



Intimacy, Confidentiality, and Power: Kiss and Tell as a Feminist Critique of Privacy Law

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Abstract

The current principle of privacy and its enactment in law and policy is presented as a reified, universal value that is gender-neutral. However this article contends this presumption, and advances that privacy is an inconsistent area of law that has allowed for the oppression of women's rights and interests. It will be proposed that the narrative of 'kiss and tell' stories offers access to substantive justice and equality by subverting legal and gender norms and deconstructing the concept of privacy. Using the tools of feminist legal theory and theoretical commentary, this argument forms four sections.

Firstly, it will be introduced that privacy is a value which is nebulous at best, and the reasons for critiquing privacy law using a perspective from feminist legal theory will be explored. Following this, the injustices perpetrated against women by the current state of privacy law will be outlined – particularly in the area of sexual information and sexuality. Using examples from both the UK and American jurisdictions, it will be submitted that privacy law is mired in patriarchal values.

Thirdly, the jurisprudence underpinning privacy law decisions on sexual relationships and the legal concepts of confidence and intimacy will be critically examined and deconstructed. Finally, drawing upon investigative research, anecdotal evidence, and critical analysis, it will be submitted that 'kiss and tell' narratives are the way forward to reconceptualise privacy. It will be recommended that kiss and tell stories have value in social communication and present a chance for women to engage in relevant public discourse, and more widely, gives law an opportunity to reach a new understanding of privacy appropriate in the modern age.

Introduction

In the era of increasing informational technology, privacy has become a hot-button topic for many. A relatively modern right, privacy has developed and expanded into a consuming legal principle often touted as a fair, neutral value that exists to protect every individual citizen's right to dignity and respect. However, this article questions this belief and submits that this perception of privacy is alarmingly idealistic, and ignores that privacy law and policy is often inconsistent and has a tradition of silencing women's voices and enabling their abuse – particularly around relationships and 'intimate' issues. It will be proposed that by re-evaluating its approach to sexual relationships and information by allowing for 'kiss and tell' stories, law offers an opportunity for women to achieve substantive justice and come to a new understanding of the standard of privacy appropriate for the modern age. This argument forms four sections. Firstly, the nebulous nature of 'privacy' and the relationship between feminist perspectives and privacy law will be introduced, and the importance of critiquing privacy law using the tools from feminist legal theory will be explored.

Secondly, the oppression and injustices perpetrated against women by the current state of privacy law will be demonstrated, using examples from both UK and American jurisdictions. Thirdly, the jurisprudence underpinning law on privacy will be critically assessed, and the legal conceptions of 'confidence' and 'intimacy' in sexual relationships will be deconstructed. Finally, it will be discussed how 'kiss and tell' narratives provide a way forward. Drawing upon academic commentary, anecdotal evidence, and critical analysis, it will be submitted that 'kiss and tell' stories provide meaningful social communication and an opportunity for women's liberation, and is a useful vehicle for reconceptualising our standard of privacy.

I. Privacy through a feminist legal lens

Privacy is a concept in disarray; it encompasses a range of legal rights, yet few can articulate what 'private' means.¹ Author Jonathan Franzen describes it as 'the Cheshire cat of values: not much substance, but a very winning smile'.² Currently, the developing legal notion of privacy denies an interactive context to information.³ The prevailing European legal framing of the debate approaching privacy as a reified concept is problematic, and has led to some complex legal fictions.⁴ Despite the fact privacy violations have different effects, importance, and significance, courts and policy-makers frequently have a singular view of privacy, causing many privacy issues to be frequently misconstrued or disregarded in the law.⁵ Privacy is not the independent right it is often presented as, there is no 'universal value' of privacy – ⁶ rather, it is dependent on the social importance of the activities it facilitates. As a legal protection resulting from norms and activities, a theory of privacy must therefore work from within a social context, and not from a position outside. Thus, applying sociological approaches to privacy law is highly relevant.⁷ One such approach is feminist legal theory.

Feminism has always been intrinsically linked to theories of privacy, abortion was first legalised in America in the landmark case of *Roe v Wade*⁸ on the basis that criminalising abortion was a violation of the constitutional right to a private life.⁹ The divide between the public and the private is central to many feminist writings, as well as feminist legal theory.¹⁰ Much of the feminist critique exposes the way in which the ideology of the public/private dichotomy allows for the suppression of women's rights and interests; one of the main successes of feminist critique has been to reveal the power-laden character of privacy.¹¹ Historically, only men had access to the public sphere of work, politics, and civil society, women were relegated to the private sphere of home and family.¹² Women were refused the most basic rights to citizenship and their participation in the market was limited.¹³ Consider commonplace professional and administrative practises over the decades – the exclusion of women from many fields of work such as medicine and law and from higher education, or the difficulties women encountered if they wished to take a lease, set up a bank account in their own

¹ Daniel L. Solove, *Understanding Privacy* (Harvard University Press 2008) 1

² Matthew Rimmer, 'How to be Alone: New Dimensions in Privacy Law' (2007) 12(4) *Media and Arts Law Review* 544, 544

³ Philip Leith, 'The Socio-legal Context of Privacy' (2006) 2(2) *International Journal of Law in Context* 105, 105

⁴ Leith (n 3) 106

⁵ Solove (n 1) 6

⁶ Solove (n 1) 10

⁷ Leith (n 3) 108

⁸ 410 U.S. 113 (1973)

⁹ Catharine A. MacKinnon, 'Privacy v Equality: beyond *Roe v Wade*' in Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), 99

¹⁰ D. Kelly Weisberg (ed), *Feminist Legal Theory Foundations* (Temple University Press 1993) 3

¹¹ Emily Jackson & Nicola Lacey, 'Introducing Feminist Legal Theory' in James Penner and others (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press 2005) 793

¹² Weisberg (n 10)

¹³ Nadine Taub & Elizabeth M. Schneider, 'Women's Subordination and the Role of Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Temple University Press 1982) 9

name, apply for a credit card, or be paid adequately.¹⁴ Women have been limited in public integration, and otherwise denied access to power, dignity, and respect.¹⁵

Privacy rights have enabled the coercion and exploitation of women, and made it difficult to politicise personal forms of injustice.¹⁶ The laws of coverture and the ideology of separate spheres denied women autonomy and rendered them vulnerable to violence and abuse.¹⁷ In the domestic realm, the law has been inadequate in regulating and protecting the interests and safety of women.¹⁸ For many years, 'privacy' was used as justification for not criminalising domestic violence, as it would 'throw open the bedroom to the gaze of the public' and interfere with marital sanctity.¹⁹ Judicial avoidance of 'raising the curtain on the bedchamber'²⁰ meant that until the 1991 case of *R v R*²¹, the marital exception to rape was not overturned in English and Welsh law. The supposed reluctance to know the sexual details of married life caused a legal enshrinement of the existing hierarchical heterosexual order.²² At the expense of women's bodily integrity, physical and mental health, and lives, men have been exempt from consequences of their actions by reason of 'privacy'.

Although today many women have legitimate access to the public realm, the public/private dichotomy remains embedded in law.²³ To address the underlying substantive political and ethical issues for women which have been 'skated over' by contemporary understandings of privacy,²⁴ we must dismantle the disingenuous and analytic incoherence of privacy law.²⁵ A great deal of feminism is about breaking the silence of women: we must disentangle the presumed unity of privacy that conceals relationships of power and control.²⁶ In doing this, we may shift the kind of theoretical discussions we have about privacy and free ourselves to focus on the various contemporary privacy issues in their proper context, providing greater clarity and guidance.²⁷ This will address the resulting power imbalance,²⁸ and allow women to shape the social and political atmosphere in which they live.²⁹

II. Injustices against women in privacy law

Privacy law is said to be concerned with 'preventing the violation of a citizen's autonomy, dignity, and self-esteem'.³⁰ In both UK and EU jurisprudence, it has been held that ensuring respect for human dignity is a general principle of law.³¹ With the enactment of the Human Rights Act 1998, these values are required to be acknowledged and enforced by the Courts.³² However, it is dubious whether privacy law is concerned with *women's* autonomy, dignity, and self-esteem. Historically, privacy law has only been determined by the interests of men. For example, Locke's *A Letter*

¹⁴ Annabelle Lever, 'Feminism, Democracy, and the Right to Privacy' (2005) vol. 9 *Minerva - An Internet Journal of Philosophy* <<http://www.minerva.mic.ul.ie/vol9/Feminism.html>> accessed 15 December 2014

¹⁵ Taub & Schneider (n 13)

¹⁶ Lever, 'Feminism, Democracy, and the Right to Privacy' (n 14)

¹⁷ Linda C. McClain, 'Reconstructive Tasks for a Liberal Feminist Conception of Privacy' (1999) 40(3) *William and Mary Law Review* 759, 774

¹⁸ Taub & Schneider (n 13)

¹⁹ Solove (n 1) 53

²⁰ McClain (n 17) 778

²¹ *R v R* [1991] 3 WLR 767

²² Joanne Conaghan, *Law and Gender* (Oxford University Press 2013) 175

²³ Weisberg (n 10) 3

²⁴ Nicola Lacey, *Unspeakable Subjects* (Hart Publishing 1998) 86

²⁵ Lacey (n 24) 29

²⁶ Anne Phillips, 'Feminism and the Politics of Difference. Or, Where Have All the Women Gone?' in Susan James & Stephanie Palmer (eds) *Visible Women* (Hart Publishing 2002) 12

²⁷ Solove (n 1) 172

²⁸ Solove (n 1) 178

²⁹ Solove (n 1) 179

³⁰ *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB) [7]

³¹ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change* (Oxford University Press 2007) 537; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 34

³² *Mosley* (n 30) [7]

Concerning Toleration,³³ in which he argued for the rights of privacy in relation to religious freedom; this adhered only to the male heads of the household in their relations with each other, and not to their subservient women members.³⁴ In more recent times, it is questionable whether women are truly protected by the rubric of privacy. UK courts were slow to legislate for 'revenge porn', a practice where ex-lovers share sexually explicit videos and images after the relationship ends. This breach of privacy is not uncommon, according to research by End Revenge Porn, 1 in 10 intimate partners threaten revenge porn, with 60% following through.³⁵

Despite this, in the past 2 and a half years, only 6 incidents out of the 149 claims made resulted in police action.³⁶ This is perhaps because 90% of the victims are women. Professor Franks theorises the reluctance to legislate for revenge porn stemmed from victim-blaming. Similar to sexual assault, 'women are expected to "take responsibility" for their lawful choices instead of men taking responsibility for their vicious actions'.³⁷ The UK has also not provided legal protection of women who avail of abortion. Women attending registered abortion clinics and pregnancy advice bureaux have been harassed by pro-life protestors with cameras and 'banners featuring images of dismembered fetuses... and strewn pathways with plastic fetuses and graphic images'.³⁸ Even with proposals for a 'buffer zone' by the British Pregnancy Advisory Service, and the activist campaign 'Back Off' urging the government to take action against this intimidation, no such concerns for privacy have been addressed.³⁹ Perhaps this is unsurprising, given that many private female reproductive decisions are treated as open for nationwide debate and are regulated by public bodies.

In other jurisdictions, sexuality and other related issues have also attracted a double-standard in privacy law for women. The highest criminal court in Texas reversed a law that prevented photography or recording with the 'intent to arouse or gratify the sexual desire of any person' on the grounds that 'the camera is essentially the photographer's pen and paintbrush'.⁴⁰ This case concerned taking a picture up a woman's skirt for sexual pleasure, known as 'upskirting' or 'creepshotting'. A similar decision was also reached in a separate case in the state of Massachusetts.⁴¹ Elsewhere in Ohio, the anonymous hacker who leaked the tweets and Instagram photos that led to the conviction of two of the Steubenville rapists, who recording themselves sexually assaulting an unconscious 16 year old girl, faces a more punitive sentence than the rapists he exposed.⁴² And yet, 'kiss and tell' stories, which usually involve powerful male celebrities having extramarital affairs exposed, are consistently held to be a violation of privacy across all Western jurisdictions.

This type of sexual information, 'passing between individuals in certain types of relationship where the source of the information is a party to that relationship', has long been held to be capable of

³³ John Locke, *A Letter Concerning Toleration* (John Tully ed, HPC classics series, Hackett 1983)

³⁴ Clare Radcliffe, 'Reconciling Liberal Democracy with Feminism' (2000) vol.7 UCL Jurisprudence Review 321, 324

³⁵ End Revenge Porn <<http://www.endrevengeporn.org/revenge-porn-infographic/>> accessed 15 December 2014

³⁶ "Revenge porn" illegal under UK law' *BBC News* (13 October 2014) <<http://www.bbc.co.uk/news/29596583>> accessed 15 December 2014

³⁷ Charlotte Rachel Proudman, 'Revenge porn: enough still isn't being done to stop it' *The Independent* (2 July 2014) <<http://www.independent.co.uk/life-style/health-and-families/features/revenge-porn-enough-still-isnt-being-done-to-stop-it-9578892.html>> accessed 15 December 2014

³⁸ Radhika Sanghani, 'Abortion protesters: 'Our presence outside UK clinics empowers women'' *The Telegraph* (28 November 2014) <<http://www.telegraph.co.uk/women/womens-health/11260391/Abortion-protesters-Our-presence-outside-UK-clinics-empowers-women.html>> accessed 15 December 2014

³⁹ *ibid.*

⁴⁰ Liz Fields, 'Court ruling makes taking pictures up women's skirts legal in Texas' *Vice News* (21 September 2014) <<https://news.vice.com/article/court-ruling-makes-taking-pictures-up-womens-skirts-legal-in-texas>> accessed 15 December 2014

⁴¹ Michael Muskal, 'Massachusetts high court: 'Upskirting' photos on Boston trolley legal' *LA Times* (6 March 2014) <<http://www.latimes.com/nation/nationnow/la-na-nn-upskirt-photo-massachusetts-20140306-story.html>> accessed 15 December 2014

⁴² 'Anonymous Hacker Who Exposed the Steubenville Rapists May Get More Prison Time Than Rapists' *Political Blindspot* (12 January 2014) <<http://politicalblindspot.com/he-exposed-steubenville-now-what/>> accessed 15 December 2014

protection by Court order.⁴³ Other derogations, including provisions for a private hearing and for anonymity for the applicant, are not uncommon.⁴⁴ Decisions regarding sexual behaviour in privacy law have been at best question-begging and under-determined, and at worst blatantly contradictory.⁴⁵ Sexuality and similar topics are public for some purposes and private for others, with a tendency to conform to traditional gender norms.⁴⁶ The central problem of sexuality in privacy law is that women are oppressed by moralistic controls law places on women's sexual expression and bodily autonomy – not to consensually share sexually explicit images or terminate unwanted pregnancies – yet women are also harmed by the violence and sexual aggression that law allows in the name of freedom and expression – unwanted 'upskirting' and shared images and recordings of sexual violence.⁴⁷ Clearly, protection of privacy on sexual issues is a privilege afforded only to men.

Where men wish to control or receive gratification from sexual expression, these issues will not be regarded as private and under legal protection. Where men do not stand to benefit – such as exposure in kiss and tell stories – these cases will be regarded as sensitive and highly private. Through such analysis, one sees how the male view has been positively inscribed in privacy law.⁴⁸ Privacy law is not concerned with the value of sexual protection for reasons of self-actualisation, personal autonomy, or expression – it is more concerned with 'keeping some men out of the bedrooms of other men'.⁴⁹ The law has translated traditional social values into the rhetoric of privacy, suppressing women's rights and civil liberties; men control sexuality, and the state supports the interests of men.⁵⁰ Patriarchal values about women's inferiority and social standing are knitted into the very fabric of legal thought on privacy, and built into the social contract upon which the legal order is imagined to rest on an implicit sexual contract effecting and authorising the power of men over women.⁵¹

Privacy law's perspective from the male standpoint enforces women's subjugated position – this must be disrupted and challenged. There is an existing social reality of sexual inequality, and it is enforced by the legal institution.⁵² As a result, the only way to confront and dispute this injustice is to engage with the orthodoxy that legitimates it – the law of privacy.

III. Sexual relationships and the law

Upon critical analysis and academic deconstruction, the jurisprudence behind limiting 'kiss and tell' narratives and the concepts of 'intimacy' and 'confidence' in sexual relationships do not hold water. It has been stated in *obiter dicta* in 'kiss and tell' cases that 'to most people, the details of their sexual lives are high on their list of those matters which they regard as confidential'.⁵³ The European Court of Human Rights has also held that sexual life is an 'important element of the personal sphere'.⁵⁴ However, equating perceived objective morality with the application of law is fraught with

⁴³ Lord Neuberger MR, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (May 2011) 1

⁴⁴ *Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB) [22]

⁴⁵ Lacey (n 24) 11

⁴⁶ Lacey (n 24) 88

⁴⁷ Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' (1984) vol. 63 *Texas Law Review* 387, 485

⁴⁸ Lacey (n 24) 75

⁴⁹ Catharine MacKinnon, 'Feminist, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs: Journal of Women in Culture and Society* 635, 636

⁵⁰ Jo Bridgeman & Susan Millns (eds), *Feminist Perspectives on Law: Law's Engagement with the Female Body* (Sweet & Maxwell 1998) 305

⁵¹ Conaghan (n 22) 83

⁵² Catharine MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press 1991) 241

⁵³ *Stephens v Avery and others* [1988] 2 WLR 1280 [454]

⁵⁴ *Peck v UK* [2003] ECHR 44 [57]

problems,⁵⁵ and some privacy theorists doubt whether the Courts sincerely have our moral sexual welfare in mind.⁵⁶ It is worthy of consideration, are facts truly private if shared by two people?⁵⁷ Or, in the case of Max Mosley, shared by himself and five prostitutes. A confidential relationship does not necessarily arise around information regarding an individual's sex life.⁵⁸

The amount of detailed knowledge of one another is often cited as reason for sexual or romantic relationships to be regarded as private. Intimate partners generally know details of one another's 'health, business affairs, sexual preferences, quirks, and eccentricities'.⁵⁹ Nevertheless, the English doctrine of breach of confidence is ill-suited to sustain disclosures by former lovers.⁶⁰ Privacy advocates liken the intimate relationship to a doctor-patient dynamic, Professor McClurg believes 'the essential reasons for demanding confidentiality apply equally'.⁶¹ However, this article submits that medical confidentiality is a world away from what one may tell their partner. Individuals usually reveal more to a psychotherapist than they would to a friend or lover, but that doesn't mean they are in an 'intimate relationship'.⁶² Sexual activity is frequently categorised as a 'private act' as it typically entails physical exposure and intimate bodily knowledge, but this does not automatically mean a sexual relationship can be said to be 'private'. The mere exposure of our naked body does not define sexual intimacy,⁶³ otherwise a doctor's routine examination might be described as foreplay.

There are many sexual relationships devoid of 'love, liking, or caring', and there are many acts expressing high levels of sentiment that are not deemed intimate.⁶⁴ Indeed, 'there are a whole range of relationships in human life in which sexual activity may occur'.⁶⁵ Erotic activities which can be 'intimate, private, and personal, and which might attract confidentiality' can fall short of sexual intercourse; a passionate embrace could be said to have those qualities.⁶⁶ It seems senseless to invest all acts of physical intimacy with the protection of confidentiality, regardless of circumstance.⁶⁷ The degree of intimacy cannot be taken in isolation from the relationship(s) in which it occurs.⁶⁸ In *Mosley*, the claimant hired sex workers to participate in the sexual activities; it could therefore fairly be described as a 'purely commercial transaction'.⁶⁹ Why should confidentiality attach to sexual activity with a hired sex worker who has not explicitly agreed to secrecy, or with an unattached, transitory sexual partner?⁷⁰

We cannot say sexual information is 'private' because it is what is not publicly known; by this logic, a person's favourite colour or soft drink might be regarded 'private' in the sense that it is generally not public knowledge.⁷¹

'An individual who regards information concerning say, his car, as personal and therefore seeks to withhold details of the size of its engine will find it difficult to convince anyone that his vehicle's registration document constitutes a disclosure of 'personal information.'⁷²

⁵⁵ Simon Smith, 'A shabby state of affairs - disclosure of sexual facts against the individual's consent. Striking the balance, pre-publication, between Articles 8 (privacy) and 10 (freedom of expression) - a claimant's perspective' (2002) 13(5) *Entertainment Law Review* 101, 101

⁵⁶ Smith (n 55) 103

⁵⁷ Jon L. Mills, *Privacy: The Lost Right* (Oxford University Press 2008) 261

⁵⁸ Mills (n 57) 262

⁵⁹ Mills (n 57) 263

⁶⁰ Mills (n 57) 262

⁶¹ Andrew J. McClurg, 'Kiss and Tell: Protecting Intimate Relationship Privacy through Implied Contacts of Confidentiality' (2006) 74(3) *University of Cincinnati Law Review* 887, 913

⁶² Jeffrey H. Reiman, 'Privacy, Intimacy, and Personhood' in Ferdinand D. Schoeman, *Philosophical Dimensions of Privacy* (Cambridge University Press 1984) 304-6

⁶³ Reiman (n 62)

⁶⁴ Solove (n 1) 34

⁶⁵ *Theakston v MGN Ltd.* [2002] EWHC 137 (QB) [57]

⁶⁶ *ibid.*

⁶⁷ *Theakston* (n 65) [59]

⁶⁸ *ibid.*

⁶⁹ *Mosley* (n 30) [107]

⁷⁰ *Theakston* (n 65) [45]

⁷¹ McClurg (n 61) 923

⁷² Raymond Wacks, *Law, Morality and the Private Domain* (Hong Kong University Press 2000) 243

While there are likely individuals who do not wish their intimate partner would divulge personal information about them, this preference is not reasonable or in accordance with common practices,⁷³ such as gossip or 'locker room talk'. As Justice Eady observed, some facts about a relationship between two persons are 'naturally accessible to outsiders'.⁷⁴ In the case of *Terry*, the claimant knew rumour was rife within the sporting community long before any threat of revelations by his partner.⁷⁵

Furthermore, the intrinsic merits of sexual relationships and their value to others in privacy law are dubious.⁷⁶ Pro-privacy theorists such as Eugene Volokh propose using contract law to mandate personal information privacy in the case of sexual relationships.⁷⁷ Essentially, the Court would enforce implied contracts of confidentiality to estop people 'kissing and telling'. An analogous notion was seen in *Terry*, where an informal 'confidentiality agreement' was drawn up by his business partners, similar in form to one that an employer might require for a personal assistant.⁷⁸ It included the phrase 'in order to assist you' and including a £1 consideration.⁷⁹ However, there is reason to be wary of such an approach. This concept is reminiscent of consortium in marriage from the previous century. In *Best v Samuel Fox & Co. Ltd.*,⁸⁰ it was decided that consortium was a duty owed by a wife to her husband, and a breach of that duty could lead to an action in tort law. This meant 'companionship, love, affection, comfort, mutual services, sexual intercourse – all belonged to the married state'.⁸¹

The roles within a marriage were framed as sexually determined and naturally occurring; marriage was depicted as a partnership or 'semi-contract', with judicial comparisons of the husband and wife relationship to master and servant.⁸² Unsurprisingly, consortium was used to enforce women's position as chattel in intimate relationships. In 'kiss and tell' cases, the Court often conveys a desire to steer away from the supposed 'murky waters' of damaged sexual relations.⁸³ But upon further examination, looking at privacy in its historical and social context, we do not see a picture of legal indifference to sexual matters;⁸⁴ rather we see a framework of rules reflecting a legal order in which men's control over women's sexuality was not only legitimated, but also integral to family-based property and financial arrangements.⁸⁵ In other areas of law, 'privacy' in romantic relationships has also allowed for the marginalisation of women's interests. For example, in the law governing property rights of cohabitants or unmarried partners, the common law and equitable principles applied to determine property rights perpetuate a clear gender bias.⁸⁶

The rules that decide how communally enjoyed property is to be allocated is the same which governs allocation between strangers; this does not recognise women's disadvantage in generally earning less or being the primary carer of children.⁸⁷ The bias against non-owning parties puts women in an unfavourable position as they are much less likely to have the property under their name.⁸⁸ In addition to this, rather than viewing activities such as housekeeping, decorating, or gardening as attempts maintain or improve the property value, these acts are attributed to be due to 'the love and

⁷³ McClurg (n 61) 924

⁷⁴ *X v Persons Unknown* [2006] EWHC 2783 (QB); [2009] EMLR 290 [38]

⁷⁵ *Terry* (n 44) [47]

⁷⁶ Annabelle Lever, *On Privacy (Thinking in Action)* (Routledge 2012) 45

⁷⁷ McClurg (n 61) 888

⁷⁸ *Terry* (n 44) [34]

⁷⁹ *ibid.*

⁸⁰ [1952] AC 716

⁸¹ *ibid.*

⁸² Conaghan (n 22) 46

⁸³ Conaghan (n 22) 40

⁸⁴ Conaghan (n 22) 172

⁸⁵ Conaghan (n 22) 173

⁸⁶ Stephanie Palmer, 'Feminism and the Promise of Human Rights' in Susan James & Stephanie Palmer (eds) *Visible Women* (Hart Publishing 2002) 108

⁸⁷ *ibid.*

⁸⁸ *ibid.*

affection' that is assumed to exist between an intimate couple.⁸⁹ The idea that love and care are natural, instinctive, and mindless activities both seriously underestimates their complexity and inevitably disparages the worth of those – predominantly women – who are most associated with them.⁹⁰

There still remains a separation between the 'male' public sphere and 'female' private sphere, where women are deemed as obligated to provide men with nurturing care and refuge from the pressures of the world –⁹¹ this harmful legal norm must be challenged.

IV. Kiss and tell narratives: the way forward

Kiss and tell is a tale as old as time, but the Internet has upped the stakes exponentially.⁹² Privacy is about power, authority, and role in society. History shows those with the most power enjoy privacy most, and those with the least power enjoy it least.⁹³ In the words of Foucault: 'silence is less the absolute limit of discourse... than an element that functions alongside the things said'.⁹⁴ Thus, it is important to determine 'the different ways of not saying things', and which type of discourse is authorised; for there are 'not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses'.⁹⁵ Modern day power is perpetuated in a way that is more diffused, decentralised, and involves constant monitoring – through the media.⁹⁶ It through the media, by publishing kiss and tell stories, that women may begin to alter the balance of power between men and women and address sexual inequality in privacy law.⁹⁷ In previously constraining kiss and tell, privacy advocates have failed to acknowledge the 'informational dance' between parties which relate to these aspects of conflict, power, and unpredictability.⁹⁸

Privacy has been used in many ways to protect authority, whether political, through the celebrity system, or where status is maintained through a staged setting.⁹⁹ One advantage to kiss and tell stories is that such tales are more likely to be expressive and accurate than edited interviews or self-styled autobiographies as the motivation to only represent in a positive light is removed.¹⁰⁰ While no one doubts the men who are threatened to be exposed by kiss and tell stories would prefer to be 'left alone', their interest in presenting 'a false or incomplete image of themselves is not very compelling'.¹⁰¹ Indeed, in *Terry* the granted super injunction was later lifted as it was held the claim was essentially a 'business matter' and the real concern was likely to be the impact of adverse publicity on earning sponsorships.¹⁰² Additionally, the definition of privacy as a right to be 'left alone' is not accurate as it only looks to one side of a relationship.¹⁰³ The current picture of the right to privacy is morally and ethically flawed – it appears woefully indifferent to the costs to women.¹⁰⁴ It is time that law re-evaluate its approach to kiss and tell cases; issues involving sexuality and intimate relationships should be viewed outside the shelter of privacy as these are areas in which women's oppression is particularly acute.¹⁰⁵

⁸⁹ *ibid.*

⁹⁰ Lever, 'Feminism, Democracy, and the Right to Privacy' (n 14)

⁹¹ Taub & Schneider (n 13)

⁹² McClurg (n 61) 887

⁹³ Leith (n 3) 108

⁹⁴ Michel Foucault, *The History of Sexuality Vol. 1: An Introduction* (Robert Hurley tr, reissue edn, Vintage Books 1990) 27

⁹⁵ *ibid.*

⁹⁶ Suzanne Dyrchs, 'Foucault, Law and Legal Feminism' (2001) vol. 8 UCL Jurisprudence Review 219, 230

⁹⁷ MacKinnon, 'Privacy v Equality: beyond Roe v Wade' (n 9)

⁹⁸ Leith (n 3) 112

⁹⁹ Leith (n 3) 108

¹⁰⁰ Lever, *On Privacy (Thinking in Action)* (n 76) 44

¹⁰¹ McClurg (n 61) 906

¹⁰² *Terry* (n 44) [95]

¹⁰³ Leith (n 3) 112

¹⁰⁴ *ibid.*

¹⁰⁵ Vashti Wyatt, 'Feminism: a critique or refinement of modern liberal political theory?' (1998) vol. 8 UCL Jurisprudence Review 42, 56

A challenge to the current legal order is necessary if women are to escape subordination and achieve equality.¹⁰⁶ After all, 'the personal is political'; sexual inequality is not simply a personal misfortune that falls from the sky, but the result of the ways in which societies distribute power over others.¹⁰⁷ Kiss and tell narratives are often seen as a vehicle for personal grudges, we are told such stories may be of questionable quality and taste and exhibit moral failings such as selfishness and dishonesty.¹⁰⁸ But this overlooks that kiss and tell narratives offer a chance for women to freely describe their lives and affairs, and to use their lives as art, science, or examples to others.¹⁰⁹ This is a valuable opportunity for women, who have traditionally been limited in their political participation, self-actualisation, and general public integration in the past. Stories are rarely told from a woman's perspective, this presents a chance to gain rare insight and potentially change common cultural narratives.

Such stories must be able to be published without permission constraints, otherwise they are unable to meaningfully describe, discuss, and explore significant events and relationships in their lives to the fullest extent.¹¹⁰ As Wickes notes, in modern times the celebrity zone has become a common ground for important social discussions and activism.¹¹¹ In the age of powerful male celebrities entangled in kiss and tell scandals with sex workers, White House interns, and their personal assistants, a feminist conception of kiss and tell narratives as a challenge to the social order seems not so radical.¹¹² These relationships are underwritten by the very mechanisms of patriarchy which concerns feminism most, like class, gender, and privilege.¹¹³ As kiss and tell narratives often contain underlying wider socio-economic ramifications, the 'scandal genre' affords a rare opportunity to illuminate relations of gendered power within wider structural formations.¹¹⁴ In particular, cases concerning male celebrities and prostitutes lack a clear recognition of the power relations. Rather than condemning a woman who is a sex worker for telling her story for lacking loyalty or moral fibre, perhaps judges might consider whether the woman had sufficient access to food, shelter, appropriate medical care, or possibly drug counselling.¹¹⁵

Law has previously failed to scrutinise such relationships or pick up on intersecting factors of socio-economic issues.¹¹⁶ By allowing the publication of kiss and tell stories, law empowers marginalised women to reclaim their life and their identity. In contrast to the prior secrecy and silence prevalent in privacy law, there is the metaphor of women finding their voices and breaking their silence.¹¹⁷ In the self-exposure of chat shows, public confessions, and various recovery movements, the private is made public so that victims of exploitative relationships and abusive dynamics do not suffer in silence.¹¹⁸ This idea that intimate relationships are 'a safe house for uninhibited emotional, spiritual and physical nourishment and exchange' is hopelessly ideological.¹¹⁹ Research models such as the Duluth Power and Control Wheel have illustrated how intimate relationships may contain elements of manipulation and coercion. It is worthy of note that use of economic elements and resources feature prominently, something many male politicians and athletes do not lack. Consequently, the judicial perception of these men as victimised or vulnerable is insufficient.

¹⁰⁶ Wyatt (n 105) 56

¹⁰⁷ Lever, 'Feminism, Democracy, and the Right to Privacy' (n 14)

¹⁰⁸ Lever, *On Privacy (Thinking in Action)* (n 76) 42

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Kellie Bean, *Post-Backlash Feminism: Women and the Media Since Reagan-Bush* (McFarland 2007) 60

¹¹² *ibid.*

¹¹³ Bean (n 111) 63

¹¹⁴ David Rowe, 'Gender, Media, and the Sport Scandal' in Jennifer Hargreaves & Eric Anderson (eds), *Routledge Handbook of Sport, Gender, and Sexuality* (Routledge 2014) 471

¹¹⁵ Deborah L. Rhode, 'Media Images, Feminist Issues' in Martha Fineman & Martha McCluskey (eds), *Feminism, Media, and the Law* (Oxford University Press 1997) 11

¹¹⁶ *ibid.*

¹¹⁷ McClain (n 17) 790

¹¹⁸ *ibid.*

¹¹⁹ McClurg (n 61) 938

By informing the public consciousness about such relationships and dynamics, there is the hope that cultural consensus shifts, prompting legal reform. Through kiss and tell narratives, ignorance and incomprehension of women's injuries can be addressed, leading to meaningful remedies. By altering the legal rights of individuals to reflect women's due to tell their story, privacy law can alter conventions that are oppressive and demeaning.¹²⁰ The repudiation of traditional conceptions of privacy can foster equal citizenship, and facilitate transformative legal justice.¹²¹ Pro-privacy rhetoric has developed from a one-sided debate which ignores this 'deeper evidence of the value of social communication'.¹²² As Goffman notes, underlying all social interaction is this 'fundamental dialectic';¹²³ kiss and tell narratives reflect a vital form of information and social communication.¹²⁴

Moreover, kiss and tell stories offer an interesting exercise in shifting the power dynamics in privacy; when men lose control, they feel they lose power.¹²⁵ This is evident in the moralising tone condemning kiss and telling. Privacy advocates write about the 'fear and uncertainty' men feel over the potential secondary use of sexual information, and the generated sense of vulnerability.¹²⁶ In assessing the judicial reasoning behind prohibiting kiss and tell narratives, we see men worried about 'loss of control of self' and discomfort with elements of their character they regard as personal becoming scrutinised –¹²⁷ one can't help but wonder if such theorists and judges realise how commonplace this treatment is for women in society. A Conservative former Member of Parliament for Braintree, Brooks Newmark, declared himself to have been 'mentally raped' by a newspaper's 'sex sting', when he was caught sending naked pictures of himself to a reporter posing as a young activist.¹²⁸ The Independent Press Standards Organisation is launching an investigation into the newspaper despite Newmark dropping the complaint, meanwhile people who have actually been victims of rape and sexual assault – primarily women – report feeling 'raped all over again' by the current permitted cross-examining in criminal trials,¹²⁹ with no updates in sight yet for the Victims Code.¹³⁰

The purported 'intrusion' is a value-loaded term,¹³¹ and ignores the agency, power, and influence these men hold. It should be considered that at least to some extent they are the author of their own fortune, as prominent men putting themselves – both literally and figuratively – into the hands of sex workers or strangers on the Internet.¹³² Unlike women of 'revenge porn' who have images published in retaliation to a (usually trusting and committed) relationship ending, Newmark was having an online adulterous affair and sending images to a woman he never met in person and had no logical reason to trust. There is a reasonable risk of exposure or blackmail inherent in such conduct.¹³³ By subverting the legal norm of privacy with the metric of kiss and tell narratives, we may come to a new understanding of how intimacy, confidentiality, and power interact, and develop an approach to privacy that is appropriate in a modern era. There is no reason why newspapers should continue to omit the sums involved, which party instigated the transaction, and how it was

¹²⁰ Lever, 'Feminism, Democracy, and the Right to Privacy' (n 14)

¹²¹ McClain (n 17) 762

¹²² Leith (n 3) 109

¹²³ Leith (n 3) 110

¹²⁴ Diane L. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' in Daniel L. Solove, *Understanding Privacy* (Harvard University Press 2008) 144

¹²⁵ MacKinnon, *Toward a Feminist Theory of State* (n 52)

¹²⁶ Solove (n 1) 132

¹²⁷ McClurg (n 61) 928

¹²⁸ Rowena Mason, 'Ex-minister Brooks Newmark felt 'mentally raped' by newspaper sex sting' *The Guardian* (13 November 2014) <<http://www.theguardian.com/uk-news/2014/nov/13/tory-mp-brooks-newmark-mentally-raped-newspaper-sex-naked-pictures>> accessed 16 December 2014

¹²⁹ Amelia Gentleman, 'Prosecuting sexual assault: 'Raped all over again'' *The Guardian* (13 April 2013) <<http://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>> accessed 16 December 2014

¹³⁰ Amelia Gentleman, 'Change is long overdue for sex abuse victims' *The Guardian* (2 April 2014) <<http://www.theguardian.com/law/2014/apr/02/victims-law-keir-starmer>> accessed 16 December 2014

¹³¹ Leith (n 3) 111

¹³² Mosley (n 30) [225]

¹³³ *ibid.*

negotiated.¹³⁴ In doing this, they could allow the public to determine how much stock to set by information provided and determine any bias for themselves.¹³⁵

This would also promote understanding of the economics of a lucrative branch of journalism, and make it easier to determine the market price – and subsequently value – of privacy.¹³⁶ By permitting publication of kiss and tell stories, the legal system and the public at large can re-evaluate privacy in the information age.

Conclusion

This article applied a feminist legal theory perspective to the current state of privacy law, contesting the perception of privacy as a universal, gender-neutral principle and submitting that privacy law is inconsistent and enshrines patriarchal values which perpetuate injustice against women. It was proposed that ‘kiss and tell’ narratives offered a solution to this by subverting legal norms and deconstructing the contemporary judicial conception of ‘privacy’. This was established in four stages. Having introduced the inconsistent and nebulous nature of privacy as a legal right and the reasons for critiquing privacy from a feminist legal theory, the injustices women suffer regarding sexual information and expression as a result of the public/private dichotomy were highlighted, using examples from both UK and US jurisdictions. Then, the jurisprudence underpinning various privacy law cases and the concepts of ‘intimacy’ and ‘confidence’ in sexual relationships was critically assessed. Consequently, it was summarised that in re-evaluating its approach to ‘kiss and tell stories’ and permitting such exploration, law would give a voice to usually marginalised women and challenge the gender norms and potent power dynamics typically involved in ‘kiss and tell’ situations.

At current time, privacy advocates ignore the deeper value of social information. But in allowing for the publication of kiss and tell stories, law will have an avenue to come to a more relevant and applicable understanding of privacy, suitable for evolving sexual norms and growing technology.

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¹³⁴ Lever, *On Privacy* (n 76) 43

¹³⁵ *ibid.*

¹³⁶ *ibid.*