

# Technology facilitated re-victimization: How video evidence of sexual violence contributes to mediated cycles of abuse

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## Abstract

With the ubiquity of technological devices producing video and audio recordings, violent crimes are increasingly captured digitally and used as evidence in the criminal justice process. This paper presents the results of a qualitative study involving Canadian criminal justice professionals, and asks questions surrounding the treatment of video evidence and the rights of victims captured within such images. We argue that loss of control over personal images and narratives can re-traumatize survivors of sexual violence, creating technologically-facilitated cycles of abuse that are perpetuated each time images are viewed. We find that the justice system has little to no consistent policy or procedure for handling video evidence, or for ameliorating the impact of these digital records on survivors. Subsequently, we assert that the need for a victim-centred evidence-based understanding of mediated evidence has never been greater.

## Keywords

Re-victimization, sexual abuse, technology-facilitated sexual violence, the justice system, video evidence

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## Introduction

During the early 1990s in Ontario, Canada, serial killers Paul Bernardo and Karla Homolka kidnapped, sexually abused and raped teenage girls, taking the lives of three. The hallmark of these horrific crimes was the use of a home video recorder. These 'critical tapes', as they were known in the Canadian criminal justice system, became a central feature in Bernardo's criminal trial, and a preoccupation of the media and public attention that surrounded it. As the case was one of the first to position video as critical evidence, it brought to the fore new challenges for balancing the principles of an open court with victim privacy in the fair and unbiased administration of justice (Cameron, 2013; MacFarlane and Keating, 1999). Vexing questions were raised regarding how to deal with the tapes during the trial, including who should view them and whether audio and video components of evidence were two separate pieces of evidence, each to be considered separately for admissibility (Goldstein, 1980). Ultimately, the courts needed to consider what would happen to the tapes once the trial and appeals processes concluded due to concerns about what Biber (2013) has referred to as the 'cultural afterlife of criminal evidence'. The case exemplified challenges courts have faced in the decades before and after, regarding the use of video evidence of sex crimes in the criminal justice system.

Twenty-five-years after the Bernardo trial, with the ubiquity of technological devices that produce high quality video and audio recordings, violent crimes are increasingly digitally captured. Indeed, the recording of crime has become an integral aspect of the process of committing the crimes themselves (Sandberg and Ugelvik, 2016). Unsurprisingly, this digital content is also increasingly used as evidence in the criminal justice process (e.g. Brayne et al., 2018; Dodge, 2018; Dodge et al., 2019; Henry and Powell, 2016, 2018; Powell, 2015; Sandberg and Ugelvik, 2016; Spencer et al., 2019). In addition to the growth in digital evidence throughout most categories of crime, technology-facilitated sexual victimization is highly prevalent and on the rise in our increasingly technologically mediated lives (Dodge, 2018; Dodge et al., 2019; Henry and Powell, 2016; Powell and Henry, 2019).

While research has focussed on the sexual exploitation of children and the impact of online child sexual abuse material on victims (Martin, 2014; Martin and Alaggia, 2013; Slane, 2010; Slane et al., 2018; Slane, 2015), very little has addressed the consequences of digital material for adult survivors of sexual violence. Although it is widely recognized that the criminal justice system can re-victimize (Regehr and Alaggia, 2006; Regehr et al., 2008; Spencer et al., 2018, 2019), little attention has been paid to the specific impacts of mediated evidence in these cases with respect to survivors' control over their images, and further, the ways in which the using and sharing of such intimate evidence within the justice system can perpetuate violence and trauma.

This paper presents the results of a qualitative study involving Canadian criminal justice professionals, and asks questions surrounding the treatment of video evidence and the rights of victims and survivors captured within such images. The professionals interviewed included police, lawyers, judges, psychiatrists, law clerks and court reporters, who lived in cities across Canada. The paper considers these professionals' perceptions of the impact of video evidence in three realms: (1) on the survivors who, we find, sometimes have little agency over the processing and distribution of their mediated images; (2) on the loved ones, some of whom have made significant attempts to place controls over the viewing of such materials; (3) and finally, on the pursuit of justice and the ways in which criminal justice professions balance the accused's right to information in order 'to make full answer and defence' (Canada, 1982; Department of Justice, 1985), with public safety and the ethics of image viewing and sharing.

We note that the actual voices of victims and survivors are an omission from this study. The reasons for this are multifaceted. First, many of the cases that surfaced in this project involved extreme levels of sexual violence and tragically, some of those cases did not have surviving victims. For those who did survive their egregious violent attacks, ethical concerns prevented us from asking to be connected to survivors by the criminal justice professionals. Thus, the focus of this project was on the perspectives of those who are responsible for the investigation, procurement, examination, analysis, sharing and deliberation of video evidence of sexual violence throughout the criminal justice system. In this paper the terms “victim”, “survivor” and “victim-survivor” are all used to reflect varying disciplinary use of language.

Using scholarship which has primarily centred around the non-consensual sharing of intimate images in youth culture – known as ‘image-based sexual abuse’ (McGlynn and Rackley, 2017), we seek to conceptualize the processes (or lack thereof) for viewing, analyzing, sharing or distributing, and deliberating video evidence of sexual violence in the justice system. We argue that given the rapid rate of visual digital technological growth, accessibility and distribution, these considerations may be especially critical for understanding the impacts of the digital afterlife of victimization on victims and families. The need for victim-centred understanding of mediated evidence and intervention has never been greater.

## Re-victimization

Moore and Singh (2018) suggest that digital evidence, in the form of photographs and video recordings of domestic violence survivors, taken in the immediate aftermath of incidents, can act as a ‘data double’ for the victim, and have an ‘emotional stickiness’ for police, lawyers, judges and jurors, bringing them back to the incident. In this way, we argue that digital evidence can create cycles of abuse that are played and relived over and over. Importantly, however, Moore and Singh also contend that the images may sometimes silence the survivor, removing their agency throughout the judicial process, as visual evidence can be seen as more reliable and credible than the living victim (Moore and Singh, 2018). Similarly, Dodge et al. (2019) found that, from a policing perspective, digital evidence in violent sexual offences might act as a ‘double edged sword’. That is, while such evidence has the potential to make an iron clad case against the accused in what has previously been presented as ‘he-said she-said’ cases, the interpretation of digital evidence is subject to the same stereotyped assumptions of how survivors of sexual assault ‘shall’ behave; therefore, the evidence may also be used against the survivor and their credibility. Further, Biber (2013) has considered the ‘afterlife’ of evidence post trial. She argues that because the archived criminal evidence may be of a ‘private, personal, sensitive, or humiliating’ nature, such material has the potential to keep on abusing. Thus, access to it upon completion of the trial similarly needs to be guided by adequate justification and sensitivity.

To this end, those in the justice system face many challenges in both handling digital evidence of violent crime, as well as with considering the impact these digital records may have on victims, their loved ones, and the broader community. For example, as Sutherland (2017) argues, the digital recording of Black deaths in America rarely serve to support restorative justice processes. Rather, through their widespread appropriation and distribution, they may actually work to ensure the affective traumatization of Black Americans in perpetuity (Sutherland, 2017). While many advances in victimology and victim assistance have been made, the effects of victimization are far less understood than the criminology of offenders (James and Eyjolfson, 2020).

## Technology-Facilitated Sexual Violence

Technology-facilitated sexual violence (TFSV) (Henry and Powell, 2016, 2018) is an umbrella term encompassing a variety of forms of digital sexual violence including cyber-flashing, online grooming and image-based sexual abuse. Image-based sexual abuse (IBSA) refers to the non-consensual creation and/or distribution of sexual images. The term is defined by McGlynn and Rackley (2017) as 'non-consensually distributed private sexual images and their initial "publication" and all subsequent "distributions", whether in hard form or electronically, including via peer-to-peer networks, and whether or not the person to whom it is distributed has already seen it' (p. 5). In noting the problematic nature of the term 'revenge porn', these authors proposed the term IBSA as a means of articulating the ways in which the sharing of sexual images can violate the subject's consent (McGlynn et al., 2017). Using Kelly's (1988) concept of the 'continuum of sexual violence', McGlynn and Rackley frame IBSA within a larger context of sexual violence and gendered societal issues such as victim-blaming which contribute to lasting harmful effects (Ringrose et al., 2021). These harms are outlined by Bates (2017), who found that technology-facilitated sexual violence can have serious implications for survivors' mental health, and parallel the experiences of victims of physical sexual assault (Bates, 2017). This notion is supported by the work of Henry and Powell (2018), who challenge the false dualisms of online/offline and mind/body, arguing that such binaries lead to an inadequate understanding of gender politics.

## The present study

Scholarship which has primarily focused on the non-consensual sharing of intimate images provides a useful theoretical framework for conceptualizing the process (or lack thereof) for viewing, analyzing, sharing or distributing and deliberating video evidence of sexual violence in the criminal justice system. In the current study we consider the rights of victims and survivors of violence and the ways in which the distributing, sharing or broadcasting of their images within the (often very well-meaning) quest for justice, may have unintended, yet unjust, effects on individuals or their surviving families. We note that the rapid rate of visual digital technological growth, accessibility and distribution, has brought to the fore the need to consider the ethical management of digital records of sexual violence held within the criminal justice system. Specifically, this study investigated the views of professionals working in the criminal justice system regarding: the survivors of sexual violence and their ability to control the use and distribution of video media capturing their images and victimization; the loved ones – particularly in the case of a deceased victim – and their attempts to place controls on the distribution and screening of video evidence and finally, the public good, and the ways in which criminal justice professions balance the accused's right to information in mounting their defence, with the ethics of image viewing and sharing in an open court.

## Methodology

This project adopted a discovery-oriented qualitative design, utilizing grounded theory method. Originally developed by Glaser and Strauss (1967) this method 'takes a systemic, inductive, comparative and interactive approach to inquiry' and developing theory in understudied areas (Charmaz, 2008: 166). Building on earlier work, Charmaz (2014, 2000) proposed an adaptation

to grounded theory, constructivist grounded theory (CGT). CGT asserts that data and meaning are co-constructed through the relationship between the researchers and the participants (Birks and Mills, 2015; Charmaz, 2017; Chun Tie et al., 2019).

To this end, this research engaged in dialogues with police investigators, civilian digital analysts, legal professionals (court reporters, lawyers and judges) and forensic mental health professionals, using the long-interview method of data collection (McCracken, 1988) in support of thick description and credibility (Lietz and Zayas, 2010). Unlike other studies involving sexually violent content that populates digital applications where content is constantly scrolling, changing and at times even disappears, such as in the case of Snapchat (Handyside and Ringrose, 2017), this study involved more permanent forms of video evidence that could be distributed and seen time and time again. Participants were asked to recount the nature of cases encountered that involved video evidence, types and sources of the video evidence encountered, the use of the video evidence in the administration of justice and the impact of video evidence on victims of the violence and their families. The proposal was approved by the Human Subjects Research Ethics Board at the University of Toronto.

Sixteen individuals who had experience working with violent video evidence participated in interviews ranging from 45 to 120 minutes in length. All individuals were criminal justice professionals living across Canada who were invited to participate through their varied professional relationships with the research team. As Canada has a Criminal Code that applies throughout the country, the overarching legal framework is consistent, although practices in policing and court processes are more locally determined. Seven participants were members of large urban or national policing organizations, six of whom were detectives or supervising senior officers with investigative experience and one of whom was a civilian analyst. Eight participants were members of the legal profession including prosecuting attorneys, defence counsel, a law clerk, a court reporter and a judge. One individual was a forensic mental health professional. Years of practice of participants was significant, ranging from 4.5 years to over 50. Thus, perspectives on the use and impact of video evidence in the criminal justice system was gathered from those with different lenses on the system and those who deal with cases at different stages in the process.

## Data Analysis

Constant comparison method was originally developed to analyze data derived from a grounded theory approach and thus has been used in this study. This method of analysis allows for comparison of data between interviews of each participant but also for comparison of themes and categories within interviews. The interviews were transcribed verbatim for line by line micro-analysis and coding, which allows researchers to interact with the data and examine emerging themes that best explain observed phenomena. All authoring researchers were involved in the data analysis, directly coding each transcript. These interviews were coded using axial and selective coding as is typical in grounded theory to determine germane categories (Strauss and Corbin, 1998). In this way, emerging themes and patterns were identified and categorized, followed by determining inter-relationships between categories. Finally, concepts were clarified and integrated in order to refine the emerging theory.

## Trustworthiness

Forms of trustworthiness include prolonged engagement, triangulation, peer validation and member checking (Lietz and Zayas, 2010; Loh, 2015). In this study this included: the researchers' prior experience in conducting research on trauma in victims of sexual violence in the criminal justice system and on non-consensual image sharing among youth; engagement with the participants through the interview process; triangulation of data from various interviews with different professionals and the relevant literature; discussions of emerging findings with other experts in the field and checking emerging hypotheses from earlier interviews in subsequent ones.

## Results

In keeping with the original aims of this study and the nature of questions posed in long interviews, the results are presented in three broad categories: (1) survivor trauma and rights to privacy; (2) seeking justice for loved ones and (3) the democratic pursuit of justice. First however, it is useful to provide context regarding the ubiquity and importance of video evidence in the justice system.

### The Ubiquity of Video Evidence

As one police officer interviewed in this study noted: 'The technology is increasing. It's amazing. . . especially when it comes to major crimes . . . security video is vital' (ID 106). A prosecuting attorney concurred, 'In today's world, 95% of the cases involve some form of video evidence. I think it is a rarity now to have a case that that doesn't have some small element of video evidence incorporated into it, so hundreds and hundreds of cases' (ID 206).

With the advent and exponential technological advances in and access to personal cameras and video recording devices, the criminal justice system has seen exponential growth in the volume of potentially traumatic image-based content and evidence of recorded crimes that now must be managed (Dodge, 2018; Farmand Jr, 2016; Henry and Powell, 2016, 2018; MacFarlane and Keating, 1999; Polak et al., 2019; Sandberg and Ugelvik, 2016; Spencer et al., 2019). This was made clear in the police officers' statements below:

[D]uring any major investigation, we seem to get a lot of sources of video, more than we've ever had before. People themselves, I know that just regular people out there are recording. . . [I]f we put a request out to people, citizens, on social media, we usually get returns with people having captured the event from multiple different angles. (ID 104)

[V]ideo that we gather as part of the investigation is so important in what we do, to the point where actually we're having difficulty in the courts where if we don't have it, it's viewed as not happening. So, it has become probably one of the most important things that we have. (ID 101)

Although researchers have begun to address the potentially traumatic impact of trials more broadly (Edwards and Miller, 2019; Leclerc et al., 2020; Lonergan et al., 2016; McQuiston et al., 2019), and the impact of involvement in the justice system for victims of sexual violence

(Englebrecht, 2012; Kunst et al., 2015; Regehr et al., 2008; Spencer et al., 2018) and their families (Alaggia et al., 2009), to date little work has specifically addressed the unprecedented growth in graphic digital evidence and its potentially traumatic impact on survivors, victims and families.

## Surviving

The traumatizing effects of sexual violence were first formulated as *rape trauma syndrome* by Burgess and Holmstrom (1974), which contributed to the inclusion of posttraumatic stress disorder (PTSD) in the diagnostic manual of the American Psychiatric Association (1987). Among the many devastating effects of PTSD is reliving or 're-experiencing' the trauma through intrusive images evoked from memory, or in response to retriggering cues (APA, 2013). In an environment where victimization is captured on video, two elements can potentially intensify the traumatizing effects of re-experiencing for victims, (1) filling in the gaps that memory has lost and creating new memories through viewing video records of one's own victimization; (2) being retriggered by knowing that these horrifying experiences will be viewed by others again and again. Professionals in the criminal justice system are witnesses to these harmful effects, and many develop personal strategies to avoid or minimize the impact on victims.

*Witnessing one's own victimization.* As the evidence of a sexual assault investigation is gathered and determinations are made about laying charges and preparing the case for prosecution, decisions must be made regarding sharing the evidence with the victim. One police officer described this process:

We had to show it to her for her to verify what happened. . . the first video we had, the perpetrator's face wasn't in the video. So, we needed to get an idea of where this had occurred, if she could identify anything about the area, anything in the room. . . And I felt really bad about it at the time because she had to sort of relive it. . . When you actually show the video, it seems to have a profound effect on them because it's literally the actual re-creation of the event. . . It's real to them. So, I think as far as still images versus video images for the victim, the video is worse for them because it has more context. (ID 104)

Not only may the victim be forced to confront terrifying memories, but in addition, during the process of an investigation regarding sexual assault, video evidence may be discovered that contains information about the assault that was previously unknown to the victim. This can re-ignite past traumas or possibly ignite previously unrealized traumas. This leaves the justice system in the strange position of not only re-traumatizing but possibly implanting new traumatic memories. Another officer described the challenge of determining whether and when victims should be confronted with the video evidence that provides information that is not in their conscious memory.

We have women who are intoxicated at the time of the sexual assault, have no memory of the sexual assault because they've ingested something else, a narcotic. . . We have a victim, we found her sexual assault on his phone. She has no memory of it. So, the ethical dilemma is when do you show this to them. Right now, we've decided not to show her. (ID 101)

This participant described efforts to be respectful of the survivor, including omitting some of the more difficult parts of the video and ensuring that she would not be exposed again when the case went to court.

One element of the decision includes whether there are supports available to victim.

Victim witness [support] workers are really good. They will actually sit with [the victim] and watch the video. . . but [in this case] we know that she lives on her own and she doesn't have anyone in the city. She's not where her parents are. And we are not in a position to provide someone to stay with her 24/7 currently. So, we just made a decision that we would wait until a more appropriate time to actually show her the video. And it's going to be terrible. (ID 101)

Thus, the police officer outlines decisions that are made during the investigation process that are sensitive to survivor needs with clear awareness about the potential impact of these videos and the need for supports and protective measures. However, these steps are by no means a standardized approach and are rather left to the professional judgement and discretion of the individual professional. The impact of victims having to watch video evidence of their own victimization in preparation for trial is a particularly salient example of the residual complications presented by video evidence. Later in this paper we will argue that protocols must be developed regarding this often re-traumatizing evidence.

As the cases move forward to prosecution, others described specific efforts to prepare survivors for the reality that video evidence containing their images will be screened in open court. One prosecuting attorney suggested that relieving the survivor of the burden of being present in the court room was another way of mitigating the potential for re-traumatizing the individual.

[In one case] I didn't end up having to show the videos to her. I just had to show them to the jury because the defence lawyer made me show three hours of video to the jury. She did not have to be a part of that. So that can sometimes happen that the victim doesn't have to identify herself because it is so clearly her. (ID 203)

It is well recognized by law enforcement and legal professionals that the criminal justice system can re-victimize survivors of violent sexual offenses (Regehr and Alaggia, 2006; Spencer et al., 2018). Paralleling the findings of Moore and Singh (2018), participants in this study identified that viewing video evidence of one's own victimization can result in significant distress and lead to the development or exacerbation of symptoms of PTSD. Our field notes reflect participants' verbal and non-verbal expressions of concern for victims as they bore witness to their own victimization. To this end, participants detailed the choices they made to mitigate the risk of perpetuating violence, such as choosing the timing of showing video evidence, determining what should be shown and ensuring supports were in place.

Three important concerns arise from this analysis however. First, these choices are left to the discretion of the individual professional and are not part of prescribed protocols. Thus, the survivor's experience of witnessing their own violence is dependent on the compassion and professionalism of the individual they encounter. Second, decisions sometimes appear to be made regarding the best interest of the survivor without providing them with full information or



engaging them in the decision-making process. This will be further explored in the section that discusses the aims of the justice system and the role of the victim or 'complainant' within the justice system. Finally, through this process, the victim is made aware that a permanent record of their victimization exists which 'is so clearly her', and that it may be shared with others. In this way, we contend that continued use of video evidence creates repetitive cycles of violence in which the traumatizing event is relived over and over again.

*Knowing others are witnesses.* Those involved in the justice system are also well aware of the implications for survivors if video evidence of sexual violence has already entered the public realm. Below two police officers reflect on the propensity of video evidence to enact and perpetuate victimization:

Victims are terrified that other people will see it and then, of course, that it's out there. . .and they can never get it back. . .So, the forever trauma on the victims, and you can't measure that after it's been created, you can't measure it. . .Their families, their colleagues, their children. . . It's always going to be out there. And even if people can't see it, they know it's there. They know that record of their trauma is somewhere out there for other people to look at. (ID 106)

[O]nce the videos are taken we can't remove it as the police off the internet. It's always going to be out there in some respect. And I think the biggest thing for her was that we arrested the perpetrator and he was going to get some type of jail sentence, so she felt that was great. But what she was really worried about was the video was still going to be out there. And even when she has her own children, or has her own husband and her own family, she can never get that video off the internet. And that's a struggle for us. (ID 104)

These participants describe the manner in which not only the survivor, but also those responsible for their safety are unable to control distribution once electronic distribution has begun, a phenomenon that has been addressed elsewhere (Regehr and Ringrose, Forthcoming; McGlynn et al., 2019). Where those involved in the justice system can potentially have greater control is with respect to the manner in which digital evidence is handled within the judicial system itself. Further to the comments above regarding decisions to share video evidence with victims, at the time of writing this paper, the processing, viewing, analysis and sharing of violent video evidence in the criminal justice system appeared to be guided more by an individual investigator's or legal professional's best judgement rather than a consistent or comprehensive policy or procedure outlining best practice considerations. Outside of digital image-based evidence involving children, which is strictly controlled and guided by laws concerning the possession, reproduction and distribution of child sexual abuse material, decision-making around the appropriate management of such evidence involving adults was largely based on localized and informal best practices. These practices varied between investigative units and digital forensics labs, as well as across police services. Notably, while some participants demonstrated quite nuanced understanding of the potential consequences of video evidence on the health and well-being of survivors, they felt that there can be little recognition of this in the justice system overall.

In recent years the impact of investigating and prosecuting cases involving online child sexual abuse material has received increasing attention, in large part for recognizing the continued

impact these images may have on child victims (Martin, 2014; Martin and Alaggia, 2013; Slane, 2010; Slane et al., 2018; Slane, 2015; Zanobini, 2016). While many professionals working with child sexual abuse material (CASM), such as those working in child protection, children's mental health or policing, suggest viewing the material is a valuable source of information and crucial for understanding its impact and providing ongoing support to victims (Slane et al., 2018), its handling – such as viewing, reproducing and distribution – throughout the justice process, is strictly controlled under existing child pornography laws (Zanobini, 2016). However, in recognizing the potentially traumatic impact for all involved, research with professionals also suggests further examination and careful consideration be given to who does and does not need to view such content (Slane et al., 2018). Similar considerations, though without much specificity of what the direct harms may be, are made in recent court decisions in both Canada and the United States. These demonstrate a move towards the idea that viewing of CSAM images re-victimizes victims every time they are viewed. In addition, these laws recognize the ongoing direct harms that arise as a result of the permanency of the record and its continued circulation (Slane, 2015), including by those working in the criminal justice system and victim support services (Slane et al., 2018). These rules are notably missing in digital evidence of sex crimes against adults.

Participants in this study described a mixture of both formal rules for the safe storage and continuity of evidence in general, as well as personal strategies for limiting the possibility that others will see victim videos, to ensure that they do not 'take away someone's dignity or be unprofessional'. Should someone violate this, 'I would argue it would be dealt with very harshly because everyone of us would think, what if that was our family member?' (ID 103). Practices employed include ensuring that it only resides on secure police equipment, limiting copies of the material and cataloguing any copies made and who is in possession of them, and limiting access, ensuring video is only viewed by those with 'a right to know and a need to know' the content. One participant stated 'That has absolutely tightened up in a very responsible, accountable way – more and more over the years' (ID 103). However, one officer notes the differences unit culture can make in the considerations for privacy and wellbeing of victims:

I think [in child exploitation], there's more respect I think for that type of evidence, in the sense of when you find something that's really horrific, it's not something that you share. . . But when you're looking at other units, sometimes there's a thought that you want to show people that video. I know that I've had the experience where people say, hey, come over, you've got to see this, it's really bad. (ID 104)

These previous examples refer to efforts to control who has access to the video evidence during the investigative process. However, once the cases reach court, an obligation exists to share the evidence with the attorney for the accused in order that they can, to use the legal phrase, 'make full answer and defence' (Department of Justice, 1985). In attempting to limit access, an attorney explained that videos containing graphic evidence would only be released to defence counsel upon the signing of a written undertaking to abide by conditions that will protect the victim and the evidence. This participant further stated:

It is intended to ensure that protection of the victims where they're depicted in the footage, because we don't wish to have the accused person have personal access to be able to use the

footage in any way. It's private information relating to the complainant and we don't want it to be in the hands of someone who does not have a professional obligation, and might – as we've seen in cases, which is why these practices evolved – choose to post the footage or use it to intimidate someone else, a witness or complainant in a case. (ID 206)

It is important to note however, that despite efforts to control the distribution and viewing of graphic video evidence of sexual violence, the content will be viewed by various actors in the system, including the accused.

The sharing and viewing during the various phases of the criminal justice process, of sensitive video evidence depicting survivors in traumatic, sexually compromised or degrading scenarios, raises uncomfortable comparisons with the illegal non-consensual sharing of intimate images – or revenge porn, – new categories considered under both British and Canadian law (Finighan, 2021; Young and Laidlaw, 2020). Several scholars have examined the non-consensual nature of the passing on, forwarding or sharing of private sexual images within the realm of contemporary culture (Döring, 2014; Krieger, 2019; McGlynn and Rackley, 2017). This sharing involves a wide range of assaultive behaviours including revenge porn, up-skirting, sexualized photo-shopping, sexual extortion, and at the extreme, recordings of sexual assault, including rape, collectively referred to as Image Based Sexual Abuse (IBSA) (McGlynn et al., 2017) or technology-facilitated sexual violence (TFSV) (Henry and Powell, 2016, 2018). The impacts of these assaultive behaviours are 'all-encompassing and pervasive, radically altering [victim-survivor] everyday life experiences, relationships, activities, and causing harms which permeated their personal, professional, and digital social worlds' (McGlynn et al., 2019: 6). Given these pervasive impacts, we have argued that the non-consensual distribution of intimate images should be understood as tantamount to non-consensual sex (Regehr and Ringrose, Forthcoming). From this perspective, the non-consensual sharing of intimate and personal digitally mediated evidence within the criminal justice system – and in fact in court room proceedings – raises serious questions about the potential to perpetuate violence and trauma.

## Loved ones

While the primary victim is the individual upon whom acts of sexual violence were perpetrated, the impacts often radiate to others who care for them, sometimes referred to as secondary victims (Alaggia et al., 2009). This is particularly true in situations in which the primary victim is a minor, or when the acts of violence culminate in murder. Tragically, some of the cases discussed in this project, did not have surviving victims. As such, the concern for the rights of the victims and the subsequent treatment of media depicting their images fell to the loved ones who had been left behind.

In instances of death or homicide – where victims did not survive – the criminal justice professionals interviewed in this project described the sharing of video evidence with the victims' family members. Some participants found the sharing of video evidence with family members as difficult or at times, even more difficult than sharing them with survivors:

. . . showing the victims' family, if you've got video evidence, it's disturbing for them. Because again, they're seeing someone they're close to, and it's an actual video of the act, of the person either being murdered, or being assaulted, or all sorts of events. (ID 104)

And then for the homicide type cases, those videos were always hard because I knew I had to show the family because it was going to be shown in court. I think those cases, no one prepares you to sit down and have to show a family their child or the family member on a video either being killed or have their body there. (ID 206)

Our interviews further highlighted many instances where families were concerned about the legacy, dignity or privacy of their deceased loved one:

I was completely empathetic to the families in that case who didn't want the possibility that those videotapes would get into the hands of the media, that's what they were mostly concerned about. . . I think that the potential for misuse of what went on in the courtroom, I think that is what drove them to destroy the tapes. . . I've been completely empathetic with that. But the legal argument they made was their privacy rights should trump the [prosecutor's] concerns to preserve the administration of justice. . . didn't hold sway. . . because the children were gone. . . whose privacy rights was it anyway? (ID 202)

This participant grapples with weighing the pursuit of justice with the family's requests for victims' privacy and their wishes to destroy non-consensual sexually explicit and abusive imagery of their daughters. A judge similarly talks about the balance between protecting those depicted in explicit material and the public's right to see the administration of justice.

There can be a distinction where a judge may say that people in the courtroom can see it but I'm not going to allow the video to be copied by the media so they can show it on their newscast. . . I think nowadays we rely to a larger extent on the discretion of the media that even if they want a copy of something, they won't publish it. . . (ID 208)

When dealing with the non-consensual sharing of intimate images within the context of relationship cultures, McGlynn and Rackley (2017) insist that a change of conceptual orientation is needed to re-frame the sharing and spreading of intimate images without the subject's consent as image based sexual violence, which is part of a larger social matrix of gendered power relations (Salter, 2018). This dynamic has been termed technologically-facilitated sexual violence (Henry and Powell, 2018).

What of course is different in the scenario outlined above, is the ideological belief that the pursuit of justice is of benefit to the victim and that the screening of such content was instrumental if not essential in achieving this goal. However, in the trial of Bernardo, referenced at the beginning of this paper, the families actively argued against this point both in the treatment and storage of the materials both before and after the verdict, within the context of the trial proceedings. The statement below outlines the position of the families and the challenge it presents to the justice system:

The families hired [a lawyer] to come and argue to suppress the tapes or to clear the courtroom when they were played. At the end of that, the judge said no. . . I mean the problem with the perspective of the family is that they are only seeing the problem through the lens of the victim or the family of the victim. They're not thinking of it in terms of justice. . . . They're not seeing

it in terms of our concept of an open courtroom, so that the public knows exactly what's going on in the courtroom. That system is very important in a democracy. (ID 201)

The participant outlines the overarching goal of the justice system in a democratic society, which takes precedent over the rights of the victim or the wishes of their surviving family to gain control over their images. Within the context of youth relationship cultures, McGlynn and Rackley emphasize that the 'private' nature of sexual images is pertinent and argue that the need for a more robust and nuanced understanding and appreciation of privacy within the digital discourse of sexual images is paramount (McGlynn and Rackley, 2017). It is important to note here that the critical elements of video evidence that make it essential to the pursuit of justice, are often the very same elements that survivors and victims' families want to maintain control over. The appropriate use of the media is relative to one's position within the justice ecosystem.

## The Pursuit of Justice and Possible Policies

Although the best interests and rights of victims and their families were noted and considered important, lawyers and judges, and to greater or lesser extent all participants interviewed in this study, overwhelmingly felt the pursuit of justice took priority. As was reported in an earlier study interviewing criminal justice professionals, a fundamental component of the justice system rests on the premise that a crime has been committed against the *state* not against the victim and 'So far as people are citizens of the state, the wrongs against those people are wrongs against the state' (Regehr and Alaggia, 2006). To this end, the determination about whether to proceed with prosecution, whether a victim will testify and whether evidence will be presented in court to support the prosecution is made by attorneys, at times without the agreement of the survivor. The advent of digital evidence, and the compelling nature of this evidence, further removes the victim from criminal justice processes concerning her victimization. In this way, digital evidence can become a surrogate for victim testimony (Moore and Singh, 2018), even if the survivor would prefer not to proceed with the prosecution. For example, as one attorney noted in a domestic violence case, where, unlike in sexual assault cases, police are compelled to charge the accused with an offense:

The 911 recording was like he's going to stab me and it was blood curdling screaming. In that case, it was a jury case, the complainant was not onsite. She didn't want the prosecution to go ahead. (ID 205)

In the absence of video evidence, a victim can be compelled to testify, but she nevertheless maintains control over what she says and can shape her story in the manner she sees fit; video evidence removes this control, potentially further disenfranchising the victim.

From a legal perspective, the justice system is intended to hear the evidence, determine guilt and mete out punishment for crimes against the state for the purposes of deterrence and ensuring public safety. In doing so, the victim of the alleged crime (officially known as the complainant) serves as a witness in the proceedings and their testimony must be questioned to protect the enshrined rights of the accused (Regehr and Alaggia, 2006). In this respect, video evidence was often positioned by participants in the current study as an indicator of truth and as such, it was

said to have become second only to DNA evidence in terms of its ability to provide an unbiased record of events. As these police officers explain:

Video is, I guess, the best evidence almost for court. . .I think it's almost, I don't want to say gold standard. It's not like DNA evidence, but if you have actual video of an offence taking place. . .How can you dispute what you're actually seeing being recreated? (ID 104)

In the world of homicide and sexual predators, that evidence is much more significant, and it gives you a tie to a victim. (ID 103)

The necessity of using video evidence and further, the determination that such content is trustworthy and 'reliable', was a continued theme in our discussions. As a judge suggested, video evidence does not have the same failings as witness testimony might regarding deteriorating memory, inaccurate perceptions and occasional untruths:

The police like video and the [prosecuting attorneys] like video because it doesn't lie. It always says the same thing. You don't have to worry about the witness getting something wrong. You just play it. . .(ID 208)

When speaking to an attorney, who had represented survivors and victims' families, the sentiment was largely the same:

I think that video evidence is integral to the justice system at this point in time. . .We don't need to rely on written notes and statements to be able to know what someone had done or what transpired. We rely on it for that purpose to sort of put you in the shoes of the participants. (ID 206)

While it indeed may be the case that digital evidence bolsters the case against the accused, the risks raised by Dodge and colleagues also ring true. That is, when the video does not reflect stereotypes of how a victim 'should' behave, the strength of the case may be undermined (Dodge et al., 2019).

Thus, it seems clear that the use of video evidence has become fundamental to the justice process and is here to stay. Given the heavy reliance on such materials, and given the potential of such media to re-victimize and perpetuate violence, work focused on developing best practices for the processing of video evidence within the criminal justice system, with a view to best respect and support survivors and their families is critical. Notably, deeper awareness and incumbent procedures have been developed within the context of child exploitation. When describing work in the field of child exploitation an officer (ID106) describes some of the restrictions as including the following dialogue:

Participant: we had a private viewing room. . .It was very sound proof. . .You had to sign into the room. . .Only [team] members were allowed in the room at any time. Only certain people were allowed in there to minimize what was being seen and to protect victims.

Interviewer: Can you say in what ways you're protecting the victim by limiting the viewing?

Participant: They're being re-victimized every time somebody looks at it. That's the point of creating it in the first place to victimize the child. By playing it over and over and over again, the child is re-victimized. So, if you cut down on the number of people who actually see it. . . it's also protecting the victim.

In cases involving children, criminal justice professionals working in such units seemed much more aware of subsequent trauma and seemed to have greater levels of training and empathy in order to support complainants. These units, and the work of individuals outlined above, take a victim-centred approach to the processing of intimate mediated documentation of crime, providing evidence that such measures are possible even if the interests of justice are paramount.

## Conclusion

The case of Paul Bernardo outlined at the beginning of this paper is a particularly heinous example of video recording of crimes and perhaps can serve as a cautionary case for these flashpoints throughout the judicial system. With the addition of the video evidence, the case against Bernardo brought to the fore, new challenges for balancing the principle of an open court with victim privacy in the fair and unbiased administration of justice (Cameron, 2013; MacFarlane and Keating, 1999). For decades – and as demonstrated early on with the Bernardo trial – the Canadian courts have been challenged with exactly how to treat and judge such evidence as admissible (e.g. if video is accompanied by audio, they may be treated as two separate items of evidence in that one may be ruled admissible while the other is not) (Goldstein, 1980).

We found that nearly 30 years after the initial case that used video evidence in a meaningful way, the justice system still has little to no consistent or comprehensive policy or procedure for handling violent digital evidence, or for considering and mediating the impact these digital records may have on victims and their loved ones. Further, the lack of control over their own narratives may work to re-traumatize victims and their families. The impact on victims of having to watch video evidence of their own victimization is particularly salient and protocols must be developed regarding this often re-traumatizing evidence.

Moore and Singh (2018) suggest that photographs and video of non-consensual sex can act as a 'data double' in place of survivors and victims, and that they have an 'emotional stickiness' for viewers. In this way, digital records can create cycles of abuse, which are perpetuated each time they are viewed. These harms are further outlined by Bates (2017), who found that mediated evidence can have serious implications for survivors' mental health, as well as parallel the experiences of victims of physical sexual assault (Bates, 2017). We are further inspired by the work of Henry and Powell (2018), who challenge the false dualisms of online/offline and mind/body, arguing that such binaries lead to an inadequate understanding of gender politics. That is to say, the suggestion that what happens on screens is somehow less real or less damaging for victims is not only outdated, but – from the very first instances of video evidence as outline above – was never the case.

Throughout our interviews we were influenced by the criminal justice professionals who had clear ideas about the re-victimizing process. These individuals tended to create their own sets of

guidelines under which to operate, based on their own experience and values, rather than policy. One officer in reflecting on the trauma experienced by victims through the sharing of video-evidence, suggested that processes currently in place in situations of child exploitation, be extended to adult victims and survivors:

And whether it's on social media, or in a court, or in a horrific criminal process. . . I think it would re-victimize, but to a greater depth and degree, when you have a permanent, tangible, yeah, it's going to be entered as evidence, and we've seen it over and over. (ID103)

Biber's (2013) incisive analysis of the cultural afterlife of archived criminal evidence suggests a 'jurisprudence of sensitivity' as an ethical way forward for anyone accessing this archived data, accessible as a matter of open justice. She suggests that because the archived criminal evidence may be of a 'private, personal, sensitive, or humiliating' nature, access to and thus its cultural afterlife needs to be guided by adequate justification and sensitivity to its continued effects. We suggest a jurisprudence of sensitivity is also necessary for the handling of such evidence throughout the justice process, prior to considering its cultural afterlife. Similar to Biber's charge for those accessing this evidence once its probative value has expired, we suggest those working with this evidence need to 'feel something' in a way that 'recognizes sensibilities, emotions, and harm' – particularly from victim perspectives (Biber, 2013: 1043).

Drawing from practices already being introduced by some individuals within the system, we advocate that stakeholders working in criminal justice contexts must shift the language applied to discussions around the use of violent sexual images as evidence. We also argue that a shift towards the language of image-based sexual abuse (IBSA) is needed (McGlynn et al., 2021; McGlynn and Rackley, 2017) in order to appreciate the potential for video evidence to perpetuate violence. For further consideration, is how to formulate a standardized approach that is victim-centred and might include the following:

1. involving victims and survivors in the decision about when or whether they will view video evidence of their own victimization in part or in full.
2. limiting the number and range of individuals who will see the content throughout the justice process
3. giving victims, survivors, and family members an opportunity to choose whether to be in court based on full information about what will be shared.
4. providing additional supports for victims, survivors and families aimed at minimizing the impact of viewing such video evidence throughout various stages of the criminal justice process, should it occur.
5. ensuring that video evidence of victimization is not available to the media for public release.
6. exploring advances in digital evidence management such as tracking and gathering data on video file access and viewing

In our view, this shift can facilitate a more nuanced approach to the use of video evidence in the pursuit of justice and is critical to ending mediated cycles of abuse that have the potential to re-assault every time they are reproduced, shared and/or viewed.



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