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Reframing Technology-Facilitated Gender-Based Violence at the Intersections of Law & Society

Jane Bailey, Carys Craig, Suzie Dunn & Sonia Lawrence

1. INTRODUCTION

This special issue of the *Canadian Journal of Law and Technology* focuses on the growing problem of technology-facilitated gender-based violence (TFGBV): an expansive, dynamic, and rapidly evolving phenomenon that Jane Bailey and Carissima Mathen have defined as “a spectrum of behaviours carried out at least in some part through digital communications technologies, including actions that cause physical or psychological harm.”¹ The collection of articles in this issue offers multi-disciplinary insights on TFGBV by bringing together the work of emerging scholars in information and media studies, communications, and law. This approach reflects our firm belief that in order to be meaningful and effective, legal and policy decisions must be grounded in knowledge that centres the lived experiences of members of marginalized communities, including those documented in social science evidence.

This introductory article proceeds in three parts. First, it discusses the origins of this special issue as part of a multi-event, SSHRC-funded conference that focused on pushing beyond a narrow conception of TFGBV; rather than approaching TFGBV as solely an issue of interpersonal behaviours, the animating objective of the conference was to examine the structural, systemic, and design factors that contribute to TFGBV. Second, it explores the importance and promise of reframing TFGBV in this way through intersectional and structural lenses. Third, it briefly highlights some of the key insights from each of the contributions in this special issue. It begins with the theoretically grounded social science insights of Rajani and Gosse focused, respectively, on racialized women’s experiences with TFGBV and on the culture of responsabilization of TFGBV targets. It then shifts to Turnbull’s analysis of corporate responsibility and potential legal liability for ecosystemic factors that contribute to TFGBV. Next, it looks at the legal analyses offered by Stevens and Sali, first on non-consensual disclosure of intimate images (NDII) through the lens of Quebec personality rights, and then on the challenges of addressing NDII through copyright law. Finally, it turns to the contribution of Dunn and Aikenhead, which considers the contested authorship of digital evidence in common law TFGBV cases.

¹ Jane Bailey & Carissima Mathen, “Technology-Facilitated Violence against Women and Girls: If Criminal Law Can Respond, Should it?” (2017) Ottawa Faculty of Law Working Paper No 2017-44 at 3.

In this way, we aim to provide some context and substance to support the reconceptualization of TFGBV as a social, structural, and systemic problem. In turn, we hope that this special issue might point the way to new approaches and strategies for tackling TFGBV and reducing the harms that it inflicts and perpetuates — harms to physical and psychological well-being, to equality and agency, and to the collective ambitions of an inclusive, participatory society.

2. ORIGIN STORY

Several of the articles in this volume were workshopped as part of the Tackling Technology Facilitated Violence Conference,² a series of online events held in April and May 2021. The Conference brought together a spectrum of voices to address questions about how we understand the problem of TFGBV, what larger systemic and institutional forces contribute to and perpetuate TFGBV, and which actors should be involved — and whose perspectives are currently missing — in discussions about how best to address TFGBV. Through public panels, meetings with civil society organizations, and an emerging scholar workshop, this conference examined the individual impacts of TFGBV together with systemic issues arising through the use of technologies including, for example, state use of predictive algorithms.

The conference launched in April with a panel entitled “Technology-Facilitated Violence: Thinking Intersectionally,” where panelists Nasreen Rajani and Pam Hrick shared their insights on the specific forms of technology-facilitated violence (TFV) experienced by racialized and 2SLGBTQI+ individuals, as well as examples of administrative bodies in other jurisdictions that have provided supports for targets of TFV. A second panel was hosted in collaboration with the Women’s Legal Education and Action Fund (LEAF)’s TFV Project,³ presenting LEAF’s newly released report “Deplatforming Misogyny,” authored by Cynthia Khoo.⁴ This important report reveals how the business and design decisions of digital platforms contribute to a hostile online environment, impacting the freedom of expression and equality rights of

² The Conference was supported by the Institute for Feminist Legal Studies (Osgoode Hall Law School at York University), The eQuality Project, the Centre for Law, Technology & Society, the Shirley Greenberg Chair in Women and the Legal Profession (University of Ottawa), and a Social Sciences and Humanities Research Council Connections Grant (PI: Professor Carys Craig). The organizers included a team from Osgoode Hall Law School, including Professors Carys Craig and Sonia Lawrence, and PhD candidate Amanda Turnbull; the University of Ottawa, including Professor Jane Bailey, PhD candidate Suzie Dunn, and law student Michelle Liu; and Pam Hrick, the Executive Director of the Women’s Legal Education and Action Fund.

³ See < www.leaf.ca/project/tfv/ > .

⁴ Cynthia Khoo, “Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence” (2021), online (pdf): *Women’s Legal Action Fund* < www.leaf.ca/wp-content/uploads/2021/04/Full-Report-Deplatforming-Misogyny.pdf > .

women and other historically marginalized groups, and it insists upon the importance of centring substantive equality in the search for practical policy responses. Khoo's insights have taken on renewed significance in fall 2021 with whistleblower and former Facebook employee Frances Haugen's disclosures of internal Facebook research documenting how algorithmic profiling practices expose some teen girls and other individuals to serious harms.⁵ In conversation with University of Calgary Professor Emily Laidlaw and Molly Reynolds, a lawyer at Tory's LLP, the panel engaged in a nuanced and wide-ranging discussion of potential avenues for regulating harmful content on social media websites and the limited effectiveness of current legal responses to harms such as NDII.

In May, the conference hosted three sets of events. First, several civil society organizations from across Canada gathered to begin a conversation on the potential for developing a TFV-focused national network that could share resources, experiences, and best practices, assisting them in supporting members of the communities that those organizations serve. Second, two half-days of closed workshops brought together senior scholars in the field to review and discuss papers written by emerging scholars on TFV, some of which are included in this special issue. One of the workshopped papers, written by Alexa Dodge, was separately published in a report entitled "Deleting Digital Harm: A Review of Nova Scotia's CyberScan Unit." Available online, Dodge's report provides an illuminating account of both the successes and shortcomings of Nova Scotia's innovative government enforcement unit, which was designed to offer "informal" or non-legal responses to cyberbullying and NDII.⁶ Third, the conference hosted two public panels with global experts on TFV. For the first panel, entitled "Discredited Data: Epistemic Violence, Technology, and the Construction of Expertise," Professor Ngozi Okidegbe from the Cardozo School of Law presented her research on the ways in which pre-trial algorithms and predictive policing technologies contribute to state-based TFV, and how data derived from community knowledge sources might be harnessed to improve algorithmic outcomes.⁷ A thought-provoking discussion about the negative impacts of algorithmic decision-making and predictive policing focused on Black communities followed Professor Okidegbe's presentation, featuring Professor Jessica Eaglin of the University Maurer School of Law, Professor Jamelia Morgan of the University of Connecticut, and Professor India Thusi from Delaware Law School. At the second May event, entitled "Technology-

⁵ See e.g. Georgia Wells, Jeff Horwitz & Deepa Seetharaman, "Facebook Knows Instagram is Toxic for Many Teen Girls, Company Documents Show" *The Wall Street Journal* (14 September 2021), online: < www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739 > .

⁶ The Report is available online at < www.vawlearningnetwork.ca/docs/CyberScan-Report.pdf > and on the Conference website: < www.tacklingtfv.ca > .

⁷ See Ngozi Okidegbe, "Discredited Data" (forthcoming, 2022) 107 *Cornell L Rev*, online: < papers.ssrn.com/sol3/papers.cfm?abstract_id=3835414 > .

Facilitated Domestic Violence Against Immigrant and Refugee Women,” Professor Nicola Henry of RMIT University shared her research findings on immigrant women’s experiences with TFV in Australia. This was followed by a discussion with the executive director of the Barbra Schlifer Commemorative Clinic, Deepa Mattoo, and RMIT University PhD candidate, Yee Man Louie, on migrant women’s experiences with TFV. Recordings of these public panels can be found on the Tackling TFV website.⁸

Overall, the Conference events led to rich discussions, knowledge sharing, and coalition building among those participating. This special issue is therefore part of what we hope will be a launching point for future collaborations among those actively working on TFV and those whose communities need better supports, information, and representation. A central ambition of the project is to shift beyond the typically narrow focus of policy discussions around TFGBV as an individual, interpersonal phenomenon toward an approach that centres intersecting systems of oppression, racial injustice, and the realities of institutionally perpetrated TFGBV by states and corporations.

3. REFRAMING TFGBV

TFGBV perpetrated by individuals against other individuals can give rise to profound and concerning personal consequences.⁹ However, focusing on TFGBV as a purely interpersonal phenomenon motivated by gender carries with it serious risks. As Bailey and Burkell point out:

[...] if TFV is understood primarily in terms of individual interpersonal acts, our ability to understand whether and how intersecting oppressions such as sexism, racism, homophobia, transphobia, colonialism affect the likelihood of being targeted and the experience of violence will be compromised. As Black feminist and critical race scholars such as Crenshaw (1991), Hill Collins (2017), and Jiwani, Berman and Cameron (2010) have ably demonstrated, individualistic single axis accounts of violence outside of technologized contexts have resulted in exclusionary and dangerous outcomes that selectively harm members of equality-seeking communities. The result of these individualized understandings of violence is that structural oppressions are “erased, trivialized, or contained within categories that evacuate the violation of [structural] violence” (Jiwani, 2006, xi-xii).¹⁰

The outcomes of such erasure include remedies emphasizing state interventions, often through criminal law, which further endanger members of BIPOC and

⁸ Online at ifls.osgoode.yorku.ca/conferences/tacklingtfv/.

⁹ Suzie Dunn, “Technology-Facilitated Gender-Based Violence: An Overview” (2021) CIGI Supporting a Safer Internet Paper No 1.

¹⁰ Jane Bailey & Jacquie Burkell, “Tech-facilitated Violence: Thinking Structurally and Intersectionally” (2021) 5:2 J Gender-Based Violence 531-542 at 532, online: < www.in-gentaconnect.com/content/tpp/jgbv/pre-prints/content-jgbvd2100052 > .

2SLGBTQI+ communities with long histories of suffering violence at the hands of the state. Moreover, TFGBV understood narrowly as arising from individual behaviours renders “invisible opportunities to intervene with respect to violence not carried out by individuals,” missing “the potential need to intervene on capitalistic corporate systems and behaviours”¹¹ and on state-perpetrated violence. Finally, as Black feminist scholars such as hooks¹² and Lorde¹³ have demonstrated, single axis accounts of gender-based violence can serve to obfuscate how other oppressions such as racism, classism, and homophobia inform harmful behaviour between women, which also merits recognition and redress.

While research suggests that disabled, BIPOC, and 2SLGBTQI+ community members are at heightened risk of TFGBV,¹⁴ less of the TFGBV research to date has focused on the experiences of these community members or the particular types of TFGBV with which they are targeted. Failing to centre the experiences of members of these communities in research can lead to faulty and sometimes dangerous assumptions that their TFGBV experiences are necessarily the same as those of more widely studied white, cis, non-disabled, heterosexual women. Not only does this have the effect of concealing the violence experienced by members of these communities, but it can also lead to impoverished understandings of what TFGBV is, resulting in the identification of “solutions” inconsistent with (or even diametrically opposed to) the needs, aspirations, and lived realities of members of these more frequently targeted communities. Centring these experiences may well raise important questions about barriers to accessing existing and proposed legal responses and potentially direct our focus toward policy responses that extend beyond reactive individual liability mechanisms to focus on systemic and structural approaches. Each of the pieces in this special issue contributes in some way to the important task of reframing and better understanding TFGBV as well as potential policy responses to it.

4. CONTRIBUTIONS

This special issue begins with two pieces reporting on social science research that take the kind of intersectional and/or systemic approaches to TFGBV that we believe are essential to reframing understandings of this phenomenon. First is Nasreen Rajani’s article, “‘I Bet You Don’t Get What We Get’: An Intersectional Analysis of Technology-Facilitated Violence Experienced by Racialized Women Anti-Violence”, Online Activists in Canada which discusses

¹¹ *Ibid.*

¹² bell hooks, “Black Women: Shaping Feminist History” in *From Margin to Center* (Boston: South End Press, 1984) 1.

¹³ Audre Lorde, “There is no Hierarchy of Oppression” in *Homophobia and Education* (New York: Council on Interracial Books for Children, 1983).

¹⁴ Dunn, *supra* note 9.

findings from her semi-structured interviews with 9 racialized women in Canada who identified as Black, Muslim, Arab, half-Chinese, Indigenous, queer, straight, abled, and disabled, aged from early 20s to their 50s. Rajani's centring of the lived experiences of this diverse group of women, impacted by multiple intersecting forms of oppression, reveals the urgency of shifting from understanding TFGBV as primarily an issue of heterosexual intimate partner violence toward one that also encompasses aggression emanating from some women and other people on the internet. Rajani's article examines certain harms that may not reach the threshold of criminal harms but are problematic nonetheless. While Rajani does not take up the question of appropriate responses, having focused on mapping experience, some of the harms she identifies in her research may be best addressed through education about online behaviours, improved content moderation on social media company websites, and support services that help people navigate problematic personal attacks online. In this way, we see how careful attention to intersectionality and experience can lay bare the need for more nuanced practical and policy responses, pointing away from civil and criminal remedies and the privileging of legal responses.

Second is Chandell Gosse's article, "Don't Take on the Responsibility of Somebody Else's Fu**ed up Behavior': Responding to Online Abuse in the Context of Barriers to Support." This article reports on Gosse's findings from semi-structured interviews with 15 women aged 21 to 44, 3 of whom identified as Black, Indigenous, or a Person of Colour, 11 of whom identified as white, and 1 of whom preferred not to disclose, about their experiences with and responses to online abuse. Gosse's centring of the lived experiences of these targets of TFGBV helps to reveal how responsabilization (or victim-blaming) manifests. As a strategy levied in service of structural oppression (including larger ideologies like patriarchy, white supremacy, and colonialism), responsabilization led her participants to understand themselves as responsible for avoiding, preventing, and responding to the abuse perpetrated against them. Gosse's findings also have potentially important policy implications, particularly in terms of the need for expressions of community responsibility for supporting targets of TFGBV in order to move beyond the all-too-familiar blame-the-victim approaches to gender-based violence.

This special issue then transitions from a focus on social science research toward four articles that are more particularly law-focused. The first two of these extend legal analysis beyond individual accountability to think about how technology corporations could and should be held responsible for the TFGBV perpetrated as a result of their systems and structures. Amanda Turnbull's article, "Onlife Harms: Uber and Sexual Violence," takes Uber Technologies, Inc. as the subject of its inquiry, demonstrating the ways in which Uber's ride-hailing technology has become a platform for TFGBV — a problem that pervades Uber's operations, from its corporate climate and labour practices to its terms of service and algorithmic design, but which remains largely

unacknowledged and unaddressed. Turnbull surveys multiple documented instances of sexual violence and harassment in which Uber drivers were either perpetrators or victims, and she identifies the part played in each by the Uber platform and its affordances. In doing so, she diagnoses a larger failure to understand the phenomenon of TFGBV and, in particular, a lack of engagement with the role played by technology in facilitating, exacerbating, and obfuscating the harms of sexual violence. She calls for greater recognition of the ways in which technologies interact with one another and with interconnected behaviours when online and offline worlds collide *onlife*. By revealing the ecosystemic nature of TFGBV, Turnbull's contribution points towards potential solutions, ranging from better workplace policies, education, and training, to improved transparency, accountability, and responsible algorithmic design.

The final three articles in this special issue address specific challenges in applying existing law to various forms of TFGBV. Yuan Stevens' article, "Dignity, Gendered Harm, and A Flexible Approach: Analysis of The Right to One's Image in Quebec," draws on Dunn's¹⁵ and and Eltis's¹⁶ hypothesis that Quebec civil law's dignity-based approach to privacy and personality rights may hold greater promise for meaningfully addressing identity-based harms than do common law privacy torts. Stevens specifically examines the harms of NDII. By analyzing the application of Quebec law in cases involving image-based harms to individuals affected by multiple, intersecting forms of oppression, Stevens' analysis contributes both to understandings of TFGBV as a manifestation of oppressions beyond sexism and to differences between civil and common law systems that may render the former better able than the latter to respond to NDII.

Meghan Sali's paper, "Intimate Images and Authors' Rights: Non-Consensual Disclosure and the Copyright Disconnect," turns to consider another possible avenue towards tackling the non-consensual distribution of intimate images: the assertion of copyright in cases where the victim of NDII (often the subject of a "selfie") took the original photograph and is therefore also a rights-bearing author under copyright law. Sali explores the potential of copyright law to offer relatively effective remedies through copyright infringement proceedings or, more expeditiously, copyright notice and takedown requests. While acknowledging the pragmatic and practical appeal of the turn to copyright, Sali identifies a fundamental mismatch between copyright's underlying rationale and the interests at stake in the context of NDII. In a discussion that carefully juxtaposes copyright's economic incentive purpose with the personal, social, and equality harms presented by NDII, Sali's article underscores the need for more appropriate remedies and a regime specifically

¹⁵ Suzie Dunn "Identity Manipulation: Responding to Advances in Artificial Intelligence and Robotics" (Paper delivered at WeRobot2020, Ottawa, 4 April 2020).

¹⁶ Karen Eltis, "Can the Reasonable Person Still be 'Highly Offended': An Invitation to Consider the Civil Law Tradition's Personality Rights-Based Approach to Tort Privacy" (2008) 5 U of Ottawa L & Technology J 199.

tailored to respond to the complex sexual privacy and integrity issues presented by NDII.

Finally, Suzie Dunn and Moira Aikenhead's article, "On the Internet, Nobody Knows You Are a Dog: Contested Authorship of Digital Evidence in Cases of Gender-Based Violence," examines how rules of evidence relating to authorship are playing out in the context of the admission of electronic documents in Canadian gender-based violence (GBV) trials. Contested authorship of digital evidence, such as text and social media messages, have become more common in GBV trials and require additional considerations in admitting and authenticating this evidence. They examine some of the evidentiary burdens that complainants, police, Crown, and defence counsel may face when questions of authorship arise in these types of cases — including the systemic barriers that victims of GBV face in criminal trials — and make recommendations on how to ensure trial fairness in these cases.

5. CONCLUSION

By bringing together insights from social science research about how women from marginalized communities experience TFV with critical analyses of existing legal approaches to TFGBV, this special issue pushes toward a reframing of TFGBV as an intersectional, structural socio-political issue that extends beyond interpersonal violence. Intersectional, structural analyses that centre the experiences of women from marginalized communities are essential to framing legal and policy responses that serve the needs and aspirations of those most at risk of TFGBV. They also help to bring into clearer relief the role of institutions such as the state and corporations in facilitating, compounding, and indeed perpetrating such violence. We hope that insisting on this kind of approach will help to inform future conversations about whether, and if so how, law can and should be involved in tackling TFGBV and offering relief to its targets. The dynamic nature of TFGBV and the shifting technological contexts in which it occurs demand an equally dynamic and contextualized response — one guided by a commitment to the well-being, autonomy, equality, and participatory potential of women, girls, and members of marginalized communities across physical and digital spaces.