Implicitly Feminist?: The Supreme Court of Canada's Decision in *R v Jarvis*

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Dans l'arrêt R c Jarvis, la Cour suprême du Canada (CSC) a interprété pour la première fois la disposition du Code criminel sur le voyeurisme. Le présent article examine la jurisprudence pertinente en matière de voyeurisme qui a précédé l'arrêt Jarvis, y compris trois questions litigieuses qui ont façonné les interprétations judiciaires antérieures : la pertinence de la jurisprudence relative à l'article 8 de la Charte, la perspective de la vie privée en public et l'applicabilité de l'analyse du risque. Bien que les motifs de la CSC ne reconnaissent pas explicitement les questions d'égalité en jeu, son traitement de ces trois questions reflète sans doute trois volets de la théorie et de la jurisprudence féministes qui favorisent l'égalité. Cet article explore ce chevauchement, suggérant que les motifs de la CSC dans l'arrêt Jarvis peuvent être compris comme étant implicitement féministes. Reconnaissant que des motifs explicitement féministes auraient un plus grand potentiel de reconnaissance de l'égalité, l'auteure affirme que les motifs de la CSC représentent une étape positive vers une conception du droit à la vie privée en ce sens.

In R v Jarvis, the Supreme Court of Canada (SCC) interpreted the Criminal Code voyeurism provision for the first time. This article explores the relevant voyeurism jurisprudence preceding Jarvis including three contentious issues that shaped prior judicial interpretation of the provision: the relevance of section 8 Charter jurisprudence, the prospect of privacy in public, and the applicability of risk analysis. Although the SCC's reasons do not explicitly recognize the equality issues at stake, their handling of these three issues arguably mirrors three equality-enhancing strands from feminist theory and jurisprudence. This article explores this overlap,

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suggesting that the SCC's reasons in Jarvis can be understood as implicitly feminist. Acknowledging that explicitly feminist reasons would have greater equality-affirming potential in future, it asserts that the SCC's reasons represent a positive step towards an equality-enhancing conception of privacy rights.

Introduction

Over a number of months in 2010–11, London, Ontario, high school teacher Ryan Jarvis secretly recorded images of the breasts of female students using a pen camera. After the recordings were discovered, Jarvis was charged with voyeurism contrary to section 162(1)(c) of the Canadian *Criminal Code*.[1] In 2011, Jarvis was acquitted at trial because the Ontario Superior Court of Justice was not convinced beyond a reasonable doubt that Jarvis had a "sexual purpose" for making the recordings.[2] The Ontario Court of Appeal (ONCA) upheld Jarvis's acquittal but for different reasons. Although convinced that Jarvis had a sexual purpose for making the recordings, the ONCA majority found that the young women targeted did not have a "reasonable expectation of privacy" in the circumstances of the case, largely because the images were recorded in public spaces of the school.[3] Disturbingly, as the dissenting justice in the ONCA decision noted, this meant that, according to the majority, students cannot reasonably expect privacy from their teachers surreptitiously taking images of them for sexual purposes while they are at school.[4] In 2019, the Supreme Court of Canada (SCC) unanimously concluded that the young women targeted reasonably expected privacy in the circumstances[5] and remitted the matter to the trial court for sentencing. In August 2019, Jarvis was sentenced to six-months imprisonment.[6]

Eight organizations intervened in the SCC hearing, including the Women's Legal Education and Action Fund (LEAF) and the Canadian Internet Policy and Public Interest Clinic (CIPPIC).[7] LEAF and CIPPIC urged the Court to take into account the equality concerns at stake, given the highly gendered nature of the crime of

1.. RSC 1985, c C-46 [*Criminal Code*].
2. See *R v Jarvis*, 2015 ONSC 6813 at para 77 [*Jarvis* trial].
3. See *R v Jarvis*, 2017 ONCA 778 at para 110 [*Jarvis* appeal].
4. *Ibid* at para 134.
5. See *R v Jarvis*, 2019 SCC 10 at paras 91, 146 [*Jarvis* SCC].
6. See Colin Perkel, "Former Ontario High School Teacher Convicted of Voyeurism Sentenced to Six Months in Jail", *Globe and Mail* (28 August 2019) <https://www.theglobeandmail.com/canada/article-former-ontario-high-school-teacher-convicted-of-voyeurism-sentenced-to/>.
7. See Jane Bailey, David Fewer & Suzie Dunn, "R v Jarvis: A Contextual Approach to Privacy" (13 March 2019), *eQuality Project* <http://www.equalityproject.ca/blog/r-v-jarvis-a-contextual-approach-to-privacy/>.

voyeurism.[8] Like other forms of sexual violence, women and girls are disproportionately likely to be targeted by voyeurism perpetrated by men.[9] The ONCA majority's interpretation of the "reasonable expectation of privacy" afforded targets of voyeurism protection for only a thin, location-based interpretation of privacy entirely incongruent with the robust and contextualized approach to privacy repeatedly affirmed in established Canadian jurisprudence.[10] In so doing, given the gender dynamics at play in sexual violence, the ONCA majority's reasons effectively relegated women and girls to second-class protection for their privacy. The SCC's reasons reversed that outcome, but without expressly recognizing the gender and other equality issues at play. Elsewhere, the author and others have expressed concern about the potential outcomes of this lack of explicit recognition but have held out hope that the SCC's reasons in *Jarvis* will nevertheless prove to be equality enhancing.[11] This article examines the degree of consistency between the SCC's reasons and established feminist theory[12] and jurisprudence, arguing that, although this body of work was largely unacknowledged by the Court, their reasons might be considered implicitly feminist nonetheless.

The first part of the article summarizes *Jarvis* within the context of the relevant voyeurism jurisprudence that preceded it, noting three elements of jurisprudential controversy from the SCC in its reasons: the relevance of section 8 *Charter* jurisprudence, the prospect of privacy in public, and the applicability of risk analysis.[13] The second part analyzes each of these three elements as it might be discussed in

8. See *R v Jarvis*, 2019 SCC 10 (Factum of the Intervener Women's Legal Education and Action Fund) at paras 1, 3–4, 32–35 <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM050_Intervener_Women's-Legal-Education-and-Action-Fund-Inc..pdf>; *R v Jarvis*, 2019 SCC 10 (Factum of the Intervener Samuelson Glushko Canadian Internet Policy and Public Interest Clinic) at paras 1, 2, 4 <https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM030_Intervener_Samuelson-Glushko-Canadian-Internet-Policy-and-Public-Interest-Clinic.pdf>.
9. See e.g. Moira Aikenhead, "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30:1 Canadian Journal of Women and the Law 117 [Aikenhead, "Non-Consensual Disclosure"].
10. See e.g. *R v Edwards*, [1996] 1 SCR 128; *R v Tessling*, 2004 SCC 67 [*Tessling*]; *R v Jones*, 2017 SCC 60.
11. See Moira Aikenhead, "A 'Reasonable' Expectation of Sexual Privacy in the Digital Age" (2018) 41:2 Dalhousie Law Journal 274 [Aikenhead, "Reasonable Expectation"].
12. While this article focuses on feminist legal theory and jurisprudence, it is essential to acknowledge that some of the insights discussed are not unique to feminist legal scholarship but are also grounded in other anti-oppression scholarship, such as critical race and critical Indigenous theory, as well as feminist scholarship in other areas. Specific instances of some of these overlaps are highlighted below.
13. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, *1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

feminist theory and jurisprudence: public versus private exercises of deliberation, the importance of contextuality and relationality, and the rhetoric of victim blaming and sexual propriety. This part asserts that whether or not the SCC's reasons in *Jarvis* can be cast as feminist, they derive their equality-enhancing potential from their consistency with insights and techniques articulated in feminist theory. The conclusion muses about what an explicitly feminist, equality-enhancing articulation of privacy might have looked like.

R v Jarvis in Context

Statutory Provision: Section 162

The voyeurism provision came into force in 2005, following a public consultation process completed by the Department of Justice in 2002: "An overwhelming majority of responses [to the public consultation were] in favour of enacting new criminal offences of sexual voyeurism and the distribution of voyeuristic materials,"[14] given a perception among respondents that such offences would fill "a legislative gap for offensive behaviour not captured by other provisions, but which harms society and degrades its victims."[15] The provision itself was enacted as part of Bill C-2, which focuses on amending *Criminal Code* provisions for the purposes of protecting children and other vulnerable persons as well as amending the *Canada Evidence Act*.[16] In addition to referring to child protection, the bill's preamble also notes that "continuing advancements in the development of new technologies, while having social and economic benefits, facilitate sexual exploitation and breaches of privacy."[17] Prior to the enactment of the provision, voyeuristic behaviour had been dealt with under a variety of *Criminal Code* provisions, including mischief, none of which accurately reflected the gravamen of voyeurism's public wrongs, including the violation of sexual integrity and invasive privacy breaches. In order to better address those wrongs, section 162(1) states:

> Every one commits an offence who, surreptitiously, observes—including by mechanical or electronic means—or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

14. Department of Justice, "Voyeurism as a Criminal Offence: Summary of the Submissions" (28 October 2002) <https://www.justice.gc.ca/eng/cons/voy/final.html>.
15. *Ibid*.
16. See Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, 1st Sess, 38th Parl, 2005 (assented to 20 July 2005), SC 2005, c 32 <https://www.parl.ca/Content/Bills/381/Government/C-2/C-2_4/C-2_4.PDF>.
17. *Ibid* at 1 (preamble).

> (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
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> (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
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> (c) the observation or recording is done for a sexual purpose.[18]

Since proof that the complainant was in circumstances giving rise to a reasonable expectation of privacy is a key component of all three forms of the offence, the next part examines the section 162 jurisprudence relating to this issue prior to the SCC's *Jarvis* ruling.

Reasonable Expectation of Privacy: Section 162 Case Law Pre-Jarvis[19]

While a number of reported decisions dealt with voyeuristic behaviour prior to the 2015 trial court decision in *Jarvis*, the SCC had not interpreted section 162 until its 2019 decision in the case. In mid-2019, The eQuality Project's online database included seventy-six Canadian criminal law cases of technology-facilitated voyeurism.[20] In all of the cases, the accused persons were men, and sixty-three were convicted. Seventy cases involved the recording of women or girls. In sixty cases, only women or girls were recorded; in three cases, only male victims were involved; and, in three cases, the gender of the victim was not stated. In these cases, the perpetrators used camcorders,[21] video cameras,[22] pencams,[23] and smartphones[24] to surreptitiously

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18. *Criminal Code*, *supra* note 2, s 162 (1).
19. This subsection is based on a prior working paper, Jane Bailey & Carissima Mathen, "Technologically-Facilitated Violence against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) University of Ottawa Faculty of Law Working Paper No 2017-44 at 4–5, 43–45 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043506>.
20. See The eQuality Project, "Tech-Facilitated Violence: Criminal Case Law—Voyeurism" <http://www.equalityproject.ca/cyberviolence-criminal-case-law/cyberviolence-criminal-case-law-offences-against-adults/cyberviolence-criminal-case-law-voyeurism/>.
21. See *R v Berry*, 2014 BCSC 284 [*Berry*].
22. See *R v Bosomworth*, 2015 BCPC 7 [*Bosomworth*]; *R v Hamilton*, 2009 BCPC 381; *R v Laskaris*, 2008 BCPC 130 [*Laskaris*]; *R v Payne,* 2014 BCPC 361 [*Payne*].
23. *Jarvis* trial, *supra* note 3; *Jarvis* appeal, *supra* note 4; *Jarvis* SCC, *supra* note 6.
24. *Payne*, *supra* note 22. See also *R v Rocha*, 2012 ABPC 24 [*Rocha*].

monitor and record women and/or girls in parks and at beaches,[25] in washrooms,[26] and in bedrooms,[27] to take "up-skirt" photos of women in public places,[28] and to record sexual assaults.[29] In five cases, surreptitiously taken sexually explicit images were distributed to the victim's friends and family via the Internet.[30] Sentences for these offences ranged from conditional discharges[31] to four years of imprisonment.[32]

The case law interpreting the meaning of the phrase "circumstances that give rise to a reasonable expectation of privacy" in section 162(1) prior to the SCC's decision in *Jarvis* raised three controversial issues: (1) the relevance of section 8 *Charter* jurisprudence to the interpretation of this phrase; (2) whether such an expectation can arise in a public place; and (3) whether proof of such an expectation is affected by whether the complainant could be said to have "exposed" herself to the risk of surreptitious recording thereby employing a form of risk analysis that will be discussed further below.

In *R v Lebenfish*, the Ontario Court of Justice found that the complainant had no reasonable expectation of privacy against being non-consensually photographed by a stranger while she was sunbathing at a public nudist beach.[33] In so doing, the court declined to apply the SCC's conclusions in *R v Wong* under section 8 of the *Charter* that "there exists a crucial distinction between exposing ourselves to the risk that others will overhear our words, and the much more pernicious risk that a permanent electronic recording will be made of our words at the sole discretion of the state."[34] On the basis that the reasoning in *Wong* was "clearly directed" towards alleged infringements by the state, the court found that this reasoning was not applicable to the determination of expectations of privacy between non-state actors, particularly in settings where "the open use of recording devices was relatively ubiquitous."[35] Thus, it held that in voyeurism cases "privacy is not approached as a constitutional

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25. *Berry*, *supra* note 21. See also *R v Rudiger*, 2011 BCSC 1397 [*Rudiger*]; *R v Taylor*, 2015 ONCJ 449 [*Taylor*].
26. *Berry*, *supra* note 21; *Bosomworth*, *supra* note 22; *Laskaris*, *supra* note 22; *Payne*, *supra* note 22. See also *R v RHC*, 2010 BCPC 475 [*RHC*]; *R v Grice*, 2008 ONCJ 476; *R v Muggridge*, 2015 CanLII 10931 (NL PC).
27. See *R v Cassels*, 2013 MBPC 47.
28. *Rocha*, *supra* note 24. See also *R v Coucke*, (June 24, 2011) Edmonton No 090658113P1 (ABPC); *R c Pierre*, 2015 QCCQ 4512.
29. See *R v Truong*, 2013 ABCA 373.
30. See *R v DeSilva*, 2011 ONCJ 133; *LSJPA – 1715*, 2017 QCCA 1143; *R v McFarlane*, 2018 MBCA 48; *R v R(T)*, 2011 ONCJ 905; *R v Trinchi*, 2016 ONSC 6585.
31. *RHC*, *supra* note 26. See also *R v Pan*, 2012 ABPC 203.
32. See *R v Schledermann*, 2014 ONSC 674 (accused received a four-year sentence concurrent on all counts, including one for voyeurism.)
33. *R v Lebenfish*, 2014 ONCJ 130 [*Lebenfish*].
34. *Ibid*, citing *R v Wong*, [1990] 3 SCR 36 at para 38.
35. *Ibid*.

guarantee against which to measure the gravity of state misconduct but, rather, as a normative concept the margins of which are determined by a number of situational factors."[36]

The Supreme Court of British Columbia in *R v Rudiger* shared the concern that "s. 8 jurisprudence should be treated with considerable caution" when interpreting "reasonable expectation of privacy" in section 162.[37] However, it accepted that "s. 8 jurisprudence has … developed certain overarching considerations which are relevant" to the interpretation.[38] These considerations included that privacy is protean, that determining whether a reasonable expectation of privacy exists depends upon assessing the totality of the circumstances, that privacy is normative and not descriptive, and that privacy "protects people and not places."[39] Applying these considerations, the court held that the child complainants who were playing in a park were in circumstances giving rise to a reasonable expectation of privacy when the defendant, who was hidden in a nearby van, surreptitiously recorded images of them.

Although the *Lebenfish* court both rejected the application of section 8 analysis and found that no reasonable expectation of privacy arose in the circumstances of that case, it nevertheless expressly left open the possibility that privacy "may be affected in public as well as in private settings."[40] The courts in *Rudiger*[41] and *R v Taylor*[42] went further to find that being in a public park did not negate the reasonableness of the complainants' expectations of privacy against being recorded. In reaching that conclusion, the *Rudiger* court expressly adopted the logic of the section 8 *Charter* analysis in *Wong*, finding that "[t]he use of electronic eavesdropping equipment fundamentally alters and impinges on the expectation of privacy that one would otherwise have[,]"[43] regardless of whether one is in a "private" or a "public" location. In so finding, the court pointed to the "ability, made possible through use of technology, to not only see or hear more acutely but to create a recording and to capture and preserve an image or communication" as a relevant consideration highlighted in *Wong*.[44]

The court in *Taylor* reached a similar conclusion with respect to women complainants whose "private areas" were non-consensually recorded through the use of a zoom lens while they were sunbathing at a public beach.[45] Without expressly citing *Wong*, the court reasoned:

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36. *Ibid* at para 18.
37. *Rudiger*, *supra* note 25 at para 82.
38. *Ibid* at para 88.
39. *Ibid* at para 89.
40. *Lebenfish*, *supra* note 33 at para 37.
41. *Rudiger*, *supra* note 25 at para 107.
42. *Taylor*, *supra* note 25 at para 32.
43. *Rudiger*, *supra* note 25 at para 95.
44. *Ibid* at 98.
45. *Taylor*, *supra* note 25 at para 31.

> In my view, it is entirely reasonable to expect that, while wearing a bathing suit on a public beach, you will be seen, maybe ogled and possibly find your way into a photograph. It is equally reasonable to expect that close-ups of your private areas will not be captured as a permanent record for the photographer, and potentially millions of others on-line. I agree with the sentiment in *Rudiger*: Technology changes everything.[46]

In their results, *Lebenfish* and, to a lesser extent, *Rudiger* and *Taylor* all employ a risk analysis that is arguably inconsistent with the SCC's prior section 8 analysis in *R v Tessling*.[47] In finding that expectations of privacy are to be determined normatively and not descriptively, the SCC in *Tessling* expressly rejected the argument that our expectations of privacy are necessarily diminished by the growing prevalence of surveillance technologies.[48] The findings in the *Lebenfish*, *Rudiger*, and *Taylor* voyeurism decisions contradict this logic by suggesting that, given the prevalence of photography in public spaces like parks and beaches, just being present in those places implies acceptance of the risk of being photographed. The only caveat that the *Rudiger* and *Taylor* courts place on that analysis is that we do not assume the risk of zoom photography focused on our "private areas." Thus, the relevance of section 8 *Charter* jurisprudence, the possibility of holding a reasonable expectation of privacy in a public place, and the applicability of risk analysis to the interpretation of section 162 were all live issues in the voyeurism jurisprudence prior to the SCC's decision in *Jarvis.*

Jarvis

Trial and Appellate Decisions

In *Jarvis*, a teacher took surreptitious photographs of female students' breasts with a pencam while they were at school.[49] Placing particular reliance on the SCC's privacy analysis in *Tessling*, Justice Andrew J. Goodman concluded at trial that the young women targeted by their teacher could reasonably expect that "close-ups of female students' cleavage or breasts will not be captured by a pen camera as a permanent record."[50] In so doing, he meaningfully distinguished between recognition of the risk of fleeting images being recorded and the recording of more focused, invasive,

46. *Ibid* at para 32.
47. *Tessling*, *supra* note 11.
48. *Ibid* at para 42.
49. Bailey & Mathen, *supra* note 19. This subpart relies on this prior working paper.
50. *Jarvis* trial, *supra* note 3 at para 46.

and enduring images that very specifically undermine the target's bodily and sexual integrity. However, Goodman J acquitted Jarvis because he was not satisfied beyond a reasonable doubt that the recordings were made for a sexual purpose.[51]

In a highly problematic decision, the ONCA upheld the acquittal for different reasons, Justice Grant Huscroft dissenting. While the ONCA majority was satisfied that Jarvis had a sexual purpose, it found the complainants had not been in circumstances giving rise to a reasonable expectation of privacy when the recordings were made.[52] Eschewing the multi-factored approaches taken in cases like *Rudiger*, *Lebenfish*, and *Taylor*, the ONCA majority relied primarily on an *Oxford English Dictionary*'s definition of "privacy," which is focused on "a person's location."[53] This led the ONCA majority to articulate this general rule about privacy in public places:

> [I]n order to give the requirement of "circumstances that give rise to a reasonable expectation of privacy" any effect where the person being surreptitiously videoed is not naked or doing a private sexual or toileting act, the person must be in circumstances, including type of place, where they expect privacy ... If a person is in a public place, fully clothed and not engaged in toileting or sexual activity, they will normally not be in circumstances that give rise to a reasonable expectation of privacy.[54]

In so doing, the ONCA majority afforded targets of voyeurism a thin location-based privacy right that contrasts sharply with robust, contextual privacy rights established for targets of state intrusions under section 8 of the *Charter*. Given that women and girls comprise the vast majority of voyeurism targets, while men comprise the vast majority of those charged with voyeurism offences,[55] the ONCA majority's approach has gender-based equality implications. The majority went on to exacerbate their decision's negative effect on equality by at least implicitly adopting a risk-based analysis.

The ONCA majority conceded that "up-skirt" photographs would be an exception to their general rule against the possibility of reasonably expecting privacy in public, presumably because what is under a skirt is intended to be hidden from public view.[56] However, its inflexible and narrow interpretation of "privacy" in the context of voyeurism suggested that those parts of women's and girls' bodies that are visible in public are fair game for harassing photographers, like those who take photographs of women's and girls' buttocks and breasts in

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51. *Ibid* at para 77.
52. *Jarvis* appeal, *supra* note 4 at para 110.
53. *Ibid* at para 94.
54. *Ibid* at para 108.
55. Aikenhead, "Non-Consensual Disclosure", *supra* note 10 at 122–25.
56. *Jarvis* appeal, *supra* note 4 at para 96.

the street and post them on social media.[57] Thus, in addition to rejecting the relevance of the section 8 jurisprudence, and dramatically narrowing the scope for privacy expectations in "public" spaces, the ONCA majority implicitly adopted a risk analysis by suggesting that women's and girls' privacy in public depends upon the degree to which they conceal their bodies in order to avoid the risk of being recorded.

SCC's Decision

The SCC unanimously allowed the Crown's appeal, issued a conviction, and remanded the matter for sentencing. Chief Justice Richard Wagner wrote the majority reasons for six judges, while Justice Malcolm Rowe wrote concurring reasons for three judges. The majority reasons, much like those in *Rudiger*, accept that broad principles from the section 8 jurisprudence are relevant to interpreting section 162 and that expectations of privacy can and do arise in otherwise "public" spaces, and they reject application of the sort of risk analysis employed by the ONCA majority. In contrast, the concurring reasons reject the applicability of principles from the section 8 jurisprudence, embrace the possibility of privacy expectations arising in "public" spaces, and do not expressly address the applicability of a risk analysis.

Majority Reasons per Wagner CJ

The majority reasons conclude that whether a complainant was in "circumstances that give rise to a reasonable expectation of privacy" for the purposes of section 162 depends upon them being in "circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred."[58] This determination is to be made based on the "entire context in which the observation or recording took place,"[59] having regard for a number of considerations that "in any given case" may include items from the following list,[60] which the majority specifically noted is not exhaustive:

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57. See Canadian Press, "Jeffrey Robert Williamson Arrested for Canada Creep Twitter Account", *Huffington Post* (15 June 2017) <http://www.huffingtonpost.ca/2017/06/15/canada-creep-twitter-arrest_n_17121540.html>. In 2017, Calgary Police charged Jeffrey Robert Williamson with multiple counts of voyeurism in relation to five years' worth of images he had captured of women in the street, many of which were posted to his now-suspended Twitter account "Canada Creep."
58. *Jarvis* SCC, *supra* note 6 at para 5.
59. *Ibid*.
60. *Ibid*.

(i) location of the recording or observation;
(ii) the nature of the impugned conduct (ie whether an observation or a recording);
(iii) awareness or consent of the person recorded or observed;
(iv) manner of observation or recording;
(v) content of the observation or recording;
(vi) any rules, regulations, and policies governing the observation or recording in question;
(vii) the relationship between the parties;
(viii) the purpose of the recording or observation; and
(ix) certain personal attributes of the person recorded or observed that are relevant to their ability to limit access to themselves and the spaces that they occupy (e.g. because they are a young person).[61]

The majority's list of factors goes beyond implicitly embedding principles from the section 8 case law to explicitly determining that numerous section 8 principles are relevant to interpreting a voyeurism complainant's expectations of privacy. The majority reasons acknowledge that the section 8 case law has developed in the context of individuals' rights *vis-à-vis* the state. However, they determine that the principles developed in that context can also inform interpretation of privacy expectations between individuals since section 8 is about "shared ideals" relating to privacy "as well as our everyday experiences" and "ordinary perceptions" of privacy.[62]

The majority reasons highlight several section 8 principles relevant to determining a complainant's expectation of privacy under section 162. First, they emphasize that a contextual assessment based on the totality of the circumstances must be undertaken (which the majority finds also accords with "ordinary understanding").[63] Second, they confirm that expectations of privacy are not confined to private places, stating that privacy is not an "all-or-nothing" concept, meaning that expectations of privacy can and do arise in otherwise public places and that those expectations can be affected by evolving technologies that expand opportunities for intrusion.[64] Third, they reiterate from the section 8 case law that reasonable expectations of privacy include "a number of related privacy interests," including territorial, personal (our bodies and "visual access to our bodies"), and informational.[65] Fourth, they confirm that just as an accused's ""reasonable expectation of privacy' is a normative rather than a descriptive standard," so is a complainant's under section 162.[66] In so doing,

61. *Ibid* at para 29.
62. *Ibid* at paras 57–59.
63. *Ibid* at para 60.
64. *Ibid* at para 61.
65. *Ibid* at para 64–66.
66. *Ibid* at para 68.

they reject the adoption of a risk analysis, finding that determining whether a section 162 complainant can reasonably expect privacy cannot be decided on the basis of whether she puts herself at risk of intrusion or simply because of the proliferation of increasingly intrusive recording technologies.[67]

By adopting this approach, the majority reasons bring the privacy rights of voyeurism targets much more closely in line with the privacy rights guaranteed under section 8 of the *Charter*, which was the exact approach rejected by the ONCA majority. While drawing primarily from rights-based assessments of privacy in prior section 8 jurisprudence, however, the majority reasons do not explicitly discuss their relevance to, or impact on, gender equality (given that girls and women are disproportionately likely to be targeted by voyeurism). Nor do they suggest that their approach is in any way motivated by such considerations or by related feminist theory or jurisprudence.

Concurring Reasons per Rowe J

The concurring reasons written by Rowe J depart from those of the majority in two material ways. First, they reject the majority's adoption of section 8 principles for interpreting section 162.[68] Rowe J provides a number of reasons for this rejection, including that *Charter* rights are to be interpreted according to a living tree approach, whereas interpreting criminal statutes in this way creates open-ended offences that fail to fairly notify citizens of the threshold at which they will be considered to have violated the criminal law.[69] The concurring reasons also find that section 8 is about protecting the right of private individuals against unreasonable intrusion by the state, whereas section 162 asks whether

> an ordinary citizen … encroached upon the reasonable expectation of privacy of the subject of the observation, another ordinary citizen. The power imbalance of the police as agents of the state *vis-à-vis* a citizen that is at the heart of the preoccupations under s. 8 … is not present under s. 162(1).[70]

Further, the concurring reasons find that section 8 affords protection to a broader range of privacy (territorial, personal, informational), whereas section 162 only covers "protection of one's physical image, a subcategory of personal privacy."[71] Finally, the concurring justices note that, in any event, one should only resort to the *Charter* in interpreting legislation in the event of a genuine ambiguity, which they find does not exist in section 162.[72]

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67. *Ibid*.
68. *Ibid* at paras 98–106.
69. *Ibid* at para 96.
70. *Ibid* at para 101.
71. *Ibid* at para 102.
72. *Ibid* at paras 104–05.

Second, the concurring reasons reject the majority's open-ended, multi-factored, contextual approach for assessing reasonable expectations of privacy. They note that four of the nine considerations listed by the majority are required by the statute and find that the remaining five are relevant to sentence, not to conviction or acquittal.[73] In addition to the fact that the majority's "relationship of trust" factor is not specifically provided for in section 162(1), the concurring justices emphasize that the provision applies just as much to strangers as it does to people in relationships.[74] Instead of the majority's approach, they adopt a two-part test focused on whether:

(i) the surreptitious observation or recording in issue diminished the target's ability to maintain control over their image; and, if so,
(ii) whether this type of observation or recording infringed the sexual integrity of the subject.[75]

With respect to the first factor, the concurring reasons state that privacy is infringed "when that which is unknown/unobserved becomes known/observed without the person having put this information forward,"[76] noting that they "provide a framework inclusive of location as well as personal dignity,"[77] identifying a privacy interest that individuals retain "even when in a public place."[78]

With respect to the second factor, the concurring reasons state that, like other sexual offences, voyeurism is concerned with observations or recordings that are "sexual in nature such that [they infringe] … the complainant's sexual integrity."[79] Whether sexual integrity is affected is to be determined in each case based on "an objective standard … in light of all the circumstances."[80] They suggest that introducing an explicit sexual integrity requirement ensures that the "sexual purpose" element of section 162(1) is not conflated with the expectation of privacy requirement—two considerations that they find should be kept distinct.[81] However, they conclude that this requirement cannot be met unless "the subject of the observation or recording [could] reasonably be perceived as intended to cause sexual stimulation in the observer."[82] This suggests that a complainant's sexual integrity cannot be violated unless the perpetrator had a sexual purpose. Like the majority reasons, the concurring reasons do not expressly indicate that their interpretation of privacy in the context of the

73. *Ibid* at paras 108–09.
74. *Ibid* at para 110.
75. *Ibid* at para 133.
76. *Ibid* at para 136.
77. *Ibid*.
78. *Ibid*.
79. *Ibid* at para 142.
80. *Ibid*.
81. *Ibid* at para 143.
82. *Ibid* at para 145.

voyeurism offence is directly motivated by equality considerations *per se*. However, they do cite the feminist scholarship of Elaine Craig that focuses on the sexual integrity approach to sexual violence. Interestingly, for reasons discussed below, although not explicitly referring to feminist theory and jurisprudence, the majority reasons seem more consistent in substance with understandings of substantive equality in existing feminist theory and jurisprudence than do the concurring reasons.

Jarvis through the Lens of Feminist Theory and Jurisprudence

One might well conclude that in *Jarvis* the SCC missed an important opportunity to address the equality issues arising from the gendered nature of sexual violence, in general, and voyeurism, in particular.[83] Indeed, the Court's decisions not to explicitly refer to the gendered nature of the crime of voyeurism, not to mention equality at all, and not to engage with feminist theory (with one exception in the concurring reasons) leave the burden of demonstrating the connections between privacy and equality firmly on the shoulders of those targeted by sexual violence in future cases. While certainly not unique, this lack of explicit reference to, and engagement with, these issues contrasts sharply with some of the SCC's prior judgments, where rights to privacy and equality were at issue in the context of sexual violence.[84] In *M (A) v Ryan*, for example, the Court explicitly recognized that the equality rights of sexual assault complainants, "often women," had to be expressly taken into account in properly formulating the test for disclosure of counselling records in civil litigation.[85] Other criminal law judgments of the SCC also expressly incorporated equality into the assessment of the procedure for disclosure of third-party records in sexual assault cases.[86] Granted, the legislative history and wording of the voyeurism provision is

83. Aikenhead "Reasonable Expectation", *supra* note 12.

84. For prior feminist analyses of this phenomenon, see e.g. Mary Eberts & Kim Staunton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 National Journal of Constitutional Law 89 at 115; Rosemary Cairns Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 Journal of Law and Equality 203 [Cairns Way, "Incorporating Equality"]; Rosemary Cairns Way, "Attending to Equality: Criminal Law, the Charter and Competitive Truths" (2012) 57 Supreme Court Law Review 39 [Cairns Way, "Attending to Equality"]; *R v Kokopenace*, 2015 SCC 28 (Factum of the Interveners David Asper Centre for Constitutional Rights and Women's Legal Education and Action Fund) <https://www.scc-csc.ca/WebDocuments-Documents-Web/35475/FM050_Intervener_David-Asper-Centre-for-Constitutional-Rights-and-Women's-Legal-Education-and-Action-Fund,-Inc.-(LEAF).pdf>.

85. *M (A) v Ryan*, [1997] 1 SCR 157 at para 30 [*Ryan*].

86. See e.g. *R v Mills*, [1999] 3 SCR 668 at para 61; *R v O'Connor*, [1995] 4 SCR 411 at para 128 (dissent).

distinct from that relating to the disclosure of third-party records in that the former includes no explicit reference to "equality," while the latter does. However, it is notable that Parliament focused on protecting children and other vulnerable persons through the voyeurism provision,[87] wording that at least implicitly triggers equality concerns related to gender and age, given the disproportionate targeting of girls and women.

Notwithstanding the lack of explicit recognition of these issues in the majority reasons and the perhaps minimal allusion to them in the concurring reasons, various aspects of the SCC's reasons in *Jarvis* share common ground with at least three seminal ideas from feminist theory and jurisprudence.

Public versus Private Exercises of De-liberation

The SCC majority reasons in *Jarvis* adopt a precedent-setting approach to statutory interpretation by explicitly accepting that the interpretation of privacy derived from *Charter* jurisprudence is also applicable in interpreting privacy rights between private individuals. Wagner CJ acknowledges the concurring justices' point that section 8 jurisprudence developed in the context of the rights of the individual against the state, while the privacy rights at issue in section 162(1) relate to individuals' privacy expectations against other individuals.[88] However, he concludes:

> [T]he s. 8 case law contemplates that individuals may have reasonable expectations of privacy against other private individuals and that these expectations may be informed by some of the same circumstances that inform expectations of privacy in relation to state agents. This lends support to the view that the jurisprudence on s. 8 of the *Charter* may be useful in resolving the question raised in the case at bar.[89]

The majority reasons further emphasize that the interpretation of privacy under section 8 is not "unmoored from our ordinary perceptions of when privacy can be expected,"[90] rather it is "informed by our fundamental shared ideals about privacy as well as our everyday experiences."[91] The concurring reasons depart from this analysis, finding that section 8 is concerned with the "power imbalance of the police as agents of the state *vis-à-vis* a citizen"[92] and is aimed at preventing "abuse of state

87. Department of Justice, *supra* note 14.
88. *Jarvis* SCC, *supra* note 6 at para 58.
89. *Ibid.*
90. *Ibid* at para 59.
91. *Ibid*.
92. *Ibid* at para 101.

authority," which the concurring justices found is not at issue in privacy expectations between individuals.[93]

This cleavage between the majority and concurring reasons implicitly revives an issue of particular focus in radical feminist legal theory: the de-liberating effects of non-state-based power and their relationship to state-based power. To be sure, state-based power can be and is exercised in ways that reflect and reinforce girls' and women's inequality (especially those affected by multiple axes of subordination such as colonialism, racism, homophobia, and transphobia). For example, as feminist researchers and activists have powerfully demonstrated, North American colonizers have weaponized sexual violence as a means to assert "[s]ymbolic and literal control over [Indigenous women's] bodies" in the war against Indigenous nations.[94] Male sexual violence against women has also been recognized on the international stage as a weapon of war, as part of state policy for conquering the "other."[95] State-backed and perpetrated acts of de-liberation are therefore primary concerns of feminism. However, the state has by no means cornered the market on the de-liberation of women and girls.

Some feminist theory argues that the same social structures of subordination that undergird state-based sources of de-liberation for girls and women (for example, sexism, racism, colonialism) are also reflected in non-state-based ones.[96] Under this analysis, for example, male sexual violence can be understood as a "method of social control over women"[97] and as both a reflection of, and a way of, maintaining

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93. *Ibid*.

94. "DangerousIntersections",*Incite!*,<https://incite-national.org/dangerous-intersections/>. See also Pamela Palmater, "Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry" (2016) 28:2 Canadian Journal of Women and the Law 253; Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 Canadian Journal of Law and Society 91.

95. See Doris Buss, "Rethinking ·Rape as a Weapon of War'" (2009) 17:2 Feminist Legal Studies 145 (analysis of the complexities of understanding "rape as a weapon of war" in the context of international tribunals).

96. See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Shuster, 1975) at 13–14; Catharine MacKinnon, *Toward a Feminist Theory of the State* (Boston: Harvard University Press, 1991) at 172; Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989:1 University of Chicago Legal Forum 139 at 157.

97. *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC) at para 9, quoted in Elizabeth A Sheehy, "The Victories of Jane Doe" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 23 at 33.

women's and girls' subordination and inequality "through rape and the fear of rape."[98] Further, the intersectional sources and effects of sexual violence as a form of social control are evident in higher rates of victimization associated with Indigeneity,[99] racialization,[100] disability,[101] and membership in the lesbian, gay, bisexual, transgender, and queer community.[102]

Finally, feminists such as Catharine MacKinnon have also argued that it is not just exercises of state or non-state power that can de-liberate; so too can decisions not to exercise state power and therefore to maintain the status quo of privately imposed subordination of women and girls.[103] Seen in this way, when law and public policy ignore the impact of non-state-based structures of power, they become complicit in privately imposed subordination, either by bringing state authorized use of force to reinforce private domination or by simply failing to bring state authorized use of force to intervene on privately imposed domination.[104] In the latter case, as MacKinnon puts it, "those who have freedoms like equality, liberty, privacy and speech socially keep them legally, free of governmental intrusion. No one who does not already have them socially is granted them legally."[105]

Equality for all women and girls, however, cannot simplistically be achieved through state action (for example, criminalization of sexual violence). While many privileged white women may understand state intervention as an important tool for defusing the de-liberating impacts of male sexual violence—for example, the realities for women subordinated by racism, colonialism, transphobia and other sources of oppression is much more complicated. More likely to be violated, prosecuted, and jailed, yet, at the same time, have violence against them ignored by legal authorities and/or perpetrated by those authorities, racialized, Indigenous, and trans-women are rightfully much less trusting of state intervention.[106] As such, as INCITE! notes,

98. Sheehy, *supra* note 80 at 33.
99. See Tina Hotton Mahony, Joanna Jacob & Heather Hobson, "Women and the Criminal Justice System" in Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 7th ed, Catalogue No 89-503-X (Ottawa: Statistics Canada, 6 June 2017) at 7–8 <https://www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/14785-eng.pdf?st=Ex8rSUzu>.
100. Incite!, *supra* note 94.
101. Hotton Mahony, Jacob & Hobson, *supra* note 99 at 9, 12.
102. See Human Rights Campaign, "Sexual Assault and the LGBTQ Community" <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community>; VAWnet, "Violence Against Trans and Non-Binary People" <https://vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and>.
103. MacKinnon, *supra* note 96 at 164–65.
104. *Ibid*.
105. *Ibid* at 163.
106. For further discussion, see Michele Decker et al, "'You Do Not Think of Me as a Human Being': Race and Gender Inequities Intersect to Discourage Police Reporting of

"strategies designed to combat violence within communities (sexual/domestic violence) must be linked to strategies that combat violence directed against communities (i.e. police brutality, prisons, racism, economic exploitation, etc.)."[107]

While the insights of intersectionality necessitate nuanced and thoughtful approaches to state and non-state-based sources of de-liberation of women and girls, feminist theory has nevertheless highlighted the importance of being attuned to both sources of de-liberation. With some exceptions,[108] Canadian sexual violence jurisprudence has traditionally been much more attuned to the de-liberating impact of state action on men than on the de-liberating effects of men's sexual violence on women and girls.[109] Apart from some notable examples discussed below, and notwithstanding considerable work by feminist scholars and activists on the issue of sexual violence,[110] this has meant very little attention to, or development of, women's and girls' privacy rights within criminal jurisprudence. The general trend towards prioritizing acts of state de-liberation over acts of non-state-based de-liberation is reflected in *Jarvis* in the concurring justices' rejection of section 8 jurisprudence as a basis for understanding complainants' rights to privacy in the context of the sexually violent act of voyeurism.

From this perspective, the majority reasons might be understood as taking an important step towards an equality-enhancing conception of privacy rights by importing principles from the section 8 jurisprudence into the interpretation of the voyeurism provision. Without saying so, perhaps the majority reasons also implicitly recognize broader systemic power imbalances that inform individual acts of sexual violence, even as the concurring reasons seem to isolate power imbalances as arising only in situations involving the individual and the state.

Violence Against Women" (2019) 96:5 Journal of Urban Health 772; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 Canadian Journal of Women and the Law 174; Kae Greenberg, "Still Hidden in the Closet: Trans Women and Domestic Violence" (2012) 27:2 Berkeley Journal of Gender Law and Justice 198.

107. Incite!, *supra* note 94.

108. See e.g. *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*] (L'Heureux-Dubé J's concurring reasons); *Ryan*, *supra* note 85 at paras 30, 84–86.

109. Cairns Way, "Incorporating Equality", *supra* note 84.

110. See e.g. Cairns Way, "Attending to Equality", *supra* note 84; Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and Disclosure of Personal Records" (2006) 43:3 Alberta Law Review 743; Jane Bailey, "Towards an Equality-Enhancing Conception of Privacy" (2008) 31:2 Dalhousie Law Journal 267; Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa, NJ: Rowman & Littlefield, 1988); Anita L Allen & Erin Mack, "How Privacy Got Its Gender" (1990) 10:3 Northern Illinois University Law Review 441; Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012).

Contextuality and Relationality

Both the SCC majority and concurring reasons reject the public/private dichotomy that strongly informed the ONCA majority's general rule against the possibility of privacy expectations in public places. In so doing, the SCC majority reasons and, to a lesser extent, the concurring reasons engage concepts of contextuality and relationality prominent in feminist and critical race theory.[111] By adopting an open-ended, multi-factor 'totality of the circumstances' approach to determining whether a voyeurism complainant could be said to have reasonably expected privacy, the SCC majority reasons implicitly embrace some of the central methods of feminist and other anti-oppression theory. First, the majority reasons move beyond overly simplistic either/or analysis based on abstract ideals towards developing "pragmatic responses to concrete dilemmas," in part by explicitly taking into account contextual factors.[112] Feminist legal and critical race theorists have long argued that paying attention to the particular context is central to the quest for substantively equal justice.[113] In this regard, the insights of intersectional feminist scholarship have been essential.[114] Conscious engagement with context helps to reveal aspects of legal issues that traditional methods obscure,[115] in large part because taking into account factors affecting the lived realities of others is explicitly incorporated into the analysis.[116]

In Canada, taking a contextual approach to judging is perhaps most closely associated with the judicial interpretation of the *Charter* and, especially, with the work of self-described "moderate feminist" and former SCC Justice Bertha Wilson.[117] Scholars

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111. See e.g. Naomi R Cahn et al, "The Case of the Speluncean Explorers: Contemporary Proceedings" (1993) 61:6 George Washington Law Review 1754 (especially the reasons of Cahn, Calmore, and Greene for helpful overviews on contextuality within feminist legal and critical race theory).
112. Katharine Bartlett, "Feminist Legal Methods" (1990) 103:4 Harvard Law Review 829 at 830–31.
113. Cahn et al, *supra* note 111.
114. See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford Law Review 1241; Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Maiden, MA: Polity Press, 2016).
115. I would argue that judges have always taken context into account, although rules such as those against parole evidence seem to suggest otherwise. Historically, however, the context implicitly taken into account actually reflected the experiences and narratives of the white, cis, wealthy, males who dominated judicial ranks. The degree of commonality in their experiences was sufficiently uniform that it came to be thought of as just the way things are, rather than as a contextualized perspective born of living in a particularly privileged social location. The Supreme Court of Canada recognized the role of life experience in the context of allegations of judicial bias in *R v S(RD)*, [1997] 3 SCR 484.
116. Bartlett, *supra* note 112 at 831.
117. See Kim Brooks, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) at 3, 211.

have traced the growth of contextual analysis in Canadian judicial decision-making to Wilson J's consistent interpretation of the law within its social, political, and economic contexts and its connection in her reasoning to equality.[118] Wilson J's taking context into account has meant adding more voices to legal analysis (even, or perhaps especially when, she wrote in dissent), with positive equality effects for women and other marginalized groups in a number of areas, including sexual assault law,[119] freedom of religion,[120] employment law,[121] and family law.[122] Keeping this history in mind, the adoption by the *Jarvis* majority reasons of a contextual approach to privacy could also be understood as part of a feminist lineage in Canadian judging.

Further, the majority's inclusion of the relationship between the perpetrator and the target and whether the target has consented as factors relevant to determining expectations of privacy infuse relationality into the equation. This is another technique associated with feminist and critical race and critical Indigenous scholarship that, among other things, unpacks the impact of relationships of power within communities on perceptions of the world[123] and on our responsibilities towards others generally[124] as well as on understandings of privacy specifically.[125] In so doing, it offers the opportunity to better reflect upon the ways in which one's own situation and relationship to others shapes one's perception of the world and to recognize this perception for what it is—one perspective—which may not be shared by those differently located within existing configurations of power relationships.

The contextual approach also allows for movement away from more traditional dichotomized thinking about privacy that conflated being in public with having no reasonable expectation of privacy. Instead, the contextual approach recognizes that multiple factors create a much more complex reality than the on/off, public/private

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118. *Ibid*.
119. *Ibid* at 157. See e.g. *R v Konkin*, [1983] 1 SCR 388.
120. Brooks, *supra* note 117 at 202. See e.g. *R v Big M Drug Mart*, [1985] 1 SCR 295.
121. Brooks, *supra* note 117 at 202. See e.g. *McKinney v Board of Governors of the University of Guelph,* [1990] 3 SCR 229.
122. Brooks, *supra* note 117 at 202. See e.g. *Pettkus v Becker*, 1978 CanLII 50 (ON CA).
123. See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011); Carys J Craig, "Reconstructing the Author-Self: Some Feminists Lessons for Copyright Law" (2007) 15:2 Journal of Gender, Social Policy and the Law 207 at 254–56.
124. Consider, for example, the deep role of relationality in Indigenous worldviews, legal orders, and scholarship. See e.g. Alex Wilson, "Relationality, Reconciliation and Anti-Oppressive Education" (Presentation to the Manitoba Teachers' Society, 22 January 2016) <https://prezi.com/rwzvc0vuvego/relationality-reconciliation-and-anti-oppressive-education/>; Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alberta Law Review 817.
125. See Ian Kerr, "Schrödinger's Robot: Privacy in Uncertain States" (2019) 20:1 Theoretical Inquiries in Law 123.

simplification that is evident in the ONCA majority reasons in *Jarvis*.[126] Helen Nissenbaum, for example, has argued for an understanding of privacy grounded in contextual integrity, an approach that takes into account sometimes complex interactions between myriad factors such as human relationships, spatial location, and social norms.[127] This more complex understanding of privacy also goes some way towards addressing concerns such as those of Catharine MacKinnon,[128] who argues that the public/private dichotomy works to the detriment of women's equality by sheltering male violence against women from public scrutiny.[129]

Finally, it is worth noting the choice of pronouns in the *Jarvis* majority reasons. The majority's decision to exclusively use the pronoun "she" to refer to those targeted by voyeurism might well be read as a nod to the contextual reality of the gendered nature of sexual violence, in general, and of voyeurism, in particular. Without saying so explicitly, perhaps this word choice can be taken as an implicit recognition of the equality issues at stake. The concurring reasons in *Jarvis* explicitly reject the majority's adoption of a contextual approach to interpreting the targets' expectations of privacy in the voyeurism provision. Nonetheless, the concurring reasons, in fact, still take a contextual approach—albeit a much narrower one than that of the majority (at least on its face). The test adopted in the concurring reasons purports to focus on two factors: (1) the diminution of the complainant's control over her image and (2) the impact of the recording on the complainant's sexual integrity. That said, it is difficult to imagine how these factors could be assessed without a relatively broad-based analysis of the surrounding context. For example, as the concurring reasons note, whether a target's control over her image has been diminished is connected to whether the impugned act was surreptitious and to the nature of the impugned act, with a recording more negatively affecting control (due to the permanence of the image) than passing observation.[130] Both factors listed in the concurring reasons' test are also listed in the majority reason's explicitly contextual approach.

Similarly, whether and how the impugned act affects the target's sexual integrity demands contextual analysis. For example, as the concurring reasons note, "[w]hether the observation or recording was sexual in nature such that it infringes the sexual integrity of the subject should be decided on an objective standard, and considered in light of all the circumstances," including the intent of the perpetrator.[131]

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126. See Beate Rössler, "Gender and Privacy: A Critique of the Liberal Tradition" in Beate Rössler, ed, *Privacies: Philosophical Evaluations* (Stanford: Stanford University Press, 2004) at 52–72.
127. See Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79:1 Washington Law Review 119.
128. *Ibid* at 123–24.
129. MacKinnon, *supra* note 96 at 49, 201.
130. *Jarvis* SCC, *supra* note 6 at para 140.
131. *Ibid* at para 142.

The concurring reasons, however, circumscribe this analysis in a troubling way—by framing the inquiry as to whether the impugned act is sexual in nature as an "objective" one, focused on determining whether "the subject of the observation or recording [is] reasonably perceived as intended to cause sexual stimulation in the observer."[132] Among other things, this circumscription shifts the focus towards an imagined sexualized male gaze, an approach that seems difficult to reconcile with the concurring reasons' express reliance on Elaine Craig's sexual integrity analysis of sexual violence.[133]

Sexual Integrity and Dignity versus Risk Analysis, Victim Blaming, and Propriety

Both the majority and concurring reasons reject shame or fault-based approaches to assessing reasonable expectations of privacy. The majority reasons do so by adopting a normative approach to privacy (thus, rejecting a risk-based analysis), while the concurring reasons' departure from these approaches derives largely from their adoption of Craig's sexual integrity framework. In so doing, the majority reasons implicitly, and the concurring reasons explicitly, engage with feminist scholarly insights against victim blaming and against understandings of sexual violence as being about sexual propriety.

The majority reasons' adoption of a normative approach to privacy might simply be viewed as an obvious application of long-standing privacy jurisprudence, perhaps best and most directly exemplified in the SCC's prior decision in *Tessling*.[134] The SCC's articulation of the normative approach in *Tessling* firmly reiterated the Court's well-established approach to grounding expectations of privacy in human dignity and rights rather than in a risk analysis.[135] From this perspective, a person's expectation of privacy is not to be determined according to whether they risked exposure to a privacy violation (for example, by being in public where surveillance technologies are increasingly prevalent) but, rather, to an aspiration to defend privacy as a human right. That said, one might also understand the majority reasons as part of a long-standing history of feminist scholarly analyses countering victim-blaming narratives that traditionally figured prominently in legal and public rhetoric around sexual violence.

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132. *Ibid* at para 145.
133. See Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012), cited in *Jarvis* SCC*, supra* note 6 at para 127 [Craig, *Troubling Sex*].
134. *Tessling*, *supra* note 11.
135. *Ibid* at para 42.

Justice Claire L'Heureux-Dubé's dissenting reasons in *R v Seaboyer*[136] and her concurring reasons in *R v Ewanchuk*[137] provide two of the most direct judicial dissections of victim-blaming myths and stereotypes in Canadian legal history. Noting, among other things, that having previously consented to sex is not presumptively relevant to whether a woman consented to sex at a later date,[138] and that a woman's right to justice against sexual violence does not depend on proof of "fight[ing] her way out of such a situation,"[139] L'Heureux-Dubé J forcefully rejected the shifting of blame onto sexual assault complainants. The rejection of victim blaming in sexual violence is also a long-standing feature of feminist scholarship by authors such as Lise Gotell and Anita Allen,[140] both of whom have argued that women's rights against sexual violation should not depend on the degree to which they cover or cloister themselves.[141] Considered within this rich body of work and the jurisprudence penned by L'Heureux-Dubé J, the adoption in the *Jarvis* majority reasons of a normative approach to privacy in the context of voyeurism can also be read as a feminist rejection of victim blaming in the context of sexual violence, all without ever explicitly saying so.

In contrast with the majority reasons, the *Jarvis* concurring reasons explicitly adopt Elaine Craig's feminist approach to sexual offences in concluding that voyeurism, like other sexual offences, should be understood as a violation of sexual integrity and not as sexual impropriety.[142] Foundational to Craig's sexual integrity-based approach is an analysis of the relationship between sex and law that is neither solely focused on "good sex" (therefore, ignoring rape and sexual violence) nor on "bad sex" (therefore, ignoring positive sexual self-esteem and pleasure).[143] As

136. *R v Seaboyer, R v Gayme*, [1991] 2 SCR 577 [*Seaboyer*].
137. *Ewanchuk*, *supra* note 108.
138. *Seaboyer*, *supra* note 136 at paras 55, 64.
139. *Ewanchuk*, *supra* note 108 at para 93.
140. See e.g. Isabel Grant & Janine Benedet, "The Sexual Assault of Older Women: Criminal Justice Responses in Canada" (2017) 62:1 McGill Law Journal 41; Wendy Larcombe, "The ·Ideal' Victim v Successful Rape Complainants: Not What You Might Expect" (2002) 10:2 Feminist Legal Studies 131; Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2003); Sheehy, *supra* note 80 at 24–31; Carrie Rentschler, "#Safetytipsforladies: Feminist Twitter Takedowns of Victim Blaming" (2015) 15:2 Feminist Media Studies 353; Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); Martha Burt, "Rape Myths and Acquaintance Rape" in Andrea Parrott & Laurie Bechhofer, eds, *Acquaintance Rape: The Hidden Crime* (New York: Wiley, 1991) 26; Janine Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014) 52:1 Alberta Law Review 127; Janice Du Mont & Deborah Parnis, "Judging Women: The Pernicious Effects of Rape Mythology" (1999) 19:1–2 Canadian Woman Studies 102.
141. Allen & Mack, *supra* note 110; Gotell, *supra* note 110.
142. *Jarvis* SCC, *supra* note 6 at para 127.
143. Craig, *Troubling Sex*, *supra* note 133 at 2.

the concurring reasons note, Craig argues that the interpretation of sexual offences should not focus on the propriety or impropriety of sex or sexual acts, on the carnal lust of perpetrators, nor on the chastity and bodily integrity of the target per se. Instead, interpretation should focus on factors associated with sexual integrity, such as trust, humiliation, and exploitation.[144] In expressly adopting Craig's approach, the concurring reasons arguably share certain common ground with other equality-seeking feminist scholarship such as that of Gotell and Allen, which aimed at understandings of sexual violence that focus on the responsibilities of the perpetrator instead of blaming the victim for bringing violence upon herself by, for example, dressing or behaving in a certain way.[145]

That said, the concurring reasons' consistency with equality-seeking feminist analyses is at best ambivalent. On the one hand, they arguably implicitly adopt at least a partially contextual analysis and purport to employ a sexual integrity approach to voyeurism. On the other hand, however, as noted above, they revert to a sexual purpose analysis focused on "sexual stimulation" that assesses sexual violence through the lens of a perpetrator-centric understanding of sex, and not according to its impact on the sexual integrity of the target as she understands it.

Conclusion

The SCC's reasons in *Jarvis*, particularly the majority reasons, resolved, in an arguably equality-affirming way that is consistent with prior feminist theory and jurisprudence, three contentious issues from prior voyeurism jurisprudence: (1) the relevance of section 8 *Charter* jurisprudence; (2) the protection of privacy in public; and (3) the applicability of risk analysis. Without ever explicitly referring to equality or to existing feminist theory and jurisprudence (with one exception in the concurring reasons), these three aspects of the SCC's reasons implicitly mirror three equality-enhancing strands from feminist scholarship and jurisprudence: (1) the importance of addressing de-liberating conduct of private actors; (2) contextual and relational approaches to judicial interpretation; and (3) the replacement of victim-blaming, risk-based, and sexual propriety accounts of sexual violence with analysis grounded in sexual integrity and dignity. As a result, the *Jarvis* reasons could be categorized as implicitly feminist. While this may be promising in terms of the reasons' equality-affirming potential, explicitly feminist reasons would have been even more so.

An explicitly feminist set of reasons would have acknowledged the gendered nature of voyeurism, particularly its overwhelming perpetration by men against

144. *Jarvis* SCC*, supra* note 6 at para 127, citing Craig, *Troubling Sex*, *supra* note 133 at 68.

145. Gotell, *supra* note 110; Allen & Mack, *supra* note 110. In the context of intimate partner violence, see also Isabel Grant, "Intimate Partner Criminal Harassment through a Lens of Responsibilization" (2015) 52:2 Osgoode Hall Law Journal 552.

women and children. They would have noted that, given the gendered power dynamics at play, women's and girls' equality rights are deeply intertwined with the interpretation of complainants' privacy rights within the voyeurism provision. They would have affirmed that, given the equality issues at stake, feminist equality and privacy theory matter and show explicitly how traditional privacy theory can and should be reconciled with those bodies of knowledge in order to advance substantive equality for women and girls. In so doing, the reasons would have established as legal precedent the connection between the interpretation of complainants' privacy in the voyeurism provision and equality for women and girls as well as acknowledging the contribution of feminist scholarship in this area. The precedent established would have gone a long way towards relieving complainants from bearing the risk that the equality/privacy connection and relevance of these bodies of scholarship would have to be proven in evidence in each and every future voyeurism case.

Perhaps next time? Until then, the battle for gender equality rages on, albeit with a boost from an arguably implicitly feminist and equality-enhancing SCC judgment in *R v Jarvis*.

About the Contributor / Quelques mots sur notre collaboratrice

Jane Bailey is a full professor of law at the University of Ottawa where she teaches cyberfeminism, technoprudence, and contracts. Jane co-leads The eQuality Project, a seven-year partnership initiative funded by the Social Sciences and Humanities Research Council and focused on the impact of online commercial profiling on young Canadians' identities and social relationships. Jane leads the project stream focused on tech-facilitated violence. Among her proudest professional achievements are co-leading The eGirls Project, the creation and teaching of her cyberfeminism course, and appearing as lead counsel for the Canadian Internet Policy and Public Interest Clinic on its intervention before the Supreme Court of Canada in the *Jarvis* voyeurism case.