LEVELING UP TO A REASONABLE WOMAN'S EXPECTATION OF PRIVACY

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Various privacy law doctrines involve a reasonable expectation of privacy or similar analyses that take into account social privacy norms. For the most part, however, neither courts nor scholars have explicitly grappled with whether courts descriptively do or normatively should consider gender in deciding what constitutes a reasonable expectation of privacy. This is despite the fact that, in various scenarios, a reasonable woman's expectation of privacy might vary from a man's in light of different lived experiences, biological differences, and existing societal gendered privacy norms.

This Article addresses how courts do and should take into account a reasonable woman's expectation of privacy. The Article delves into the case study of monitored drug testing, a scenario in which the reasonable expectation of privacy may differ for women in light of gendered privacy norms surrounding restrooms. Within that case study, the Article identifies various approaches courts take to consider gender as part of the reasonableness analysis in privacy law: (1) an express approach, (2) a silent approach, and (3) a gender-irrelevant approach. Ultimately, the Article concludes that courts ought to adopt a new approach—a floor approach in which gendered privacy norms are expressly taken into account as part of the reasonableness analysis, but then that level of privacy becomes a minimum floor leveling up privacy protection for everyone, regardless of gender.

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INTRODUCTION

The 1997 dystopian science-fiction film *Gattaca* is framed by scenes in which the protagonist, aspiring astronaut Vincent, produces a urine sample while being visually monitored by his employer's in-house physician, Dr. Lamar.[1] In both scenes, it is apparent just how closely Dr. Lamar is watching Vincent produce his urine sample. In the monitored urine test at the beginning of the film, Dr. Lamar comments on Vincent's "beautiful piece of equipment," explaining that it is an "occupational hazard. I see a great many on the course of any given day. Yours just happens to be an exceptional example."[2] Then—spoiler alert—at Vincent's monitored urine test at the end of the film, Dr. Lamar reveals that he knew all along that Vincent was an imposter who had borrowed his genetic identity from a right-handed man, telling him, "for future reference, right-handed men don't hold it with their left."[3] In the dystopian world of the film, where genetic engineering is common and DNA-based predictions determine social outcomes, invasive monitored urinalysis appears to be a routine part of life for Vincent as an aspiring astronaut.

The film never shows whether Vincent's female colleagues, including Uma Thurman's character, Irene, submit to similarly intrusive visually monitored urine tests. Have gendered privacy norms surrounding urination survived in this fictional dystopian future? The film's plot does not require an answer. In the real world, however, the role that gendered privacy norms should play in privacy law remains a valid question in need of an answer.[4]

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1. GATTACA (Columbia Pictures 1997). While the film is not entirely clear on this point, it appears that the urine testing was done both for purposes of drug and genetic testing.

2. *Id.*

3. *Id.*

4. Of course, sex and gender are not identical. Whereas sex refers to an individual's anatomical and biological characteristics, gender refers to socially constructed norms associated with a person's sex. Because this Article is largely about socially constructed gendered privacy norms, it mostly uses the term "gender," although at times gender norms may be tied to sex-based characteristics. In using the term "gendered privacy norms," the Article includes those privacy norms that have some origin or relationship to physical or biological differences. The Article also recognizes that there are individuals whose gender identity does not align with their sex. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995). There are also individuals who have nonbinary gender identities.

Privacy law in both the public and private sectors often relies on court determinations of reasonable expectations of privacy and related concepts, which in turn rely on determinations of social privacy norms.[5] In the public law context, an initial finding of a reasonable expectation of privacy triggers Fourth Amendment protections.[6] Additional social privacy-norm-based reasonableness assessments play a role in various aspects of the Fourth Amendment balancing analysis.[7] In the private law context, three of the four traditional privacy torts—public disclosure of private facts, intrusion upon seclusion, and false light—ask whether a particular privacy invasion would be "highly offensive to a reasonable person."[8] These privacy torts also look to social privacy norms to determine what society is prepared to consider as reasonable.[9]

Surprisingly, while scholars have written about the impact of privacy law on women,[10] to date there has not been a rigorous

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Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019) (addressing the law's failure to recognize those with nonbinary gender identities). The gender-norm-floor approach ultimately endorsed by this Article allows courts to take into account both sets of individuals.

5. See Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Law*, 67 HASTINGS L.J. 143 (2015), for a comprehensive discussion of the public-private divide in privacy law.

6. The Court determines a person's right to privacy for Fourth Amendment purposes using the "reasonable expectation of privacy" test first articulated in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (holding a person must "have exhibited an actual (subjective) expectation of privacy" and "the expectation [must] be one that society is prepared to recognize as 'reasonable'").

7. Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. (forthcoming 2021), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1268&context=scholarship [https://perma.cc/48PH-BVEN] (explaining that courts often look to existing social norms regarding privacy to resolve difficult questions in Fourth Amendment law).

8. RESTATEMENT (SECOND) OF TORTS § 652(B) (AM. L. INST. 1977). The traditional privacy torts were originally categorized as such by William Prosser in his famous 1960 article creating an analytical framework for the three-hundred privacy tort cases decided in the preceding seventy years. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). They were subsequently recognized by the Restatement of Torts and adopted by countless jurisdictions. *But see* Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CAL. L. REV. 2007 (2010) (advocating for replacing Prosser's categories with a single invasion-of-privacy tort).

9. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994).

10. *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191–94 (1989) (calling the right to privacy "a right of men 'to be let alone' to oppress women one at a time"); ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 180–81 (1988) (arguing that the traditional predicament of American women was too much of the wrong kinds of

analysis of whether courts descriptively do or normatively should[11] consider gendered privacy norms in deciding the reasonable expectation of privacy question pervasive throughout privacy law.[12] Put differently, do courts take into account a reasonable woman's expectation of privacy to the extent that it differs from a reasonable man's expectation of privacy?[13] Should they?

Perhaps one reason for this gap in the voluminous privacy law literature is that courts and scholars assume that considering gender as part of a reasonable expectation of privacy analysis would not impact case outcomes. Indeed, even Jesse-Justin Cuevas and Tonja Jacobi, scholars who otherwise advocate taking into account the role of gender in the law, write that "the reasonable expectation of privacy inquiry would remain the same if the courts incorporated consideration of gender" because

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privacy); Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990).

11. While no work has comprehensively addressed the descriptive question of whether courts *do* consider gendered privacy norms or the normative question of whether courts *should* consider gendered privacy norms, there is work looking at whether courts *could* consider gendered privacy norms. *See* Matthew B. Kugler & Lior Jacob Strahilevitz, *Assessing the Empirical Upside of Personalized Criminal Procedure*, 86 U. CHI. L. REV. 489, 491–92 (2019) (noting that there are hard normative and constitutional questions regarding whether criminal procedure ought to be personalized on the basis of immutable traits, such as sex, but "largely sidestep[ping] the normative questions" to focus on the empirical ones). Furthermore, there is work within the Fourth Amendment context arguing that the reasonable expectation of privacy analysis (along with other reasonableness and objectivity tests) should be discarded based on a feminist critique. *See* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 214 (2008) (arguing that a feminist jurisprudence requires "abandoning reasonableness-based standards altogether").

12. *See* Kugler & Strahilevitz, *supra* note 11, at 491 (pointing out that whether "constitutionalized bodies of doctrine like criminal procedure," of which Fourth Amendment privacy law is a subset, "ought to be personalized on the basis of immutable traits has scarcely been addressed"). The closest work on this issue has been insightful. *See* I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855 (2015) (challenging overreliance on same-gender searches in Fourth Amendment jurisprudence in part by pointing out the role of traditional notions of sex and gender in informing what is considered "reasonable" under the Fourth Amendment).

13. Courts have considered the perspective of a reasonable woman in the context of sexual harassment law. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) ("[A] female plaintiff states a prima facie case for hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.").

"societal expectations of privacy are not particularly gendered."[14] If they are correct that gender makes no difference to the analysis, then there would be no need to grapple with the challenging normative question of whether courts should consider gender in evaluating reasonableness in privacy law cases. And admittedly, in many contexts, there do not appear to be differences between the reasonable expectation of privacy of men and women. Scholars empirically studying privacy preferences found no measurable differences among the privacy preferences of men versus women when testing general hypotheticals that did not necessarily implicate gendered privacy norms.[15]

Nonetheless, there are situations where men and women have different reasonable expectations of privacy, either because of differences in life experiences correlated with their gender, physical sex-based differences, different gendered privacy norms, or combinations thereof. For example, social-science scholarship has found that males tend to maintain a greater amount of personal space than females during social interactions.[16] On the other hand, studies suggest that women have greater informational privacy concerns than men. As a result, they tend to disclose less identity information, such as home addresses, phone numbers, and instant-messaging usernames, than men do on social networking sites.[17]

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14. Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2222–23 (2016).

15. *See, e.g.*, Kugler & Strahilevitz, *supra* note 11, at 508 (finding no difference on the basis of gender, but noting that the survey they conducted only concerned a subset of possible search activities representing interesting questions at the intersection of law and technology and that "[i]t is possible that, for other searches, we may see some gender differences. For example, some searches of the body may implicate different gender norms."); Henry F. Fradella et al., *Quantifying* Katz*: Empirically Measuring "Reasonable Expectation of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289 (2011) (finding no statistically significant differences on the basis of sex when asking individuals whether they agree with precedent authorizing warrantless invasions of bodily and territorial privacy and precedent authorizing warrantless invasions of informational or communications privacy, which was contrary to the authors' hypothesis based on the leading social-psychology studies of privacy).

16. *See* Julian J. Edney & Nancy L. Jordan-Edney, *Territorial Spacing on a Beach*, 37 SOCIOMETRY 92, 97–98 (1974); Lynn Renee Cohen, *Nonverbal (Mis)communication Between Managerial Men and Women*, 26 BUS. HORIZONS 13, 15 (1983).

17. *See* Joshua Fogel & Elham Nehmad, *Internet Social Network Communities: Risk Taking, Trust, and Privacy Concerns*, 25 COMPUTS. HUM. BEHAV. 153, 159–60 (2009).

A few hypothetical examples illustrate situations where a privacy invasion that is perfectly reasonable and not particularly invasive for a man may be unreasonable and extremely invasive for a woman. The first hypothetical illustrates how biological differences between the sexes can result in different expectations of privacy in certain circumstances. During the COVID-19 pandemic, it became common for employers to request that employees complete a daily wellness check-in and disclose whether they have various symptoms, including a fever. Some companies' questionnaires required the employee to check and record their exact temperature in order to verify that the employee did not have a fever. Temperatures rise during a menstrual cycle and can signal ovulation as well as pregnancy. Therefore requiring employees to report precise temperatures daily may reveal intimate details about ovulation cycles and pregnancy status for a subset of female employees. Such a sex-based issue could be avoided by employers simply asking a binary question of whether someone has a fever, as opposed to requiring a daily reporting of exact temperatures.

A second example illustrates potential differences in reasonable expectations of privacy resulting from the interaction between sex-based differences and gender-based norms. There exist numerous scenarios where an officer demands to search under a suspect's shirt or a school official searches a teenager's chest area for weapons or drugs at the entrance to prom. Such requests are far more privacy invasive for women. This is partly because there are biological differences between female and male breasts. At the same time, this also has to do with gendered privacy norms in which men routinely appear in public places like pools or the beach without a shirt, whereas it remains socially taboo for women to do so. This gendered privacy norm may be based in biological differences, but it is still a socially constructed, gendered privacy norm.[18] Regardless, the difference in gendered privacy norms means that a search inside a woman's

18. Some state legislatures have recognized this difference by defining strip search as including "a female person's breast" but not the chest area of a male. *See, e.g.*, Wis. Stat. Ann. § 968.255 (West 2016) (defining a strip search as "a search in which a [detained person's] genitals, pubic area, buttock or anus, or *a female* [*person's*] *breast*, is uncovered and either is exposed to view or is touched by a person conducting the search" (emphasis added)); Wash. Rev. Code Ann. § 10.79.070 (West 1983) (defining strip search as "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or *breasts of a female person*" (emphasis added)).

shirt might violate a reasonable expectation of privacy in a way that a similar search of a man would not.[19]

These examples illustrate that the reasonable expectation of privacy inquiry would differ if courts considered gendered privacy norms. Therefore, this Article fills the void in the scholarly literature and addresses both the descriptive and normative questions of whether courts do and should consider gendered privacy norms when evaluating reasonableness under privacy law.

Monitored urinalysis drug testing serves as a useful case study to explore the descriptive question. Drug testing occurs at work,[20] at school, and in the criminal justice system. Courts reviewing the legality of such drug testing under the Fourth Amendment,[21] state privacy protections, or privacy tort law[22] evaluate various reasonable expectation of privacy doctrines by looking to social privacy norms.[23] As part of that reasonableness analysis, courts evaluate the invasiveness of the procedure used to conduct the drug test. The most privacy-invasive procedures require the tested individual to provide a urine sample while being visually observed by a monitor whose job it is to prevent tampering with the sample. Because there are different gendered privacy norms resulting from the gendered way society has structured most public restrooms,[24] men and women have different experiences with being visible to others during urination.

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19. State v. Williams, 521 S.W.3d 689, 704 (Mo. Ct. App. 2017) (noting that the pat-down procedure at the school involved patting down the front of the student's chest "for a male student, at least").

20. There is an extensive law review literature discussing employee drug testing. *See, e.g.*, John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799 (2000); Thomas L. McGovern III, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453 (1987); Dean S. Landis, *Drug Testing of Private Employees*, 16 U. BALT. L. REV. 552 (1987); Edward M. Chen, Pauline T. Kim, & John M. True, *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON U. L. REV. 651 (1990).

21. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989).

22. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994).

23. *See Skinner*, 489 U.S. at 634 (finding the drug tests to be reasonable in part because of a "diminished expectation of privacy" on the part of the railway employees).

24. There is extensive law review literature discussing the problems with the way our society has structured public restrooms. *See, e.g.*, Capers, *supra* note 12, at 894–903 (explaining that "restrooms too are sites that produce and reproduce gender difference"); Taunya Lovell Banks, *Toilets as a Feminist Issue*: *A True Story*, 6 BERKELEY WOMEN'S L.J. 263 (1991). This debate is beyond the scope of this Article, which takes as a given that gendered bathroom practices currently exist and create gendered privacy norms, regardless of whether normatively they ought to exist.

Therefore, a case study examining courts' treatment of monitored urinalysis drug-testing cases serves as a useful way to explore the extent to which courts consider such gendered privacy norms.

A deep dive into the monitored drug-testing cases reveals that, descriptively, courts have taken widely different approaches to considering gendered privacy norms. A few courts have taken an express approach by explicitly discussing the impact of gendered privacy norms on the reasonableness analysis. Other courts seem to take a silent approach in which gender appears to impact the case outcomes with women winning many of their cases. These courts do not, however, explicitly acknowledge taking gender into account. Finally, some courts appear to take a gender-irrelevant approach and ignore the role of gendered privacy norms entirely. None of the written opinions in any of these cases, however, explain or defend the chosen approach to considering (or not considering) the impact of gendered privacy norms surrounding restrooms on the analysis of the reasonableness of monitored urinalysis drug testing.

After reviewing the benefits and drawbacks of the existing approaches used by courts, this Article proposes a novel floor approach. Under this approach, courts expressly consider and discuss gendered privacy norms when evaluating privacy law claims. The expectations of privacy identified by this consideration of gendered privacy norms would then get leveled up to create a minimum floor level of privacy protection, applicable to all individuals regardless of gender. This allows for intellectual honesty, with court decisions truthfully reflecting their reasoning and accurately recognizing societal gendered privacy norms where they exist. At the same time, by leveling up and applying equally to all individuals, this floor approach would not create different results for similarly situated men, women, or gender nonbinary individuals. Rather, by using gender privacy norms to create a privacy floor below which no one can fall, the floor approach would increase privacy protection for everyone while increasing predictability as compared to the existing hodgepodge used by courts.

In laying out this claim, the Article proceeds in five parts. Part I identifies the privacy doctrines that rely on some version of a reasonable expectation of privacy and explains how analysis of these doctrines relies on social privacy norms. Part II addresses gendered privacy norms. After discussing the literature gap in which neither scholars nor courts have addressed the role

of gendered privacy norms in privacy law cases, this Part identifies scenarios in which gendered privacy norms might impact the reasonableness analysis. Part III explores two contexts in which courts and scholars have grappled with some aspects of gender in privacy cases in a limited way. First, the Supreme Court has told courts to consider "sex"[25] as part of the Fourth Amendment review of school searches, yet the lower courts struggle to implement that requirement due to the Court's failure to provide any guidance. Second, courts and scholars have discussed the role of gender and privacy within the prison context in a largely relational sense. Part IV turns to the case study of monitored urinalysis drug testing and describes the various approaches taken by courts with regard to considering gendered privacy norms as part of the analysis. Part V identifies both the normative benefits and drawbacks of each identified approach. It then concludes by recommending the novel floor approach.

I. PRIVACY LAW, REASONABLENESS, AND SOCIAL PRIVACY NORMS

A reasonableness analysis plays a critical role throughout privacy law. In the public law context, a reasonable expectation of privacy initially triggers Fourth Amendment protections. Additionally, once within the Fourth Amendment framework, reasonableness tests play a further role in evaluating the constitutionality of searches. In the private law context, various privacy torts and other legal regimes also incorporate concepts of reasonable expectations of privacy. In both spheres, courts often look to social privacy norms to help determine what expectations of privacy to consider reasonable.

A. A Reasonable Expectation of Privacy and Social Privacy Norms in Fourth Amendment Jurisprudence

Courts apply a Fourth Amendment constitutional framework to evaluate invasions of privacy by governmental actors. The Fourth Amendment states:

25. At times, courts appear to use the term "sex" in situations where they might more accurately mean gender. This Article will retain the courts' terminology where they do so.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[26]

Although the word privacy does not appear within the Amendment, its prohibition of "unreasonable searches" lies at the core of much of privacy law. The Fourth Amendment's use of the term "unreasonable" in describing prohibited searches invites courts "to take evolving social norms into account."[27]

The Supreme Court has taken up that constitutional invitation and consistently held that Fourth Amendment protections only apply when an individual has a reasonable expectation of privacy "that society is prepared to recognize as 'reasonable.'"[28] By its very terms, this threshold limitation for Fourth Amendment protections necessarily requires addressing the social privacy norms considered reasonable within society.[29] Thus, when the reasonable expectation of privacy arises in Fourth Amendment caselaw, it is necessarily a heavily norm-driven analysis requiring, by its very nature, an inquiry into prevailing societal privacy norms.[30] For example, the Supreme Court examined social privacy norms in evaluating whether an overnight guest has a reasonable expectation of privacy for purposes of triggering Fourth Amendment protections.[31] The Court explained that "[t]o

26. U.S. CONST. amend. IV.

27. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 303 (2012) ("The word 'unreasonable' in the Fourth Amendment also authorizes interpreters to take evolving social norms into account.").

28. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2213, 2219 (2018) (quoting Smith v. Maryland, 442 U.S. 735 (1979) (holding that the government invaded a defendant's "reasonable expectation of privacy in the whole of his physical movements" when accessing cell-site location information from wireless carriers)).

29. *See* Robbins v. California, 453 U.S. 420, 428 (1981) (plurality op.), *overruled on other grounds by* United States v. Ross, 456 U.S. 798 (1982) (recognizing that "[e]xpectations of privacy are established by general social norms").

30. *See generally* Tokson & Waldman, *supra* note 7 (explaining that courts often look to existing social norms to resolve difficult questions in Fourth Amendment law); *see also* Jed Rubenfeld, *The End of Privacy,* 61 STAN. L. REV. 101, 107 (2008) ("[T]he Court has sought to root individuals' privacy expectations in widespread social norms.").

31. *See* Minnesota v. Olson, 495 U.S. 91, 96–97 (1990) ("[S]tatus as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.").

hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share."[32] The Court went on to describe the "longstanding social custom" that governs hosting and being a guest and explained that, based on these social privacy norms, "[f]rom either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home."[33]

The Fourth Amendment extends beyond searches by police in the criminal context to whenever the government is involved in an invasion of privacy, such as searches by public employers[34] and at public schools.[35] In the law-enforcement context, the Fourth Amendment usually requires a warrant for a search to be deemed reasonable. By contrast, the Supreme Court has held that so-called "special needs" searches, whose primary purpose is "to serve special needs, beyond the normal need for law enforcement,"[36] can be reasonable without a warrant. In these cases, courts have found that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[37] These "special needs" categories have expanded and now cover many types of governmental privacy invasions.[38]

In these "special needs" contexts, reasonableness and social privacy norms play a role beyond the threshold triggering of Fourth Amendment protections. Once the court finds an initial "reasonable expectation of privacy" such that a Fourth Amendment search has occurred, the court then turns to a second reasonableness analysis—namely "whether the search was reasonable under all the circumstances."[39] For this second reasonableness analysis, courts evaluate whether a search is reasonable by balancing (1) the nature of the privacy interest,[40]

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32. *Id.* at 98.

33. *Id.*

34. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989).

35. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (holding "that the Fourth Amendment applies to searches conducted by school authorities").

36. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

37. *See, e.g.*, *T.L.O*, 469 U.S. at 340 (searching in schools); *Von Raab*, 48 U.S. 656 (1989) (searching public employees).

38. *See* Elise Bjorkan Clare et al., *Warrantless Searches and Seizures*, 84 GEO. L.J. 743, 743 (1996) (listing thirteen exceptions to the warrant and probable cause requirements).

39. True v. Nebraska, 612 F.3d 676, 681 (2010) (explaining the two-step test created by O'Connor v. Ortega, 480 U.S. 709 (1987)).

40. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

(2) the character of the privacy intrusion,[41] and (3) the nature and immediacy of the government concerns.[42] The first two factors involve careful consideration of social privacy norms. In evaluating the first factor, "nature of the privacy interest," courts consider whether the subjective expectation of privacy is one "that society recognizes as 'legitimate,'"[43] which explicitly considers social privacy norms. Similarly, the analysis of the second factor, "character of the intrusion," also involves a look at what is reasonable in light of social privacy norms.[44] Therefore, the "special needs" Fourth Amendment framework considers social privacy norms beyond the initial question of whether or not a person has a reasonable expectation of privacy.

B. A Reasonable Expectation of Privacy and Social Privacy Norms in Other Privacy Law Doctrines

While courts analyze governmental privacy invasions under the Fourth Amendment "reasonable expectation of privacy" framework, the Fourth Amendment does not apply to the private sector.[45] Instead, courts analyze privacy invasions by private actors under a variety of other legal frameworks, including state constitutional privacy provisions,[46] federal statutes,[47] state statutes,[48] and state privacy torts.[49]

Many of these legal frameworks contain doctrinal concepts analyzing something akin to the Fourth Amendment's "reasonable expectation of privacy" doctrine.[50] For example, the Re-

41. *See id.* at 658.

42. *See id.* at 660.

43. *Id.* at 654.

44. *Id.* at 658.

45. *See* Chandler v. Miller, 520 U.S. 305, 323 (1997) (noting that drug testing in the private sector is a "domain unguarded by Fourth Amendment constraints").

46. Unlike the federal Constitution's Fourth Amendment protections creating a reasonable expectation of privacy only from government actors, the California Constitution's privacy protections also apply to the private sector. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 641 (Cal. 1994).

47. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681 (2013) (applying to private-sector recordkeeping); Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1181 (applying to health information privacy).

48. *See, e.g.*, CONN. GEN. STAT. 42-471 (2009) (requiring businesses collecting social security numbers to create a privacy protection policy).

49. RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1965).

50. For a comprehensive discussion of the differences in the reasonable expectation of privacy between the public and private law cases, *see* Schwartz, *supra* note 5.

statement's description of three of the four privacy torts expressly invokes the concept of behavior that is "unreasonable."[51] In practice, these privacy torts necessarily require an examination of whether the alleged privacy invasions would be offensive to a reasonable person, which in turn requires consideration of social privacy norms. As the California Supreme Court has explained, "to the extent there is a common denominator" among the common law privacy torts, "it appears to be improper interference . . . with aspects of life consigned to the realm of the 'personal and confidential' by strong and widely shared social norms."[52] The California Supreme Court further described the privacy torts as insisting on "objectively reasonable expectations of privacy based on widely shared social norms."[53]

One example of a reasonableness analysis can be found in the way the Restatement describes the intrusion upon seclusion tort. It states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[54] The Restatement does not expressly include the "reasonable expectation of privacy" language. Nonetheless, in applying this tort, courts often consider whether the individual had a reasonable expectation of privacy, either to determine whether the individual had a privacy interest that could

51. RESTATEMENT (SECOND) OF TORTS, *supra* note 49 (identifying three of the four privacy torts as "*unreasonable* intrusion upon the seclusion of another," "*unreasonable* publicity given to the other's private life," and "publicity that *unreasonably* places the other in a false light before the public" (emphases added)).

52. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994).

53. *Id.* at 649.

54. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1965). Although the Restatement says "highly offensive to a reasonable person," for some reason, the comment to the Restatement rephrases this as "highly offensive to a reasonable man."

be intruded upon[55] or whether the intrusion would be highly offensive to a reasonable person.[56] Both elements require consideration of social privacy norms.[57]

Another example can be found in the Restatement's explanation of the publicity given to private life tort. In defining publicity, the Restatement provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[58]

Here, too, courts have found that a reasonable expectation of privacy is relevant both in determining what counts as "private life,"[59] as well as what would be "highly offensive to a reasonable person."[60] The Restatement references the role of social norms in this analysis when it states that "[t]he protection afforded to

55. *See, e.g.*, Shulman v. Grp. W Prod., Inc., 18 Cal. 4th 200, 232, 234 (1998) (finding a "triable issue exists as to whether both plaintiffs had an *objectively reasonable expectation of privacy* in the interior of the rescue helicopter, which served as an ambulance," as well as "a reasonable expectation of privacy" in conversations with rescuers while evaluating the "intrusion into a private place, conversation or matter" element of the intrusion upon seclusion tort (emphasis added)); Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) (applying the Restatement definition of intrusion upon seclusion and concluding that there was no "reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor . . ." and thus "any reasonable expectation of privacy was lost").

56. *See, e.g.*, Miller v. Brooks, 123 N.C. App. 20, 26 (1996) (finding that because plaintiff "had every reasonable expectation of privacy in his mail and in his home and bedroom" and that "[a] jury could conclude that these invasions would be highly offensive to a reasonable person").

57. *See, e.g.*, Williams v. Facebook, Inc., 384 F. Supp. 3d 1043 (N.D. Cal. 2018) (finding an intrusion-upon-seclusion claim survived dismissal because "[t]he theft of a person's call and text logs, without the user's consent or knowledge . . . may or may not be highly offensive to current privacy norms. It is indeed a factual question 'best left for a jury'").

58. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1965); *see also Shulman*, 18 Cal. 4th at 214 (identifying the elements of the public disclosure tort under California law, which "does not differ significantly from the Restatement's" as "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern").

59. *See* Doe v. Mills, 212 Mich. App. 73, 84 (1995) (finding that a disclosure concerning a decision to have an abortion alleges "a private matter," because "a reasonable person would consider [it] private").

60. *Id.* at 82 (finding the publicity of abortions could be highly offensive because "a reasonable person" could "be justified in feeling seriously aggrieved by such publicity").

the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."[61] Courts have also looked to social privacy norms to evaluate these tort claims.[62]

Borrowing heavily from privacy-tort jurisprudence, courts analyzing privacy claims under the California Constitution also consider "the nature of any intrusion upon reasonable expectations of privacy."[63] For the first element, the claimant must possess a "legally protected privacy interest," which can include informational privacy.[64] A particular class of information is private "when well-established *social norms* recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue."[65] The second element of the California state constitutional cause of action for invasion of privacy requires "a reasonable expectation of privacy on plaintiff's part."[66] This is "an objective entitlement founded on broadly based and widely accepted community norms."[67] Finally, the third element requires that "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."[68] Therefore, at all three steps of the analysis, courts consider social norms in determining whether there is a privacy law violation under the California Constitution.

Social norms also play a role in a reasonableness analysis for privacy claims under the Oregon Constitution. For example, the Oregon Supreme Court recently evaluated whether garbage

61. RESTATEMENT (SECOND) OF TORTS § 652D, com. (c) (AM. L. INST. 1965). Interestingly, the Restatement appears to expressly contemplate personalizing the tort analysis with regard to the "occupation of the plaintiff" but leaves vague whether the plaintiff's gender and its associated gendered privacy norms can be taken into account.

62. *See, e.g.*, Expose v. Thad Wilderson & Assocs., P.A., 863 N.W. 2d 95, 110 (Minn. Ct. App. 2015) (explaining that the elements of the claim "are concerned primarily with community norms concerning privacy").

63. Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1073–74 (Cal. 2009).

64. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994).

65. *Id.* (emphasis added).

66. *Id.* at 655.

67. *Id.*

68. *Id.*

placed curbside for collection contained privacy interests protected by the state constitution.[69] The court found protectable privacy interests "[b]ased on social and legal norms" and that "privacy norms exist notwithstanding" that the garbage was placed in "an area accessible to members of the public other than the sanitation company."[70] The court recognized that the privacy interest protected by the Oregon Constitution is "grounded in particular social contexts" and therefore determined whether a privacy interest existed "by first considering general social norms of behavior."[71]

While both scholars and dissenting Supreme Court Justices have criticized this emphasis on social norms,[72] courts continue to evaluate reasonableness throughout privacy law by considering the social privacy norms that exist in society. As long as that remains the case, this raises the question of how courts do and should consider gendered privacy norms. This question is the focus of the remainder of the Article.

II. GENDERED PRIVACY NORMS

Despite regularly looking to social privacy norms to help determine what is reasonable in privacy law doctrine, neither courts nor scholars have paid much attention to the role of gendered privacy norms in evaluating reasonableness. While countless cases and law review articles analyze the reasonable expectation of privacy and related doctrines, overwhelmingly, the literature does not address either the descriptive question of whether gendered privacy norms do nor the normative question of whether gendered privacy norms should impact the reasonableness analysis at all. Despite this gap in the literature, there are numerous scenarios where considering gendered privacy norms could affect a court's reasonableness analysis.

69. State v. Lien, 441 P.3d 185, 193 (Or. 2019).

70. *Id.*

71. *Id.* at 191.

72. *See* Carpenter v. United States, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (criticizing the *Katz* reasonable expectation of privacy framework in part because judges are often looking to their own intuition for guidance on social norms which leads to a lack of predictability). *See generally* Tokson & Waldman, *supra* note 7.

A. Role of Gender in Privacy Law Scholarship

Typically when scholars have written about privacy law and gender, it has been in the context of examining the negative impact of privacy law on women. For example, Reva Siegel has written about the role that the "marital privacy" doctrine played in justifying giving wife beaters immunity from prosecution.[73] Catharine MacKinnon has called the right to privacy "a right of men 'to be let alone' to oppress women one at a time."[74] Anita Allen has written that the traditional predicament of American women was too much of the wrong kinds of privacy.[75] Dana Raigrodski has even argued that the reasonable expectation of privacy analysis should be entirely discarded based on a feminist critique.[76]

Other scholars who have considered the role of gender within privacy law have done so in the relational context of evaluating same-gender versus opposite-gender searches. For example, I. Bennett Capers's work challenges overreliance on same-gender searches in Fourth Amendment jurisprudence in part by pointing out the role of traditional notions of sex and gender in informing what is considered "reasonable" under the Fourth Amendment.[77] However, the role of gendered privacy norms beyond the question of same-gender versus opposite-gender searches is outside the scope of Capers's useful work. Similarly, as discussed further in Part III, there are two specific contexts where courts have considered the role of gender in privacy law: school search cases and prison cases. In these contexts, courts and scholars have also focused on the gender of the individual being searched in relation to the gender of the person doing the search. Neither courts nor scholars have carefully considered gendered privacy norms that exist regardless of the gender of the individual conducting the search.

This gap in the caselaw and scholarly literature regarding the role that gendered privacy norms should play in analyzing privacy law reasonableness doctrines occurs despite the "gendered history of the establishment of a right to privacy" revealed

73. Siegel, *supra* note 10, at 2152–53.
74. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 59 (1987).
75. ALLEN, *supra* note 10; *see also* Allen & Mack, *supra* note 10.
76. *See* Raigrodski, *supra* note 11.
77. *See* Capers, *supra* note 12.

by historian Dr. Jessica Lake.[78] In early privacy cases, "it was the issue of the unauthorized circulation of women's photographic portraits that first catapulted a right to privacy into public consciousness, and it was young women who brought the first cases that pushed for and established its legal recognition."[79] After reviewing primary court documents and exhibits of important early cases, Lake found that although the court decisions themselves largely relied on outdated and troublesome notions of female "modesty," the female plaintiffs bringing the cases did not frame things that way.[80] Instead, they tried to "claim ownership of their life experiences and to protest against the appropriation and exploitation of those experiences."[81] These right to privacy cases gave women the legal power "to rescue their images from public consumption and impede the desire of the voyeur" while allowing "them to choose the terms upon which they presented themselves in their public and professional lives."[82] Lake argues that a gendered analysis is necessary to understand why the majority of early plaintiffs were women and why privacy appealed especially to women plaintiffs.[83]

Additionally, Anita Allen and Erin Mack uncovered one early 1932 privacy tort court decision that acknowledged that gendered privacy norms might cause different results in case outcomes.[84] In *Graham v. Baltimore Post Co.*, the court held that an attempt to use a photograph of a female private-citizen plaintiff without her consent in paid newspaper advertisements by theatre and taxicab companies violated her privacy rights.[85] In responding to slippery-slope arguments that had apparently been raised during oral arguments, the court offered that "the same act that might well be a violation of the right to privacy, as applied to a woman, might be dismissed, with legal indifference,

78. JESSICA LAKE, THE FACE THAT LAUNCHED A THOUSAND LAWSUITS: THE AMERICAN WOMEN WHO FORGED A RIGHT TO PRIVACY 10 (2016).

79. *Id.* at 8.

80. *Id.* at 225.

81. *Id.* at 221.

82. *Id.* at 8.

83. *Id.* at 9.

84. Allen & Mack, *supra* note 10, at 464 (discussing *Graham v. Baltimore Post Co.* (Balt. Super. Ct. 1932)).

85. Graham v. Baltimore Post Co. (Balt. Super. Ct. 1932), *reported in The Right of Privacy,* 22 KY. L.J. 108, 120–21 (1933).

as applied to a man."[86] Yet courts since *Graham* have overwhelmingly ignored its suggestion to consider gender in evaluating privacy torts.

In related contexts, scholars have recognized the reasonable person analyses that proliferate throughout the law tend to assume the reasonable person is a man.[87] For example, Jesse-Justin Cuevas and Tonja Jacobi have written on the ways in which constitutional criminal procedure law mistakenly treats men and women as the same for purposes of the reasonable person analysis, despite "extensive empirical psychological evidence showing that men and women behave and express themselves differently from one another."[88] But even Cuevas and Jacobi, who write so persuasively regarding the importance of considering gender in other areas of criminal procedure, dismiss the impact of gendered privacy norms on the reasonable expectation of privacy inquiry. Instead, they summarily conclude that courts do not need to consider gender in the reasonable expectation of privacy inquiry, which "would remain the same if the courts incorporated consideration of gender"[89] because "societal expectations of privacy are not particularly gendered."[90] Thus, both courts and scholars have ignored the role of gendered privacy norms in evaluating the reasonable expectation of privacy.

B. Gendered Societal Expectations of Privacy

This Article disputes the claim that "societal expectations of privacy are not particularly gendered."[91] Rather, gender can impact the social norms underlying reasonable expectations of privacy in a variety of scenarios. Some gendered privacy norms occur as the result of physical or biological differences, whereas others are the result of social or cultural norms surrounding gender. For example, only females can ovulate and get pregnant. Therefore, invasions of privacy that have the potential to reveal

86. *Id.* at 116.

87. *See e.g.*, Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 770 (1994) (showing that the reasonableness standard remains male); Cuevas & Jacobi, *supra* note 14, at 2191 (noting that "the reasonable person is the common *man*").

88. Cuevas & Jacobi, *supra* note 14, at 2162.

89. *Id.* at 2222.

90. *Id.* at 2223.

91. *Id.*

information regarding fertility cycles or pregnancy status necessarily trigger different expectations of privacy based on sex. As discussed in the Introduction, this biological difference means that female employees likely have different expectations of privacy regarding the daily temperature checks that have been widely implemented during the COVID-19 pandemic. Given the potential for discrimination, female employees likely have a reasonable expectation of privacy in their ovulation cycles and pregnancy status, such that daily temperature checks invade their privacy in a way that they do not for male employees.[92] By contrast, a screening that simply asked whether an employee had a fever would obtain the necessary health information without revealing the minor fluctuations in temperature that can reveal ovulation or pregnancy.

Another biological difference with privacy implications is that females menstruate and use products associated with menstruation, whereas males do not. And females likely have a reasonable expectation of privacy as to whether they are menstruating or using menstruation products.[93] This can implicate a number of privacy invasions that impact females and males differently. For example, due to safety concerns, a number of sports and other entertainment venues have implemented policies requiring that patrons carry only clear plastic bags into the venue.[94] Such policies may uniquely impact a female guest's expectation of privacy by forcing her to carry a bag that reveals whether she is carrying menstruation products. Similar policies have been required at some state bar exams, where bar examinees have been required to keep menstrual products in a clear bag, if they are permitted at all.[95] Additionally, courts have recognized that the use of backscatter x-ray technology can reveal

92. *See* Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (holding that requiring a member of the high school swim team to take a pregnancy test constituted an unreasonable search in violation of the Fourth Amendment). Such a search would only happen to a female member of the swim team.

93. *See* Wilkes v. Borough of Clayton, 696 F. Supp. 144, 147 (N.J. 1988) ("[Courts have not had] much difficulty in concluding that society considers reasonable [a woman's] expectation that she would be permitted to attend in private to the very personal hygienic needs arising out of her menstruation. One strains to conjure up an activity more private than the changing of a sanitary napkin.").

94. For example, the NFL has implemented such a policy. *Clear Bag Policy*, NFL, https://www.nfl.com/legal/clear-bag-policy [https://perma.cc/WY2A-MHTG].

95. *See* Elie Mystal, *Bar Exam Day One: No Right to Tampons or Pencils, but Valets Are Okay*, ABOVE THE L. (July 31, 2013, 10:49 AM), https://abovethelaw.com/2013/07/bar-exam-day-one-no-right-to-tampons-or-pencils-but-valets-are-okay/?rf=1 [https://perma.cc/265F-ZHLQ] ("[T]he progressive

whether someone is wearing feminine hygiene products.[96] Thus, there are numerous factual scenarios that would implicate gendered privacy norms that are rooted in biological differences between the sexes.

Other societal expectations of privacy are gendered as the result of the social norms surrounding biological differences. Some of these social norms draw upon outdated modesty theories of privacy that are problematic for equality. For example, while there are biological differences between the chest areas of men and women, social norms allow men to walk topless in places like the pool and beaches, whereas women are typically expected to cover their chests.[97] Indeed, some state legislatures have recognized this difference by defining strip searches as including female breasts but not male breasts.[98] This gendered privacy norm likely arises from a problematic history of society imposing upon women expectations of modesty, chastity, and domestic isolation.[99] As Anita Allen has argued in her work, in traditional American culture, problematic norms of female modesty "required that women, much more than men, exhibit speech,

folks at the California Bar required users to display all tampons in a clear plastic bag. Nothing like writing about gender discrimination while announcing to 1,000 of your future colleagues that you're on the rag."); Kathryn Rubino, *If You're Menstruating or Lactating During the Bar Exam You're Screwed*, ABOVE THE L. (July 20, 2020, 3:28 PM), https://abovethelaw.com/2020/07/if-youre-menstruating-or-lactating-during-the-bar-exam-youre-screwed/?rf=1 [https://perma.cc/V6HX-TQP9] (noting that Arizona reversed its initial policy entirely banning menstrual products in favor of allowing applicants to bring in such products in their clear, personal baggie).

96. *See* Harrington-Wisely v. State, No. B248565, 2015 WL 1915483, at *1 (Cal. Ct. App. Apr. 28, 2015) (noting that the low-level backscatter x-ray machines used by the California state prisons for searching visitors would reveal darkened areas for feminine hygiene products, breast implants, brassiere underwire, and diapers, which would then trigger an unclothed visual inspection and possibly a visual body cavity search).

97. *See* Anita Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1188 (2000) ("[W]omen's breasts, especially the nipple and areola have been long regarded as parts of the human body that ought to be concealed from public view; indeed, laws prohibit public disclosure of women's breasts in all but a few artistic and profane settings.").

98. *See, e.g.*, WIS. STAT. ANN. § 968.255 (West 2016) (defining a strip search as "a search in which a detailed person's genitals, pubic area, buttock or anus, or *a female person's breast*, is uncovered and either is exposed to view or is touched by a person conducting the search" (emphasis added)); WASH. REV. CODE ANN. § 10.79.070 (West 1983) (defining strip search as "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or *breasts of a female person*" (emphasis added)).

99. Allen, *supra* note 97, at 1177; ALLEN, *supra* note 10.

dress, and behavior calculated to deflect attention from their bodies, views or desires."[100] While many of these "expectations of female self-concealment and seclusion in the name of modesty have greatly diminished,"[101] the ongoing differential treatment of the chest area of men and women reveals that some resulting gendered privacy norms remain. Thus, courts and scholars must address how to handle the existence of such gendered privacy norms, even if the solution is that courts deliberately ignore such norms. As Danielle Citron has argued, recognizing gendered privacy norms surrounding the naked body does not affirm the view that women should be ashamed of their nude bodies, but instead "make[s] clear that each and every one of us should be able to decide who gets to view our naked bodies."[102] Therefore, even if the origin of this gendered privacy norm is problematic, its continued existence means that a search of women's breasts is a different experience than a search of men's chest areas, which can impact the reasonable expectation of privacy analysis.

Other gendered privacy norms may result from differences in life experience. For example, as the "Me Too" movement reminded us,[103] women are much more likely to be victims of sexual harassment or assault than men.[104] As a result, women might feel more of a need for privacy in their physical location, the GPS data associated with the location of their phones, or their home addresses than men would. Kristen Thomasen has recognized that drone technology might undermine women's privacy in particular, especially when considering "the long history of sexual violence, stalking, and objectification of women in public."[105] Similarly, Danielle Citron has explained that cyber harassment, including the nonconsensual disclosure of intimate images, or so-called "revenge porn," disproportionately impacts women.[106] More generally, Citron writes about the way in which women shoulder the brunt of the abuse from invasions of what

100. Allen & Mack, *supra* note 10, at 444.

101. *Id.*

102. Danielle Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1876 n.15 (2020).

103. Joanna L. Grossman, *Sexual Harassment in the Post-Weinstein World,* 11 U.C. IRVINE L. REV. 943, 945–57 (2021).

104. *See* Anne Bryson Bauer, *We Can Do It? How the Tax Cuts and Jobs Acts Perpetuates Implicit Gender Bias in the Code,* 43 HARV. J.L. & GENDER 1, 26–27 (2020).

105. *See* Kristen M. J. Thomasen, *Beyond Airspace Safety: A Feminist Perspective on Drone Privacy Regulation*, 16 CAN. J.L. & TECH. 307, 324 (2016).

106. DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 13–17 (2014).

she calls "sexual privacy."[107] She defines sexual privacy as "the social norms (behaviors, expectations, and decisions) that govern access to, and information about, individuals' intimate lives."[108] Sexual privacy includes both "the concealment of naked bodies and intimate activities," such as sexual intercourse, as well as "decisions about intimate life, such as whether to entrust others with information about one's sexuality or gender, or whether to expose one's body to others."[109] Citron explains that "sexual-privacy invasions impact women and individuals from marginalized communities in distinctly damaging ways."[110] The gendered privacy norms that arise from experiences disproportionately impacting women may impact the expectation of privacy that courts and society are prepared to recognize as reasonable.

Despite these differences in gendered privacy norms, courts have not often considered the role of gendered privacy norms in the reasonable expectation of privacy analysis. Nor have scholars grappled systematically with the way in which gendered privacy norms ought to impact the reasonable expectation of privacy analysis. The next Part discusses the limited contexts and degrees to which courts and scholars have acknowledged the impact of gender at all on the reasonable expectation of privacy analysis.

III. LIMITED ROLE OF GENDER IN PRIVACY CASES

There are two specific contexts in which scholars and courts, including the Supreme Court, have acknowledged that gender may impact the reasonable expectation of privacy analysis: school search cases and prison cases. Indeed, the Supreme Court has even told courts to consider sex as part of the analysis in school search cases; however, the Court has failed to provide any guidance to lower courts regarding implementing that requirement. Furthermore, courts and scholars have addressed the role of gender in the prison context, in a very limited and relational way, focusing on whether the gender of the prison guard conducting the search must match the gender of the prisoner being searched.

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107. Citron, *supra* note 102, at 1875.
108. *Id.* at 1874.
109. *Id.*
110. *Id.* at 1891.

A. Role of "Sex" in School Search Cases

In the school search context, courts and scholars have recognized, to a certain degree, the role of "sex" in analyzing the reasonableness of searches. In a pair of cases decades apart, the Supreme Court adopted and reiterated a test instructing courts to consider the "sex of the student" in determining the reasonableness of a school search.[111] However, in both cases, the Court failed to offer any explanation as to how the sex of the student affects the analysis.[112] In the absence of Supreme Court guidance, lower courts have inconsistently applied the "sex of the student" test, such that it is unclear whether it involves gendered privacy norms.

1. Supreme Court's "Sex of the Student" Test

In 1985, the Supreme Court first addressed the standard for reviewing the legality of public-school searches in *New Jersey v. T.L.O.*[113] T.L.O., a fourteen-year-old girl, was accused of smoking in a school lavatory in violation of school rules.[114] The male assistant vice principal demanded to search T.L.O.'s purse and found a small amount of marijuana and evidence of drug dealing.[115] T.L.O. moved to suppress the evidence, arguing that the search of her purse violated the Fourth Amendment.[116]

The Supreme Court held that the Fourth Amendment applies to searches by school authorities, but the typical warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[117] The Court also held that the normal "probable cause" requirement does not apply to the search of a student.[118] Instead, "the legality of a search of a student should depend

111. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).

112. *See T.L.O.*, 469 U.S. at 328; *see also Redding*, 557 U.S. at 368.

113. *T.L.O.*, 469 U.S. at 328.

114. *Id.*

115. *Id.*

116. *Id.* at 329.

117. *Id.* at 340.

118. *See id.* at 341 ("[T]he accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.").

simply on the reasonableness—under all the circumstances—of the search."[119]

The Court further explained that evaluating reasonableness involves a twofold inquiry: first, whether the "action was justified at its inception," and second, whether "the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[120] Elaborating on the second prong, the Court stated that a school search is permissible in scope when "the measures adopted are reasonably related to the objectives of the search" and the measures are "not excessively intrusive in light of the age and *sex of the student* and the nature of the infraction."[121]

The majority opinion did not, however, expand upon how the sex of the student might impact the intrusiveness of the search, but simply found that "the search was in no sense unreasonable for Fourth Amendment purposes."[122] Given that the case involved the search of a purse, the court could have determined that the search of a girl's purse is no more "excessively intrusive" than the search of a boy's belongings, such that T.L.O.'s sex did not influence the court's analysis.[123] If that were the case, then the Court might have said so. Instead, as scholars have noted,[124] the Court did not discuss how T.L.O.'s sex might impact the analysis nor did it provide any guidance to lower courts as to how its newly announced "sex of the student" test should be applied.[125]

By contrast, in his dissent, Justice Brennan subtly alluded to how the "sex of the student" might affect the reasonableness

119. *Id.*

120. *Id.*

121. *Id.* at 342 (emphasis added).

122. *Id.* at 343.

123. *Id.* at 342.

124. *See, e.g.*, Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 883 (2018) (noting that the T.L.O. court "left more questions unanswered than answered," including "[a]re boys or girls more sensitive to having their belongings or bodies searched"); Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 922 (1987) ("[T]he Court never explained the relevance of the sex of the student consideration."); Cuevas & Jacobi, *supra* note 14, at 2212–13 ("[W]hen the Court finally confronted the legality of the searches at bar, it did not discuss either T.L.O.'s age or gender, even though it was crafting a rule requiring it, and even though it is clearly relevant to the reasonableness of the actions.").

125. *See T.L.O.*, 469 U.S. at 343–47 (containing no discussion of the relevance of T.L.O.'s sex in the rule application of the newly announced test).

of the search of a student's purse. Justice Brennan wrote that the vice principal's "thorough excavation of T.L.O.'s purse was undoubtedly a serious intrusion on her privacy."[126] While Justice Brennan did not expressly state that he reached this conclusion based on the student's sex, in a footnote, he noted that,

> a purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.[127]

While the "shy or sensitive adolescents" language Justice Brennan uses is ostensibly gender neutral, the reference to "items of personal hygiene" implies that a search of a girl's purse could reveal feminine hygiene items related to menstruation, which could be particularly embarrassing for a teenage girl. Therefore, following the dissent's logic, a lower court who wanted to apply the majority's "sex of the student" factor could conclude that a search of an adolescent female student's purse could be particularly intrusive for purposes of determining the reasonableness of the scope of the search.[128]

Decades later, in *Safford Unified School District No. 1 v. Redding*, a case involving the strip search of a female student, the Supreme Court had a perfect opportunity to clarify its "sex of the student" test.[129] The male assistant principal of a middle school summoned thirteen-year-old Savana Redding to his office, where she was shown a day planner containing knives, lighters, and a cigarette.[130] Savana acknowledged the planner belonged to her but claimed that she had lent it to her friend and that

126. *Id.* at 355 (Brennan, J., concurring in part and dissenting in part).

127. *Id.*

128. Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 CRITICAL CRIMINOLOGY 117, 128 (2006) (pointing to Justice Brennan's dissent to explain why searches of student property unique to one sex are sometimes deemed especially intrusive); Gardner, *supra* note 124, at 922–23 (hypothesizing that the Court's "sex of the student" language "is suggesting that some intrusions characteristically affect members of one sex differently from those of the other" and looking to Justice Brennan's footnote to conclude that "the search of a female student's purse seems especially intrusive given that purses typically contain items of a highly personal nature such as 'notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene'").

129. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).

130. *Id.*

none of the items were hers.[131] The assistant principal then showed Savana four prescription-strength ibuprofen pills and one over-the-counter blue naproxen pill—all banned under school rules without advance permission—and informed her that he had received a report that she was distributing pills to other students.[132] She denied the allegation and consented to a search of her backpack, which found nothing.[133]

The assistant principal next instructed a female administrative assistant to take Savana to the female school nurse's office to search her clothing for pills.[134] They instructed Savana to remove her jacket, socks, shoes, stretch pants, and T-shirt and "to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree."[135] They did not find any pills. Savana's mother sued the school district for strip-searching her daughter in violation of her Fourth Amendment rights.

The Supreme Court reaffirmed that the *T.L.O.* test governs the constitutionality of searches in the school context, including that "a school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[136] In applying the *T.L.O.* test, the Court found that the school's search was not reasonable.[137] The Court explained that regardless of what was actually seen by the school officials,

> [t]he very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 369.
135. *Id.*
136. *Id.* at 370.
137. *Id.* at 377 (identifying numerous "fatal" deficiencies in the search's reasonableness).

> of justification on the part of school authorities for going beyond a search of outer clothing and belongings.[138]

The Court noted that Savana's description of the experience as "embarrassing, frightening, and humiliating" demonstrated her subjective expectation of privacy.[139] The Court pointed to various studies and policies indicating that strip searches can result in serious emotional damage to students in support of the reasonableness of Savana's expectation of privacy.[140]

Although the *Redding* Court reiterated the "sex of the student" factor for evaluating the intrusiveness of a school's search, the Court once again failed to provide guidance to lower courts regarding how that prong ought to factor into the analysis. The Court did extensively discuss the harm of strip searches on adolescents, thus suggesting a role for the "age of the student" prong.[141] However, while the Court repeatedly mentioned in the facts that Savana was a thirteen-year-old girl, the Court did not explain whether and how the analysis would be different for a strip search of a thirteen-year-old boy.[142]

In a pair of partial concurrences, Justices Stevens and Ginsburg agreed with the majority that, under the *T.L.O.* precedent, a school search becomes unconstitutional if it is "excessively intrusive in light of the age and sex of the student and the nature

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138. *Id.*

139. *Id.* at 375.

140. *Id.*

141. *See id.*

142. *See* Laura Jarrett, *Excessively Intrusive in Light of Age or Sex? An Analysis of* Stafford Unified School District No. 1. v. Redding *and Its Implications for Strip Searches in School*, 33 HARV. J.L. & GENDER 403, 407, 409 (2010) ("Even though the T.L.O. standard requires consideration of a student's age, sex, and the nature of the infraction, the significance of Savana's sex was not explicitly explored in the majority's analysis of the search . . . and provides no clear indication of whether Savana's sex affected the outcome of the case."); Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955, 984, 987 (2011) (noting that, in *Redding*, "the Supreme Court has offered no guidance as to the meaning of the age and sex of the student factors" and that such guidance would be "at least, helpful, if not essential, in making such assessments"); Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV. 1123, 1154 (2010) (noting that the Supreme Court "mentioned the importance of 'age and sex' in its application of the scope of the intrusion prong of *T.L.O.*" but did not explain "what sex was more at risk for trauma from a strip search" or "provide guidance on how to apply these factors in the future").

of the infraction."[143] In a short rule application, Justice Ginsburg subtly suggested that she was applying the "sex of the student" factor when she concluded that "'the nature of the [supposed] infraction,' the slim basis for suspecting Savana Redding, and her 'age and sex,' establish beyond doubt" that the "treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it."[144] However, beyond a quick reference to Redding's "age and sex," Justice Ginsburg did not explain how Redding's sex impacted the analysis.

News reports at the time, however, suggest that Redding's sex did impact both Justice Ginsburg's and the Court's analyses. Justice Ginsburg told *USA Today* in an unorthodox interview that, judging from their comments at the case's oral arguments, her all-male colleagues had failed to appreciate what Ms. Redding had endured.[145] As Justice Ginsburg noted, "[t]hey have never been a 13-year-old girl. . . . It's a very sensitive age for a girl. I don't think that my colleagues, some of them, quite understood."[146] This suggests that, behind the scenes, Justice Ginsburg may have emphasized to her colleagues that they ought to consider gendered privacy norms.[147]

In his partial concurrence and partial dissent, Justice Thomas suggested a different role for the "sex of the student" factor.[148] In a footnote, Justice Thomas noted that "among 12- to 17-year-olds, females are more likely than boys to have abused prescription drugs and have higher rates of dependence or abuse involving prescription drugs."[149] Therefore, in his view, "rather than undermining the relevant governmental interest

143. *Redding*, 557 U.S. at 379 (Stevens, J., concurring in part and dissenting in part); *id.* at 382 (Ginsburg, J., concurring in part and dissenting in part).

144. *Id.* at 382 (Ginsburg, J., concurring in part and dissenting in part).

145. Adam Liptak, *Supreme Court Says Child's Rights Violated by Strip Search*, N.Y. TIMES (June 25, 2009), https://www.nytimes.com/2009/06/26/us/politics/26scotus.html [https://perma.cc/AN3E-3YR2].

146. *Id.*

147. *See* Theresa M. Beiner, *Is There Really a Diversity Conundrum?* 2017 WIS. L. REV. 285, 295 (2017) (recounting the Justice Ginsburg quote and pondering "if Justice Ginsburg's understanding of a thirteen-year-old girl's perception swayed some of her fellow justices"); Amy Howe, *Interpreting the Supreme Court: Finding Meaning in the Justices' Personal Experiences*, 68 FLA. L. REV. 393, 403 (2016) ("[B]ased on Justice Ginsburg's comments it seems at least very possible that the case may have ultimately hinged on the fact that there was one member of the Court who was once a thirteen-year-old girl").

148. *Redding*, 557 U.S. at 382 (Thomas, J., concurring in part and dissenting in part).

149. *Id.* at 397 n.6.

here, Redding's age and sex, if anything, increased the need for a search to prevent the reasonably suspected use of prescription drugs."[150] Thus, in Justice Thomas' view, the age and sex of the student should be considered in the context of their statistical propensity to engage in the behavior justifying the search, rather than the harm to the student caused by the invasiveness of the search.[151] Although the Supreme Court established the "sex of the student" test in *T.L.O.* and reaffirmed it in *Redding*, the lack of clarity regarding how the test applies left lower courts to figure it out on their own.

2. Lower Courts Struggle with "Sex of the Student" Test

Both before and after the Supreme Court weighed in again in *Redding*, lower courts have struggled with how to apply *T.L.O.*'s "sex of the student" factor.[152] In *Jenkins by Hall*, an *en banc* panel of the Eleventh Circuit expressly called out the Supreme Court's lack of helpful guidance in a decision discussing qualified immunity for school officials who twice strip-searched two eight-year-old girls in an attempt to find seven dollars stolen from a classmate.[153] The Eleventh Circuit acknowledged that the Supreme Court in *T.L.O.* "did not apply its own test strictly to the facts presented in that case,"[154] such that "specific application of the factors established . . . is notably absent from the Courts' discussion and conclusion."[155] Thus, the Eleventh Circuit concluded that in "the absence of detailed guidance" from

150. *Id.*

151. Justice Thomas's argument conflates the two reasonableness tests set out in *T.L.O.* In the first prong, courts consider the reasonableness of the search at inception. In the second prong, the courts analyze the reasonableness of scope of the search. The court used the "age and sex of the student" solely in relation to the second reasonableness of the scope test. Justice Thomas appears to confuse the two by suggesting he would consider the sex of the student in deciding whether the search was reasonable at the inception.

152. *See* Chart Summarizing 286 School Search Cases and Every Case Beyond the School Search Context that Cites the Relevant Provision from *T.L.O.* (2021) (on file with the author). 162 of the cases occurred prior to 2009 when the Supreme Court returned to the "sex of the student" test in *Redding*, 557 U.S. 364 (2009).

153. Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036 (11th Cir. 1996), *reh'g en banc granted, opinion vacated*, 115 F.3d 821 (11th Cir. 1996), *on reh'g en banc*, 115 F.3d 821, 822 (11th Cir. 1997).

154. Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 824 (11th Cir. 1997).

155. *Id.* at 825.

the Supreme Court, no reasonable school official could determine "whether the search of a boy or girl is more or less reasonable."[156] Therefore, school officials could not know whether their conduct violated a clearly established constitutional right, as required to overcome qualified immunity.[157]

Lacking Supreme Court direction, many lower court decisions merely recited the line from *T.L.O.* about considering the "sex of the student" but, like the Supreme Court, did not actually discuss the rule in explaining the court's reasoning.[158] Other lower court cases cited to the *T.L.O.* case as providing the governing rule but then omitted the "sex of the student" portion of the rule statement. Instead, these courts analyzed the "scope" of the search through a totality-of-the-circumstances approach.[159] A third set of lower courts cite to all three elements of *T.L.O.*'s test but only refer to age and/or the nature of the infraction in the analysis determining whether the search was reasonable while entirely ignoring the sex aspect of the rule.[160]

A small number of lower courts did pay lip service to the Supreme Court requirement to consider the "sex of the student" but, like the Supreme Court decisions themselves, provided minimal explanation of the role that "sex" played in the analysis. For example, one court summarily concluded that the search of a student "can certainly be viewed as 'excessively intrusive' . . . especially in light of the fact that Plaintiff was a minor female and

156. *Id.* at 826.

157. *Id.* at 826.

158. *See, e.g.*, Rinker v. Sipler, 264 F. Supp. 2d 181 (M.D. Pa. 2003); *In re* Murray, 136 N.C. App. 648, 652 (2000); D.B. v. State, 728 N.W. 2d 179, 181–82 (Ind. Ct. App. 2000); Donahoe, *supra* note 142, at 1155.

159. *See, e.g.*, Shoemaker v. State, 971 S.W.2d 178, 182 (Tex. App. 1998) (citing to the *T.L.O.* test and finding the search of a student's locker was reasonably related in scope to the circumstances justifying the search without mentioning the "sex of the student" aspect of the *T.L.O.* decision); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 982–83 (8th Cir. 1996).

160. Vassallo v. Lando, 591 F. Supp. 2d 172, 192 (E.D.N.Y. 2008) (framing the test as evaluating intrusiveness "in light of the age and sex of the student" but, in the rule application, exclusively focusing on a male student's age in finding that searches of his backpack and person "were not excessively intrusive when balancing [his] age in the context of the nature of the alleged infraction"); *In re* Garn, 5th Dist. Richland, No. 2006-CA-0053 & 2006-CA-0055, 2007-Ohio-6765, at *5–6 (involving a male administrator's search of a female student's purse, just like in *T.L.O.*, but, nonetheless, after reciting the full *T.L.O.* test, concluding "that the search was not excessively intrusive in light of the age of the appellant and the nature of the threats, i.e., murder" with no reference to the "sex" prong in the rule application).

her alleged infraction created no imminent danger to either herself or those around her."[161] The court's language suggested that a female plaintiff made the search "especially" intrusive but did not clarify why that might be. Other courts concluded that the searches under review were not excessively intrusive in light of the age and gender of the student being searched, but again did not explain how the age or sex of the party being searched impacted the court's analysis.[162]

For the most part, lower courts that did account for the "sex of the student" in their reasonableness analyses did so in the relational sense—that is, by considering the sex of the student in relation to the sex of the person conducting the search—on the apparent assumption that opposite-sex searches are more problematic than same-sex searches.[163] For example, in *Cornfield by Lewis,* the Seventh Circuit analyzed the reasonableness of a strip search of a sixteen-year-old male student who "appeared too well-endowed" and was suspected of "crotching" drugs.[164] The court extensively discussed the impact of the student's age in evaluating reasonableness.[165] With regard to the student's sex, however, the court pointed out that "a nude search of a student by an administrator or teacher of the opposite sex would obviously violate [the *T.L.O.*] standard."[166] Because "two male school personnel performed the search and did so in the privacy of the boys' locker room," the court found the search reasonable.[167]

In a different school search case, a federal district court explained that "the gender of the participants is relevant," citing

161. Sostarecz v. Misko, No. 97-CV-2112, 1999 WL 239401 (E.D. Pa. Mar. 26, 1999).

162. United States v. Aguilera, 287 F. Supp. 2d 1204 (E.D. Cal. 2003); Bravo *ex rel.* Ramirez v. Hsu, 404 F. Supp. 2d 1195, 1202 (C.D. Cal. 2005) ("[T]he search was not excessively intrusive in light of Jennyfer's age and sex.").

163. *See* Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489 (6th Cir. 2008) (stating that right to privacy includes the right to shield one's body from exposure to viewing by the opposite sex); Gardner, *supra* note 142, at 985–86 ("The most common understanding focuses not simply on the sex of the student but also on the sex of the person conducting the search, making the assumption that searches by persons of the opposite sex of the student are more intrusive than those by persons of the same sex.").

164. Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993).

165. *Id.* at 1321.

166. *Id.* at 1320.

167. *Id.* at 1323.

to *T.L.O.*'s "sex of the student" language for support.[168] The court noted that there were five searches of male plaintiffs by female school officials, even though a male school official was apparently available to undertake the search.[169] Thus, the court made clear that the relevance of the participants' gender was their relation to one another. Nonetheless, the court still found the searches reasonable because "the searches were considerably less intrusive" than a strip search in a prior case.[170] Another federal district court similarly found the search of a thirteen-year-old boy asked to remove most of his clothing based on a suspicion of drugs was "reasonable in its scope in light of plaintiff's age and sex and the nature of the suspected infraction."[171] The court reached its conclusion in part because "the search was conducted in the privacy of the principal's office with only two male administrators present."[172]

If the Supreme Court meant to suggest that opposite-sex searches are more intrusive than same-sex searches, then the facts of *T.L.O.*—involving a male principal searching a female student's purse in a private office—gave the Court an opportunity to say so.[173] By focusing on the sex of the student solely in relation to the sex of the party conducting the search,[174] lower courts have missed the opportunity provided by the Supreme Court's language to evaluate the role that gendered privacy norms can play. Furthermore, because *Redding* did not clarify how the "sex of the student" prong ought to impact the analysis,

168. H.Y. *ex rel.* K.Y. v. Russell Cnty. Bd. of Educ., 490 F. Supp. 2d 1174, 1186 (M.D. Ala. 2007).

169. *Id.*

170. *Id.*

171. Singleton v. Bd. of Educ. USD 500, 894 F. Supp. 386 (D. Kan 1995); *see also In re* Josue T., 1999-NMCA-115, 128 N.M. 56, 989 P.2d 431 (1999) ("[T]his limited search was not excessively intrusive in light of the age and sex of the student. Student, a male, was searched by a male officer.").

172. *Singleton*, 894 F. Supp. at 391.

173. Maria M. Lewis, *The Fourth Amendment in Schools: An Ambiguous Precedent and the Role of Gender in Determining Reasonableness*, 23 BUFF. J. GENDER, L. & SOC. POL'Y 1 (2015) ("[T]he Court may have focused on the sex of the student as relevant when the search is conducted by a school official of the opposite sex. Such searches are presumably more intrusive than those conducted by a member of the student's sex. If this is the point, the search of TLO's purse . . . by a male principal in a private office again appears highly intrusive.").

174. As explained further below, this relational consideration of gender is beyond the scope of this Article.

lower court cases after *Redding* continue to either entirely ignore the "sex" prong of the *T.L.O.* test,[175] apply it in a relational matter considering the sex of the student searched in relation to the sex of the searcher,[176] or dismiss it as irrelevant.[177]

The Supreme Court's "sex of the student" language also left ambiguous whether the Court actually meant sex as opposed to gender. Whereas "sex" refers to biological attributes and "gender" refers to socially constructed roles, behaviors, expressions, and identities, the terms are often used interchangeably.[178] Given that the *T.L.O.* decision was written in 1985, it seems particularly likely that the Court may have conflated these terms. Indeed, some lower courts have paraphrased the Court's language by replacing the word "sex" with "gender" without any discussion or explanation.[179] Other lower courts have quoted the *T.L.O.* decision as written—including the "sex of student" language—but in surrounding discussions replaced the word "sex" with "gender."[180] As another approach, some courts have used brackets to replace the word "sex" with "gender" when quoting from the *T.L.O.* decision.[181] None of these courts explained the reasoning behind replacing "sex" with "gender," despite the clearly deliberate decision to do so. The Supreme Court's failure

175. *See, e.g.*, State v. Rodriguez, 521 S.W.3d 1 (Tex. Crim. App. 2017) (failing to indicate that sex made any difference to the analysis of searching a female student's dorm room).

176. Salyer v. Hollidaysburg Area Sch. Dist., No. 3:16-57, 2018 WL 3579838, at *10 (W.D. Pa. July 25, 2018) ("Nor could a reasonable jury determine that the search was excessively intrusive, given that Salyer was a male high school junior, the search was conducted by a male officer, the search only entailed touching Salyer's back pocket, and the search concerned a serious infraction.").

177. Jackson v. McCurry, 303 F. Supp. 3d 1367 (M.D. Ga. 2017), *aff'd,* 762 F. App'x 919 (11th Cir. 2019) (applying the *T.L.O.* factors and concluding that "her sex is irrelevant to the search of the cell phone").

178. For example, people commonly refer to "gender reveal parties," when usually it is the baby's sex that is being revealed.

179. *See, e.g.*, United States v. Aguilera, 287 F. Supp. 2d 1204, 1212 (E.D. Cal. 2003) (finding that a frisk of defendant's outer clothing "was not excessively intrusive in light of defendant's age and gender" and citing to *T.L.O.*); Interest of J.M., 588 S.W.3d 612, 618 (Mo. Ct. App. 2019).

180. *See In re* S.W.*,* 614 S.E.2d 424, 426–27 (N.C. Ct. App. 2005) (quoting directly from *T.L.*O.'s "sex of the student" language but then concluding that a pat-down search of a male juvenile "was not excessively intrusive in light of the age and gender of the juvenile"); *see also In re* D.L.D., 694 S.E.2d 395 (N.C. Ct. App. 2010); H.Y. *ex rel.* K.Y. v. Russell Cnty. Bd. of Educ., 490 F. Supp. 2d 1174, 1186 (M.D. Ala. 2007) (stating that the "gender of the participants is relevant" and then citing to *T.L.O.*'s "sex of the student" language in support of that proposition).

181. *In re* Welfare of S.M.L., No. A05-1632, 2006 WL 2255834, at *2 (Minn. Ct. App. Aug. 8, 2006); *In re* Welfare of T.J.R., No. A06-380, 2007 WL 583010 (Minn. Ct. App. Feb. 27, 2007).

to explain its "sex of the student" test has led lower courts to come up with their own analyses to apply regarding the "sex" or "gender" of the plaintiff before them.

3. Categories of School Search Cases

Different types of searches create different opportunities for courts to consider gendered privacy norms as part of the "sex of the student" analysis. For example, gendered differences in societal bathroom norms mean that student drug-testing cases implicate gendered privacy norms in the same way as employee and prison drug-testing cases. By contrast, just as in *T.L.O.*, courts do not appear to recognize any gendered or sex-based differences in searches of students' belongings. Finally, cases that involve pat downs, strip searches, and other searches of students' bodies, as in *Redding*, easily have the potential to raise questions about gendered privacy norms, especially regarding the chest and bra area of female students.

Drug-testing and school search cases provide an opportunity for lower courts to address the role of gendered privacy norms in evaluating the "sex of the student" factor in light of the different societal restroom norms for boys and girls. In one of the earliest cases after *T.L.O.*, a federal district court held that "requiring a teenaged student to disrobe from the waist down while an adult school official, even though of the same sex, watches the student urinate in the 'open' into a tube is an excessive intrusion upon the student's legitimate expectations of privacy."[182] Despite the fact that the case involved teenaged girls, the court used gender-neutral language in holding that such a search would be unreasonable for any teenaged student, regardless of gender.[183] Ultimately, in *Vernonia*, the Supreme Court weighed in on the constitutionality of drug testing in schools, upholding such testing when students participate in interscholastic athletics.[184] Ironically, that case entirely ignored *T.L.O.*'s "sex of the student" test, although the Court did discuss gendered privacy norms regarding urination as part of its analysis.[185]

182. Anable v. Ford, 653 F. Supp. 22, 41 (W.D. Ark. 1985).

183. *Id.*

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

185. *Id.* at 658. Part III discusses the Supreme Court's discussion of gendered privacy norms in *Vernonia* in more detail as part of the larger case study of court treatment of gendered privacy norms in monitored drug-testing cases.

A second category of school search cases involves searches of students' belongings, as in *T.L.O.* itself. As Justice Brennan's *T.L.O.* dissent pointed out, searching students' belongings could implicate gendered privacy norms, as a female student's belongings may contain feminine hygiene products.[186] Nonetheless, only nine of the 134 cases involving student belongings addressed the sex of the student in any way, and one case only did so to say that the sex of the student is *not* relevant to a search of her cellphone.[187] Several of the cases that do address the sex of the student involve multiple types of searches in addition to the search of the student's belongings, such as a school official first searching a student's locker and then conducting a pat down of the student.[188] For the most part, lower courts do not appear particularly concerned with the "sex of the student" in searches of a student's belongings, despite the fact that the *T.L.O.* decision that announced such a test itself involved the search of a student's belongings.

186. New Jersey v. T.L.O., 469 U.S. 325, 355 n.1 (1985) (Brennan, J., concurring in part and dissenting in part).

187. *See* Bravo, *supra* note 165; Bridgman *ex rel.* Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146 (7th Cir. 1997); Commonwealth v. Hor, No. 982126(001), 1999 WL 674443, at *3 (Mass. Dist. Ct. Aug. 12, 1999) ("In comparison with the facts of *New Jersey v. T.L.O.*, where the vice principal searched a fourteen-year-old female student's purse because she was suspected of violating a school prohibition on smoking, Dr. Moorehouse's search of a male high school student's bookpack who is under suspicion of selling drugs in the school was completely reasonable."); Greenleaf *ex rel.* Greenleaf v. Cote, 77 F. Supp. 2d 168, 170 (D. Me. 1999) (noting that a male administrator suspected that a female student's bag contained feminine hygiene products and allowed a female teacher to search the bag); Jackson v. McCurry, 303 F. Supp. 3d 1367, 1377 (M.D. Ga. 2017), *aff'd*, 762 F. App'x 919 (11th Cir. 2019) ("Her sex is irrelevant to the search of the cell phone."); Salyer v. Hollidaysburg Area Sch. Dist., No. 3:16-57, 2018 WL 3579838 (W.D. Pa. July 25, 2018); Singleton v. Bd. of Educ. USD 500, 894 F. Supp. 386 (D. Kan. 1995); V.W. *ex rel.* Wybrow v. DaVinci Acad. of Sci. & the Arts, No. 1:09-CV-127, 2011 WL 4001150 (D. Utah Sept. 8, 2011); Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987).

188. *Bravo*, *supra* note 165 (finding a search of students' backpacks and shoes reasonable in light of what students of that age might experience at an airport or athletic event); *Bridgman*, 128 F.3d at 1150 (involving a search of the students' outer clothing and noting that "the search at issue . . . was not so invasive as to render [the school's] failure to recruit a male searcher unconstitutional" where the student retained his pants and undershirt); *Salyer*, 2018 WL 3579838 (involving a pat-down search as well as a search of the student's locker and backpack); *Singleton*, 894 F. Supp. 386 (involving both a search of the student's locker and body); *V.W.*, 2011 WL 4001150 (addressing sex of the student where her belongings were searched and she was subjected to a strip search and seizure, during which she was told to urinate in trash can within view of a male student).

Searches involving pat downs and strip searches of students' bodies, such as *Redding*, present a more obvious opportunity for courts to address gendered privacy norms as part of the "sex of the student" factor. For example, a series of cases involving searches of female students' bra area provided courts, both before and after *Redding*, the opportunity to address the different privacy norms with regard to female breasts versus the male chest. One district court case analyzed a strip search where girls were forced to remove their bras and allow school administrators to search them for stolen money.[189] However, the court's analysis did not take the opportunity to address the uniquely invasive nature of such a search in light of gendered privacy norms surrounding the wearing of bras and covering of the girls' chest area.[190] Instead, the court focused on the "tender age" of the seventh-grade girls and the minor offense being investigated in concluding that it was "unreasonable to conduct a strip search of young school girls in an effort to recover the grand sum of four dollars and fifty cents."[191] Similarly, in a second case, the plaintiffs alleged "that both boys and girls are required to raise their shirts to the neck when being searched, exposing the boys' chests and the girls' bras."[192] This fact pattern provided a perfect opportunity for the court to address the different gendered privacy norms in which boys' chests are routinely visible at a swimming pool or beach but girls' bras are not. Instead, the court held that it "cannot conclude as a matter of law that this procedure is not excessive in light of the age and sex of the students affected" without exploring how the boys and girls would experience the search differently.[193]

Other court cases appear to take into account the gendered privacy norms surrounding bras, even while not doing so explicitly. In a post-*Redding* district court case considering searches of female students' bras, *Herrera v. Santa Fe Public Schools*, students were subjected to suspicionless pat-down searches before a school dance.[194] The court held that "it was clearly established that a suspicionless search of every student entering prom that included the cupping of breasts, the pulling of bra straps, and

189. Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995).

190. *Id.* at 1211.

191. *Id.* at 1218.

192. Melvin H. v. Atlanta Indep. Sch. Sys., No. 1:08-CV-1435-BBM, 2008 WL 11342510, at *12 (N.D. Ga. July 10, 2008).

193. *Id.*

194. Herrera v. Santa Fe Pub. Schs., 41 F. Supp. 3d 1027, 1060 (D.N.M. 2014).

the touching of bare skin violated the students' Fourth Amendment rights to be free from an unreasonable search."[195] The recited offensive facts were clearly gendered, including "the cupping of breasts, the feeling of bare legs and arms, the lifting of dresses to midthigh, and the putting of fingers inside of a dress to check a student's cleavage."[196] Nevertheless, the court did not discuss the different expectations of privacy between male and female students when being searched in light of different gendered privacy norms. The court did conclude summarily that "the searches were excessively intrusive in light of the age and sex of the students."[197] At most, since the facts of the case involved female students searched by a female, it appears that the court's understanding of the "sex of the student" factor was not merely a relational one.

At least one court has discussed the meaning of "sex of the student" factor in the bra search context. A North Carolina court of appeals, although subsequently overturned, did address the meaning of the factor in a case in which a student challenged a suspicionless search of her bra as part of a broader school search.[198] School officials required female students "to perform a 'bra lift,' where they 'pull their shirts out,' 'shake them,' and 'go underneath themselves with their thumb in the middle of their bra to pull it out.'"[199] The court recited the *T.L.O.* test, adding particular emphasis to its language requiring that the search be "not excessively intrusive in light of the age and sex of the student."[200] The court implied that a search that revealed a female's chest area would be different if conducted on male students by pointing to a Fourth Circuit case that noted that many statutes define strip search as permitting visual inspection of the "female breasts."[201] Later in the analysis, the court found that "the bra-lift at issue was degrading, demeaning, and highly intrusive."[202] In reaching that conclusion, the court relied in part on a relational analysis, pointing out that a male official was in the room at the time of the bra search. The court cited to

195. *Id.* at 1102.
196. *Id.* at 1101.
197. *Id.*
198. *In re* T.A.S., 713 S.E.2d 211 (N.C. App.), *writ allowed*, 712 S.E.2d 884 (N.C. 2011), *and vacated*, 732 S.E.2d 575 (N.C. 2012).
199. *Id.* at 213.
200. *Id.* at 214.
201. *Id.* at 217 (citing Amaechi v. West, 237 F. 3d 356, 362 n.15 (4th Cir. 2001)).
202. *Id.* at 220.

Thomas Hooks's law review article for the observation that courts have generally interpreted the "sex of the student" requirement "to mean the school officials conducting the strip search 'must be of the same sex as the student.'"[203] The court suggested, however, that the bra lift may have been highly intrusive, even if conducted by an official of the same sex. The court's reasoning was presumably motivated by the gendered privacy norms surrounding female breasts, given that it noted that school officials in this case "could have positioned themselves to see her bra or breasts."[204]

The school search scenario is a rare context where the Supreme Court has officially acknowledged some role for courts to consider sex as part of the reasonableness analysis. Nonetheless, lacking Supreme Court guidance, most lower courts have failed to meaningfully engage with the impact of the "sex of the student" by not seriously considering differences in lived experiences between girls and boys, biological differences surrounding menstruation and puberty, and differences in gendered privacy norms for boys and girls.

B. Gendered Privacy Norms in Prison Search Cases

Some courts have also recognized the role of gendered privacy norms in analyzing the reasonableness of searches in the prison search context where courts have held that prisoners have reduced expectations of privacy.[205] As in the school search context, the vast majority of these cases have focused on the relational aspects of the gender of the searched prisoner being the same or different than the gender of the guard doing the searching.[206] Courts have debated the legal propriety of requiring same-gender searches, as doing so can have Title VII sex discrimination implications.[207] Courts have often balanced these

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203. *Id.* at 221 (citing Thomas R. Hooks, *A Rock, a Hard Place, and a Reasonable Suspicion: How the United States Supreme Court Stripped School Officials of the Authority to Keep Students Safe*, 71 LA. L. REV. 269, 296 (2010)).

204. *Id.*

205. Hudson v. Palmer, 468 U.S. 517 (1984) (holding that the Fourth Amendment does not apply in prison cells); Turner v. Safley, 482 U.S. 78 (1987) (reviewing prison privacy claims primarily for whether they are rationally related to a penological objective).

206. *See, e.g.*, Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985); Byrd v. Maricopa Cnty. Sheriff's Dep't, 629 F.3d 1135 (9th Cir. 2011).

207. *See, e.g.*, Hansen v. Cal. Dep't of Corrs., 920 F. Supp. 1480, 1499 (N.D. Cal. 1996) (distinguishing cases that involved "observation of unclothed bodies by

conflicting privacy and employment discrimination interests by adjusting scheduling and job responsibilities for the guards in order to prevent the need for cross-gender searches.[208] While this question of how to balance prisoners' privacy interests with the employment interests of opposite-sex guards presents interesting questions, it is beyond the scope of this Article and has been comprehensively debated in existing scholarship.[209]

More pertinently, a few courts in the prison context have gone beyond recognizing gender solely as part of the relational analysis of whether searches must be conducted by a member of the same gender. Instead, those courts have recognized that the actual experience of being searched may vary between men and women in light of different life experiences and social norms.

Most notably, in 1993, the Ninth Circuit, sitting *en banc* in *Jordan v. Gardner*, held that a prison policy requiring male guards to conduct random, non-emergency, clothed body searches of female prisoners constituted cruel and unusual punishment under the Eighth Amendment.[210] In *Jordan*, male guards subjected female prisoners to physically intrusive tactile searches of the crotch and breast area.[211] In finding this was cruel and unusual, the court recognized that there were "physical, emotional and psychological differences between men and women" that could "cause women, and especially physically and

persons of the opposite sex" whereas, in this case, "the observation was conducted by a person of the same sex as the plaintiff; such observation is generally considered to be much more social acceptable"); Booker v. City of St. Louis, 309 F.3d 464 (8th Cir. 2002) (holding that same-sex monitoring was *not* required); Sepulveda v. Ramirez, 967 F.2d 1413 (9th Cir. 1992) (discussing cross-sex monitoring as problematic); Cornwell v. Dahlberg, 963 F.2d 912, 916–17 (6th Cir. 1992); Johnson v. Phelan, 69 F.3d 144, 150, 152 (7th Cir. 1995) (offering two sides of the issue in a related surveillance context with Judge Frank Easterbrook writing for the majority that there is no need to require cross-gender surveillance, and Judge Richard Posner, in concurrence, writing that it is "the duty of a society that would like to think of itself as civilized to treat its prisoners humanely," which requires allowing prisoners to be "free from unnecessary cross-sex surveillance").

208. *See* Hovater v. Robinson, 1 F.3d 1063, 1067 (10th Cir. 1993).

209. *See* Capers, *supra* note 12; Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to Be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31 (2002); Teresa Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861 (2001); Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 AM. U. J. GENDER SOC. POL'Y & L. 1 (1991); Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2005).

210. Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) (en banc).

211. *Id.* at 1523.

sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women."[212] The court explicitly considered gender norms and concluded that the "record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women."[213] For support, the court pointed to witnesses who discussed "the differences in gender socialization" that would cause "differences in the experiences of men and women with regard to sexuality."[214] Notably, the majority opinion declined to decide the case on Fourth Amendment grounds because the inmates' privacy interests in freedom from such searches had not yet been judicially recognized whereas their right to be free of cruel and unusual punishment had.[215]

Although *Jordan*'s gender-norm analysis took place in the context of an Eighth Amendment challenge, a similar gender-norm analysis could be done in the Fourth Amendment context. Indeed, the concurrence in *Jordan* also took into account gendered privacy norms and would have decided the case on Fourth Amendment grounds in addition to the Eighth Amendment claim relied upon by the majority. The concurrence explained that conduct permitting "men in positions of authority to flatten the breasts of women who are powerless and totally subject to their control, to knead the seams of their clothing at their inner thighs, and to thrust their hands inward and upward into their crotches" would be "offensive in the extreme to *all* women, regardless of their prior sexual history."[216] A subsequent federal district court case citing to *Jordan* similarly considered *Jordan*'s gender-norm analysis in the context of Fourth Amendment law.[217]

Therefore, a few courts have recognized that there are differences in lived experiences by women that could impact the reasonableness analysis of an invasive search for women in the context of cross-gender prison searches. Similar differences in lived experiences by women that lead different gendered privacy norms could affect cases beyond the prison search context as well.

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212. *Id.* at 1525.
213. *Id.* at 1526.
214. *Id.*
215. *See id.* at 1525.
216. *Id.* at 1540 (Reinhardt, J., concurring).
217. *See* Carlin v. Manu, 72 F. Supp. 2d 1177 (D. Or. 1999).

Although the majority of cases have ignored the role that gender may play in a reasonableness privacy analysis, in both the school and the prison contexts, courts have somewhat recognized that gender may have an impact. In the school search context, the Supreme Court's rule asking courts to consider the "sex of the student" as part of the reasonableness analysis seemingly invites courts to take into account gendered privacy norms, but for the most part, courts have failed to take up the opportunity to do so. In the prison search context, a small minority of courts has recognized the role of gendered privacy norms in considering the experience of prison searches for female prisoners. In both contexts, most courts that take into account gender as part of the analysis at all have done so primarily in a relational way considering the impact of cross-gender searches on prisoners and students.

IV. MONITORED DRUG TESTING: A CASE STUDY

As established above, scholars and courts have not comprehensively explored either the descriptive questions of whether and how courts choose to consider gender in evaluating privacy law claims nor the corresponding normative question of whether courts ought to do so. This Part seeks to address the descriptive question through the specific case study of monitored urinalysis drug testing.

Monitored urinalysis drug testing presents a useful case study to explore court consideration of gendered privacy norms because the privacy invasions it triggers may differ by gender. First, the testing of urine has the potential to reveal gender-specific private medical information, such as whether the woman is pregnant or taking birth control.[218] Society generally considers

218. *See* Anchorage Police Dep't Emps. Ass'n v. Mun. of Anchorage, 24 P.3d 547, 568 (Alaska 2001) (noting that the fire and police department employees challenging random drug testing included as evidence of their expectation of privacy an affidavit stating that the analysis of their urine could reveal such private matters as whether the employee is taking birth control pills); Loder v. City of Glendale, 927 P.2d 1200, 1236 (Cal. 1997) (Mosk, J., concurring) (positing that drug testing all applicants for city employment is unconstitutional in part because the drug tests can reveal information about the private lives of the applicants, including whether the applicant is "taking birth control pills").

taking birth control[219] and pregnancy[220] to be particularly private information. Second, the precise procedures for monitored drug testing—involving a monitor visually observing the collection of urine to eliminate concerns about tampering with the sample—implicates differences in gendered privacy norms surrounding bathrooms. Men's public restrooms typically feature urinals. By contrast, women's public restrooms typically have private stalls, which prevent women from being watched while they urinate. Regardless of whether this difference in public restroom design is normatively problematic, it remains true that women are much less likely to be watched—and therefore much less accustomed to being watched—while they urinate. This potentially implicates women's reasonable expectations of privacy during a visually monitored urinalysis drug test.

In light of these gender-based differences, monitored urinalysis drug testing presents a helpful case study to examine how courts consider gender in the reasonableness analysis. Drug testing, including monitored drug testing, can arise in cases in the context of the workplace,[221] schools, and the criminal justice system. Drug testing done by or for a governmental actor triggers Fourth Amendment jurisprudence. Drug testing conducted by a private actor, however, does not implicate the Fourth Amendment. Privacy law challenges to such private-sector drug tests are still possible under privacy torts and some state constitutional provisions, thus still providing courts with the opportunity to consider the role of gender as part of the reasonableness analysis.

Descriptively, courts have taken three different approaches to considering gendered privacy norms in drug-testing cases. First, a small number of courts have taken an express approach

219. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 666 (Cal. 1994) ("[Q]uestions about birth control pills . . . are undoubtedly significant from a privacy standpoint."); United Steelworkers of Am. v. USS, No. CIV. A. 89-1546, 1989 WL 30697, at *3 (E.D. Pa. Mar. 29, 1989) (noting that a urinalysis drug screening "would also reveal various very personal information about the employees' personal lives, such as whether a woman was taking birth control pills").

220. *See* Ascolese v. Se. Pa. Transp. Auth., 925 F. Supp. 351, 357 (1996) (finding "a pregnancy test" to be "a form of intrusion upon an employee's privacy quite different" from the many to which regulated police officers submit); Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (requiring a high school swimmer to take a pregnancy test constituted an unreasonable search in violation of the Fourth Amendment).

221. *See* Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009, 1018 (2006).

in which the court openly considers gendered privacy norms as part of the written analysis. Second, some courts appear to have taken a silent approach in which the result of the case suggests that the court has considered gendered privacy norms but the court does not expressly say so in its decision. Finally, many courts appear to use a gender-irrelevant approach in which gendered privacy norms are entirely ignored.

A. Supreme Court Addresses Constitutionality of Drug Testing

In 1989, the Supreme Court addressed the constitutionality of employee drug tests under the Fourth Amendment in a pair of high-profile cases. In both cases, the Court appeared to take a gender-irrelevant approach. The Court in *Skinner v. Railway Labor Executives' Association*[222] addressed a Fourth Amendment challenge to federal regulations requiring drug testing for railroad employees involved in certain train accidents.[223] The Court held for the first time that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable" and, therefore, government-endorsed employment drug tests "must be deemed searches under the Fourth Amendment."[224]

Specifically, the *Skinner* Court identified two separate privacy interests potentially implicated by drug testing. First, the chemical analysis of urine "can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic."[225] Interestingly, the Court acknowledged that such drug testing could reveal pregnancy yet did not mention that pregnancy only applies to female employees. Further, by sandwiching the term "pregnancy" between two non-gendered conditions, the Court further diluted any possible gendered implication.[226]

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222. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989).

223. *Id.* at 606.

224. *Id.* at 617.

225. *Id.* at 617. This is an extremely odd trifecta. Why the choice of epilepsy, pregnancy, and diabetes? Presumably, a urine test can reveal numerous conditions, so why were those selected? Compare the dissent, which writes that drug tests can reveal medical disorders such as "epilepsy, diabetes, and clinical depression" with no mention of pregnancy. *Id.* at 647 (Marshall, J., dissenting).

226. As a result of this sentence, numerous lower courts have referenced this "'pregnancy sandwich'" of conditions—referring to "epileptic, pregnant, or diabetic"—in reviewing drug-testing procedures. *See, e.g.*, Pierce v. Smith, 117 F.3d

Second, the *Skinner* Court found that "the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests."[227] Quoting the Fifth Circuit, the Court explained that there

> are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[228]

The Court's recognition of a protectable privacy interest in the collection of urine acknowledged the existence of social privacy norms regarding urination but, in doing so, ignored the gendered nature of those privacy norms.

Having determined that the identified privacy interests triggered a Fourth Amendment analysis and that a warrant is not required under the special needs framework,[229] the Court turned to whether individualized suspicion is required for a warrantless drug test to be reasonable.[230] Previously, the Court had held that no individualized suspicion is required "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[231] With regard to the privacy interests implicated by the search, the Court again acknowledged that the procedure for collecting urine for a drug test requires "employees to perform an excretory function traditionally shielded by great privacy," which the Court "would not characterize . . . as minimal in most contexts."[232] Here too, the Court did not address whether urination was "traditionally shielded" by more privacy-based differences in gendered restroom privacy norms.

866, 875 (5th Cir. 1997) (upholding a drug test of a female doctor where there was no evidence that the test was used to look for whether she was "epileptic, pregnant, or diabetic").

227. *Skinner*, 489 U.S. at 617.

228. *Id.* (quoting Nat'l Treasury Emps. Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

229. *Id.* at 619–24.

230. *Id.* at 624.

231. *Id.*

232. *Id.* at 626.

Despite recognizing the "great privacy" traditionally given to the act of urination, the Court concluded the government's compelling safety interests outweighed the employees' privacy concerns and therefore the regulations were reasonable under the Fourth Amendment. In reaching that determination, the Court explained that the challenged regulations "do not require that samples be furnished under the direct observation of a monitor."[233] The Court thus implied that visually monitored drug testing would trigger a stronger privacy interest for purposes of the balancing test. Furthermore, the Court found that railroad employees had a reduced expectation of privacy by virtue of their employment in a heavily regulated safety-oriented industry.[234] On the other side of the balancing scale, the Court found the government interest "in regulating the conduct of railroad employees to ensure safety"[235] to be "compelling."[236] Despite concluding that the unmonitored drug tests were constitutional, the Court in *Skinner* recognized two Fourth Amendment privacy interests potentially triggered by a urinalysis test: medical information revealed by the test and the testing procedure itself. But it did not acknowledge that both identified privacy interests can differ by gender.

The same day as *Skinner*, the Supreme Court decided a second case on the constitutionality of workplace drug testing in *National Treasury Employees Union v. Von Raab*.[237] *Von Raab* addressed whether the Fourth Amendment prohibits the United States Customs Service from requiring a urinalysis drug test from three categories of employees seeking transfer or promotion: (1) employees directly involved in drug interdiction, (2) employees that carry firearms, and (3) employees that handle "classified" material.[238] The specific procedure used for the drug test involved producing the urine sample behind a partition or in a bathroom stall while a monitor of the same sex listened for normal sounds of urination.[239] Therefore, the employees at issue in *Von Raab* were subject to same-sex audial—but not visual—monitoring. The Court upheld the drug testing program for two out of the three categories because "the Government's need to

233. *Id.*
234. *Id.* at 627.
235. *Id.* at 620.
236. *Id.* at 633.
237. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989).
238. *Id.* at 660–61.
239. *Id.* at 661.

conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."[240]

Unlike in *Skinner*, where the Court elaborated on the serious privacy inherent to excretory functions, the Court's discussion of the privacy interests implicated by the drug testing in *Von Raab* was limited to a single sentence acknowledging that "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances."[241] The Court then immediately went on to explain that some types of employees have a reduced expectation of privacy, including customs employees who are involved in interdiction of illegal drugs or who carry firearms because "successful performance of their duties depends uniquely on their judgment and dexterity."[242] By contrast, in his dissent, Justice Scalia called same-sex audial monitoring during urination "particularly destructive of privacy and offensive to personal dignity."[243]

As in *Skinner*, neither the majority nor dissent in *Von Raab* engage in any discussion of whether an employee's privacy interest may vary based on gendered privacy norms surrounding urination and bathrooms. Rather, the descriptive reference to using a "monitor of the same sex" is the only acknowledgement by the Court that the gender of the employee may make a difference—and even then, as was the case in the school and prison contexts, it is only referenced as a relational matter. And, unlike in *Skinner*, the *Von Raab* decision did not acknowledge the possibility of a drug test revealing pregnancy.

By contrast, the Supreme Court has alluded to gendered privacy norms in the school drug-testing context. As analyzed in Part III above, the Court had already showed its willingness to consider the "sex of the student" in school search cases. In *Vernonia School District 47J v. Acton*,[244] the Supreme Court considered a challenge to a school district policy requiring random monitored drug testing for students to participate in inter-

240. *Id.* at 668. The Court remanded for the third category because it found the record inadequate.

241. *Id.* at 671.

242. *Id.* at 672.

243. *Id.* at 679 (Scalia, J., dissenting).

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

scholastic athletics. The Court upheld the policy in light of concerns regarding drug use in schools and reaffirmed that "students within the school environment have a lesser expectation of privacy than members of the population generally."[245] The Court also pointed out that student athletes have further reduced expectations of privacy given the lack of privacy in school locker rooms and required physical exams.[246]

Having established a reduced expectation of privacy for student athletes, the Supreme Court turned to the reasonableness of the challenged privacy intrusion. Pointing out that *Skinner* had identified "the degree of intrusion depends upon the manner in which production of the urine sample is monitored,"[247] the Court described the monitoring procedure used by the district as different for male or female students. Male students "produce samples at a urinal along a wall, . . . remain fully clothed and are only observed from behind, if at all."[248] By contrast, female students "produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering."[249] As such, the district's policies already accounted for gendered privacy norms regarding bathrooms—specifically that men and boys routinely use urinals with less visual privacy, while women and girls typically urinate in enclosed stalls with others able to hear but not see them.

Because district testing procedures already incorporated gendered privacy norms, the Court did not have to opine about whether such gender-tailored procedures are required under the Fourth Amendment. However, the Court did point out that the gender-based policies "are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily."[250] Given that the procedures closely tracked gendered privacy norms "typically encountered in public restrooms," the court held "the privacy interests compromised by the process of obtaining the urine sample are in our view negligible."[251] The Court also pointed out that the procedure only tested for drugs and not the conditions identified in

245. *Id.* at 657 (quoting New Jersey v. T.L.O., 469 U.S. 325, 348 (1985)).
246. *See id.*
247. *Id.* at 658.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

Skinner of whether the student is "epileptic, pregnant, or diabetic,"[252] thus avoiding another possible gendered difference. The Court's discussion of the gendered privacy norms baked into the school district's procedures strongly suggests an openness to an express approach to considering gender in monitored drug-testing cases—at least in the school context.

B. Lower Court Approaches to Considering Gendered Privacy Norms

Courts have taken widely different approaches to considering gendered privacy norms in evaluating privacy law challenges to monitored urinalysis drug tests. Descriptively, there are two layers of decisions facing courts. First, courts can decide whether to consider gendered privacy norms in evaluating reasonableness as part of the decision-making process. Second, courts can decide whether to be explicit about the decision to use gendered privacy norms. The way that courts appear to have answered these two questions can be categorized into three approaches: (1) an express approach, (2) a silent approach, and (3) a gender-irrelevant approach.[253] The sole similarity across the cases is that none of the courts explain or justify their chosen approach to considering gendered privacy norms.

1. Express Approach

The first option is for courts both to consider gendered privacy norms in the decision-making process for privacy law cases and to acknowledge the role that gendered privacy norms played in the court's decision. Under this express approach, courts recognize that the reasonable expectation of privacy analysis is inextricably linked with societal privacy norms. As a descriptive matter, men and women have different gendered privacy norms in ways that might result in different, gendered reasonable ex-

252. *Id.*

253. Dana Raigrodski advances a fourth, more radical approach—namely advocating for the abandonment of the concepts of reasonableness and objectivity from Fourth Amendment jurisprudence on the basis of a feminist critique. *See* Raigrodski, *supra* note 11, at 157. Although her proposal is an intellectually interesting suggestion for various reasons, including the textual use of "reasonableness" within the Fourth Amendment, this Article assumes that a wholesale removal of reasonableness from privacy law is not a realistic option.

pectations of privacy. Therefore, the express approach both recognizes gendered privacy norms where they exist and expressly takes them into account when evaluating the privacy law doctrines where privacy norms come into play. In the context of a class action or other multi-plaintiff litigation, this approach would likely require the court to consider privacy claims broken down by gender separately. As discussed above, the Supreme Court alluded to the possibility of such an approach in *Vernonia* when it upheld the school district's drug-testing policy and recognized that the district's separate testing procedures for male and female students closely tracked gendered privacy norms for restrooms.[254]

The approach alluded to in *Vernonia* was used even more explicitly outside of the school context by the Third Circuit in *Wilcher v. City of Wilmington.*[255] In that case, the court fully embraced an express approach by openly discussing the different gendered privacy norms around urination for men and women and analyzing the plaintiffs' reasonable expectation of privacy separately based on those differing norms. In *Wilcher*, firefighters brought a class action lawsuit challenging a drug-testing policy requiring firefighters to provide a urine specimen under direct visual observation of a monitor.[256]

Applying the Fourth Amendment reasonableness test, the court analyzed the intrusiveness of the direct observation method by comparing the precise methodology of the test with prevailing gendered privacy norms. The court began by recognizing that the direct observation method "represents a significant intrusion on the privacy of any government employee."[257] Nonetheless, the court turned to gendered privacy norms and pointed out that, in "a world where men frequently urinate at exposed urinals in public restrooms, it is difficult to characterize [the] procedure as a significant intrusion on the male firefighters' privacy."[258] The court agreed with the district court's analogy between the presence of monitors in the bathrooms for firefighters and the similar presence of monitors in *Vernonia.* Because in both cases the monitors "stand behind the individual providing the urine specimen" and "observe only the collection

254. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995).
255. Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998).
256. *Id.* at 370.
257. *Id.* at 376.
258. *Id.*

process generally and not the particular individual's genitalia," the court held that the direct observation testing procedure used for the male firefighters was reasonable.[259] The court explained that "the conditions created by [the monitored drug test] do not differ significantly from the conditions present in an ordinary public restroom."[260]

The court then turned to the reasonableness of the direct observation method for female firefighters, noting, "[w]e must admit that we are more cautious about the reasonableness of the direct observation method as it applies to female firefighters."[261] The court recognized the different gendered privacy norms surrounding bathrooms and, therefore, could not "characterize the presence of a monitor in a bathroom while a female urinates as an ordinary aspect of daily life."[262] Unlike in *Vernonia* where monitors listened from outside of stalls while female students urinated, in *Wilcher*, for both male and female firefighters, the monitors were "directed to observe the urine collection process by looking in the firefighter's general direction as he or she commences urination," but were not "directed nor expected to focus on the firefighter's genitals."[263] Despite finding that the observation of the female firefighters did not match gendered privacy norms, the court nonetheless held that the significant intrusion into the female firefighters' privacy was carried out "in an appropriate and professional manner."[264] The court cited approvingly that the policy "took substantial measures to minimize the intrusion of privacy to female firefighters caused by the direct observation procedure," including monitors standing to the side and not looking at genitalia as well as replacing an initial monitor with a nurse practitioner.[265] In light of these efforts to minimize the intrusion to the female firefighters, the court concluded that the direct observation method at issue was constitutional as to both male and female firefighters, as "[t]he City's significant interest in preserving the integrity of its firefighters' drug tests outweighs [the firefighters'] expectations of privacy."[266]

259. *Id.*
260. *Id.* at 378.
261. *Id.* at 376.
262. *Id.*
263. *Id.* at 371.
264. *Id.* at 377.
265. *Id.*
266. *Id.* at 378.

The court ultimately reached the same result for male and female firefighters—monitored drug testing was upheld as reasonable. Therefore, the court could have entirely ignored the different gendered privacy norms in writing up its analysis, and it would have reached the same outcome. Instead, the court chose to address gendered privacy norms surrounding bathrooms in analyzing the reasonableness of the privacy invasion as part of an express approach. The *Wilcher* case provides a helpful example to other courts regarding how to adopt an express approach to considering gendered privacy norms.

2. Silent Approach

Under the second option, the silent approach, courts also take into account gendered privacy norms in reaching a decision. However, under this approach, the court leaves out explicit discussion of gendered privacy norms in its written decision and instead uses gender-neutral language. The analysis talks in terms of general societal privacy norms, but it does not explicitly discuss the gender-specific norms that influence the court's decision-making. This may occur out of fears of disparate treatment on the basis of gender, fears of reinforcing gendered privacy norms, or, perhaps most likely, as the result of unconscious bias.

The silent approach may explain a collection of successful challenges to monitored drug testing by individual female plaintiffs. Those cases acknowledged the plaintiffs as female but did not otherwise mention gendered privacy norms surrounding urination in the written opinion. Nonetheless, given that these successful cases involved female plaintiffs, it is possible that gendered privacy norms influenced the courts' decisions and led to pro-plaintiff outcomes, which contrast with the much less successful outcomes that are typical with male plaintiffs or class actions.

Various courts have considered the constitutionality of monitored drug testing in cases involving a solo female plaintiff—providing the perfect opportunity to address gendered privacy norms within the context of those female plaintiffs' reasonable expectation of privacy. While these courts may have been influenced by the plaintiff's gender, as suggested by the outcomes they reached, the courts never expressly addressed the role of

the plaintiff's gender or gendered privacy norms in their analyses. Instead, the courts adopted gender-neutral language on the face of their decisions.

For example, the D.C. Circuit considered the constitutionality of monitored drug testing in *Piroglu v. Coleman*.[267] *Piroglu* involved a lawsuit by a female emergency medical technician (EMT) trainee, Maria Piroglu, who claimed that she was visually observed as she produced her urine sample. The D.C. Circuit remanded the case to the district court, as the facts were unclear whether the same-sex monitor had Piroglu "in plain sight as Piroglu urinated or whether she was merely present and observed Piroglu in some less intrusive way while the sample was provided," such as observing her feet under the stall door.[268] The court instructed that if on remand the district court found that the observation of Piroglu as she "urinated was unobstructed and complete and was without reasonable suspicion that she would tamper with her sample," then the test would be "unreasonable under the fourth amendment."[269] Alternatively, if the monitor did not have the plaintiff in plain sight as she urinated, then the urine collection would be reasonable.[270]

The *Piroglu* court never clarified whether the reasonableness of the urinalysis methodology is impacted by the fact that the drug-tested employee in the case was a woman. Its discussion, however, appears to suggest that the court was silently accounting for gendered privacy norms regarding restrooms. The way the court set up the factual dispute to be resolved on remand suggested that the act of being directly watched during urination—which does not typically occur for women who urinate in the privacy of individual stalls—is so unreasonable that it would be a Fourth Amendment violation in the absence of a reasonable suspicion of tampering, which might justify such a severe privacy invasion. By contrast, if the plaintiff "was in a stall when she urinated and [the monitor] merely observed her feet under the door," the court implied that this would not be a Fourth Amendment violation. The court never explicitly acknowledged, however, that urination in a stall while a monitor observes the employee's feet under the door happens to track a behavior that commonly occurs in society's current gendered privacy norms for

267. Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994).
268. *Id.* at 1101.
269. *Id.*
270. *Id.* at 1101–02.

women in restrooms. Nor did the court resolve or even address in dicta whether the same dichotomy between a direct observation and an observation from outside a stall would exist in determining reasonableness for a similarly situated man for whom societal restroom privacy norms differ.

By contrast with *Piroglu*, in *Straub v. County of Greenville*, a district court considered a male paramedic's challenge to the county's EMT drug-testing policy.[271] On a motion for summary judgment, the court upheld the drug-testing policy with no concerns for whether the factual record regarding the drug-testing procedure suffered from the same deficiencies as the factual record in *Piroglu*.[272] The *Straub* court offered no discussion as to whether the urinalysis test was monitored or conducted from the privacy of a stall nor did it follow *Piroglu's* example and remand for determination of those facts. The *Straub* court was aware of the *Piroglu* decision, as it was cited for an unrelated proposition. Is the difference between these cases the different gendered privacy norms that apply to a female plaintiff in *Piroglu* versus a male plaintiff in *Straub*, or just differences in lawyering?[273] That is impossible to know or prove, but it certainly raises the question of whether some courts are silently or subconsciously considering gendered privacy norms implicated by monitored drug-testing procedures when the plaintiff is a woman.

The same year as *Piroglu*, a federal district court in California also considered a female employee's Fourth Amendment challenge to monitored drug testing in *Hansen v. California Department of Correction*.[274] Teresa Hansen, an employee of the California Department of Correction (CDC), had agreed to a one-year random urinalysis drug-test regime after she admitted to one episode of marijuana use during her eight years of employment.[275] The CDC had "a blanket policy of having a female member observe the person providing the urine sample during urination" in order to ensure the reliability of the sample.[276] Hansen petitioned the court for a temporary restraining order (TRO) on

271. Straub v. County of Greenville, No. CIV.A.6-04-21847-RBH, 2006 WL 1073883 (D.S.C. Apr. 20, 2006).

272. *See id.* at *5 ("[E]mergency medical technician such as the plaintiff occupies a safety-sensitive position which involves protecting the public welfare and safety" and, therefore, summary judgment is granted for the alleged violation of the Fourth Amendment).

273. *Id.* at *4.

274. Hansen v. Cal. Dep't of Corr., 868 F. Supp. 271 (N.D. Cal. 1994).

275. *Id.* at 271.

276. *Id.*

Fourth Amendment grounds to prevent having a staff member observe her during the agreed-upon urinalysis drug test.[277] The court explained, "[v]isual observation of an employee undergoing a urine test is only appropriate when deemed to be necessary in order to ensure the reliability of the sample."[278] The court rejected the CDC's justification that there was an increased possibility of a tainted sample because Hansen's continued employment was contingent on the test results.[279] The court granted the TRO, finding that the CDC's use of this drug-testing method would cause Hansen irreparable harm, as she "would be subjected to an unconscionable intrusion upon her privacy."[280] As in *Piroglu*, the court did not directly opine on whether this method was an unconscionable intrusion because she was a woman, nor whether, in light of prevailing gendered privacy norms regarding restrooms, her gender made any difference in its analysis.

In a subsequent lawsuit arising out of the same facts, the district court held that "the direct observation of Hansen's urine tests violated Hansen's California constitutional right to privacy."[281] In applying the first "specific, legally protected privacy interest" prong, the court used gender-neutral language, pointing to the California Supreme Court's previous finding that monitored urination impacted a legally protected privacy interest by "intrud[ing] on a human bodily function that by law and social custom is generally performed in private and without observers."[282] Neither the California Supreme Court nor the *Hansen* court pointed out that the "social custom" surrounding urination is gendered.

Similarly, under the second reasonable expectation of privacy prong, the court's language focused on the plaintiff's expectations of privacy as a prison guard rather than her expectations of privacy as a woman. The court did look carefully at the legiti-

277. *Id.*

278. *Id.* at 272.

279. *Id.* at 273–74.

280. *Id.* at 274.

281. Hansen v. Cal. Dep't of Corrs., 920 F. Supp. 1480, 1503 (N.D. Cal. 1996). The court also dismissed her Fourth Amendment claim for damages (as opposed to the injunctive relief she had previously obtained) on the grounds that the Fourth Amendment violation had not been clearly established for the purposes of qualified immunity. *Id.* at 1487–96.

282. *Id.* at 1503–04 (alteration and internal citations omitted) (quoting Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 657, 663 (Cal. 1994)).

macy of her expectation of privacy "with respect to direct observation of urination."[283] But instead of focusing on how gendered privacy norms might impact those expectations of privacy, the court noted that prison guards do not routinely experience the same invasions of privacy that college athletes endure because they regularly undress in communal locker rooms.[284] Therefore, based on the court's written opinion, the key characteristic of the plaintiff was her job as a prison guard, not that she was a woman in our society where women are not routinely watched during urination. Nonetheless, because prison guards have a higher expectation of privacy than the students in the California Supreme Court case, the court had "no difficulty concluding that Hansen's reasonable expectations of privacy were invaded when she was required to submit to direct observation of urination."[285]

Finally, the court addressed the third prong requiring that privacy invasions "be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."[286] The court summarily concluded, "[t]here can be no doubt that direct observation of urination constitutes a very serious invasion of privacy."[287] While impossible to prove, it appears that behind these seemingly gender-neutral statements, the court considered gendered privacy norms in reaching its conclusions about the expectations of privacy and the invasiveness of the direct observation of urination for women on all three prongs of the California constitutional right to privacy claim.

Similarly, the Southern District of New York had the opportunity to consider a challenge by an individual female plaintiff to the constitutionality of direct observation of urination as part of a drug test in *Allen v. Schiff*.[288] Lillian Allen worked as a corrections officer supervising inmates, preventing contraband from entering the jail, and otherwise maintaining order and security.[289] Like many similar safety-sensitive positions, Allen was subject to a random drug-testing program. A female technician working for a county contractor "followed plaintiff into the

283. *Id.* at 1504.
284. *Id.* at 1504–05.
285. *Id.* at 1506.
286. *Id.* at 1503 (quoting *Hill*, 865 P.2d at 654).
287. *Id.* at 1506.
288. Allen v. Schiff, 908 F. Supp. 2d 451 (S.D.N.Y. 2012).
289. *Id.* at 456.

bathroom, where she stood in front of plaintiff as plaintiff removed her uniform pants and undergarments and squatted and balanced herself over the toilet to urinate into the plastic cup."[290] The technician testified "that she observed urine passing from plaintiff's body into the cup."[291] This methodology was consistent with department procedures that "provided that 'testing personnel of the same sex as the employee shall be present and observe production of the urine sample.'"[292] After Allen was terminated because her urine tested positive for marijuana, she sued on a number of theories, including violation of her Fourth Amendment rights.

The court began by finding that Allen's legitimate expectation of privacy was substantially diminished because her job as a corrections officer required her to work with drugs and carry a firearm when transporting inmates.[293] The court then turned to the intrusiveness of the search and held that direct observation of the collection of a urine sample is only permissible "if the government articulates a concern about the test's efficacy that justifies the additional encroachment upon privacy."[294] Because the government failed to "provide some justification for its highly intrusive search," the court denied the defendants' motion for summary on the Fourth Amendment claim.[295]

Consistent with the other cases involving female plaintiffs, the *Allen* decision limited its language to a gender-neutral analysis and did not expressly address the role of gendered privacy norms surrounding restrooms. This gender-neutral language even extended to the court's treatment of the relevant facts in its analysis. In the statement of facts, the court noted that the plaintiff "squatted and balanced herself over the toilet to urinate," a fact that would be unique to a female employee.[296] In the analysis of the character of the search, however, the court removed any mention of this gendered fact. The court retold the undisputed character and manner of the monitoring as the technician "followed plaintiff into the bathroom and stood 'in front of [her] with an unobstructed view' while plaintiff urinated into a

290. *Id.* at 457.
291. *Id.*
292. *Id.* at 456 (quoting the Substance Abuse Testing Procedure (SATP) ¶¶ 3.5.4, 3.5.6).
293. *Id.* at 460–61.
294. *Id.* at 462.
295. *Id.* at 463.
296. *Id.* at 457.

plastic cup."[297] The court then wrote that the technician corroborated that she "physically watched [Allen] urinate into a cup."[298] Other than the gendered pronoun, both descriptions could just as easily apply to a male plaintiff. The portion of the experience that would have been unique to female plaintiffs—the squatting and balancing over the toilet—is inexplicably absent from the analysis. The requirement that the government articulate a concern about the test's efficacy to justify "direct observation of the collection of a urine sample" is also gender neutral.[299]

All of the cases discussed above involving female plaintiffs used entirely gender-neutral language in a facially gender-neutral analysis. Thus, on the face of the court's reasoning, it does not matter that the plaintiff is female in deciding whether the monitored drug test was reasonable. Even though the reasonable expectations of privacy analysis centers around privacy norms, these courts ignored prevailing gender-specific privacy norms in their written analyses, leaving open the possibility that the cases would have been decided identically had the plaintiffs been male.

Yet despite this gender-neutral language, all three cases reached largely favorable results for the female plaintiffs—and this is not a situation of cherry-picking cases. After an extensive search, no case entirely upheld the direct observation of the collection of a urine sample in a case solely involving a female plaintiff.[300] This is true even when extended to private-sector cases.[301] Of course, the sample size is much too small to reach any quantitative or even any serious qualitative conclusions. Nonetheless, this observation leaves open the possibility that

297. *Id.* at 461.

298. *Id.*

299. *Id.* at 462.

300. *See* Herzog v. Vill. of Winnetka, 309 F.3d 1041, 1043–44 (7th Cir. 2002) (reversing a grant of summary judgment for the defendants in a case where a woman was "forced to give a urine specimen in the presence of" a female police officer after a traffic stop for driving under the influence because, in Judge Posner's gender-neutral terms, "[g]ratuitously forcing a person to urinate in the presence of another is an invasion of privacy in the most elementary sense").

301. *See, e.g.*, Lockhart v. ExamOne World Wide, Inc., 904 F. Supp. 2d 928, 949 (S.D. Ind. 2012) (denying summary judgment and instead certifying a question to the Indiana Supreme Court as to whether "an observed urinalysis drug test conducted at the direction of a private employer" could form the basis of "the tort of invasion of privacy by intrusion upon seclusion" under Indiana law in a case involving two female plaintiffs).

courts are being influenced by gendered privacy norms even when they do not explicitly say so.

Some of these silent-approach cases may result from a conscious decision on the part of the court that it may be problematic to openly discuss gendered privacy norms and that it is preferable to leave that troublesome analysis out of the written opinion. This could be because the court recognizes the possible harms, including the harm of reinforcing troubling gender-based stereotypes—a harm that courts may believe would be exacerbated by the express reliance on such gendered privacy norms in a written decision. It is also possible that some silent approach cases may result from a subconscious reliance on gender norms such that even the court itself is not aware of the extent to which gendered privacy norms influence its decisions.[302] There is a rich existing literature on subconscious or implicit biases, especially with regard to race and gender. Scholars have recognized that judges are not immune to such implicit biases.[303] Ultimately it is not clear whether the silent approach results from a conscious strategic decision not to explicitly invoke gendered privacy norms or a subconscious lack of realization that gendered privacy norms are even being invoked. Nonetheless, the fact that a number of female plaintiffs have prevailed in privacy challenges to monitored drug testing when similar male plaintiffs have not had similar success suggest that courts are in fact descriptively following a silent approach to gendered privacy norms.

3. Gender-Irrelevant Approach

Under both the express and the silent approaches, courts take into account gendered privacy norms in their decision-making. The main difference between the two approaches is that in the former, the court is explicit in the written opinion about its

302. *See* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 407 (1989) ("[T]he judicial decisionmaking process is a complex blend of conscious and unconscious factors.")

303. *See* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'*, 99 KY. L.J. 259 (addressing the challenges of unconscious biases including gender-based biases on impartial judging and advocating judicial training to help fight such biases); Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555 (2012) (exploring the role of implicit bias on the part of family court judges in stereotyping women as all-knowing and nurturing); Marsha S. Stern, *Courting Justice: Addressing Gender Bias in the Judicial System*, 1996 ANN. SURV. AM. L. 1 (1996).

consideration of gendered privacy norms. By contrast, under the gender-irrelevant approach, courts analyzing a plaintiff's reasonable expectation of privacy or related reasonableness privacy doctrines do not take into account gendered privacy norms. Under this approach, courts assume that there is a single gender-neutral "reasonableness" concept, and gendered privacy norms play no role in either the court's internal analysis or written decision. Consistent with this approach, the court may make explicit that it considers any potential gender norms to be irrelevant or even harmful. However, the court may also ignore gender norms entirely.

This approach appears most clearly in court decisions considering challenges to monitored drug-testing regimes that apply to large numbers of people, rather than individual challenges. While courts in these broader challenges can break up the analysis by gender, as the court did in *Wilcher*, more commonly, such group challenges allow courts to ignore gendered privacy norms and instead pretend there is a single, supposedly gender-neutral standard of reasonableness.

For example, in *National Treasury Employees Union v. Yeutter*,[304] the D.C. Circuit considered a Fourth Amendment challenge to a USDA employee drug-testing program, in part on the ground that the program's monitored drug-testing procedures were excessively intrusive.[305] The program required same-sex visual observation of a subset of employees[306] who were required to undergo urinalysis drug testing based on reasonable suspicion (rather than random selection).[307] The D.C. Circuit explained that "it is appropriate to measure the observation requirement itself against the core constitutional test of reasonableness."[308]

The court of appeals held that the monitored drug-testing procedures violated the Fourth Amendment "[b]ecause we can discern no weighty government interest in observation that

304. Nat'l Treasury Emps. Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990).

305. *Id.* at 969–70.

306. Another subset of employees, USDA motor vehicle operators, were subject to random urinalysis drug testing, which the D.C. Circuit upheld as "materially indistinguishable from testing previously upheld." *Id.* Additionally, the D.C. Circuit held that the "USDA Program is unconstitutional insofar as it authorizes mandatory drug testing of FNS workers who do not hold safety- or security-sensitive jobs, absent reasonable suspicion of on-duty drug use or drug-impaired work performance." *Id.* at 974.

307. *Id.* at 975.

308. *Id.*

counterbalances its intrusion on employee privacy."[309] The court noted that the previous year the government had strongly defended the accuracy of urinalysis testing without visual monitoring in *Von Raab*, thus allowing the *Yeutter* court to conclude that visual monitoring did not significantly improve testing accuracy.[310] The *Yeutter* court did not discuss whether gendered privacy norms surrounding urination resulted in any differences in the intrusiveness of the monitored drug-testing procedure. However, the court did observe that *Von Raab* held "that the absence of visual observation 'significantly' diminishes the intrusion on employee privacy," allowing the *Yeutter* court to deduce that an "observation requirement should be justified by strong evidence of necessity."[311] Following that reasoning, the D.C. Circuit struck down the visually monitored drug testing as unreasonable for employees without any mention of gendered privacy norms in the analysis.

In another apparent example of a gender-irrelevant approach in a case reaching the opposite result, *BNSF Railway Co. v. U.S. Department of Transportation*, the D.C. Circuit rejected a Fourth Amendment challenge to a Department of Transportation rule requiring "a same-gender observer to 'watch the urine go from the employee's body into the collection container.'"[312] The court used gender-neutral language in acknowledging that "[i]ndividuals ordinarily have extremely strong interests in freedom from searches as intrusive as direct observation urine testing."[313] The court found, however, that here the privacy interest was diminished, both because the specific employees subject to the direct-observation drug tests had safety-sensitive duties and because they had violated the drug regulations in the past.[314] Therefore, when balancing the employee privacy interest against the government's interest, the court found that "direct observation is extremely invasive, but that intrusion is mitigated by the fact that employees can avoid it altogether by simply complying with the drug regulations."[315] And on the other side of the balancing test, the court found that "the proliferation of cheating devices makes direct observation necessary

309. *Id.*
310. *Id.* at 976.
311. *Id.*
312. BNSF Ry. Co. v. U.S. Dep't of Transp., 566 F.3d 200, 202 (D.C. Cir. 2009).
313. *Id.* at 206.
314. *See id.* at 206–07.
315. *Id.* at 208.

to render these drug tests—needed to protect the traveling public from lethal hazards—effective. . . . Weighing these factors, we strike the balance in favor of permitting direct observation testing in these circumstances."[316] Because the case involved a "facial challenge" to the regulations, the court was able to use entirely gender-neutral language and entirely avoided any discussion of gendered privacy norms.

As a descriptive matter, courts appear to have taken three different approaches to considering gendered privacy norms in privacy cases challenging monitored drug testing: (1) the express approach, (2) the silent approach and (3) the gender-irrelevant approach. No court has addressed or in any way defended its approach to considering gendered privacy norms. As a result, there is no normative discussion in the caselaw of the benefits or drawbacks of any of the three approaches.

CONCLUSION: ADVOCATING A FLOOR APPROACH

Descriptively, within the drug-testing case study, courts have taken three different approaches to considering gendered privacy norms. This Part turns to the related normative question of whether courts *should* consider gendered privacy norms. It begins by looking at the benefits and drawbacks of the existing approaches. It then advocates for a new floor approach to considering gendered privacy norms.

A. Evaluating the Express Approach

There are a number of benefits to courts adopting an express approach, similar to the way the court did in *Wilcher*. With regard to the first step of this approach—considering gendered privacy norms as part of the decision-making process for the reasonable expectation of privacy analysis—taking into account the role of gender allows the court's decision-making to better match societal realities. Failing to recognize actual gendered privacy norms as they exist may result in harm to plaintiffs. That is, in some cases, courts may not identify a reasonable expectation of privacy when the plaintiff does in fact have one, given existing gendered privacy norms. Furthermore, acknowledging gendered privacy norms may counter the tendency to assume that the

316. *Id.*

court is using a gender-neutral privacy norm when it is actually relying upon male privacy norms.[317]

Once the decision to consider gendered privacy norms has been made, the express approach also benefits from its intellectual honesty by openly and explicitly discussing how the gendered privacy norm influences the analysis.[318] This judicial candor regarding the use of gendered privacy norms, like broader discussions of judicial candor, creates various benefits. First, candor in judicial reasoning helps to establish the moral authority of the courts and reinforces the public trust necessary for the judiciary to function.[319] Second, candor regarding use of gendered privacy norms allows litigants reading the decisions to learn that these norms are relevant to the court's analysis. This helps future litigants with predictability by allowing parties to plan their behavior based on the court's actual rationale.[320] It also allows parties to submit briefings on, and even present evidence of, gendered privacy norms, rather than the judge making assumptions based on his or her (usually his)[321] perceptions. Finally, the common-law system, with its legal principle of *stare decisis*, depends on judges being intellectually honest about the

317. Scholars in various other contexts have argued that gender-neutral standards incorporate preexisting notions based on men. *See, e.g.*, Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 807 (1993) ("The term 'reasonable man' is burdened by an enormous amount of historical baggage. Dating back at least two hundred years, the term undeniably evolved from extremely male-oriented legal and cultural roots."). *See generally* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985).

318. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing for candor in the crafting of judicial opinions); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 56 (1988) (arguing that judges should honestly explain their decisions because "the real danger of arbitrary judicial action is greatest when the announced reasons for judicial action bear little relationship to their actual sources in the judge's thinking processes").

319. *See* Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1331 n.183 (1994) (summarizing scholarship on the benefits of candor in the judicial process).

320. *See* Zeppos, *supra* note 302, at 401 (noting the argument that candor in judging seeks to make the law predictable).

321. A study found female judges make up 27 percent of lower federal court sitting judges. DEMOCRACY & GOV'T REFORM TEAM, CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 33 (2020), https://cdn.americanprogress.org/content/uploads/2020/02/12075802/Judicial-Diversity-Circuit-District-Courts.pdf [https://perma.cc/CQ74-F9ZZ].

true bases of their decisions.[322] This judicial candor allows various courts to engage in dialogue with one another and benefit from understanding the true reasoning of fellow members of the judiciary.[323]

There are also potential harms from the express approach that could result from the candor required to acknowledge use of gendered privacy norms. Expressly relying upon gender-based norms can potentially reinforce and strengthen those norms.[324] This is particularly troublesome in circumstances where it might be problematic that these gender norms exist at all.[325] In the privacy context, many gendered privacy norms may derive from a paternalistic and infantilizing vision of women's modesty. Courts considering gender-based norms in which women are encouraged to be more modest than their male counterparts, for example, necessarily rely upon notions of modesty and chastity that historically operated to deny women autonomy over their sexual decisions. As Anita Allen has argued, "[c]onventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression."[326] Courts following an express approach thus have the potential to problematically reinforce a set of gender-based norms and stereotypes that may be descriptively accurate but normatively troublesome.[327]

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322. *Cf.* Ira C. Lupa, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 602 (1991) (explaining the role of the judiciary's written decisions in ensuring "intellectual honesty and consistency" by publicizing the reasons for the judges' decisions).

323. *See* Zeppos, *supra* note 302, at 401 (arguing that the predictability accompanying judicial candor is important because it "allows future courts to know the grounds upon which the ruling was based").

324. *See* Tokson & Waldman, *supra* note 7, at 3 ("[C]ourts adopting existing social norms can entrench ideas that are outmoded and discriminatory."); *cf.* Katharine T. Bartlett*, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality,* 92 MICH. L. REV. 2541, 2544 (1994) (noting that courts rationalize appearance requirements by reference to social and community norms that simply reinforce and legitimize gender stereotypes).

325. For example, numerous scholars have criticized the enduring gender-based norms regarding restrooms. *See* Mary Anne Case*, Why Not Abolish the Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 219 (Harvey Molotch & Laura Noren eds., 2010) (explaining that removing segregated restrooms could have the benefit of "mixing up . . . sex roles in society at large" in ways that will enable various forms of gender nonconformity).

326. Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 471 (1987).

327. *See* Tokson & Waldman, *supra* note 7, at 31 (recognizing within Fourth Amendment consent-search jurisprudence that the Supreme Court "privileges a

The express approach may also be harmful to the extent that it could treat similarly situated men and women entirely different with regard to their privacy law claims.[328] This could lead to employment discrimination if the legal requirement to treat employees differently as the result of different gender norms incentivizes employers to discriminate on the basis of gender.[329] This harm is far less likely to make a difference on the margin, however, in light of various existing legal regimes that differentiate between men and women and already create such incentives.[330] Additionally, gender-based differences in treatment could create resentment and reinforce gender ten-

norm of social behavior that was developed when gender relations were substantially different than they are today . . . , when women's rights to autonomy and bodily integrity in the domestic context were devalued . . . . [It] risks embedding discriminatory norms in constitutional law.").

328. There is even a question as to whether different standards on the basis of gender would create an Equal Protection Clause problem. That area of the law is beyond my expertise and is beyond the scope of the Article. *See* Schaill *ex rel.* Kross v. Tippecanoe Cnty. Sch. Corp., 679 F. Supp. 833, 854 (N.D. Ind. 1988) (finding "no equal protection problems" in a school drug-testing program that "is applicable to all students, male and female, who seek participation" in athletics); *see also* Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169 (2017) (explaining that the Court's sex-based equal protection doctrine subjects laws that classify on the basis of sex to heightened scrutiny, but with an exception for "inherent differences," which are largely limited to reproductive biology); Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051 (2018) (arguing that constitutional equal protection principles could influence the substance of privacy torts).

329. Of course, other regimes, including disparate impact in Title VII, are designed to help protect against this outcome, but much ink has been spilled over the extent to which such regimes are effective.

330. In the 1980s, feminist scholars began to debate whether gender-specific statutes, such as those providing protections during pregnancy, could cause employers to discriminate against women in hiring. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985). By contrast, when the Family Medical Leave Act was written, Congress intentionally adopted gender-neutral rules "to avoid the discrimination against women that a gender-specific entitlement might trigger." Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2015–16 (2003) (noting that Congress found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender").

sions and stereotypes in traditionally male-dominated workplaces. Finally, gender-based differences even have the potential for equal protection challenges.[331]

Overall, the express approach benefits from its intellectual honesty and consistency with actual, lived gendered privacy norms where they exist. At the same time, however, the approach retains some drawbacks, including concerns with reinforcing harmful gender-based stereotypes and harms from treating men and women differently.

B. Evaluating the Silent Approach

The silent approach retains some of the identified benefits of the express approach, particularly regarding the initial decision by courts to consider gendered privacy norms as part of the decision-making process. As such, the results of these cases would be consistent with gendered privacy norms actually experienced by the plaintiff in a particular case. Furthermore, by not expressly discussing the gendered privacy norm in the opinion, this approach minimizes the worst of the reinforcement of gender-based stereotypes and biases addressed above.

On the other hand, the primary drawback of the silent approach is precisely the inverse of the judicial-candor benefits of the express approach: the lack of intellectual honesty. By keeping gendered privacy norms under the table, other courts and litigants are denied the ability to benefit from the court's true analysis. Furthermore, with time and a large enough sample size, it would become clear that plaintiffs of one gender were prevailing at a significantly higher rate than plaintiffs of the other gender. If recognized, such a disparity in results without an accompanying explanation of the difference would ultimately undermine faith in the intellectual integrity of the court system. Therefore, this approach would be the most feasible in areas of the law with a small number of cases where the disparity would be less noticeable. Additionally, this approach is the only option if the court is not even aware that it is considering gendered privacy norms, as it cannot put into the opinion aspects of the decision-making process that occur subconsciously. Overall, if unnoticed, the silent approach would allow individual plaintiffs to

331. *See* Skinner-Thompson, *supra* note 328, at 2090–99 (arguing that equal protection may be implicated if courts interpreting privacy law do so in a way that treats similarly situated plaintiffs differently across the protected classes).

prevail consistent with their experience with gendered privacy norms while minimizing the role of the courts in reinforcing any troublesome stereotypes.

C. Evaluating the Gender-Irrelevant Approach

In contrast to the intellectual dishonesty of the silent approach, the gender-irrelevant approach is internally consistent and intellectually honest, as the court's actual analysis aligns with its written decision in refusing to consider gendered privacy norms. Additionally, the gender-irrelevant approach does not reinforce potentially troubling gendered privacy norms and stereotypes. Furthermore, in contrast to the express approach, if successfully applied, this approach would treat similarly situated male and female plaintiffs identically and thus should cause neither discrimination nor resentment.

The gender-irrelevant approach also has a number of major drawbacks. First, individual plaintiffs may not prevail in cases where they have an actual reasonable expectation of privacy based upon their lived experiences with gendered privacy norms. Additionally, the gender-irrelevant approach could transform into an unintentional silent approach. A well-meaning court, believing that reinforcing gendered privacy norms is harmful and that gendered privacy norms should play no role in the analysis, could set out intending not to consider the plaintiff's gender or corresponding gendered privacy. If, however, the court is aware of the plaintiff's gender—and, as a member of society, also likely aware of societal gendered privacy norms—it may be impossible in many circumstances for the court to truly make a decision without taking into account that knowledge.

In theory, if society wanted courts to truly maintain a gender-neutral approach, courts could adopt a particular variation on the gender-irrelevant approach: a gender-blind approach. Under a gender-blind approach, the court would guard against the risk of unintentionally considering gender norms by remaining deliberately unaware of the plaintiff's gender, thus making it impossible to be swayed by that fact. Theoretically, this could occur at the appellate court level where courts do not hear direct testimony from the parties. Yet doing so would be logistically challenging because it would require removing gendered pronouns, first names, and other gender-identifying information from the appellate briefs and record and forbidding gendered in-

formation from being included by the parties. While academically interesting, as a practical matter, the dramatic overhaul that would be required means that a gender-blind approach is unrealistic for solving the challenges with the gender-irrelevant approach.

Furthermore, a gender-blind approach would not solve an additional concern with the gender-irrelevant approach—namely, ensuring that a supposedly gender-neutral lens does not morph into a male-centric lens. As courts have recognized in other contexts, "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[332] As Dana Raigrodski has contended, the Fourth Amendment's reasonableness tests, while claiming to be gender-neutral and objective, contain invisible biases that "particularly embody male values and reflect a male perspective."[333] Raigrodski argues this is partially because the Justices determine the reasonableness of one's privacy expectations "in light of their own conceptualizations of privacy and reasonableness," and "[m]ost of the Supreme Court Justices are, and always have been, white, male, and middle to upper class."[334] Therefore, even if judges do not know the gender of the plaintiff, the judge is still likely to make assumptions as to the supposedly gender-neutral reasonable expectation of privacy of the now gender-neutral plaintiff. According to Raigrodski, because judges tend to assess seemingly objective factors through the eyes of someone like themselves and given the composition of the judiciary, even a gender-blind approach would likely continue to "perpetuate the privileged status assigned to everything which is stereotypically male."[335] Therefore, while the gender-irrelevant approach would offer some benefits over the previous alternatives, it also contains some significant normative concerns in its actual implementation.

D. Proposing a New Floor Approach

While there is no perfect system for considering gendered privacy norms as part of the reasonableness analysis in privacy

332. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (explaining why the court adopts the perspective of a reasonable woman for claims of hostile environment sexual harassment).

333. Raigrodski, *supra* note 11, at 156.

334. *Id.* at 164–65.

335. *Id.* at 165.

law, courts should adopt a floor approach as the best imperfect option. Under a floor approach, courts would consider gendered privacy norms in the reasonable expectation of privacy analysis, similar to how they do under the express gender norm approach. Where this approach differs, however, is that once gendered privacy norms are taken into account to determine the reasonable expectation of privacy, that level of privacy would create a minimum floor that applies to everyone, regardless of gender.

To illustrate, consider how the floor approach would work in the case study of monitored urinalysis drug testing. As seen above, Fourth Amendment cases challenging the constitutionality of monitored drug testing require courts to balance the reasonable expectation of privacy and the degree of intrusiveness of the search, on the one hand, against the compelling interest of the need for the search and process used, on the other. Courts could consider the role of gendered privacy norms in analyzing the reasonable expectation of privacy and the degree of intrusiveness of the monitored urinalysis drug test. In this context, the court would address the gendered privacy norms that currently exist surrounding urination, including that women in public restrooms typically urinate in the privacy of stalls and are not typically subject to visual observation while urinating. As a result, visually monitored drug testing would both violate a reasonable woman's expectation of privacy and would be highly intrusive to a woman in light of those gendered privacy norms.

Under the leveling up[336] that occurs under the proposed floor approach, visually monitored urinalysis drug testing would not be permitted for anyone of any gender unless the government's need for monitored drug testing outweighed the higher expectation of privacy and increased intrusiveness established

336. Courts and scholars have argued for leveling up in the statutory context where a statute that originally extended protections to women is found to violate equal protection provisions. *Cf.* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 362–63 (2019) (recognizing that, in the sex discrimination context, courts achieve equality by holding that a statutory gender classification violates equal protection, typically extending the coverage of the statute to include those who are aggrieved by the exclusion or "leveling up"); *see also* Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 180 (2019) (arguing "for a strong presumption of leveling up in cases of gender discrimination" and criticizing the Supreme Court's decision in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) for "leveling down" by denying rather than extending an equal protection violation of gender discrimination); Deborah L. Brake*, When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004) (arguing that only leveling up, not leveling down, is consistent with equality).

based on women's gendered privacy norms regarding restrooms. Put differently, if the government's interest in monitored drug testing outweighed a reasonable woman's high expectation of privacy and the high degree of the testing's invasiveness in light of gendered privacy norms surrounding restrooms, then the monitored drug testing would be reasonable, and thus constitutional, when imposed on a person of any gender. On the other hand, if the government's interest in the monitored drug test did not outweigh a reasonable woman's high expectation of privacy and high degree of invasiveness based on gendered privacy norms, then the visually monitored drug test would be unreasonable, and thus unconstitutional, regardless of the gender of the person being tested. In that case, a visually monitored drug testing policy would be deemed unconstitutional unless all individuals, regardless of gender, were monitored from outside the restroom stall consistent with existing privacy norms for women's restrooms.

Wilkes v. Borough of Clayton, a 1988 district court case that pre-dates *Von Raab*, illustrates how a floor approach could work.[337] The case found that an arrested woman had a reasonable expectation of privacy in changing a sanitary napkin during menstruation but then extrapolated that finding to a policy that applies to everyone. The plaintiff was arrested when she refused a field breathalyzer after swerving in her car and being stopped for suspicion of driving under the influence.[338] At the station, Ms. Wilkes, who was menstruating, asked to use the bathroom to change her sanitary napkin. She was permitted to do so but was accompanied by a female officer, consistent with the department's policy of requiring a same-sex officer to visually observe all arrestees in police custody when using bathroom facilities.[339] The officer did not permit her to close the bathroom door and instead watched while she removed her clothing and changed her sanitary napkin.[340]

The court held that it did not "have much difficulty in concluding that society considers reasonable Ms. Wilkes' expectation that she would be permitted to attend in private to the very personal hygienic needs arising out of her menstruation."[341] In

337. Wilkes v. Borough of Clayton, 969 F. Supp. 144, 147 (N.J. 1988).
338. *Id.* at 145.
339. *Id.*
340. *Id.*
341. *Id.* at 147.

addition to "causing the exposure of the arrestee's genitalia," the court further recognized that "indeed it may be the case that many women would prefer a visual strip search to the humiliation of being observed while changing a sanitary napkin or tampon."[342] Presumably, the court reached this conclusion based on the gendered societal privacy norms surrounding menstruation, which society considers extremely private.

Having taken into account the gendered privacy norms of the plaintiff's specific situation, much like a court would do in a floor approach, the court then appeared to "level up" that gendered privacy norm to apply to everyone in its ultimate holding. That is, the court did not merely state that visual observation while arrestees go to the restroom is only problematic for female arrestees. Rather, the court went further to reach what appears to be a gender-neutral holding that "arrestees may reasonably expect to defecate, urinate and change sanitary napkins or tampons without direct visual observation by law enforcement officers, unless some justification for the intrusion is demonstrated."[343] While the court does not make entirely clear that the holding applies to *all* arrestees, its use of gender-neutral language, as well as reference to facts that can apply regardless of gender (defecation and urination), suggest an intention to level up its findings and apply it to all arrestees, regardless of gender. Ideally, in a true floor approach, the court would be 100 percent clear that its holding applies to all individuals regardless of gender, but that conclusion is a plausible reading of the court's holding.

This floor approach would retain many of the benefits of the express approach like intellectual honesty, such that court decisions truthfully reflect their reasoning and accurate reflect societal gendered privacy norms. It would also have the benefit of allowing advocates to offer evidence of actual gender-based privacy differences or gendered privacy norms. Further, the floor approach still takes into account the reality of gender norms regarding privacy, both when the court makes its decision as well as explicitly in the court's written opinion.

Where the floor approach differs from the express approach, however, is that, as a result of the leveling-up effect, the specific gender of the individual whose privacy has been invaded would not make a difference in the result. Such a rule would have the

342. *Id.*
343. *Id.* at 147–48.

effect of making gendered privacy norms a sort of floor for behavior, which would apply equally to all individuals. As a result, this approach would avoid the problem created by the express approach in which otherwise similarly situated men and women are treated differently by privacy law, with its corresponding potential for equal protection challenges.[344]

The floor approach would also have the benefit of allowing for equal treatment for those who are transgender or with nonbinary gender identities.[345] Under floor approach, courts treat men and women equally based on the higher level of gendered privacy norms, and transgender and gender nonbinary individuals would also benefit from this higher level of privacy—without any need to determine which traditional binary gender category best applies. More generally, the floor approach entirely avoids the need for the party conducting a search to make a determination as to the gender of the individual being searched in order to determine the reasonable expectation of privacy standard that ought to be applied. Instead, for example, if courts decide that visually monitored drug tests are constitutionally unreasonable when taking into account gendered privacy norms for women regarding restrooms, then all individuals being drug tested would receive the privacy of a stall, regardless of whether the individual identifies as a man, woman, transgender or nonbinary.

While this Article concludes that a floor approach improves on existing court approaches, ultimately the goal of this Article is to encourage scholars and courts to take a close look and engage in a healthy and open debate as to whether gendered privacy norms ought to be a part of the reasonable expectation of privacy analysis in privacy law cases. Hopefully it will have succeeded in doing so.

344. *See* Skinner-Thompson, *supra* note 328, at 93.
345. *See* Clarke, *supra* note 4.