their forceful clarity and recontextualization. Sometimes, the best scholarship helps readers understand familiar situations in new ways or reiterates a familiar account in a clearer, more emphatic form. Doing so importantly contributes to the conversations about complicated issues and, by my reading, that is where Skinner-Thompson's book makes a significant impact. Part 1 of this Review describes these privacy narratives in more detail.

Part 2 of this Review takes issue with some of Skinner-Thompson's caveats in his doctrinal arguments, which I describe in Part 1. My critical engagement is not necessarily a disagreement with the need for the outcomes he describes—we seem to share sympathies for the same causes and litigants. My critique is rooted largely in my own cynicism (some might say realism) regarding the Supreme Court's constitutional rights jurisprudence, which I interpret to be rarely freedom- or equality-enhancing for the most

11. LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz, eds., 1998).

vulnerable people and communities, who arguably most need the Constitution's protection.[12] In Part 2, I draw on two cases to illustrate my critique, one Skinner-Thompson discusses in his book (*Foster v. Svenson* (pp. 136–37)), and one he does not (*Lanier v. Harvard College*, which was recently decided by the Massachusetts Supreme Judicial Court).[13] These cases illustrate for me some of the trenchant difficulties within constitutional privacy's doctrinal landscape, and I don't think Skinner-Thompson's proposed framework helps us through the thicket. What his framework does accomplish for readers is admirable, however, which is to ask the very hard question about which values matter in the inevitable balance that encompasses privacy regulation. And this is the subject of the conclusion to this Essay.

The conclusion briefly takes up Skinner-Thompson's implicit challenge to choose certain values over others, by making the values at stake explicit (e.g., lived equality and anti-subordination over the public preservation or revelation of truthful facts). Doing so doesn't resolve their often-conflicting coexistence. But hopefully, by surfacing more of the value balancing and sorting in which *Privacy at the Margin* engages, this Review can enhance Skinner-Thompson's project, which is as much about privacy as it

12. *Brown v. Board of Education* and *Roe v. Wade* are considered some of the most important Supreme Court cases for equality and privacy in the twentieth century. And yet, watershed decisions as they are, they are rare. And now *Roe* has been overruled. *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022). Moreover, the promise of *Brown* and access to abortion remain unrealized or substantially weak today. *See, e.g.*, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack Balkin, ed., 2002); WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL LEGAL DECISION (Jack Balkin, ed., 2005). *See also* Roe v. Wade *In Peril: Our Latest Resources*, GUTTMACHER INSTITUTE, https://www.guttmacher.org/abortion-rights-supreme-court. Linda Greenhouse, *The Supreme Court Gaslights Its Way to the End of Roe*, N.Y. TIMES (Dec. 3, 2021); Linda Greenhouse & Reva Siegel, *The Unfinished Story of* Roe v. Wade, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Kate Shaw & Reva Siegel eds., 2019). As I describe more below, *Lawrence v. Texas* and *Obergefell v. Hodges* are likewise watershed cases, but they too are under substantial attack and their precedential value is unclear in light of the new conservative Supreme Court majority. Mark Joseph Stern, *Marriage Equality May Soon Be In Peril*, SLATE.COM (July 5, 2017), https://slate.com/news-and-politics/2017/07/how-the-supreme-court-could-overturn-obergefell-v-hodges.html; Mark Joseph Stern, *Two Supreme Court Justices Just Put Marriage Equality on the Chopping Block*, SLATE.COM (Oct. 5, 2020), https://slate.com/news-and-politics/2020/10/supreme-court-ready-to-overturn-obergefell.html.

13. Foster v. Svenson, 7 N.Y.S. 3d 96, 128 (2015); Tamara Lanier v. President and Fellows of Harvard College, SJC-13138 (on appeal from the Judgment of the Middlesex County Superior Court, decided June 23, 2022).

is about equality, because it asserts their interdependence. The goal then, for both *Privacy at the Margins* and this Review, is to join the chorus of other scholars who seek to raise awareness of the implications of privacy law and policy decisions on some of society's other fundamental values, as experienced by both individuals and institutions for whom privacy law matters (which is to say, for everyone).

PART 1

Skinner-Thompson presents four privacy narratives that deserve the detailed treatment he provides. This is especially so because, in recounting these privacy stories in the context of their application to marginalized communities, he demonstrates how privacy law as currently constituted disadvantages these communities and exacerbates their vulnerability.

A. PRIVACY IN PUBLIC IS REAL

Privacy at the Margins explains how a person can demand or assume the existence of privacy in public. This may seem at first like an oxymoron, but much of the rest of the book depends on readers understanding that in fact "privacy in public" is a long-standing expectation in our society, despite the law's uneasy protection of it. We expect that "upskirting" (taking photos surreptitiously underneath a person's skirt who is nonetheless in public) should be a violation of privacy, but courts have held otherwise (p. 41). And we expect that intimate photos sent between lovers but then disseminated widely over the internet should remain private under law and the internet dissemination actionable, but this is not always the case (p. 40). We also expect that peeping Toms and the use of special camera equipment to see inside a person's home violate privacy where it is most relied upon and expected, but again, not all courts agree (pp. 136–37). Skinner-Thompson explains the law's rigid binary between public and private (and thus the difficulty of protecting "privacy in public") as based on the law behind norms. "What counts as 'public' and 'private' is driven by normative value judgments and choices, [but] the law contributes to making them seem preconceptual, almost instinctual and powerfully shapes how we learn public and private, making the fixed conceptions hard to challenge" (p. 10, internal quotations omitted). There are two parts of this story, that "privacy in public is real" and that help

undermine the rigid binary of "public" and "private." Together, as recounted by Skinner-Thompson, they expose privacy law's exacerbation of lived inequality for marginalized communities. Moreover, the recounting unravels the contradiction of "privacy in public" by demonstrating how we in fact rely on there being such a thing that law should protect, and that it should protect all of us equally.

In the first part of the story, Skinner-Thompson reminds readers of the critique of the Supreme Court's privacy jurisprudence, grounded in the Fourth Amendment's promise to be free of unreasonable searches and seizures, as unequally applying to marginalized communities, because they are surveilled more frequently through administrative state procedures and discriminatory policing practices. The Supreme Court's Fourth Amendment jurisprudence requires as a prerequisite to protection that citizens keep their private information out of public (or the state's) view, which means that communities more frequently policed or whose personal data is collected by the state (e.g., for the purpose of economic or social welfare) are less protected by the Constitution. This "secrecy paradigm," as the book calls it, draws on Dan Solove and other third-generation privacy scholars' work as foundation (p. 9)[14] and extends even further. If personal information is shared with a third-party, such as with a court under limited circumstances, the outing of that information to a much broader audience (e.g. by a municipal health commissioner to a local newspaper) does not under current doctrine amount to a constitutional privacy violation (p. 14). This narrow conception of what "private" information is, even when shared in a limited way, is sometimes called "situated privacy"[15] (p. 9). And, as Skinner-Thompson explains, it creates a

> self-fulfilling prophecy of privacy loss—once information is exposed to the "public" (even marginally), greater surveillance and loss of privacy is then often legally permissible . . . [T]he

14. *See*, *e.g.*, DANIEL SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVATE IN THE INFORMATION AGE 42–43, 143 (2004); Joel Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 152 (2014); Robert Post, *Three Concepts of Privacy*, 89 GEO. L. J. 2087 (2001).

15. Skinner-Thompson cites to Margot Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 203 (2017), for this phrase. Kaminski develops the concept in the context of the First Amendment, as explicitly drawn from Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 101, 111–12 (2004), and Reidenberg, *supra* note 14.

> secrecy paradigm is increasingly debilitating as privacy-invading technologies expand the reach of state and private, corporate surveillance regimes (which often work hand in hand) (p. 9).

The secrecy paradigm as applied in this way substantially burdens people "living at the margins of society who . . . are subjected to high levels of government and private surveillance and transparent living quarters, [for whom] keeping any information . . . completely secret . . . is a practical impossibility" (p. 15). It also "disproportionally burdens marginalized communities who may share information as a form of bonding, identity exploration, or resistance and who are, in certain contexts, less able to keep information secret *ex ante*" (p. 15), such as queer communities and religious minorities. In this way, Skinner-Thompson extends the earlier literature on the secrecy paradigm to the communities at the margin, for whom privacy loss is particularly devastating.

The second part of the story explains how doctrinal innovations in the secrecy paradigm can help protect what we assume is some measure of "privacy in public," particularly for these marginalized communities. Skinner-Thompson harnesses the past two decades' expanded breadth of the First Amendment's speech protection in the service of privacy and equality. Specifically, he argues that "performative privacy in public"—for example, attempts at maintaining anonymity by wearing head coverings or using encryption technology to hide online communications—are forms of "expressive opposition to the ever-expanding surveillance society . . . and may be protected as symbolic expressive conduct under the First Amendment" (p. 45). He calls such attempts at maintaining forms of situated privacy part of a "long history of democratic, political dissent—dissent that is safeguarded by the First Amendment" (p. 46). The book describes examples of this performative and situated privacy at length, making a strong case that the state understands the functional efforts to maintain privacy as political expression and that this very understanding by the state is paradoxically used to justify its regulation, often as a measure of security or safety. As a way through this paradox, Skinner-Thompson suggests that performative privacy as a concept should be categorized as political speech, and thus maximally protected by the Constitution and subject to strict scrutiny. Moreover, doing so will help "redraw the line between public and private . . . discursively

shap[ing] public attitudes toward attempts to obtain privacy in public" and therefore the normative application of the constitutional provisions (p. 85).

This part of *Privacy at the Margins* goes deep into the weeds of First Amendment doctrine, a summary of which will not further the point of this Review. Suffice it to say, I find little fault with Skinner-Thompson's description of the often-convoluted doctrinal evolution of the First Amendment speech doctrine over the past several decades. And I agree that performances of privacy in public that he describes are often expressions of political resistance. My critique, as I'll explain more in Part 2, is that I don't think the Supreme Court, even in the era of the "imperial First Amendment" and what others have called "First Amendment Lochnerism," will apply its evolving doctrine to protect privacy in the way Skinner-Thompson suggests (p. 95).[16]

For example, I am less sure of the distinctions Skinner-Thompson draws between cases such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[17] and *Boy Scouts of America v. Dale*[18] as distinctions that will matter for the current Supreme Court. In *Masterpiece Cakeshop*, the Court held that evidence of religious animus against a baker, based on his refusal to bake a cake for a gay wedding, triggered heightened scrutiny under the First Amendment free exercise clause. (The Court punted on the question of the application of the antidiscrimination provision of Colorado law that forbids discrimination in places of public accommodation on the basis of sexual orientation.) Skinner-Thompson says *Masterpiece Cakeshop* is a compelled speech case, not a performative privacy case, and thus it is better understood as about the validity of antidiscrimination laws in the face of questionably compelled speech, a question the Court left open (asking but not answering whether baking a cake is speech and if it is speech of the baker or the customer who orders the cake). *Boy Scouts of America v. Dale*, on the other hand, enjoined a public accommodations law that forbid discrimination on the basis of sexual orientation as applied to the Boy Scouts who sought to exclude gay troop leaders. Skinner-Thompson says this case more directly implicates

16. This seems more evidence since the Supreme Court has narrowed the right to privacy in *Dobbs*. *See Dobbs, supra* note 12.

17. 138 S. Ct. 1719 (2018).

18. 530 U.S. 640 (2000).

expressive associational rights (of the Boy Scouts) and is a closer case on the head-to-head contest pitting rights of equal treatment against the First Amendment. But, he says, when LGBTQ equality is at stake, as it is in both of these cases, equality likely outweighs any purported speech interests, even assuming it exists. And thus, he implies *Dale* was wrongly decided (p. 96). I sympathize with this position, and I agree that the equal protection clause should be understood to modify the amendments that came before it (equality and antidiscrimination should trump speech and associational interests in both of these cases). But I am skeptical the Court will decide the matter in this way, given its hostility to substantive due process and robust equality of the kinds to which Skinner-Thompson is clearly committed.[19]

As I explain more in Part 2, in the context of two cases about photographs, speech, and privacy, the results in these cases often turn on implicit judgments about the value of the speech and the person speaking, which undermine the very principle of equality that Skinner-Thompson seeks to embolden. In *Masterpiece Cakeshop*, the implicit and unstated judgment is that religious freedom of the business owner trumps the right of a gay couple to be served in a private business (although some equivocating language and civil rights era citations in both majority and the concurrence tried to defend against such a result);[20] and in *Dale*,

19. For a fresh analysis of the substantive due process debate and the role of judicial review in constitutional democracy, see Reva Siegel & Douglas NeJaime, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902 (2021). For an examples of hostility to recent substantive due process cases, see Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting):

> . . . . [T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 . . . The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial 'caution' and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." . . . As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

20. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) ("Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under

the court's judgment explicitly held that the right of private association even for public presentation trumps the right of a person to be both a troop leader and out as gay. Lamentably, in both of these cases, the Supreme Court chooses the private thoughts or associations of the mainstream defendant over the rights of inclusion and equality of the marginalized plaintiff.[21] Doctrinally, it might be plausibly explained as religion comes first (and that is textually true in the Amendment) and being gay, while now a quasi-protected class with the right to be married, does not come with the right to free association with anti-gay organizations.[22] (Both arguments ignore the role of equal protection as altering the hierarchy of values that the Constitution lays out, as already mentioned.) I don't see how Skinner-Thompson's theory of performative privacy as speech, imploring

a neutral and generally applicable public accommodations law. *See* Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400, 402, n. 5 (1968) (per curiam).") *See also id.* at 1733 n.* (Kagan, J., concurring) (restating the previous rule of *Piggie Park*). Recent Supreme Court decisions have weakened the protection of generally applicable public accommodations with the broadening exceptions for religious objections to services. *See*, *e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (unanimously holding that City's antidiscrimination policy for placing foster children could not be applied to Catholic Social Services (CSS) who provided foster services under contract with the City and allowed CSS to discriminate against same-sex couples, exempting it from the City's antidiscrimination rule). And some state-based legislative initiatives have weakened access to services on equal grounds. *See*, *e.g.*, Lora Cicconi, *Pharmacists Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacists Conscience Clauses*, 54 UCLA L. REV. 709 (2007) (describing history of laws, which allow a pharmacist to refuse to dispense medications on ethical, religious, or moral grounds, mostly pertaining to birth control).

21. To be sure, some Supreme Court Justices perceive Christian (and specifically Catholic) values to be under attack and therefore not privileged or "mainstream" in this calculation. I disagree with this assessment of our contemporary culture and the identification of dominant identities and cultural power brokers. *See*, *e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268–69 (2020) (Alito, J. concurring) (recounting history of anti-Catholic bias from late 1800s and citing to an 1871 cartoon depicting "Catholic priests as crocodiles slithering hungrily toward American children as a public school crumbles in the background" to explain the reality of anti-Catholic bias). The current U.S. President is a practicing Catholic; the power of the Catholic Church in the United States both politically and culturally is very strong. *See*, *e.g.*, NPR, *US Government Sees Wave of Catholic Leaders* (Jan. 24, 2021), https://www.npr.org/2021/01/24/960060873/u-s-government-sees-wave-of-catholic-leaders.

22. *United States v. Windsor* struck down the Defense of Marriage Act (DOMA) as unconstitutionally discriminating on the basis of sexual orientation, but arguably under rational basis and not intermediate scrutiny, leaving the question open as to whether sexual orientation is a protected class subject to heightened scrutiny, or not a protected class and subject to rational basis. United States v. Windsor, 570 U.S. 744 (2013). *Obergefell v. Hodges* held that the U.S. Constitution protects a person's right to be married to another person regardless of sex—constitutionalizing the right to marriage equality for same-sex couples—on the basis of substantive due process, not equal protection. Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015).

the Court to give more solace to the other side's privacy-as-speech interests in its balancing, would make a doctrinal difference in these cases, because it does not alter the Court majority's ideological priors (of religious freedom and protecting private association) that forcefully anchor its decisions regarding whose First Amendment rights count more.

B. PROTECTING PRIVACY FACILITATES ANTI-SUBORDINATION AND EQUALITY

Constitutional rights are often analyzed independently and listed serially—e.g., freedom of religion, speech, press, assembly, and petition in the context of the First Amendment. Less frequently are constitutional rights examined in combination or as mutually interdependent.[23] Doctrinally, individual rights often have their own families of cases—cannons that build from within and that infrequently cross-pollinate.[24] When different rights clash—for example, the right to equal protection and the right to free exercise of religion—the Supreme Court often explains away the presence of an infringed right or defers analysis of its existence in the case for another time rather than balance two rights against each other. (*Masterpiece Cakeshop* is an example of such deferral, putting off the issue of whether cakemaking is a form of protected First Amendment expression, deciding only as a preliminary matter that the presence of religious animus by the Colorado Commission required reexamination by the state court.) This kind of deferral, to me, has often seemed like an exercise in wishful thinking: if the Court punts with enough frequency, the rights will stay in their own lanes. That way, the Court could avoid exposing value preferences that should be anathema to judicial neutrality (preferring free speech of bakers in their "art" over LGBTQ equality in the right to be served in a bakeshop) by not declaring a winner in a head-to-head contest of constitutional rights that are presumably equally vital to our democratic republic.

23. For an inspirational counter example, see Burt Neuborne, *The House Was Quiet and the World Was Calm The Reader Became the Book*, 57 VAND. L. REV. 2005 (2019) (interpreting the Bill of Rights as a "structural whole" not a "set of self-contained commands" unified around several central themes).

24. I have always found this fact of legal doctrine both surprising and frustrating, as it artificially separates legal principles from each other when they are obviously interrelated and stem from intertwining historical circumstances. I suppose the reason for the isolation and analysis—like isolating cells in a culture or a bug in a computer program—is for clarity and precision, but doing so without reconstituting the whole or considering the structural context is an error of myopia.

The artificial and politically expedient separation of fundamental rights in doctrinal analysis makes Skinner-Thompson's insistence on their mutual interdependence so refreshing. He argues that privacy is central to equality, that privacy in fact serves equality, and that the two individual rights can be interpreted in harmony rather than in conflict. I am entirely persuaded by his arguments demonstrating that privacy in its myriad manifestations (including public performances of privacy and resistance to surveillance) advances anti-subordination ends and is necessary for vulnerable populations to resist oppression by the state and ameliorate their subordinated status that is exacerbated by both government and private actors. Being able to keep secret one's sex assigned at birth, for example, and reveal only one's gender identity, protects the person from discrimination on the basis of so-called biological sex. Being able to keep hidden one's face at a public protest by wearing a hoodie, mask, or head covering, protects the person from ongoing discrimination exacerbated by racialized surveillance and stigmatized identities and viewpoints. Whereas much privacy scholarship often focuses on privacy's ability to promote autonomy and dignity as a form of "decisional privacy"—an ability to develop one's identity and relationships free from state interference regarding family and other intimate relationships, political organization, and medical decisions—Skinner-Thompson explains how *informational* privacy and the harm of unwanted disclosure of private facts likewise promotes autonomy and dignity by assuring the anti-subordination of marginalized groups or beliefs. Informational privacy has not yet been determined to be of the same caliber as decisional, bodily, or spatial privacy, and yet, in *Privacy at the Margins*, Skinner-Thompson is making a strong argument that it should be.[25] "In this way," he says, "informational privacy case law resonates with some of the First Amendment case law providing special consideration to stigmatized viewpoints/identities" (p. 140).

Skinner-Thompson makes two subsidiary points related to privacy's role in promoting equality. One concerns First Amendment precedent regarding the so-called Heckler's Veto, on which he draws to demonstrate how privacy's promotion of equality is already implicit in constitutional doctrine, obviating

25. Erwin Chemerinsky, *Rediscovering Brandeis' Right to Privacy*, 45 BRANDEIS L. J. 643 (2007).

the need to engage in the uncomfortable choice of privacy or equal treatment. This line of cases explains that "where a heckler's speech disrupts the speech of another, government intervention via regulation of the heckler is constitutionally permissible . . . we must understand that speech rights are implicated on both sides of the ledger . . . [and] the heckling analogy creates a fair fight between two sets of expressive interests" (p. 113). Via the Heckler's Veto doctrine, Skinner-Thompson suggests that the Court already chooses equality in many such cases, and one need merely apply or extend that line of argument to justify more privacy at the margins. I will have more to say about the heckler analogy below in Part 2, as I am less sure than is Skinner-Thompson (and for reasons similar to those mentioned above) that the rule suppressing the heckler helps "chart a true course for reconciling competing rights" (p. 113).

The other point is the more trodden path in privacy scholarship, but worth repeating: privacy is an instrumental rather than intrinsic value (a point Neil Richards among others makes as well).[26] Privacy not only serves equality, but it serves participatory democracy, diversity of expression, and freedom of association. For sure, one of the reasons privacy law has continued to expand in its application at the Supreme Court and elsewhere is because of privacy's instrumental role in promoting other fundamental values that structure constitutional doctrine. The Supreme Court's substantive due process and Fourth Amendment cases expanding the "right of privacy" in intimate associations (such as between consensual lovers and in marriage) and in our cell phones and other digital data are testament to the growing embrace of privacy interests in broader areas of everyday life.[27] This fact of privacy right's expanding scope at the Supreme Court, of course, does not necessarily change the application of privacy rights at the margins. I am nonetheless grateful for Skinner-Thompson's creative doctrinal work that opens plausible avenues for more privacy and equal justice for all, should courts choose to follow them.

26. RICHARDS, *supra* note 6, at 6.

27. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2016); Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

C. NOT ALL INFORMATION IS EQUAL

What exactly is "privacy" and how does one identify a privacy "injury"? These questions of privacy's vagueness are regular criticisms of privacy-protective regulation and scholarship supporting it.[28] "Privacy is a concept in disarray," Daniel Solove wrote in 2008, echoing Judith Jarvis Thomson in 1975.[29] Privacy may feel like a shape-shifter that evades sufficient demarcation to apprehend and defend.[30] But it is no chimera; it is inexorably real, especially for those who seek it or allege injury from its invasion. Privacy's elusiveness as a concept and diversity as an experience mean that privacy injuries are often alleged alongside more concrete claims.[31] Skinner-Thompson addresses this problem of concreteness in two ways, building specifically on the work of Paul Ohm, Danielle Citron, Tom Gerety, and W. A. Parent.[32] He isolates two categories of personal information for special protection—intimate information and political thought—justifying their special solicitude by demonstrating how these kinds of information disclosures result in specific and predictable material harms.

28. For a review of the problems of concreteness of harm, see Danielle Citron & Daniel Solove, *Privacy Harms*, 102 B.U. L. REV. 793 (2022); *see also* Ryan Calo, *Boundaries of Privacy Harm*, 86 IND. L. J. 1131 (2011).

29. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2008). In 1975, Judith Jarvis Thomson wrote that "perhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is." Judith Jarvis Thomson, *The Right to Privacy*, 4(4) PHIL. & PUB. AFF. 295–314 (1975). For his part, Daniel J. Solove wrote that "privacy is a concept in disarray. Nobody can articulate what it means. As one commentator has observed, 'privacy suffers from an embarrassment of meanings.' Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of 'privacy' do not fare well when pitted against more concretely stated countervailing interests." Solove, *supra* note 4, at 478.

30. As Julie Cohen has written in work developing new tools for theorizing privacy, turning it "inside out" as it were, "the quest for theoretical consistency is itself an artifact of privacy's framing within particular philosophical and political traditions." Julie Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQ. IN L. 1, 4 (2019).

31. I have written elsewhere about how privacy and copyright claims are often linked, usually problematically from the perspective of copyright law's goals, but the reason for their joinder is for the plaintiff to receive some redress for the unwanted disclosure. And copyright infringement is both easier to prove and its remedies plaintiff-friendly (non-disclosure, injunction, and large statutory damages). *See* Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929 (2019); *see also* JESSICA SILBEY, *Privacy, in* AGAINST PROGRESS: INTELL. PROP. AND FUNDAMENTAL VALUES IN THE INTERNET AGE 156–213 (2022).

32. Tom Gerety, *Redefining Privacy*, 12 HARV. CR-CL L. REV 233, 236 (1977), W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL & PUB AFF. 269, 269–70 (1983); Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125 (2015); DANIELLE CITRON, HATE CRIMES IN CYBERSPACE (2014); Danielle Citron, *Sexual Privacy*, 128 YALE L. J. 1792 (2019).

Skinner-Thompson explains that the "emphasis on dignity and autonomy has distracted courts from informational privacy's more palpable, and perhaps circumscribed underlying interests—how protection of intimate information and political thought can contribute to anti-subordination and lived equality" (p. 142). He then writes that his "contribution [to the privacy literature on which he builds] is to explain how recentering these two categories in the constitutional informational privacy context can garner informational privacy more widespread judicial acceptance and a stronger doctrinal foothold" (p. 142, n.11). We see from this categorical focus that Skinner-Thomson aims to influence courts and strengthen the available arguments for advocates. His narrowing to these two kinds of information that should get special legal protection is driven by existing constitutional precedent for which he believes there is support and momentum, because both categories relate to already recognized fundamental rights under the Supreme Court's substantive due process and First Amendment jurisprudence. It makes the right to informational privacy both manageable and limited in scope, "increasing its likelihood of judicial acceptance," as he writes (p. 159). And "[c]ertain categories of information (intimate and political) are more likely to result in material consequences (such as discrimination or stifled political discourse) and, as such, are entitled to more fundamental protection" (p. 158).

This line of argument tracks the development in the Supreme Court's substantive due process and Fourth Amendment cases, cases such as *Lawrence v. Texas* (2003), *United States v. Windsor* (2013), *Riley v. California* (2014), *Obergefell v. Hodges* (2015), and *Carpenter v. United States* (2018).[33] Notably, however, only *Riley* was unanimous, the case holding that a warrantless search of digital contents of a cell phone during an arrest is unconstitutional. The other cases concerning the scope of sexual privacy in consensual adult relationships, including marriage, were close and sharply divided, garnering bitter dissents from Justices who are now in the majority of the Supreme Court. And *Carpenter v. United States*, holding that government collection of cell tower data indicating the physical location of cellphones

33. Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Riley v. California, 573 U.S. 373 (2014); Obergefell v. Hodges, 576 U.S. 644 (2016); Carpenter v. United States, 138 S. Ct. 2206 (2018).

absent a search warrant violates the Fourth Amendment, was also a 5–4 decision. In that case, Chief Justice Roberts wrote for a five-Justice majority that includes only three Justices who remain today.[34] *Carpenter* was an important case narrowing the application of the third-party doctrine, which is a rule that effectively and powerfully limits privacy of consumer data when they "give" it to third parties, such as Verizon or T-Mobile, in the course of using their phones. Whether the vitality of *Carpenter v. United States* remains strong in the face of the current Supreme Court's apparent disregard for both recent and long-standing precedent is unclear, now that Chief Justice Roberts appears to have lost his hold of the Court's center.[35]

Skinner-Thompson's theoretical and doctrinal innovations, building on this precedent make good sense, in the manner of strategic cause lawyering and brief writing. And he is certainly right to point out that intimate information and political thought—the kind of personal information that is not the same as others and therefore ripe for special treatment—is so "in part because they are likely to result in negative palpable consequences, such as discrimination, marginalization, or even violence" (p. 168). Disclosure of medical status, sexual orientation, and political views, for example, are the stuff of discrimination lawsuits and First Amendment claims, because stigma and stereotyping are often associated with this information. Disclosure of this kind of intimate or political information is the reason people are hired or fired, subject to exclusion, harassment, or worse. In this way, his solution to one of the problems of privacy law—its vagueness both doctrinally and materially—is both smart on the doctrine and the facts. (Its success, however, does require judicial decisionmakers and juries to perceive the harm of discrimination on these bases as both

34. Justice Ruth Bader Ginsburg's death in September 2020 left only three reliable votes on the Supreme Court for expanded rights of privacy as part of substantive due process.

35. Joan Biskupic, *Roberts Has Lost Control of the Supreme Court*, CNN (Sept. 2, 2021), https://www.cnn.com/2021/09/02/politics/john-roberts-abortion-texas/index.html; Dahlia Lithwick, *Roberts has Lost Control*, SLATE.COM (Dec. 10, 2021), https://slate.com/news-and-politics/2021/12/texas-abortion-john-roberts-lost-control-supreme-court.htmlhttps://slate.com/news-and-politics/2021/12/texas-abortion-john-roberts-lost-control-supreme-court.html. *See also Justices Spar Over Precedent*, NAT'L L. REV. (Apr. 27, 2020), https://www.natlawreview.com/article/supreme-court-justices-spar-over-precedent (describing a range of recent cases in which the Justices debate the strength of stare decisis and the reasons for departing from it as principle).

unlawful and wrong. My caveats above about *Masterpiece* and *Dale* apply equally here.) The idea that "not all information is equal" is well worth remembering, as legislatures across the country contemplate enacting or revising privacy laws. The complex patchwork of state and federal privacy laws regulating, for example, medical data, biometric data, library records, student information, financial information, and data related to children, are testament to the need for informational hierarchies and prioritization to avoid either a race to the bottom or perpetual confusion. As the previous paragraph forewarns, however, I am unsure if the Court's precedent on which Skinner-Thompson relies will hold. The precedent may nonetheless reflect the norm as a matter of national culture, which is critically important for the long game of law reform. The Supreme Court strays from national consensus on issues this fundamental to people's conception of justice at its peril.[36]

D. APPLICATION OF PRIVACY LAW HAS UNEQUAL OUTCOMES

In the book's last chapter, Skinner-Thompson demonstrates empirically that the application of privacy law has unequal outcomes, according to predictable categories of privilege. In particular, the tort of public disclosure of private facts has "been used to great effect by people of privilege and has been largely ineffective for those in precarious social positions" (p. 181). This conclusion should not be surprising to anyone who has studied how structural inequality based in race, class, or gender permeates the justice system, which promises equal justice for all but rarely provides it.[37] Because privacy is in short supply for many marginalized people, and its violation is often more materially consequential for them, the fact that its violation is also unequally remedied for them (if at all) through the court system is the proverbial nail in the coffin for privacy at the margins.

Skinner-Thompson explains that a root of privacy law's structural inequality is the "secrecy double standard." This catch-22 "require[s] plaintiffs to keep their information totally secret prior to bringing a claim, but at the same time, [does] not permit[]

36. JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISES OF THE SUPREME COURT, at Ch. 8 (2009).

37. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (3rd ed. 2017).

claims unless the defendant disclosed the information to a significant number of people" (p. 182). In other words, you only have a claim for unauthorized disclosure if the information was truly secret—a near impossibility for most people, especially for members of marginalized communities for whom surveillance is a fact of life. And you only have a claim if the disclosure is to a lot of people—to the "public" as it were. Building on Khiara Bridges' *The Poverty of Privacy Rights*,[38] Skinner-Thompson says that this double standard operates to "erase marginalized people's formal privacy tort rights . . . [U]nearthing evidence that tort law is operating with unequal results suggests that there may be a place for constitutional equality and anti-subordination principles to influence the shape and direction of common-law doctrine" (p. 182).

This hopeful analysis in *Privacy at the Margins*—that unearthing inequality in application of privacy tort law may fruitfully lay a foundation for successful equal protection claims—is highly optimistic. It requires revitalizing two constitutional doctrines that are very defendant friendly: the state action doctrine of *Shelley v. Kramer* from 1948,[39] holding that judicial enforcement of racial covenants in land conveyances was state action prohibited by the Fourteenth Amendment; and the disparate impact theory of unlawful discrimination from *Arlington Heights v. Metropolitan Housing Development Corporation* decided in 1977.[40] As I said at the outset of this review, I am very sympathetic to these efforts at doctrinal rejuvenation, but I am a Supreme Court skeptic when it comes to the Court's role as a champion of lived equality, especially for people who lead lives of economic and social precarity. If Skinner-Thompson aims to inform readers of the entrenched problem and the long road to reform regarding privacy law at the margins, he has wildly succeeded. If he's relying on the Supreme Court's help to get there in the near future, I sadly demur. The book successfully explains the central importance of privacy to lived equality, especially at the margins, and also that what we mean by "public" and "private" is contestable and subject to evolving context and culture. That is good for the hopeful reformer, but the success of that reform will require an all-fronts attack. *Privacy at*

38. Bridges, *supra* note 5.
39. 334 U.S. 1 (1948).
40. 429 U.S. 252 (1977).

the Margins is a significant contribution to that effort. But suggesting the Supreme Court can be an effective partner in that effort, especially after the past several years cementing its conservative capture, feels like folly.

II. TWO HARD CASES

This part will develop some of the critiques above through two hard cases. Both involve photographs, what feel like intolerable privacy intrusions, and contested values at near equipoise. Discussion of these cases can show how the doctrinal innovations Skinner-Thompson describes in *Privacy at the Margins* does not inevitably result in privacy-enhancing outcomes. And that is because, to my mind, the result in these cases (as in many hard cases) depends on implicit values of those deciding the case or analyzing them, which values are left unspoken, but that nonetheless shape the analysis and outcome. Exposing those ideological priors, especially about whose speech counts and which speech matters more, nonetheless reinforces the truths driving Skinner-Thompsons's project by highlighting the inequality and hierarchy at play in the growing number of cases argued over privacy's terrain.

Privacy at the Margins is both smart and incisive. It contributes importantly to questions of lived equality by connecting privacy to privilege. But Skinner-Thompson relies on judges, precedent, and legal doctrine that are inhospitable and possibly also a direct threat to equality for marginalized communities, such as the queer community, women, and communities of color. In the discussion that follows of cases about photographs and privacy, this problem of the inherent conservativeness of Skinner-Thompson's tools for law reform reveals the need for explicit value prioritization, which is unlikely to come from judges, precedent, or legal doctrine without more fundamental (or revolutionary?) shifts in society and culture. At first, both cases seem to pit property (in the photography) against privacy (of the subject), or privilege of the photographer against the powerlessness of the person photographed. And in both cases, the former prevails, as Skinner-Thompson would predict. But reframing the cases as pitting privacy against privacy, or speech against speech, which is what Skinner-Thompson's analysis would achieve, does not "without more" help us answer the question of whose legal case is stronger. It does, however, surface the biases

embedded in the system, a substantial contribution of *Privacy at the Margins*. Because when there is privacy or speech on both sides of the conflict, choosing a side should be hard, and other interests, such as relative vulnerability and historical injustices, should matter.

A. *FOSTER V. SVENSON*

Foster v. Svenson, a case decided in 2015 by New York's highest state court, pits privacy against speech, or, as Skinner-Thompson reformulates, performative privacy as protected expression against another's right to free speech (p. 136). The case began as a lawsuit against the "critically acclaimed fine art photographer" Arne Svenson, who made photographs of his New York neighbors in their homes without their knowledge with a telephoto camera when they passed their open windows.[41] The photographs were exhibited in galleries in Los Angeles and New York and local and national news coverage of the controversial art also reproduced the photographs. The case raises many of the questions Skinner-Thompson analyzes throughout the book, although he only devotes two pages to this case. It presents the question of whether a person has a reasonable expectation of privacy in their home in front of an open window (a "privacy in public" issue) and whether the fact of being in one's home is a "performance of privacy"—an expressive act—that conflicts with the photographer's "speech" expressed through his photographs. It further raises the question of whether the photographer is a kind of "heckler" who interferes with the "speech" of another, whether in private or not, and thus whose speech can be suppressed as a way of sustaining the condition of maximal speech for all. This case does not directly raise issues of unequal socio-economic privileges, but the most objectionable photographs in the case were of children in diapers and swimsuits. As Skinner-Thompson describes the case, the privacy of photographer Svenson's subjects "was critical to Svenson's own expression" (p. 136), implying that the defendant-photographer behaved in ways that were both exploitative and expropriative. There exists a strongly implied vulnerability among the photographic subjects (especially given the presence of children), who believed

41. 7 N.Y.S. 3d 96, 128 (2015) (describing the defendant as "a critically acclaimed fine art photographer whose work has appeared in galleries and museums throughout the United States and Europe.").

themselves to be alone, living private lives in their homes with their families, but who were in fact being surreptitiously surveilled and recorded for close to a year by a neighbor with a telephoto lens.

There is another side to this case, based in the artistic and critical reception of the photographs, and also in the circumstances of their making, which potentially weakens the privacy claims. As described in news coverage at the time the controversy erupted, Svenson was looking onto his neighbors at a building "made up of floor-to-ceiling windows, the building's façade offered a panorama of urban living: rows of families in high-visibility nests." [42] When Svenson became obsessed with the idea of documenting everyday life in New York apartments, apparently he "consulted a lawyer and learned that, in a city where people are so tightly crammed together, there is scant presumption of privacy."[43] Photos included "an image of a man sleeping on a couch with a giant stuffed giraffe looming behind him; another shows a pregnant woman and her husband, reading over breakfast."[44] The identities of his neighbors are obscured in the photos. Svenson explains he "was looking for the most quiet moments, the most human moments."[45] As one reviewer explained, "The result is no shots of full faces in the series, but rather a beautiful collection of body parts including bent knees under tables, shoulders leant against windows and silhouetted fingers reaching out towards something out of shot."[46] Another reviewer described the collection this way: "The identities of Svenson's neighbors, who are rendered with a soft, painterly effect, are obscured, and the choice of framing also leaves a sense of mystery. They are truthful, artistic representations of life which possess a subtle theatricality (a characteristic evident throughout his practice)."[47] For Svenson's part, he explained: "I don't photograph anything salacious or demeaning . . . I am not photographing the residents as specific, identifiable individuals,

42. Raffi Khatchadourian, *Stakeout*, THE NEW YORKER (May 20, 2013), www.newyorker.com/magazine/2013/05/27/stakeout.

43. *Id.*

44. *Id.*

45. *Id.*

46. You can view many of the photos here, https://www.itsnicethat.com/articles/arne-svenson-the-neighbors-190516, which also contains this description.

47. Jonny Weeks, *The Art of Peeping: Photography at the Limits of Privacy*, THE GUARDIAN (August 19, 2013), https://www.theguardian.com/artanddesign/photography-blog/2013/aug/19/art-peeping-photography-privacy-arne-svenson.

but as representations of humankind."[48] At the time of their original dissemination to the public and in response to these pre-lawsuit complaints, Svenson said: "People get crazed by the concept and don't see the art. But I really, really hope they come to like the work. I hope they find it beautiful."[49]

Svenson was responding to the outrage and distress of his neighbors and to some reporting that his work was creepy and invasive. Some objectors said: "We can't close the blinds all day long and stay sane, so we pray our neighbors are decent enough to leave us alone."[50] Others said "It's shocking. You always think that there's a chance that somebody will see you by coincidence, but to watch us for a year and a half with a telephoto lens—that I don't expect."[51] To be sure, Svenson's work is not nearly as explicit as other photographic art (or painting!).[52] Svenson was following in the footsteps of many other artists and photographers who make art of unsuspecting people engaging in private behavior.

Svenson did eventually remove the photographs of the children from his gallery shows, and he reached out to his subjects by email, explaining his practice. But he continued with his art shows and eventually published a book of the photographs, which was published a month before the appeal of the court case that was decided in his favor. His work has been compared to Vermeer and Hopper—scenes of everyday life—that nonetheless are also (however unwittingly) commentary on the "acute national anxiety over surveillance and privacy."[53] Svenson says his "overall intent was always to capture the moments that define our humanness at the most basic level and I felt the only true way to do this was if the subject was unaware of my camera's presence. If I had staged these domestic scenes as a collaborative project with the subjects I don't think I ever would have been able to capture the visual serendipity and unexpected nuances of

48. *Id.*
49. Khatchadourian, *Stakeout*, *supra* note 42.
50. *Id.*
51. *Id.*
52. As one reviewer said, Svenson's work "lacks the explicitness of Merry Alpern's photographs of prostitutes (Dirty Windows) and the scopophilic drive of Miroslav Tichy's homespun snaps of female bathers. But it is a selfish practice nonetheless." Weeks, *supra* note 47.
53. Amazon, https://www.amazon.com/Arne-Svenson-Neighbors-David-Ebony/dp/0692266402.

expressive non-movement."[54] In *Art Forum*, the work was described as both "beautiful" and "arresting" and animated by

> an ethical tension, built into and inseparable from the way in which they were made. We rarely see how people appear when they think no one is looking at them. Much of modern life is lived in public, and we have adjusted ourselves accordingly; we are accustomed to arranging ourselves to be viewed or photographed at any time. The expectation of privacy, even in public, is something emotionally (indeed legally) in flux, as was previously evidenced by a lawsuit filed by the subject of one of the portraits in Philip-Lorca diCorcia's 1999–2001 series of Times Square pedestrians shot from more than twenty feet away. (With the advent of Google Glass more than a decade later, the notion of privacy in public seems almost quaint.) DiCorcia's works are thrilling for the same reason Svenson's are. They depict bodies decidedly not arranged for a camera.[55]

In other words, in a world of waning privacy, Svenson's photographs that require privacy's invasion to be made help generate the debate about why privacy matters, by displaying the beauty of everyday human life in private. The paradox is palpable, and the question is what the law should do about it.

Skinner-Thompson criticizes the result in this case in the context of his discussion of how recording private intimate activity should be considered a kind of heckler's veto, which can be regulated under the First Amendment through the application of private tort law. He recognizes that these kinds of cases rarely succeed because the speech or private information has been "left open—even marginally—to the public view" (p 137). And that is certainly true in *Svenson*, as all the photographs are of people in front of their open windows. He doesn't explain how the private activity is expressive, and therefore is speech that competes with the photographer's as a matter of the First Amendment. But it is not hard to imagine the behaviors and relationships occurring in homes in part because they are in private. That is, the presumptive privacy in one's home enables the expression (of private behavior and relationships) that the photographer manages to capture. Indeed, this appears to be what makes the photographs so intriguing and critically acclaimed.

54. Rebecca Fullyloev, *Its Nice That* (art blog "Championing Creativity since 2007"), May 19, 2016. https://www.itsnicethat.com/articles/arne-svenson-the-neighbors-190516.

55. Emily Hall, *Arne Svenson*. ART FORUM (July 2013), https://www.artforum.com/print/reviews/201307/arne-svenson-42708.

Therefore, the case pits the private "speech" (or activity or facts or relationships) of the photographic subjects against the photographic artistic expression made by Arne Svenson. In considering how to decide this case, the New York Supreme Court considered the legislative purpose of New York's privacy law, which was to prevent exploitation of a person's likeness for the purposes of trade or advertising without their consent. The statute does not grant a broad right of privacy, but a more limited one in the context of commercial transactions. The statute—like most such statutes—has exemptions for publications regarding newsworthy events and matters of public concern. This includes art and entertainment, "because there is a strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues."[56] At the same time, the Court recognized that "to give absolute protection to all expressive works [even controversial art] would be to eliminate the statutory right to privacy."[57] There must be more than a merely incidental relationship between the subject whose privacy is violated and the expressive purpose of the publication for the art to be protected.[58] And the expression will lose entitlement to First Amendment protection as newsworthy or of public concern if the means by which the person's privacy was invaded to make the speech was "truly outrageous."[59] This is a high standard, rising to the level of "atrocious, indecent and utterly despicable," which the New York Court said Svenson's behavior did not meet.

The New York court expressed regret that it could not provide some relief to the subjects of Svenson's photographs, saying that "we do not, in any way, mean to give short shift to plaintiffs' concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken in this case."[60] But the Court explained it felt "constrained to apply the law as it exists," and that such "complaints are best addressed to the Legislature—the body empowered to remedy such inequities."[61] Moreover, the Court wrote: "as illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more

56. 128 A.D. 3d at 101.
57. *Id*. at 102.
58. *Id*. at 103.
59. *Id*.
60. *Id.* at 105–06.
61. *Id*. at 106.

invasive technologies, we call upon the Legislature to revisit this important issue."[62]

The Court's reluctance to act itself and instead call for legislative reform echoes Skinner-Thompson's call to "alter privacy tort law" to recognize the existence of privacy in public and the expressive value of privacy as a First Amendment interest equal to that of traditional expression and speech, such as that of the photographer in this case. But it is not clear how that legislative reform would proceed, given the long and strong history of protecting art and expression of this kind, which includes the wrinkle of a plausibly offensive privacy violation.[63] Indeed, the court did not have difficulty holding, as a matter of first impression, that photographs are works of art that did not violate the state privacy law, finding in the photographic art, as in newspapers and the press generally, that the "informational value of ideas conveyed by the art work . . . [w]as . . . [a] matter of public interest."[64] That seems to me to be the whole game. Once determined that the photographers' speech is in the public interest (and that of course is a matter of interpretation of the art itself), the expressive value of the performative privacy—a creative concept that deserves significant consideration—already takes second place. This is true even given the development of the "imperial First Amendment," because despite the set-up of "speech versus speech" in this case, as Skinner-Thompson describes it, some speech (or information) is considered more important than others (even by his standards). This is either a case of intimate expression against intimate expression, intimate expression against political expression, or political expression against political expression. How is one to decide?[65]

Unspoken but strongly implied in the New York court's analysis is the history of photographic documentation and modern art that has prevailed in attempts to censor or constrain its

62. *Id*.

63. Also, the strength of the copyright industry lobbies are formidable, making legislative reform that limits copyright protection for authors challenging. *See* JESSICA LITMAN, DIGITAL COPYRIGHT (2001) (describing the lopsided legislative efforts in the case of copyright law reform resulting in benefits to major industry players and harms to the public domain and everyday audiences and authors).

64. *Id*. at 158.

65. Skinner-Thompson decides by elevating certain speech over others, in a form of epistemic ordering that is his normative contribution to the literature and which makes him a fourth-amendment privacy scholar, as I explain at the beginning of this Review.

publication on the basis of political viewpoint or privacy.[66] Although the court did not mention the history of photojournalism, it is centrally relevant to the case, given its documentation of subjects and victims of atrocities and trauma since its inception, in which subjects rarely if ever know they are being photographed, and who rarely if ever give their consent to being photographed.[67] Nor did the court mention the history of art, portraying real people through novelization, drawing, painting, sculpture or photography in private settings made from memory and often without the consent or knowledge of those people. (Unauthorized biographies come to mind as some of the more controversial art cases concerning public disclosure of private facts from the recent past; but any number of art forms contain private facts about people whose identities and life events are subsequently captured by artists, and for whom artists rarely, if ever, get permission to expose.[68]) The court did mention two other photographic art cases, one less offensive and one plausibly more so, in which both artists (and photographs) were protected under the First Amendment despite the photographs' making and commercialization without consent of people who presumably believed their faces to be their own.[69]

66. Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205 (2000–2001); Amy Adler, *Photography on trial*, 25(3) INDEX ON CENSORSHIP 141–46 (1996).

67. The history of photojournalism began in the mid-nineteenth century with war photography. Jessica Stewart, *The History of Photojournalism: How Photography Changed the Way We Receive News*, MY MODERN MET (June 20, 2017), mymodernmet.com/photojournalism-history. *See also* WILLIAM JOHNSON ET AL., A HISTORY OF PHOTOGRAPHY: FROM 1839 TO THE PRESENT 250–55 (The George Eastman House Collection, Taschen, 2012) (describing some of first war photography during the Crimean War).

68. Janny Scott, *For Unauthorized Biographers, the World is Very Hostile*, N.Y. TIMES (Oct. 6, 1996), https://archive.nytimes.com/www.nytimes.com/ books/98/11/22/ specials/welty-unauthorized.html; Katie Hafner, *Steve Job's Review of His Biography: Ban It*, N.Y. TIMES (Apr. 30, 2005), https://www.nytimes.com/2005/04/30/ technology/steve-jobss-review-of-his-biography-ban-it.html. For a discussion of a particular lawsuit on this issue regarding James Joyce and archival materials, see Robert Spoo, *Archival Foreclosure: A Scholar's Lawsuit Against the Estate of James Joyce*, 71 AM. ARCHIVIST 544-51 (2008). And for specific discussion of this dynamic tension between journalist photographers and subjects of the photographs, see Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 COLUM.–VLA J. L. & THE ARTS 351 (2019) [hereinafter, Silbey, *Control*].

69. Hoepker v. Kruger, 200 F. Supp. 2d 340 (2002) (ruling for defendant artist Barbara Kruger against privacy claim of subject of photo that Kruger made into collage art); Nussenzweig v. diCorcia, 38 A.D. 3d 339 (1st Dep. 2007) (protecting under First Amendment candid street photographs by diCorcia—whose sale value was between $20K and $30K—of people walking in Times Square, even when subject was Orthodox Jew with

In the wake of such strong precedents and preferences under the First Amendment, I don't see how Skinner-Thompson's creative doctrinal innovations get us to a different result in *Svenson v. Foster*, either judicially or legislatively. To be sure, one could choose one side over the other based on relative social or economic power of the parties for whom the privacy invasion might matter more. This would be a preference in the nature of the fourth-generation privacy scholarship I mentioned in the beginning, but it is not by force of the doctrinal analysis. But even with that preference in mind, there are so many hard facts about this case, including: the judicial distaste for discriminating on the basis of the content of speech and its aesthetic form, the open windows and critically acclaimed artistic expression, and the absence of changing norms regarding what counts as "truly outrageous" privacy invasions. All combine to make this a difficult case for Skinner-Thompson's project, even if we considered the plaintiffs as particularly vulnerable or members of marginalized communities, which is not clear from the facts. To be sure, being home behind closed doors is a form of "situated privacy" for which many of us expect strengthened protection. But not all actions or expressions made at home are protected absolutely and when done in front of an open window, the reasonable expectation lessons. This is not to say that Svenson's photographic subjects were unreasonable to feel violated. This case is hard, as I said. But the photographer responded to the most objectionable privacy violation (the photographs of children) by removing those photographs from his collection, evidencing some empathy and stewardship of his photographs on behalf of his subjects.

In the end, in hard cases such as this, perhaps leaving reconciliation and conflict management to professional ethical norms and community standards rather than to the courts is more effective privacy protection.[70] This seems especially important to consider in light of the Supreme Court's already very strong preferences protecting traditional forms of expression (protest, dissent, art, and news) alongside the current Court's minimization

deep religious beliefs against the use of his image).

70. Photographers have fairly well-defined norms of how to treat their subjects, ones which take into account the integrity of the images they make and the trust required of subjects when making those images from whom consent is required. *See* Silbey, *Control*, *supra* note 68; JESSICA SILBEY, AGAINST PROGRESS: INTELL. PROP. AND FUNDAMENTAL VALUES IN THE INTERNET AGE 25–86 (2022).

of the importance of preventing inequality and its exacerbation of vulnerability and subordination. In First Amendment cases in which speech could hurt vulnerable populations—such as with false and misleading speech in the context of abortion care[71] or in public accommodations cases in which the "speech" of bakers or florists discriminates against gay customers and clients (*Masterpiece Cakeshop*)—the Supreme Court majority demonstrates little interest analyzing both sides as "expression" and one side as a "Heckler." The Supreme Court may have dramatically expanded the First Amendment's reach over the past two decades, but it has done so as a deregulatory mechanism, disempowering legislatures from facilitating what lawmakers consider fair play.[72] And even though recent substantive due process cases have expanded the scope of decisional privacy (in the marriage equality cases, for example), the Court majority for those cases no longer exists, and *Dobbs* recently excised the long-held right to abortion from the right of privacy.[73] Skinner-Thompson's rejuvenation of the First Amendment in the service of privacy's equality-enhancing features cleverly redirects the doctrinal path the Supreme Court majority has laid, but the current Supreme Court is unfortunately unlikely to follow Skinner-Thompson's lead.

B. *LANIER V. HARVARD COLLEGE*

Skinner-Thompson does not discuss the case of *Tamara Lanier v. Harvard College*, which is also about photographs, privacy invasions, and the First Amendment, because it is too recent. A Superior Court in Massachusetts, sitting in Middlesex County, issued judgment on March 1, 2021, and Supreme Judicial Court of Massachusetts heard oral arguments on appeal in November 2021. The Massachusetts Supreme Judicial Court issued a 39-page opinion with two equally long concurrences by single justices. The case concerns two photographs from the 1850s (daguerreotypes, really, the first popular form of photography from the mid-1800s) claimed to be the property of named plaintiff

71. *See*, *e.g.*, J. A. Lang, *The Right to Remain Silent: Abortion and Compelled Physician Speech*, 62 B.C. L. REV. 2091 (2021).

72. Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Jedidiah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014).

73. Dobbs v. Jackson Women's Health Organization, *supra* note 12.

Tamara Lanier through ancestral inheritance. The subjects of the photographs are indisputably of a man named Renty Taylor, and another of his daughter Delia, when they were enslaved on a plantation in South Carolina. Their photographs were taken as part of "evidence collection" by Harvard University Professor Louis Agassiz to support his white supremacist theory of polygenism: that different races of people did not share common biological origins or ancestors. Tamara Lanier is a direct ancestor of Delia and Renty (known in Lanier's family as "Papa Renty"). She discovered the photographs in Harvard's archives a decade ago when she was doing genealogical work on her family history. She has been trying to recover the photographs ever since, and Harvard has resisted.

The photographs can be viewed online on dozens of websites that describe the lawsuit many of which highlight that it raises controversial questions regarding reparations for slavery and the return of cultural property to the ancestors of those who were enslaved.[74] When the photographs were first rediscovered in Harvard's archives, they were thought to be the earliest known photographs of enslaved African Americans. And Harvard sought then, as it does now, to "steward" the photographs. A Harvard spokesperson wrote recently after the Superior Court judgment in its favor dismissing the lawsuit:

> These highly sensitive objects foreground the dignity and humanity of enslaved Black American and African born men and women, who were photographed against their will. We are hopeful the Court's ruling will allow Harvard to explore an appropriate home for the daguerreotypes moving forward that allows them to be more accessible to a broader segment of the public and to tell the stories of enslaved people that they depict.[75]

But to Tamara Lanier, Harvard has never been an ethical steward of these images, because, as she explains, among other reasons, for decades Harvard perpetuated the celebrity and intellect of Louis Agassiz describing him until recently as "a great systematist, paleontologist and renowned teacher of natural

74. Harvard also published a book in the 1986 with Papa Renty on its cover, but that book has since gone out of print. Doris Burk, *Who Should Own Photos of Slaves? The Descendants, not Harvard, a Lawsuit Says*, N.Y. TIMES (March 20, 2019).

75. Madison Shirazi, *Five Generations of Renty*, THE CRIMSON (March 18, 2021) https://www.thecrimson.com/article/2021/3/18/lanier-v-harvard-scrut/ (describing allegations in the complaint).

history."[76] Also, according to Lanier, Harvard has refused for the ten years she has been pursuing her claims to negotiate in good faith over the proper home for the photographs of Lanier's relatives.

The photographs are evidence of trauma and they produce trauma to look at them. "Renty had to strip naked. And have his features, his lips, his arms, chest, his male organs, buttocks, everything measured to prove some racist beliefs," Lanier's lawyer explains. "Delia had it worse in some ways. This young woman standing there in front of all those strange men groping on her breasts and measure her buttocks."[77] Lanier tells the story that when she attended a Radcliff Institute for Advanced Study event with her daughter and saw, immediately on the screen in the conference room, "the huge image of Renty staring at her, . . . 'My daughter I both stopped in our tracks, and I'll never forget her words. She said, 'Mom, Papa Renty looks mad.'"[78] These photographs are evidence of crimes against humanity, as well as assault and kidnapping. They also evidence total deprivation of privacy inflicted on Renty and Delia Taylor (as well as all enslaved people) as a consequence of the racial hierarchical beliefs that defined American slavery. In these photos, privacy and equality are inextricably bound together.

But what kind of legal claims does Tamara Lanier have against Harvard? This is a hard case because the legal theories for relief require ignoring long-expired statutes of limitations and justifying novel theories of property interests in photographs when the plaintiff is neither the photographer (the maker of the image) nor the owner of its tangible instantiation. Lanier makes complex arguments for conversion, replevin, and unjust enrichment, among others. She claims Renty and Delia had property interests in their images, a right of publicity and privacy claim sounding a lot like the *Svenson* case discussed above. She also claims that Harvard cannot claim property in the photographs on the basis of possession alone, because the circumstances of the making of the photographs would have been illegal in Massachusetts at the time (Massachusetts outlawed

76. Juliet Isselbacher, *Agassiz Name on Harvard Campus Honors Not Louis Agassiz, But Wife and Son*, THE CRIMSON (Apr. 4, 2019), https://www.thecrimson.com/article/2019/4/4/agassiz-name-and-legacy/.

77. Shirazi, *supra* note 75.

78. *Id*.

slavery in 1781). These are challenging claims, not because she's wrong as a matter of facts or morals, but because as the Superior Court judge says (again echoing the *Svenson* court): "unfortunately this Court is constrained by current legal principles, as it is the role of the Legislature of Massachusetts Appellate Courts to determine whether or not to recognize a cause of action and to provide the redress Lanier now seeks."[79]

Amicus briefs in the case on appeal remind the Supreme Judicial Court that disrupting the well-established rule that subjects of photographs have no property interest in the photograph would wreak havoc on photojournalism and the important First Amendment interests it serves. They ask the Court to imagine "the impact of a rule that [would give] subjects of photographs ownership interests [in news] photographs. In photographs of battlefields, or of mass gatherings, or of the Jan. 6, 2021 assault on the U.S. Capitol, how would a[] news editor even begin to sort out the 'bundle of sticks' implicated in the multiplicity of claims of ownership by both the photographer and the photographer's subjects? . . . The end result would be a news media that would be reluctant to use newsworthy photographs."[80] The brief further explains the rule cannot be changed for "egregiously objectionable circumstances" because that would preclude "so much of what photojournalism has captured over the last 150 years, from the earliest battlefield images of the Crimean War to the photographs of torture at Abu Ghraib . . . ."[81]

Of course, many would say Louis Agassiz was a criminal by today's standards, not just a person witnessing atrocities from a distance in order to record them. And the photographs are evidence of his complicity in the crimes he witnessed. But as everyone in the case agrees, slavery was legal in South Carolina at the time these photographs were taken. Renty and Delia Taylor had no rights under law as persons. They were property of the plantation owners who granted Agassiz permission to enter and document. Tamara Lanier is making very strong moral claims of a legal system that at the time was immoral. When the Supreme

79. Tamara Lanier v. President and Fellows of Harvard College, Memorandum of Decision and Order on Defendants' Motion to Dismiss Second Amended Complaint, Superior Court, CA No. 1981CV00784, at 11 (dated March 1, 2021).

80. Brief of Amicus Curiae, Massachusetts Newspaper Publishers Association and New England First Amendment Coalition, filed in Lanier v. President and Fellows of Harvard College, Mass. SJC-13139, 2021 WL 4943363, at 13.

81. *Id*. at 14.

Judicial Court of the Commonwealth of Massachusetts issued its decision, it affirmed the superior court's legal determinations dismissing all of the property-based claims. But it reversed on negligent infliction of emotional distress and on the lower court's refusal to amend the complaint to include reckless infliction of emotional distress.

The theory on which these claims survived was that Harvard arguably mistreated Lanier when she brought her concerns to their attention. "We conclude that Harvard's present obligations cannot be divorced from its past abuses. In light of Harvard's complicity in the horrific actions surrounding the creation of the daguerreotypes, once Lanier communicated her understanding that the daguerreotypes depicted her ancestors and provided supporting documentation, we discern in both existing social values and customs and appropriate social policy a duty on Harvard's part to take reasonable care in responding to her."[82] The survival of these claims allow Lanier to engage in discovery and prove her case. But the Court was clear that monetary damages are all that is available to her, which is not the relief she seeks. "[A]ny right, as well as any remedy that might ultimately be awarded, must be carefully delineated to respect the protection for freedom of speech under the First Amendment . . . This may limit what activity by Harvard may be taken into account in determining the university's liability for negligently or recklessly inflicting emotional distress on Lanier. In particular, even if shameful, Harvard's commentary on the daguerreotypes and Agassiz's role in their creation, presented in the context of an academic conference, would appear to be protected speech under the First Amendment; this includes Harvard's own characterization in the conference program of Agassiz's work as scientific research and of Renty as being rendered invisible."[83]

Would consideration of *Privacy at the Margins* help Lanier's case? I don't think so. Lanier seeks the repossession of the photographs to preserve the privacy and dignity of her ancestors through her sequestering and stewardship of the images. She further seeks possession of the photographs as an act of reparations for slavery, what some consider an essential step towards reestablishing racial justice and equality in the United

82. Tamara Lanier v. President and Fellows of Harvard College, Mass. SJC-13138, slip op. at 12.

83. *Id.* at 25.

States. But even if "what was looted gets booted," to use the Smithsonian's new phrase for their policy on looted cultural property, representing a new ethical approach to museum curating,[84] the images of Renty and Delia Taylor circulate freely in the public domain. Nothing about the information contained in the images or the images themselves can be re-sequestered or extracted from the public just because the daguerreotypes are themselves returned to Tamara Lanier. What makes this case easy in my mind—that all Harvard has to do is give the original daguerreotypes to Tamara Lanier as she and 43 descendants of Louis Agassiz have asked[85]—is also what makes it hard. The kind of justice Lanier seeks is not accomplished by the return of the photographs because speech about Renty and Delia Taylor in the form of their photographic images and their objectification through Agassiz's racist project will remain in the public domain as long as the First Amendment's priority is the disclosure of truthful facts. This is especially true if (as is the case here) the information, images, and facts are already in the public domain. To be sure, Harvard should return the photographs to Lanier, not because she is the author or subject of the photographs, but because it is the right thing to do given Harvard's supportive role in the trauma the photos depict, as perpetrated on Lanier's relatives. Harvard's ongoing interest in its "stewardship" of the information about those photographs and whatever copies they have or produced in the 170 years since their making would not be affected by conceding to Tamara Lanier's requests. Doing so doesn't create legal precedent or establish legal responsibility that

84. Peggy McGlone, *Why the Smithsonian is Changing Its Approach to Collecting, Starting With The Removal of Looted Benin Treasures*, WASH. POST (Jan. 6, 2022), https://www.washingtonpost.com/entertainment/museums/smithsonian-collecting-policy-overhaul/2022/01/05/36998dd8-6819-11ec-b0a7-13dd3af4f70f_story.html. The Smithsonian is following a policy it has enacted, not a federal law. "The panel is examining past collecting standards through a moral rather than legal lens. The new guidelines will require Smithsonian museums to dig into the circumstances behind their acquisitions and make an effort to address any wrongs." As reported on *Lanier*, "There is no legal mandate requiring . . . museums to return artifacts relating to American slavery to the descendants of the enslaved. By contrast, the Native American Graves Protection and Repatriation At (NAGPRA) passed in 1990, requires institutions to return Native American remains and burial items . . . to their origins and descendants . . . . [And] [t]he Holocaust Expropriated Art Recovery Act of 2016 (HEAR), extends the statute of limitations for descendants of Jewish people whose possessions were stolen by the Nazis during the Holocaust, providing descendants the opportunity to sue for their ancestors' belongings if they can prove ownership. No equivalent has been enacted for remains of or possessions that were taken from enslaved Black Americans." Shirazi, *supra* note 75.

85. *Id.*

might threaten the work of photojournalists, museums, universities, or researchers invested in an expansive application of the First Amendment for the purposes of understanding history or witnessing the present. But likewise, doing the right thing is only a very small step toward necessary reparations and not at all a step toward law reform.

Another amicus brief, filed by Harvard graduate student Jarrett Martin Drake in the Department of Anthropology, makes the case that Harvard should return the daguerreotypes, not as a matter of legal remedy, but in accordance with ethical obligations under the standards of contemporary archival practice.[86] Drake explains that Harvard's continued possession of the daguerreotypes is in conflict with core archival responsibilities of provenance and privacy. He writes:

> archives and archivists are duty-bound by the principle of provenance . . . [which] entails not only verifiable information about the source of historical materials but also a documented custodial history . . . Adherence to the principle of provenance stretches back at least as early as 1841 . . . [and] were principles that professionals followed at the time the daguerreotypes were created in 1850."[87]

Harvard has failed to provide any custodial history for the photographs, such as who gifted the photographs to the University, when the gift was made, and whether the person making the gift was authorized to do so.[88] As documents therefore of "dubious origin," Drake writes, archivists have a duty to "cooperate in the repatriation of displaced archives,"[89] and returning them to Lanier would be the first step towards doing so.

Drake also explains that although Massachusetts law does not recognize a right of privacy for people who are deceased, professional ethics among archivists, as codified by the Society of American Archivists (SAA), does. And that code requires that archivists "establish procedures and policies to protect the interests of . . . individuals . . . whose public and private lives are documented in archival holdings and promote the respectful use

86. Brief of Amicus Curiae, of Jarrett Martin Drake, PhD Candidate in the Department of Anthropology, Harvard University, in Support of the Plaintiff-Appellant, Lanier v. Harvard College, filed in Lanier v. President and Fellows of Harvard College, Mass. SJC-13139, 2021 WL 4943363.

87. *Id.* at 8.

88. *Id.*

89. *Id*.

of culturally sensitive materials in their care."[90] Drake forcefully argues that Harvard's reproduction of an enlarged photograph of Renty Taylor as a backdrop to the University's conference about universities and slavery is not respectful use, and that the University's repeated recirculation of the images in manners that "enlarge . . . dehumanizing stereotypes" of formerly enslaved men and women is also not respectful use.[91] Pointing to the practice among historians, anthropologists, and archivists of using care when circulating images of crimes against humanity, in order not to "desecrate the memory as well descendants of people who endured unimaginable harm," this Amicus Brief explains that Harvard's responsibility to protect the privacy of Renty and Delia Taylor did not expire at their death, but if anything today "the responsibility is raised."[92]

It might seem unfair to critique as overly optimistic the creative and doctrinally sophisticated analysis in *Privacy at the Margins* that proposes legal opportunities for privacy law reform. But what I consider to be the very hard legal case of *Lanier v. Harvard University*, on even an optimistic reading of the legal precedent, is an easy case from the perspective of the non-legal ethics of both photojournalists and archivists. Their job is to preserve and protect the truths of our history, while also respecting the people who make it, perhaps more effectively than a robustly applied First Amendment doctrine can. By stepping outside the legal framework, we avoid precarious legal precedent and reliance on the Court to choose equality and "performative privacy" over certain forms of speech, some that is well-established as protected under the First Amendment (photography), and some that remains under consideration for protection (cakemaking and floral arrangements). Skinner-Thompson's doctrinal innovations appear to concede adherence to judicial precedent, even weak precedent, while also insisting on the prioritization of lived equality and privacy (e.g., the sequestration of photographs) over the public presentation of truthful facts (through the publication of photographs). This would be a reversal of the most straight-forward applications of most First Amendment doctrine. I am sympathetic to the justification for this position, especially in light of the widespread

90. *Id*. at 12.
91. *Id*.
92. *Id*. at 13.

systemic injustices persistently perpetuated against marginalized people and communities, such as African-Americans, in the name of the First Amendment freedom of speech and freedom of association. But for *Privacy at the Margins* to successfully convince courts and lawyers to follow its lead, those courts and lawyers need to order priorities as Skinner-Thompson has. And although we can make arguments for one prioritization over the other—as I said, I think there is a strong argument that equality is the framework through which all the individual rights must be analyzed—one needs to be explicit about those priorities and convince judicial decisionmakers that equality comes first.

CONCLUSION

The cases of *Svenson v. Foster* and *Lanier v. Harvard* illustrate some of the contentious situations in which privacy, speech, and equality are fighting for prominence. In the end, I am unsure that First Amendment jurisprudence and substantive due process—or even a revision of those doctrines as Skinner-Thompson provides in *Privacy at the Margins*—gets us to the kind of lived equality for more people, especially at the margins. This might reflect a problem with the pace and nature of constitutional change through judicial means or it may reflect the Constitution itself, which, despite being "a great outline" to be reaffirmed through adaptive interpretation for the "crises of all ages,"[93] lacks sufficient clarity and guidance for its satisfying application. It might be because other institutional or community-based norms can better protect privacy than can constitutional law. Professor Skinner-Thompson is admirably hopeful about the promise of judicial review to provide more privacy at the margins, given an expanding role of the First Amendment's free speech jurisprudence. I see that expanding First Amendment as largely benefiting the same powerful players and not marginalized communities, as both of these hard cases indicate.[94]

Privacy at the Margins implicitly challenges readers to elevate

93. McCulloch v. Maryland, 17 U.S. 316 (1819).

94. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (striking down campaign finance regulation which would have prevented a small group of wealthy donors and special interests to use dark money to influence elections); Janus v. American Federation of State, County, and Municipal Employees, Council, 138 S. Ct. 2448 (2018) (striking down mandatory union dues for public employees on First Amendment grounds and further weakening the viability of unions to negotiate on behalf of workers).

the value of lived equality over privacy, as currently and narrowly constituted. Skinner-Thompson doesn't argue that there is a hard choice to make between competing values, because he says, if properly and more broadly constituted, privacy (as understood as "performative privacy") integrates substantive equality concerns and the value of free speech. His doctrinal arguments are creative and detailed. They are the tools of cause lawyers, to be sure, and remind me of the way racial justice and LGBTQ advocates carved a path through inhospitable doctrine by drawing on relatively conservative caselaw to expand its application to racial minorities and LGBTQ people.[95] They rely for their success, however, on a hospitable Supreme Court, which we do not currently have. And, at times, the arguments also require in fact putting equality first, even at the expense of broad free speech rights. There is room in the law to make the case for such a hierarchy, but *Privacy at the Margins* doesn't make it explicitly. Perhaps it will be Professor Skinner-Thompson's next project, which would be an exciting development for equality scholars and advocates.

The main project that structures *Privacy at the Margins* is to highlight four privacy stories that bear repeating and recontextualizing in order to emphasize privacy's relationship to equality: privacy in public is real but largely elusive especially for marginalized communities; privacy facilitates equality; not all information is equal; and the application of privacy law has unequal outcomes in practice. These important stories are part of what I am calling "fourth-generation privacy scholarship," and their further study and application as developed in *Privacy at the Margins* is commendable in order to achieve the promise of equal justice for all.

95. Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083 (1988); Mary Bonuato & James Esseks, *Marriage Equality Advocacy from the Trenches*, 29 COLUM. J. GENDER & L. 117 (2015); Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2009–2010).