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Toward Survivor-Centred Outcomes for Targets of Privacy-Invasive TFVA: Assessing the Equality-Affirming Impact of *R. v. Jarvis*

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Contents

1. INTRODUCTION

Privacy takes on renewed significance in a digitally networked environment. This may be especially so for members of equality-seeking communities,[1] as we witness the disparately negative impacts of sexist,

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[**] M.Sc., 2L student, University of Ottawa, Faculty of Law. Jasmine wishes to thank The eQuality Project for all the enrichment it has provided her (still early) legal studies. She especially thanks her co-author whose generous mentorship, wisdom and pedagogy continue to inspire her.

[1] See Jane Bailey & Carissima Mathen, "Technologically-Facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) Ottawa Faculty of Law Working Paper No 2017-44; *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) (Factum of the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic); Statistics Canada, *Violent Victimization of Lesbians, Gays, and Bisexuals in Canada, 2014*, by Laura Simpson, Catalogue No 85-002-X (Ottawa: Statistics Canada, 31 May 2013); Anastasia Powell, Adrian J Scott & Nicola Henry, "Digital Harassment and Abuse: Experiences of Sexuality and Gender Minority Adults" (2018) 17:2 European J Criminology 199; Imran Awan, "Islamophobia and Twitter: A Typology of Online Hate

racist, homophobic and transphobic privacy-violative attacks, such as non-consensual disclosure of intimate images (NDII), doxing, and identity theft and manipulation, on women, girls and members of 2SLGBTQ+,[2] and on Black and Indigenous communities.[3] Indeed, research continues to indicate the importance of privacy to members of these communities, as well as the growing recognition of the tie between privacy and equality in this digital era[4] where (mis)information about a person can be so easily widely disseminated to shame and harass them[5] or profile and surveil them for corporate and government purposes.

Canadian law (especially common law jurisprudence) has a long history of failing to meaningfully address the relationship between privacy and equality, especially in the context of privacy intrusions on multiply marginalized members of equality-seeking communities.[6] Thus, it is

Against Muslims on Social Media" (2014) 6:2 Policy & Internet 133; Lindsey Snaychuk & Melanie O'Neill, "Technology-Facilitated Sexual Violence: Prevalence, Risk, and Resiliency in Undergraduate Studies" (2020) 29:8 J Aggression, Maltreatment & Trauma 984 at 992.

2 See Anastasia Powell et al, "Image-Based Sexual Abuse: An International Study of Victims and Perpetrators – A Summary Report" (2020), online (pdf): < research.monash.edu/files/319918063/ImageBasedSexualAbuseReport_170220_WEB_2.pdf > ; Powell, Scott & Henry, *supra* note 1; Jane Bailey, "'Sexualized Online Bullying' Through An Equality Lens: Missed Opportunity in *AB v Bragg*?", Case Comment, (2014) 59 McGill LJ 709 [Bailey, "Sexualized Online Bullying"]; Abigail Curlew, "Vigilantism & Transmisogyny: Digital Violence Against Women and Hate Motivated Violence" (2020), online (pdf): *The Learning Network* < vawlearningnetwork.ca/webinars/upcoming-webinars/Slides_Final_Copy.pdf > [unpublished]; Pew Research Center, "Online Harassment 2017" (11 July 2017), online: *Pew Research Center* < www.pewresearch.org/internet/2017/07/11/online-harassment-2017 > .

3 See Nasreen Rajani, "Intersectionality & Technologies To End Violence Against Women" (2020), online (pdf): The Learning Network < www.vawlearningnetwork.ca/img/Nasreen_Nov_24_presentation.pdf > [unpublished]; Angela Sterritt, "Rise In Anti-Indigenous Racism And Violence Seen In Wake of Wet'suwet'en Protests" *CBC News* (27 February 2020), online: < www.cbc.ca/news/canada/british-columbia/rise-in-anti-indigenous-racism-violence-requires-allyship-accountability-say-victims-advocates-1.5477383 > ; Jane Bailey & Sara Shayan, "Missing and Murdered Indigenous Women Crisis: Technological Dimensions" (2016) 28:2 CJWL 321 at 333; Taima Moeke-Pickering, Sheila Cote-Meek & Ann Pegoraro, "Understanding the Ways Missing and Murdered Indigenous Women Are Framed and Handled By Social Media Users" (2018) 169:1 Media Intl Australia 54.

4 Young 2SLGBTQ+ folks have indicated the importance of being able to manage who has access to information about being out: see e.g. Jane Bailey & Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives" (2017) LCO Issue Paper, online: < www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf > . Similarly, both cis and transgendered women and girls have indicated the importance of being able to control how they are represented in terms of their names, gender identities and representations of their sexuality: see e.g. Curlew, *supra* note 2; Suzie Dunn, "Technology-Facilitated Gender-Based Violence: An Overview" (2020) Centre for International Governance Innovation Paper at 6 [forthcoming in 2020] [Dunn, "Overview"], citing Azmina Dhoria, "Unsocial Media: A Toxic Place for Women" (2018) 24:4 Institute for Public Policy Research Progressive Rev 380.

5 See Danielle Keats Citron, "Sexual Privacy" (2019) 128:7 Yale LJ 1870.

6 The disturbing way that courts have dealt with production of the counselling records of targets of sexual violence in the context of criminal litigation is an especially clear example

perhaps unsurprising to find this trend has continued notwithstanding the very real connection between privacy and equality made more apparent in our digitally networked world. That said, new legal responses have been created, including criminalization of NDII,[7] creation of statutory torts of NDII in various provinces,[8] and common law recognition of invasion of privacy torts in Ontario.[9] Additionally, pre-existing laws relating to criminal harassment and identity theft have been applied to forms of technology-facilitated violence and abuse (TFVA) such as doxing[10] and coercive intimate partner control.[11] In some instances, certain connections between privacy and equality are explicitly recognized in the wording of new legislation[12] and/or in related reasons for decision.[13] Generally, however, there has been little discussion of equality despite arguments that directing explicit attention to equality could be key to achieving survivor-centred outcomes for members of equality-seeking communities, especially in the context of sexualized forms of TFVA.

In its 2019 judgment in *R. v. Jarvis*,[14] a case involving technology-facilitated voyeurism, the Supreme Court of Canada continued the trend of not explicitly discussing equality, although it did adopt arguably more feminist analyses of privacy and sexualized violence – an approach we will refer to as "equality-adjacent". This chapter considers how the Supreme Court's reasons in *Jarvis* have been applied by courts in subsequent cases

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of this deficiency: see Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and Disclosure of Personal Records" (2006) 43:3 Alta LR 743 [Gotell, "Privacy Not Enough"]. We revisit this example in more detail in Part II, below.

7 See *Criminal Code*, R.S.C. 1985, c. C-46, s. 162.1.

8 See Jane Bailey, "Canadian Legal Approaches To 'Cyberbullying' and Cyberviolence: An Overview" (2016) Ottawa Faculty of Law Working Paper No 2016-37.

9 See e.g. *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541 (Ont. S.C.J.); *Jane Doe 464533 v. D. (N.)*, 2017 ONSC 127 (Ont. S.C.J.); *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607 (Ont. S.C.J.) (NDII, public disclosure of private facts); *Doucet v. The Royal Winnipeg Ballet*, 2018 ONSC 4008 (invasion of privacy tort recognized as a common issue in certified class proceedings regarding intimate images of the ballet students that were distributed and/or sold).

10 See e.g. *R. v. A. (B.L.)*, 2015 BCPC 203 (B.C. Prov. Ct.); *R. v. Korbut*, 2012 ONCJ 522 (Ont. C.J.).

11 See Moira Aikenhead, "Revenge Pornography and Rape Culture in Canada's Non-Consensual Distribution Case Law" [Aikenhead, "Revenge Pornography"] in Jane Bailey, Asher Flynn & Nicola Henry, eds, *Emerald International Handbook of Technology-Facilitated Violence and Abuse* (UK: Emerald, 2021) [Bailey, Flynn & Henry, *Emerald International Handbook*].

12 See *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.5(2).

13 See e.g. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.); *R. v. Friesen*, 2020 SCC 9 (S.C.C.); *R. v. Barton*, 2019 SCC 33 (S.C.C.) (dealing with s. 276); *R. v. R.V.*, 2019 SCC 41 (S.C.C.) (s. 276); *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (S.C.C.). With respect to recognition of the disparate gender-based impacts of NDII, see *R. v. J.S.*, 2018 CarswellOnt 1743 (Ont. C.J.) at para. 33; *R. v. Zhou*, 2016 CarswellOnt 13938, [2016] O.J. No. 4641 (Ont. C.J.) at para. 20.

14 *R. v. Jarvis*, 2019 SCC 10 (S.C.C.).

with a view to assessing the impact of the Court's equality-adjacent approach on achieving survivor-centred outcomes for members of equality-seeking communities.

The chapter proceeds in four parts. Part 2 explores the connection between privacy and equality in the context of TFVA, with particular attention to sexually violent and gender-based forms. Part 3 examines why equality-explicit reasoning in the context of cases involving privacy-invasive forms of TFVA could play a role in producing more survivor-centred outcomes for members of equality-seeking communities. In so doing, it brings prior feminist analyses about the need for and impacts of equality-explicit reasoning to bear on the current digital context. Part 4 explores the shift toward arguably more feminist approaches to privacy in the Supreme Court's reasons in *Jarvis*, highlighting aspects of the decision that potentiate positive outcomes for members of equality-seeking communities targeted by privacy-invasive forms of TFVA. Part 5 explores the impact of *Jarvis* on achieving survivor-centred outcomes by examining the decision's application in subsequent cases that include analysis of the privacy rights of members of equality-seeking communities in a digitally networked world. The Conclusion reflects on the mixed results seen from our analysis of subsequent case law. It highlights the limitations of criminal and civil litigation for achieving meaningful privacy for members of equality-seeking communities in a digital era and stresses the importance of proactive/preventative community-based action, education and human rights-focused approaches.

2. THE PRIVACY/EQUALITY CONNECTION IN TFVA

For purposes of this chapter, we use the term TFVA to denote violence and abuse that is perpetrated through technological means, such as pen cameras, email, websites, social media, etc. TFVA comes in many forms – including online hate and harassment, NDII, voyeurism and unwanted surveillance[15] – and privacy invasion and intrusion play an increasingly significant role.[16] Because members of equality-seeking communities are frequently targeted, privacy and equality can be deeply imbricated in the context of TFVA. Often, multiple forms of TFVA are perpetrated against a single individual or group,[17] with multiple structures of discrimination frequently overlapping in attacks on members of equality-seeking commu-

[15] See Jane Bailey, Asher Flynn & Nicola Henry, "Technology-Facilitated Violence and Abuse: International Perspectives and Experiences" in Bailey, Flynn & Henry, *Emerald International Handbook*, *supra* note 11.

[16] See Kristen Thomasen & Suzie Dunn, "Reasonable Expectations of Privacy in the Era of Drones and Deepfakes: Examining the Supreme Court of Canada's Decision in *R v Jarvis*" [Thomasen & Dunn, "Drones and Deepfakes"] in Bailey, Flynn & Henry, *Emerald International Handbook*, *supra* note 11.

[17] See Jane Bailey & Carissima Mathen, "Technology-Facilitated Violence Against Women

nities subordinated by intersecting axes of oppression.[18] While TFVA is often approached as a form of interpersonal violence, analyses of the technology-facilitated abuses perpetrated by corporations and by the state throw into clearer relief the central roles of structural violence and systemic inequality.[19] These are factors that Black and other critical race feminists have for some time emphasized are central to understanding and meaningfully addressing violence.[20] While a full review of the growing phenomenon of privacy-invasive TFVA is beyond the scope of this chapter, in this section, we discuss a variety of examples of privacy-invasive TFVA that are both interpersonal and corporate/state-perpetrated, in the hope of underscoring the urgent need for approaches and analyses that take into account privacy's intimate connection with equality in a digitally networked world.

(a) Interpersonal Privacy-Invasive TFVA

A number of interpersonal forms of privacy-invasive TFVA disproportionately target women, girls and 2SLGBTQ+ community members, frequently deploying intersecting oppressions such as misogyny, racism, homophobia, transphobia, classism, ableism, and colonialism in their attacks. For example, many privacy-invasive forms of TFVA deliberately prey upon pre-existing structural prejudices that seek to control and constrain expressions of sexuality and gender according to discriminatory myths, norms and stereotypes that shame women in relation to sexuality, and 2SLGBTQ+ community members in relation to sexuality and gender expression.[21]

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and Girls: Assessing the Canadian Criminal Law Response" (2019) 97 Can Bar Rev 664 at 667.

18 With respect to intersectionality and intersecting systemic oppression, see Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" (1991) 43:6 Stan L Rev 1241; Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (London: Harper Collins, 1990).

19 See Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (Medford, MA: Polity, 2019); Joy Buolamwini, "Artificial Intelligence Has Problem with Gender and Racial Bias: Here's How to Solve It", *Time* (7 February 2021), online: < time.com/5520558/artificial-intelligence-racial-gender-bias > ; Safia Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York: NYU Press, 2018); Jane Bailey et al, "AI and Technology-Facilitated Violence and Abuse" in Florian Martin-Bariteau & Teresa Scassa, eds, *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada, 2021).

20 See e.g. Yasmin Jiwani, Helene Berman & Ann Cameron, "Violence Prevention and the Canadian Girl Child" (2010) 1:2 Intl J Child, Youth & Family Studies 134 at 143; Patricia Hill Collins, "On Violence, Intersectionality and Transversal Politics (2017) 40:9 Ethnic & Racial Studies 1460 at 1464.

21 See Bailey, "Sexualized Online Bullying", *supra* note 2; Dunn, "Overview", *supra* note 4 at 12, 30.

Pre-existing double standards mean that NDII can have particularly negative effects on women and girls, and is often deployed as a mechanism of asserting coercive control over women in the context of intimate and ex-intimate relationships.[22] Likewise, women (particularly South Korean women) are disproportionately targeted by sexualized attacks using deepfake technology in which images of their faces are non-consensually inserted into pictures and films in order to falsely misrepresent them engaging in the sexual acts depicted.[23]

Doxing, the non-consensual distribution of someone's personal information (e.g., name, address, photos, place of work, etc.), is another form of privacy-invasive TFVA used to reinforce discriminatory norms around gender and sexuality, and is often intersected with racism. Non-consensual distribution of trans people's former names and pre-transition photos draws on and perpetuates systemic transphobia in an effort to shame, humiliate and silence them.[24] Online "outing" of members of the 2SLGBTQ+ community on dating sites also trades on discriminatory shaming tactics.[25] Doxing is also used to expose cis and trans women and girls to physical acts of sexualized violence as well, through distribution of their names, addresses, places of work and phone numbers, in combination with false invitations that suggest they are looking for sexual partners.[26]

Technology-facilitated voyeurism takes a variety of privacy-invasive forms, frequently with discriminatory motivations and impacts. For example, upskirting, downblousing and creepshots are all disproportionately targeted at women by men.[27] Creepshots involve photographing

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22 See Aikenhead, "Revenge Pornography", *supra* note 11.

23 In fact, 96% of publicly available deepfakes analyzed in a 2018 study were sexual deepfakes "made exclusively of women without their consent", with South Korean women being disproportionately targeted: see Suzie Dunn, "Identity Manipulation: Responding to Advances in Artificial Intelligence and Robotics" (Conference paper delivered at the WeRobot Conference, Ottawa, 4 April 2020) at 10 [unpublished], citing Henry Ajder et al, "The State of Deepfakes: Landscape, Threats, and Impact" (29 November 2019), online: *Tracer Newsletter* <medium.com/deeptrace/mapping-the-deepfake-landscape-27cb809e98bc>.

24 See Curlew, *supra* note 2.

25 See Florence Ashley, "Trans People Under Attack", *The McGill Daily* (12 November 2018), online: <www.mcgilldaily.com/2018/11/trans-people-under-attack>; Rasha Younes, "This Pride Month, Shame On You: Exposing Anti-LGBT Government Strategies in MENA", *Human Rights Watch* (8 June 2020), online: <www.hrw.org/news/2020/06/08/pride-month-shame-you-exposing-anti-lgbt-government-strategies-mena>; Michelle Kim, "A New Trend of Outing Gay Men Using Dating Apps Has Swept Morocco. A Trans Woman Started It", *Them.* (20 April 2020), online: <www.them.us/story/gay-men-outed-morocco-naoufal-moussa>.

26 See Citron, *supra* note 5; Dunn, "Overview", *supra* note 4 at 28, citing Jessica West, "Cyber-Violence Against Women" (2014 May), online (pdf): *Battered Women's Support Services* <www.bwss.org/wp-content/uploads/2014/05/CyberVAWReportJessicaWest.pdf>.

27 See Anne Burns, "Creepshots and Power: Covert Sexualized Photography, Online Communities and the Maintenance of Gender Inequality" in Marco Bohr & Basia Sliwinska, eds, *The Evolution of the Image: Political Action and the Digital Self* (New York:

women's bodies or parts of their bodies in public (typically without their consent) then posting the images online with invitations for public comment,[28] usually to shame and intimidate those targeted.[29] Posted comments are frequently "sexually violent, objectifying and racist" towards women and their bodies.[30]

Privacy intrusions through hacking into accounts and devices can also disparately affect members of equality-seeking communities. For example, the devices of disabled women have become hacking targets of abusive ex-partners,[31] and racialized women's devices, such as that of Leslie Jones, have been hacked for the purpose of posting their personal information (e.g., their passports) online.[32]

While we have discussed these types of privacy-invasive TFVA as separate categories, in fact, they are often overlapping as members of equality-seeking communities are targeted by multiple forms. For example, research indicates racialized and queer women face higher levels of harassment on platforms such as Twitter, and those harassed are more likely to be doxed.[33] Similarly, women targeted by NDII often have their personal information exposed through doxing,[34] and hacking of personal devices is often a precursor to NDII.[35]

Routledge, 2018); Tyler Kingkade & Davey Alba, "A Man Sent 1,000 Men Expecting Sex and Drugs To His Ex-Boyfriend Using Grindr, A Lawsuit Says", *Buzzfeed News* (10 January 2019), online: < www.buzzfeednews.com/article/tylerkingkade/grindr-herrick-lawsuit-230-online-stalking > (concerning the case *Herrick v. Grindr LLC et al*, 765 Fed.Appx. 586 (2d Cir., 2019)); Dunn, "Overview", *supra* note 4 at 18.

28 See Clare McGlynn, Erika Rackley & Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25:1 Fem Leg Stud 25.

29 See Anita Gurumurthy, Amrita Vasudevan & Nadini Chami, "Born Digital, Born Free? A Socio-Legal Study on Young Women's Experiences of Cyberviolence in South India" (2019), online (pdf): *IT For Change* < itforchange.net/sites/default/files/1618/Born-Digital_Born-Free_SynthesisReport.pdf > .

30 Dunn, "Overview", *supra* note 4 at 10.

31 *Ibid* at 15-16.

32 See Aja Romano, "The Leslie Jones Hack Is the Flashpoint of the Alt-Right's Escalating Culture War", *Vox* (26 August 2016), online: < www.vox.com/2016/8/26/12653474/leslie-jones-hack-alt-right-culture-war > .

33 See Amnesty International, "Toxic Twitter – A Toxic Place For Women" (2018), online: *Amnesty International Research Report* < www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/ > .

34 See Dunn, "Overview", *supra* note 4 at 19-20.

35 See e.g. Nicola Henry et al, *Image-Based Sexual Abuse: A Study On the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge: New York, 2021); Lauren O'Connor, "Celebrity Nude Photo Leak: Just One More Reminder That Privacy Does Not Exist Online and Legally, There's Not Much We Can Do About It" (2014) *GGU Law Review Blog*, online: .

(b) Corporate and State-Perpetrated Privacy Invasions

Corporate and state-perpetrated forms of privacy-invasive TFVA abound and often intersect, with particularly serious consequences for already over-policed and over-surveilled Black and Indigenous community members. Given space constraints, we highlight only a few prominent examples. Facial recognition technologies created by private companies based on biometric data collected from people's faces incorporate known biases that negatively affect Black community members. Notwithstanding this, these technologies have been adopted and employed by police forces with devastating results, including false arrest and wrongful incarceration.[36] Similarly, privately created predictive technologies drawing from various data sources are increasingly being employed at multiple sites within the justice system, compiling profiles that affect, among other things, which neighbourhoods are targeted for surveillance and which offenders are profiled as having a higher risk of recidivism for pre-trial, sentencing and bail determinations.[37] These predictive technologies work to reinforce and exacerbate pre-existing biases and discrimination within the data they employ for profile creation, again producing serious harms that disproportionately affect Black and Indigenous community members.[38] Further, state actors monitor content posted on privately owned social media sites like Facebook in order to create dossiers to monitor equality-seeking groups and their members, including Indigenous scholar, social worker and activist Dr. Cindy Blackstock.[39]

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[36] See e.g. Jane Bailey, Jacquelyn Burkell & Valerie Steeves, "AI Technologies – Like Police Facial Recognition – Discriminate Against People of Colour", *The Conversation* (24 August 2020), online: < theconversation.com/ai-technologies-like-police-facial-recognition-discriminate-against-people-of-colour-143227 > . See also Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict, A Human Rights Analysis of Algorithmic Policing in Canada, Citizen Lab and International Human Rights Program", University of Toronto Faculty of Law, (September 2020), online: < citizenlab.ca/2020/09/to-surveil-andpredict-a-human-rights-analysis-of-algorithmic-policing-in-canada/ > ; and Buolamwini, *supra* note 19.

[37] See e.g. Robertson, Khoo & Song, *supra* note 36; Law Commission of Ontario, "The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada" (2020 October), online (pdf): < www.lco-cdo.org/wp-content/uploads/2020/10/Criminal-AI-Paper-Final-Oct-28-2020.pdf > ; Jennifer L Skeem & Christopher Lowenkamp, "Risk, Race, & Recidivism: Predictive Bias and Disparate Impact" (2016), online: < dx.doi.org/10.2139/ssrn.2687339 > . See also *Ewert v. Canada*, 2018 SCC 30 (S.C.C.) (use of actuarial risk assessment tools that reproduce bias).

[38] See Robertson, Khoo & Song, *supra* note 36.

[39] See Jane Bailey, "'Gendering Big Brother': What Should a Feminist Do?" (2016) 12 JL & Equality 157, citing Cindy Blackstock, "The Government Spied On Me Without A Warrant: How An Aboriginal Advocate Became the Target of Government Snooping", *Toronto Star* (21 June 2014), online: < www.thestar.com/opinion/commentary/2014/06/21/the_government_spied_on_me_without_a_warrant.html > ; Craig Benjamin, "Invasive Surveillance of Human Rights Defender Cindy Blackstock", *Amnesty International* (29 May 2013), online: < www.amnesty.ca/news/news-updates/invasive-surveillance-of-human-rights-defender-cindy-blackstock > .

Even this very brief overview of interpersonal, corporate and state-based forms of technology-facilitated privacy-invasive acts serves to drive home the strong *lived* connection between privacy and equality – a connection that we suggest demands more equality-explicit analyses of privacy in Canadian law.

3. WHY EXPLICIT EQUALITY ANALYSES OF PRIVACY MIGHT MATTER

It matters philosophically and practically both that reasons are given for reaching a certain outcome or taking a particular action, and *which* reasons are given to justify and/or explain the outcome or action. From a Kantian perspective, the moral rightness or wrongness of an action is based on the reasoning that precedes it,[40] with a focus on categorical imperatives (e.g., rights to privacy or equality) rather than the ends or consequences achieved. Reasoning and the categorical imperatives employed in it can and should be subjected to criticism and public discourse, [41] which in turn can influence society and social ordering.[42]

From this perspective, judicial reasons for a decision in and of themselves might be understood as contributing to a larger public discourse, with capacity to shape that discourse in ways that materially affect the lived realities of members of equality-seeking communities both within and beyond the legal system. For example, research indicates that judicial decisions grounded in categorical imperatives are more likely to be associated with expanding rights, less likely to be challenged on appeal,[43] and less susceptible to public outrage (compared to decisions based on balancing particular facts).[44] Further, non-consequentialist reasons and values such as equality are more likely to resonate with social movements

[40] See Douglas Birsch, *Ethical Insights: A Brief Introduction*, 2nd ed (Boston: McGraw Hill, 2001) at 13.

[41] See Immanuel Kant, *Critique of Judgment*, ed by Nicholas Walker & James Creed Meredith (New York: Oxford University Press, 2007); Immanuel Kant, *Critique of Pure Reason* (New York: Willey Book Co, 1899); Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" in Mary J Gregor, ed, *Practical Philosophy* (New York: Cambridge University Press, 1999) 11 at 36-37. See also Onora O'Neill, "Kant's Conception of Public Reason" in Charlton Payne & Lucas Thorpe, eds, *Kant and the Concept of Community* (University of Rochester Press, 2011) 138 at 146; Onara O'Neill, *Constructing Authorities* (Cambridge: Cambridge University Press, 2015) at 25; Kenneth R Westphal, "Kant's Two Models of Human Actions" (2019) 75:1 Revista Portuguesa de Filosofia 17 at 29.

[42] See Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1984). Although Habermas' morality also is derived from an understanding of reason, in Habermas' philosophy, morality can be synthesized through opposing positions and can evolve over time in a way that is likely not true of Kant's perception of categorical imperatives: see generally Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 1990).

[43] See "Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role", Note, (2017) 130 Harv L Rev 1436 at 1442.

seeking to expand rights (thus supporting them in pressuring for increased promotion of substantive equality)[45] and to be seen as trustworthy and altruistic (thus reinforcing equality principles and public trust in the rule of law).[46] On a practical level, in Canada's precedent-based common law system, reasons of appellate courts, especially the Supreme Court of Canada, can affect how courts subsequently apply the law in future cases (although, as we discuss in Part 5 below, not always in predictable ways).

However, it isn't just resort to categorical imperatives that matters, it also matters *which* categorical imperatives are addressed. Scholars have regularly raised this kind of point in the context of jurisprudential and statutory inattention to equality in favour of other categorical imperatives such as privacy and due process. These critiques highlight four potentially negative impacts of privacy-focused legal reasoning that excludes equality analysis.

First, advancing claims on the basis of privacy without consideration for equality can work to obfuscate underlying issues of systemic discrimination, potentially producing a variety of equality-undermining results. For example, a "win" for an equality-seeking community in one case based solely on privacy rights can create a judicial precedent expanding privacy rights that is used in subsequent cases to deepen the subjugation of members of the same or other equality-seeking groups.[47] Similarly, wins for equality-seeking groups solely based on due process and/or privacy arguments may erroneously suggest that what is at stake is individual and fact-based, rather than collective and systemic, thereby depoliticizing the issue and disincentivizing social activism for implementation of much-needed systemic change.[48]

Second, reliance on privacy alone may restrict state interference with individual liberty, when affirmative state action is required to create conditions conducive to the exercise of liberty and to incite meaningful

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44 *Ibid* at 1444-1451. See also Cass R Sunstein, "If People Would Be Outraged by Their Rulings, Should Judges Care?" (2007) 60 Stan L Rev 155 at 165.

45 See Government of Canada, "Noble and Wolf v Alley" (14 April 2015), online: *Government of Canada* < www.canada.ca/en/news/archive/2015/04/noble-wolf-v-alley.html > .

46 See Tamar A Kreps & Benoit Monin, "Core Values Versus Common Sense: Consequentialist Views Appear Less Rooted in Morality" (2014) 40:11 Personality & Soc Psychology Bull 1529; Valerio Capraro et al, "People Making Deontological Judgments in the Trapdoor Dilemma Are Perceived to Be More Prosocial in Economic Games Than They Actually Are" (2018) 13:10 PLoS One < doi.org/10.1371/journal.pone.0205066 > ; Mitch Brown & Donald F Sacco, "Is Pulling the Lever Sexy? Deontology As a Downstream Cue to Long-Term Mate Quality" (2019) 36:3 Journal of Social and Personal Relationships 957.

47 For example, in the context of domestic violence, by expanding men's ability to dominate women in the "privacy" of their own home, see Catharine MacKinnon, "The Road Not Taken: Sex Equality in Lawrence v Texas" (2004) 65:5 Ohio St LJ 1081 at 1088.

48 Jonathan Rudin, "Tell It Like It Is – An Argument for The Use of Section 15 Over Section 7 to Challenge Discriminatory Criminal Legislation" (2017) 64 CLQ 317.

change in the lived experiences of members of equality-seeking communities. For example, reliance on privacy rather than equality in the context of abortion rights has resulted in decisions that restrict government interference with individual choice, without mandating state provision of safe, accessible abortion services, which is a necessary precursor to being able to exercise that choice.[49]

Third, solely privacy-based arguments can work to further implicate law in perpetuating the discriminatory myths and stereotypes that make refuge in privacy necessary in the first place. For example, reliance on privacy alone as the basis for precluding publication of a survivor's name in cases involving sexualized violence can implicitly collude with discriminatory prejudices used to shame women and members of the 2SLGBTQ+ community by suggesting that expressions of sex and sexuality are shameful and embarrassing.[50]

Fourth, privacy-based arguments uninformed by surrounding issues of inequality and discrimination can lead to results that are not sufficiently contextualized to produce robust protections for members of equality-seeking groups. For example, protections for children's privacy uninformed by equality considerations may be understood as discretionary matters of paternalism based on presumed vulnerability, rather than as matters of legal entitlement to equal benefit and protection of the law.[51] Similarly, failure to take into account the gender-based impacts of NDII may impede recognition of privacy rights in relation to sexual images if a court assumes that prior consensual sharing of an intimate image negates any subsequent reasonable expectation of privacy in relation to that image.[52]

It is important to note, however, that the presence of explicit equality analysis is by no means a guarantee for consistent production of survivor-centred outcomes for members of equality-seeking communities in subsequent criminal or civil litigation. Pamela Hrick suggests the following factors are indicative of survivor-centred approaches:[53]

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[49] See Sanda Rodgers, "Misconceptions: Equality and Reproductive Autonomy in the Supreme Court of Canada" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont.: LexisNexis Canada, 2006).

[50] See Bailey, "Sexualized Online Bullying", *supra* note 2 at 732.

[51] See Jane Bailey & Vanessa Ford, "Parenting In the Shadow of Corporate Surveillance: Reflections on children's privacy after widespread pandemic-induced adoption of education technology" in Fiona Green & Jaqueline McLeod Rogers, eds, *Mothering/Internet/Kids* (Demeter Press: Toronto, 2022) [forthcoming in 2022].

[52] Moira Aikenhead, "Nonconsensual Disclosure of Intimate Images as a Crime of Gender-Based Violence", (2018) 30 CJWL 117 at 140. See also, in another context: *R. v. Mai*, 2019 ONSC 6691 (Ont. S.C.J.) (affirming risk-based analysis of privacy).

[53] Survivor-centred approaches aim to shift activism away from punitive dependence on criminal legal systems, university policies, and other institutional hierarchies. Use of the term "survivor-centred" has evolved from the United Nations Entity for Gender Equality and the Empowerment of Women, "Survivor-Centred Approach" (2012) in *Virtual*

(1) they are intersectional, recognizing that the needs and experiences of survivors are likely to vary based on social locations affected by gender, race, sexual orientation, ability, and other identity factors;
(2) they affirm survivors' rights to choose their own course of action and to maintain control over that course of action;
(3) they treat survivors with dignity and respect, and do not blame them for the violence they have experienced;
(4) they are prevention-focused, emphasizing collective responsibility for encouraging cultural shifts in attitudes and understandings of oppression-based TFVA; and
(5) they are informed by "research, evidence and perspectives of survivors."[54]

Unfortunately, equality-explicit jurisprudential reasoning and/or equality-explicit statutory language cannot be relied upon to consistently produce survivor-centred outcomes. In fact, such reasoning and statutory language often does not even produce subsequent judicial reasoning that actually considers equality. For example, in the context of controlling access to survivors' counselling records in sexual assault cases under section 278 of the *Criminal Code*, a lengthy history of advocacy, jurisprudence and statutory amendments has grappled with how to most effectively take equality into account.[55] Since women are disproportionately likely to be the targets of sexual assault, as well as the targets of motions for access to counselling records in sexual assault trials, it was recognized that women's right to equal protection and benefit of the law was intimately connected to ensuring robust privacy protections in this area. Among other things, without such protections, women would be dissuaded from pursuing legal remedies for sexual assault for fear their confidential records would be disclosed and leveraged by defence to attack their credibility/reliability – a common defence strategy that plays into discriminatory myths and stereotypes about women and members of other equality-seeking groups.[56]

Knowledge Centre to End Violence Against Women and Girls, online: < www.endvawnow.org/en/articles/652-survivor-centred-approach.html > .

54 Pamela Hrick, "The Potential of Centralized and Statutorily-Empowered Bodies to Advance a Survivor-Centred Approach to Technology-Facilitated Violence Against Women" in Bailey, Flynn & Henry, *Emerald International Handbook*, *supra* note 11 at 598-599.

55 See Department of Justice, *Bill C-46: Records Applications Post-Mills, A Caselaw Review*, by Susan McDonald, Andrea Wobick & Janet Graham, Research Report (2015), online: < www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p4_4.html > [DOJ, *Bill C-46*]; Department of Justice, *Third Party Records: A Review of the Case Law from 2011-2017*, by Carly Jacuk & Hassan Rasmi Hassan (2018), online: < www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p6.html > [DOJ, *Third Party Records*]; *R. v. Mills* (1999), 180 D.L.R. (4th) 1, [1999] 3 S.C.R. 668 (S.C.C.) (asserted that privacy concerns are at their strongest in the context of information about one's lifestyle and intimate relationships and s. 278 engages privacy and equality rights of complainants, at para. 80).

56 See e.g. Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence

It was hoped that explicit inclusion of mandates to avoid reliance on discriminatory myths and take into account other equality-based considerations within the relevant statutory provisions would ameliorate such equality-undermining outcomes.

However, analyses of case law applying the provisions that explicitly included these considerations revealed, in one study, continuing negative effects on women,[57] and in another, "[n]o definitive trends in terms of reasons ... with the exception of a greater emphasis on the privacy of complainants".[58] A third analysis of the judicial interpretation of the provision from 2011-2017 revealed that equality was referred to in only 3 of 91 cases, that society's interest in encouraging the reporting of sexual offences was considered in only 4 of 91 cases, and whether production of the record was based on a discriminatory belief or bias was considered in only 2 of 91 cases.[59] Disappointing outcomes such as these have prompted additional rounds of more equality-affirming legislative amendments and subsequent Supreme Court jurisprudence.[60] For example, Bill C-51,[61] which received royal assent in 2018, permits survivors to make submissions and to be represented by counsel at any admissibility hearing. Although these amendments purport to give survivors a more direct voice in judicial decision-making concerning their privacy and equality rights, actual impacts on equality (if any) will require future study,[62] particularly when one recognizes the fact that negative and violent interactions with law enforcement, courts and other state-based agencies, experienced by members of many equality-seeking communities, create a massive disincentive against seeking legal remedies in the first place.[63]

Cases" (1997) 9 CJWL 148; Karen Busby, "Third Party Records Cases Since O'Connor" (2000) 27 Man LJ 355 [Busby "Third Party Records"]; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251 [Gotell, "Charter Implications"]; *R. v. Mills* (1999), 180 D.L.R. (4th) 1, [1999] 3 S.C.R. 668 (S.C.C.) at para. 92.

57 See Gotell, "Privacy Not Enough", *supra* note 6; Busby, "Third Party Records", *supra* note 56.

58 DOJ, *Bill C-46*, *supra* note 55 at 43.

59 See DOJ, *Third Party Records*, *supra* note 55.

60 *Ibid.* See especially *R. v. Barton*, 2019 SCC 33 (S.C.C.); *R. v. Goldfinch*, 2019 SCC 38 (S.C.C.); *R. v. R.V.*, 2019 SCC 41 (S.C.C.).

61 Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, cls 23-25 (assented to 13 December 2018) [Bill C-51].

62 A quick review of a handful of decisions relating to s. 278 applications after royal assent of Bill C-51 suggests that judicial reasons are not engaging heavily with equality considerations, intersectionality, etc.

63 See Julia Cheneyere Oparah (formerly Julia Sudbury), "Rethinking Antiviolence Strategies: Lessons from the Black Women's Movement in Britain" in INCITE! Women of Color Against Violence, eds, *Color of Violence: The INCITE! Anthology*. (Cambridge MA: Duke University Press, 2016) 13 at 21; Sarah Deer, "Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State" in *The INCITE! Anthology* (*ibid*) 32 at 37-38; Pam Palmater, "Shining Light on the Dark Places: Addressing Police

That equality-explicit jurisprudential and statutory language may yield disappointing results in terms of uptake in subsequent case law comes as no surprise. The same roadblocks that contribute to a general lack of equality-explicit appellate jurisprudence in criminal law almost certainly also impede lower courts' uptake of the small amount of equality-based reasoning available in prior jurisprudence. These roadblocks include lack of clarity in equality law, potentially related reluctance on the part of advocates to raise equality arguments in court, lack of judicial training on the interpretation and application of equality principles, the potential need for social science evidence to substantiate a claim of disparate impact,[64] and (especially in the context of criminal litigation) the conceptual misfit between the necessarily collective and systemic analysis of equality on the one hand and rights relating to full answer and defence or privacy that are paradigmatically understood as individual on the other.[65]

That said, there are indications that in other contexts where equality considerations relating to survivors are not characterized as competing with an accused's right to privacy or to full answer and defence, equality-explicit jurisprudence may be more likely to be taken up in subsequent case law. For example, the Supreme Court's decision in *R. v. Friesen*,[66] indicating that equality rights of children are relevant in sentencing for child sexual offences, has been explicitly adopted and applied in many subsequent cases.[67] This example may be best explained as a reflection of courts' inclination toward paternalistic protection of children or the more common practice of taking broader social factors into account during sentencing hearings (as opposed to at the stage of determining criminal liability). As such, it may not exemplify the kind of commitment to substantive systemic equality that would make such analyses more likely to surface in cases involving privacy rights for both child *and* adult members of equality-seeking communities. Nonetheless, it does help to demonstrate that equality-explicit appellate jurisprudence *can* make a difference in subsequent case law.

Before turning to our analysis of whether the Supreme Court's decision in *Jarvis* made an equality-affirming difference in subsequent case law, we first provide an overview of the *Jarvis* decision.

Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry" (2016) 28 CJWL 253.

64 See Bailey, "Sexualized Online Bullying", *supra* note 2 at 731.

65 See Rosemary Cairns Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 JL & Equality 203. See also *R. v. Trinchi*, 2019 ONCA 356 (Ont. C.A.) (interpreted "surreptitiously" from accused perspective under voyeurism offence).

66 *R. v. Friesen*, 2020 SCC 9 (S.C.C.).

67 See e.g. *HMQ v. M*, 2020 NBQB 214 (N.B. Q.B.) at para. 22; *R. v. D.D.*, 2020 ONCJ 218 (Ont. C.J.) at paras. 14 and 17; *R. v. Alfred*, 2020 BCCA 256 (B.C. C.A.) at para. 29; *R. v. DCH*, 2020 ABQB 510 (Alta. Q.B.) at paras. 70-71; *R. v. Williams*, 2020 BCCA 286 (B.C. C.A.) at para. 12.

4. *R. V. JARVIS*: EQUALITY-ADJACENT PRIVACY ANALYSIS

In *R. v. Jarvis*,[68] a high school teacher was charged with voyeurism after using a pen camera to secretly record images of the breasts of young women students. Jarvis was acquitted at trial because the judge concluded proof of a sexual purpose – an element of the voyeurism offence – was not demonstrated beyond a reasonable doubt.[69] Jarvis' acquittal was upheld on appeal. Although the Court of Appeal for Ontario found that a sexual purpose had been proven, the majority concluded the young women targeted did not have a reasonable expectation of privacy in the circumstances primarily because Jarvis recorded the images in public areas of the school.[70] In so doing, the Court of Appeal's reasons suggested that targets of voyeurism waive all privacy rights with respect to their bodies and images *simply by being in public*. Ultimately, however, the Supreme Court unanimously granted the Crown's appeal from this decision and convicted Jarvis.[71]

Equality issues arose not only on the facts of *Jarvis*, but also in relation to the voyeurism offence more generally. The fact that an adult male teacher committed this offence against young women students raised intersecting issues of power imbalance and inequality in terms of age, gender and social standing (since the violations happened in school: a place where young people are legally mandated to attend and where they are repeatedly told to show respect for – and trust – their teachers). These inequalities were exacerbated by the Court of Appeal's robust, contextual interpretation of Jarvis' privacy rights raised during his constitutional challenge to the police search and seizure of the surreptitious videos he recorded,[72] compared to the court's thin, location-based analysis of the privacy rights of Jarvis' young female targets. These case-specific inequalities mirror broader systemic issues.

Voyeurism, like other sexual offences, is a highly gendered crime far more likely to be perpetrated by men against women and girls.[73] As such, interpreting the provision in a way that offers robust protection to perpetrators' related privacy rights (e.g., in relation to police search and seizure of equipment used to record voyeuristic images) and weak protection for targets' privacy rights translates into unequal protection and benefit of the law on the basis of gender. This unequal recognition and protection of women and girls' privacy *at law* reflects and exacerbates *lived*

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[68] *R. v. Jarvis*, 2017 ONCA 778 (Ont. C.A.), reversed 2019 CarswellOnt 1921, 2019 CarswellOnt 1922 (S.C.C.).

[69] See Jane Bailey, "Implicitly Feminist?: The SCC's Decision in *R v Jarvis*", Case Comment, (2020) 32:1 CJWL 196 [Bailey, "Implicitly Feminist?"] at 197.

[70] *Ibid.*

[71] *Ibid* at 198.

[72] See *R. v. Jarvis*, 2017 ONCA 778 (Ont. C.A.) at paras. 56-61.

[73] See Bailey, "Implicitly Feminist?", *supra* note 69; Powell et al, *supra* note 2 at 6.

experiences of inequality that, in the context of TFVA more generally, drive women and girls (especially those affected by intersecting oppressions such as racism, homophobia, transphobia, classism, ableism and colonialism) away from full participation in society due to fear of being threatened, attacked and violated.[74] The implicit suggestion in the Court of Appeal's reasoning – that privacy in relation to one's body is waived whenever one is in public – is especially concerning in a context where sexualized privacy invasions often committed in public spaces have become a "significant form" of gender-based violence.[75]

In light of both the case-specific and more general equality issues at play, two intervenors before the Supreme Court, the Women's Legal Education and Action Fund (LEAF) and the Canadian Internet Policy and Public Interest Clinic (CIPPIC), urged the Court to explicitly include equality in its analysis of the privacy rights of the young women targeted.[76] However, neither of the two sets of reasons delivered by the Court in support of its unanimous decision to convict Jarvis did so. Nonetheless, as discussed below, subsequent commentaries have suggested that both the majority reasons written by Chief Justice Wagner for six justices and the concurring reasons written by Justice Rowe for three justices hold *equality-affirming* potential that could be especially important in robustly protecting the privacy rights of members of equality-seeking communities in a digital era and in achieving survivor-centred outcomes in future cases.[77]

The majority reasons' explicit rejection of location- and risk-based approaches to interpreting the privacy rights of voyeurism targets in favour of an entire context approach [78] appears to afford equality-affirming potential for survivor-centred outcomes in at least three ways. First, by drawing on the same constitutional analysis protecting accused persons' privacy rights, the majority's multi-factor contextual approach to interpreting targets' privacy rights recognizes that privacy violations by both state and individual actors can have devastating consequences.[79] Ensuring robust protection for privacy not just against state intrusion, but also

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74 See Citron, *supra* note 5.

75 See Thomasen & Dunn, "Drones and Deepfakes", *supra* note 16 at 555.

76 See Bailey, "Implicitly Feminist?", *supra* note 69 at 197-198.

77 See e.g. Moira Aikenhead, "A 'Reasonable' Expectation of Sexual Privacy in the Digital Age" (2018) 41:2 Dal LJ 273; Bailey, "Implicitly Feminist?", *supra* note 69; Pam Hrick & Moira Aikenhead, "The Supreme Court's Jarvis Ruling Delivers A Win For Privacy, But It's A Missed Opportunity For Equality", *The Globe and Mail* (24 February 2019), online: < www.theglobeandmail.com/opinion/article-the-supreme-courts-jarvis-ruling-delivers-a-win-for-privacy-but-its/ > ; Kristen Thomasen & Suzie Dunn, "The Supreme Court's Ruling On a Voyeurism Case Contributes To a Broader Conversation About Surveillance and Privacy In Public and Semi-Public Spaces", *Policy Options* (25 February 2019), online: < policyoptions.irpp.org/fr/magazines/february-2019/court-ruling-voyeurism-broad-social-impact/ > .

78 See *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at paras. 52-53.

79 See Bailey, "Implicitly Feminist?", *supra* note 69 at 206.

against intrusions committed by other individuals, may be especially important for women and members of other equality-seeking groups who are increasingly exposed to technology-facilitated invasions of their privacy in contexts such as intimate partner violence.[80]

Second, the majority reasons' entire context approach helps direct judicial attention toward the lived realities of targets, potentially decreasing the probability that judges will rely on their own disproportionately privileged experiences to understand the nature and impact of an alleged privacy violation.[81] In this regard, the majority reasons' specification that the relationship between the target and the perpetrator is one element of the contextual analysis could shift future judicial analysis towards the existence and impacts of power imbalances that shape the lived realities of members of equality-seeking communities. The majority reasons therefore bring concepts of relationality to light in privacy which might otherwise be invisible to judges coming from privileged social locations.[82] Just as mandating interpretive attention to context has proven beneficial in achieving survivor-centred outcomes for members of equality-seeking communities in case law in other areas,[83] it may be similarly beneficial in the context of technology-facilitated privacy invasions.

Third, the majority reasons' rejection of the Court of Appeal's location- and risk-based approach[84] at least implicitly rejects adoption of a victim blaming approach. Under the majority's approach, courts in future cases should not reject targets' assertions of privacy rights simply because they chose to be "in public" or to represent themselves in a certain way. This sort of interpretive guidance against blaming targets of privacy intrusions for their own victimization could prove significant in achieving survivor-centred outcomes in future cases involving TFVA.

Fourth, and related to the third point, the concurring reasons' explicit adoption of Elaine Craig's analysis of sexualized violence as an attack on the sexual and bodily integrity of the target, rather than a condemnation of sex

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80 For further analysis of technology-facilitated intimate partner violence in the context of Canadian case law, see Aikenhead, "Revenge Pornography", *supra* note 11.

81 See Bailey, "Implicitly Feminist?", *supra* note 69 at 212-215.

82 See Office of the Commissioner for Federal Judicial Affairs Canada, *Statistics Regarding Judicial Applicants and Appointees* (2018), online: < www.fja.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-eng.html > (majority of appointees between October 2016 and October 2018 were white, and demographic statistics were not collected before the government's 2016 reform to superior courts judicial appointments process); Nneka MacGregor & Shelleena Hackett, "Declarations of Truth: Documenting Insights from Survivors of Sexual Violence" (2020), online (pdf): *WomenatthecentrE* < www.womenatthecentre.com/declarations-of-truth/ > at 122 (all judges in the 13 cases live monitored were white).

83 See e.g. *R. v. Mabior*, 2012 SCC 47 (S.C.C.); *R. v. Ipeelee*, 2012 SCC 13 (S.C.C.) (interpreting the "Gladue" principles under s. 718.2(e) of the *Criminal Code* whose equality-promoting effect is highly contested); *R. v. Barton*, 2019 SCC 33 (S.C.C.); *R. v. Sharpe*, 2001 SCC 2 (S.C.C.).

84 *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at para. 48, 63.

as shameful and improper,[85] and the majority's specific reference to sexual integrity,[86] could prove important for achieving equality-affirming outcomes in the context of technology-facilitated privacy intrusions. Under this analysis, courts' attention in future cases should be directed toward understanding such intrusions as attacks on targets' right and capacity for self-determination in relation to their bodies and representations thereof. By directing attention away from shaming around sexuality and toward rights of self-determination, this aspect of the Supreme Court's reasons could play an important role in achieving survivor-centred outcomes in future cases, especially those involving subsequent distribution of previously privately shared intimate images.[87]

With the equality-affirming potential of the *Jarvis* reasons in mind, we turn now to consider the case's impact on achieving survivor-centred outcomes for members of equality-seeking communities in subsequent case law.

5. THE IMPACT OF *JARVIS* ON SUBSEQUENT CASE LAW

In order to prepare this analysis of the impact of *Jarvis* on subsequent case law, we conducted a search using the Canadian Legal Information Institute (CanLII) database in September 2020, which revealed 56 cases citing *Jarvis* in jurisdictions across Canada in a variety of areas including section 278 applications, sexual assault, voyeurism, child pornography, criminal harassment, NDII, section 8 *Charter* challenges, wrongful dismissal cases and interpretation of a number of miscellaneous statutes. Overall, *Jarvis* appeared to have little positive effect in terms of producing equality-affirming reasoning by subsequent courts.

Given the particularly disparately negative impacts of sexualized privacy-invasive TFVA on members of equality-seeking communities (especially women and girls) as discussed above, we narrowed our review to consideration of cases involving voyeurism, NDII and section 278 applications, in which sexualized privacy-invasive forms of TFVA seemed more likely to be raised. This left us with 16 cases (8 relating to voyeurism,[88]

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[85] See *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at para. 127, citing Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012).

[86] See *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at para. 48-49, 52-53, 85.

[87] All of that said, aspects of the concurring reasons could also be quite problematic in terms of future achievement of survivor-centred outcomes for at least two reasons. First, they mandate consideration of a much narrower range of context in interpreting targets' privacy rights. Second, they suggest that determinations of whether a target's sexual integrity has been violated should centre primarily on "objective" interpretations of whether the impugned conduct or images were intended to be sexually stimulating to others, rather than on the target's own perception and understanding of their impact: See Bailey, "Implicitly Feminist?", *supra* note 69; *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at paras. 144-145.

[88] See *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.); *R. v. Downes*, 2019 BCSC 992

1 relating to NDII,[89] and 7 relating to section 278 applications[90]) in which *Jarvis*' equality-adjacent reasoning was applied with mixed results in terms of achieving survivor-centred outcomes.

In all of the voyeurism and NDII cases we reviewed, judges concluded that survivors held a reasonable expectation of privacy in the circumstances. Moreover, the reasoning in the judicial decisions was attentive to the factors laid out by the majority in *Jarvis* and turned toward the broader social context and/or relational themes affecting the survivors' lived realities.

Our review of section 278 decisions involving survivors' reasonable expectations of privacy over records yielded mixed results in terms of survivor-centred outcomes. Decided in the wake of more equality-explicit amendments to section 278 and related case law,[91] *Jarvis* seemed in at least a few cases to have played some role in strengthening the privacy/equality connection by incentivizing better-contextualized privacy analyses in an area where results of feminist reform remain slow-going. While in the past section 278 hearings tended to concern survivors' privacy over counselling records, section 278 is now commonly used by defence counsel when seeking to adduce electronic communications, photos or videos about the survivor to weaken their credibility and/or reliability at trial. This interplay between privacy, equality, and technology in section 278 made *Jarvis* a relevant guiding precedent, and on occasion, the majority's contextual approach was imported into section 278 privacy analyses in ways that could be seen as consistent with survivor-centred outcomes for members of equality-seeking groups.

With this general overview of our findings in place, we now turn to focus in more detail on the handful of cases in which *Jarvis* appears to have played a *positive* role in producing the types of equality-affirming survivor-centred outcomes identified in Pamela Hrick's above-noted framework. As discussed above, achievement of survivor-centred outcomes was certainly not the norm in the cases we reviewed. However, we have chosen to focus on the positive outcomes in hope of better understanding which kinds of approaches and analyses may hold more potential for producing survivor-centred outcomes in subsequent cases.

(B.C. S.C.); *R. v. Downes*, 2020 BCSC 177 (B.C. S.C.); *R. v. Trinchi*, 2019 ONCA 356 (Ont. C.A.); *R. v. Jones*, 2019 ONCJ 805 (Ont. C.J.); *R. c. L.L.*, 2019 QCCQ 2845 (C.Q.); *R. c. Comtois*, 2019 QCCQ 7920 (C.Q.); *R. c. Comtois*, 2020 QCCQ 2071 (C.Q.), reversed in part *Comtois c. R.*, 2020 CarswellQue 11102 (C.A. Que.).

89 See *R. v. Borden*, 2019 NLPC 1318A00651 (N.L. Prov. Ct.).

90 See *R. v. A.M.*, 2020 ONSC 1846 (Ont. S.C.J.); *R. v. F.A.*, 2020 ONCJ 178 (Ont. C.J.); *R. v. Ali*, 2020 ONCJ 8 (Ont. C.J.); *R. v. Mai*, 2019 ONSC 6691 (Ont. S.C.J.); *R. v. W.M.*, 2019 ONSC 6535 (Ont. S.C.J.); *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.); *R. v. I.P.*, 2019 NLPC 1319PY00003 (N.L. Prov. Ct.).

91 See *R. v. Barton*, 2019 SCC 33 (S.C.C.); *R. v. Goldfinch*, 2019 SCC 38 (S.C.C.); *R. v. R.V.*, 2019 SCC 41 (S.C.C.); Bill C-51, *supra* note 61.

(a) Attention to Social Context Post-*Jarvis* and the Beginnings of an Intersectional Approach

A number of courts in subsequent cases deployed *Jarvis*' contextualized privacy analysis in ways that fostered a broader systemic understanding of sexualized TFVA beyond the facts of the individual cases before them. Privacy understood as a product and reflection of interconnected socio-political contexts stands in contrast to the prevailing neoliberal assumption that individualizes subjects apart from societal power structures.[92] Some post-*Jarvis* cases did explicitly recognize sexualized violence as a social issue connected to gender inequality, but, notably, this recognition only surfaced in cases involving sexual assault (inclusive of section 278 applications) and not sexualized TFVA like voyeurism or NDII. As mentioned above, this is likely because consideration of equality issues such as dispelling myths and stereotypes has been plainly spelled out by the legislature and in Supreme Court jurisprudence under the sexual assault and section 278 provisions. Nonetheless, mentions of the disproportionate impact of sexualized violence on survivors facing intersecting oppressions in post-*Jarvis* cases may mark the beginnings of an intersectional conceptualization of privacy, which sees survivors' lived realities as embedded in socio-political contexts and constructed in the face of developing technologies which shape privacy norms and expectations.

Equality and equality-related considerations such as the gendered nature of sexualized violence were mentioned in 4 of 7 post-*Jarvis* section 278 cases that we reviewed, but were rarely meaningfully elaborated upon in judicial reasoning beyond the ticking of a rhetorical checkbox. For example, in *R. v I.P.*,[93] the accused brought an application pursuant to section 278.3 to adduce the survivors' school attendance records and assert his right to full answer and defence. Though Justice Gorman acknowledged the section 278 provisions "sprang from a recognition of privacy and equality interests" as noted by the Supreme Court in *Mills*,[94] and that privacy is not an all-or-nothing concept as explained in *Jarvis*,[95] the chance to strengthen the privacy/equality connection was ultimately lost. In dismissing the application, Justice Gorman concluded the records lacked significant enough probative value to warrant overriding the survivor's privacy interests. Equality interests, though mentioned, were not an explicit factor in the reasoning leading to this outcome, and this was the trend for most of the post-*Jarvis* section 278 cases that we reviewed,[96] with one notable exception – Justice Chapman's reasons in *R. v. M.S.*,[97] which provided general guidance on the interpretation of Bill C-51's amendments to section 278.

[92] See Hrick & Aikenhead, *supra* note 77.
[93] *R. v. I.P.*, 2019 NLPC 1319PY00003 (N.L. Prov. Ct.).
[94] See *R. v. I.P.*, 2019 NLPC 1319PY00003 (N.L. Prov. Ct.) at para. 5.
[95] See *R. v. I.P.*, 2019 NLPC 1319PY00003 (N.L. Prov. Ct.) at para. 5.

In *R. v. M.S.*, Justice Chapman integrated aspects of the contextual approach from *Jarvis* with other statutory and jurisprudential sources, yielding an analysis with promise for achieving equality-affirming, survivor-centred, and intersectionally informed outcomes. Justice Chapman's reasons relating to survivors' privacy and equality drew on: (a) the section 278 provisions, (b) *R. v. Mills* dealing with section 278, (c) *R. v. Barton* dealing with section 276, and (d) *Jarvis*, ultimately leading to a list of considerations that explicitly engaged with equality and intersectionality.[98] In *M.S.*, a young person was charged with sexual assault. Defence counsel was considering introducing a variety of digital communications (including photos, videos, text messages and social media posts) involving the complainant[99] that were in the accused's possession, in order to cross-examine the complainant at trial.[100] The issue was whether the accused had to make an application pursuant to section 278.93 in order to do so. The determination of that question turned on whether these digital documents constituted a "record" under the recently amended section 278, and concomitantly, whether the complainant held a reasonable expectation of privacy in relation to the documents. Justice Chapman ultimately found that a section 278 application was necessary before the defence could introduce into evidence any text message, social media posting, photo or video involving discussion of sexual activity and/or sexual innuendo, and that (subject to additional information/context) the complainant had an ongoing reasonable expectation of privacy in text messages between her and the accused that contained personal information and details of daily activities (even where the content was non-sexual). The outcome of determinations such as these could have important effects on the rights of

[96] Equality was mentioned but not engaged with in the reasoning: see *R. v. A.M.*, 2020 ONSC 1846 (Ont. S.C.J.) and *R. v. Mai*, 2019 ONSC 6691 (Ont. S.C.J.).

[97] *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.).

[98] The list from *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 50 included: "If [the record] is not sexual history is it something akin to sexual history? If it is not akin to sexual history, is it the kind of information that has historically, and improperly, been used to discredit sexual assault complainants? Such as their street-involved status or (non-sexual) mistreatment by others? In relation to photos/videos where were they taken? By whom were they taken? For what purpose were they taken and how did the accused end up with them? For social media postings, what is the nature of the social media application in question? Is it designed for public sharing of information or immediate destruction of the communication once sent? Is the social media posting of a child or an adult? What is the nature of the relationship between the parties that are communicating? For example, is it a relationship of trust or authority? Whose account was the information taken from and what are the privacy settings?"

[99] We use the term "complainant" in discussing cases where we were unable to confirm a criminal conviction resulted. We use the term "survivor" where we confirmed a criminal conviction resulted. The distinction is based purely on legal precision, and does not come from a place of disbelieving survivors of sexual assault.

[100] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 3.

survivors since, if an application is required, complainants then have the right to make submissions and to be represented by counsel at the admissibility hearing.

With privacy and equality intimately linked in both the analysis and practical effects of section 278, Justice Chapman's reasons incorporated *Jarvis* into an approach with equality-affirming potential for assessing survivors' privacy rights in relation to digital content already in the possession of an accused. Her reasons began by reinforcing the equality-explicit purpose of section 278 articulated in Justice Moldaver's pronouncements in *R. v. Barton*, which emphasized the importance of addressing "historic inequalities" faced by sexual assault survivors.[101] Not only did Justice Chapman frame her analysis in equality, she also explicitly recognized that survivors who experience multiple intersecting oppressions relating to Indigeneity, mental and physical disabilities, poverty, street-involvement, and childhood sexual assault are significantly more vulnerable to sexualized violence.[102]

Jarvis was specifically relied on in *M.S.* to deploy equality-related concerns as contextual factors in the privacy analysis. Relying on Justice Rowe's statement in *Jarvis* that "reasonable expectation of privacy" is a protean concept[103] that takes on meaning from the context in which it is used, Justice Chapman explicitly named the section 15 *Charter* equality rights of survivors of sexualized violence as an important part of the context at play in section 278 cases.[104] Further, Justice Chapman applied an intersectional approach to privacy by explaining that vulnerable groups facing intersecting oppressions are most documented and therefore disproportionately both more at risk of, and impacted by, privacy invasions.[105] In this way, *Jarvis* became part of an equality-affirming matrix of reasoning extending beyond the specific offence of voyeurism that could help to improve contextual analyses of survivors' privacy in sexual assault trials more generally. In addition, Justice Chapman's analysis in *M.S.* recognizes that privacy is constructed and intruded upon differently for multiply marginalized members of equality-seeking groups – a potentially important step forward in achieving intersectionally informed survivor-centred outcomes.

[101] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 19; *R. v. Barton*, 2019 SCC 33 (S.C.C.).
[102] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 49.
[103] See *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at para. 128.
[104] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 49.
[105] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 49.

(b) Post-*Jarvis* Decisions Avoiding "Victim-Blaming" Logic

By rejecting a risk-based approach to privacy, the Supreme Court in *Jarvis* steered subsequent voyeurism cases we reviewed away from victim-blaming logic – a logic that reinforces systemic injustices underlying sexualized violence.[106] A risk-based approach to privacy foists the burden on equality-seeking groups to guard against privacy violations, and also blames them if they fail to manage these risks. In a step toward achieving survivor-centred outcomes, all post-*Jarvis* voyeurism cases we reviewed adopted a contextual analysis, rather than a risk-based one.

Although the young girl survivor in *R. v. Jones*[107] was recorded while fully clothed and in a public location, Justice Bourgeois rejected a risk- and location-based analysis of privacy and found "no doubt" that Mr. Jones made the recordings on his cellphone for a sexual purpose given the context: the target of recordings was a young female child; Jones was a stranger to the child; and Jones had other child pornography on his phone.[108] In assessing the content of Mr. Jones' phone, Justice Bourgeois applied the Supreme Court's protection of children approach from *Sharpe*, noting the importance of context when applying the objective test for proof of sexual purpose under the definition of child pornography.[109] When determining sexual purpose under section 162(1)(c) of the voyeurism provision, Justice Bourgeois took cues from both *Sharpe* and *Jarvis* by placing the case in the broader gender-based context of sexualized violence. She reasoned that an adult man who had child pornography on his phone and was recording images of a young girl who was unknown to him must have been doing so for a sexual purpose. In concluding the young girl had a reasonable expectation of privacy in the circumstances (notwithstanding the fact that she was in a public location), Justice Bourgeois noted *Jarvis*' reasoning that privacy is not an all-or-nothing concept, that a recording can result in lasting and exaggerated harm compared to an observation, and that the purpose and object of section 162(1) is "to protect individuals, especially vulnerable individuals from sexual exploitation".[110] As such, *Jarvis* served as a catalyst in *Jones* for taking broader account of surrounding context, thereby avoiding location- and risk-based interpretations of privacy and narrow interpretations of sexual purpose that focus on sexual gratification or depiction of sexual organs.

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[106] See Statistics Canada, *Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces*, by Adam Cotter & Laura Savage (Statistics Canada, 5 December 2019), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.htm> (where 1 in 5 victims of sexual assault experience victim-blaming).

[107] *R. v. Jones*, 2019 ONCJ 805 (Ont. C.J.).

[108] See *R. v. Jones*, 2019 ONCJ 805 (Ont. C.J.) at para. 66.

[109] See *R. v. Jones*, 2019 ONCJ 805 (Ont. C.J.) at paras. 10-14.

[110] *R. v. Jones*, 2019 ONCJ 805 (Ont. C.J.) at para. 49.

In *R. v. De Jesus Carrasco*, Justice Goldstein similarly adopted a non-risk-based, contextual privacy analysis, finding that the survivor was in circumstances giving rise to a reasonable expectation of privacy when she was photographed and filmed being sexually assaulted by her manager in a basement office much of which was covered by a surveillance camera.[111] These images were subsequently shared between the manager and bar owner. The defence launched a risk-based argument that the survivor did not have a reasonable expectation of privacy because she knew the basement office had surveillance cameras. Observing from *Jarvis* that "context matters", Justice Goldstein found that the survivor had not been aware of the camera in the basement office (though she was aware of the camera system in other areas of the bar). Further, Justice Goldstein held that, even if the survivor knew about the cameras, she still reasonably expected not to be the subject of this type of observation or recording, just as the students targeted by their teacher in *Jarvis* had.[112] Justice Goldstein was also careful to denounce victim-blaming and discriminatory rape myths, clarifying that the survivor was not obliged to "fight back or speak out more forcefully", and rejecting the defence's submission that the survivor could not have been sexually assaulted because she went home with her perpetrator later in the evening.[113] We will discuss other instances in which *Jarvis* was cited in support of resisting myths and stereotypes associated with sexualized violence in the next section below.

The Ontario Court of Appeal in *R. v. Trinchi* also drew on *Jarvis*' caution against risk-based analyses, finding the survivor's privacy was violated after her intimate partner captured and distributed without her knowledge or consent screenshots of her while she was naked on a webcam.[114] While the survivor was argued to have "undertaken the risk" that her partner might take screenshots of her naked during an intimate webcam video chat, the judge rejected this risk-based analysis of privacy by pointing to other contextual factors outlined in *Jarvis*.[115] Applying Chief Justice Wagner's reasoning from *Jarvis* that for privacy purposes, being observed is fundamentally different from being recorded, the Court in *Trinchi* found that while a person expects their sexual partner will *observe* them unclothed, they can still reasonably expect that their partner will not *record* them unclothed without their consent.[116] Contextual factors like the nature of the conduct, the manner in which the recording was made, and lack of consent were determinative for the Court in *Trinchi*, leading it to

[111] See *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.) at para. 62.
[112] See *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.) at para. 62.
[113] See *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.) at para. 50.
[114] See *R. v. Trinchi*, 2019 ONCA 356 (Ont. C.A.) at para. 24.
[115] See *R. v. Trinchi*, 2019 ONCA 356 (Ont. C.A.) at para. 24.
[116] See *R. v. Trinchi*, 2019 ONCA 356 (Ont. C.A.) at paras. 27-29, citing *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at para. 38.

reject a risk-based analysis that blames survivors for contributing to the gendered privacy intrusions they experience simply by participating in sexual activity.

Similarly, Justice Chapman's reasons in *M.S.* drew on *Jarvis*' contextual, non-risk-based approach to avoid victim-blaming by interpreting the meaning of privacy under section 278.1 according to her understanding of realistic human expectations about technology use. As noted above, the defence in *M.S.* had indicated an intention to adduce at trial photos and videos of varying levels of intimacy, social media posts and messages from Instagram, Facebook, Whatsapp, and Snapchat, and text messages between the complainant and the accused. Justice Chapman recommended inspecting electronic documents contextually and from various angles when assessing a survivor's expectations of privacy in relation to them. Features like whether a communication was between two private individuals, whether it could be reasonably inferred that communications were to be kept private, whether a social media post was designed for public sharing or immediate destruction once sent, and how many followers the Instagram user had were all to be considered as part of the context.[117] These considerations shifted the privacy analysis away from the risk-based approaches adopted in several other post-*Jarvis* section 278 cases we reviewed.[118] Justice Chapman's non-risk-based approach in *M.S.* better accords with social realities by rejecting the argument that a survivor loses any reasonable expectation of privacy over messages, photos, or videos shared electronically solely because that data becomes part of a digital footprint. While sharing these items with the accused may diminish a survivor's expectations of privacy in terms of the accused possessing them, the survivor can still retain a reasonable expectation of privacy against their use in a criminal trial.[119] Thus, in *M.S.* the Supreme Court's rejection of a risk-based privacy analysis in *Jarvis* led to rejection of a similarly flawed risk-based privacy analysis for electronic records under section 278 that would blame survivors for using electronic communication and ignore their lived experiences in a digitized social reality.[120]

This *M.S.* analysis has also proven effective in avoiding problematic risk-based, victim-blaming logic in other section 278 cases.[121] For example, in *Her Majesty v. T.A.*, Justice Gomery found that although the chat histories sought to be produced were not sexually explicit in content, the

[117] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 53.

[118] Risk-based analyses were adopted in *R. v. W.M.*, 2019 ONSC 6535 (Ont. S.C.J.); *R. v. Mai*, 2019 ONSC 6691 (Ont. S.C.J.); *R. v. F.A.*, 2020 ONCJ 178 (Ont. C.J.); and *R. v. A.M.*, 2020 ONSC 1846 (Ont. S.C.J.).

[119] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 68.

[120] See Jordan Fairbairn, "Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age" in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens: Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's Voices* (Ottawa: University of Ottawa Press, 2015) at 229.

complainant still held a reasonable expectation of privacy in relation to them because they contained "thoughts, aspirations, feelings, friendships, social interactions and the details of their daily activities" as outlined in *M.S.*[122] Further, she rejected using the adversarial relationship between complainant and accused in a criminal proceeding as justification for limiting the complainant's expectation of privacy over records, as other section 278 post-*Jarvis* cases have done.[123] Relying on *M.S.*, Justice Gomery found such logic to be circular and victim-blaming with its "troubling implication that a complainant is somehow responsible for a potentially harrowing experience in the context of a sexual assault trial, based on her past poor choices about entrusting personal information".[124] Instead, Justice Gomery echoed Justice Chapman's partially *Jarvis*-inspired contextual privacy analysis for electronic records under section 278, listing factors such as the content of records, whether the records were shared only with the accused, and the nature of the relationship at the time records were shared as germane to the determination.[125] Tracing this context-informed privacy analysis from *T.A.* to *M.S.* and back to *Jarvis* demonstrates the potential for equality-affirming Supreme Court judgments to redefine courts' (and potentially society's) thinking around sexualized violence and TFVA, highlighting the philosophical and practical importance of addressing categorical imperatives like equality in judicial reasoning.

(c) Cultural and Attitudinal Shifts Promoted by *Jarvis*

Courts have a role to play in helping society to unlearn myths and stereotypes that are pervasive in contexts such as sexualized violence and TFVA. Such myths and stereotypes impede the court's truth-finding function by imposing rigid notions of the "ideal" victim (modest, chaste, engaged in low-risk behaviour), public/private appropriateness, "stranger danger", and the twin myths that a woman with a prior sexual history is less worthy of belief and more likely to have consented to the sexual activity at issue in a case.[126] Both the majority and concurring reasons in *Jarvis* note the importance of understanding sexualized violence such as voyeurism in terms of the sexual integrity of survivors.[127] Some of the post-*Jarvis* case law

[121] See *Her Majesty v. T.A.*, 2020 ONSC 2613 (Ont. S.C.J.); *R. v. Whitehouse*, 2020 NSSC 87 (N.S. S.C.).
[122] *Her Majesty v. T.A.*, 2020 ONSC 2613 (Ont. S.C.J.) at para. 39.
[123] See *R. v. W.M.*, 2019 ONSC 6535 (Ont. S.C.J.); *R. v. Mai*, 2019 ONSC 6691 (Ont. S.C.J.).
[124] *Her Majesty v. T.A.*, 2020 ONSC 2613 (Ont. S.C.J.) at para. 29.
[125] See *Her Majesty v. T.A.*, 2020 ONSC 2613 (Ont. S.C.J.) at paras. 36, 41.
[126] See Michael Flood & Bob Pease, "Factors Influencing Attitudes of Violence Against Women" (2009) 10:2 Trauma, Violence & Abuse 125; Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 622-623.
[127] See *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at paras. 48-49, 52-53, 127.

that we reviewed adopted this line of reasoning in ways that might contribute toward attitudinal shifts away from myths and stereotypes behind sexualized violence.

In *R. c. Comtois*, Justice Lacoursière cited the *Jarvis* majority's reference to sexual integrity and ultimately arrived at the conclusion that a custodial sentence was necessary to signal judicial disapproval of healthcare providers surreptitiously recording their patients.[128] Similarly, in *R. v. Downes*, Justice MacNaughton recognized that photographs can more severely violate sexual integrity than mere observation.[129] *Jarvis*' consideration of sexual integrity was also adopted in an NDII case, *R. v. Borden*, in which Justice Gorman cited the concurring reasons' explicit adoption of Elaine Craig's feminist scholarship, noting the alignment of the *Jarvis* sexual integrity analysis with prior Supreme Court decisions in *Ewanchuk, Hutchinson* and *Sharpe*.[130] Thus we see the potential ripple effect of *Jarvis*' incorporation of sexual integrity analysis in interpreting the voyeurism offence into other areas of sexualized TFVA such as NDII,[131] opening opportunities for expanded awareness of the privacy/equality connection. Further, the *Jarvis* concurring reasons' focus on sexual integrity has been cited repeatedly in subsequent cases involving sexualized violence,[132] arguably involving *Jarvis* in a broader push away from both characterizing sexualized violence as a matter of sexual propriety and from the sexist beliefs about the "ideal" victim that come with it.[133]

The *Jarvis* majority's contextual approach could also play a role in attitudinal shifts by helping courts in future cases to deconstruct binary notions such as appropriate/inappropriate, public/private, and sexual/non-sexual that form the patriarchal[134] underpinnings of myths and stereotypes in sexualized violence. Of these, as Lise Gotell has noted, the sexual/non-sexual binary has played a particularly problematic role as "slippery justification" for admitting evidence in sexual assault trials.[135] That binary

[128] See *R. c. Comtois*, 2020 QCCQ 2071 (C.Q.), reversed in part *Comtois c. R.*, 2020 CarswellQue 11102 (C.A. Que.) at paras. 63, 64, 81.

[129] See *R. v. Downes*, 2019 BCSC 992 (B.C. S.C.) at para. 141, citing the majority in *R. v. Jarvis*, 2019 SCC 10 (S.C.C.) at paras. 53, 62, 72.

[130] *R. v. Borden*, 2019 NLPC 1318A00651 (N.L. Prov. Ct.) at para. 45.

[131] See Cairns Way, *supra* note 65 for equality-promoting impacts of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.) and *R. v. Sharpe*, 2001 SCC 2 (S.C.C.).

[132] See e.g. *R. v. Stuckless*, 2019 ONCA 504 (Ont. C.A.) and *Manoharan c. R.*, 2020 QCCA 1120 (C.A. Que.) (court rejected contact with genitals as element of sexual assault). See also *R. v. J.K.*, 2019 CarswellNfld 203 (N.L. Prov. Ct.); *R. v. Friesen*, 2020 SCC 9 (S.C.C.).

[133] See Gotell, "Charter Implications", *supra* note 56 at 260.

[134] See Susanne Gannon & Bronwyn Davies, "Postmodern, Poststructural, and Critical Theories" in Sharlene Nagy Hesse-Biber, ed, *Handbook of Feminist Research: Theory and Praxis* (California: Sage, 2007) at 72. See also Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press, 1976) for Derrida's process of deconstruction which involves questioning and troubling binaries of Western metaphysics, and the historically constituted, assumed truths and taken-for-granted knowledge derived from them.

[135] See Gotell, "Privacy Not Enough", *supra* note 6 at 763 (provides an example where sexual

itself draws on dominant (heterosexual male) perspectives about what is deemed sexual or non-sexual, oversexualization of (especially Black and Indigenous) women's bodies,[136] and essentialist views of sexualized violence even though they have been formally rejected in Canadian law.[137]

For example, in *M.S.*, Justice Chapman's adoption of a contextual approach militated against narrowly focusing on the sexual/non-sexual contents of electronic communications. Instead, she emphasized avoiding reliance on myths and stereotypes, inviting courts in section 278 applications to ask whether the records were "akin" to sexual history, or could be used to discredit the survivor through some common discriminatory tactic like leading evidence about their "street-involved status or (non-sexual) mistreatment by others".[138] Ultimately, Justice Chapman found that digital materials relating to a survivor in the possession of accused persons should be vetted through a section 278 application not only where they are explicitly sexual in nature, but also where they are "potentially sexual" or "intimate in nature".[139] Justice Chapman also found that a survivor can have an ongoing privacy interest in text messages containing personal information between her and the accused. These outcomes reflect the fact that Justice Chapman's analysis moved beyond myopic focus on whether the information was sexual in nature, toward a broader, more contextualized approach that included "thoughts, aspirations, feelings, friendships, social interactions and the details of their daily lives"[140] in the category of personal information attracting a reasonable expectation of privacy.

Similarly, as noted above, Justice Gorman in *I.P.* applied *Jarvis*' contextual approach and found the survivor's school attendance records lacked sufficient probative value and were inadmissible. Observing from *Jarvis* that privacy is not all-or-nothing, and given the weighing of multiple interests set out in the section 278 provisions, Justice Gorman concluded that the degree to which the information contained in the records was

history evidence was admissible in *R. v. Crosby*, [1995] 2 S.C.R. 912 (S.C.C.) based on its non-sexual features even though non-sexual features are still framed by symbolically gendered sexual evidence).

136 Black female slaves in Canada were portrayed as "seducers whose charms (hapless) White men cannot resist": see Afua Cooper, *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (Toronto: HarperCollins, 2006) at 90.

137 Until 1983, penetration was a defining element of sexual assault: see e.g. Jennifer Tempkin, *Rape and The Legal Process*, 2nd ed (Oxford: Oxford University Press, 2002) at 155. On challenging the androcentric view of intercourse as the definitive heterosexual act, see Horowitz & Spicer, "'Having Sex' as a Graded and Hierarchical Construct" (2013) 50:2 Journal of Sex Research 139; Nicola Gavey, Nicola McPhillips & Virginia Braun, "Interruptus Coitus: Heterosexuals Accounting for Intercourse" (1999) 2:1 Sexualities 35. See also Justice Iacobucci in *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), an appeal involving sexual assault, following an "arbitrary distinction" based on the survivor's body parts which obscures the context of all circumstances surrounding her experience.

138 *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 50.

139 *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 60.

140 *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 72.

personal was not the only consideration when deciding survivors' privacy rights in relation to them.[141] In the context of criminal prosecutions of sexual offences, records outside a "highly personal context" (like non-sexually explicit school attendance records) did not automatically warrant disclosure without more careful analysis.[142] In *M.S.* and *I.P.*, *Jarvis* contributed to established and emerging groundwork aimed at deconstructing patriarchal binaries such as the sexual/non-sexual distinction. In this way, we see *Jarvis*' adoption of a contextual approach to analyzing voyeurism targets' privacy rights taking its place within a matrix of legislative amendments and jurisprudence in section 278 cases that mandate more careful assessment of the admissibility of survivors' records than was previously the case. Expanding the definition of "record" to include non-sexual materials broadens protections for survivors' privacy, challenges androcentric heterosexist norms about sex, and honours survivors' perspectives by taking into account socially nuanced approaches to consent instead of defaulting to arbitrary binaries in judicial reasoning.

Finally, in an effort to dispel the "stranger danger" myth, Justice Chapman noted in *M.S.* that sexualized violence perpetrators are typically known to their targets.[143] Tying this reality together with the new realities of our digitally networked world, Justice Chapman anticipated that it will be increasingly common for accused persons to possess private communications with and about survivors, given the ubiquity of texting and social media. Cognizant of this reality for survivors living in a digitized environment, she favoured a "nuanced approach to privacy" when examining text messages, where survivors' desire for confidentiality may be inferred if not expressed in the text messages, and privacy does not hinge on whether the communications are sexual/non-sexual in nature.[144] Contextual analyses like those in *M.S.* and *Jarvis* engage with the intersections among privacy, equality and technology, offering hope for a reframing of sexualized violence and TFVA in a manner that challenges cultural attitudes and better reflects and responds to the lived realities of survivors from equality-seeking communities.

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[141] See *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at paras. 11, 45.

[142] See *R. v. I.P.*, 2019 NLPC 1319PY00003 (N.L. Prov. Ct.) at para. 12.

[143] See Statistics Canada, *Police-Reported Sexual Assaults In Canada, 2009 to 2014: A Statistical Profile*, by Cristine Rotenberg (Ottawa: Statistics Canada, 3 October, 2017) indicating that the victims knew their assailants in 87% of cases where sexual assault charges were laid by police.

[144] *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 70.

(d) Centring of Survivors' Perspectives in Decisions Post-*Jarvis*

In addition to the survivor-centred outcomes already discussed (which in and of themselves centre survivors' perspectives), some of the post-*Jarvis* case law we reviewed drew on concepts of relationality from *Jarvis* to centre survivors' perspectives with respect to their relationships. The *Jarvis* majority's inclusion of relational power imbalances as a contextual factor to be considered in assessing reasonable expectations of privacy was particularly influential in a few of the cases we reviewed.

For example, the "unique" relationship between a young athlete and their coach who took photos of them in various states of undress in arena change rooms weighed heavily in favour of protecting young people's privacy in *R. v. Downes*.[145] Contextual factors from *Jarvis* also led Justice Lacoursière in *R. c. Comtois* to find a woman patient reasonably expected that her massage therapist would not surreptitiously record her partially naked body while he treated her.[146] Justice Lacoursière recognized the survivor was the vulnerable party in a patient-caregiver relationship involving a high degree of trust, and that this breach of trust and privacy affected not only the survivor's future willingness to seek healthcare, but the larger community's as well.[147] However, while Justice Lacoursière discussed these personal and societal consequences in relation to patients trusting healthcare professionals, the ways in which such abuses of power undermine the equality rights of this survivor and other members of equality-seeking groups subjected to sexualized TFVA were not raised.

Similarly, the employee-employer relationship in *R. v. De Jesus Carrasco* factored into Justice Goldstein's finding that the employee survivor reasonably expected not to be filmed being sexually assaulted "by her direct boss" in the basement office of her workplace.[148] Justice Goldstein relied both on *Jarvis* and section 162(1)'s purpose to protect "especially vulnerable people" for his assertion that the boss' conduct was the exact type of exploitative behaviour targeted by the offence.[149] Lastly, *Jarvis* infused relationality into the analysis of privacy for sexual assault survivors over their communications in *M.S.*. Justice Chapman's section 278 privacy analysis specifically queried the nature of the relationship between parties communicating by asking, "is it a relationship of trust or authority?"[150] This contextual factor is consistent with the language of the analogous factor set out in *Jarvis*, and similarly considers relational factors that contribute to the regulation of a survivor's sexuality. Properly

[145] *R. v. Downes*, 2019 BCSC 992 (B.C. S.C.) at para. 196.
[146] *R. c. Comtois*, 2019 QCCQ 7920 (C.Q.) at para. 43.
[147] See *R. c. Comtois*, 2019 QCCQ 7920 (C.Q.) at para. 43.
[148] *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.) at para. 65.
[149] *R. v. De Jesus Carrasco*, 2020 ONSC 4743 (Ont. S.C.J.) at para. 65.
[150] *R. v. M.S.*, 2019 ONCJ 670 (Ont. C.J.) at para. 50.

contextualizing individual cases within the larger relational and social matrices of power in which they arise expands opportunities for survivors' experiences to be recognized and respected.[151] This sort of engagement with survivors' lived realities could be an important step forward for developing meaningful legal responses for targets of privacy-invasive forms of TFVA more generally.

6. CONCLUSION

Privacy is important in a digital context, especially for members of equality-seeking communities who are disparately targeted by privacy-invasive forms of TFVA at the hands of individuals, corporations and the state. Any role that legal responses might play in addressing these phenomena is severely curtailed by the longstanding inability/unwillingness at common law to meaningfully take equality into account, especially where equality conflicts with rights such as privacy. In this context, equality-explicit privacy analysis seems more important than ever. Analyzing incursions on the rights of equality-seeking community members solely as matters of individual privacy has several risks: burying systemic political issues under the façade of individual legal rights; seeing non-intervention as the *only* solution in circumstances when affirmative action is required; colluding with myths and stereotypes used to shame members of equality-seeking communities (especially in relation to sexuality); and developing privacy analyses that are not sufficiently contextualized to account for the lived realities of members of equality-seeking communities.

From this perspective, equality-explicit privacy analysis could be key to survivor-centred outcomes for members of equality-seeking communities targeted by privacy-invasive forms of TFVA. Such analysis could contribute to legal analyses and responses in which survivors are treated with respect, they are not blamed for their own victimization, and the socially prevalent myths and stereotypes that constrain them are dispelled in favour of rich contextualized accounts of their lived realities across the spectrum of social locations. Historically, however, legislative and jurisprudential attempts at infusing equality-explicit privacy analysis into contexts such as sexual violence, particularly in relation to survivors' counselling records and sexual histories, have proven largely ineffective in achieving survivor-centred outcomes. This lack of success in no small part reflects the deeply entrenched intersecting systems of discrimination that pervade society more generally, which is in turn mirrored in the relatively widespread failure of courts to actively engage with and implement anti-discrimination, equality-based analyses.

[151] See Deborah L Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge, MA: Harvard University Press, 1989) on the problem of focusing on abstract rights in legal reasoning rather than the social context that constrains them.

Consistent with this trend, the Supreme Court's reasons in *Jarvis* once again avoided equality-explicit reasoning, this time in the context of the privacy-invasive, often technologically facilitated sexual offence of voyeurism. Nonetheless, *Jarvis* implicitly adopted a number of strands from anti-oppression scholarship that could be important for achieving equality-affirming survivor-centred outcomes in the context of privacy-invasive sexualized violence, including in technology-facilitated forms. The contextual, relational and sexual integrity approach to sexualized violence articulated in *Jarvis*' analysis of voyeurism survivors' privacy rights, while not equality-explicit, is at *least* equality-adjacent. But if equality-explicit privacy analyses have not been successful in achieving widespread survivor-centred outcomes, what chance is there that equality-adjacent reasoning such as that in *Jarvis* will do so?

Our analysis of the subsequent case law citing *Jarvis* suggests that its equality-adjacent reasoning is far from achieving *widespread* equality-affirming outcomes for survivors whose rights were considered in those cases. For example, risk-based, victim-blaming approaches continued to predominate in the context of section 278 cases relating to production of survivors' records. Nonetheless, our analysis reveals, at least in some cases, the integration of *Jarvis*' equality-adjacent reasoning into a larger pre-existing and developing equality-affirming matrix of case law and legislation, with seemingly positive effects on achieving survivor-centred outcomes in a handful of NDII, section 278 and voyeurism cases that take up *Jarvis*' invitation to contextual, relational, sexual integrity-focused accounts of survivors' privacy. To what extent such positive effects will spread more widely remains to be seen.

And while courts continue to grapple with how to give proper weight to equality rights even with legislative directions and guidance for doing so, survivors and their on-the-ground support networks turn increasingly to community-based approaches to achieve survivor-centred justice and grassroots organizing to advance social and political change. Alternative forms of justice are trauma-informed, survivor-driven and survivor-centred, recognizing that the legal system is often unsafe for survivors due to its systemically racist, sexist and colonialist roots which have historically disenfranchised Black and Indigenous peoples. Given this reality, symbolic mentions of equality by courts seem unlikely to counter the strong incentive behind sexualized violence to uphold deeply entrenched social narratives that benefit both state and socially privileged non-state actors. As long as equality remains implicit in judicial reasoning, the affirmative actions required to mitigate the social inequality underlying social issues like privacy-invasive TFVA seem likely to be obscured. In the circumstances, community-based and educational approaches targeting these underlying issues seem much better positioned to achieve the sort of social transforma-

tion that is needed. Meanwhile, the rights of members of equality-seeking communities targeted by privacy-invasive forms of TFVA hang in the balance.