The Annual Review of Interdisciplinary Justice Research
Volume 9, 2020

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The University of Winnipeg
Centre for Interdisciplinary Justice Studies (CIJS)
ISSN 1925-2420

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Introduction: Digitizing Justice

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More than two decades ago, Manuel Castells (1996: 464) wrote of the network society, enacted by light-speed digital information technologies, through which the pace of information flows begin to alter traditional notions of time and space. Digital networks are open structures, can expand without limit, and are the necessary instruments for a decentralized and global capitalist economy. Castells warned that this network society will increase individualization and exacerbate all forms of inequality. Castells was writing just as the internet was becoming all-pervasive, well before the rise of so-called "smart" phones and other "smart" devices. Since Castells' writing on the network society, digitization has changed our world drastically, perhaps even more than Castells had anticipated. Online and digital initiatives are transforming criminal justice practices and processes too. However, criminology and criminal justice scholars have yet to fully grasp the many ways that digitization is changing crime, law, policing, prosecution, punishment, and social life more broadly.

Although research on the digital is scattered among criminology and criminal justice scholarship, we contend that online and digital initiatives should be a central focus in criminology and interdisciplinary justice studies. Looking at digital, virtual, and online practices is ideal for interdisciplinary justice studies because these topics implicate a range of fields, including philosophy, cultural studies, and numerous social sciences, from geography to politics and sociology. Digitization processes and practices comprise theoretical, methodological, and ethical dimensions that beg further scholarly analysis (Capurro 2017; Brown & Toze 2017; Kernaghan 2014; Hui 2012). This ninth issue of *The Annual Review of Interdisciplinary Justice Research* (*IJR*) will explore how the digital world is reshaping crime and crime control as well as the broader field of interdisciplinary justice studies.

Theorizations of the digital and the virtual have resulted in some of the most original and innovative works to be published in academia in the past three decades (e.g., Poster 2001, 1995; Bogard 1996; Virilio 1995; Baudrillard 1995). We are now living in the era of big data (Smith et al. 2017; Chan & Bennett Moses 2016; Mosco 2015) enabled by digitization and the diffusion of computer technology. Today, computers are used to find aggregate trends in large datasets in novel ways that were simply impossible a generation ago (Mosco 2019). Criminal justice organizations also collect more data about our lives than ever before, using new technologies and tapping into new data streams, fundamentally shifting organizational risk practices (Hannah-Moffat 2019). People also produce and surrender data about themselves in staggering ways due to their relationship with digital technology (Tahir et al. 2018; Zuboff 2019).

Surveillance is becoming less a matter of people watching people as Marx (1985, 1988) discussed, and more about intelligent machines monitoring data streams. For example, offenders released in the community are increasingly subject to wireless, remote electronic monitoring and surveillance (Nellis 1991). Wireless and mobile devices are also providing new access to courtrooms, as court deliberations are now webcast to a consuming public (McDonald et al. 2015). Jails are also viewed online in a voyeuristic fashion (Lynch 2004). At the same time, new digital workflows for receiving, analyzing, and presenting evidence in police and court processes have emerged. These types of developments and practices are now being taught in law schools (White et al. 2015).

Online sources of information are changing the ways people understand and interact with the state and the criminal justice system (Roche, Pickett, & Gertz 2016). Online practices enable new kinds of digital agency (Karaian 2014, 2012; Long 2012). There are newfangled types of justice emerging, including cybersecurity vigilantes (Silva 2018; also see Wood, Rose, & Thompson 2019) who seek to expose wrongdoing and facilitate justice in non-traditional ways or in ways that usually work outside of the formal criminal justice system. For example, voluntary non-government groups such as Creep Catchers are now established in dozens of countries. Group members pose as online youth and try to catch people engaged in

online/internet sex crimes. Sometimes cyber vigilantes operate at the nexus of policing and the entertainment industry in ways that can alter police practices and justice outcomes (Kohm 2009). Public police struggle to keep up with these shifting digital and online practices (Dupont 2017; Karaian & Van Meyl 2015; Karaian 2014). Police may face barriers to investigating heinous online crimes because of legal decisions that become precedent and subsequently shape how interactions on the internet are regulated. As a result, the governance of crime in online and digital realms can foster complicated relationships between public police, telecommunications and tech companies, private citizens, and NGOs (Jewkes 2010; Yar 2013). It is also important to note that although technologies are changing, these processes remain normative and moralized (Gurusami 2019; Werth 2017).

There are also novel kinds of online and digital crimes, addictions and disorders (Shin et al. 2018), and new networks being created by online forums (Dupont et al. 2017; Prinsen, de Haan, & Leander 2015). Extreme forms of online pornography and violent videogames constitute "cultural zones of exception" allowing viewers/players to enact violent impulses largely constrained by the civilizing process (Atkinson & Rodgers 2016). Violent videogames such as the *Grand Theft Auto* franchise depict the pleasures of transgression, inviting players to creatively experience an online world of crime and disorder (Rowlands, Ratnabalasuriar, & Noel 2016). Networked and online gaming platforms connect game players worldwide and offer opportunities to enact fantasies of violence and transgression while providing opportunities for criminal exploitation and victimization — both virtual and real (Rowlands, Ratnabalasuriar, & Noel 2016). These virtual and online game spaces can also provide opportunities for resistive and countervisual representations of issues of race, crime, and social justice (Mazurek & Gray 2017). The social effects of representations of crime in digital and online media are the subject of considerable scholarly debate in fields such as experimental psychology. However, contributions on digital crimes and forms of justice from scholars working in the field of interdisciplinary justice studies are just beginning to emerge.

These shifts in crime and crime control are part of the broader digitization of the relationship between citizens and governments (Atif & Chou 2018; Prins et al. 2011; Papacharissi 2004). New forms of surveillance are emerging (Monahan 2016; Monahan and Mokos 2013), but new forms of digital citizenship are being established (Meares 2017; Jones and Mitchell 2016). With the onset of digitization in the 1990s, it was claimed that digital and internet initiatives might decrease hierarchy and inequality, though now it seems as likely that racial, gender, and other inequalities are exacerbated by this technological turn (Kim et al. 2018; Barbosa et al. 2018; Micheletti and Stolle 2008). Haiven, Brophy, and Anderson (2019) claim that legacies of empire, imperialism, and colonialism are found in new digital technologies like algorithmic processes, which reproduce and deepen inequality and oppression. Access to information is being digitized in the form of proactive disclosure, but open government initiatives online have been critiqued as flawed (Tkacz 2012). Access to justice can become hidden "behind a wall of technicity" (Johnson 2016: 28) as a result. What has been referred to as the "digital divide" (Huffman 2018) may well be reproduced in the criminal justice system.

What this means is there is strong justification to explore the forms and effects of digital injustice (Couldry et al. 2013) that new technologies create in Canadian society. There is also a need to explore how theories of justice apply to these new digital and online innovations and changes (Christians 2016; Ashworth & Free 2006). This issue of *The Annual Review of Interdisciplinary Justice Research* charts a path to interdisciplinary justice research on the digital and virtual, by bringing together a collective of papers that explore the intersection between crime, justice, law, and the digital from different disciplinary and theoretical perspectives.

Overview of *IJR* Issue 9

The volume opens with a research note by Sarah Esther Lageson. The author conceptualizes privacy loss as a collateral consequence of the existence and expansive use of digital criminal records. Lageson explains that in the age of digitization, digital records pertaining to a person's criminal justice involvement are so easily accessible that

highly sensitive information can be found "inadvertently" via a simple Google search. Drawing on privacy theory, Lageson shows that privacy harms constitute a serious and far-reaching consequence of existing and emerging processes of digitization in the realm of punishment and criminal justice. Digitization, the author shows, has created new forms of privacy inequalities that constrain people's everyday lives and choices in important and long-lasting ways, with marginalized groups being particularly affected.

Continuing on the theme of punishment, technology, and digitization, James Gacek's contribution provides a detailed overview and analysis of the state of electronic monitoring in Canada and beyond. The article draws attention to the ways electronic monitoring functions as a strategy of governance and control in shaping and often hindering the lives of criminalized individuals, specifically their civic and economic participation in society. Gacek concludes that electronic monitoring is not a benign form of community-based supervision but rather should be conceived of as an "alternative form of incarceration."

Shifting to digital forms of culture and the representation of crime and justice, Kevin Walby, Matthew Ferguson, and Justin Piché analyze digital displays in police museums as an example of the digital turn in museum curation. The article shows several entertainment-oriented images of digital displays that sanitize and simplify crime control and other images that naturalize the use of force and perpetuate myths of policing, downplaying harms associated with policing. The authors conceptualize these innovations as a way museums control knowledge and create categories of intelligibility that shape how museum goers understand the world. In the case of police museums, they claim digital displays are a form of camouflage that distracts or moves attention away from police controversies and violence. In addition to these representations as a form of distraction, using the concept of digital interpellation, they argue these displays force visitors to adopt a hegemonic subject position that boosts the ideology of police legitimacy and reinforces policing as a dominant social institution.

Also focused on the digital and visual culture, Christina Fawcett examines the concepts of suffering, retribution, punishment, and pain in a horror-themed video game. Analysis of the scenes in this video game reveals the extent to which meanings of justice and injustice are now communicated in digital and leisure platforms that reach broader audiences than formal criminal justice communications. Fawcett's analysis also reveals the extent to which identities are constituted in digital, visual, and participatory ways. Fawcett's analysis has implications for literatures on gaming, emotions, and justice.

Two contributions in this volume examine the digital within law and the legal process. Jane Bailey and Jacquelyn Burkell examine young people's perspectives on legal remedies for online attacks. The authors examine why young people are unlikely to use legal remedies for online bullying and harassment. Participants discussed difficulties pursuing legal remedies such as loss of control and increasing vulnerability experienced by victims. Instead, participants were most concerned with ways to minimize damage from hurtful/harmful messages including ignoring them, directly asking users to remove content, having mechanisms of communication in school systems, and holding platforms responsive to complaints. Participants were cautious in advocating for punishment of offenders, reinforcing the authors' conclusion that legal responses form only part of an effective response to online aggression and abuse and that existing legal remedies do not deal with the majority of concerns expressed by youth.

Alexandra Parada, Sandrine Prom Tep, Florence Millerand, Pierre Noreau, and Anne-Marie Santorineos examine how digital court records are processed, accessed, and used in contemporary Quebec. Demonstrating how legal and digital culture intersect, the authors explore how self-represented litigants interact with these digitized records and the implications for legal cases and access to justice. The authors also examine how lawyers and other legal workers interact with these digitized records. This work has implications for literature on access to information and access to justice in the digital world.

Lastly, two contributions examine aspects of justice and the digital in spaces and places beyond the formal criminal justice system.

Matthew S. Johnston, Ryan Coulling, and Jennifer M. Kilty engage in an analysis of competing discourses that arose on Twitter following the Jian Ghomeshi verdict as a way to contribute to progressive reform in sexual assault cases. They argue digital technologies such as Twitter shape our interpretation of time and space and show how the tweets accelerated democratic participation, are evidence of a diversity of voices, and how these digital responses (re)shaped social and political spaces. The authors focus on emotion as a way of knowing, and the digital as a forum to express emotion. They analyze the implicit knowledge that is revealed through emotion as a way to transform the criminal justice system and realize a more just and empathic understanding, and develop a more conciliatory and effective justice system.

Kemi Salawu Anazodo, Nicole C. Jones Young, and Rosemary Ricciardelli extend the theme of this issue in a novel and creative way. The authors draw on institutional theory and theories of positive deviance to analyze the way technology intercedes in socially responsible hiring practices. While access to information about criminal histories online can present challenges to individuals in the employment market, Anazodo and colleagues argue that technology can also be used in positive ways to achieve justice for groups typically disadvantaged in the employment market, such as released prisoners. Their provocative discussion culminates in a conceptual model for future research in this area.

It is our hope that this thematic issue of the *Annual Review of Interdisciplinary Justice Research* moves scholarship on crime, law, justice, and the digital forward in new and creative ways. The papers in this issue of *IJR* embody a diversity of perspectives and disciplinary positions that promise to open up new theoretical, methodological, and empirical insights into both digitization and justice. We invite readers to imagine new ways of approaching issues related to crime, digital, and the virtual in the 21st century and we present this issue of *IJR* as a critical step in that direction.

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Research Note: "Privacy Loss as a Collateral Consequence"

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Abstract

The digital age has raised important new questions about privacy rights, particularly in the collection and dissemination of personally identifiable data. In a justice context, these privacy questions are compounded by the stigmatizing nature of criminal records. While discrimination based on a criminal conviction has been long documented in social science research, and privacy conversations have been invoked in criminal record policy, less direct attention has been paid to the psychological and social privacy harms of internet-based criminal record disclosure, especially for non-conviction, sealed, and expunged records. This note situates digital and reputational harms amidst broader collateral consequences of criminal records by discussing the complexity of competing privacy norms and law and the racialized dynamics of digital records and surveillance. By focusing on reputation and privacy, this note suggests that public policy better incorporate protections for the accused against digital punishment.

Introduction

In a digitized world, criminal records are increasingly available at a keystroke to employers, landlords, and a curious public. Though this phenomenon is well documented in the United States, the digital release of police and court records has also been documented in Canada (Bailey & Burkell, 2013), the United Kingdom, and Sweden (Corda & Lageson, 2019). While criminal records, particularly court proceedings, are made public in the interest of government transparency, these records also contain multitudes of personal information about arrestees and defendants, including full names, birthdates, and addresses. The rise of personal information in public criminal records has brought troubling consequences for people who

have been arrested or charged with crimes, especially for those offenses that have been dismissed or expunged. And while there are efforts to regulate criminal record–based discrimination and public shaming (such as in the United States' Clean Slate efforts and Europe's Right to Be Forgotten online), there has been less discussion of how internet reputation and digital privacy rights should be addressed specifically within a criminal justice context, especially when data is classified as a public record and includes pre-conviction information. Given the availability of such records, this note considers the need to incorporate privacy as a collateral consequence of justice system interactions that take into account dynamics of inequality, surveillance, and due process rights.

Digitization, Disclosure, and Harms

Criminal justice records used to exist in practical obscurity in the drawers and basements of police departments and courthouses, but the digital revolution has dramatically changed this scenario, especially in the United States, making even the most minor of criminal accusations part of the public canon, easily searchable and retrievable through the internet. In America, the 1996 Electronic Freedom of Information Act encouraged government agencies to "use new technology to enhance public access to agency records and information." This legislation was followed by the E-Government Act of 2002, requiring online access to federal court records, and leading state courts to follow suit. Legally, the records of criminal justice proceedings are considered a public good and retrievable through the Freedom of Information Act (FOIA) and transparency laws that govern law enforcement, courts, and correctional facilities in America. The practical obscurity of paper-based records in some ways undermined the promise of FOIA — but it also offered subjects a degree of privacy by limiting access to records to people who were willing to make the effort to request records.

As a result, documents pertaining to a variety of criminal justice operations are now available on the internet. For instance, in the United States, a daily record of police arrests and jail inmate rosters have long been part of the public record as a way to monitor arrests. But these records also contain a tremendous amount of information

about the arrested suspect, such as their name, address, and photograph. For court records, there is a common law right to "access court records to inspect and to copy" (*Nixon v Warner Communications, Inc,* 435 U.S. 589 [1978]) in the United States, and with varying degrees of public access in Canada and Scandinavia. These records too contain lots of personal information about defendants, including bail amount, home address, or date of birth.

But when they existed only on paper, the damage to reputation was minor. The emergence of big data approaches to the personal information industry, alongside broad digitization, duplication, and online indexing of these records, has fundamentally changed their scope. As a result, however, this dramatically changed the reach of records from being an item a person had to *actively* seek out in person to a bit of information one can *inadvertently* discover through a Google search.

Criminal record data constitutes an especially damaging type of personal data, given that it brings a particular type of stigma. Further, the various forms of criminal records available today include a broad swath of data, including booking photos, jailhouse rosters, court records, and prisoner databases, are routinely bought and sold by data brokers and background check vendors (Solove, 2002; Conley et al., 2011). Even in the rare cases where expungement could seal a governmental record, these privately sourced records remain online unless the record subject identifies each source and serves their expungement order to the website publisher of every online platform that features their mugshot or criminal record.

A long line of research shows how criminal records impact people's lives, establishing the "collateral consequences" of a criminal record (Hagan & Dinovitzer, 1999; Pinard, 2010; Justice Centre, 2018). These harms are referred to as collateral consequences because they are located outside the criminal legal system and implemented by non–criminal justice institutions (Uggen & Stewart, 2015). Criminal records regulate access and opportunity across numerous social, economic, and political domains (Pager, 2008). Surveys and experimental audits of employers measure the discriminatory impact of a criminal record on hiring outcomes; in sociologist Devah Pager's

Milwaukee-based audit study, pairs of "testers" were sent to apply for entry-level jobs — one applicant with a criminal record and one (otherwise identical) applicant without such a record. Pager found that for white testers, there was a large and significant effect of criminal record on employment: 34% of whites without records received callbacks, while 17% with records received callbacks. For black testers, 14% without criminal records received callbacks, compared to 5% with a record. Thus, the effect of a criminal record is "40% larger for blacks than for whites," though men from both race groups faced significant discrimination based on their felony conviction (Pager, 2003). Subsequent research has showed that this discriminatory effect also occurs for non-conviction arrest records, in ways similarly patterned by race (Uggen et al., 2014).

Criminal records can also impact a person's ability to secure housing (Carey, 2004/5), especially for those groups already facing discrimination from landlords in more vulnerable housing markets (Roscigno, Karafin, & Tester, 2009). The marketplace for court-ordered eviction databases is rapidly growing (TransUnion SmartMove, 2018), incorporating secondary criminal record information, such as arrests (American Information Research Services, 2018). For instance, AIRS (American Information Research Services, Inc.) sells landlords access to an eviction database that uses publicly accessible data, including criminal records, that they pull using "data retrieval services from public records sources only" (American Information Research Services, 2018). Landlords can run quick, free searches and "deny tenants housing based on the few (sometimes inaccurate or misleading) facts they find online" (Caramello & Mahlberg, 2017). Digital criminal record disclosure has also been shown to produce a particularly harmful chilling effect on prosocial behaviors, such as volunteering and parenting (Lageson, 2016).

While these types of discrimination have been addressed by various types of public policy and regulation (such as limiting an employer's ability to use arrest records, laws for expungement and record sealing, and regulating background checks through the United States Fair Credit Reporting Act), the attendant reputational harms caused by record disclosure have not been examined or addressed in similar

depth. Privacy theory offers a helpful starting lens to understand the social and psychological harms of record disclosure.

Privacy Theory

In Canada, the right to privacy has been codified through government regulation (such as the 1983 Privacy Act) and further cemented in case law, such as in the 1988 Supreme Court of Canada Case, *R. v. Dymet*, where the court noted that the right to privacy "must be interpreted in a broad and liberal manner" and that "its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times." In Europe, the right to privacy is defined as a fundamental right, alongside the freedoms of expression and association. In contrast, the U.S. Constitution does not address privacy as a fundamental right. Instead, courts have defined this right through case law as "penumbral," where privacy is located in the shadows of the First, Third, Fourth, Fifth, and Ninth Amendments of the American Bill of Rights. Thus, when privacy is questioned, courts draw from more clearly articulated rights to develop a modern concept of privacy that encompasses the contradictory guarantees of transparency in government and fundamental individual rights of life, liberty, and the pursuit of happiness.

The concept of privacy has evolved over time, often in tandem with technological changes that gave governments and companies more power to collect and leverage personal data about people. Originally, the concept of privacy carried connotations of feelings of loneliness or isolation (Glenn, 2003), but Enlightenment-era thinking ushered in a more rights-focused view of privacy that associated the concept with the relationship between the individual and the state. As time when on, privacy became equated with autonomy, choice, and liberty, or as Judge Thomas Cooley defined it in the 1880s, "a right of complete immunity: to be let alone" (Cooley, 1880), a phrase also adopted by American justices Samuel Warren and Louis Brandeis in their key 1890 *Harvard Law Review* article, "The Right to Privacy" (Warren & Brandeis, 1890). Anticipating the acceleration of new communication technologies that could transform "whisper[s] in the closet" to messages now able to be "proclaimed from the house-

tops," Warren and Brandeis also offered the idea of privacy as a right to control information about oneself as a mode of selective self-presentation, laying the groundwork for future, legal concepts of digital and reputational privacy (Warren & Brandeis, 1890, 195).

Academic considerations of privacy also accelerated as concerns over data privacy and surveillance loomed larger. In legal academia, the digital transformation ushered in a rich body of work analyzing identity and privacy issues in a technologically mediated world. With a focus on how digital information is created and attached to people, legal scholar Jeffrey Rosen (2000) writes of the "unwanted gaze" of data-driven surveillance that observes and records our digital identity, combining disparate pieces of information from a variety of sources and stripping these data from their original context, and then using this information against people. This leaves us "vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences" (Rosen, 2000, p. 9). Daniel Solove (2002) agrees, describing the creation of "digital biographies" as an "unauthorized biography, only partially true and very reductive," pointing to an "aggregation problem" (p. 1137). When we allow government to share our data freely with private companies that haphazardly combine various information sources, the result is a "growing dehumanization, powerlessness, and vulnerability for individuals" (Solove, 2002, p. 1140). Digital personal information, posits Helen Nissenbaum, should be understood and evaluated by its "contextual integrity," which forces attention to the nuances of data, such as the subject, sender, recipient, information type, and mode of transmission (2009).

Social scientists have wrestled with how to understand privacy in various social contexts, how to incorporate social structure and inequality into privacy rights, and how to establish a solid legal ground for controlling personal information (Baghai, 2012). This view posits privacy as a "resource that is unequally distributed in society," which in turn means that the "production and management of privacy may create inequality among social actors" (Anthony et al., 2017, p. 15). Emerging sociological and criminological conceptions of privacy, then, not only ask questions about individual autonomy and control over one's personal information, but also about

access and equity to privacy rights at all.

Privacy Violations and Avoidance

Privacy violations create a chilling effect on people's behaviour, which is often a basis for the articulation of privacy rights. Organizations like the Privacy Rights Clearinghouse in California assert that, when a person's privacy is violated, they begin to avoid situations where personal information is gathered, effectively avoiding participation in civic and public life to try to control their information (Privacy Rights Clearinghouse, 2002). Research has shown this to be true within the criminal justice context, with studies showing that people with criminal histories purposefully "opt out" of prosocial situations, such as volunteering and voting (Bernburg & Krohn, 2003; Carey, 2004/5; Pager, 2008; Winnick & Bodkin, 2008; Thatcher, 2008; Uggen et al., 2014; Uggen & Stewart, 2015; Lageson, 2016).

Technology exacerbates these effects. Inequality researchers show that low-income people face a "matrix of vulnerabilities" as result of the collection and aggregation of big data (Madden et al., 2017), especially in their ability to protect personal information online, prevent digital privacy harms, and police their online persona. While privacy concerns are central to debates over how personal information is swept into technological transformations of society, the ability to exercise privacy is too often a privileged right. Sociologists have conceptualized privacy as access of one actor to another, making access a valuable resource in a field (Anthony et al., 2017). This might include access to information, access to particular types of information, and the ability to use information in particular ways, calling into question how privacy and access intersect with power, especially in a punitive institution like criminal justice.

Discovering one's own online criminal stigma can be shocking, surprising, and upsetting to the criminal record subject. Confronting digital criminal record stigma can lead to an attempt to "fly under the radar" to avoid having others discover the information (Lageson, 2016). This is akin to other forms of institutional avoidance documented in criminal justice research, such as in Goffman's

observation in her Philadelphia study of young men who purposefully avoided places, relationships, stable routines, and legal services as a method to "cultivate unpredictability" and avoid the threat of police contact (Goffman, 2015). Similarly, by introducing the concept of "system avoidance," Brayne (2014) quantitatively assesses these avoidance patterns documented in qualitative research. Her analysis shows that people with criminal justice experience are less likely to interact with "surveilling institutions," including medical, financial, labour market, and educational institutions. Having a multitude of online criminal records has a similar contribution to systems avoidance, and extends these avoidance techniques into digital spaces. By indiscriminately attaching stigma, online criminal records lead people to purposefully avoid situations that might induce an internet search for their name. This means avoiding participation in social and civic institutions or staying locked into less-than-desirable employment, housing, and relationships (Lageson, 2016).

The release and commodification of criminal records (particularly in the United States, but emerging in Canada and Europe [Corda & Lageson, 2019]) is potentially so widespread as to make privacy nearly impossible once a person is arrested, even if charges are never filed. At the same time, privacy violations — such as the public application of the criminal label — can be cause for people to disengage from digital and real-world contexts. In this way, the internet mimics the everyday experiences of disenfranchised people, becoming another system in which people do not have power or control over their representation.

Further, having the skillset and legal understanding required to claim privacy equity involves having access to a set of resources, privileges, and a particular type of legal consciousness. The outcome is that those *least* likely to be entangled in the criminal justice system are often best equipped to deal with the privacy and reputational impacts. Implicit in the structure of "digital punishment" is a predetermination of who gets to move on from an accusation, arrest, or conviction, and truly get the second chance promised in the proverbial rehabilitative aim of the criminal justice system (Lageson, 2020). Patterns of social and racial inequality in criminal justice operations are thus compounded into privacy inequalities, structuring

the impact of privacy harms to disadvantage those who are most vulnerable. Not only does digital punishment unequally stigmatize marginalized and socially ostracized groups, it exacerbates privacy inequalities because members of these already sidelined communities are less likely to have the ability to address, remedy, or overcome a criminal record (Myrick, 2013). Mass punishment is raced and classed at its roots, and thus it should come as no surprise that its offshoot, digital punishment, is so raced and classed as well.

Preservation and Identity

In the United States, there is concern that attaching privacy rights to the accused will undermine the notion of the public record. The blurred line between public records and technology companies has further complicated this matter as private companies monetize and publish personal information online. In contrast to the American system of allowing private companies to disseminate public records that are indexed into internet search engines, Europe has regulated privacy and identity through regulating technology companies and search results (including criminal records) though "Right to Be Forgotten" legislation. To further strengthen these privacy protections, most European countries restrict access to both pre- and post-conviction records of criminal processing (Jacobs & Larrauri, 2012).

In contrast, American governments opt for disclosure of criminal records, and American tech companies typically disagree with the Right to Be Forgotten. For instance, Google immediately challenged the EU ruling in a *Guardian* op-ed and argued that forcing the search engine to remove links "means that the *Guardian* could have an article on its website about an individual that's perfectly legal, but we might not legally be able to show links to it in our results when you search for that person's name. It is a bit like saying the book can stay in the library but cannot be included in the library's card catalogue" (Drummond, 2014). The *New York Times* editorialized that "the European position is deeply troubling because it could lead to censorship by public officials who want to whitewash the past. It also sets a terrible example for officials in other countries who might also want to demand that Internet companies remove links they don't like"

(The Editorial Board, 2015). Eugene Volokh (2017) wrote in the *Washington Post* that such a law is "unconstitutional under current First Amendment law, and I hope First Amendment law will stay that way (no matter what rules other countries might have adopted)."

These public pronouncements don't match neatly with public opinion; a 2018 poll found nearly nine in ten Americans support Right to Be Forgotten legislation in the United States (Trujillo, 2018), likely because people inherently seek control over their online identities. But when tech companies and First Amendment advocates like Volokh invoke the positive aspects of the United States having the right to publish and link to criminal records, he is implicitly drawing a broader cultural line between America, Canada, and Europe. He unwittingly demonstrates how cultural norms shape the development and application of privacy law, as well as the broader understandings of technology and its role in society. In this sense, the Right to Be Forgotten addresses what some see as a core philosophical divide between Europe and the United States regarding how digital information should be treated. The American view often posits that once information is online it should stay online, taking a preservationist approach that stands in contrast to a "deletionist" approach, which argues preservation and permanence represent an unrealistic view of how human memory works (Jones 2016, p. 102). Instead, the deletionist view posits, information is at the mercy of malleable processes of shifting memories and the passage of time. Viktor Mayer-Schönberger (2011), for instance, argues that digital documentation negates time, and argues that through "perfect memory, we may lose a fundamental human capacity — to live in the present" (p. 12). And digital memory, claims Meg Leta Jones (2016), "prevents society from moving beyond the past because it cannot forget the past" (p. 20). Privacy scholar Julia Powles (2015) agrees, arguing that a preservationist approach is "insufficiently nuanced to cope with the reality of our lives and the complexities of human existence … Since when has the internet become 'truth', or 'memory?' And since when has 'history' been reduced to Google's commercially prioritised list of an imperfect collection of digital traces?"

Rehabilitation, Privacy and Collateral Consequences

In many ways, technological innovation within the criminal justice system can be harnessed for positive ends. Transparency policy allows for governmental watchdogging. In the aggregate, data about police and courts can uncover systematic discrimination and bias and lead to better justice outcomes. DNA testing can exonerate an innocent person, facial recognition software can be used to identify victims of sex trafficking, and body-worn cameras can improve police accountability. But the reputational harms of criminal record disclosure do have real and lasting effects. People whose records are publicly disclosed on the internet have little recourse, particularly in the United States, and instead are forced to resort to digital and social avoidance as a response to privacy violations. The power to apply the criminal label now comes from many sources, including social media and crime watch websites, making stigma even more inescapable.

Plus, compilation, digitization, and availability of criminal records began to produce more public demand for records. This coincided with the rise of criminal justice operations, culminating in the era of mass incarceration of the 1990s and 2000s. Criminal record policy also grew more punitive. Sex offender registries, public notification laws, and the dissemination of records by both the public and private sectors are all symbols of a public that is ready and willing to single out criminal offenders and ensure that this label endures, even if these are shown to be ineffective or to carry unintended consequences. Megan's Law, passed in 1996, requires states to provide public notification of the identities and addresses of people convicted of sex offenses, but has shown mixed results when it comes to actually preventing crime. Registries may even increase recidivism.

Granting access to criminal records is a steadily popular political talking point, framed as a method for ensuring public safety. Yet, the criminal label has been shown to be largely ineffective for preventing crime, and in some ways can be criminogenic by hindering rehabilitation, leading to a so-called self-fulfilling prophecy (Lageson & Maruna, 2018). Public policy debates moving forward might focus on more centralized management of pre-conviction and court processing data, or limit the inclusion of private data brokers that

mine, duplicate, and sell criminal record data in the United States, Canada, and Europe. As concern over data privacy continues to grow, the time may also be ripe for criminal record reform, particularly amidst debates in the United States over increasingly popular "Clean Slate" record expungement policy.

In considering the consequences of criminal punishment, it is imperative to now include reputational and privacy harms amidst the growing list of collateral consequences of a criminal record. It is also key to situate the rather rapid growth of digital criminal record disclosure among other forms of "tough on crime" rhetoric that favours perpetual, public punishment. Reputational punishment has always been part of the broader punishment apparatus, but the net of people swept into such harms has grown far beyond those convicted of sex offenses or other high-profile crimes. Digital and informational harms are remarkably expansive by initiating data surveillance and privacy harms at the moment of an initial police contact and extending far beyond the payment of a fine or serving a jail or prison sentence. By attaching stigma at so many points across the justice system, these digital privacy harms are permanently stigmatizing as criminal records become a lingering part of the internet archive.

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In the Era of E-Carceration: Criminal Justice Trends and Concerns with Electronic Monitoring

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Abstract

Often considered as an "alternative to incarceration," electronic monitoring (EM) is widely promoted as a central method of reducing incarceration costs while ensuring public safety. Yet there remain questions regarding the use of EM which require further academic attention. Drawing upon a litany of cross-jurisdictional EM literature, this article identifies ongoing trends and concerns of EM. At present there are growing EM debates pertaining to privatization: the perspectives from offenders, operators, victims, media, and the public about EM, which ultimately progress the debate forward. In Canada the evolution of EM has been relatively slow and intermittent compared to its American and European counterparts; however, we are not immune to the challenges facing the use of EM as a fix to criminal justice system crises. The article concludes with a reflection on EM as *an alternative form of incarceration*; in the era of "E-Carceration" we are witnessing the use of technology to deprive people of their liberty and punish them (Kilgore, 2018). Challenging EM requires us to support humane solutions to human problems, rather than resorting to the answer EM provides.

Introduction

Faced with the problem of prison overcrowding and mass incarceration, many countries continue to consider alternatives to prison sentences. In an effort to establish more rehabilitative-oriented and less punitive sanctions, the electronic monitoring (EM) of offenders has become touted as one of the primary solutions to burgeoning prison populations. Nellis and colleagues (2013, pp. 4–5) define electronic monitoring as "technology [which] must be understood as nothing more or less than a form of remote surveillant

control, a means of flexibly regulating the spatial and temporal schedules of an offender's life." The technology has a chameleon-like character of a multi-use device, and the enhanced capabilities of monitoring offenders' pre-conviction, post-conviction, or post-release (Payne & Gainey, 2004). Generally, the offender has a tag attached to their ankle and is instructed to stay within close proximity to a transceiver installed in the offender's residence. The transceiver continually transmits radio frequency (RF) signals from the tag to a computer at a distant monitoring and control centre, via either the landline telephone system, GPS satellite system, or the mobile phone system (Nellis, Beyens, & Kaminski, 2013). As a relatively new way of controlling (and punishing) offenders in the community, EM has been taken up in varying degrees (either as localized experiments or nationwide schemes) in more than two dozen countries over the last several decades (Nellis et al., 2013).

Drawing upon a litany of cross-jurisdictional EM literature, this article identifies the ongoing trends and concerns of EM. While EM is considered an "alternative to incarceration" in the US and various countries in Europe (Nellis et al., 2013), and few meta-analyses on EM have occurred in the last two decades (see Renzema & Mayo-Wilson, 2005; Belur, Thornton, Tompson, Manning, Sidebottom, & Bowers, 2017), there remain questions in the use of EM which require further academic attention. As this article demonstrates, there are growing EM debates pertaining to privatization; the perspectives from offenders, operators, victims, media, and the public about EM, which ultimately progress the debate forward. The aim is to tour through some of the debates, connecting these discussions back to the Canadian case. In Canada the evolution of EM has been relatively slow and intermittent compared to its American and European counterparts (Wallace-Capretta & Roberts, 2013); however, we are not immune to the challenges facing the use of EM as a fix to criminal justice system crises (for example, see Gacek, 2019; Sparks & Gacek, 2019). The article concludes with a reflection on EM as an alternative form of incarceration; in the era of "E-Carceration" we are witnessing a time "where the home becomes [a] cage" and technology is used to deprive people of their liberty and punish them (Kilgore, 2018, n.p.). Challenging EM requires us to support humane

solutions to human problems, rather than resorting to the answer EM provides.

Tagging Offenders in the True North

EM has only recently been associated with sentencing, as its original emergence and development began as a new technological element of the Canadian correctional system. The original intention of EM in Canada was to enforce house arrest, and gradually it became "a community-based alternative to incarceration" (Bonta, Wallace-Capretta, & Rooney, 1999). EM technology has expanded in Canada without attracting controversy among either criminal justice professionals or the general public, and it has yet to experience some of the heated debates surrounding its use and implementation (Wallace-Capretta & Roberts, 2013). In this respect, Wallace-Capretta and Roberts (2013, pp. 44–45) contend that no single triggering event was responsible for the introduction of this form of offender monitoring in Canada: "[EM] simply emerged as a result of correctional policy transfer from the United States." The federal nature of the country has meant that EM, where employed across Canada, operates differently between the provinces and territories.

In Canada, the responsibility for criminal justice is shared among the federal, provincial, and territorial governments. The federal government is responsible for the creation of criminal law, while the administration of justice (such as police and court administration) falls within the jurisdiction of the provinces and territories (McDonald, 2015). As a result, this divided criminal justice jurisdiction has impacted the influence of EM insofar as it has not received a nationwide "roll-out" as has been the case in several European countries to date (Wallace-Capretta & Roberts, 2013). This divided authority provides provinces and territories with a reasonable autonomy over managing the needs and goals of their respective criminal justice systems and implementing changes to such criminal justice programs when appropriate or warranted. Therefore, while several provinces in the past have incrementally adopted the EM technology in response to institutional overcrowding, others continue to rely on human verification to ensure compliance with the

conditions of parole or temporary absence from prison (Wallace-Capretta & Roberts, 2013, p. 45; see also McDonald, 2015).

Indeed, EM can be described as a "sleeper issue" within the field of Canadian criminal justice (Wallace-Capretta & Roberts, 2013, p. 45). While some of the Canadian public has become gradually aware that offenders in the country were undergoing EM as part of their post-release program, most Canadians are familiar with the EM concept because of EM's "widespread exposure to US news media" (Wallace-Capretta & Roberts, 2013, p. 45). Unfortunately, this sleeper issue is a consequence of several facets of EM, such as (1) the limited and sporadic application of EM within Canada; (2) US media coverage of EM influencing the Canadian public's familiarity with the technology (as mentioned above); and (3) the absence of any high-profile Canadian case in which EM played a role (Wallace-Capretta & Roberts, 2013, p. 45).

In order to examine the effectiveness of EM, the federal correctional system, Correctional Service Canada (CSC), undertook a pilot study of the EM of federal offenders (Hanby, Nelson, & Farrell McDonald, 2018). A total of 294 EM participants who had ever been active on EM were compared to a control group of 294 offenders matched on demographic characteristics (e.g., gender, Indigenous status), offence and risk information (e.g., sex offender status, reintegration potential), and release characteristics (e.g., region of supervision, supervision type, special conditions, residency) (Hanby et al., 2018, p. iii). The findings of this study suggest that EM is being utilized by parole officers "as a discretionary tool to monitor supervision conditions and may contribute to decision making in the area of suspensions but not revocations of release or residency" (Hanby et al., 2018, p. iii). Interestingly, the federal EM pilot is not a mandatory program for offenders, and according to CSC, EM "is not considered an alternative to incarceration" (Hanby et al., 2018, p. 35). As McDonald (2015, p. 22) suggests:

The average annual cost to maintain an offender in a Canadian prison is over $115,000. In comparison, the cost of maintaining one year of electronic supervision…is approximately $37,626. If EM were truly

considered an alternative to prison, its comparative cost advantage would surely result in many more offenders sentenced to supervision under GPS and fewer to prison terms. The figures reported by Statistics Canada, however, show that the number of adults in sentenced custody remains stable and the number of adults in remand continues to increase in almost all provinces and territories (Perreault, 2014; Statistics Canada, 2015) clearly indicating that EM is not viewed as a serious, reliable alternative to prison.

However, Hanby and colleagues (2018, p. 35) assert in their CSC study that the technology "appears to have become a reliable way of monitoring compliance with geographical and/or curfew conditions in a way that was not previously available to corrections officials"; it even may assist in offender reintegration and improve public safety. This is interesting to note, given that more than a decade earlier CSC had already previously conducted an Electronic Monitoring Pilot Program (EMPP) in Ontario for federally sentenced offenders and reported inconclusive findings about the rehabilitative impact of EM (see Olotu, Beaupre, & Verbrugge, 2009). Nevertheless, if it is true that CSC no longer views EM as an alternative to incarceration, it begs the question of how this view differs from other jurisdictions like the UK and US where EM is considered both a discretionary tool *and* an alternative to incarceration (Nellis et al., 2013). Perhaps, to view it as an alternative opens the discussion up to further questions, such as whether we should be more concerned about the extension and delegation of the state's power to punish (Sparks & Gacek, 2019), or more generally, about the underlying culture of control pervading our understandings of the scope of the penal realm (Gacek, 2019; Gacek & Sparks, forthcoming). This may be a conversation CSC is not fully equipped to engage in yet. Nevertheless, avoiding these larger questions about EM leads us away from interrogating the realities of mass supervision in everyday life (McNeill, 2018). Future research across the federal, provincial, and territorial levels will need to further examine the community supervision outcomes of EM participants in more depth (Hanby et al., 2018, p. iii).

In sum, EM has developed in Canada in a rather haphazard fashion, and there has been no national debate about the utility and propriety

of subjecting offenders to this form of surveillance (McDonald, 2015). However, much like the rest of the international community, Canada needs to examine more closely the way EM operates and reconsider the technology's legitimacy and implications upon offenders, victims, and their communities. Canada may be socially, politically, and historically unique, but it is not immune to prominent EM debates currently on the rise internationally. Such debates include the privatization of EM and the perspectives from offenders, operators, victims, media, and the public about EM. As we will see in the following sections, the aims of EM for government, commercial, and civil society interests do not always interpenetrate, and when EM involves the inadequately examined delegation of the state's power to punish, a serious reconsideration of EM must be undertaken.

E-Carceration Inc.: EM and the Private Sector

The question of whether the daily monitoring of offenders should be contracted out to the private sector was and still is a highly contentious and political debate (Paterson, 2013). While such contracts can be different across countries and jurisdictions, in the US and the UK we see the private sector involved in the contracted provision of EM in two ways: technology manufacture and service provision (Nellis et al., 2013). However, some organizations combine both functions. For example, England and Wales, and Scotland have fully fledged private sector providers, contracted for five-year periods (Nellis et al., 2013). State agencies within the US have even tended to buy or loan equipment and do the monitoring themselves. Many of the business areas where EM and commercial criminal justice now flourish are based upon original developments in the US, and have inspired the development of new commercial crime control markets across the globe.

Paterson's (2013, p. 213) research on the development of EM in the context of international developments in private security and penal provision highlights the growth of the "corrections-commercial complex." The corrections-commercial complex is an endlessly recomposing and amorphous ensemble of profit-driven organizations, all of whom are contracted to provide services at various levels of

state administration. Similarly, Kilgore (2017, n.p.) refers to such organizations as "carceral conglomerates," companies that reach their "investment tentacles into several sectors of the prison-industrial-complex to garner profits from mass incarceration." Indeed, research conducted by Kilgore and colleagues (2018) suggests that four large private corporations control a majority of the contracts for EM of people on parole across the US. These companies make approximately $200 million per year just from these contracts, and the corrections-commercial market continues to grow (Kilgore, Sanders, & Hayes, 2018). Carceral conglomerates —GEO Group and Securus Technologies being the best examples —seek to penetrate a range of sectors of the carceral state, not just institutional ownership and management (Kilgore, 2017). As a result, information, resources (financial and otherwise), and influence flow between for-profit companies and organizations on the one hand, and professional and federal agencies on the other. Such a complex typically operates without public scrutiny, and both lobbies for and exercises enormous influence over corrections policy.

By drawing on the growth of commercial markets in the US, Canada, and England and Wales, Paterson (2013, p. 224) argues that the commercial markets in incarceration and social control have been driven by "the dual forces of neoliberal globalization and insecurity." Despite a lack of conclusive evidence that EM "works" in protecting the public and reducing offending, Paterson (2013, p. 223) indicates that such growth is driven by a fascination with "the potential of new technologies to deliver managerialist solutions to complex social problems." In effect, he suggests that by sub-contracting service delivery to the commercial sector, "central government is able to expand the crime control system, and…meet the political demand for enhancing security, while also deviating around fiscal restraints" (Paterson, 2013, p. 224). Arguably, this creates new problems for transparency and accountability within a fluid structure where relations between different agencies are both perpetually negotiated and are part of an ongoing political contest. As Sparks and Gacek (2019, p. 390) suggest, with the survival of the private company "dependent on its ability to raise revenue and remain competitive in the correctional market," not only could this impact the nature of

intervention and delivery of service, but one may question "whether it is ethical to charge fees for those who cannot pay," and what detrimental effects it may have upon their loved ones and communities. Especially if offenders and pre-trial defendants continue to exist as a consistent source of profit for these carceral conglomerates, one of the most disquieting results of imposing the role of revenue generator on these groups is they have become embroiled in a system which appears to reinforce oppression in distinct ways (Teague, 2016, p. 104, cited in Sparks & Gacek, 2019, p. 390).

Offenders'[1] and Operators' Perspectives of EM

As Payne and Gainey (2000, p. 96) suggest, punishment is experienced differently by different groups and individuals; EM causes some individuals to be unfairly punished, while others are not necessarily affected by the sanction. Tracing the development of EM programs in the US, the authors contend that research on EM must continue to explore the viability of these programs, and ensure that lines of communication and transparency between researchers, program officials, politicians, and citizens are and remain open (Payne & Gainey, 2000, p. 106). Furthermore, as institutions change, so should the standards and the role EM plays in the criminal justice system; therefore we must be mindful that evaluations of EM programs (regardless of their success) must continue (Payne & Gainey, 2000, p. 106). Finally, such evaluations have the potential to better fit offenders with supportive technologies and ensure a criminal justice system that operates as efficiently, effectively, and as humanely as possible (Payne & Gainey, 2000, p. 107).

Recent research conducted by CSC unpacks operators' (Hanby & Nelson, 2017) and offenders' (Hanby & Cociu, 2018) perspectives on EM. While Hanby and Nelson (2017) found that EM is not viewed by

[1] In this article I refer to "offenders" for the sake of convenience. However, I recognize that the term "offender" is contestable, and there are some that take issue with its use (for a discussion, see Brownlee, 2017).

staff to negatively impact the daily lives or relationships of offenders, the findings in Hanby and Cociu's (2018) study were mixed. Specifically, a total of 171 offenders participated in Hanby and Cociu's (2018, n.p.) study, and while "the majority of offenders reported that EM had no impact on their ability to comply with their conditions and programming…substantial proportions of offenders reported that EM did have a positive impact in increasing their ability to abide by geographic/curfew conditions (31%), avoid committing a new offence (18%), and accept responsibilities for their actions (31%)." Moreover, most offenders in Hanby and Cociu's (2018, n.p.) study reported that "EM had either a negative impact or no impact on various aspects of their daily lives and relationships," yet the main areas of concern where EM was reported by offenders to have a negative impact "were in the quality of job they could get (32%) and their ability to find a job (30%), as well as their relationships with their spouse/partner (29%) and friends (28%)."

Jones (2005) examined EM in several areas within England and Wales, indicating that while the rollout of EM was nationwide, there were slight differences in the implementation of EM geographically that influenced the experiences of monitoring officers as they went about their work. Such differences included the densities of populations within the urban areas, the busyness of traffic congestion, the distance for travel to remote or rural communities, the weather conditions, and the number of officers assigned to monitor a particular offender (Jones, 2005). With a similar focus upon England and Wales, Hucklesby (2008) examined the impact of standalone curfew orders imposed upon 78 offenders between April and August of 2005, and how EM factored into offenders' desistance from crime. Hucklesby's (2008) findings suggest that for some offenders, curfew orders reduce offending and contribute to desistance by (1) reducing offenders' links with situations, people, places, and networks correlated with their offending; and (2) by encouraging offenders to (re)connect with influences linked with desistance such as employment and family. Following this, Hucklesby (2009) then analyzed the same data collected to investigate offenders' experiences and attitudes about compliance to EM curfew orders. These findings indicated that the surveillance-based nature of the

curfew orders influenced offenders' decisions to comply, and that subjective perceptions of offenders about EM equipment efficiency played a role in their compliant behaviour. Such findings also take into consideration the consistent use of the (sub-)contracted monitoring company (Hucklesby, 2009; see also Hucklesby, 2011, 2013).

One study of 27 offenders subjected to EM in Belgium found that EM was not simply a "soft" alternative to imprisonment for those who experience it (Vanhaelemeesch, Vander Beken, & Vandevelde, 2014). The majority of respondents found EM to be both a penalty and a favour, in comparison to the physical confinement and restricted mobility inmates experience while incarcerated. However, there were mixed results in terms of the social life of respondents, as some felt slight changes in their routines and habits with friends and family members, while others experienced significant strain (Vanhaelemeesch et al., 2014). While the EM technology allowed respondents a greater allowance of flexibility to find and hold employment as they abided to their EM conditions, respondents overwhelmingly felt variations of restricted freedom. Such "false" or illusory freedom has been noted in Martin and colleagues' (2009) research as well, as offenders perceive and expect more freedom with EM than they get in actuality, which leads them to think of themselves as prisoners in their own home. The respondents in Vanhaelemeesch and colleagues' (2014, p. 281) research had reported that they felt limited in the use they could make of local space (such as within the immediate space outside of and surrounding the home), and those respondents who needed to rely on public transportation were "mainly tied to a particular geographical area." Other respondents had resented the limitations placed on their own home by the boundaries of EM, as some could not even go into their own garden or into the hallway of their building without triggering the EM receiver alarm installed in their residence. Such limits on freedom, even at the minute level of movement through and around the home or residential property, was one element of EM that made the experience more difficult for the respondents, increasing their temptations to violate EM compliance and transgress the EM boundaries placed on them (Vanhaelemeesch et al., 2014, p. 281).

Victims' Perspectives and Involvement with EM

Victim involvement in the use of EM can take on many forms. However, existing empirical knowledge pertaining to EM is mostly derived from small qualitative studies conducted in the US and in Sweden. While informative and useful, the ability to generalize from these studies' findings is limited. Recognizing these different penal cultures and criminal justice apparatuses, one must be mindful that, in terms of such small studies, there is the influence of bias in who chooses to respond and why. Nevertheless, a theme throughout this research is it becomes difficult for researchers studying victims' perspectives to obtain a representative understanding of victims' experiences with EM, a discussion to which we now turn.

According to Wennerberg and Holmberg (2007; see also Wennerberg, 2013), in Sweden the perspectives of both victims and their advocates seem to have shifted over time, as originally victims' groups expressed opposition to EM reforms due to what they perceived as a lack of understanding of its impact on victims. However, victims' perspectives of EM in Sweden since that time have been shown to be more mixed if not positive (Wennerberg & Holmberg, 2007; Wennerberg, 2013). In Wennerberg and Holmberg's study (2007), the authors conducted interviewed with 39 victims (22 females, 17 males) where the offenders had been placed on EM release. They attempted to obtain victims of violent crimes (ranging from sexual assault to grievous bodily harm and attempted murder) and sexual crimes for the study, in order to reflect the significant proportions of these types of offenders in EM release (Wennerberg & Holmberg, 2007). Given the proportion of participants in the study who had been a victim to a violent and/or sexual crime, a particularly interesting finding was that most victims expressed the view that they did not feel unsafe during the period wherein which the offender underwent EM. In fact, the authors' findings indicated that feelings of safety were increased with the knowledge that the offender was being monitored, and that protocols and alerts would be followed if the offender breached their EM conditions (Wennerberg & Holmberg, 2007). Furthermore, some respondents had believed that EM release was less harmful than

prison. Overall, the majority of the crime victims interviewed for the study showed positive perceptions "[of] the offender serving a sentence at home with electronic tagging" (Wennerberg & Holmberg, 2007, p. 20).

The notion of alerting victims has become increasingly significant with the development of EM technology. Although it is not currently used extensively, increasing numbers of European jurisdictions like Albania, the Republic of Ireland, the Netherlands, and Norway are piloting or incorporating *victim notification* into their EM schemes, as well as *victim involvement* into bilateral electronic monitoring (BEM) (Nellis, 2013). Empirical literature on BEM remains limited, but BEM can be accomplished using RF or GPS technology, or hybridized RF/GPS tags. According to Graham and McIvor (2015), there is currently in Scotland the capacity for victim involvement through imposing "away from" restrictions and exclusion zones which seek to prevent and reduce the chances of a monitored person approaching a specified place, such as a victim's home or a small or local business. This type of victim involvement is voluntary and requires the victim's consent, and it is currently used only in a relatively small number of cases (Graham & McIvor, 2015, p. 81). It is important to note that who is notified will depend on the jurisdiction and when, for instance, an alert may first be received by the victim themselves, by probation, by police, or by the EM service provider, or combinations of these people. Describing how this technology works with a standard RF-based arrangement, Nellis and Lilly (2010, p. 362) state that the victim's home is "equipped with a receiver sensitive to the signal from the offender's ankle bracelet [personal identification (PID) tag]; if the offender goes near the home, both the victim and the police are alerted." There are limitations to the RF-based arrangement, as this type of monitoring is limited to knowledge of whether the offender approaches the exclusion zone from which they are restricted. Additionally, such arrangements cannot account for the fact that victims are more likely to spend significant portions of time away from and outside the monitored exclusion zone.

Where GPS EM technology is used, BEM can involve victims carrying or wearing a device on their person, such as a device in their bag or pocket, or being tagged themselves (Graham & McIvor, 2015). In effect, the monitoring is not simply that of a specific place or property, "but tracking the location of the victim themselves in real time" (Graham & McIvor, 2015, p. 81). Indeed, Paterson and Clamp (2014) argue that the advent of BEM is a major shift from EM as an offender-focused approach to surveillance and punishment, to BEM as a victim-centred approach, prioritizing surveillance towards victim monitoring in the interests of their safety and protection. The notification of victims, as well as authorities (usually police) when alerts are generated, expands crime control beyond traditional realms of surveillance (Paterson & Clamp, 2014). However, Erez and Ibarra (2007) found mixed results, which conveyed the tensions and opportunities of BEM, whereas later research conducted by Erez (2009) indicated more positive perspectives about benefits from victim involvement. Erez and Ibarra (2007) conducted interviews with criminal justice professionals (n = 22) who worked with victims, and female victims (n = 30) of domestic abuse involved in BEM. Their findings suggest that numerous victims cumulatively developed a sense of safety over time with the advent of BEM, and described the transformation of their homes from sites of conflict to spaces of refuge and shelter (Erez & Ibarra, 2007). Furthermore, victims stated they were better able to relax and experienced reductions in fear and stress (Erez & Ibarra, 2007, p. 108). Some victims had even reported that they (and their children, if they were parents) felt that they could return to and resume an ordinary lifestyle again (Erez & Ibarra, 2007, p. 110).

When investigating the appropriateness and availability of the technology, it is important to remember that there are uncertainties about the technological functions and application of BEM "which may hinder effective operation at any given time" (Hoffman, 2014, p. 2). Some questions we must ask ourselves include: "[Is] the monitoring device receiving a GPS and cellular signal; is the device charged and working properly; is the victim carrying the device; did the offender approach the victim intentionally or unintentionally; does the victim know the quickest route to safety; [and] can law

enforcement arrive in time?" (Hoffman, 2014, p. 2). As Hoffman (2014, p. 2) contends, all functions with the BEM system "must operate flawlessly" and must be seamlessly coordinated with the victim's notification program and law enforcement's response "to enhance the victim's safety." In effect, Hoffman (2014) has argued that there is promise in both BEM and victim notification programs, so long as we understand the limitations and constraints of the EM technology.

Media and Public Opinion on EM

Internationally, there is limited research on public attitudes toward and media representations of EM (Graham & McIvor, 2015). In his study which documented and analyzed media coverage of EM bail pilots, Nellis (2007) argued that media discourses on EM in Scotland have been negative and skeptical. Such discourses have focused on the leniency of tagging offenders and the risk posed to the public through individuals charged with serious offences subjected to EM, while the "success stories" of EM have been avoided (Nellis, 2007). Media representations in England and Wales appear to have mixed findings, though overall there are still more negative media representations than positive in their orientation (Graham & McIvor, 2015). Such a mixture of results could be partly attributed to the introduction and expansion of EM in England and Wales, which was originally characterized by limited media attention and debate (Nellis, 2003).

Scandinavian countries such as Sweden and Norway have had significantly different experiences with media. For instance, Wennerberg (2013) argues that Swedish media tend to be relatively positive towards EM, despite some initial concerns by some media commentators that EM was not sufficiently punitive, would result in a mechanistic approach to offender supervision in the community, and was only suitable for people in relatively stable social circumstances. Per Wennerberg (2013), positive media depictions of EM were facilitated in part by a proactive and clearly defined media strategy by the Swedish probation service, by the gradual introduction and evaluation of EM with different target groups prior

to a national EM rollout and implementation, and by the absence of serious and high-profile incidents involving monitored people. Similarly, in Norway the majority of media representation of EM has been described as positive, following close liaison between media broadcasters and the Norwegian government both before and during the implementation of Norway's EM pilot (Kylstad Øster & Rokkan, 2012). In light of the initial opposition by political parties in Norway, the positive reception of EM by the media and the public has been viewed as remarkable, despite the fact that the original decision to initiate the EM pilot in Norway was described as "controversial" (Kylstad Øster & Rokkan, 2012, p. 90).

European and American research has attempted to explore public attitudes towards EM; however, these studies have tended to use samples of students (usually from discipline(s) of, or related to, criminal justice), which means that the studies' wider generalizability is unclear (Graham & McIvor, 2015). Research from the US has indicated that public attitudes regarding EM may vary per demographic characteristics of respondents like gender or ethnicity. For example, Payne and colleagues' (2009) study suggests that respondents from non-white minorities held more negative than positive views of EM. Such variances in demography, they argued, could reflect perceived inequalities in the use of EM with different ethnic and/or racial groups (Payne, DeMichele, & Okafo, 2009). Indeed, race and EM remains a pressing concern, particularly in the US, and future research must question whether the Canadian case is similar in this regard. Such a concern exists especially for groups that are not only oppressed by racism and poverty but are "people on ankle shackles trying to deal with mental illness" (Kilgore, 2018, n.p.). As Alexander (2018, n.p.) rightly suggests, EM is not an alternative to incarceration but rather a dangerous sequel to mass incarceration the same way that Jim Crow was a dangerous sequel to slavery:

If you asked slaves if they would rather live with their families and raise their own children, albeit subject to "whites only signs," legal discrimination and Jim Crow segregation, they'd almost certainly say: I'll take Jim Crow. By the same token, if you ask prisoners

whether they'd rather live with their families and raise their children, albeit with nearly constant digital surveillance and monitoring, they'd almost certainly say: I'll take the electronic monitor. I would too. But hopefully we can now see that Jim Crow was a less restrictive form of racial and social control, not a real alternative to racial caste systems. Similarly, if the goal is to end mass incarceration and mass criminalization, digital prisons are not an answer. They're just another way of posing the question.

In effect, we see how different jurisdictions incorporate media into public attitudes toward EM. Graham and McIvor (2015) argue that there is some (albeit limited) evidence which suggests that public opinions about EM can develop and change in association with the provision of educational information. However, it remains unclear "how much and what types of information…would [be required] in light of negative media depictions of EM" for meaningful changes in attitudes towards EM to be achieved (Graham & McIvor, 2015, p. 85).

Discussion and Concluding Thoughts

This paper was an attempt to galvanize attention towards the ongoing trends and concerns of EM in criminal justice, with the goal of applying these debates to existing knowledge of the Canadian case. The technologies used in EM continue to develop, and next generation "tagging" will likely (if not certainly) feature new capabilities (Jones, 2013, p. 475), especially if, as indicated above, victim involvement is to play a significant role in EM technology developments. As we have seen, for some, EM may appear as a progressive alternative to older forms of punishment. Yet for others, such as already marginalized and racialized offenders, the surveillant and controlling qualities of EM remain deeply troubling, and will have highly negative effects upon them, their loved ones, and their communities at large (for examples see Button, DeMichele, & Payne, 2009; Payne et al., 2009; Jones, 2013; Kilgore, 2017, 2018; Sparks & Gacek, 2019). As Kilgore and colleagues (2018, p. 13) conclude in their report on EM in the US:

EM has grave implications for the future in two ways. First, the spread of EM lays the groundwork for a new form of mass incarceration: locking people up in their homes and communities. As the capacity of devices increases, the possibility of more precisely and comprehensively restricting people's movement looms. Beyond house arrest, we could see a form of E-Gentrification with exclusion zones programmed into devices and areas of movement restricted according to demographics, income, criminal background, citizenship status, etc.

It remains difficult to discern whether EM, supplementing the growth and prominence of algorithmic risk assessment tools in criminal justice, will ever recede. It also seems probable that confluent interests from the commercial, governmental, and civil society sectors will, in the absence of robust interrogation, continue to extend the scope of penal supervision in the lives and communities of already marginalized people (Gacek & Sparks, forthcoming). The penal arm of the state is chronically overburdened, and apt to seek to generate additional capacity through innovative extensions, technologies, and socio-technical assemblages (Sparks & Gacek, 2019); put differently, the state seeks a fix, and EM provides a solution.

EM is more than a handy technology able to increase diversion and to decrease incarceration rates and costs; it is assisting in remaking conceptions of citizenship (Gottschalk, 2014, p. 290, cited in Gacek & Sparks, forthcoming). The interests of carceral conglomerates continue to dominant discussions of EM, extending their "carceral campaigns" (Gacek & Sparks, forthcoming) beyond the prison and into community life. EM widens a net that is becoming ever more diffuse (for one of the earliest examinations of EM in Canada suggesting this, see Bonta, Wallace-Capretta, & Rooney, 2000; see also Gacek & Sparks, forthcoming). It is creating an ever-growing group of outcasts within our society, making it difficult for them to gain meaningful employment and maintain positive relationships (Hanby & Cociu, 2018; Gacek, 2019). In sum, whether EM was considered a "community-based alternative to incarceration" (Bonta et al., 1999) or no longer "an alternative to incarceration" (Hanby et

al., 2018, p. 35), this article demonstrates a more theoretical and contextualized understanding of EM as an *alternative form of incarceration* is a warranted and timely endeavour (see also Kilgore, 2018).

As Hayes (2018a, n.p.) contends, regardless of our goals for pushing progressive criminal justice reform, we must "continue to be critical of solutions we consider to be alternatives to incarceration" (see also Alexander, 2018; Kilgore, 2018). The complex issues marginalized groups experience are exacerbated when we neglect the worrisome effects of EM. Indeed, despite evidence that offenders and their families might be favourably disposed to EM, efforts to "disentangle the idea of EM as a potentially usual supervision tool from its delivery by a despised profit-seeking provider" have not been achieved (Nellis, 2016, p. 119), and Canada is not immune to these types of discussions or concerns. While we live in a political moment where the demand to decarcerate is ushering in a new wave of criminal justice reforms, "if we ignore how electronic monitors create digital prisons…we run the risk of replicating the same forms of punishment" (Hayes, 2018b, n.p.). As Kilgore and colleagues (2018, p. 14) remind us:

When people have done their time, they should be set free. Instead of using technology to further restrain and punish people released from prison, authorities should be mobilizing technology to provide employment, education, training and other opportunities to get individuals moving down the path away from prisons and jails and toward contributing to the development of their community. This imperative is particularly crucial in the communities of color that have been hardest hit by mass criminalization and mass incarceration. It is time to challenge E-Carceration and build genuine alternatives to the prison industrial complex that put resources into communities, not punitive surveillance technology.

Bluntly and subtly, EM leaches into the everyday spaces and places of life for impoverished, marginalized groups and communities alike; in the era of E-Carceration, such social awareness is too essential to evade any further.

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"Take a Look at Yourself": Digital Displays at Police Museums as Camouflage

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Abstract

Museums are sites where members of the public learn about history and dominant social institutions. One little examined cultural and heritage site in Canada is the police museum. These sites are full of relics from the early 20th century that tend to depict a limited version of public police in Canada by focusing primarily on the establishment of police services. One emerging trend we have discovered in our fieldwork is that some Canadian police museums are moving toward digital displays. According to interviews with those working in these heritage spaces, their digitization initiatives are an effort to draw from best practices in the field of museum design and curation. It is also an attempt to connect with more diverse and younger audiences whom the police are supposed to serve. Drawing from critical media and information studies we liken these new digital displays at police museums in Canada to a kind of camouflage that (1) deters critiques, (2) distracts from major controversies that are unfolding concerning police, as well as (3) boosts the perception of police legitimacy and transparency. In our discussion, we draw attention to critical museum and curation practices that could be used to disrupt the current maintenance and promotion of the policing status quo that occurs within these cultural sites.

Keywords: digitization; media; police; police museums; ideology; screen culture; power

Introduction

Brick and mortar museums are vessels of history, and for that reason may not be thought of as the most fun or interactive sites to visit, especially among younger persons who readily have access to social and digital forms of media that shape how they make sense of, and engage with, the world around them. Many museums have responded to this development by implementing digital displays in cultural sites (Olesen 2016). We define digital displays as museum displays that use computer, electronic or digital technologies — rather than analogue or mechanical devices — to communicate and/or interact with visitors. The implementation of digital displays is meant to refresh the aesthetics of museums spaces (Bedford 2014; Bertacchini and Morando 2013; Thomas and Mintz 1998), appeal to younger visitors (Andre et al. 2017), allow some degree of visitor choice in the selection of content (Lydens et al. 2007), as well as provide more interactive displays and experiences (Chan and Cope 2015). Interactive digital signage allows museums or cultural sites to update content more effectively (Devine and Tarr 2019), while allowing visitors to access content within (Chan and Cope 2015) and beyond the walls of the traditional museum remotely through virtual spaces online (Shook et al. 2018). There is no shortage of tourism literature, both academic and industry, touting the benefits of digital displays (e.g., Andre et al. 2017; Bedford 2014; Murphy 2018). New companies specializing in digital displays at museums (Wright 2017) that are part of a growing industry now serve heritage sites seeking to digitize their displays.

Some penal history museums have tapped into this trend in museum design and curation. From prison to courthouse to police museums, digital displays are becoming more common. Yet, little research has been conducted on the role that these digital innovations in curation play in penal history museums or police museums specifically. Rather than view digital displays in police museums as markers of transparency that allow visitors to gain new insights into the backstage of police work, we conceptualize these innovations as one way museums control knowledge and create categories of intelligibility that shape how museum goers understand the world (Bennett 1995; Macdonald and Silverstone 1992; Hooper-Greenhill

1992). Contrary to the idea that digital displays boost transparency and openness as it relates to phenomena that are the focus of museums (Yoon and Wang 2014), here we examine digital displays as a form of camouflage that distracts or moves attention away from police-involved controversies and violence. We focus on two facets of this camouflage: representation as mere distraction and as channelling into hegemonic subject positions, notably the police officer as a societal guardian against "criminals."

This paper is organized in four parts. First, we review literature on critical media and information studies to conceptualize digital displays at museums. Second, we offer a note on method. Third, we analyze our findings from research at police museums across Canada. Drawing from critical media and information studies (Fuchs 2011) we liken new digital displays at police museums in Canada to a kind of camouflage that (1) deters critiques, (2) distracts from major controversies concerning police, as well as (3) boosts the perception of police legitimacy and transparency. Our inquiry focuses on how these displays digitally interpellate or hail (Althusser 1971) viewers and visitors in ways that legitimize policing as a dominant social institution. Fourth, we explain what our findings and arguments add to literature on cultural sites where the penal system is represented.

We also draw attention to critical museum and curation practices that could be used to disrupt the current maintenance and promotion of the policing status quo that occurs within these cultural sites. In so doing, we invite law enforcement organizations involved in memorialization work to, in the words of the Calgary Police Museum, "[t]ake a look at yourself" as a means of acknowledging and offering alternatives to the violence of policing.

Meaning, Museums, and Police in the Digital Age

Police museums are being established around the globe, often by police services themselves or ex-officers who have joined police or local heritage associations. Existing literature has examined how police museums communicate ideas about social control and force to visitors (e.g., Buffington 2012; Caimari 2012), as well as how these spaces obscure or simplify issues of violence and harm in society by

ignoring them or creating an us-versus-them dichotomy whereby criminalized persons are constructed as deserving of any fate that becomes them, including death at the hands of police (e.g., Jackson 2017; McNair 2011; also see Ferguson, Piché, and Walby 2019). This literature connects to broader literature on public police, memory, and meaning (Linke 2018; Phillips 2016; Palmer 2012; Pemberton 2008; Mulcahy 2000; Taylor 1986), which examines how police try to generate legitimacy, authority, and sympathy for their work among the citizens they serve.

More research is needed on the form and the content of representations at museum sites, and by focusing on digital displays we attend to both form and content in our analysis. Digital displays obviously involve new technology, which may be familiar to a generation raised on computers and smartphones. For Fuchs (2011) technology is not neutral, neither in its form nor in the content it conveys. The technology and ideas accompanying it are ideological insofar as these operate to communicate dominant ideas that promote the existing social order. Information and technology need to be understood in the broader context of critical political economy (Schiller 1988). Digital technologies promoted under the auspices of participation and openness are also ideological insofar as they tout the notion that information is free, accessible, and available (Stadler 2018; Bollmer 2018). The content is also ideological. According to Fuchs (2011), a critique of ideology should "uncover and deconstruct false reality claims, to show how these claims try to legitimize domination and to provide alternative analyses that explain the actual state of society" (p. 327). State agencies advance these false reality claims, sometimes strategically. In a sense, this paper explores the form and the content of digital displays or the ideological confluence we are observing in the form and content of police museum displays. We understand ideology as the pervasive set of ideas that reproduce structures of dominance (Hall 1985) including the "criminal justice" system. With our research we examine the ideas and material contexts that reproduce the idea that penal system agencies are necessary and socially valuable in contemporary society (Walby and Piché 2015a, 2015b).

For Reeves and Packer (2013), police have a history of using innovative media to boost their legitimacy with the public. From mug shots to Crime Stoppers, public police rely on media to circulate their messages, but also enlist citizens to their cause of social control. Digital media may allow police to reach even further, especially into younger minds, to shape messaging about police and social control circulating in given contexts more effectively. Reeves and Packer (2013) explain that an important ideal of police agencies is the digital ideal, which refers to "the rapid and flawless storage, translation, and dissemination of evidence and other data" (p. 361). Along with adopting forms of innovative media, the police are also increasingly looking for ways to monitor and control the digital and the virtual realm of communication and information sharing.

Electronic and digital forms of communication have erroneously been characterized as promoting openness and transparency (Barbrook and Cameron 1996). Digital media have the capacity to send messages and bring people together instantaneously (Pertierra 2018; Bennett and Segerberg 2012). Virtual or digital worlds are not only an escape from material reality, but are a way of creating new realities and meanings (Bollmer 2018; Kücklich 2009). State entities and actors, including policing organizations and police leaders, are interested in digital technologies not only because of efficiency, but because of the ability to communicate more rapidly and reach broader audiences (Schneider 2016; Reeves and Packer 2013). Digital displays also increase the perception of science-based communication (Isaac 2008) or the idea that the information contained in the display is scientific and factual.

Ritchie (2015) argues that forms of digital displays are designed to make us feel something for the state. Ritchie uses the notion of an affective economy to refer to the emotions generated by digital displays and state communications. Similar to printed displays (see, for example, Piché and Larsen 2009), the most blatant form of communication in this regard may be anti-terrorism communications that are meant to make citizens feel afraid, but also protected by state security agencies by alluding to the omnipresent threats to national security and efforts by authorities to neutralize them with the involvement of a responsible citizenry on the look-out for threatening

non-white others (Corbin 2017). In these ways, trust in and strong feelings for state agencies are fostered and sustained in museums.

State agencies are undergoing a process of datafication, which is the transfer of social action into online and digital forms (van Dijck 2014). Datafication can increase trust and legitimacy for a state agency. If data is mishandled or used in malicious ways, trust and legitimacy can decrease. The transfer of social action into digital forms could be seen as a strategy to increase trust and legitimacy for public police. Tolbert and Mossberger (2006) have found that e-government can boost trust and confidence in government if these mechanisms are viewed as respectable. While digital initiatives could boost citizen views of the state, this is contingent on the use of information being viewed as ethical.

In the process of revealing certain aspects of a given phenomenon, datafication and digitization can also conceal others. Such information is not without framing that limits access (Shapiro 2018). Digitized forms can appear open, yet be full of abstractions or ideological messages. The digital display can be a form of camouflage that creates obfuscation or misdirection that hails an individual as a subject of law, while appearing entertaining and arousing. State communication espouses a dominant ideology which people are interpellated to conform to (Althusser 1971). In this model, ideology operates through hailing (also see Montag 1995; Purvis and Hunt 1993). Ideology hails or calls out to people in the way that the police officer might shout to a citizen, "Stop! Police!" The process is spontaneous. When we stop and turn to face the officer we are constituted as a subject of law and liberal democracy. We internalize this belief so that the response becomes automatic. Such communication constitutes people as subjects and makes certain forms of consciousness possible, while rendering other ways of conceptualizing the past, present, and future as unthinkable or off limits. Museum curators may be more or less aware that they are engaging in this ideological hailing and creation of camouflage for police.

Bousquet (2018) reviews the relationship between the digital and camouflage. The thing about camouflage is that it is an attempt to

evade a particular kind of seeing. We argue police museum communications in digital form are a way of evading scrutiny from those who trust digital communications and do not have the attention span to look beyond or behind them. Stobiecka (2018) likewise argues digital displays in museums generate a form of escapism. Digital displays in museums are meant to create a sense of openness. However, new digital forms that may appear cutting-edge can actually vacate important content. The digital form appears more legitimate and believable, but the content can be more easily manipulated. Escapism emerges when some content is vacated because it is not cool or compelling. This can create a "quasi-sci-fi re-creation of past reality" (Stobiecka 2018: 12). The digital is an escape from the past. It is also a form of escape from the present when the displays obscure or ignore current contentious issues in policing.

Research Methods

As part of a larger project on police, courthouse, and prison museums in Canada (Piché and Walby 2016), which draws from sociology, visual studies, cultural studies, as well as criminology and "criminal justice" studies, we conducted observations at 23 police museums across Canada. Most of the museums in our sample are situated in police stations and/or funded by police forces or police associations. During fieldwork, research team members took detailed field notes on the displays and placards. Photographs of displays and placards were taken for use as visual data and for later reference. All textual and visual data have been analyzed using open coding to locate prominent themes. We include visual data here since these pictures provide a texture to our account that serves to enhance the credibility of our claims about such representations (Banks 2018). Data on digital displays were located in the larger dataset and analyzed thematically to locate subthemes. Interviews were conducted with curators and museum staff where possible. A guide informed these interviews, but participants were able to take the discussion in directions that they considered relevant. Interviews were transcribed. Most curators were associated with police organizations (e.g., ex-officers). With few exceptions, those who were trained in curation had a history of working in "criminal justice" or military museums, and were in this sense partial to social control agencies.

We focus on two facets of digital displays as camouflage: representation as mere distraction and as channelling into hegemonic subject positions (i.e., the police officer versus the "criminal"). Below, we focus on four museums from our datset that feature the most prominent digital displays. Not all police museums in Canada feature digital displays. This could be because of cost, since some types of technology must be purchased and consultants must be hired to program and install such digital displays on the museum floor. The absence of digital displays in some police museums warrants further investigation.

Digital Displays: Sanitizing and Simplifying

A hallmark underpinning the use of digital technologies is that they provide users with more control over what content they produce and consume (Lydens et al. 2007). This is an illusion because within each platform there are limits placed on what can and cannot be produced and consumed (Stobiecka 2018). This is true of police museums, where all possibilities offered through digital displays are mapped-out by those curating them, often with the institutional objectives of policing organizations in mind. Thus, while a police museum visitor may feel in control as they interact with digital content, they are making choices within venues where "all roads lead to Rome." In this case, Rome is the locale where all narratives encountered legitimize public police as a state enterprise that are said to exist to protect and serve the citizenry (Mawby 2002), rather than an entity that contributes towards the material and symbolic reproduction of capitalist relations (Hall et al. 1978).

One of the first displays at the Calgary Police Museum is called the Discovery Wall, which is digital, but also interactive (see *Image 1*). The material is a shorter version of content found elsewhere in the museum, but its interactive touch screens give visitors the impression they are making choices about what they are consuming. The parameters of the choices being made are already predetermined, so the choice is hollow at best.

Image 1

There is no possibility of creating your own frame as a visitor or adding your own story. There is no possibility of exploring ideas related to resisting police. One can only navigate sanitized histories of policing manufactured by police themselves.

There is another display on video surveillance, with the title "You're on Camera" (see *Image 2*). A video feed of the individual shows oneself looking at and being part of the display. The placard beside the screen instructs the visitor on police use of video surveillance. The display normalizes police surveillance and also suggests it has a playful, innocuous dimension. There is no information offered about the extent of the use of video surveillance by police in Canada (see Hier 2016). There is no mention of public street video surveillance in Calgary or assessment of body-worn cameras (St. Louis, Saulnier, and Walby 2019). There is no description of key cases or rulings regarding police video surveillance and egregious privacy violations (e.g., Lett, Hier, and Walby 2012). These missing significations end up simplifying and sanitizing the issue of police video surveillance.

Image 2

Some digital displays operate as mere distraction to the extent they focus on entertainment or offer content that portray aspects of police work in misleading ways. Sonet (2017) theorizes the types and functions of smartphone screens, and this analysis can be extended to museum digital displays. The show screen offers a bit more of an entertaining or alluring image. Doing so is a strategic tactic that museums use to boost levels of satisfaction among visitors (Vom Lehn and Heath 2005). Some of the screens and displays are not unlike those found in casinos. The colourful lights draw the viewer in. The point is to be flashy and command attention. Digital displays move police museums into the attention economy that includes social and digital media. However, for Sonet (2017) the advisory screen is a warning, a caution, and a number of other digital displays appear to be more oriented toward the advisory screen. There are a number of digital displays that position the visitor as someone who police might be interested in. The visitor is invited to think about the negative qualities of persons who are criminalized, reducing them to sheer "criminality."

For example, the display "Taking Meth? Take a Look at Yourself" at the Calgary Police Museum distorts the face of the viewer, and is meant to generate disgust and embarrassment (see *Image 3*). The display makes the use of prohibited drugs generally and meth use in particular to appear to be an individual problem, rather than a

phenomenon arising from social circumstances (Linnemann and Wall 2013). It also fails to mention the socio-economic context in which certain psychoactive substances are regulated by "criminal justice" entities that make drug production, sales, and consumption more dangerous (Carstairs 2006).

Image 3

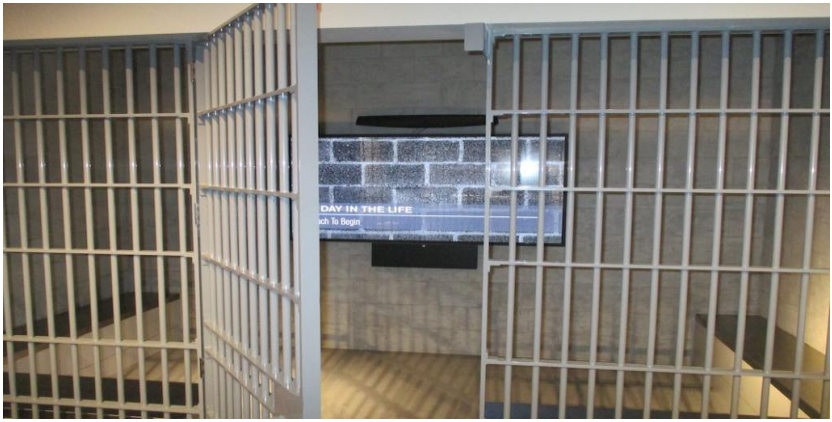
Other displays also obscure the realities of drug use and regulation in ways that vilify the subjects of policing. The display "Is There a Grow Op Next Door?" is meant to generate suspicion and castigation (see *Image 4*). It is out of touch with the movement toward decriminalization and home-growing of cannabis (Bear 2017). The display also encourages suspicion, instead of community. Again, given the lack of context and sociological content, these issues are simplified and sanitized.

The display "Day in the Life of an Imprisoned Person" at the Calgary Police Museum is meant to generate shame for criminalization (see *Image 5*). It follows the criminalized person through a number of scenes that show their life in disarray. It lacks context and humanization, capturing and representing a person on their worst or lowest day and reducing criminalization to a single event. Again, the display renders criminalization as an individual, rather than a social, problem. This digital display is a form of "police media" (Reeves and

Packer 2013: 376) that provides an insight into how reality looks through the police lens.

Image 4

Image 5



All of these digital displays have a "crime" prevention lens that the visitor is invited to adopt, advising against ending up like the proposed subjects who are the characters in these scenes. In so doing, they are not dissimilar to scared-straight programs targeted at kids in a stated effort to deter them from breaking the law (Maahs and Pratt 2017; Petrosino et al. 2000). The displays fail to address the systemic

and structural elements of criminalization, and instead adopt the standpoint of police advising individual viewers to be law-abiding citizens.

Adopting the Police Role

There are also digital displays that position the visitor as a police officer. One example is the police car simulator for kids at the RCMP Museum in Regina. Resembling a video game, kids are invited to position themselves as police officers chasing "bad guys" and enforcing laws (see *Image 6*). This naturalizes criminal law and criminalization, along with the notion that there are "bad guys" to track down and detain.

Image 6

By making the digital display appealing to kids, the RCMP Museum is able to generate an opportunity to try to shape their worldview with messages that encourage children to conform and consider what it would be like to become a police officer in the future.

At the same museum there is an adult size police car simulator (see *Image 7*). Adults get into the car and ride through a number of scenarios. Here there is more focus on the "blue light" or, in other words, the speed and the thrill of policing. These displays are meant to appeal to those who play video games and understand reality through such gaming experiences. This display reinforces stereotypes, this time about policing and the sense of excitement that

it purportedly creates for officers. There is no display on the mundane aspects of policing (Huey and Broll 2015), post-traumatic stress disorder associated with traumatic events when they happen (Henry 2004), the high rates of alcoholism (Violanti et al. 2011), or other negative aspects of the job. There is no display on rates of harassment within the RCMP (McPhail 2017) either.

Image 7

In Calgary, there are digital displays pertaining to the police force's helicopter. The visitor can position themselves as an officer monitoring urban space with military precision (see *Image 8*). In this sense, the museum goer can adopt the police role and vantage point. There is no mention of public controversies regarding police helicopters in Canada, which are viewed as part of a trend toward militarization (see, for example, Roziere and Walby 2018). This is a form of digital escapism (Stobiecka 2018) insofar as the material form of policing and the injustices it can create are eschewed by a digital display that positions the viewer as a police action hero.

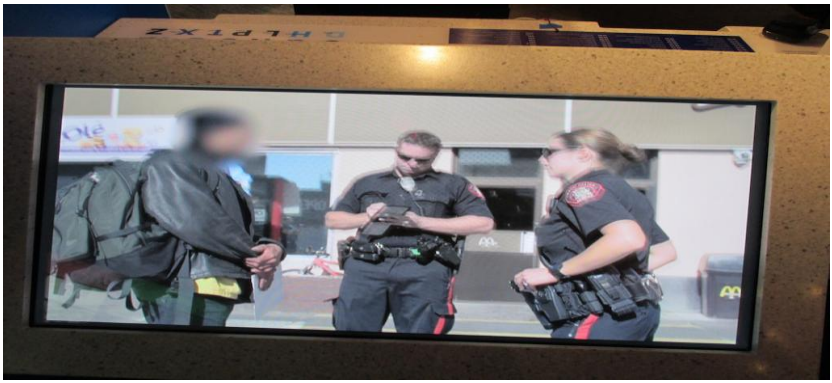
There is also a display entitled "Day in the Life of a Police Officer" that invites the viewer to adopt the viewpoint of the officers (see *Image 9*), in this case two white officers carding a racialized person. Adopting the police role, in other words, entails adopting the whiteness of the portrayed officers. The police role is subtly depicted as one of white, settler vigilance. The officers are depicted as having important work, managing neighbourhood rubbish who pose a threat

to social order. The officers are depicted as authoritative and trustworthy. The police appear to be honourable, if not heroic, figures in these representations. These displays attempt to align the viewer with law enforcement and naturalize the standpoint of the police in our daily lives. Neither the role of public police in creating further marginalization in the inner city, nor the use of technology by police to reinforce discriminatory and racialized stereotypes (Sanders & Hannem 2012), is raised for discussion.

Image 8

The Vancouver Police Museum bills itself as the "oldest police museum in North America," but is full of numerous interactive and digital displays inside. One example is a permanent exhibit titled, "Bridging the Gap: Vancouver's Youth and the Law", that educates visitors about the history of youth "crime" trends, legislation, and policing in Vancouver (see Blisett 2016). In addition to text and graffiti artwork, the exhibit features two tablet computers where visitors can play a game called "Caught in the Act" that was produced by a company called A.C.R.O.N.Y.M. Digital, which specializes in children's entertainment. Players are encouraged to commit "crimes" in 1950, 1970, 1990, or 2010, such as causing trouble at a concert or beating up a senior citizen. In the end, they are always caught by police and the consequences are dependent on the judicial sentences of each era. Aimed at youth, the display drills into players the myth that police always "get their man" (Surette 2007).

Image 9



Downplaying Harms of Policing

Another prominent theme in Canadian police museums that feature digital displays is the downplaying of the harms of policing. For example, an exhibit room at the Calgary Police Museum funded by Shaw – a cable and internet provider in Western Canada – features iPads that can be used to instruct dozens of visitors on cyber crime and online safety. Once again, this display is curated from a police point of view. Questions about overbroad use of police powers and breaches of online privacy by police that are often raised by privacy commissioners (e.g., Office of the Privacy Commissioner of Canada 2010) and scholars (e.g., Huey and Rosenberg 2004) are nowhere to be found. The issue of privacy legislation and section 8 protections against unreasonable search and seizure in the Canadian *Charter of Rights and Freedoms* are not raised either. Nor does the display comment on the cooperation of private corporations, such as communications companies, with police to facilitate communications surveillance (Lyon 2014). The move toward a surveillance society (Ball et al. 2012) and the role of police in this (Taylor 2016) is not a topic of discussion. The harms and pains of policing are not referenced in the displays communicated to museum goers. Instead, the corporate-state symbiosis between communications companies and police is naturalized.

In these examples, the visitor is asked to adopt a hegemonic subject position that is pre-determined. There is no choice to add to or reject these subject positions other than to not engage with the displays. This is why we have referred to these as hegemonic subject positions, since they are pre-given and transcend age. The audience is recruited not only to be entertained or to gain information, but to be hailed ideologically and spontaneously conform to the subject position proffered by the museum screens and police messaging.

Digital displays in police museums usher this hailing into the 21st century. Digital displays at police museums may be conceived of as forms of mediatisation, whereby institutions are "implicated in activities which constitute and perform the very phenomena they purport to depict" (Taylor 2017: 54). Mediatisation in police museums not only conveys information about police as purveyors of security, but are performative because they position police and their communications as an authority. It is performative not only for the police communication, but also for the viewers who become ideologically hailed by the display.

The Saskatoon Police Museum is located in the front foyer of the Saskatoon Police Headquarters. There is a digital kiosk that is located in the foyer that communicates current and historical information about Saskatoon Police Service in the 12 most commonly spoken languages across Saskatoon. The Saskatoon Police Service has had this current and historical information translated into these languages at great expense. The goal was to communicate with newcomer Canadians especially and provide information to all Saskatoon citizens. Similar to the Discovery Wall at the Calgary Police Museum, the kiosk is interactive. Users can feel like they are in charge and learning something unique about police. However, the content is scripted and incomplete. The treatment of immigrant and migrant persons by police, such as the collaboration of public police with Canada Border Services Agency intelligence officers, is not mentioned (McSorley 2019). The messages are limited to boilerplate material also posted on the police website. Moreover, the digital kiosk is only available intermittently as it is plagued by software problems and poor interoperability.

A digital display at the Vancouver Police Museum is also the platform for a recent exhibit about women in policing (see Joshua et al. forthcoming). Visitors are encouraged to scroll through a computer and read stories related to female police officers. The stories are all pro-police and involve topics such as drug use and police heroism. One story is called "Kung Fu Kitty" and was written by a female officer. In a humorous tone, it tells of the time she and her police dog, PD Hondo, encountered a cat during a call; the cat boldly launched itself at the much larger dog as it entered the feline's territory. Police dogs, she writes, "are motivated, driven, and very intense. They love to work, to do as their handlers bid them, and in the case of my dog, chase small furry creatures." Attacked by the cat, the trained dog went "completely crazy" and was admonished by the officer for "being so foolish" in its instinctive response. The situation causes the officer some laughs and embarrassment. A photo is displayed of the officer posing with the dog, both of whom are gazing off into the distance in front of a lake and dense forest background. The digitization of content, from the first two VPD policewomen in 1912 to the present where they now constitute "26% of sworn officers" in the force (Miceli 2018), doubly conveys the organization's continued march forward and, in so doing, challenges criticism directed toward policing as being stuck in the past (Frois and Machado 2016).

Discussion and Conclusion

Public police organizations are increasingly searching for ways to protect and enhance their image due to constant criticism from across the political spectrum (Schneider 2016). Museums and the digital displays within them are one means of providing this reputational boost. Yet the histories presented at these sites are what Landsberg (2018) calls prosthetic memories. These memories are selectively chosen bits and parts. There is something missing from these memories, notably the harms of policing and the pains of criminalization. The memories have also been commodified, rendered entertaining, and are decidedly pro-police. Many of the digital displays are targeted toward young people to either recruit them into policing or at least recruit them into law-abiding liberal citizenship. Digital displays make it appear that police history in the museum is

up-to-date and trustworthy. Drawing from critical media and information studies (Fuchs 2011) we have argued that these digital displays at police museums are a kind of camouflage designed to (1) deter critiques, (2) distract from major controversies that are unfolding concerning police, as well as (3) boost the perception of police legitimacy and transparency.

In terms of an empirical contribution, we have examined digital displays at police museums in Western Canada to demonstrate how these communications are utilizing new technology to convey old myths about policing and certain stereotypes about those who police come into contact with. In terms of a conceptual contribution, we have likened the implementation of digital displays at police museums as akin to the ideology accompanying social and digital media, one that is often a distraction serving the function of camouflage for powerful institutions with a vested interest in maintaining the status quo of social control. This camouflage takes two different forms. First, it takes the form of representation as mere distraction. Second, it takes the form of interpellative and hegemonic subject positions (officer or "criminal") that the visitor is asked to accept and adopt. Rejection of the subject position is not an option, which reveals the true nature of the digital display. It is a false choice or a non-choice. The digital display provides the illusion or sensation that one gets to make their own choice about what is relevant or significant. Our analysis of interpellative communications at police museums helps to reveal how policing myths are conveyed and how police legitimacy is reinforced. Thinking of police cultural work and communications as camouflage helps to advance critical policing studies and critical communication studies by denaturalizing these representations and destabilizing the meanings contained therein.

Müller (2002: 21) argues digital displays and keeping up with trends in digital culture is one way for museums to maintain their cultural authority. Our point is that these displays and the process of hailing at police museums functions to maintain the position of police as a dominant authority despite profound shifts in our culture. The police museum is a material and aesthetic context where police entities can construct messages that entrench the institution of police, which is traditionally conservative (Reiner 2010), and soften its image that

citizens may have in mind. This requires cultural work — it requires a foray by police into the domain of representation. It is necessary for them to do so to advance their own worldview as a truth, to enrol citizens to agree and obey. Given the capacity of police to shape meanings of law and "justice," the digitization of "criminal justice" messaging is a crucial trend to track and interrogate if one wants to understand how the authority of penal system agencies is communicated.

Digital displays in police museums communicate pre-given subject positions, but they are not pre-destined to do so. It is imperative to consider critical museum practices that could be used to disrupt the promotion of the police status quo happening in these cultural sites. Fuchs (2011) notes it is necessary to use social media to disrupt dominant ideologies. As he explains, "communication technologies tend to advance instrumental, heteronomous, one-dimensional claims about reality … [but] they also support critical modes of thinking and action" (p. 327). Harcourt (2015) uses the term "digital resistance" to refer to the use of social media to counter forms of surveillance, but also communications of powerful social institutions. It is necessary to contest and disrupt these messages, or at least subject them to public debate and scrutiny. This could take the form of critical curation practices to make them less entertainment and more education oriented. Should Canadian policing organizations involved in memorialization work through museums not engage in such work by "taking a look" at themselves, as well as inviting in academics and activists critical of policing to curate alternative representations, the latter need to advocate for and take up this space. Given that ideology is comprised of ideas that can enable more authoritarian modes of governance to become possible (Hunt 1985: 31), these museums should not be abandoned to "criminal justice" knowledge workers and threat entrepreneurs.

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Consumed by Guilt: Retribution and Justice in *Until Dawn*[1]

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Abstract

Horror media, as text, film or game, engages with justice, retribution and punishment. Employing the monster to police social boundaries, horror media reflects cultural norms and the threat of transgression. *Until Dawn* plays into horror conventions but challenges our traditional position as passive voyeur by bringing us into complex encounters with justice. By playing as all eight characters, players engage in both the crimes and punishments of the teenagers trapped on a mountain with human and supernatural threats. Our involvement complicates the dual layers of retribution at play, as the teens are punished for their sins in the tradition of an eye for an eye while the Wendigo embody a supernatural repercussion for breaking the taboo of consuming human flesh. Thus, the game articulates a rational choice approach to transgression and the monstrous retribution that follows. *Until Dawn*'s evocation of the Wendigo in tandem with the traditional elements of horror film and participatory elements of the video game brings the player into the system of sin, suffering and punishment.

Introduction

Until Dawn (2015) from Supermassive Games plays into horror conventions of abjection, moral judgement and suspense, engaging the player through participatory elements. The game maps key choices, showing the outcomes of the player's decisions and mistakes. We play as all eight teenagers, controlling how they interact and what they discover, thus removing the voyeurism of horror films and making us responsible for the characters' survival or

[1] The author would like to gratefully acknowledge the careful eyes and thoughtful feedback of Professor Steven Kohm and Dr. Andrea Braithwaite, as well as the effective recommendations of the anonymous reviewers from *IJR*.

demise. The story centres on Hannah and Beth Washington, who disappear in the opening; one year later, their loss haunts the space, memories and conversations, while their brother Josh's suffering and grief drives him to gather the group for vengeance. A further narrative of retribution underpins the figure of the Wendigo: the game's core is punishment as response for social or moral transgression. The player's participation in the characters' choices and actions engages us with the characters' mistakes and the repercussions while facing the larger threat of the Wendigo; the game challenges the player's distance from horror's retributive justice.

Until Dawn articulates traditional aspects of horror while disrupting a simple coding of justice, showing parallel forms of sin and punishment: the teens face psychological torture for their mistreatment of Hannah, while the Wendigo face horrific transformation after consuming human flesh. Young (2009) notes our fascination with both crime and punishment, as "[b]ound up with disapprobation and distaste for crime is an intense interest in its forms, motivations and impacts. This doubled relation, oscillating between censure and desire, can be called fascination" (p. 3). The player's participation brings us into cruel and criminal actions, enabling us to examine the motivations through embodiment. The game provides a conservative view of justice through the lens of rational choice, suggesting punishment results justly from immoral action. Our participation is key, so the repercussions are an outcome of our choices and actions in the game-world.

Set in an isolated Albertan mountain lodge, *Until Dawn* opens with a group of teenagers on a winter vacation: Hannah, her twin sister Beth and younger brother Josh have invited friends for a getaway. Hannah is lured into a prank: she follows a letter from her crush Mike, sneaking away to meet him. She begins undressing and realizes she is being watched and filmed by the others; she flees in embarrassment, running out into the snow. Beth follows her, and they are chased off a cliff by an unseen threat. The game jumps forward one year, when Josh has invited the group back to the ski lodge. However, past relationships and simmering tensions result in the group splitting up: Mike and Jessica go to the guest cabin, Emily and Matt return to the cable-car station, and Sam goes for a bath while Josh, Chris and

Ashley play with a Ouija board. Disaster strikes when an unseen assailant drags Jessica violently from the cabin, and an assailant in a clown mask attacks Chris and Ashley, then chases Sam. Events escalate: Josh dies violently, Sam, Ashley and Chris are drugged and restrained, Mike chases a stranger through an abandoned sanitorium, and Emily and Matt try to radio for help at a fire tower that collapses, stranding them in an abandoned mine. Midway through the night, Josh reveals he is alive and masterminded the psychological torture; yet, a greater danger predates the mountain: the Wendigo. The game's core threat is thus a supernatural consequence of taboo: one becomes wendigo by eating human flesh.

This paper will address the concepts of justice and participation, as *Until Dawn* demands choice and culpability. By examining how the game articulates the inherent morality underpinning horror, I argue *Until Dawn* offers complex encounters with justice and retribution through affect and horror (Young 2009). Considered through Valier's (2002) arguments on crime and Gothic horror, *Until Dawn* encourages a reconsideration of justice by engaging with human and supernatural retribution. Focusing player experience around cause and effect, choice and punishment, the game constructs a narrative that relies on and critiques the concepts of horror.

Until Dawn as Horror

Until Dawn draws on horror tropes, featuring an isolated location, a group of unsupervised teenagers, tragic death, the need for revenge and a supernatural threat. The game moves from teen slasher into the story of the Wendigo, an Indigenous undead, while keeping our focus on bodies and the grotesque. Kristeva's (1982) concepts of abjection, the body's engagement and rejection of rot and taboo, inform our complicated relationship with gore:

> A wound with blood and pus, or the sickly, acrid smell of sweat, of decay, does not *signify* death … These body fluids, this defilement, this shit are what life withstands, hardly and with difficulty, on the part of death. There, I am at the border of my condition as a living being. My body extricates itself, as being alive, from that border. (p. 3)

Life struggling on the border of death underpins the impact of splatter horror, as *Until Dawn* evokes; Valier (2002) notes that the key element of abject horror is it is "met with *both* violent denial and pleasurable fascination … [as] abjection foregrounds ambivalence" (p. 331). In analysis of film's ability to evoke emotional and sensational response, Young (2009) notes that horror's power to move beyond boundaries is central to film and visual media: "the affective dimension … [is] the experience of watching, and the ways in which the spectator is thereby implicated in the onscreen image" (p. 9). Cinematic affect is the body engaging with the sensation without physical experience (p. 9): a powerful tool in constructing response to violence, abjection and brutality. As Grant (2010) notes, the concept of horror is the affect:

> The word "horror" itself derives, significantly, from the Latin "orur," to describe the physical sensation of bristling, of one's hair standing on end. So important are the physiological responses in these genres that the extent to which films produce them in viewers is commonly used as a determining factor in judging how good these movies are. (p. 3)

The game also plays with psychological torture, as Josh manipulates his friends. Torture horror, which articulates malice beyond simple bodily abjection, creates a morally complicated space, as Morris (2010) describes: "the vengeful or sadistic purposes of the torture are a source of horror beyond the depiction of the torture itself, and it is through the torturer's purpose that the justification questions are addressed" (p. 44). The game balances grotesque and psychological horror to articulate forms of punishment, while subjecting the player to jump-scares and protracted visual construction. As Carroll (1990) notes, the "cross-media genre of horror takes its title from the emotion it characteristically or rather ideally promotes" (p. 14). *Until Dawn* develops this affect through visual, narrative and participatory elements: the revulsion, anxiety and bodily engagement bring us into the horror, setting up the player's expectations for the narrative.

Genre tropes not only draw *Until Dawn* into the horror megatext, but also the gaming genre of survival horror. Earlier games, like the *Resident Evil* (1996) and *Silent Hill* (1999) series, do not engage with the morality of player choice, but focus on a singular goal: survive.

Until Dawn moves beyond that structure into concepts of justice and punishment while still looking and moving like traditional survival horror. Fixed camera angles and shot structures emulate film and early survival horror gaming, restricting the angle of view. As Pinchbeck (2009) describes, "[f]orced camera angles are extensively used in survival horror to limit [access to the environment], directly manipulating tension and creating moments of shock where action occurs just beyond the capacity of the player to see" (p. 79). *Until Dawn*'s locked frame constricts the player's view, building fear through information delay or denial, anticipation-building long shots, voyeuristic perspectives, suspenseful irony and jump-scares. The visual and thematic horror construction is the core of the game's language of justice.

Horror traditionally centres on moral messages: from the grotesque vices in morality plays, the social morals of gothic novels, the pithy afternotes in early twentieth century pulps and comics to the modern cinema (Grant 2010). The rules of horror appear in the film *Scream*: "1. You can never have sex. The minute you get a little nookie—you're as good as gone. Sex always equals death. 2. Never drink or do drugs. The sin factor. It's an extension of number one" (Konrad & Woods, 1996). The "sin factor" naturally underpins the rational choice narrative, as transgression merits punishment. Morris (2010) notes that torture horror enacts the impossible Kantian system of retribution: an eye for an eye (p. 46). *Until Dawn* plays with two layers of sin and punishment: the standard teenage slasher wherein sex and betrayal are punished, and the greater social and spiritual taboo of the Wendigo. Like *Silent Hill*, morals are upheld through monstrous intervention. "Silent Hill itself is a monstrous entity, an *unheimlich* town … corrupted by a malicious will which seeks to punish those who offend a perverse moral order. The few souls left wandering its streets move with vengeful intent" (Steinmetz, 2018, p. 273-4). The mountain becomes threatening through the Wendigo policing and predating the space. Horror's conservatism appears in *Until Dawn*'s punishment of sex, as Jessica is the first attacked: after her phone is thrown into the cabin, she goes outside to yell at her assumed harassers.

> HEY! YEAH! PRICKS! THAT MEANS YOU! I KNOW you're OUT THERE! The FUCK are you trying to do? You want to ruin our fun THAT BAD?! Well GUESS WHAT? You can't! You can't ruin our good time! Because Michael and I are gonna FUCK! That's right! We are going to have SEX! And it's gonna be HOT! So ENJOY IT! Because I know WE'RE GOING TO! (*Until Dawn,* 2015, Chapter 3)[2]

Her declared comfort with sex is met immediately with violence: Jessica is pulled through the cabin window by a clawed hand grasping her hair, violently wresting her out [Figure 1]. As Clover (1992) notes, traditional horror victims are often linked to sexual behaviour: "sexual transgressors of both sexes are scheduled for early destruction. The genre is studded with couples trying to find a place beyond purview of parents and employers where they can have sex, and immediately afterward (or during the act) being killed" (p. 33). Valier (2002) notes that emotionally charged responses can result in heavy punishment of crimes, as moral panic and folk devilling create disproportional reactions (p. 323). Horror overreacts to sexuality, continuing traditions of the monster tale: violence and the supernatural police borders of socially appropriate behaviour.

Figure1: Jessica Pulled from the Cabin

[2] All quotations from the game reflect the capitalization, spelling and punctuation provided in the game's subtitles.

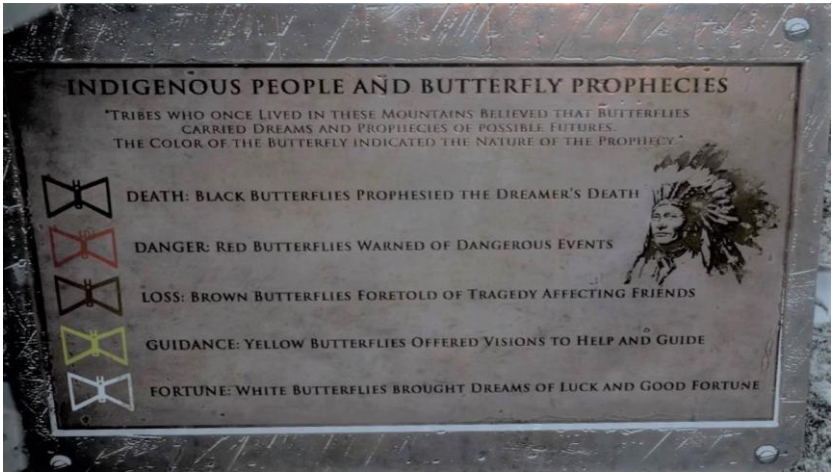
Valier (2002) addresses the power of emotion and gothic imagery in contemporary concepts of retributivism, as penality and punishment evoke strong reactions; she asks early in her article "[h]ow are these raw emotions implicated in the return to retributivism" (p. 320)? Representations of criminality and penality have relied on language of the monstrous, the horrific and the emotionally manipulative, as society's fears have become less grounded in the individual and more in the anonymous, faceless and imperceptible (p. 324). As such, the language of the monstrous in relation to justice reaches beyond the world of horror and has become part of common parlance, and come to define our institutions of justice: "gothic tropes are embedded in the practices of the institutions of crime control and punishment themselves. The florid textuality through which crimes are represented in popular culture both shapes, and is derivative of, the gothicity of legal judgments and penal policies" (p. 322). Archaic institutions of justice and the gothic images of punishment appear in other popular participatory media, like *Batman: Arkham Asylum* (2009), though often with visible commentary (Fawcett & Kohm, 2019). In evoking fear in the discussions of the predator, serial killer, unexplainable villain and unstoppable threat, the monster becomes an element of everyday discourse. As Halberstam (1995) argues, "part of the experience of horror comes from the realization that meaning itself runs riot … The monster always becomes a primary focus of interpretation and its monstrosity seems available for any number of meanings" (p. 2). The issue of this language is that an evocation of the monster becomes an evocation of punishment — the monster is *demonstrare*: demonstration. These bodies demonstrate a community's rules and limits and the punishment one faces for transgressing. As *Until Dawn* shows, to consider justice through the framework of monstrosity is to immediately position retribution as the natural form of punishment. This conservative view of crime as choice and justice as punishment is articulated in horror spaces like *Until Dawn*.

The Wendigo and Punishment

The wendigo, a traditional North American monster, is a supernatural narrative of cannibalism. A creature from Algonquin, Cree and Ojibway mythology, among others, wendigo (or windigo) are violent

spirits embodying the cold isolation of winter that drive hosts to become cannibals: "In northern Algonquian traditions, the windigo was the spirit of winter, which could transform a man, woman, or child into a cannibalistic being with a heart of ice. In time, this being would grow into a giant" (Smallman, 2014, p. 21). Wendigo stories stretch back centuries with a steady focus on cannibalism. Smallman (2014) describes how the loss of self and loss of humanity are at the core of these stories: "These narratives were ostensibly about transformations by (and into) cannibalistic spirit beings. Madness, and the fear of madness, was as important a motif in these narratives as cannibalism" (p. 35). The wendigo's madness and loss of self reflects its role as the monstrous categorical crisis Steinmetz (2018) addresses: the monster's function is to disrupt boundaries and social limits of purity and morality. "While the exact characteristics of the monster are contested, Carroll (1990) usefully considers monstrosity as linked to impurity … Monsters are thus beings that upset our sensibilities and assumptions about the natural order; they disrupt social categories and disturb our ontologies" (Steinmetz, 2018, p. 267). Wendigo represent that categorical crisis, disrupting the natural and challenging the community's conceptions of purity. Regarding the disturbance of norms, Cohen (1996) notes this "refusal to participate in the classificatory 'order of things' is true of monsters generally: they are disturbing hybrids whose externally incoherent bodies resist attempts to include them in any systematic structuration" (p. 6). The monster defies social structure, order and boundary: "monsters are identified as impure and unclean. They are putrid or moldering things, or they hail from oozing places, or they are made of dead or rotting flesh, or chemical waste, or are associated with vermin, disease, or crawling things" (Carroll, 1990, p. 23). The tie of the monstrous body and the abject is at the core of the wendigo. The consumption of human flesh and madness disassociates the wendigo from its former self: to break laws and taboos is to lose your identity and place. To lose your place is to become monstrous.

Figure 2: The Butterfly Totem Chart



Until Dawn draws on wendigo to situate the narrative, placing the story on Canadian soil with a Canadian monster. However, a UK-based studio creating a game about predominantly Caucasian characters with a single reference to an Indigenous wendigo flattens and appropriates the myth. While the original wendigo tales stretch across cultures, communities and time, taking on complex social signifiers, *Until Dawn* simplifies the wendigo to its core concept: breaking the taboo of cannibalism transforms the person into a supernatural cannibal. This simplification reduces the wendigo to a modern Western zombie, although the choice to consume human flesh causing transformation provides the game's moral focus. A further grounding in "Indigenous" spaces appears in mapping player decisions through butterflies; the butterfly begins as a simple synecdoche for chaos theory, then is situated in "Indigenous" traditions [Figure 2], using totems to reinforce this connection throughout the game. This framing once again flattens any cultural specifics, tapping into "Indigenous" belief, rather than Cree, Ojibway or Algonquin, who are the primary tellers of wendigo tales, or the Blackfoot or Tsuu T'ina, the traditional caretakers of the Rocky Mountains. While most traditions frame the butterfly as a positive, powerful symbol (Lake-Thom, 1997; Bastian & Mitchell, 2004), its presence as a portent and bearer of messages also carries across

communities. However, the significance is unique to each culture, so using the butterfly to simply add "local colour" draws in signifiers without acknowledging the cultures. Instead, butterflies are simply portents and wendigo are simply zombies demonstrating moral judgement. In a game that demands players consider actions and morality, the designers ignored the moral implications of appropriating Indigenous cultures and histories.

The Wendigo haunts the game from the outset, but only becomes a real threat when Jessica is ripped through the window. Hints appear fleetingly in jump-scares, like a pair of inhuman eyes flashing into view in a set of binoculars late in Chapter 1, or an unseen predator attacking a deer; voyeur perspectives show the Wendigo's movement-based vision, highlighting the teens. The game withholds details of the monstrous threat, building anticipation and enabling imaginative speculation. As Fahy (2010) describes in *The Philosophy of Horror*, horror appeals because it offers a series of experiences: "the anticipation of terror, the mixture of fear and exhilaration as events unfold, the opportunity to confront the unpredictable and dangerous, the promise of relative safety … and the feeling of relief and regained control when it's over" (p. 1–2). Delaying information sets up the eventual exhilaration: we get glimpses and teases early in the game, with the first full reveal taking place when the Wendigo chases Emily through the mines before she is saved by the Stranger. He explains to the teens: "[t]his mountain belongs to the Wendigo … There is a curse. That dwells in these mountains. Should any man or woman resort to cannibalism in these woods the spirit of the Wendigo shall be unleashed" (*Until Dawn,* 2015, Chapter 8). The narrative evokes elements of wendigo myth, particularly aspects of trauma, taboo and retribution. The creature design, highlighted in the bonus content "Bringing 'It' to Life," focuses on how voice cues the monster's human origin. Barney Pratt, *Until Dawn's* audio designer, describes creating the Wendigo's voice:

> For the main vocalizations of the Wendigo we used our own vocalizations, various different animals from the exotic to the farmyard. Various plug-ins and processes to gel these sounds together, and keep a human resonance behind that voice, telling the back story [sic] of the Wendigo. ("Bringing 'It' to Life")

The creature's "human resonance" situates the horror in retribution, rather than simple physical threat. *Until Dawn* draws supernatural danger to the geographic space and thus gestures to the traditional elements of crime and punishment that often underpin horror narratives. While the game highlights the human element inherent in the monstrous wendigo, Valier (2002) argues that modern society positions human crime as shapeless, formless and sensational (p. 326). Blending the criminal and monster complicates our participation in the game, as characters become situated in the same structure of punishment and retributivism.

Until Dawn and Retribution

The narrative motivation of retribution is what Morris (2010) describes as "seeking for an appropriate code of punishment … [T]he appeal of torture-horror is not unlike that offered by the carnival atmosphere of public executions" (p. 47). Josh seeks to hurt those who drove his sisters out into the snow. He further amplifies their punishment through the recording and intended distribution of his psychological torture. His video invitation takes on a clear irony later in the game:

> First off, I gotta say I am super excited to welcome all my pals back to the annual Blackwood winter getaway! So, um … Let me just let you know, let's take a moment to address the "elephant in the room" for a second … it means so much to me that we're doing this. And I… I know it would mean so much to Hannah and Beth that we're all still here together, thinking of them. I really want to spend some quality time with each and every one of you and share some moments that we'll never forget, for the sake of my sisters, you know? (*Until Dawn,* 2015, Chapter 1)

His veiled threat to create memorable moments in the name of his sisters becomes clear when Josh reveals he is alive and has caused his friends' suffering. He frames his invitation through an attempted recovery; the pauses add to his performance as he sets up his friends' traumatic suffering. This effort creating a fiction shows his investment in using horror for punishment. When Josh removes his mask, he takes visible joy in how his carefully crafted fiction has caused suffering.

> How does it feel? Do you enjoy feeling terrorized? Humiliated? I mean, panicked? All those emotions that my sisters got to feel one year ago! Only guess what? They don't get to laugh it off! … I hope you appreciated my little phantasmagorical spectacle! … [y]ou guys are all going to thank me when you guys become internet sensations! … Oh you better believe this little puppy is going viral ladies and germs. I mean we got unrequited love. We got … we got blood! I don't think there's enough hard drives in China to count all the views we're going to get, you guys. (*Until Dawn,* 2015, Chapter 7)

He wants them to feel his sisters' fear and panic, wants to punish them with spectacle. The transition between "One Year Ago" and "Chapter 1" is voiced-over by newscasters discussing the Washington sisters' disappearance, suggesting that publicity has dogged Josh's life. His retribution thus includes the spectacle Morris (2010) discusses, as his actions replay his sisters' panic and enable public fascination with that punishment. Valier (2002) notes that "public gatherings around scenes of violence and trauma [perform] a breakdown between the public and private registers of experience, as well as between mass exhibitions and individual fantasies" (p. 322). Our interest in suffering results in our cultural fascination with monsters as retributive force. Though Josh initially appears as a monster, *Until Dawn*'s larger force of retribution disrupts his personal vendettas. The greater force of justice, an external and presumed universal morality and judgement, appears embodied in the Wendigo as both tortured and torturer.

Until Dawn flattens the Wendigo to an undead who consumes the flesh of a human and thus becomes the suffering echo of their former selves. We only see the miners and Hannah as Wendigo, though the Stranger references the Wendigo spirit having Indigenous origins. The story maintains simplified concepts of desperation and survival: trapped after a cave-in, miners consume one another to prevent starvation. Mike can find records of the miners' horrific transformation in the Blackwood Sanitorium, and finding Butterfly Totems unlocks segments of a video clip entitled "The Past." Upon finding the first Totem, a tutorial screen explains that "[as] you explore you can discover totem artefacts. Picking a totem up and turning it will reveal a colored butterfly and a premonition of a

possible future … The future is uncertain. Whether or not the prophecy comes true depends on the choices you make" (*Until Dawn,* 2015, Chapter 1). The totems, a generic signifier of Indigenous cultures, not only predict the future, but unlock the origin of the Wendigo. The video shows the threat of Blackwood Mountain, as the game makes a small gesture toward Indigenous history in the name of the strongest Wendigo spirit: Makkapitew means "one who has big teeth" in Algonquian.[3]

> Many years ago, my grandfather hunted those possessed by the curse, but there was one that eluded him — the fiercest of all, the Makkapitew. It was a terrible thing, and my grandfather could not defeat it. Some time after, the prospectors came to mine this mountain, until a cave-in trapped the men, and woke the curse again. There were dozens of men. No food, no light. And in that blackness, the hunger came.
>
> They were consumed by their abominable cravings and driven mad. Murderers! Cannibals, eating human flesh. And if you kill this monstrous thing, the spirit is released, and swirls the mountain like an evil wind, waiting to possess again. You best not kill them; I have tried. You can only trap them, taunt them with fire. (*Until Dawn,* 2015, "The Events of the Past")

The clip further explains that the Makkapitew chased Hannah and Beth over the cliff, and then was finally killed with fire. The Indigenous history of the monster is a fleeting gesture, as the more central element is the "abominable" and inhuman actions of the miners: "Murderers! Cannibals, eating human flesh." The anxiety over taboo pervades the Stranger's description, which the player only sees by finding all the totems. Thus, knowledge of the miners' history and the mythology underpinning the game's horror is a reward for completionist gameplay. This reward structure puts value on understanding the moral message of the Wendigo in the game.

Hannah, driven to desperation through circumstance, remains recognizable by her distinctive tattoo — a clue the player can

[3]Algonquin territory is in Eastern Canada and would have no overlap with the Rocky Mountains or the communities that live there. Thus, the name further shows a lack of awareness of Supermassive's designers of the distance and distinctions between Indigenous communities.

discover in multiple photographs and notes. This butterfly tattoo shows a continuity of body from human to wendigo. Lee Robinson, the game's production designer, describes how their visual design focused on degeneration of the human form:

> Understanding the ancient myths of the Wendigo was key for their development, that helped the visual look … such as eyes being milk, almost dead, with loss of lips and eyelids due to frostbite. Fangs growing, and arms and legs getting longer, with skin hardening and thickening to look snarling and menacing, yet withered and lean … Fingers and toenails extending like claws, allowing them to climb effortlessly. We made them look gaunt and weathered, and having ragged remains of clothes they wore, bloodstained and rotten … they retain strong skeletal limbs, which enable them to be agile and quick through the environment. (*Until Dawn* 2015, "Bringing 'It' to Life")

The physical toll of transformation focuses our attention on the environment while remnants of the person's clothing connect the Wendigo to its human past. Visuals of transformation cue monstrosity, as Halberstam (1995) notes: "Slowly but surely the outside becomes the inside and the hide no longer conceals or contains, it offers itself up as text, as body, as monster" (p. 7). We can read the skin, the design and shape of the monster as a hybrid. While we only know the human identity of one Wendigo, human elements remain a design focus and thus play on the uncanny. As near-human analogue, zombies are both human and not, monster and not, and thus exist between categories. Steinmetz (2018) notes that the uncanny is "[i]nvolved [with] a sense of strangeness arising from the paradoxical perception that something is both familiar and unfamiliar, where the real and the unreal become blurred" (p. 268). Horror games create spaces where we engage with this uncanny other; the Wendigo, situated on the margins, creates a form of categorical crisis.

Punishment and Participation

Justice and retributivism complicate our relationship with the characters: we play as all eight characters, collapsing our distance from the wrongdoer. When the game jumps forward after Hannah and Beth's fall, we play as Sam, who questions pranking Hannah.

However, we quickly shift to Chris, a willing participant, then Jessica, Matt and Ashley, who all took joy in teasing Hannah. Morris (2010) notes the significance of viewers' engagement with both torturer and tortured in torture horror films: "Torture-horror requires an audience both capable of empathy with the victims and able to share something of the joy of the torturers, however unsavory … In order to enjoy sadistic torture-horror, the audience must experience both of these conflicting sentiments" (p. 51). The appeal and repulsion draw us into the horror and the complex morality therein. *Until Dawn*, as a participatory space, pushes beyond visual identification and encourages our investment in these characters. Young (2009) argues that filmic framing and the power of the image is that "we see it *haptically*" (p. 12, italics in original). Video games offer more engagement, as the perceptual relation between image and body ties us to the scene, while our participation in choices ties us to the character: we play as Josh after he reveals his psychological torture, positioning us in characters who we witness harming people. In his discussion of play and ethics, Sicart (2013) addresses how an avatar frames our ethical position in the world:

> It determines, to a large extent, players' ethical presence in that world. The values … are important in the fictional creation of that world: players explore those values and live by them. The company that they keep is not only the avatar or the gameworld. It is also their meanings and the interpretations that the players give to those values and that world. (p. 13)

While we maintain our own ethical awareness and engage with the game through a character space, we become complicit in the character's actions. *Until Dawn* pushes projection further by situating the player in all eight spaces.

Beyond our control over choices and conversations, which moves slowly enough to consider options and potential outcomes, action sequences are articulated in two different forms: quick-time events and mandated stillness. Quick-time events require the player to press a button within a designated window to achieve an outcome. The button-dash brings the player into the character's reaction, investing us in the movement and moment. The quick-time format creates urgency, asking us to respond to cues as the character responds to his

or her surroundings. The second tool in action sequences is the opposite: stillness. The narrative justifies this mechanic through the Wendigo's movement-based sight, but the tool creates a novel form of challenge: a game designed to heighten adrenaline and create jump-scares demands player stillness so the character will survive. The need to remain still shifts from character to player, as the PlayStation controller measures the player's movement, going beyond Young's (2009) argument of haptic experience into literally mapping the screen onto the body. The closing segment of the game focuses on Sam and the remaining teens in the lodge, which has been taken over by Wendigo. During a violent fight between Wendigo which the teens helplessly watch, the fireplace gas line breaks, and Mike crushes a lightbulb to create an active source of spark. The player, controlling Sam, must choose when to stay still and when to run, flip the light switch and blow up the house with anyone left inside. The controller's vibration feedback amplifies the challenge, as it simulates a racing heartbeat. The sequence challenges us to leave Sam vulnerable and trust our ability to remain still, as each decision to wait rather than run enables another character to escape safely. Sam is our "final girl," who "perceives the full extent of the preceding horror and of her own peril; … She alone looks death in the face, but she alone also finds strength either to stay the killer long enough to be rescued (ending A) or kill him herself (ending B)" (Clover, 1992, p. 35). We are positioned with this strong, fragile figure; her survival is literally in our hands. The player must choose to save Sam or try to stay still enough to enable others to escape. The game maps action onto our body to amplify investment and potential projection.

The game introduces each character with a set of descriptive adjectives [Figure 3] inviting us to participate in the story through each character using movement, action and conversation mechanics, in which players choose how characters interact: dialogue appears as branching options, two choices, each with a prompt and emotional tone [Figure 4]. The player thus shapes relationships, prioritizing some connections and sacrificing others. Participating through multiple lenses engages us with all the characters' priorities, preventing simple projection and encouraging a diversified

understanding of the story, seeing relationships from both sides. We can focus on the overall consequence of each choice, addressing what Domsch (2013) notes in his discussion of storyplay and narrative choice:

> The expectation of consequence is what keeps players motivated to make choices … Especially in those cases where they are withholding gameplay information, the player's focus turns towards a decision's storyworld significance. In order to do justice to the importance of player choices in the specific narrative experience of video games, one needs to take a further look at the way that consequence is used, presented, and experienced in them. (p. 137)

Figure 3: Sam and Josh's Character Introductions

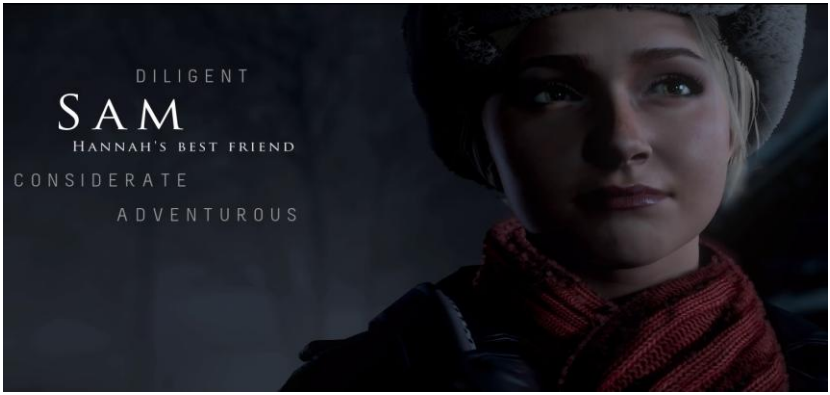


Figure 4: Conversation Mechanics

Game design leans into a rational choice perspective, as players operate in a system of cause and effect, action and punishment. Gameplay's nodal form, as Domsch (2013) notes, means a choice closes paths, shaping the story and creating narrative consequence for the player's action. Further than that, *Until Dawn* provides more permanent repercussions for our participation and choice, reiterating the conservative views of justice inherent in horror spaces.

Our choices can harm or kill the characters, creating later challenges: Mike can lose a hand early on, complicating his later actions, or if Matt is killed, Jessica must try escaping the mines alone. Player choices thus take on narrative and ludic repercussions, implicating us through gameplay mechanics. Unlike most survival horror games, the story continues after character deaths: the story moves forward without them. The genuine repercussions capture Conway's (2012) critiques on how the shift away from games with inherent loss results in a loss of ludicity, or play-agency, in favour of play centred on perpetual do-overs (pp. 36–37). The game reinforces the player as participant through Dr. Hill, an analyst who meets with an anonymous character early in the game and intermittently through the story. In Dr. Hill's first appearance, he sets a clear tone for the player's engagement with the game.

> Before we begin, there are a few things I need to make sure you understand … Everything you do, every decision you make from now on, will open doors to the future. I want you to remember this. I want you to remember this as you play your game. Every single choice will affect your fate, and the fate of those around you. So, you have committed to commence with this "game." This is significant. (*Until Dawn,* 2015, Session 1)

Dr. Hill's dialogue about playing a game addresses the screen: the player. This framing positions us as the central actor, despite the various character lenses. The game maps actions on the characters while fundamentally situating choice with the player: the game's theory of justice is inherently a rational choice approach, as we supposedly act freely and thus face justified consequence.

The game focuses our choices through the Butterfly Effect, which maps narrative repercussions for our decisions. The game begins with an ominous introduction that lays out how player choices shape the game: the clip shows a butterfly, before zooming in to follow a single path along a butterfly's wing vein, as the rest of the wing appears to rot. The over-text references chaos theory: "A tiny butterfly flapping its wings today may lead to a devastating hurricane weeks from now. The smallest decision can dramatically change the future. Your actions will shape how the story unfolds. Your story is one of many possibilities. Choose your actions carefully" (*Until Dawn,* 2015, Introduction). Spreading rot keeps our focus on death and decay, abject elements of horror, while the path shows our impact on the storyline. The Butterfly Effect map appears on the Pause Menu to show the player what decisions she has made and their gradually building outcomes: while the characters act, we choose. The focus on player immersion appears in Pratt's description of the Wendigo's audio-design:

> During the chase sequences the anger of the Wendigo is felt by encircling breaths, screams and screeches, that essentially chase you as you're being chased by the Wendigo. We would layer them up in a multitude of layers, sometimes 15–20 sounds playing at the same time, to build up the vocalizations for this fearsome creature which is always in attack mode, hyperactive and chasing you throughout the game. (*Until Dawn,* 2015, "Bringing 'It' to Life")

Pratt's repetition of "you" shows the player is the central figure, rather than the characters, and points to attempted immersion. The affect of putting us in the space makes us feel threatened and attacked. Our responses to this threat become mapped onto individual characters: for example, Ashley and Chris are locked in a *Saw*-esque death contraption. Chris must choose to shoot himself or Ashley, saving one by killing the other; however, as this is part of Josh's staged psychological torture, regardless of Chris' choice, the gun is empty and the saw stops. If Chris chooses to shoot Ashley, she will later lock the door on Chris when he is chased by Wendigo, leaving him to be killed. The player's choices as each character impact their relationships and future actions.

The player immerses in each of the eight characters, before and after transgressive and violent acts, collapsing our choice as player and the characters' actions. Ashley locking the door, effectively killing Chris, is a repercussion for the choices the player made, while we later play as Ashley and thus take on her choices as well. By moving between characters, we surrender to various spaces and embrace different identities and choices. As Sicart (2013) describes, the process of

> [s]urrendering to a game does not mean participants will always play by the rules, but it means that they will commit to playing … Surrendering in a game means taking things as they are designed but also creatively engaging with them to create and interpret what is been given so that the fiction becomes more of a conversation than a monologue. (p. 12)

The game demands, by putting us into people who have caused harm, that we engage with the morality of their actions and our own. In the branching story options, if one discovers evidence that Hannah has transformed into a Wendigo, Josh will recognize his sister when she attacks. If he does so, his life is spared, as she grabs and takes him into the caverns. If Josh lives, he does not do so without cost; a post-credits scene shows him becoming a Wendigo himself. Rescuers discover Josh in the collapsed mine tunnels, consuming flesh as his own face pulls back in a monstrous transformation [Figure 5]. As we play as Josh, his shifting monstrous form highlights how close the monster is to the human. Our separation from the monster is fragile at best.

Figure 5: Josh's Transformation

Conclusion

The post-credits scene of Josh's transformation points to the immortality of the monster. Cohen's (1996) thesis "The Monster Always Escapes" appears in the wendigo's continuity:

> No monster tastes of death but once. The anxiety that condenses like green vapor into the form of the vampire can be dispersed temporarily, but the revenant by definition returns. And so the monster's body is both corporal and incorporeal; its threat is its propensity to shift. (p. 5)

The monster remains a threat to simple categories: it is a mechanism of punishment, and the punished. They are demonstrable figures, showing the audience the suffering that results from transgression in both their actions and their bodies. Valier (2002) notes the collapse of the language of the monster into our understanding of justice shows how our reading of the monstrous other shapes our understanding of crime, criminality and the frameworks of justice. The player's participation brings us into transgression and culpability, as our attempts to save Josh result in his transformation: the monstrous torturer becomes the monstrous Wendigo and we recognize in him a character we played.

Our participation complicates the morality of the game ending: the credits feature police interviews with the surviving characters and

show a time-captioned screenshot of the moment any character was killed. We also face the repercussions of discovering Hannah's transformation, and thus Josh's monstering. While we do not play Hannah, we play as Josh, both in his imagined therapy with Dr. Hill and in the real world. Our play as a character who transgresses and transforms blends conceptions of the human and the monster. Young (2009) notes the significance of our projection into visual spaces, as our understanding of violence takes place on an affective level, rather than a simply cognitive one. This engagement, through participation and choices, brings us into the morality of the game.

In using the wendigo, Supermassive Games has engaged a complex undead figure with Indigenous roots, but cut off the character before tapping into that depth and space. In appropriating the myth and drawing in butterfly imagery, Supermassive Games evokes a space without understanding it, reducing the complex history of the wendigo into any other zombie. They have chosen a zombie with an inherent moral transgression but flattened the figure and focused instead on the player's choice, rather than the monster's cultural history.

The game's self-situating in the genre of horror through tropes and clichés, visual framing and style, builds *Until Dawn* into a tradition of monstrosity and morality. While horror film offers us the opportunity to take vicarious pleasure in the sins and punishments enacted on screen, survival horror games ask us to navigate through the challenges, taking on the responsibility for characters' survival. *Until Dawn* positions us to view the actions of the characters while choosing their paths. We engage with the moral repercussions of our choices, the characters' actions and our own surrender to the game. *Until Dawn* asks us to participate, projecting ourselves into a space wherein we see, create and become the monster.

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Legal Remedies for Online Attacks: Young People's Perspectives

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Abstract

Online attacks can deeply affect young people and their reputations, sometimes with serious long-term consequences. There is growing awareness of the harms of both true and false attacks on others, especially where the attacks violate trust, confidence, and/or expectations of privacy. There are, however, few reported Canadian examples of young people seeking *legal* remedies in response to online attacks, which raises the question of whether young people understand the law as a meaningful response. This paper draws on the results of qualitative interviews with young people aged 15 to 22 about their experiences with and understandings of reputation, privacy, and online attacks, with particular focus on their opinions and experiences regarding response to online attacks. In response to online abuse, young people focus on a range of goals, including minimizing damage, repairing and redressing harm, punishing perpetrators, and prevention. To achieve these goals, they look to a variety of sources of support or assistance, including themselves, members of their social groups, parents, the school (including teachers), social media platforms, police, and the justice system. Criminal and civil justice system responses are viewed as having limited effectiveness in responding to experiences of online abuse, and respondents view these alternatives as limited to the most serious cases of online aggression. We discuss the perspectives of interview participants in relation to current legal responses, and suggest that there may be a need to refocus policy attention away from traditional

reactive civil and criminal law processes toward more proactive and informal response mechanisms.

Introduction

Growing awareness of the negative impact that online attacks can have on young people's well-being and reputation has prompted calls for new and/or improved legal responses (MacKay, 2015). Little is known, however, about how young people want to address these online attacks, and whether legal responses can meet their needs for appropriate and effective responses. This paper addresses the gap by reporting relevant results from interviews that examine the perspectives of young Canadians on responding to online attacks (Bailey & Steeves, 2017), focusing on whether they see the law (particularly criminal and civil law relating to defamation) as a meaningful response. Part I of this paper highlights relevant background information relating to online attacks, and then considers the literature relating to public perceptions of law and justice systems, as well as access to justice problems particular to young people. After setting this foundation, we turn in Part II to discuss the methodology used in the interviews (Bailey & Steeves, 2017). Part III discusses our findings and implications.

Background

Online Attacks

Recently, there has been heightened public focus on "cyberbullying" and online harassment including defamation (Bailey, 2014). Reports vary as to the prevalence and severity of these experiences. Among US youth, for example, estimates of prevalence range from 11% (youth aged 10–17, data from 2010; Jones et al., 2013) to 67% (youth aged 16–29, data from 2016, Duggan, 2017; see also Livingstone et al., 2016 for a discussion of international trends). Recent data from Statistics Canada (Hango, 2016) indicate that 17% of Canadians aged 15–29 experienced cyberbullying or cyberstalking between 2009 and 2014. Canadian data from young people in grades 4–11 suggest that for the large majority of respondents (89%) "online meanness or cruelty is rarely or never a problem for them and when they do experience it, they are typically able to resolve it by ignoring it or by

turning to parents and friends for help" (Steeves, 2014, 8). Serious attacks including cyberstalking and cyberbullying, however, have a negative impact on mental health, with almost 20% of those reporting these experiences indicating they have subsequently experienced emotional or psychological consequences (Hango, 2016). Almost a quarter of young Americans aged 16–29 who have experienced online harassment report emotional or mental distress as a consequence (Duggan, 2017), and 44% of all respondents who had experienced more severe forms (sustained harassment, stalking, sexual harassment) suffered from these kinds of distress as a result (Duggan, 2017).

Legal avenues are among the many responses available to online harassment. Recent data from the US suggest that Americans view better policies and tools from online companies, stronger online harassment laws, peer pressure, and increased law enforcement attention as the most effective ways to address online harassment (Duggan 2017). A small minority of respondents in that survey (5%) indicated that they had reported recent online harassment to the police, and 3% indicated that they had received support from legal resources (Duggan, 2017). Canadian data (Statistics Canada, 2018) suggest that police reports of cybercrimes that include harassment and bullying are increasing. One US study indicates that those who sue for defamation generally do so for non-pecuniary reasons (e.g., the belief that a legal claim will help them to set the record straight and restore their reputation), and even those who lost their cases felt that bringing the action had satisfied most of their objectives, including defending their reputations (Laidlaw, 2017, p. 22). Notwithstanding these results, 70% of those interviewed said they would consider alternatives to a court case if confronted with a similar situation in the future in order to avoid bringing a lawsuit, to reduce costs and time, and to achieve a public outcome (Laidlaw, 2017, p. 24). Thus, although victims of online abuse can in at least some cases seek legal recourse, this is not always viewed as the best, or even a possible, course of action.

Lack of Public Faith in Justice Systems

One of the problems with seeking legal remedies for online attacks could be negative perceptions of the legal system. Numerous indicators suggest a lack of public faith in both civil and criminal justice systems in Canada. Results from the 2013 General Social Survey, for example, demonstrated that only 57% of Canadians have confidence ("a great deal" or "some") in the justice system and courts (Cotter, 2015). The Ontario justice system has been described as "unfair, inaccessible, and intimidating to most of the province's residents" (Coletto, 2016, p. 6); a 2016 report on the performance of criminal courts across Canada concluded that "with few exceptions, our justice system is slow, inefficient and costly" (Perrin & Audas, 2016, p. 4). A 2016 survey in Ontario indicated that 40% of respondents did not believe they had equal and fair access to the justice system, a quarter of those who had sought legal advice had faced obstacles in doing so, and many had little or no confidence that they would be able to afford the services of a lawyer or paralegal (Coletto, 2016). Moreover, although the cost of legal services is of significant concern, numerous studies indicate that the cost of legal services or court processes "plays a secondary role in people's decisions about how to handle the civil justice situations they encounter" (Sandefur, 2015, p. 444). Instead, these studies suggest that people do not "take their civil justice situations to law" primarily because: (i) they don't see the issues as legal or think of law as a solution, and (ii) they feel they understand their situations and are doing what is possible to address them (Sandefur, 2015, p. 444).

Young People and Legal Remedies

Although many young people experience legal problems, including bullying and harassment leading to stress-related illness (Macourt, 2014, pp. 3–4), they are much less likely than adults to get legal advice or to take action to resolve a legal problem. They are also less likely to recognize that they require legal advice or to know where to find help. These difficulties are exacerbated for young people who experience mental health issues, homelessness, or other vulnerabilities (Centre for Public Legal Education Alberta, 2013, p. 1) and those negatively affected by intersecting forms of

discrimination (Huys & Chan, 2016). A number of different reasons are offered for the challenges that young people face in accessing justice through formal legal services. These include the fact that children and young people don't know their rights, as well as practical barriers that impede young people's ability to access justice.

(a) *Children's and young people's awareness of their legal rights*

Some studies suggest that children are not aware of their legal rights, and that this may be particularly true for young people from marginalized communities. A 2009 UK study, for example, found that young people aged 16–25 from particularly disadvantaged communities "had little or no knowledge of most basic rights and entitlements," and were unaware of any system of civil legal recourse to which they had access, as well as the processes associated with those systems (Parle, 2009, p. 5). Young people's negative perceptions (and, often, experiences) with professionals, such as police, drove them toward seeking help and advice from family members and friends, but their impetus to act and their chosen course of action was motivated by their understanding of what was at stake (Parle, 2009, p. 6). A more recent 2018 study of children aged 8-11 and their understanding of law in their everyday lives indicated the participants' strong concern for gender equality, but also a sense of powerlessness and lack of certainty about legal limits on adults' interactions with them, suggesting a lack of legal knowledge that cannot be "dismissed or explained simply as an inevitable stage in their development toward adulthood competency" (Watkins et al., 2018, p. 77). Results such as these suggest and support the need for and development of public legal information and education campaigns to assist children and young people in understanding their rights, as well as the processes to which they have access to vindicate them. However, they also highlight the role that diversity of experience with discrimination can play in affecting young people's willingness and perceived ability to use law to enforce their rights.

(b) *Practical barriers to pursuing legal remedies*

Young people face a number of practical barriers to pursuing civil legal remedies, including being required to be represented by a litigation guardian in order to commence a legal action before they

reach the age of majority. Pursuit of civil legal remedies, including those relating to online harassment or "cyberbullying" is also complicated by costs of time and money, and internal limitations on existing legal claims (e.g., to pursue defamation, an attack must be untrue; Davis, 2015). The pursuit of criminal legal remedies, particularly where the online attacker is another young person, raises important social and ethical questions about the consequences of criminalizing young people (Davis, 2015, p. 58; MacKay, 2015). Moreover, legal remedies may fail to give young targets of online attacks what many say they want most: quick, low-profile mechanisms for removing offending content (MacKay, 2015; Bailey, 2015).

We turn now to consider our findings with respect to young people's perspectives on law as a response to online attacks.

Methodology

The results reported here represent secondary analysis of interviews conducted in February and March 2017 in Ontario, Canada, and discussed in Bailey and Steeves (2017). Participants were recruited through Research House, a research firm located in Toronto. Interview participants were 20 young Canadians aged 15–21. The purpose of the interviews was to explore young people's attitudes toward and experiences with online defamation, reputation, anonymity, and the benefits and drawbacks of existing mechanisms for addressing online defamation and other forms of aggression.

Sample

The sample consisted of 20 participants in total, 12 (6 aged 15–17 and 6 aged 18–21) from an urban centre and 8 (4 aged 15–17 and 4 aged 18–21) from 3 rural areas near to that urban centre. Ten of the participants self-identified as female and ten participants self-identified as male. Ten of the participants identified as Caucasian and seven identified as German-Canadian, Korean-Canadian, Lebanese/African-Canadian, Black Canadian, Haitian-Canadian, Turkish-Canadian, and First Nations, respectively. The remaining three did not specify a race and/or ethnicity with which they

identified. Two of the participants identified as being French/English bilingual. Two participants identified as queer, one identified as pansexual, one indicated having no specific sexual orientation, twelve participants identified as straight, and four did not specify their sexual orientation. Two participants identified as Muslim, one identified as Christian, and seventeen participants did not specify their religion. Table 1 provides details regarding the participants.

Table 1: Participants by region, pseudonym, age, gender, race/ethnicity, sexual orientation, and religion

Pseudonym	Age, Gender, Race/Ethnicity, Sexual Orientation, Religion
Urban Participants	
Michael	16, Male, Caucasian, Pansexual, Not Specified
Lina	16, Female, Caucasian (German Canadian), Queer, Not Specified
Jackson	17, Male, Black, Not Specified, Not Specified
Sarah	17, Female, Not Specified, Not Specified, Not Specified
Caitlyn	20, Female, Caucasian, Straight, Not Specified
Kim	18, Female, Korean, Straight, Not Specified
Daniel	18, Male, Caucasian, Straight, Not Specified
Harper	21, Female, Caucasian, Queer, Not Specified
Fadi	21, Male, Lebanese/African, Straight, Muslim
Marcus	17, Male, Black, Straight, Christian
Stéphanie	15, Female, Black/Haitian, No Specific Sexual Orientation, Not Specified
Ameera	20, Female, Turkish/Muslim, Straight, Not Specified
Rural Participants	
Rain	16, Female, First Nations, Straight, Not Specified
Ashley	15, Female, Caucasian, Straight, Not Specified
Morgan	15, Female, Not Specified, Not Specified, Not Specified
Jeff	17, Male, Caucasian, Straight, Not Specified
Scott	21, Male, Caucasian, Straight, Not Specified
Aaron	21, Male, Caucasian, Straight, Not Specified
Katherine	20, Female, Caucasian, Straight, Not Specified
Nicole	18, Female, Not Specified, Not Specified, Not Specified

Administration of the Interviews

Individual interviews were conducted with each participant, lasting 60 to 90 minutes. During the interviews, the researcher(s) and participants discussed, among other things, the various online activities that they engaged in, their experiences with and understandings of reputation, anonymity and free speech in the online context, and their experiences and understandings of various

responses to online defamation, including legal, school-based and social media platform–based responses. With participant permission, the interviews were audiotaped and transcribed for analysis. Identifying information was removed from the transcripts and pseudonyms have been used to identify participants in this report.

Results

Participant Experience

The young people who participated in the interviews were active users of social media platforms. All indicated that they were users of at least two different social media platforms, and the large majority (17/20) included Facebook among the platforms listed. Other commonly identified platforms included Snapchat (13/20 participants) and Instagram (15/20 participants); other named platforms included YouTube, Twitter, Tumblr, and VSCO (a photo-sharing application). In the course of their interviews, many of the participants reported some direct experience with hurtful content, usually as recipients but in a few cases as posters of comments that others found hurtful or harmful. Reported experiences were, however, typically limited both in scope and severity, and their direct reports described relatively minor attacks, resulting in little hurt or harm. The one participant (Harper) who reported experiencing significant bullying when she was younger did not indicate any long-standing consequences, and at the time she dealt with the issue without any legal or police involvement. Second-hand reports of online attacks experienced by family, friends, or acquaintances often included descriptions of more serious incidents, in many but not all cases related to the non-consensual distribution of intimate images. Although many of the participants were aware of cases of extreme online aggression with very serious consequences (e.g., the Rehtaeh Parsons case in Canada), none reported incidents of this severity in their direct experience or among their friends or acquaintances.

Perspective on Responding to Attacks

In their discussions of responses to online attacks, participants focused on four different objectives, and discussed different strategies or approaches to achieve each. The first and most commonly

discussed objective was to minimize the damage caused by hurtful or harmful posts (MacKay, 2015). The second goal was repair, and redress: repair of reputation and relationships, and remedy, particularly of compensable damage and/or repairable faults. The third and fourth goals were, by contrast, externally focused: prevention of other or future incidents of online abuse, and punishment of perpetrators. Strategies or approaches to address online aggression included ignoring or deleting content, enlisting help from friends, parents, the school, or police, and seeking assistance through the justice system. We discuss below the perspective of participants on justice system responses, and then move on to a series of brief discussions of the approaches they have, or endorse, for addressing their objectives in responding to online aggression.

Research participants occupied a wide range of intersectional positions with respect to gender, sexuality, and other characteristics (see Table 1); there was, however, relatively little variability in their first-hand or other reports of online aggression, in that none had directly experienced online aggression that led to significant negative consequences, and few had even second-hand experiences of more serious incidents. Our focus in this analysis is on their *general* perceptions of appropriate or desirable responses to online aggression, rather than on their perspectives on responses to specific situations. Given this general (rather than case-specific) focus, and given the fact that none of the respondents discussed any specific first-hand experiences that merited (in their opinion) a justice system response, it is unsurprising that there is little variability in their discussions. Each of the points below was endorsed by some (but generally not all) participants, and there were no discernable differences based on demographic characteristics such as gender, racial identity, religion, sexuality, or other characteristics.

Justice System Responses

None of the participants had personally experienced a situation of online abuse in which the criminal or civil legal system had been engaged, and very few of the participants spontaneously brought up legal responses to online abuse. When questioned directly on the

issue, however, all participants endorsed the notion that legal remedies including both civil and criminal approaches were appropriate in some, more serious, incidents of online abuse. At the same time, they noted limitations in the effectiveness of justice system responses, and they identified cost and delay as significant barriers to using the justice system. In their responses, police responses were discussed separately from justice system interventions, and were most closely linked with interventions by the schools; as a result, we describe their perspectives on police involvement separately.

When asked to consider legal responses to abuse, participants focused on civil proceedings, and particularly on the question of compensation. Aaron echoes the perspective of many other participants in his understanding that the law "gets involved" when there is a "monetary or quantifiable" loss, but not if the aggression just "hurts your feelings." Participants did not feel that higher-status victims (e.g., celebrities) should be eligible for higher compensation, except insofar as their documentable financial losses were greater. Stéphanie was one of the relatively few respondents who felt that emotional consequences alone were enough to warrant compensation:

> if the person was truly like impacted emotionally, then they should get money … because the person will never feel the same way, you know?

There was general agreement that online attacks could have reputational effects that translated into financial loss (e.g., loss of employment, loss of other opportunity), and that victims should be eligible for compensation for these identifiable losses. Marcus represents this perspective when he comments, "if they lose their job or something, then, yeah, they should get money from it"; Scott thinks that it might be appropriate to go to court

> if something bad is said in high school and somebody's getting, like, a big scholarship or something and somebody finds out, or [they lose] future jobs.

In addition, some participants noted that victims might incur costs addressing the consequences of online abuse, such as the cost of counselling to address emotional or psychological issues, and that

victims should also be able to seek compensation for these costs. Stéphanie, for example, thinks that compensation is appropriate because she feels that "with the money you can seek out the help you need. Maybe get a psychologist or a therapist to talk about it." In the end, however, compensation does not deal with the "core" of the problem. As Stéphanie puts it, "for some people, no matter how much money you give them it won't like heal the pain you've caused them."

Perspectives on criminal proceedings were more complicated. Participants were sensitive to the social realities of online bullying and other forms of aggression. In particular, they note that harmful or hurtful communication could be a "stupid mistake" (Ashley), an unintentional result, or part of a larger story of reciprocal aggression. A number of participants focused on intent, remarking that unintentional harms should not result in jail or other sanctions. In general, punishment of perpetrators was not a focus for these interview participants (see section "Punishment" below), except in cases of significant harm (e.g., extreme emotional distress including suicidality).

Although participants felt that legal responses were in at least some cases appropriate and justified, they also identified the limitations of legal responses and challenges associated with a legal response. Their comments reflect the general lack of faith in the legal system identified in earlier studies, and they raised concerns similar to those identified in that earlier literature. Among their concerns were the expense and long duration of legal action, and the reality that pursuing legal action could serve to re-focus attention on the original harmful communication — and thus, rather than minimizing the damage, could actually contribute to greater harmful effects. Related to this was a concern that, in seeking a response through the justice system, victims could "lose control" of both public knowledge of the original defence and the consequences for themselves and the aggressor:

> It would [be] blown up into like a larger thing than it really was because if I brought up that someone was like bullying me at school, that it would like make it seem like such a big ordeal, even

> though it is a big deal. It's just it could get a lot further than I'd wanted it to go and I have no control in stopping it because it's like gone to the police and now they want to make a court date out of it. (Morgan)

Many participants felt that it would be valuable for victims to be able to report abuse anonymously, in order to provide them some protection from retaliation and/or further exposure of the harmful content.

Some participants noted the futility of trying to control aggressive or hurtful behaviour through legal responses. Ashley, for example, says that:

> the law could get involved and just put a stop to it —- but it's really about the people. And if they want to find a way around it, then they can. It's just like no matter how much security system you have in your house, if people want to break in, they — they'll still find a way.

Stéphanie echoes this response, noting that "people will say what they want to say."

Part of the difficulty, of course, is the "slippery" nature of the offences, particularly in the case of cyberbullying, where some hurtful comments can masquerade as seemingly innocuous online remarks or posts. One respondent noted a concern that reports of aggression might not be believed; others remarked on the difficulty of determining what, exactly, constituted a "lie" or whether content was harmful; still others noted that communications taken out of context might inappropriately represent the interaction (appearing either *more* or *less* harmful than might be warranted).

Minimizing the Damage

Respondents recounted, and endorsed, responses that were focused on removing or isolating the hurtful or harmful information quickly, or otherwise limiting the "reach" of the content. With respect to "minimizing the damage," actions that brought attention to the victim or to the hurtful information were usually counterproductive, and "keeping it quiet" was generally viewed positively.

In describing responses to online attacks, participants focused first on individual responsibility, both in describing their own experiences and in discussing the experiences of others. They described victims of attacks as being, at least in some cases, well placed to minimize the damage from hurtful comments. In some cases, these discussions extended to a victim blaming discourse that held the victims of online attacks at least in part responsible for those attacks. In other cases, participants focused on the reality that a non-response by targets of hurtful messages was the best way to limit the social "reach," and thus damage, associated with the messages.

Katherine, for example, recounts an instance where an online comment suggested she was sleeping with a work colleague. She made a joke of it, remarking to him, "apparently, did you hear we're sleeping together?" Michael likes to think of himself as "not getting riled up" by comments or postings that are meant to get a negative reaction, and he believes that "a lot of people" will treat this type of content the same way and "not care."

Another approach is to ask for the content to be removed, or to remove the content oneself. Caitlyn recalls that, when she was younger, "someone posted a picture of me drinking, and I felt that that would affect me later on, so I told them to take it off." Presumably, the photo was removed, and later in the interview Caitlyn indicates that she would do the same for someone asking *her* to remove content they found problematic:

> I know I've posted a [problematic] picture online, but it never came to anything massive. It was just, "hey, can you please take it down?" Like, yeah. That was it … you take it down.

Morgan says that, in response to negative comments, she would typically

> just either delete the comment as soon as it was made, or I would say, like "if you have anything negative to say, I would prefer if you private messaged me about it" … because then we can resolve it instead of making a scene.

"Making a scene," or adding to the drama, simply exacerbates the social damage — and that is something to be avoided. For this

reason, enlisting help from friends was *not* a preferred approach to addressing online aggression, since this "assistance" might serve only to exacerbate the situation.

Participants focused on platforms (e.g., Facebook) as bearing some responsibility for addressing problematic online behaviour by limiting distribution or removing problematic content. Most were aware that platform users could complain about problematic content, and some had used this approach to flag content that was generally offensive (e.g., racist, homophobic, or sexual content) or specifically problematic for them (e.g., a photograph that they did not want online). Experiences with reporting problematic online content were generally positive, and in many cases participants noted that access to the content was limited by the platform (e.g., by removal), and the perpetrators were in some cases censured. Michael, for example, lauds the "good moderators" who promptly "muted" a young player who was "spewing racist slurs and homophobic statements" on a gaming platform. Some respondents, however, note that response from the platform could have been faster, and the procedure could have been more transparent. Morgan, for example, was generally pleased that when people complain about problematic photographs of themselves, "they usually just report it and have it taken down … after about a week, it is usually down." While she was positive about the response, she feels that "it should be faster, because if I report it, it should be down as soon as possible because that could affect me in a bad way."

Participants identified a number of challenges with requests to remove content that was identified as hurtful or harmful (e.g., defamatory content) by one specific individual. In particular, they noted the challenges associated with placing platform providers in the role of adjudicating claims of hurtful, harmful, or defamatory content. Scott discusses this issue:

> It must get hard, because … how's this person from Facebook gonna know whether it's a lie or not? So they can't just go and delete everything that anyone reports.

At the same time, as Caitlyn notes, it is particularly important that this content is removed quickly, since leaving it up on the platform

increases the potential for further distribution and, thus, harm. Discussing a specific incident where a problematic photo of her sister had been posted, she remarks:

> And so my sister got a bunch of her friends to report it and like there's depending on the social media platform, there might have to be a certain number of reports or it takes them a certain amount of time before they can post it and by that time you can already screenshot, etc., etc. The photo's already been posted. It's done.

Participants discussed the tension inherent in having platforms monitor content, noting the privacy issues and the issues of freedom of speech.

In some cases, schools were noted as having an important role to play in limiting the damage. Although Harper had not disclosed when she was being bullied, in retrospect she feels that if she "had told a teacher or something they probably would have asked those guys to stop, or like told those guys they had to stop or something." She is both calling on the school to do *more* than what was originally provided, and recognizing that the school, including teachers and other staff, could have helped her, and can help to protect students who are being victimized.

Repair and Redress

Financial compensation, as discussed in the section above on justice system responses, is one obvious, if limited, way to redress the damage from online aggression. Social support from friends, family, and teachers at the school was identified as an important source of emotional repair, helping victims to minimize the emotional damage of aggressive online behaviour. Parents were an obvious source of emotional and practical support for victims of online aggression. According to Ashley, victims need "someone who cares about them" to help them with the emotional consequences of online aggression — and parents (along with teachers) fit the bill. For some participants, including Ashley and Daniel, parents are an obvious "go to" source of emotional support. In some cases, friends and acquaintances were identified as important resources for repairing reputational harms, by countering the negative messages that were

posted by aggressors. This tactic, however, had the possibility of backfiring, since it could create a spiral of aggressive messages, and could increase the attention on the original problematic messages.

In some cases, social repair was initiated by the victims themselves. Harper, for example, "tried to talk to" the person who was bullying her online, and although she was not initially successful, eventually he apologized to her and they became "cool at school." Nicole's attempt at an intervention with a friend who had hurt her was less successful, and the two no longer have any contact. One participant turned to her mother for assistance in negotiating a détente with an ex-friend who had been posting hurtful content. Although the two friends were not able to resolve the conflict, the intervention was still helpful since the two mothers discussed the issue and ensured, together, that no more hurtful content would be posted. In some cases, however, external interventions to negotiate some sort of resolution were identified as inappropriate and unhelpful. Daniel, for example, recounted an incident in which he had been bullied by a schoolmate. When he disclosed to the school, the principal intervened and insisted that the two meet and "shake hands":

> And so I did, and obviously I was like "okay, like I don't want to like — I don't want to shake hands with him because I know it's not sincere." She's like "well I really want you to shake hands with him." I'm like "fine, I'm like I'll shake hands with him but I know this isn't going to make a difference. Like, he's still going to be like a dick to me."

Many of the participants felt that an honest apology could help to address the damage from hurtful or harmful comments. The concern, however, is that apologies might not be sincere, especially if those apologies are public. Jeff feels that public apologies are "played up for everyone else," and that a private apology would be more meaningful. He is certainly not alone in this perception: Nicole, for example, feels that if an offender were to apologize in person, "it would make a difference." She thinks that honest apologies are "personal things," and that online apologies could make the issue "public again," leading "everybody" to know about it.

Prevention

Prevention was an important issue discussed by some participants. Although many comments focused on specific victims and/or perpetrators, others were more general in nature, addressing attitudes and practices that lead to cyberbullying or other forms of online aggression. Participants identified parents and schools as having important roles to play in education and the development of appropriate norms for online behaviour. Caitlyn, for example, believes that "parents and even schools … they need to educate and be able to provide tools for kids to learn about the internet and the proper and improper use and what to do in those situations." Harper thinks that schools should go beyond current initiatives and develop a more "integrated approach" to cyberbullying, ensuring that students encounter anti-bullying messages regularly in the classroom. With respect to prevention, participants also highlighted the important role that police play in educating students and parents about the potential legal consequences of some forms of online aggression, and intervening with individual perpetrators to stop the abuse.

Punishing Perpetrators

Many of the respondents felt that the identity of accused perpetrators should be protected, and some even felt that those who were known to have participated in online aggression should be allowed to remain anonymous. Ashley, for example, expresses concern that naming perpetrators could result in lasting damage to *their* reputation:

> If it's not, if it's not anonymous then you're saying "this person said this about this person." And if it's publicized, then that'll make people think bad things about them and then it ruins their reputation.

This protection of the identity of presumed or actual perpetrators makes sense in the context of the types of aggression that participants reported: sometimes unintentional, often reciprocal, and of relatively little long-term consequence.

In terms of punishment, legal repercussions, including jail, were viewed as appropriate in only the most serious of circumstances,

when online aggression resulted in permanent and significant emotional damage to victims. Participants described some cases of non-consensual distribution of intimate images in which police had been called to the school, confiscated telephones, and wiped the images. These consequences were viewed as appropriate, although perhaps not significant enough, since no particular consequences were enacted. Stéphanie, for example, describes a situation of non-consensual distribution:

> The police came in and they wiped all their phones, so there was no — there's no more trace of the video on either of the guys' phones now. But, ah, well I feel like it wasn't fair for her because none of the guys had any consequences. Like one of them, he was suspended from his hockey team but it was probably like a week. But things just went back to normal.

While punishment is not the primary focus of these participants in responding to online aggression, appropriate and limited consequences were viewed positively.

Discussion

In their discussion of responses to online aggression, the first goal of participants was to end or minimize the damage, primarily by limiting attention to and distribution of the hurtful content. To this end, they discussed a variety of approaches that included ignoring, deleting, or reporting problematic content, and "pushing back," either individually or as part of a larger social circle. The increased visibility and attention that would necessarily accompany a legal response were viewed as detrimental to this primary goal; at the same time, police involvement that involved "wiping" content (e.g., in the case of non-consensual distribution of intimate images) was positively viewed. A secondary interest was redressing or repairing damage, and in this respect participants focused on reputational and relational issues. Many participants raised responses that would help to repair relational damage, including face-to-face apologies from perpetrators and rapprochement, typically negotiated by parents or schools. Participants were aware of the possibility of financial compensation from civil action, and noted that this would be helpful to address direct financial losses, and to pay for services required to

address psychological or emotional damage. At the same time, they noted that such awards could not undo the damage itself, and the increased attention resulting from the legal action might even exacerbate the negative impact of the original harmful material. Their comments echo the earlier findings of MacKay (2015) and Bailey (2015): the current justice system is simply unable to give young people what they need in response to online aggression.

Participants were also interested in preventing online aggression, and focused on parents and schools as primarily responsible for achieving this outcome. In addition, they discussed the role of police and platforms in prevention. They did not, however, view criminal or legal responses as instrumental in achieving this goal. Finally, punishment of perpetrators was advocated in more egregious cases. In general, however, participants were cautious in advocating this approach, noting the complicated nature of many instances of online aggression, the difficulty of determining "truth" and "falsehood" in the context of their everyday online communications, and the relative ease with which online interactions can become aggressive. While in no way condoning online aggression, and in most cases not placing any blame on the victims of these attacks, participants expressed concern that more significant punishments, including jail or other legal responses, might be more severe than warranted. Instead, they endorsed more limited forms of punishment, meted out by schools or by police in the form of confiscation and "wiping" of devices. Davis (2015) and MacKay (2015) raise a similar point in their earlier discussions, noting the social and ethical questions raised by pursuing criminal actions against young people involved in online aggression.

The fact that our participants were unlikely to focus on legal responses suggests that they do not feel that the law offers them an effective means for achieving their most pressing objectives. We turn in the next section to consider: (i) whether they are correct in that assumption; and (ii) to the extent that they are correct, how law might be reformed to better assist them in achieving their goals.

Legal Responses and Young People's Priorities

Canadian policy has for some time centred digital connectivity and technological innovation as core to economic growth, frequently focusing on getting young people online and keeping them there (Bailey, 2016). By the 1990s, however, federal policy debate was increasingly engaged with the negative aspects of connectivity for youth, including luring, cyberbullying, and online child pornography. Numerous legal responses have resulted, including both the application of pre-internet laws (e.g., defamation), as well as creation of new laws specifically targeted at online attacks (e.g., criminal prohibitions against non-consensual distribution of intimate images [NDII] and child luring, statutory cyberbullying and NDII torts in some provinces) (Bailey, 2018). As a result, Canada has a broad assortment of civil, criminal, administrative (e.g., privacy complaints), and education (e.g., policies against and disciplinary action for cyberbullying) law responses that would apply to various forms of online attacks (Bailey, 2018). Most are reactive, providing responses after attacks happen. Others, particularly in the space of education law and policy, are proactive: seeking to foster respectful, diverse, and inclusive environments designed to discourage attacks *before* they happen (Bailey, 2018). For example, with only one exception,[1] education legislation in all Canadian provinces and territories requires schools and/or school boards to address "cyberbullying" in school policies and/or codes of conduct, although there appears to be a significant degree of variation in fulfilling these requirements from school to school and board to board (Bailey, 2017). Since legal responses are frequently developed without direct consultation with young people, however, they often miscomprehend young people's priorities and therefore fail to meet young people's needs (Bailey, 2015).

Minimizing the Damage

Save for proactive educational measures, for the most part, the law in Canada reacts to problems after the damage has occurred, either imposing punishment in the context of criminal law or awarding

[1] Nunavut's education legislation is the exception, although it includes other provisions that would apply to "cyberbullying" (Bailey, 2018).

monetary damages in the case of civil litigation. Legal remedies are available only *after* a trial that could take weeks, months, or even years, unless the parties settle. These remedies, therefore, do very little to address our participants' first priority — stopping the damage by removing the content or by restricting access.

Interim or injunctive relief pending a trial might be one mechanism for preventing further damage (e.g., Ardia, 2013). In the criminal context, interim orders for seizure and forfeiture (and in some cases deletion), are available with respect to material relating to certain offences, including online hate propagation, unauthorized use of computer systems, and NDII (*Criminal Code [1985], 320.1, 164(1))*. However, obtaining a civil injunction or a criminal court order will also inevitably involve some element of delay, since both require filing material and appearing before a judge. Further, the civil remedy is expensive and only available to a litigant who can prove, among other things, that they will suffer irreparable harm if the injunction is not granted (*RJR-MacDonald v. Canada* 1995*)*. Thus, while interim injunctive remedies may technically be available in certain instances, they are unlikely to offer the speedy relief from further distribution that our participants prioritized.

Legal reforms that provide cheaper, more easily accessed forms of interim relief would go some way toward responding to our participants' primary concerns. Incentives could be created for service providers to respond more quickly and effectively to takedown requests by, for example, explicitly exposing them to a risk of civil or criminal liability. Unlike in the US, internet service providers in Canada are not explicitly immune from liability for illegal content posted on their sites (Slane & Langlois, 2018). In fact, intermediaries *could* be held liable for defamatory material posted on their sites by third parties under Canadian defamation law as currently framed (Laidlaw & Young, 2019). They can also be exposed to criminal liability for hosting certain types of content, such as NDII (Slane & Langlois, 2018) and advertising the sale of the sexual services of others *(Criminal Code*, s 286.4 and 286.5), although intermediaries are *not* generally criminal law enforcement targets.

Exposing intermediaries to civil or criminal liability raises a host of concerns, including undue interference with free expression and business innovation and development (Slane & Langlois, 2018), as well as the potential unfairness of imposing liability without blameworthiness (Laidlaw & Young, 2019). Further, many intermediaries already privately administer community standards that can result in reporting and removal of material, although the basis for enforcement of these standards can be quite opaque (Dunn et al., 2017). Layering on exposure to civil or criminal liability could simply work to incent further non-transparent decision-making (although larger intermediaries such as Facebook [2019] and Twitter [2019] have begun to issue transparency reports that at least demonstrate the frequency with which they remove certain types of content). As a result, regulatory approaches (for non-criminal content), such as notice and notice systems (Laidlaw & Young, 2019), that would make intermediaries more procedurally accountable (Bunting, 2018) have been proposed. Such approaches (combined with criminal liability for intermediaries actively soliciting or knowingly hosting illegal content) could work toward achieving our participants' primary goal of stopping the damage in a timely manner while addressing broader concerns about the lack of transparency in private service providers' content removal decisions and the protection of freedom of expression (Dunn et al., 2017).

In the long term, privacy-focused administrative law reforms, such as the "right to be forgotten" in the EU (*General Data Protection Regulation,* 2016) might also partially respond to our participants' focus on stopping the damage of online attacks. While a statutory right to request a service provider such as Google to de-list URLs associated with impugned content that is no longer publicly relevant (Kuner, 2015) would not immediately stop the flow of harm, it could help to mitigate long-term repercussions of online attacks. However, such measures would be of limited effect in relation to content posted on online platforms that are not indexed by larger search engines. Further, these kinds of measures should be paired with public reporting requirements since they vest significant authority in private platforms to make determinations about the public interest in having access to information (see Bertram et al., 2017).

Current Canadian provincial administrative regimes in Manitoba (*The Intimate Image Protection Act*, 2014-5) and Nova Scotia (*Intimate Images and Cyber-protection Act,* 2017), and national regimes in other countries relating to NDII and cyberbullying[2] provide models for legally facilitated approaches that arguably better address our participants' first priority. Under these acts, statutorily designated bodies assist those targeted by non-consensual distribution and/or "cyberbullying" to get harmful content taken down. This approach to online attacks could go some way toward our participants' objectives of stopping the damage quickly, especially if the regime includes take down powers and/or provides support for negotiating expeditious removal of offending content.

Even if civil litigation, criminal prosecution, or a "right to be forgotten" are unlikely to play a particularly meaningful role in addressing young people's first priority of quickly stopping the harm of online attacks, these approaches may still prove useful in achieving some of their other priorities (as discussed below). In order to do so, however, legal processes would need to be structured to facilitate access to justice for young people. One way of doing this would be to make it easier for a targeted young person to initiate a claim for damages without having to worry about exposing them to further unwanted publicity and notoriety by allowing them to sue using pseudonyms. The Supreme Court of Canada went part way down this road by holding in *AB v. Bragg* (2012) that targets of sexualized "cyberbullying" may be able to sue using pseudonyms without evidence to prove they will be harmed by further notoriety because that harm should be presumed. This approach could be expanded with respect to other kinds of online attacks and possibly to further extend existing provisions that currently protect complainants' names from disclosure in certain kinds of criminal cases (Burkell & Bailey, 2017).

[2] Federally appointed bodies in Australia (Office of the eSafety Commissioner) and in New Zealand (NetSafe) provide interesting national models of these kinds of regimes.

Repairing and Redressing the Damage

Our participants' second priority with respect to addressing online attacks was to repair the damage that had been done. As they recognized, civil litigation would allow for targets to recover monetary damages for harm to their reputations, as well as to collect damages for specific losses, such as the cost of counselling. Although participants were not aware of the possibility, in some cases, targets might even be able to recover damages for mental suffering. Typically, these damage awards would be retrospective, but could also be forward-looking, including with respect to future costs of counselling and so forth.

Unfortunately, as our participants also recognized, litigation is often not conducive to mending damaged social relationships. In the right kind of case, however, alternative dispute resolution and restorative justice approaches might go some way toward repairing that sort of damage (Nova Scotia Task Force on Bullying and Cyberbullying, 2012). Creation of additional bodies modelled on existing administrative regimes in Nova Scotia, Manitoba, Australia, and New Zealand referred to above could facilitate these kinds of non-monetary-based resolutions by offering mediation and restorative justice services.

Preventing Future Incidents

Our participants' third priority with respect to online attacks was to prevent future damage — often through preventative/educational measures. While Canadian law primarily *reacts* to harm, it can also facilitate harm prevention through education in at least two ways. First, by vesting statutory bodies such as human rights tribunals, privacy commissioners' offices, and offices such as those in Manitoba and Nova Scotia with powers and obligations to engage in public education campaigns, law can assist in reducing the incidences of online attacks *before* they happen. Second, education laws, policies, and regulations that set curriculum in schools can play a preventative role by incorporating more comprehensive educational initiatives focused on human rights–based digital literacy that address

issues such as racism, misogyny, and homophobia that often underlie online attacks.

Even civil litigation itself can produce outcomes oriented toward prevention of future online attacks. Damage awards, for example, can be used to fund prevention agencies and support centres (Moran, 2005), and these same kinds of preventative strategies can also be achieved through settlements privately arrived at by the parties themselves (see, e.g., Indigenous and Northern Affairs Canada, n.d.).

Punishing Perpetrators

Our participants' fourth priority in terms of responses to online attacks was punishment of perpetrators. Sentences imposed in criminal cases are primarily designed to achieve this objective, although rehabilitation is the primary concern in the context of young offenders. In very rare cases, however, civil litigation remedies can also address the goals of retribution and punishment through punitive awards (*Whiten v. Pilot Insurance*, 2002).

Law's roles, however, are not limited to preventing harm, remedying harm, or even punishing wrongdoers. Law is also an expression, for better or worse, of community values. The criminal prohibition on NDII, for example, flags this as a matter of public concern where community-recognized rights are at stake. Even as we may accept that the existence of legal prohibitions does not effectively deter impugned behaviours, their existence creates an opportunity (especially in schools) to open dialogue about values like privacy, equality, and mutual respect that may itself contribute to prevention of future harms.

Conclusion

The responses of our interview participants concur with existing literature that suggests two things: first, that legal responses form only *part* of an effective response to online aggression and abuse (e.g., Broll, 2016; Tomczyk, 2017), and, second, that current legal regimes are largely ineffective tools for addressing the issue (e.g., Ardia, 2010). Appropriate and effective responses to online

aggression require an integrated and networked response from peers, parents, schools, platforms, police, and the justice system. This paper has explored the views of Canadian youth on responses to online abuse, focusing on their goals in responding to this type of aggression. Careful attention to the perspective of youth will assist us to design effective responses that meet the needs of victims of this type of abuse (see, e.g., Ashktorab & Vitak, 2016). We have provided here some recommendations that could help to ensure that the legal system provides meaningful assistance to youth experiencing online aggression.

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Digital Court Records: A Diversity of Uses

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Abstract

This article addresses the topic of digital court records, focusing on their uses. Our empirical research on access to dockets in Quebec revealed an important diversity of uses that we present and discuss in this paper. The original function of court records is to leave an official trace of courts activities, in respect of the public character of justice and the principle of accountability of public institutions. However, our study identified many practical objects of digital dockets. There are used in judicial contexts, as a summary presenting all the steps of a case, but also in other professional or private contexts, to conduct a background check, for instance. This article presents the various situations where digital dockets are resorted to, revealing an important diversity of uses. In a perspective of access to justice, we discuss the role of digitization in this diversity, focusing on two important issues. The first one is the question of access to digital dockets by self-represented litigants. In this framework, we discuss the progress brought by digitization. The second issue is related to the sensitive character of the information contained in dockets. It raises privacy questions that we address, as well as a deep reflection on digital access.

Introduction

Digitization of the justice sector in Canada contributes to its modernization and is part of a solution designed to address the issue of access to justice (Benyekhlef, 2016). Court records are now

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computerized and often even accessible online. This digitization has brought changes to the very way that dockets[2] are resorted to.

In Quebec, computerized court records are accessible free of charge through computer terminals in courthouses. They can also be consulted online for a fee, through the website of La société québécoise d'information juridique (SOQUIJ, loosely translated as Quebec Legal Information Society), requiring a paid subscription to their service. SOQUIJ is a company whose purpose is to "analyze, organize, enrich and publish the law in Quebec" (SOQUIJ, n.d.-a), which operates under the authority of the Quebec Minister of Justice. In 1982, SOQUIJ obtained the mandate to release civil and criminal dockets; at that time, computerized dockets were available at the courthouse, freely accessible through a computer terminal.[3] In 2004, SOQUIJ implemented their online consultation system, followed in 2006, by the integration of municipal court dockets into their consultation systems.[4]

Since 2016, our research team has been studying both docket systems (computer terminals in the courthouse and the online consultation system) from the perspective of access to justice.[5] Our interdisciplinary research team focuses on the knowledge required to ensure better access to court records by identifying the multidimensional barriers faced by actual and potential users (Le Plumitif Accessible, n.d.). To this end, we conducted an empirical study comprising observation of individuals using the consultation systems in the courthouse together with semi-structured interviews of

[2] In the context of our research, the terms docket and court record are both used to refer to court dockets, which are court files containing the official summary of proceedings in a court of law.

[3] Print copies were also available in the courthouse, upon demand and for a fee.

[4] Out of 89 municipal courts in Quebec, Montreal is the only one not yet integrated in the docket consultation systems.

[5] Our project, named "Le Plumitif Accessible" (Accessible Court Records), is part of a 6-year SSHRC-funded research project titled "ADAJ, Accès au Droit et à la Justice" (Accessing Law and Justice) that unites 50 researchers from 9 universities and 60 partners around this important issue. There are 23 research hubs studying different aspect of access to the justice system, with the object of building a broad and actual vision of the law, and to develop alternative practices for overcoming the obstacles standing between litigants and justice (ADAJ, 2019).

users of the two systems. The data collected in this context shed light on many important issues regarding digital access to court records, such as practical difficulties, awareness and knowledge obstacles, privacy challenges, as well as inequalities among the actors of the justice system in facing these issues (Prom Tep et al., 2019). In addition, our research gave us a broad and clear understanding of the context surrounding digital dockets in Quebec. A further fine-grained qualitative analysis revealed different contexts of uses of dockets, including some that were unexpected. Dockets being public documents, our research has focused mainly on the question of access for all. But realizing that the dockets serve multiple purposes, and that there are more contexts in which they are consulted than we initially thought, we developed new interrogations and reflections around this subject. What are the uses of digital court records? In which contexts are they used, and by who? This paper aims to answer these questions and to discuss the results from the perspective of access to justice. Actual and potential uses do indeed have an impact on the global issues related to access to digital dockets and to the justice system in general. The discussion prompted by our results led us to rethink the role of the digitization of public records.

The first part of this article introduces the approach and methods used to collect and analyze the empirical data, followed by a presentation of our research findings, shedding light on the variety of uses made of court records. We first introduce the main use identified (i.e., by lawyers in the context of their work), and then describe uses made by litigants themselves, who were often self-represented citizens. We also describe uses that we initially did not expect, such as background checks made by employers or journalists. We conclude this first part by highlighting the great diversity of uses made of digital court records.

Part two of this article reflects on a number of questions arising from this diversity of uses. We argue that digitization has eliminated, at least in part, the practical obscurity of dockets (Blankley, 2004), with a resulting impact on the various contexts in which they are consulted. We discuss this point first from the perspective of self-represented litigants, and second in relation to the issue of the right to

privacy, highlighting the potential dangers related to computerized and online court records.

Uses of Digital Court Records

The preliminary findings of our research on access to digital dockets prompted us to deepen our reflection on access to justice. We noticed a clear disparity in the use of and access to court records between law professionals and laypersons respectively (Prom Tep et al., 2019). To further pursue our preliminary reflections, we analyzed our data in more detail to elicit the themes that would emerge (Thomas, 2006). This approach revealed more categories of users than we originally considered (i.e., law professionals and laypersons), and a great variety of contexts in which court records are consulted. Empirical research provided our team concrete information on dockets in Quebec, leading us to raise relevant questions and discussions regarding access.

Methodology

Our research project "Le Plumitif Accessible" was designed around the general question of access to digital dockets, aiming to identify obstacles and possible solutions, and to ensure better access for all. We used a qualitative approach to understand the operation of both consultation systems (computer terminals in courthouses and the online consultation system) and the users' experiences (Denzin & Lincoln, 2008). We were interested in collecting data about the users, the purpose and mode of consultation, and the consultation experience itself, particularly regarding access. To obtain this information, we conducted *in situ* observations of people using the docket consultation system in the courthouse (Mace & Pétry, 2017; Poupart et al., 1997). We coupled our observations with semi-structured interviews with the users of both systems to understand their perception of digital dockets and the process of accessing them (Paillé, 1991; Savoie-Zajc, 1997). We planned two phases for our data collection: first, we started out with the computer terminals at the courthouse, and in the second phase we brought a laptop to the courthouse that could access the SOQUIJ online system. During both phases it was a challenge to find and interview users who were not

law professional. In total, we interviewed 19 people, of which only 3 were litigants. Since the latter were important subjects in our access to justice project, we then planned a third phase consisting of approaching organizations working directly with litigants. We conducted interviews with three community justice centre employees who work daily with litigants.

To obtain a vision of digital dockets and their access, which was well grounded in the data we had collected, we conducted a qualitative thematic analysis (Paillé, 1994). We proceeded, with the help of data analysis software named *NVivo*, to code our interviews and observations by themes, which enabled us to build a classification tree, producing different categories (such as "challenges," "users," and "use contexts") (Mucchielli, 2009; Paillé, 1994). Detailed analysis of these categories revealed the great variety of uses on which this article is focused. Studying the different contexts in which digital dockets are employed raised interesting questions and discussions regarding access and digitization. Even though the main purpose of digital court records is ostensibly to serve the judicial context, our study showed that the context of each docket consultation can be different and unique.

Contexts of Uses of Digital Court Records

As public records, the dockets' objective is to leave an official trace of the acts taken by a court (Éducaloi, n.d.). Every litigant has such a record, and anyone should be able to consult them given the public nature of justice, and the rule of law that "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws" (Secretary-General of the United Nations Security Council, 2004). Accountability of the justice system is thus fundamental in this context. In Quebec, access to public records is guaranteed by the *Act respecting access to documents held by public bodies and the protection of personal information* (1982). As researcher Beth Givens (2002) underlined in her presentation on public records and privacy during the twelfth annual conference on Computers, Freedom and Privacy, dockets are essentially "tools to keep government accountable" and to "monitor" it (p.2). However, dockets have a

more practical function in a judicial framework. These records provide important information about litigants that can be useful in the context of a judicial case.

Court Records as a Tool for Lawyers

Dockets contain information such as "the names of the parties, the court case number, the date of each hearing, a list of legal documents placed in the court file and decisions of the judge" (Éducaloi, n.d.). They constitute a history of a case, which explains why they are so often used by lawyers. It is common practice for lawyers to take a copy of their client's docket for their file, and they can refer to it for any practical information they need regarding a trial, their client, or procedures related to a case (Kolish, 2005). A legal expert we interviewed in a community justice centre explained that for lawyers, dockets can serve as a compass to obtain their bearings, particularly when their client was previously represented by someone else: "people have a hard time explaining their legal issue. So, sometimes, by listening to their version, and by looking at the docket, we can match the two versions together to have a better understanding of the case" (Legal expert 1, personal communication, April 20, 2018).

There are also more technical contexts in which lawyers resort to dockets. For instance, a lawyer we interviewed in the courthouse told us that she would consult any "record she has a [sic] interest in, even though she's not the attorney on the case" (Lawyer 5, personal communication, June 28, 2017). This could be a record belonging to an accomplice, partner, co-defendant, plaintiff, or any other actor whose judicial background could be useful to know about when representing her client. Furthermore, for lawyers, dates are particularly important information in the dockets since the law sometimes provides time limits for taking specific legal actions or for starting certain procedures.

In terms of access, our study showed that law professionals use both of the docket consultation systems. Law firms and organizations often pay the subscription to SOQUIJ so that their employees can access court records online. However, as expected, this is seldom the case for small law firms or organizations with fewer financial

resources. Lawyers who we met at the courthouse told us that when they go there for procedures, they often take the opportunity to print out for free any dockets they might need (Prom Tep, Millerand, Bahary, & Noreau, 2018). Digitization has improved the method of accessing dockets for lawyers, but neither system is perfect yet in terms of use (Prom Tep et al., 2019).

Even though digital dockets display public information to guarantee accountability of the courts and justice system, they are a working tool for law professionals and serve as landmarks within judicial frames. However, law professionals are not the only users of dockets. Some litigants represent themselves in justice, and in such a context, court records are necessary for them.

Court Records as a Tool for Self-Represented Litigants

The number of litigants representing themselves in Quebec and across Canada continues to grow (Bernheim & Laniel, 2015; Birnbaum, Bala, & Bertrand, 2012). The cost related to lawyers is the main obstacle driving litigants to self-representation. Researchers also discussed some complex reasons, such as the empowerment aspect of self-representation, which can motivate litigants to go to court without a lawyer (Birnbaum et al., 2012).

Obtaining the experiences of self-represented litigants using dockets was a challenge given the difficulty in reaching non–law professionals during our data collection. Notwithstanding, the interviews we conducted with legal experts from two different community justice centres featured significant information related to litigants' use and access to court records. Details and comments contributed by some lawyers we interviewed at the court also help us understand the experience of self-represented litigants.

The use of dockets as a practical reference tool within judicial cases does not seem to be so self-evident among unrepresented litigants. Community justice centres, encountering many citizens facing justice without a lawyer, aim to help litigants in judicial situations by providing them with relevant information (Centre de Justice de Proximité du Grand Montréal [CJPGM], 2018). The legal experts we

interviewed explained that they are frequently obliged to assist litigants in accessing and using their dockets. They cited two types of situation: unrepresented litigants already in possession of their docket, and litigants without their dockets, who require legal experts to print their dockets for them during the meeting. In the first situation, the litigant had often been represented by a lawyer before, but could no longer afford one, and the lawyer had handed over all their documents, including their records; typically, the litigant is not even aware they possessed such records. Whenever legal experts in the centres meet self-representing litigants who don't have a copy of their dockets, they will print them through the SOQUIJ online system.

> [W]e are going to say: "Ok, you don't remember your file number or you don't have the needed documents with you, so I'm going to look for your name, I'm going to print it, put it on the table, we're going to take a look at it together, […] look, this is your file number and here you see the final divorce decision, it was pronounced that day." So, when they arrive at the Court, they already know what they need. (Legal expert 1, personal communication, April 20, 2018)

This depiction from a legal expert in a community justice centre clearly illustrates the circumstances in which self-represented citizens access their records. Court records are important in a judicial context and, in almost every situation, unrepresented litigants will need assistance to understand the content of their court record and how to interpret it (Prom Tep et al., 2018). Court records are intended to help obtain one's bearing in a court case, but they do not appear to be very effective when not used by professionals. In fact, SOQUIJ directs its docket consultation services mainly at professionals who have the skills to read and understand the content[6] (SOQUIJ, n.d.-c). Our observations suggest that court records are not designed with citizens in mind, but rather for professionals. As one of our interviewees in a community justice centre explained, whether it be knowing what a docket is, how to access it and how to use it, "it is not a record made for a citizen, it is an internal record, aiming to serve the legal field"

[6] They also have services aiming to reach law laypersons, where a consultant will deliver to the client the information needed. This information may be contained in the docket that the consultant will access, without giving access to the client (SOQUIJ, n.d.-b).

(Legal expert 2, personal communication, April 10, 2018). With the issue of accessibility in mind, we discuss, in the second part of this article, the need to consider self-represented citizens as appropriate users of dockets.

Law professionals interviewed about citizen access to court records also reported situations where citizens resort to using dockets outside a judicial context, most of the time to conduct background checks.

Background Checks and Other Uses

Our research revealed many cases where contracts were the reason behind judicial background checks. Many citizens visit community justice centres to obtain their court records because of requests from their insurers, landlords, and other institutions (Prom Tep et al., 2018).

According to a legal expert we interviewed, insurance companies almost systematically request a copy of their client's court record. Since they just ask for a copy, it is difficult to know which information in the record interests them. Our interviewee guesses that they check for potential criminal records, since this information could allow them to "increase their insurance coverage" (*Legal expert 3*, personal communication, April 10, 2018). It is also common for citizens to obtain a copy of their record to present to their employer or their school. In some companies, a candidate's court records are directly accessed by the human resources department. Again, the assumption here is that staff consult these records to be aware of any potential civil or criminal infractions. For the same reason, landlords can be tempted to ask potential tenants for a copy of their court records. Citizens looking for an apartment may also check court records of potential landlords for evidence and the nature of previous disputes (Prom Tep et al., 2018).[7]

More surprisingly, these background checks are sometimes conducted in a private context. A lawyer told us about parents

[7] Rental disputes are governed by a separate government agency called La Régie du Logement. They also have their own dockets, which are accessible online through their website. Searches cannot be made by name, but by postal address.

wishing to check the court records of their daughter's partner to see if he had a criminal past. Other similar situations were mentioned during the interviews, where curiosity and anxiety were the main drivers behind accessing court records.

In the conduct of a more professional activity, journalists also make use of dockets. SOQUIJ qualifies court records as "investigation tools" for journalists and investigators (Gélinas, 2017). They use them to explore people's judicial history, or to follow a judicial case (Gélinas, 2018). Professor Elizabeth Judge (2002), in an article about electronic court records, indicates the "important role" that the media play in terms of judicial information (p. 8). Journalists have the same public access as citizens, "but [act] as the people's eyes" (Judge, 2002, p. 8). Access to court records is needed to disseminate public information.

Diversification of the Contexts of Uses of Digital Court Records

Lawyers and law experts we interviewed point out an evolving context in the use of digital court records:

> But it wasn't made for them at the beginning, it was to follow a case and all. The problem now is that there is an increasing number of instances, where organizations, use [dockets] to qualify a person, and I'm not so sure that the people requesting them actually understand them. (Legal expert 2, personal communication, April 10, 2018)

All these observations and information allow us to conclude that there is a greater diversity of uses and users of digital court records than we initially expected when studying digital dockets in Quebec. Why and how did it become so common to consult dockets outside a judicial context? One reason raised by lawyers and legal experts we interviewed is that the actual official document used for a background check is the "nominative criminal record extract" that anyone can request in a police office; however, it is not free, and actually pretty expensive.[8] On the other hand, accessing court records through computer terminals in courthouses or obtaining them through

[8] In Quebec, prices vary from 50 to 100 dollars (Site officiel du gouvernement du Québec, n.d.).

community justice centres is free of charge. Online access through SOQUIJ entails subscription fees, but if used regularly and for different records, the cost may be lower than the charge for a single record extract in a police office. The practical aspects of online access result in people consulting dockets rather than travelling to police stations to obtain criminal record extracts. Dockets and criminal record extracts are two different kinds of documents that cannot be used interchangeably for any purpose (SOQUIJ, n.d.-c). Nevertheless, to get information about someone's judicial background, they are equivalent and in terms of access, digital dockets seem then to be better than criminal record extracts.

Can we then imply than digitization enhanced access to court records for all? What are the challenges related to the diversity of uses? These questions are part of the reflections we developed when understanding the various contexts of uses of court records, and all the actors involved in the matter of access.

Diversity of Uses of Digital Court Records: Issues and Challenges

Understanding the conditions of access to dockets, and the nature and importance of the barriers standing between litigants and court records, was the first objective of our research. When the broader picture of uses and users of dockets was revealed to us, it exposed two major issues. First, there is the question of inequalities in facing barriers to access dockets, between law professionals, other professionals, and litigants. It seems that the modernization process developed through digitization did not fully consider all actors concerned in accessing court records. We will deepen our reflection around this consideration by studying the case of self-represented litigants, a group that is especially in need of assistance in the justice frame (Cabral et al., 2012). Within a judicial context, they aspire to use an information tool that was initially designed for professionals, which creates difficulties even though the technology was developed to enhance access. The second issue that we pursue here is related to the great and unexpected variety of uses of digital court records. Digitization has enabled easier access to the public information contained in dockets, to serve, as we have seen, a diversity of

purposes. Consequently, it seems inevitable that we address the question of privacy and all the issues surrounding it.

The Case of Self-Represented Litigants

As we mentioned above, self-represented litigants frequently need assistance when it comes to dockets. Whether this assistance means being made aware of the records' existence, how to access them, or how to interpret them, our research showed there are many difficulties faced by litigants. Despite the computerization of court records that is intended to enhance access, barriers remain. After reviewing these barriers, we will analyze the role of digitization on the framework of access to justice.

In his work on access to justice, law professor Trevor Farrow (2014) considers the question from the perspective of "those who use the system" (p. 957). Our research on court records, which brought self-represented litigants to our attention, naturally led us to adopt a similar approach. Literature on access to justice generally goes in the same direction (Cappelletti & Garth, 1978; Macdonald, 2005), and so it is our precise frame of research with ADAJ that aims to put the litigant in the heart of the justice system (ADAJ, 2019). The following section will describe the different levels of issues faced by self-represented litigants aiming to access dockets.

Obstacles to Access to Digital Court Records

First, there is the problem of awareness and knowledge regarding dockets. As our interviews revealed, many citizens are unaware that they can access their court records, and that this could be useful, sometimes even necessary, when going to court. These records contain precious information for litigants, such as the date of their next hearing, or their file number. The journey to find this data can be very difficult. Some people end up finding it after going to the courthouse and asking around, which is very time consuming. In community justice centres, legal experts usually provide court records to citizens, highlighting the needed information (e.g., a date, a decision, or a file number), since litigants are not able to identify it.

Second, once aware of the docket's existence, accessing it is not straightforward; our research widely documented the practical obstacles to accessing computerized court records (Prom Tep et al., 2018). As mentioned above, there are two ways to access court records. The costless option, through computer terminals in courthouses, implies among other things that the user must travel to access their records. Patricia Hughes (2013), the founding executive director of the Law Commission of Ontario, documented the access situation of people living in rural areas; she considers that "[g]eographic location, often coupled with other factors, […] affects access to justice" (p. 15). She explains how having to travel to courthouses generates financial and practical preoccupations in addition to the judicial ones. Besides, once in the courthouse, having passed security checks at the entrance, citizens still have to find and use the terminals. Our research report details the many technical obstacles to overcome when using the consultation system in the courthouse: "unintuitive, inconvenient and not very effective" (Prom Tep et al., 2019, p. 228) are some of the descriptions of the system. To sum up, the system is not user-friendly for self-represented litigants who lack the familiarity possessed by law professionals. The other method of accessing dockets, through the SOQUIJ website, presents an obvious financial obstacle, since a paid subscription is required, though the online system appears to be more user-friendly (Prom Tep et al., 2019). Even though it overcomes the distance barrier, it requires access to the internet, which is less universal that we may think (Schetzer & Henderson, 2003). Patricia Hughes (2013) also highlights the existence of a computer literacy challenge, since basic computer skills are required to use both systems.

Last but not least, self-represented litigants face a law literacy issue when reading court records. "[I]ndividuals using information, however acquired, must be able to read it, understand it and apply it to their own situation. Each of these tasks requires an increasing level of literacy" (Hughes, 2013, p. 13). Indeed, the lawyers we interviewed in the community justice centres reported problems in reading the dockets. An attorney told us that she, even though accustomed to consulting these files, still finds it difficult to understand and interpret them. Abbreviations are used to refer to

accusations or decisions, and sometimes the abbreviation of a word can vary from one docket to another. Dates are not always in the same format, and references to laws can differ too (Kolish, 2005). One of the legal experts we interviewed also confirmed that it takes practice and knowledge in the law to fully and properly understand dockets : "It is confusing for attorneys. So, for a non-attorney, it is nonsense" (Legal expert 1, personal communication, April 20, 2018).

Accessing and using dockets is an important part of litigants' larger task of self-representation before the justice system. The variety of barriers encountered in this activity highlight the need to provide assistance during their "court records journey." Facilitating access at all levels — from practical access to interpretation —– could be a real support for self-represented litigants. Digitization was a step in this direction, given that its objective, among other goals, was to improve access (Cabral et al., 2012).

Better Access to Court Records through Digitization

The nature of access to justice is multidimensional and very complex. In his work, former McGill professor Trevor Macdonald (2005) highlighted the fact that difficulty in accessing justice is often closely related to a personal situation. Every situation is different: "there are as many obstacles to justice as there are citizens seeking to access it," as we mentioned in a previous paper about access to justice (Prom Tep et al., 2019, p. 237). The digitization of court records was introduced as a way to overcome some of the access obstacles, such as geographical ones (Epineuse, 2016; Hughes, 2013). The ability to access court records online, through the SOQUIJ's services, is an improvement in that sense, and it may have participated in the diversification of contexts of uses revealed in our research. However, other issues have to be considered, such as access to the internet, digital literacy, or the paid subscription. The last is important for unrepresented litigants, since financial issues are often the reason for their self-representation (Birnbaum et al., 2012). Our research showed that it is mostly law firms and private companies that use SOQUIJ's services (Prom Tep et al., 2018). When asked about improving access to justice for unrepresented litigants, a lawyer in a

community justice centre stressed the need to remove the charges for online access.

Online court records, especially when displayed in a user-friendly interface and system, can indeed enhance access for some litigants, but not for all of them. This last statement may seem counter-intuitive; however, Bailey, Burkell, and Reynold (2013), in their article on technology and access to justice, talk about "technological determinism that uncritically equates technological innovation with progress" (p. 205). Technology is not a universal answer to the access issue. Research has shown that what can appear to be a solution for some citizens, such as online court records, can raise barriers for others (Bailey et al., 2013; Hughes, 2013; Vermeys, 2016).

The above implies that the need for reflection about access to justice is never finished. When designing solutions, all the factors possibly affecting access must be identified and considered. There is a need for constant dialogue between the public and institutions, and constant care for and awareness of the litigant's experience (Cabral et al., 2012). In a symposium for the ADAJ project last June 2019, Chief Justice Wagner stressed the need to leave behind traditional paradigms where citizens are excluded, and to build "an adequate justice for all, not an exceptional justice for a few individuals".[9] Digitization is a means of progress in terms of access to justice but it cannot be considered as a perfect solution. Aside from the inequalities they can bring to the question of access, digitization and the internet have also generated many privacy and security issues.

Challenges of the Various Contexts of Uses of Digital Court Records

The digitization of court records has played an important role in the evolution of their use. Before computerization, accessing them was even more arduous: the records were paper files in the courthouse, a fee was requested to consult them, and copies could be obtained for an extra cost. Digital access generated a wider public, an advantage in terms of access to justice, in addition to unexpected uses, including potential dangers regarding privacy. Court records comprise sensitive

[9] Loosely translated from "Une justice adéquate pour tous, et non une justice exceptionnelle pour certains," Grande Rencontre ADAJ, Montréal, June 14, 2019.

information such as full name, address, and social insurance number. Elizabeth Judge (2002) explains that the content of court records makes them a particular kind of public record, and this makes "finding the appropriate balance between access and privacy especially difficult" (p. 3). After reviewing the potential dangers that digital and online court records present, we shall discuss the existing tension between accessibility of public records and privacy.

The Risks with Open Digital Court Records

The main danger with open and facilitated access to court records is the misuse of the information displayed. Whether used by an identity thief or to discriminate, ill-intentioned people can access sensitive information when consulting the dockets. However, federal and provincial laws make provision for the right to privacy and protection of personal information. In Canada, it is the *Privacy Act* that guarantees these rights (Privacy Act, R.S.C., c. P-21, 1985). The Quebec Charter of Human Rights and Freedoms, in its articles 4 and 5, recognizes such rights as well as a right to safeguard dignity, honour, and reputation (Charter of Human Rights and Freedoms, C-12, 1975). The Charter also addresses discrimination in the context of employment. To discriminate on the basis of criminal records is illegal, unless "the offence was […] connected with the employment" and has not been pardoned (1975, sec. 18.2). In addition to the right to privacy, specific laws relate to access to public documents and protection of personal information (Act Respecting Access to Documents Held By Public Bodies and the Protection of Personal Information, 1982; Act Respecting the Protection of Personal Information in the Private Sector, 1993).

Nonetheless, court records are public, and, in principle, anyone should be able to consult them. As presented above, they are often used as a safeguard in closing contracts, and there is a high risk of discriminatory outcomes when decisions are based on these records. During our interviews, many lawyers expressed their worries regarding the interpretation of dockets or the consequences of potential errors that could appear in the document: "we don't know how the person that consults [it] whether they are an insurer, tenant… how this person reads it and what they understand from it. It could be

detrimental to the litigant" (Legal expert 3, personal communication, April 10 2018). This refers to the law literacy and experience required to understand the written content of dockets. Aside from this, it is not rare to find typing errors within the text or to find records that are not up to date, which could be particularly problematic in the case of acquittals or dismissals. Beth Givens (2002), in her presentation on online public records, talks about the absence of "social forgiveness" (p. 4). Our interviews also revealed possible problems regarding people with the same name and/or birthday (Prom Tep et al., 2018). An attorney told us that this can be harmful, in the context of background checks, to people with common names In the words of Givens (2002): "There is no such thing as a perfect database. And there are no infallible users of data files" (p. 4).

Another "valid source of worry," according to Nicolas Vermeys (2016), deputy director at the Université de Montréal's Cyberjustice Laboratory, "is that private organizations such as data brokers, insurance companies, and banks could mine court records" (p. 130). Commercial interests in general could lead to exploitation of the data contained in the records. Givens (2002) explains:

> Compiling public records information from several sources and merging them with commercial sector data files allows the data to be sifted and sorted in many different ways. Brand new records are created. The types of uses that can be made of these new records extend far beyond the original public policy reason for collecting them. (p. 4)

She provides an example where a US company organizing tours for singles accessed divorce files to obtain names and personal information to promote the tours (Givens, 2002, p. 4).

These privacy considerations, coupled with the litigants' lack of knowledge regarding dockets, can create stressful situations for the litigants. The legal experts we interviewed told us about observing some litigants who became anxious when accessing their dockets online through SOQUIJ. An attorney from a community justice centre described a litigant's reaction when he saw his name on the computer together with details of his judicial history:

> [H]e told me that if I have access, certainly other people do too, and he asked, "[I]s it like Google, does it appear on Google?"; it created a lot of issues and anxiety for this person. I saw his distress. He was like, "[H] ow do I erase it?" (Legal expert 1, personal communication, April 20, 2018)

In general, people are worried when they learn that court records are public and accessible online. Even though this is the consequence of a transparent justice system, it can increase distrust towards it. A contradictory tension exists between trust in the justice system and trust in the docket consultation system. In her article about electronic court records, Elizabeth Judge (2002) distinguishes between users and subjects of the dockets: "we tend to appreciate public resources that reveal information about other people, but to criticize those resources when they reveal information about ourselves" (p. 6). All these dangers and issues must be taken into consideration when designing safe and effective access to court records.

Public Access to Court Records and the Right to Privacy

Many researchers consider that the delicate balance between public access and privacy is not a new issue in the context of access to justice (Givens, 2002; Hughes, 2013; Judge, 2002; Vermeys, 2016). Nevertheless, it is the potential availability of court records via the internet that has put the topic under the spotlight. Our study shows that having the records online means it is impossible to be aware of all the uses made of the dockets. Indeed, before internet access, people were required to explain to the clerk in the courthouse why they needed to access records, and it was thus easier to identify intentions and to prevent jeopardizing the right to privacy (Sudbeck, 2005). These circumstances amounted to "practical obscurity," a term broadly used to describe a situation where public documents are accessible to all in principle, but there are obstacles in place that ensure it is not "too easy" to access the information. Kristen Blankley (2004) explains this phenomenon:

> Prior to Internet publication, sensitive material contained in court documents was protected by the phenomenon of "practical obscurity." […] With this information (now) available at the click of a mouse, the government increases the risk of identity theft or other misuse of this sensitive information. (p. 413)

So, should we go back to paper files? As stressed above, widening access to court records is a matter of access to justice and accountability of the justice system. "The public policy reasons for making them available electronically are irrefutable — promoting easier access to government services as well as opening government practices to the public and fostering accountability," notes Givens (2002, p. 5). Many actors could benefit from open access: lawyers, all litigants, the media, and any citizen interested in a case (Morman & Bock, 2004). The issue then is not whether to accept or reject computerization but deciding on which definition of public access is relevant in this digital context.

Defining effective public access requires choosing what information should be displayed and, moreover, which principles underlie these choices. A full-access approach recognizes the principle of equal access for all, removing any kind of practical obscurity, and promoting free online access (Deyling, 1999; Prom Tep et al., 2019). Other approaches consider the right to privacy as an important principle within the access issue, such as the hierarchized access approach which focuses on the purpose of dockets. In an article about computerized court records, our team studied the Australian system where "the docket is viewed as a judicial monitoring device or tracking tool" (Prom Tep et al., 2019, p. 236) and can be fully accessed only by actors involved in the case and partially accessed by the public. Altogether, there are many ways of conceiving public access, depending on the weight given to different principles. Nevertheless, there is a growing consensus among law scholars that a shift has occurred in the question of access to justice that puts the interest of the citizen at the heart of the issue. According to Elizabeth Judge (2002), many access systems are now designed considering "that privacy and personal information are interests that should be recognized, even where the source of the information is a 'public' document or can be viewed in public, so that transparency and private life can be balanced" (p. 7).

Our analysis points in the same direction. In community justice centres, the general policy emphasizes privacy and requires strong reasons for consulting another person's record. Their objective is to support the litigant who needs to access their docket, but as an

employee told us "not to allow everyone to access data about someone else" (Legal expert 2, personal communication, April 10, 2018). Another attorney explained that there exists a professional conscience and moral framework that prevents law professionals from using the data contained in dockets in a harmful way; however, this is not the case for non–law professionals. So, in community justice centres, when people wish to consult someone else's records outside of a judicial context, they are redirected to the courthouse.

Among the issues of equal access for all, the right to privacy, accountability of and trust in the justice system, modernization and effectiveness of public administration, there are many elements to consider on the subject of access to digital court records. Elizabeth Judge (2002) recommends careful progress in this context, one which avoids repeating the mistakes of other states that "went 'e'" too fast, causing damaging consequences for citizens (p. 3).

Conclusion

Court records are important to the subject of access to justice. Implemented under the principles of transparency of public administration and accountability of the justice system, they have proven to be necessary tools for anyone involved in a judicial case. It is thus important to be concerned about access to court records, especially as litigants are increasingly representing themselves in justice. Our inductive research, however, has revealed other uses of digital dockets that make us rethink our approach to the access question.

We noted that the digitization of court records has facilitated diversification in their use, and partially removed the practical obscurity surrounding them. Of the many uses being made of court records, some present high risks for discrimination and the right to privacy, and while these uses go beyond the main purpose of dockets, they represent an evolution which must be considered when designing digital access to the dockets. From the perspective of access to justice, there is a strong interest in understanding and classifying these different functions attributed to dockets, since they have a significant impact on access to computerized court records.

Even if court records are now accessible online, people seeking to access them face many obstacles. Law professionals expressed a need to improve the consultation systems and the way dockets are presented to make them more practical and effective in support of their work. Self-representing litigants face even bigger obstacles to court records; digitization has enhanced access, but not for everyone. The solution to the access problem is more complex than computerization. It must embrace all the possible barriers, all the potential users, and all the challenges related to court records. In other words, a multidimensional solution is needed and must be based on the actual purpose and role of dockets.

There are many issues to consider when working on better access to justice for all, as our study on the uses of digital court records clearly illustrates. Consequently, we conclude by stressing the need for a very careful and citizen-oriented approach when designing access to digital court records. The great diversity of uses presents challenges that are sometimes difficult to reconcile.

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Digital Knowledge Divides: Sexual Violence and Collective Emotional Responses to the Jian Ghomeshi Verdict on Twitter

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Abstract

While social media platforms like Twitter can be divisive, this research explores how they contribute to progressive reforms in cases dealing with sexual assault. We found that the Twitter content following the not-guilty Jian Ghomeshi verdict fell into two porous camps — verdict protesters versus verdict supporters — and mapped out the emotional and affective epistemologies embedded in the two sides. On the one side, verdict supporters supported the problematic dichotomies of guilty/innocent, victim/perpetrator, and credible/unreliable testimonies. On the other side, verdict protestors were generally critical of the inherently masculine notions of due process, judicial truth, and victim blaming. We argue that criminologists should take seriously how emotions both structure and merge from legal practices and outcomes, and in doing so, can promote a more conciliatory and effective criminal justice system. These implications suggest that the Canadian criminal justice system needs to integrate an intersectional consideration of emotions if it will be successful in promoting healing rather than punitive forms of punishment that offer little to the survivors of sexual violence.

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Keywords: sexual assault, digital publics, intersectionality, feminism, gender

Introduction

The use of hashtags on Twitter has become a powerful tactic in efforts to combat gender inequalities (Clark, 2016). The recent #metoo and #timesup movements (started in 2006 by American activist Tarana Burke and internationally popularized in 2017 following the Harvey Weinstein allegations) have helped to bring stories of sexual assault and harassment to the forefront of public discourse. Amidst backlash, the oft-marginalized voices of victims[1] are amplified on social media, encouraging people to come forward with their stories and to express solidarity and support. Victims of colour often respond to sexual assault differently and face different issues than do white victims. For example, African American women are less likely to report sexual assault than are white women because they fear being seen as disloyal to their race, given the elevated rates of imprisonment in the Black community (Tillman et al., 2010). They are also more likely to be discredited as victims and viewed as more promiscuous and deserving of victimization (Maier, 2012). As increasing numbers of women come forward, we have, perhaps for the first time, witnessed swift ramifications for accused celebrities and other powerful men. While some of the most well-known include Bill Cosby, Louis C.K., Harvey Weinstein, Bill O'Reilly, Kevin Spacey, and Larry Nassar (to name a few), before these cases went viral on social media there was the Canadian trial of Jian Ghomeshi.

In this article, we move beyond our earlier media analysis of the emotional content posted on Twitter following the acquittal of Jian Ghomeshi (Coulling & Johnston, 2018) to account for the implications of digital knowledge, which are discussed in relation to the law's failure to successfully prosecute cases of sexual violence against women. Digital knowledge refers to the electronic accumulation of information enabled through an array of technological and organizational changes (Antonelli, 2017). Twitter content about the Ghomeshi verdict largely fell into two camps — that posted by those we describe as "verdict protesters" and "verdict supporters." Twitter users on both sides of the debate created a collective and often emo-

tional sensibility by way of tweeted content (Pavan, 2017), which, at first glance, may appear to reify the divisive politics that social media platforms have been accused of promoting (Berenger, 2013); however, there were also times when diverse voices formed agreements and came together to form networks of collective action that have the potential to underpin positive social change.

After briefly describing the case and reviewing key literature on sexual violence and the media, we outline how we used emotional and affective epistemologies, forms of implicit knowledge, as sensitizing theoretical constructs to guide the analysis. Following a brief description of the methodology, we review the emotional Twitter content framing the two sides of this debate. We conclude with a discussion of the implications of our findings, specifically outlining our call for the Canadian criminal justice system to adopt a case formulation approach (which we define in the next section) to assessing and responding to accusations of sexual violence (Wheatcroft & Walklate, 2014). We build on this model, suggesting that a consideration of emotions needs to structure this approach in order for it to successfully promote healing rather than punishment alone.

Background of the Jian Ghomeshi Case

Jian Ghomeshi co-created and hosted *Q*, the highest-rated radio program in the history of the Canadian Broadcast Corporation (CBC). On October 24, 2014, before several allegations of sexual assault against him were made public by many Canadian media outlets, Ghomeshi took a leave from his show. Two days after he announced his leave, the CBC terminated his employment. Ghomeshi responded that day with a lengthy Facebook post accusing the CBC of firing him because of false allegations brought forward by "a jilted ex-girlfriend" (Toronto Star, 2014).

Over the course of several weeks, several major Canadian media outlets publicized more accusations of sexual assault and abusive behaviour against Ghomeshi, and lawyer Janice Rubin launched an internal investigation into the working environment at *Q*. On February 1, 2016, the police dropped two of the charges of sexual assault because the Crown claimed there was no reasonable chance of conviction. At

trial, Ghomeshi faced four counts of sexual assault and one count of overcoming resistance by choking (across three complainants[2]); he was acquitted on all five charges on March 24, 2016. In his decision, the judge explained that he did not find the complainants to be credible. The judge remarked that the first complainant's testimony "suffered irreparable damage" due to inconsistencies in her memory of events; he felt the second complainant had "consciously suppress[ed] relevant and material information" which indicated "a wilful carelessness with the truth," while the third complainant "was clearly 'playing chicken' with the justice system" because she "was prepared to tell half the truth for as long as she thought she might get away with it" (CBC News, 2016).

There was concurrent coverage of the trial by traditional and social media forums, where there were also related discussions about the nature of sexual assault, consent, and false allegations. As journalists live-tweeted trial coverage, the Twittersphere erupted when the judge read the not-guilty verdict. In digital spaces and networks, gender, race, sexuality, ability, and class collide and create tensions in terms of how sexual assault cases are understood (Salter, 2013; Fairbairn & Spencer, 2018). It is thus paramount to mobilize a framework that can make sense of online interpretations of sexual assault cases in ways that push our capacity to think about the possibilities of a criminal justice system that better responds to sexual victimization.

Sexual Violence, Justice, "Trial by Media," and Carceral Feminism

Alongside advancements in legal and procedural reforms (Spohn & Tellis, 2012), feminist and victimology scholars have rallied the experiences of countless survivors of sexual violence into impassioned calls for more carefully considered research, government responses, political commentary, and institutional policy (Belknap, 2010; Brown & Walklate, 2011; Christie, 1977; Johnson, 2017; Kelly, 2011; McGarry & Walklate, 2015; Stanko, 2007; Walklate, 2007). Despite progress in discourse and policy, some social, cultural, procedural, and institutional responses to sexual assault cases remain riddled with problematic assumptions about gender and controversies over what counts as truth (Walby et al., 2011; Walklate,

2014). The widely publicized idea that women often lie and "cry wolf" about sexual violence suppresses women's willingness to report sexual assault and proliferates belief systems among police, prosecutors, and citizens that sexual assault accusations are frequently baseless and should be treated with indelicate caution in the criminal justice system (Brown & Walklate, 2011; Kelly, 2010).

The term "false allegation" has long been criticized for its lack of conceptual clarity and inability to capture accurate representations of truth in situations where the circumstances surrounding consent and disclosure are messy, complex, and entangled by competing interests (Ahrens et al., 2010; Fahs & McCelland, 2016; Norfolk, 2011; Wheatcroft & Walklate, 2014). When methodologically rigorous research designs and consistent definitions and measurements are employed to estimate the number of false reports, statistics generally aggregate around 2% or lower in the US and Commonwealth nations (Lonsway, 2010; Spohn & Tellis, 2014). Higher false report percentages range between 30–90% (Jordan, 2004; Rumney, 2006) and tend to surface when law enforcement agents improperly categorize unfounded complaints on account of the complainants' behaviour at the time of the incident; lack of cooperation with prosecutorial authorities; delayed reporting; or because researchers problematically accept that unfounded cases equate to false allegations (Konradi, 2007; Spohn & Tellis, 2014).

Rather than engender suspicion, accusatory language, adversarial tactics, re-victimization, or even impartiality as the beginning premise in adult sexual assault investigations (see Buchwald et al., 2005; Rumney, 2006; Saunders, 2012), Wheatcroft and Walklate (2014) advocate using a case formulation model that begins with "believability" in the evidentiary process. This model would weaken commonplace ideas that women who report sexual victimization do so as an act of revenge, fantasy, or to hide their own sexual appetite or inclination toward practices that some might label deviant, such as BDSM (D'Cruze, 2011; Gavey & Gow, 2001; Greer & Jewkes, 2005; Buchwald et al., 2005), which is important given that mass and social media networks perpetuate rape myths (Coulling & Johnston, 2018; O'Hara, 2012). It bears mentioning that journalists also publicize cases of sexual violence in ways that do not always benefit the defen-

dants, especially when their stories subscribe to highly emotive and sensationalized depictions of gender, race, and class (Barrie, 2015; Bhattacharyya, 2008; Brown Givens & Monahan, 2005; Jewkes, 2011; Kilty & Frigon, 2016; Kilty & Bogosavljevic, 2019). Case studies document how racialized minorities are vulnerable to false sexual assault charges and scapegoating by white communities (Patton & Yuly, 2007; Johnson, 2016). Even when contradictory evidence exists, the media and other stakeholders sustain white patriarchal hegemony by casting Black men in particular as violent animals out to harm white women. The concept "trial by media" captures the tensions and imbalances between court officials who are expected to conduct trials without external interference and journalists whose duty is to report news objectively (Chagnon & Chesney-Lind, 2015; Greer & McLaughlin, 2011, 2012; Middleweek, 2017). Indeed, "naming and shaming" (Greer & McLaughlin, 2012, p. 298) can desecrate an accused person's right to the presumption of innocence, not to mention a survivor's dignity and privacy. Unfortunately, while mobilizing the concept "trial by media" may expose the media's tactics of victim blaming or unfair treatment of the defendant, it does little to showcase women's resistance and activism against the patriarchal practices of the criminal justice system (Salter, 2013; Fairbairn & Spencer, 2018).

In spite of this resistance, liberal feminists have often equated legal reform success with increased convictions in cases of gendered violence (Richie, 2012). Bernstein (2010) conceptualized the rightward shift away from a redistributive or reconciliatory model of justice to supporting carceral paradigms of justice as carceral feminism. Demands for a punitive response to gendered violence have been critiqued for being paradoxical to the gains that the anti-carceral movement has made in rejecting the militarized and capitalist structures of the prison industrial complex (Bernstein, 2012; Richie, 2012). Moreover, reliance on the state to mete out punishment to perpetrators of violence only creates more violence, as exemplified by the violent nature of incarceration and the number of women and men who are sexually and physically assaulted in the penal system (Sweet, 2016). Given that criminalized people are disproportionately racialized, we must consider carceral feminist calls for harsh custodial sentences as

ignorant of the racial dynamics that structure the criminal justice system (Bernstein, 2010; Kim, 2018; Richie, 2012). Sweet (2016) suggests that changing the political, social, and economic landscapes that steer intersectional power relationships between men, women, and gendered Others — and which are a root cause of violence against women (Crenshaw, 1991) — would do more to end gendered violence.

Still, how a society increases accountability for rapists and better serves survivors of sexual violence is a difficult question to answer. Remaining optimistic about the individual capacity to change, some criminologists have encouraged the adoption of transformative and restorative justice frameworks to hold perpetrators of gendered violence accountable, and even to participate in survivors' healing processes (Braithwaite, 2002; Daly, 2006; Daly et al., 2013; Kelly, 2011; Rossner, 2011). For these practices to be successful, there must be a willingness among survivors, community members, and offenders to endure the stress of participation and to abandon more punitive conceptions of justice. Even when these elements are present, tensions persist over their efficacy (Cossins, 2008). Importantly, not only do these approaches challenge the root causes of gendered violence, they also increase the visibility of harms that "current remedies to gender violence enact on communities of colour, immigrants, poor people, lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) communities and people with disabilities" (Kim, 2018, p. 229). Transgender people of colour have taken leadership in the analysis of intersectional forms of violence and call for critical social movement strategies that are not complicit with gender policing, state violence, arrest, and incarceration (Smith & Stanley, 2011).

Notably, transformative and restorative justice approaches remain in limited use, and the case we examine in this paper was processed by way of the traditional criminal court trial. That said, Phillips and Chagnon (2020) note that it is important not to overemphasize some victims' alignment with the carceral state as that too can promote rape culture and constrict social movements seeking gendered justice from moving beyond the decarceration discourse, which in and of itself is not enough to enact the legal, social, and cultural changes needed to end sexual violence.

Virtualization and Acceleration of Digital Knowledge: Theorizing Twitter

Fairbairn and Spencer (2018) argue that social media has the power to shape cultural responses to sexual assault cases and may influence criminal justice procedures. Fundamental to their argument, they draw insights on speed and virtualization from Virilio (2002, 2008) and Virilio and Beitchman (2009). In what follows, we theorize Twitter by building on the theoretical framework employed by Fairbairn and Spencer. We argue that social media also accumulates implicit and explicit knowledge and are thus banks of digital knowledge.

Digital technologies shape our interpretation of time and space. The speeding-up these technologies offer — almost instantaneous contact — distorts social worlds by shrinking space and altering its dimensions and representations (Virilio, 2008; Virilio & Beitchman, 2009). Virilio (2000) refers to this phenomenon as an accelerated reality. Digital acceleration erodes the importance of public, geophysical space and bolsters an interactive image that is ready at all times. Digital technologies maximize the acceleration of time to the point that the continuum of time — past, present, and future — is less important than the (image of the) event, yet the primacy of audiovisual representation removes or blurs the kinetic experience of virtual presence. Many frame the result of this kind of detachment positively, as it (1) accelerates democratic participation, (2) increases the number and diversity of participants in the discussion (Virilio, 2002), and (3) (re)shapes unjust social and political spaces (Virilio, 2008).

On Twitter these three outcomes hold true. The speed with which one can post reactions to events and reactions to reactions is limited only by how long it takes to type up to 140 characters (which was the limit at the time of data collection), or post a photo, video, meme, or link. During our investigation, for example, 754 tweets were posted during the first 5 minutes of our query. Perhaps more important than the acceleration of democratic participation, Twitter's accessibility and virtuality invites participation from everyone with access to a computer or smartphone, including, importantly, those who are often silenced. Where victims of sexual assault may be hesitant to bring their

cases forward to police or to trial (Johnson, 2017), Twitter gives them a space where their voices can be heard. Twitter, then, stimulates and hosts massive volumes of diverse knowledge. Each tweet tweets in conversation with each other, aggregates of tweets, convergences of tweets in opposition, and a collection of all tweets on a particular subject. Thus, they represent forms of digital knowledge rarely accessible in other media.

In addition to welcoming diverse participants, Twitter also invites diverse expressions. The speed with which one can participate incites emotional reactions as opposed to statements that are crafted and calculated over time (like those presented before the courts); therefore, the digital knowledge hosted on Twitter includes both explicit and implicit ways of knowing that reflect varied voices and adversarial opinions. It is our contention that it is the convergence of these myriad voices and ways of knowing within this social media space that helps to reshape unjust social and political spaces.

Implicit Ways of Knowing: Emotional and Bodily Epistemologies

Implicit knowledge reflects that which is generated in an array of ways so as to capture, interpret, and describe our experiences (Shotwell, 2014). These include bodily responses and, since emotions are often felt in the body, affective feelings. When we speak of bodily responses, we mean, of course, the individual physiological body (Kemper, 1978); but bodies also respond with emotions that are structured by interpersonal and social power relations (Massumi, 2002). There are many theoretical orientations and analytic angles to the study of emotions, from the psychobiological to the social, indeterminate to conscious, or corporeal to discursive. We use emotions as a catchall term for what gets taken up in popular discourse and academic research as emotions, affect, feelings, sentiments, and moods. We acknowledge the distinctions between each of these terms, especially between the expressive feeling states of emotions, sentiments, and moods capture, compared to affect, which is the emergence of a physical manifestation of what will come to be known as emotion before we know it as such. Deleuze and Guattari (1987, 1994) define affect as the change that occurs when bodies collide or come into contact. Through this contact a body can affect, be

affected, or both. This is a power acted out as a reaction. At the same time, affect is also the body's continuous intensive variation in its capacity for acting and thus reflects the potential power to act upon, coerce, and force.

Our use of emotions in this paper includes affect and the in-betweenness (Muñoz, 2009) that emerges amidst virtual–actual, psychobiological–social, indeterminate–conscious, and corporeal–discursive responses to symbols in a culture (Ahmed, 2014; Seigworth & Gregg, 2010; Thoits, 1989). Our use of emotions is similar to how Campbell (1997) used feelings both as classic passions (e.g., anger, love, and fear) and shadow emotions (e.g., confidence), and how Barbalet (1998) mobilizes the notion of collective emotions. Following Campbell (1997), we view emotions as emerging through expression, not as antecedent to expression. One consequence of the surfacing of emotions through expression is that emotions can be misread (Rogers & Robinson, 2014). People may read the directionality of an emotional vector yet misread the emotion. For example, hate, fear, anxiety, and disgust all include withdrawal, and while we may view the withdrawal instigated by an actor's anxiety, we may misread it as hate. Since emotions need not be conscious, their interpretation can be difficult, and there is an expressive component to interpretation. (Mis)reading allows emotion to be taken up and directed consciously and discursively.

In sexual assault cases, social media has disproportionately focused on emotionally enraged expressions of victim blaming rather than women's resistance (Salter, 2013). Still, the digital world has the ability to transform the criminal justice system by reshaping the social response to sexual assault (Fairbairn & Spencer, 2018). Digital spaces allow for diversity as individuals give voice to their standpoints and encounter different views. Online spaces, then, can amplify the nuances inherent in these tensions (Coulling & Johnston, 2018). If we wish to leverage the insight of these nuances to help transform the criminal justice system and realize a more just and empathic understanding of and response to sexual assault, we must consider the implicit knowledge that is revealed through emotions, which is the aim of our analysis.

Method

We conducted a qualitative content analysis of the emergent and competing discourses that arose on Twitter during the six weeks following the announcement of the not-guilty verdict in the Jian Ghomeshi trial. Qualitative content analysis is particularly useful in this case because it fits data into a model of communication and allows the situation, socio-cultural background, and effects of the messages to be interpreted and categorized through a step-by-step process (Mayring, 2000). In our earlier analysis (Coulling & Johnston, 2018), we analyzed tweets posted within the first hours of the trial outcome (n=3,943) to reveal the visceral and emotive confrontations that facilitated divisions between verdict supporters and protesters. In this study, we examine the Twitter responses that followed thereafter (n=17,799) to capture the evolution in nuances, tensions, narratives, and confrontations over what constitutes an appropriate, practical, and/or more just approach to handling cases of sexual assault.

We coded the data by first reading through the archived tweets and grouping them by theme in a Microsoft Word document (Creswell, 2014). We then removed any duplicated retweets or redundant content from the document. The first and second author reviewed the coded and sorted data and discussed their reflections and considerations to ensure intercoder reliability. This does not mean that we do not have subjective biases. All three authors are critical of the criminal justice system's incapacity to adequately deal with cases of sexual assault, and some of the authors take an abolitionist stance on issues pertaining to criminalization and punishment. Despite our best efforts to democratically and objectively analyze the perspectives of tweeters on the Ghomeshi case, it was difficult not to take sides at times, which encouraged us to reflect on our own positionality and how it influenced this research. As a collaborative project, together we wrestled with the complex issues and notions of justice that emerge when accusations of sexual violence surface, and we tried to ensure that our argumentation speaks to the diverse perspectives we uncovered in the Twittersphere.

The final step was to analyze the themes, the ways that the various themes interacted, and the meanings that inform Twitter users'

expressions of positionality regarding the criminal justice system's current and prospective role in managing sexual assault cases. We were looking for layers of critique in support of, neutral to, and/or dissenting from the current practices of the criminal justice system. Dominant themes from our first study were used to categorize the data presented herein. Specifically, in the first study, we coded tweets affirming that the criminal justice system worked and tweets asserting that the criminal justice system did not work. We also identified that tweets from the former theme split into those that thought this was as it should be and those who lamented the way the criminal justice system worked. For organizational brevity in this paper, we sorted these themes into verdict supporters and verdict protestors.

For tweets to be included in our analysis, they had to contain the hashtag "#Ghomeshi". Hashtags are used to link a tweet to a larger conversation (Bruns & Moe, 2014), so we interpreted these tweets as desiring to be a part of the public discourse on the trial and verdict. While informed consent is not always required for public data (Ackland, 2013), due to the sensitivity of the topic we took extra care to preserve anonymity and confidentiality by removing any usernames that were generated from our software (*Twitter Archiver*) following a retweet mention and transferring the text-only tweets into a separate spreadsheet. This practice blinded us to most personal details of Twitter users.

Imaginary Justice by Verdict Protesters

> I was in such a good mood this morning until I opened Twitter to see #Ghomeshi trending. Oh the rage, the absolute f*cking rage I am feeling

> This #ghomeshi judgement feels like a personal assault - something shared with all women particularly victims of assault #ibelievesurvivors

The first tweet expresses the author's rage; we suggest that there is a slow boil before rage spills out that occurs from the constant heat of daily personal assaults and patriarchal justifications of harassing behaviour. For verdict protesters, the Ghomeshi verdict signaled legal justification for violence against women. In the hours following the

verdict, Twitter content reflected this slow boil simmering and beginning to bubble over (Coulling & Johnston, 2018). There was an expressed rage by Twitter users who lashed out at the "personal assault" of the judgement, an assault they suggest is culturally shared amongst women. If rage is visceral, born from feeling pressed by the criminal justice system and the commonplace nature of sexual assault and Twitter's reaction, then the volume of tweets of this nature showcases the cultural embeddedness of and complacency toward sexual violence and harassment. As personal accounts and views were tweeted in response to the Ghomeshi verdict, they began to collate under the hashtag #ghomeshi and thus moved beyond the personal to the political in a way that united women and some men in a public discursive battle to end sexual violence.

In both of the above tweets we see an initial reaction to the Ghomeshi verdict that is centred on "us" — an in-group consisting of women, victims of sexual violence and harassment, and their allies. They also signal the start of a point of rupture that extends outward beyond the border of survivors of sexual violence. The rage expressed in these tweets and felt affectively in the body (which is both physical and collective) arose in response to the continued manifestation of patriarchal power enacted upon women's bodies and the female gendered subject. There is also a reactionary power to expressed rage as it comes to affect others who may reach out to comfort, mansplain, or troll the author. But this rupture becomes a capacity and power to act upon and coerce via lines of flight that begin internally and flow outward in solidarity to target the criminal justice system and broader culture for transformation. These lines of flight flowed through breakdown and healing, lashing out at Ghomeshi and the criminal justice system, and revolutionary transformation.

Breaking Down and Healing

> We're having a mass breakdown under the weight of a system that so evidently hates us. #Ghomeshi

> I feel so drained after today. Tried to focus on the solidarity. Held my friend while she cried. Shame on this country. #Ghomeshi

The hatred that the criminal justice system directs toward survivors of sexual assault wears on the body, making it tired and potentially sick (see Coulling & Johnston, 2018). This breakdown exemplifies power as an emotional reaction exerted on the body as the body is affected by "the weight of a system that so evidently hates us." But this breakdown was also met with self-care, comforting friends and giving space for tears, a reaction that also affects others. These tweets also attach emotions to the criminal justice system and the state. By affixing hate toward the system and shame against the country, these feelings and emotions circulate and orientate future judgements about patriarchy, the criminal justice system, and the country. In doing so, the emotions expressed in these tweets have the capacity to act upon the system and state.

These and other lines of flight erupt in varied and nuanced ways on Twitter that create capacities to act in transformative ways — a kind of transformative justice that is difficult if not impossible to come by via traditional criminal justice processes. For example, Twitter users worked through condemnation of Ghomeshi, the judge, and the judgement to explicate calls for changes to the system.

> Hope once shock of verdict wears off, women & men see we need to work together against gendered violence. #Ghomeshi

> Perhaps it's time to approach sexual assault reports with focus on #healing instead of crim law processes? #Ghomeshi

Here we see how this digital space facilitates the possibility for generating a collective voice that can unite Twitter users in their calls for criminal justice reform that is underscored by transformative and restorative justice principles of healing in lieu of punishment that does nothing to address the root causes of gendered violence.

Lashing Out

Emotions circulate through their stickiness, clinging to bodies and serving as cues in the future (Sedgwick, 2003; Sedgwick & Frank, 1995). In the following tweet we see that shame, guilt, and embarrassment clung to the women who brought charges against Ghomeshi. This tweet also shows the author's agency to act upon

Ghomeshi, imbuing him with a public guilt that he must carry forward. We do not know, however, whether or not Ghomeshi felt some measure of guilt. The adversarial nature of the criminal justice system does not allow for any emotional expression of guilt or sorrow by the accused, which would be taken up as "Truth" (Kilty & Frigon, 2016; Coulling & Johnston, 2018) and could therefore influence the court's ruling and increase punishment. A court structured to focus on justice as retribution does not allow for the expression of emotions that might help with healing. This tweet, while directed toward Ghomeshi, also brings the victims of sexual assault into the conversation and connects Ghomeshi to his accusers by way of shared emotions.

> I hope he suffers with guilt the same way those women suffered with shame, guilt, embarrassment, etc #JianGhomeshi #Ghomeshi #ottnews

By pointing out the shame, guilt, and embarrassment victims of assault face, this tweet illustrates the emotional turn inward and away from others that many victims experience. These emotions reveal the emotive desire to hide while being exposed (Sedgwick & Frank, 1995). By coming forward, victims are subject to increased witnessing which can invoke an even harder emotional turn away from this visibility. On Twitter, the voices and emotions of victims were amplified; their speed and virtualization accelerated in ways that led to a capacity that endeavoured to act on Ghomeshi. As we will see in the following tweets, the criminal justice system was also a target for reform.

> How idiotic to think we don't understand the verdict. We understand it. And that IS why we are angry. #Ghomeshi

> FUCK YOU if u think a not guilty verdict means an innocent man FUCK YOU if u believe #Ghomeshi The law believes rapists #IBelieveSurvivors

The reaction by those opposing the Ghomeshi verdict was frequently met with explanations of due process and legal rationality, but emotional reactions to the verdict were not due to misunderstanding the legal footing upon which the verdict rests. In the first of the above tweets, the author emphasizes that their anger is oriented toward the

verdict and the legal precedent that grounds the verdict. While there was anger at the verdict itself, the second tweet demonstrates that this anger was predominantly directed toward the apparatus that separates what may or may not be classified as Truth. A large segment of the emotional tweets we read were directed toward the patriarchal legal canon and how the criminal justice system empowers men while subjugating women and the epistemic hegemonic masculinity that ranks men and dominant expressions of masculinity above women and the feminine.

> A judge criticizing each of the women's actions after being assaulted while saying nothing about #Ghomeshi is #rapeculture at work.
>
> Once again, we've sent girls the msg to be perfect victims, instead of telling boys not to rape. No mention of consent in #Ghomeshi trial
>
> Re telling victims how to behave. Unless u understand the fear/shame/anxiety of reporting you **can't judge** the survivors actions. #Ghomeshi

These tweets illustrate how one strand of public discourse suggests that the criminal justice system mandates a lack of empathy toward victims of sexual violence while protecting accused persons; one way this is said to occur is by imposing notions of how "real" victims ought to behave (i.e., "be perfect"). As the first tweet articulates, this is one way that rape culture functions, reproduces, and gets subsumed into legal rationality. The imbrication of rape culture into the criminal justice system enacts power, as a capacity to act upon and coerce victims, which is manifested through critiques of their visceral emotional reactions as they attempt to cope with the assault and its implications on their bodies, relationships, and communities.

Revolutionary Transformation

The lack of understanding and the critique that the criminal justice system reinforces rape culture stirred emotional reactions toward the judge and his judgement. These emotional expressions are forms of reactionary power directed toward those who brought the injustice to life and who reified hegemonic masculinity and patriarchy in the

criminal justice system, where verdict protesters demonstrated a capacity to act upon underlying structural injustice. The nuances that arose in the Twitter content challenge judgements (both legal and on Twitter) in favour of a phenomenological understanding of experience. The emotional expressions noted above, then, are not only reactionary, they are also revolutionary forms of power that call for: (1) changes to the system; and (2) empathy to understand the emotions of those who report assault and thus how power acts upon the body.

> The bravery of those women must never be forgotten. Canada must protect them, even if the justice system didn't. #IBelieveSurvivors #Ghomeshi

> Instead of just calling to tear down the adversarial system this actually suggests building something new #Ghomeshi

> We need special courts for rape that do not require victim to testify and be revictimized. Female judges. #Ghomeshi

The revolutionary forms of power that came to the fore on Twitter called for building a non-agonistic, intersectional justice system that would focus on protecting survivors and healing. Twitter users imagined a system in which healing could occur in a structure that embraced all voices such as through specialized courts with female judges. This call for female judges can easily be extrapolated to include other neglected and marginalized bodies, most notably Indigenous and other persons of colour. Tweets expressing displeasure with and disapproval of the criminal justice system in its current formation elicited reactions on Twitter that imagined a transformative future. Articulated 140 characters at a time, users began to make the imagined supportive culture a reality.

Feminist Imaginaries by Verdict Supporters

Verdict supporters held differing views about the meaning of feminism. Some tweeters characterized feminism as a kind of dogma for rejecting the established and tested principles of reasonable doubt and legal rationality enshrined in our judicial system. Others attacked feminism as a stagnant and divisive social movement that punishes and "vilifies" those who do not identify with it.

> Idea for a Feminist Superhero: The Hoaxer: she mercilessly defeats her evil male opponents by accusing them all of rape. #Ghomeshi
>
> #feminism is the radical idea that men must be convicted without evidence #Ghomeshi
>
> #Ghomeshi you see, Feminism is like a cult. If you don't agree with their dogma they vilify you.

The imagined "feminist superhero" points to something key: if survivors of sexual violence are observed from a position of belief, as outlined in the case formulation approach (Wheatcroft & Walklate, 2014), then they have the capacity to act upon men. This capacity to act upon men is a revolutionary power that can transform the ways in which we conceive of sexual violence and justice. For those wanting to protect the patriarchal dividend that suppresses women's testimony and engenders resentment against women's rights progressions, the suspicion that characterizes the criminal justice system's approach to claims of sexual violence must stay intact. Hence the "Feminist Superhero" is characterized more as a villain, unrelenting in her attempts to sway the masses away from buying into the current system's rationality that it protects innocent people from false accusations. These verdict supporters are suggesting that calls to validate the ways survivors recall and experience sexual violence disguise the real motives behind feminist insurgency: to taste revenge and tame men's grip over how justice is executed and understood.

The second tweet, while revealing a widespread belief of verdict supporters that there was not enough evidence to convict Ghomeshi, also sheds light on another tension. Some verdict supporters see feminists advocating the need to believe survivors as a break from an agreed upon social contract obligating citizens to subscribe to the foundational legal principle of the presumption of innocence. Any resistance to this established principle, no matter the reasons or emotions warranting the dissent, violates procedural law. Unlike the first two tweets, the third tweet does not denounce feminism for the solidarity it creates among women and marginalized populations, but it does suggest that feminism "others" those who oppose it. From the perspective of these tweeters, publicly expressing dissent against the verdict mirrors joining a cult and opposing the establishment, which

is synonymous with challenging "society," or in this instance, the legal institution. Feminist opposition is interpreted as jeopardizing a foundational social institution upon which many people benefit, and social media, an accelerated medium of protest, intensifies the threat to this complicit type of masculine power exponentially.

Due Process

Other verdict supporters identified the principles of due process as embodying "true feminism." They believed that protesters who condemned the outcome of the trial did so under the guise of a feminism that is far less critical and much more flawed than the positions of supporters who respect case "facts" and decisions as an important part of the reasoning process in forming a public opinion.

> Feminism means women are adults & responsible/accountable for their actions. If you swear to tell the truth, do it. #Ghomeshi

> Its women like the ones from the #Ghomeshi trial that ruin it for ACTUAL victims of rape. You don't lie about something that serious. Ever.

These tweets call into question critiques of the "ideal victim" discourse (Christie, 1986; Walklate, 2014) and positions Ghomeshi's accusers as unable to withstand being scrutinized for how they narrated their experiences. Yet, this view also assumes that women are simultaneously "trusting yet, in the sexual sphere, not to be trusted" (Wheatcroft & Walklate, 2014, p. 242). To refrain from condemning what many felt were lies or partial truths in the complainants' testimonies would mean accepting the clause that women should be held less accountable than men, albeit in a male-dominated and privileged system of justice. Verdict supporters frequently wanted traumatized survivors of sexual violence to live up to idealized conceptualizations about the juridical presentation of Truth; however, this position fails to consider how "'testing the evidence' in cases of sexual assault" and "the benchmark of believability and it [sic] associated anchored narratives results in an inverted process of evidence seeking" (Wheatcroft & Walklate, 2014, p. 245). Suggesting that women share the same capacity as men to be held accountable in a court of law and are powerful enough to overcome epistemic privi-

leges that determine what the standards of truth are promotes a gender-neutral version of feminism that does not accept that the judicial system creates and sustains gendered inequality in cases of sexual violence.

The second tweet warns that the hostilities and confrontations expressed by verdict protesters distract public attention from cases of "real" sexual assault, whereby the survivors, regardless of their trauma or experiences, are able to live up to the ideals of truth telling under heavy public and judicial interrogation. Many verdict supporters interpreted the survivors' testimonies as false and accused them of lying about the nature of their relationship with Ghomeshi or colluding on social media in order to make their stories uniform. While the complainants vehemently denied the defence's allegations that they lied about the nature of their relationships with Ghomeshi, the trial revealed two important facts that discredited their narratives and ultimately revealed the messiness of this case: (1) that they discussed the case amongst themselves before the trial commenced; and (2) they denied that they had contact with Ghomeshi after the assaults. These two facts contributed to the divide between verdict supporters, whose tweets often centred on the importance of honest and transparent testimony as central to following the rule of law, and verdict protesters, whose tweets largely emphasized the need to "believe women/survivors" and the emotional difficulty victims have coming forward with allegations of sexual violence. In this way, verdict protesters were more supportive of a case formulation approach while verdict supporters wanted to maintain the current adversarial legal approach.

Two Sides: Truth and Lies, Not Men and Women

Many verdict supporters also defended Ghomeshi's lawyer, Marie Henein, for acting in the best interests of her client. Some even commended her defence of Ghomeshi in the face of public protest and hostility as a noble and courageous act of feminine strength.

> If you're truly a feminist, you identify with Marie Heinen: who stood with facts against baseless rhetoric that infantilize women #Ghomeshi

> If a male lawyer represented #Ghomeshi and he was found guilty, would that lawyer be accused of "betraying" his gender? I didn't think so.
>
> #Ghomeshi's lawyer is not wrong & she did not set women back 70 years...You can't lie abt being sexually assaulted. THATS what puts us back

Henein, who was constructed by many protesters as an "evil" anti-feminist enabler of Ghomeshi's acquittal, is depicted in the first tweet as the real feminist superhero because she protected the virtuous underpinnings of feminism. That is, the kind of feminism that pursues Truth even if it means protecting and siding with a man characterized by many as a violent threat to women. This representation reverses traditional conceptions of the male heroic figure; instead, it was a woman who rescued a powerful man from punishment while re-entrenching notions of ideal victimhood.

The second tweet understands Henein's public reprimand as reflecting a deep-seated hatred toward women. Henein is applauded for reaching the top of a male-dominated profession and winning a high-profile case. Yet some felt she was attacked over a failure to meet an imagined feminist and womanly responsibility *not* to defend Ghomeshi or to alter her courtroom tactics so that the prosecution would have had a better chance at winning and satisfying the broad public belief in Ghomeshi's guilt. Doing so, of course, would be antithetical to her job and to justice, which is why the second tweeter identifies her work as exemplifying feminist strength.

The third tweet, however, recognizes that while there is someone to blame in the case, the fault belongs with the survivors. Henein is rendered innocent of setting women's rights back, but the complainants, who were thought to be lying or exaggerating in their testimony, are cast as lepers to the feminist movement. The stakes are high if survivors are labelled insurgents to feminism and deceivers of humankind — a viewpoint (ironically) shared by many tweeters who expressed hyper-masculine hatred toward women and feminist movements in general (Coulling & Johnston, 2018).

Presumption of Innocence or a Broken System?

Most verdict supporters backed the existing adversarial justice system, and some commented on the frightening implications that could accompany abolishing or reforming the criminal justice system.

> Forgoing reasonable doubt for only shaky testimony leads to issues like David Milgaard. #Ghomeshi

> As long as the Liberals keep #C51 in place, we all should be thrilled with the presumption of innocence and S.11 of the Charter. #ghomeshi

Both of these tweets evidence concern that protesters want people accused of sexual assault to lose their constitutional rights to a presumption of innocence and due process. The first tweet refers to a renowned case of wrongful conviction in Canada, where David Milgaard spent 23 years in prison for the rape and murder of nursing assistant Gail Miller, until he was exonerated by DNA evidence in 1997. The second tweet references the increasing surveillance measures and laws that skew accountability and provide the government with the right to spy on its citizens and gather evidence against them without a warrant. While these statements are difficult to decontextualize because of the 140 characters Twitter provided users to express their opinion, they beg the question of whether the presumption of innocence contributes to the generation of legal practices that disadvantage victims of sexual assault. The tension in this argumentation calls us to ask: who do these laws protect? How do we measure due process if the blatant disadvantages survivors of sexual violence face in seeking justice are a necessary evil to protecting defendants against state abuse (Walklate, 2014)?

One discursive thread that gave us pause (and hope) was when verdict supporters empathized with protesters who viewed this case as part of a longstanding pattern of neglect and abuse toward women in the criminal justice system. Simultaneously, these sentiments were accompanied by frustration over calls for punitive justice.

> Our legal system fails survivors of sexual assault. After #Ghomeshi, should feminists be looking past prisons?

> Dec: "The system is broken, free Steve Avery from jail!" Mar: "The system is broken, send #Ghomeshi to jail!"
>
> Man, when people want blood – people want blood. #Ghomeshi
>
> Interesting how the same people who savaged Harper's "tough on crime" agenda now want the criminal burden of proof lowered… #Ghomeshi

These tweeters were less concerned with debating whether or not Ghomeshi's acquittal represented a travesty of justice than with acknowledging that the criminal justice system is deeply flawed when it comes to trying sexual assault cases. What they dispute in the emotive discourses offered by verdict protesters is their reliance on punitive responses to the gendered inequity of the criminal justice system. These tweets lament, mock, and express confusion over what they see as a lack of critical thinking or contradiction on the part of those who felt a guilty verdict and subsequent sentence of incarceration would have been a victory for feminism, which Bernstein (2010, 2012) critiques as carceral feminism. As the second tweet illustrates, the same individual posted in December about the broken system's failure to protect the poor, citing the American Steven Avery[3] case as a miscarriage of justice, then posted in March that the system was broken because Ghomeshi was acquitted but should have been incarcerated. These tweets reflect how anger toward an institution seen as corrupt or broken can simultaneously manifest in both liberatory and punitive ways. The last tweet notes the irony of leftist opposition to conservative tough-on-crime politics that result in greater reliance on incarceration and the simultaneous demand for a punitive carceral response in a case where a man is acquitted of sexual violence. The incongruity of rejecting then supporting a carceral agenda when it pertains to violence against women is a problematic paradox inherent to carceral feminist agendas (Bernstein, 2010, 2012; Kilty & Orsini, 2019; Richie, 2012).

While leftist and feminist movements in Canada have both been involved in resisting and upholding the demand for increased incarceration, it is noteworthy that they recently protested the right-wing criminological agendas of the conservative Harper government (2006–2015) (see Prince, 2015). It is therefore interesting to find that

the few tweets in the entire dataset that called for healing pulled readers in the direction of imagining alternative criminal justice practices. These tweets respect, in some sense, the understandably emotive responses of verdict protesters, yet speculate how sexual assault legislation could advance without succumbing to punitive justice and mass incarceration.

Erasure of Race

Our analysis of public responses to the Ghomeshi verdict focused on the tensions between verdict supporters and protesters, and how these divisions are contoured in gendered ways. One lone tweet in the entire dataset spoke of race, something that was absent in mass and social media content and that was rarely discussed by researchers leading up to or following the verdict.

> White women want brown men jailed on women's word alone. #IbelieveSurvivors #Ghomeshi #WhyWomenShouldNotVote

Ghomeshi was born in London, UK, to Iranian parents, and the women who accused him of abuse were white. And while it is important to acknowledge that this quote problematizes the absent discussion about race in this case and the need to preserve due process and the presumption of innocence, it also mobilizes deeply troubling patriarchal commentary that women should not be permitted to vote because they are untrustworthy — a historically common trope and myth afforded to victims of sexual violence (Belknap, 2010; Gavey & Gow, 2001; Kelly, 2010; Wheatcroft & Walklate, 2014). When we shared our preliminary findings at a national sociology conference in Canada, one of the panelists questioned us about the invisibility of race in the case. She remarked, "I argue that race is always there, even when it is not there." At the end of the panel discussion, a Brown male graduate student commented that white celebrities who are accused of sexual violence, like Woody Allen, still get to be a part of society, while the careers of people of colour, like Jian Ghomeshi, are ruined.

We suggest that the absence of any real discussion of race in the Twitter content is a convergence that speaks to three things. First, Ghomeshi, while a racialized man, often "passed" as white; early in

his career he actively presented himself as "Jean" so that he would be more easily accepted by white and Francophone Canadians (Kingston, 2014). Second, Ghomeshi's celebrity and popularity as the host of *Q* familiarized him to Canadians; "one of us" Twitter users centred their commentary more on the shock that a well-known and well-liked public figure could commit acts of sexual violence, issues of due process, and the need to believe survivors. This contributed to the divide we uncovered between verdict supporters and verdict protesters and speaks to the tensions in the content between calls for individual versus collective accountability. Verdict protesters echoed carceral feminist sentiments for greater collective accountability for sexual violence that do not adequately consider the racial implications of criminalization processes (Richie, 2012). Despite this, it is noteworthy that the verdict protesters' demand that we believe survivors reflects one of the premises of the case formulation approach (Walklate, 2014; Wheatcroft & Walklate, 2014) and thus the difficulties and tensions that emerge from trying to envision how to enact progressive calls for legal reform while balancing due process. On the other hand, by prioritizing due process, verdict supporters emphasized individual accountability and thus the Canadian state's and law's supposed race-neutrality (where the default standard is white) and objectivity (Maynard, 2017).

Finally, the tweets also reveal the potential emotional and affective difficulty Twitter users may have in directly speaking about race. Given that the Canadian state has historically and continues to express a problematic sense of race-neutrality as a form of multiculturalism (Maynard, 2017), we suggest that citizens are unprepared as to how to speak about race in a thoughtful way, thus making these types of discussions appear to be and/or to feel too painful, confusing, or even shameful. Ultimately, the statements we received at the conference and the outlier tweet about race direct our attention to the need for an intersectional framework to assess public perspectives on sexual violence and calls for action in cases of sexual assault.

Discussion, Synthesis, and Implications

Thus far we have tried to present the two sides of the Twitter content — verdict protesters versus verdict supporters — democratically

(Fairbairn & Spencer, 2018): we identified and presented key themes in the Twitter content but did not pass judgement on the veracity of the claims made. Instead, we mapped out the emotional and affective epistemologies embedded in the weeks-long national "tweetstorm" that followed the Ghomeshi verdict, noting the main opposing beliefs, tensions, and nuances in the content posted by verdict supporters and protesters with an eye to considering how gender structured or was implicated in said content. We took up the call for criminologists to take publicly expressed, collectively felt emotions and opinions seriously, especially when considering efforts to reform legislation and/or respond to accusations of sexual violence, even when these positions are engulfed by competing notions of truth, expressions of hatred, and problematic assumptions regarding gender, race, and class (Mopas & Moore, 2012). The question then becomes, can collectively felt, publicly expressed emotions regarding sexual violence contribute to progressive social and/or legal reforms that would better recognize and take efforts to counter gendered forms of inequality? We believe so, and henceforth offer a discussion of some of the potential implications of these viewpoints.

Following Wheatcroft and Walklate (2014), we advocate for the use of a case formulation model with respect to sexual violence, which "premises belief as its opening gambit. This method would aim to disprove the 'believability hypothesis' model rather than using disbelief as the general framework from the outset" (p. 246). Moreover, a case formulation approach "allows for more than mere description, diagnosis, or statistic" by seeking a contextual explanation that "identifies origins of the problems and addresses individual need, thus minimising the potential for the aggravating influence of myth and stereotype" (Wheatcroft & Walklate, 2014, p. 246). This is particularly important given the patriarchal cultural context and traditions that structure our social and legal institutions (Heberle & Grace, 2008; Machado et al., 2010; Spohn & Tellis, 2012, 2014). We contend that one potential way to combat the influence of patriarchal norms and bolster a case formulation model is by moving toward an integrative consideration of the role of emotions and how they both structure and emerge from legal practices and outcomes. Reflecting the emotional narratives that we uncovered in the data, and how they

worked to unify and collectivize groups on both sides of the debate, we suggest that emotions can be redirected in such a way that they can promote a more conciliatory and effective justice system.

The adversarial nature of the legal system promotes problematic dichotomies – guilty/innocent, victim/perpetrator, and credible/ unreliable testimonies, to name but a few. This means that due process, as it currently functions, fails to encourage expressions of guilt and remorse that might jeopardize one's defence (Greer & McLaughlin, 2012; Gurnham, 2016; Kilty & Crépault, forthcoming; Kilty & Frigon, 2016). While Lady Justice is conceptualized as impartial and emotionless, we know that emotions structure criminal justice proceedings as well as public responses to certain cases and their outcomes (Greer & McLaughlin, 2011; Kilty & Crépault, forthcoming; Kilty & Frigon, 2016), which is why we suggest that a better way to reconcile competing claims of truth is for healing to be the goal, rather than only punishment and incarceration. This approach can improve judicial accountability, as an agreed upon truth of the events is typically required (Daly, 2006; Daly et al., 2013).

However, a system that permits a critical exploration of the emotional impacts of crime and punishment must be one that recognizes how intersectional markers of difference (i.e., gender, race, class, ableism, sanism, ageism, and so on) (Heberle & Grace, 2008; Salter, 2016) create power relationships that drive both violence against women and our legal and cultural responses to it. As feminist scholars advocate, we must centre what counts as gendered violence within the patriarchal and racialized cultural context that gives rise to and reinforces those acts and expressions of violence (Machado, et al., 2010; Richie, 2012; Walklate, 2014). As Walklate (2014, p. 75) writes, "[c]entring patriarchy determines the what, how and who questions in relation to such violence and clearly puts men and their behaviour on the academic and policy agendas." Feminism's longstanding ability to engage in self-reflexive critique can be mobilized to encourage social and cultural reflection about the commonplace nature of gendered violence (Heberle & Grace, 2008) and the problematic gendered and racialized assumptions that blame victims, accuse women of making false allegations, and characterize women as manipulative liars looking to execute revenge fantasies against innocent men.

Beyond engaging in a theoretical discussion about the role of emotions in relation to the data set, our reading of the Twitter content offers an important finding about the nature of online social media communication platforms. Notably, that despite popular claims that social media is creating a more intolerant and divisive politics, society and culture (Berenger, 2013), these mediums do have the potential to act as a unifying force (Pavan, 2017), promoting a sense of emotional connection and collectivity by way of active, albeit sometimes hostile, participation in debate and discussion about contemporary examples and historical forms of social injustice. Although we found tweeted content on both sides of the spectrum, which critics might argue is demonstrative of the divisive us-versus-them politics social media reifies, our analysis demonstrates that a more coherent synthesis of views is possible. What we found most interesting and hopeful were the points of convergence in the narratives created by what, at first glance, appear to be two opposing sides. For example, many verdict supporters acknowledged that the criminal justice system is flawed and that it routinely fails victims of gendered violence while also professing support of and belief in due process and the need to protect the presumption of innocence.

We found that the hashtag #Ibelievesurvivors, which emerged in relation to the Ghomeshi case, was taken up and interpreted in different ways by verdict supporters and protesters. While verdict protesters used this hashtag as a way to (unknowingly) promote some of the principles outlined in Wheatcroft and Walklate's (2014) case formulation model — including beginning a criminal investigation into sexual assault with the premise that the accuser is to be believed rather than from the position of trying to discredit their claims — verdict supporters were skeptical that this would threaten due process. The problematic here is that it is very difficult to craft a nuanced commentary about a complex issue that different groups of people will be able to empathize with, in 140 characters. Perhaps the biggest critique of Twitter as a medium is that the limited character structure facilitates visceral emotional content production, which can be simultaneously divisive and unifying, rather than more tempered argumentation. However, accepting that adversarial criminal justice does not inherently protect due process, and in some cases can actu-

ally hinder it, our call to incorporate an integrative consideration of emotions offers a pathway toward a more progressive, intersectional approach to doing justice. Empathy, after all, stimulates mutual understanding and opens up lines of communication between groups who might otherwise only feel and express anger toward and contempt for one another, which is necessary if healing is centred as one of the core goals of justice.

Notes

1. There is tension regarding the most appropriate terminology to describe people who have experienced sexual violence; while victim is most common, some suggest that the term survivor communicates a more positive connation that moves away from the stasis of a victim identity (Kelly et al., 1996).

2. A complainant is a person who brings forth a formal complaint in a court of law; in this case, the complainants were the women who accused Jian Ghomeshi of sexual violence.

3. Avery was the subject of the Netflix 10-episode documentary *Making a Murderer*, which examines allegations of police and prosecutorial misconduct, evidence tampering, and witness coercion.

Declaration of Conflicting Interests

The authors declare no potential conflicts of interests with respect to the authorship and/or publication of this article.

Funding

The first author wishes to thank the Ontario Graduate Scholarship Program for the generous funding provided during his doctoral program. He also thanks the Social Sciences and Humanities Research Council of Canada (SSHRC) for his postdoctoral fellowship.

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Challenging the Status Quo: Organizational Deviations towards Socially Responsible Behaviours in the Age of Digitization

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Abstract

Recognizing the increased reliance on and access to digital platforms, we unpack how technology influences socially responsible organizational behaviours and employment practices as related to marginalized populations, such as individuals with a criminal history (e.g., former Canadian federal prisoners). Reviewing the employment of individuals with a criminal history, we discuss the effect of digitization on employment reintegration and consider organizational responses directed towards individuals with a criminal history in the labour market. Drawing from institutional theory and theories of positive deviance we contribute by explaining the mechanisms that each of the three central pillars (i.e., regulative, normative, and cognitive) (Scott, 2008) of institutional theory inform prosocial deviations from prevailing legislation, norms, and processes. The theoretical development suggests that the increasingly digitized world may inform more progressive and inclusive work environments.

Keywords: criminal history, employment discrimination, digitization, institutional theory, positive deviance

Introduction

Organizations are typically encouraged to adhere to authoritative structural guidelines that are informed by a focus on profit-maximization and particular norms, routines, and practices. From a human resource management perspective, such adherence is met with an expectation to attract and retain highly qualified workers who can successfully contribute to organizational performance and sustain a competitive advantage. Organizational members actively produce and reproduce the social processes that inform organizational norms (Powell & Colyvas, 2008). Institutional theory remains instrumental for understanding how organizations are influenced by the prevailing external environment (Furusten, 2013). With technological development, advancements such as the digitization of information can provide organizations with an increased ability to gain information that can then be used to inform comparisons of organizational social processes both within and outside of the target comparison group. The digitization of information may serve as an agent of organizational change (Yoo, Boland, Lyytinen, & Majchrzak, 2012), particularly pertaining to responsiveness towards marginalized individuals, who are less often considered in organizational contexts (see Mowat, 2015).

Organizations may opt to depart from prevailing industry norms and trends, especially if discriminatory in nature, when in receipt of alternative information. Attuned organizations, then, refer to organizations that "embody the potential to respond to opportunities to improve both economic and social performance concurrently" (Orlitzky & Swanson, 2006, p. 4). While organizations may vary in their focus and desire to respond to prevailing social issues, socially driven motivations, such as employing individuals who are marginalized, may emerge at the fore of their efforts (Harmon et al., 2017). We focus here on the impact that digitization has on organizational responses to individuals with a criminal history—those who are formally incarcerated.

A criminal history[1] is an enduring trait, commonly seen as deviant or abnormal (Goffman, 1963); thus, individuals with a criminal history often experience discrimination and negative employment effects (Hoskins, 2014; LeBel, 2012; Western, 2002; Western & Pettit, 2005). In the U.S., more than sixty million individuals have a criminal record (Jacobs, 2015), which equates to approximately 30% of potential U.S. labour force participants (McGinty, 2015). Other countries such as Canada and England must also contend with this issue, where the rates are 114 and 146 out of every 100,000 people, respectively (Public Safety Canada, 2019). Previously, criminal record information was accessible to a relatively low number of citizens; however, digital platforms have been introduced in criminal justice contexts as effective tools for optimizing the delivery of current criminal record information (e.g., Jacobs, 2015; Quan, 2017). Digitization has increased the visibility of and accessibility to criminal history information, for various stakeholders including organizations (Jacobs, 2015; Lageson, 2016). Once in possession of criminal history information, organizations may decide to act in accordance with traditional discriminatory expectations and norms or may respond with honourable intentions as evidenced through organizational policies, norms, and individual practices (Spreitzer & Sonenshein, 2003, 2004). Said decision-making process is central when considering whether, how, and why organizations access and utilize available criminal history information.

Although previous researchers have identified conditions that may prompt organizations to behave more socially responsibly (see Campbell, 2007), there is limited understanding of the circumstances underpinning times when organizations may depart from industry norms. To explore this process of departure further, we rely on each of three foundational pillars, regulative (i.e., legislation), normative (i.e., norms), and cognitive (i.e., individual perspectives) (Kim, Kim, & Lee, 2009), and examine how organizations may respond to individuals with a criminal history in the digital context. We begin

[1] We differentiate between *criminal history* and *criminal record.* Criminal record refers to a formal, legal record of offences. Criminal history refers to a record of information (informal and/or formal) that may be suggestive of an individual's involvement in a criminal act or history of incarceration.

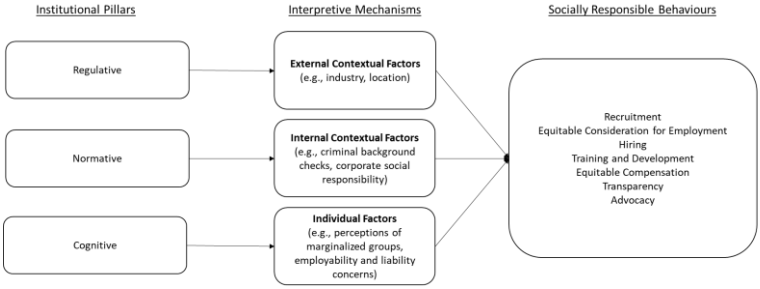
with an overview of digitization and positive deviations in a discriminatory structure. Next, we propose a model that articulates the mechanisms through which each of the three central pillars of institutional theory (i.e., i) regulative, ii) normative, and iii) cognitive) (Scott, 2008) inform socially responsible hiring behaviours. The paper is structured such that the proposed mechanisms of this model are articulated by unpacking categories that are specific to each pillar. First, within the regulative pillar, we propose that regulative factors will be interpreted as external contextual factors, which will inform the extent to which formal policies and procedures will positively deviate from inequitable industry norms. Next, within the normative pillar, we propose that normative factors will be interpreted as internal contextual factors, which will inform the extent to which collective values and norms positively deviate from inequitable industry norms. Lastly, within the cognitive pillar, we propose that cognitive factors will be interpreted as individual factors that inform the extent to which individual behaviours positively deviate from discriminatory norms.

Digitization and Positive Deviations in a Discriminatory Structure

The emergence of a criminal records revolution has expanded the breadth of information available, scope of individuals or entities with access to information, and permanence of access to information (Watstein, 2009). With the emergence of both formal (e.g., governmental websites) and informal (e.g., social media) digital platforms, an easily accessible digital trail begins from the moment a person is charged and persists with each interaction within the criminal justice system (Lageson, 2017). While access may assist, digitization has also resulted in the dissemination of erroneous information including charges that have been dismissed (Lageson, 2017). These changing times may prompt organizations to reconsider how they use criminal history information in the employment context. As our increasingly digitized world intersects with organizational responses to social norms, practices, and processes, these reconsiderations may result in positive deviations away from the traditional norm.

Positive deviance refers to the "intentional behaviors that depart from the norms of a referent group in honorable ways" (Spreitzer & Sonenshein, 2004, p. 832). The term describes a positive impetus for deviation from the "typical" or "regular" expectations and behaviours of a specific group (i.e., organization, industry, general business practice [Spreitzer & Sonenshein, 2004]). The definition makes positive deviance akin to similar constructs such as organizational citizenship behaviour, which describe behaviours individuals do that extend beyond job requirements (Organ & Ryan, 1995). As identified by Pager and colleagues, prevailing stigmas exist toward, and thus exclude, individuals with a criminal history from employment (Pager, 2003; 2007; Pager, Western, & Sugie, 2009). The tenets of positive deviance shed light on the contextual, organizational, and individual variables that may prompt honourable employer intentions towards and responses to individuals with a criminal history in the form of inclusive employment policies, norms, and behaviours. We provide the following model to illustrate the mechanisms and outcomes associated with each pillar (see Figure 1).

Figure 1: Model of Pillars, Mechanisms, and Socially Responsible Behaviours



The Regulative Pillar

The regulative pillar focuses on the influence of government, politics, and legislation on formal organizational practices (Scott, 2005). In particular, the pillar considers the extent that organizations conform to and are impacted by industry norms, as these are reflected in formal policies and procedures (Xu & Shenkar, 2002; Kim et al., 2009). Governing legislation, regulations, and policies can support or

hinder organizational intentions and efforts to develop more inclusive environments, particularly with reference to individuals with a criminal history (see Griffith, Rade, & Anazodo, 2019). Digital technology has contributed to uncertainties in interpreting governing legislature. For instance, despite fair chance policies and legislation that speaks to privacy of information, employers may lack clarity about the appropriateness of using informal data (e.g., Google, social media) to verify the criminal history of job applicants. Further, employers may be unclear about what constitutes appropriate consideration of a criminal history that is found online even, for instance, in circumstances such as the offence being expunged from an applicant's criminal history.

With access to a plethora of information, organizations may seek to navigate the employment of individuals with a criminal history by doing the minimum required by law, which may vary in detail and interpretation across contexts. For instance, according to the "Human Rights Code, RSO 1990, c H.19," (2019) (Government of Ontario, Canada), employers should not discriminate against individuals with respect to a prior criminal offence for which a pardon has been granted or for an offence for which the respective sentence is under the jurisdiction of the provincial government. Australia, Britain, and the U.S. have also passed legislation which prohibits discrimination based on criminal history (Lam & Harcourt, 2003). However, prohibition of discrimination has not historically translated into equitable employment consideration and outcomes for individuals with a criminal record. Thus, organizations that seek to do more than said minimum may go further and embark on legislative initiatives, such as second chance policies, which have been created with the goal of increasing employment for individuals with a criminal history. Therefore, organizations that seek to positively deviate may consider how to go above and beyond legal requirements. Within the regulative pillar we suggest that external contextual factors may influence how organizations interpret governing legislature and that their interpretations will inform willingness to adopt supportive employment practices towards persons with a criminal record. We consider industry and location as examples of these interpretive mechanisms.

Industry

Industry practices and policies that exclude individuals with a criminal record are widespread. Thus, having a criminal record has historically resulted in a disadvantageous position during the employment process (Western, 2002; Western & Pettit, 2005). Not surprisingly, scholars have largely focused on negative employer responses to criminal records or pasts (e.g., Graffam, Shinkfield, & Hardcastle, 2008; Harding, 2003; Western, 2002). However, and in accordance with institutional theory, because organizations often adhere to and adopt policies consistent with their industry leaders, organizations within industries with supportive hiring policies may be more likely to also adopt supportive policies.

Individuals with a criminal background are commonly employed in temporary, low-skill, low-income jobs (Harding, 2003); industries with a large number of these positions may be more likely to positively deviate and, thus, adopt supportive hiring policies. Various studies have found industries such as manufacturing, construction, trade, mining, and retail to be more supportive of hiring individuals with a criminal record (Lichtenberger, 2006). Conversely, industries that are least likely to hire individuals with a criminal record include finance and insurance, scientific and technical services, public administration, and healthcare. However, some of these industries may also be poised to change if an industry leader shifts their policy. For instance, researchers found support from some hiring managers in industries such as construction, technology, and customer service were willing to hire individuals with a criminal record (Griffith & Young, 2017. The findings here were consistent with those of a large financial services company, JPMorgan Chase, which recently positively deviated from the norm of the financial services industry by starting to hire individuals with a criminal record (Voytko, 2019). While such practices of hiring former offenders may have remained an internal policy in the past, it is now widely shared online and through social media, which provides other organizations with an opportunity to see how these positive deviations to the hiring policy will be interpreted. The resulting ability to learn about other organizational policies and see how changes are interpreted by an

industry leader may prompt other organizations to deviate in the same manner.

Organizational Location

The regulative pillar considers the influence of formal regulations and legislation (Geels, 2004) as each relates to specific aspects of the organizational context. Despite general organizational tendencies towards adherence to formal regulations and legislation, institutional theorists recognize that variations in interpretations of and responses to prevailing philosophies may vary across locations and cultures thereby leading to fundamentally different practices (Furusten, 2013). In Europe, for instance, data privacy regulation has received an increased focus and has afforded individuals the "right to be forgotten" or "right to erasure" thereby enabling citizens to enforce the deletion of sensitive personal information (Kelion, 2019). Since 2014, Europeans have had the ability to request that sensitive personal information be removed from internet search platforms (Kelion, 2019), the obligations were further enforced with the implementation of the General Data Protection Regulation in 2018 (GDPR; European Parliament and the Council of the European Union, 2018). Privacy laws can be effective for limiting employer access to historical information by requiring consent from the individual to release said information.

In the U.S., although governing legislation and regulatory bodies recognize the vested interest that individuals have in maintaining privacy with respect to criminal history, processes related to the release of this information have not been regularly monitored (Lageson, 2017). To this end, employers are urged to consider guidance provided by the U.S. Equal Employment Opportunity Commission (EEOC) (2012), which allows employers to consider the nature of the offence, time since the offence, and the nature of the job when evaluating criminal history of applicants. However, more progressive policies such as Ban the Box have encouraged employers to eliminate questions pertaining to criminal history on their employment application (Avery, 2019) and instead consider criminal history information at a later stage of the hiring process. The process provides an opportunity for positive contact to occur between the

applicant and hiring manager, which can mitigate perceptions of risk (Griffith & Young 2017). Similar policies, such as "Open Hiring" and "The First Step Act," aim to support and guide employers in making equitable and inclusive employment decisions when considering the employment of individuals with a criminal record (see American Civil Liberties Union, 2017; Conscious Company, 2018; Lundquist, Pager, & Strader, 2018; Minor, Persico, & Weiss, 2018). Conversely, in Canada employers are unable to perform a criminal background check without an individual's consent (Police Record Checks Reform Act, S.O., 2015, c. 30, 2019). However, media reports can serve as an outlet for information pertaining to individual criminal histories. As laws vary by country, state, or province/territory, and even jurisdiction, organizational location can affect the legislation employers are obliged to follow in their hiring process.

The Normative Pillar

The normative pillar consists of "social norms, values, beliefs, and assumptions about human nature and human behavior that are socially shared and are carried by individuals" (Kostova, 1997, p. 180). The pillar encompasses desirable organizational goals as well as the preferred means of attaining those goals (Xu & Shenkar, 2002). In particular, the pillar highlights the relevance of collective values and norms within the organization and the extent to which their legitimacy is rooted in external social norms and practices. This may include an evaluation of the perceived risks involved in and incentives designed for hiring individuals with a criminal history (e.g., Busenitz, Gómez, & Spencer, 2000). Members of societies are believed to hold common values (e.g., Hofstede, 1980); with respect to individuals with a criminal history, some value systems may encourage, while others oppose, a second chance (Busenitz et al., 2000).

The normative dimension also encompasses the degree that societal values include organizational efforts towards corporate social responsibility. Media outlets, activists, journalists, and management scholars have increasingly pressured organizations to engage in society as good citizens (see Matten & Crane, 2005). Organizations

that employ individuals with a criminal history may be considered as fulfilling a unique aspect of corporate social responsibility; that of giving individuals a second chance. In particular, employment has been attributed to promoting desistance from crime and reducing recidivism, thus contributing to safer communities (Anazodo, Chan, & Ricciardelli, 2016). Recognizing that several organizations are facing a human capital crisis in the U.S., the Society for Human Resource Management (2019) actively encourages business leaders to join with their counterparts in considering all qualified candidates for employment, including individuals with a criminal record. Such encouragement suggests growing support for the fair consideration of individuals with a criminal record for employment. Within the normative pillar, however, we suggest that internal organizational factors may influence how organizations interpret external norms and practices. Interpretations may then affect an organization's willingness to adopt policies and practices that align with support for the employment of individuals with a criminal record. We consider norms around criminal background checks and corporate social responsibility as examples of these interpretive mechanisms.

Criminal Background Checks

Employers may have several motivations for conducting a criminal background check including: legal requirements; relevance to an applicant's ability to do a job; aims to provide/maintain a safe work environment (Clay & Stephens, 1995; Raphael, 2011). Criminal history information may be used to inform an employer's interpretation of a candidate's honesty, integrity, and any potential associated safety risks for their staff and clients. According to a CareerBuilder survey (2016), 72% of U.S. employers conduct background checks. However, even if an organization does not actively conduct a background check, the digitization of criminal records (e.g., mugshots and news stories) provides employers access to criminal history information (Atkin & Armstrong, 2013). Thus, employers that consciously decide not to pursue this information or consider this information may be more likely to hire individuals with a criminal history, thereby deviating from cultural norms. As an example, Greyston Bakery in New York (U.S.) has an open hiring policy, where despite the plethora of digital information available,

employment is offered without a background check (Greyston Bakery, 2019). In these cases, positive deviance from the norm may explain why some organizations may engage in a different set of practices—even after uncovering criminal history information.

Griffith & Young (2017) noted that some hiring managers hold more positive attitudes towards employing individuals with a criminal history. These findings aligned with a subsequent study where 74% of managers and 84% of HR professionals expressed a willingness or openness to considering individuals with a criminal history for employment (Society for Human Resource Management [SHRM] & The Charles Koch Institute, 2018). Viewpoints such as these can now be promoted and shared online, which can signal a shift in cultural norms and encourage other organizations to positively deviate (e.g., toward hiring rather than discriminating against individuals with a criminal history).

Corporate Social Responsibility

Corporate social responsibility (CSR) can be described as the extent that an organization engages in actions and policies that account for economic, social, and environmental considerations as well as the interests and expectations of stakeholders (Aguinis, 2011). Organizations aligned closely with the social dimension are described as those that are mindful of the impact they have within the community, including the integration of business operations that address prevalent social concerns (Dahlsrud, 2008). Organizations that participate in programming or actively employ individuals with a criminal record may do so recognizing that such practices correlate with several community and social justice benefits, such as less crime, greater public safety, and reduced costs for the government and taxpayers, and improved community attitudes toward individuals with a criminal history (Anazodo et al., 2016; Graffam et al., 2008). Thus, organizations that align with the social dimension of CSR may be more likely to recognize the barriers to employment that individuals with a criminal history encounter and, thus, may be more apt to deviate from employment norms.

Online, there appears to be a shift towards organizational willingness to consider individuals with a criminal history for employment. With the emergence of digital platforms, prospective candidates can actively search online and find organizations with more favourable hiring policies for individuals with a criminal history (e.g., Mullaney, 2018). Some organizations, such as Golden Corral, Jiffy Lube, and Kohl's, have been listed as companies that will hire individuals with a criminal offence and incarceration history (Mayo, 2017). Others have leaders who promote training programs to develop employee skills for future employment (see Griffith et al., 2019). While these initiatives continue to develop and improve, employment training and mentoring programs have produced promising outcomes for individuals with a criminal history (Rosenfeld, Petersilia, & Visher, 2008). For example, work placement programs such as "Recipe for Success" at Wendy's offered through the John Howard Society of Niagara (Canada) provides participants with training and certification in an effort to boost prospects and eligibility for future employment (John Howard Society of Niagara, 2019). Certain organizations such as Dave's Killer Bread, a recognized "Second Chance Project," actively employs and advocates for the employment of individuals with a criminal history, recognizing employment as an opportunity to successfully integrate and positively contribute to society. In the U.S. and Europe, social enterprise initiatives rate particularly high in the social dimension for CSR, as they are well positioned to equip individuals with the skills to secure future employment (Defourny & Nyssens, 2010). A social enterprise is a not-for-profit organization with an explicit aim to provide goods or services that benefit the community (Defourny & Nyssens, 2008). As an example, Blue Sky Development and Regeneration (Blue Sky), a social enterprise founded in the U.K., recruits individuals with a criminal history to fill roles in numerous organizations for a limited work term, and then helps these individuals find further employment. As numerous initiatives geared toward the employment of individuals with a criminal history expand in scope, the online visibility and access to this template may inspire similar models in organizational settings.

The Cognitive Pillar

The cognitive pillar highlights internal representations of the environment; the associated rules and perspectives that ultimately shape individual behaviour, beliefs, and assumptions (Xu & Shenkar, 2002; Scott, 2005; Markus & Zajonc, 1985). Kostova and Roth (2002) suggest that dimensions associated with the cognitive pillar affect how people select and interpret information such as criminal history, in specific environments (i.e., a workplace setting) (Kostova, 1997). Within the employment context, this pillar may be most directly connected to the individual level, which may inform our understanding of the behaviours of individual actors in the work context (i.e., hiring managers, colleagues). Specifically, we consider the micro-processes in organizational decision-making and how these shape organizational member perspectives of the role of organizations in relation to individuals with a criminal history. While some organizations have specific policies towards individuals with a criminal history, in many instances, evaluations are done on a case-by-case basis. These individualized approaches create inconsistencies in how the law is interpreted and applied across organizations (Lageson, Vuolo, & Uggen, 2015). Although hiring managers should select candidates based on job-related information, unrelated characteristics or stereotypes, such as those associated with criminal history, may affect interpretations of an individual's suitability for employment (Perry, Davis-Blake, & Kulik, 1994). Within the cognitive pillar we suggest that individual factors may influence how people interpret discriminatory norms and inform their willingness to engage in behaviours that support individuals with a criminal history in the work environment. We highlight perceptions of marginalized groups as well as employability and liability concerns, as examples of interpretive mechanisms at the individual level.

Perceptions of Marginalized Groups

The dominant and negative perceptions of criminal histories (Taub, Blinde, & Greer, 1999) may result in hiring managers who are unable to associate an applicant with a criminal history with agentic values such as success and achievement. As previously noted, many employers are reluctant to trust individuals who have essentially been

labelled as untrustworthy by the justice systems (Graffam et al., 2008). Such perceptions of untrustworthiness relate to organizational concerns about the safety of their workforce (e.g., Harris & Keller, 2005), integrity of their products and services, or potential loss of customers (Bhattacharya & Sen, 2003), workplace disruption (Gill, 1997; Harris & Keller, 2005), or employer liability should the individual commit a subsequent offence (Lam & Harcourt, 2003). Accessibility of criminal history information may not only expose individuals but may also make them vulnerable to be taken advantage of by employers given their limited employment prospects (e.g., underpaid and/or overworked) (Atkin & Armstrong, 2013; Purser, 2012; Visher, Debus-Sherrill, & Yahner, 2011). Thus, the extent to which an individual has the human capital (i.e., experience, education) to counter prevailing stigmas, will determine the extent to which overarching stigmas drive their interpretation of that information.

Demographic characteristics, such as race, may also affect the perceptions of marginalized groups and the relevance of criminal history in employment. In the U.S., race has consistently been shown to result in differential perceptions of the law, police, and criminal justice system, with more Black than white citizens displaying distrust in the system (Rocque, 2011). Such findings may be partially due to the disproportionate numbers of racial minorities involved in the criminal justice system. According to the United States Census Bureau (2015), the racial percentages for white, Black, and Latino/a individuals are 77%, 13%, and 17% respectively. However, out of the 1,467,847 people in the U.S. sentenced to prison in 2015, 34% were white, while 35% were Black, and 22% were Latinx, (Carson & Anderson, 2016). In other words, while only 30% of the actual population is comprised of racial and ethnic minorities, these individuals represent over half of the custodial population. In Canada, 73% of the population is white, 5% Indigenous Canadian, 3% Black, and 10% Asian (Statistics Canada, 2017). While most of the total custodial population identified by Public Safety Canada (2018) was white (58%), Black and Indigenous Canadians are disproportionately represented in the criminal justice system as 7.5% Black and 23% Indigenous Canadian (Public Safety Canada, 2018). To be clear, we

are not asserting that hiring managers who are racial minorities will find criminal behaviour acceptable; however, we do contend that the race of the hiring manager may influence perceptions of applicants, with or without with a criminal history. From this perspective, some hiring managers do not believe this population possesses any more of a risk than an employee without a criminal history (Griffith & Young, 2017). Thus, hiring managers who share this perspective are more likely willing to offer "second chance" employment, thereby willing to deviate from the norms of the cognitive pillar.

Employability and Liability Concerns

One of the prominent employer concerns with hiring individuals with an incarceration history from an employer perspective has to do with whether individuals possess the necessary skills and abilities for employment (Waldfogel, 1994). Some of the primary concerns related to skills and abilities include education, level of numeracy and literacy, as well as occupational and interpersonal experience and skills (Graffam, Shinkfield, Lavelle, & McPherson, 2004).

Employers may also perceive risks for the organizational environment including a concern for the genuineness of one's search for employment and, in turn, realistic expectations for commitment to the organization (Gill, 1997; Harris & Keller, 2005). Some employers have expressed fears that they will be found liable for negligent hiring if they willingly hire an individual that has a criminal record and that person engages in a criminal act while at work (Adler, 1993; Connerley, Arvey, & Bernardy, 2001) or who may become harmful to others while at work (Gill, 1997; Wang & Kleiner, 2000). In the U.S. and Canada, employers are increasingly held accountable based on policy standards which stipulate that employers may be held liable for the behaviour of their employees if the employer knew or ought to have known that the employee was likely to behave in a particular manner (Lam & Harcourt, 2003). A criminal record can be seen as indicative of likely behavior depending on the offence, which may make employers increasingly uneasy about hiring former prisoners (Lam & Harcourt, 2003).

Industry reports have identified individuals with a criminal history as a large pool of potentially skilled labour (SHRM, 2012; SHRM & The Charles Koch Institute, 2018). As captured in reports from the U.S. and U.K., many individuals are keen to improve themselves and their image and may in turn exude a high level of commitment, loyalty, honesty, reliability, and resiliency, more so than the average person (Palmer & Christian, 2019; Gill, 1997). However, as organizations become increasingly reliant on digital platforms and technology, the technologies will affect various aspects of the employment relationship: communication, consumption, information, and service exchange; each rendering the employee more vulnerable to record searches and exposing any lack of technological competencies (Berger, 2017). Organizations that recognize the potential value of persons with a criminal history are well poised to contribute positively to the social progression of these individuals as well as to society as a whole.

Discussion

Organizational members actively produce and reproduce institutional norms, and for certain populations, this contributes to perpetuating stigma and marginalization in the workplace. Recent developments in employer responses to individuals with a criminal history point to the evolving nature of organizational responses to prevailing industry norms and trends in the midst of information digitization. The three central pillars of institutional theory inform perspectives of and responses to legislative policy (i.e., regulative), collective norms and values (i.e., normative), and individual perspectives and behaviours (i.e., cognitive). Each of these pillars reflect various sources of motivation for aligning business practices within institutional environments with general societal norms; practices that can be interpreted to maintain capitalist ideologies and inequities in hiring or that can be interpreted to encourage socially responsible hiring and equity, particularly in reference to persons with criminal histories. Said another way, in instances where practices and policies inequitably disadvantage stigmatized populations such as individuals with a criminal history, organizations may, in line with the tenets of positive deviance, elect to adopt a socially just response, thus deviating from established rules of legitimacy. The emerging

digitization of information provides a unique context within which organizations may have a wealth of insight into individual characteristics, including their criminal history, which may be informative or misleading. Digital platforms and ready access to information also offer organizations an opportunity to learn from their counterparts as guidance for adopting more inclusive policies and practices. Within this context of information overload and uncertainty, there does appear to be a shift whereby organizations are moving away from discriminatory norms and considering more progressive and inclusive business models.

In this article, we explored the reasoning that guides positive organizational deviation as well as the adoption of policies and processes that counter inequitable or discriminatory market expectations. Organizations may take a risk of introducing a stigmatized population into its workforce (Pager, 2003), but opt to do so to achieve a larger social benefit, in particular for traditionally marginalized and disadvantaged populations. From this perspective we have sought to unpack the mechanisms that influence positive deviations from discriminatory social norms. We have referenced the crucial role that digitized information can play in organizational change processes, thereby paving the way for inclusive social environments. Organizational leaders may respond to the legislative landscape when considering the employment of individuals with a criminal history in different ways depending on the nature of environmental factors such as industry, organizational size, and location. As any of these elements shift, we may expect a shift in expectations for employer willingness to consider individuals with various backgrounds for employment.

Research Implications

We contribute to broadening deviance scholarship by extending an understanding of the conditions and factors that contribute to organizational engagement in positive deviance. We have proposed a model that serves as the foundation for building upon our understanding of the mechanisms through which the three central pillars of institutional theory inform prosocial deviations from prevailing legislation. In discussing the influence of technology on

organizational norms and practices, we would like to highlight that persons with a criminal record are increasingly vulnerable due to technology. Where criminal record information is not readily sought out or available, individuals may contemplate whether, when, and to whom to reveal their criminal history (Ricciardelli & Mooney, 2018). For those who are successful in obtaining employment, digitization and access to criminal history may increase individual vulnerability to being "found out" by employers or coworkers, thereby affecting disclosure decisions and in turn social response to the information. We encourage researchers to examine the effects of the digitization of criminal records on prospects for obtaining and maintaining employment from employer and individual perspectives. In addition, while necessary to be mindful and to recognize the realities of discrimination towards individuals with a criminal history in employment contexts (Harcourt, Lam, & Harcourt, 2005), it is also useful to recognize and examine efforts that point to more inclusive practices. Examining such efforts lends insight toward unpacking the drivers of prosocial organizational behaviours that tend towards inclusivity of marginalized populations. Understanding this may contribute to understanding how to effectively encourage adoption of and adherence to inclusive policies and practice. Future research is encouraged that expands on these ideas further, perhaps through considering further detail beyond the scope of the examples articulated in this paper. For instance, future studies may consider the role of perceptual processes and the impact this has on individual decision-making in employment (see Crocker, Major, & Steele, 1998; Fiske, Cuddy, Glick, & Xu, 2002).

We also contribute to understandings of the function of institutional theory. In particular, we present a renewed focus on organizational legitimacy; we expand how organizations define legitimacy and consider the implications for response to marginalized populations and engaging in non-traditional markets—a perspective necessary to expand the field of management studies and the interdisciplinary nature of criminal justice studies. For instance, scholars are encouraged to consider how we operationalize legitimacy in future research. In the latter rests consideration of how organizations define legitimacy when they engage in unconventional and less researched

markets, such as the too often overlooked niche markets served by non-profit organizations. Turning a focus to positive deviance may provide greater insight into how these types of organizations establish legitimacy within their communities and provide ways to uncover additional organizational factors that may challenge the three central pillars of institutional theory.

Practical Implications

The digitization of information affects organizations and individuals; informing employment decision-making processes and the interpretation of the available labour pool. While our model provides a foundational basis for understanding the ensuing mechanisms, the outcome variables, in particular, serve as useful considerations for how organizations may opt to exhibit socially responsible behaviours. The three central pillars have implications tied to employers deviating from established norms of legitimacy. For example, retailers like TOMS, a for-profit shoe retailer, takes alternative approaches with arguably more humane and socialist profit models. TOMS promotes a "One-for-One" model, whereby one pair of shoes is donated for every pair sold; thus, profit margins are reduced in light of increased costs tied to donated material goods (TOMS, 2017). Instead of reinvesting all profits into business and capital gains, such organizational shifts challenge the societal emphasis placed on profit, or the normative pillar, with success (e.g., measured by sales and overall profit) (TOMS, 2017). Other organizational processes, such as training, may provide a similar reinvestment, but in relation to developing human capital. For instance, organizations can reinvest in training individuals in relevant organizational technologies. Organizations that exert positive deviance in this way can not only benefit their organization, but also a variety of populations, including those often disadvantaged in the workplace such as individuals with a criminal history.

Second, governing policies and practices may be driven by the degree of deviation from established norms embraced by the organization. While the nature of certain occupations may require reasonable considerations for criminal history (e.g., working with vulnerable persons), further development, adoption, and adherence to practices

that enable consideration for individual skills and abilities during the hiring process, irrespective of criminal history, are encouraged (Boyer, 2016). Our model provides a foundational framework for conceptualizing progressive policies that lend towards supporting the identified socially responsible behaviours. As criminal history information is increasingly accessible, this may taint employer perspectives; however, hiring policies and practices can be designed in response to positive deviance. Some organizational leaders, then, may believe that they need to interact with their employees, or even the larger community, in a way that exudes connection and support. Some organizations have incorporated this through the support of employee resource groups, thereby demonstrating their value for and desire to connect with diverse members in an organization. Positive deviance may be a useful perspective to explain why some organizations choose to adopt non-mandatory or financially risky initiatives that serve a larger benefit.

Conclusion

In spite of established regulations and norms that signal legitimacy across employment contexts, deviations from discriminatory norms provide, new, humane, and socially necessary and progressive ways for organizations to make hiring decisions that are more inclusive, thus interlinking larger societal issues with new business solutions. Moreover, we show that considering the pillars of institutional theory can also contribute to further understanding of the organizational factors that may determine positive deviations; specifically, the transition in interpretations that encourage or motivate a shift to more equitable and socially responsible hiring and employment practices and processes. Understanding organizational motivations for and contextual factors related to positive deviance may enable us to determine the extent to which labour market climates impact organizational practices that can contribute to progressive practices and positive social change. From this perspective, our understanding of corporate social responsibility may be expanded to encompass the true nature of the social influence that organizations may have in society as well as their duty to acknowledge this when making equitable employment decisions.

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