HAUNTED BY SPECTERS, SURROUNDED BY SPECTATORS:
LAW, TECHNOLOGY, AND THE FRAGMENTATION OF IDENTITY

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ABSTRACT

Wayne Erik Rysavy: Haunted by Specters, Surrounded by Spectators:
Law, Technology, and the Fragmentation of Identity
(Under the direction of Ken Hillis)

Haunted by Specters, Surrounded by Spectators explores the pervasive nature of digital

media and the social web in challenging the ways we understand self, other, society, and the

world around us. Juxtaposing the histories of public and private, both as terms and conditions, to

contemporary understandings and communicative practices we enlist, this project considers the

ways digital media and the social web fundamentally alter how we relate to each other through

visuality at a distance rather than experientially, empathetically, and interpersonally. Exploring

three pertinent case studies that highlight the fragmentation of identity when imagery is taken as

the totality of those depicted, this project illuminates the process I call "Crowdsourced Morality"

whereby individuals actively enlist imagery and physical and psychological distance to

decontextualize, devalue, shame, and torment those depicted in visual content. So distanced from

those captured in visual content, context becomes constituted in the mind of the viewer who

visualizes the content and imbues it with his or her thoughts, beliefs, and values as he or she

shares it across connective media with little to no regard for the person(s) depicted. As a

consequence, individuals not only engage each other as information to be disposed of, which aids

in the reduction of personal accountability for the actions they take against one another, they

further perpetuate "visuality as reality" in denying the embodied, corporeal form of those

depicted in visual content and those associated with them. Supplanting experiential engagement

for vision, such nuanced practices of communication online not only drive us into further physical isolation from one another they contribute to greater selection and confirmation biases that encourage "truthiness"—personal feeling over recognition and acknowledgement of others—as well as, in America and certain other Western societies, the growing divide between liberal and conservative ideologies.

For Jelena Stojakovic, whose indomitable, vibrant spirit reminded me to fight on.
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only to persevere and find themselves stronger in the end.
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CHAPTER ONE:
FRAGMENTS OF IDENTITY
IN A WORLD THAT NEVER STOPS WATCHING

Introduction

Digital media and the social web challenge how we understand self, other, society, and the world around us. Consider the case of Lindsey Stone whose casual visit to the Arlington National Cemetery in October 2012 dramatically changed her life. Strolling through the site's immaculate grounds with a co-worker, she happened upon a circular iron placard placed before the Tomb of the Unknown Soldier. The placard read, "SILENCE AND RESPECT." In a moment of jest, Stone asked her co-worker to snap what she thought would be a humorous photo. Crouching beside the placard, Stone posed, pretending to scream while flipping off the placard (see Figure 1).

Figure 1: Lindsey Stone Flipping Off the Placard at the Arlington National Memorial

She later uploaded the photo to her Facebook profile, thinking her friends would find the scene

amusing. Yet, much to her surprise, the majority of the comments were unsupportive. In an

attempt to assuage the negative reactions, Stone replied to her friends:

> Whoa whoa whoa... wait. This is just us, being the douchebags that we are,
> challenging authority in general. Much like the pic posted the night before, of me
> smoking right next to a no smoking sign. OBVIOUSLY we meant NO disrespect
> to people that serve or have served our country [author's original emphasis]
> (Stone quoted in Zimmerman, 2012a).

The damage was already done. Although her reply seemed to pacify her friends, she could not

control the distribution of the image, which managed to circulate beyond her profile and her

friends' to an individual who acted on his indignation.

A month after the picture was originally shared with her friends, a page called "Fire

Lindsey Stone" was created and, within hours, thousands of "likes"—Facebook's seemingly

innocuous blue button and a quintessential act of agreement with the author—populated the

page. Started by a former armed forces service member who also appropriated her image (see

Figure 2), the page encouraged the agreeing masses to "let [Stone's] employer know what a

waste of oxygen this disrespectful person [was]," and it quickly spawned an online petition that

gained over 3,000 signatures urging Living Independently Forever, Inc. (LIFE), Stone's

employer, to fire her (Zimmerman, 2012a, 2012b).

Figure 2: The Manipulated Image of Lindsey Stone.

Under pressure from these "cyber activists," LIFE issued a statement that clarified that both Stone and her co-worker who took the photo had been placed on unpaid leave pending an internal investigation. During this time, Lindsey Stone "deleted all of her Facebook posts" and waited for the verdict (Zimmerman, 2012a). Four days later, Stone and her co-worker were fired, and, in an ironic twist of personal expression online, Stone deactivated her Facebook profile and denied all media requests to speak with her (Zimmerman, 2012b).

Regardless of whether Stone's photo was in poor taste and posted without careful thought in a public medium, her incident illustrates interpersonal and societal tensions surrounding expression online through digital media and the social web. Proffering a world of interconnection through a never-ending stream of information both personally supplied by others and ourselves, connective media challenge the ways we communicate with one another by constituting our communications as a series of ongoing interactions in the form of content—an array of textual and visual information—shared online and across networked technologies. Although ostensibly

"harmless" and "presumably" within the realm of individual control, information shared online by others and ourselves now increasingly overlaps, transgresses, and ultimately contests the historically-inflected conditions of public and private across the domains of our personal relationships, organizational settings, and our culture. [1]

Interpersonally, the technologies that structure digital media and the social web challenge the dichotomy between public and private by flattening or denying the context of information shared between individuals (Baym, 2010; Marwick & boyd, 2011a; Trottier, 2012; Van Dijck, 2013b; see also Nissenbaum, 2010 regarding contexts of information). In particular, the most prominent example of connective media, social networking sites, presents individuals with a primary interface through which they communicate with others: a personal profile. Although seemingly simple, a user's profile operates as a complicated nexus of contested impression management, particularly as he carefully manages his identity through privacy settings, his selective expressions to others, and the various content he allows others to share about him to the extent he can control such content.[2] As an intermediary space and an extension of the self projected on the screen, the profile allows the user to freely and creatively express himself to a collection of intimate and unknown others.[3] Enlisting the profile as an extension of select aspects of identity affords the user the condition of being "materially 'here' at the same time as

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[1] I use the terms "digital media and the social web" and "connective media" interchangeably. These technologies form the wide range of connective networked services, platforms, and devices such as blogs, email, social networking sites, phone apps, computers, and cell phones. Together, these media constitute what José Van Dijck (2013a) calls the "networked ecosystem of digital communication" because each medium affects one another and shapes sociality.

[2] I use the term "user" as a broad placeholder for any individual who uses a social media site founded on the sharing of information such as Facebook, Twitter, YouTube, and Tumblr. However, I do not necessarily agree that the term "user" is interchangeable with "individual" since social media sites refer to a person as "a user," which in turn assumes that he is solely a composite element of the greater array of social media. Therefore, when I discuss a user as an individual within this project, I am attempting to contextualize the human communication elements implicated within (and most often overlooked by) the current array of digital technologies that structure digital media and the social web.

[3] I will be using both masculine and feminine examples. At times I will use "she" and at other times I will use "he."

seemingly 'there'," or what Hillis refers to as "telepresence" (2009, p. 215).[4] Through

telepresence, what Hillis terms the "source/body"—the physical form of an person, object, or

phenomenon depicted in visual content—is projected onscreen and elsewhere. As a consequence,

however, the profile—and, arguably, any image of an individual shared online by himself or

others—becomes a site of potential social "accidents."

Though an individual curates what others can see in his profile, he is never fully in

control of the ways others visualize, interpret, and/or alter the projection of the "source/body"

that appears before them. As viewers encounter imagery across connective media, they come to

understand the visually-dependent telepresence depicted before them in ways that allow them to

objectify the content as information to be consumed. Afforded distance from the physical form

of the source/body depicted in visual content, the viewer comes to fetishize the screen-based

telepresence by imbuing the visual display with her thoughts, beliefs, and values. The objectified

assemblage of personal ideation in connection with or opposition to visual content, what Hillis

(2009) calls the "telefetish," then takes on a life beyond the source/body. Subject to the

interpretation of countless others that may encounter the visual display and cast it as a telefetish,

an individual's telepresence and his actions lose the context and character germane to the realm

in which they were originally performed and shared. As a result, viewers shape and reshape the

coherency and context of the telepresence in dramatic ways. In creating associations and

meanings in connection with or opposition to the telepresence, it becomes a telefetish that

operates beyond the control of the source/body that produced and shared it. This not only leads

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[4] While Hillis primarily refers to "telepresence" in the more "interactive" forms of avatars and personal webcams in his analysis, Hillis also critically notes that telepresence "induces" an individual to become one with image, which I will extend throughout this project. As will become clearer in my analysis, whether imagery is more "interactive" in moving forms in film, video, or avatars, or more "static" in a photo, image, or graphic, it is potentially subject to the same kinds of adulteration and appropriation given the array of accessible technologies available through digital media and the social web.

to "misinterpretations" of the visual display that overlook the context of its formation, but often also to psychological and personal threats to the individual(s) depicted.

All content shared online is "public by default, private through effort" (boyd, 2012). When "accidents" occur, then, content of a profile spirals out of the assumed control of the individual managing his profile. With the individual no longer in control of the original context in which select visual content was shared, content becomes subject to heightened scrutiny as countless unknown others evaluate and judge the individual and his actions, and easily circulate and manipulate the content they find objectionable to foment greater collective action. In extreme instances, such as Lindsey Stone's, content can attract others who capture the telepresence in visual content, discount the corporeal form beyond/behind the image, and enlist physical and psychological distance and anonymity to decontextualize, devalue, shame, threaten, and torment the individual as content is shared and spreads across digital media and the social web. Visual content shared online comes to operate as the digital placeholder of physical presence, ultimately "appearing" as an almost totalizing embodiment of those depicted while also not wholly encapsulating who and what they are. As a consequence, individuals not only engage each other as information to be disposed of—which aids in the reduction of personal accountability for the actions they take against one another—they also further perpetuate "visuality as reality" by discounting the embodied, corporeal form of those depicted in content and those with whom they are associated.

Similarly, at the sociocultural level, connective media in the form of email, social networking sites, and mobile applications challenge the private quality of personal interactions. Whether a person communicates through email, a social networking site, or an app on her mobile device, all her interactions through these channels become a product of the service in use. When

a person uses her personal Yahoo email account, the information she shares with others, however personal, belongs to Yahoo. Any status updates or personal information posted to Facebook, whether personally shared or supplied by another, become a product of Facebook. All tweets are products of Twitter, and public tweets are housed by the Library of Congress and can be mined by researchers and advertisers for a variety of purposes (Gross, 2013; Van Dijck, 2013b). In each instance, an individual's privacy is never assured or protected; instead, it is a commodity one willingly (or, perhaps, unknowingly) cedes for convenience and ease. Because each of these services holds proprietary claims over the information stored and shared within its databases and because individuals accept the terms and conditions of use without much protest, personal information becomes abstracted from the individual and is rendered increasingly public through technological features and individual communicative practices.

Consider social networking sites. Initially founded upon self-expression and connections with friends, social networking sites shifted from community-based connectivity when site creators and investors realized they could monetize the personal data and internet traffic generated on their sites (Van Dijck, 2012). As a result, producers of social networking sites gradually restructured the interfaces of their sites, inviting users to share more information about themselves in the moment through status updates, across their social circles through page comments, and even through their personal histories with features such as Facebook's "Timeline" (Van Dijck, 2013b). As personal input options became relatively fixed through each new feature (e.g., providing geo-location with each status update, sharing comment posts with all of a user's followers, requiring profile images and Timeline cover images, encouraging more image-like status updates), site creators, encouraged by investors, refashioned the architecture of the sites to allow easier message dissemination and access to others.

This, in turn, allowed site creators and investors to more easily monitor, track, aggregate, and analyze user information. As users communicate with people through the new features, they encode their personal information for site databases and supply behavioral data about their wants and desires to site creators who use the information to personalize advertisements for each user. Consequently, user information is a public commodity for these sites; a proprietary product that site creators and investors use to justify a shift in socially normed practices of public and private expression and identity management. In particular, Mark Zuckerberg, founder and CEO of Facebook, infamously stated that users "have one identity," and that any attempt to maintain multiple identities was "an example of a lack of integrity" (Zuckerberg quoted in Kirkpatrick, 2010, p. 199). Despite the illusion of privacy one believes one is maintaining through managing one's privacy settings, and despite any socially normed expectations that privacy "exists" when it comes to personal information and personal communications, digital media and the social web collapse private into public to promote a singular, uniform identity that abstracts, quantifies, and commodifies the individual as content produced by the self and others primarily for consumption by others. So disembodied in content, an individual is "known," not by her physical presence and in experiential engagement, but instead as the composite of content she and others share, as well as the behavioral data gleaned from her interactions within and across technological networks.

As individual identities become quantified as information and content, digital media and the technologies that support them challenge both ontological and epistemological assumptions about identity and social order. Ontologically, the digital components of connective media challenge the performative process of impression management by flattening it into a rather singular, public, front-stage mode of interaction that digitally inscribes identity as content shared

by others and ourselves.[5] As an individual interacts with others through a digital interface, her

identity becomes less a product of the personal information she directly supplies and more of a

product of how others use and interpret the information gleaned in her interactions with others,

on sites, and across sites (boyd, 2012). As a result, her identity becomes inextricably linked to

the highly dramaturgical expectations of the public image shaped in communicative practices

online, despite any efforts or desires to express a more dynamic and nuanced presence (Van

Dijck, 2013a; see also Goffman, 1959, 1966 regarding front and back regions of interaction).

Constricted by social pressures to conform and an awareness that content can be shared beyond

its original context, an individual limits what she shares and, consequently, reproduces a

hierarchy of social order that redefines "appropriateness" as a matter of collective taste.

Whereas "appropriateness" historically structured social order by detailing sumptuary

rules germane to class interaction out in public (Bourdieu, 1984; Sennett, 1977; see also

Nissenbaum, 2010 regarding "cultural norms"), connective media and shifting communicative

practices recast "appropriateness" as a matter of perpetual public consumption and commentary.

Countless others, known and unknown, are encouraged to participate in each others' expressions

and lives with little to no recognition for the individual depicted beyond/behind the screen. As

this occurs, individuals feel encouraged or even entitled to participate—to comment, critique,

and shame—with ethical abandon as they do not physically experience the other and do not need

to account for the effects of their actions (see Zimbardo, 2008 regarding dehumanization in

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[5] Here I am invoking "impression management" with reference to Goffman's (1959, 1966) and Mead's (1934)
works about the "front " and "back" regions of interaction a person occupies. "Front region" performances are
public interactions an individual engages in with others where she may perform to expected roles or where she may
emulate others to fit a social situation. "Back region" performances are personal, private, and/or hidden
performances an individual enlists to cast off an expected role and be herself. Goffman believed these regions were
performed theatrically and spatially, where front-stage performances corresponded to public space and back-stage
performances typically corresponded to personal or private spaces such as the home. Where digital media and the
social web collapse public and private we see a conflict of impression management that challenges individuals to
express themselves in ways that are deemed appropriate to the public, even if they are not beneficial or therapeutic
for the individual.

physical and psychological distance). The technological features and communicative practices

individuals engage in online, therefore, destabilize the context of information shared, which in

turn diminishes privacy as a condition of impression management and identity (Goffman, 1959,

1966; Mayer-Schönberger, 2011; Nissenbaum, 2010). Consequently, an individual's identity is

constituted in streams of content online that conflate identity with information and which

overlook the embodied corporeal form (Hillis, Petit, & Jarrett, 2013; Kitchin & Dodge, 2011;

Pariser, 2011).

　　　As a form of "market-based data," content shared by others and ourselves generates

information that allows sites to target specific advertisements, products, and news stories at

individuals based on desires and wants revealed in ongoing interactions (Van Dicjk, 2012,

2013b). Although seemingly harmless, the creation of filter bubbles in site-specific algorithms

shapes the content individuals interact with and consume (Pariser, 2011), which inevitably

affects how they view others, society, and the world around them. In extreme instances, when

these data are used beyond the immediate context of the site or service in which they emerged,

they also reveal personal information about an individual to other sources who may misuse,

misinterpret, and misrepresent the individual. For example, users' personal data generated and

aggregated within specific social media sites such as Facebook, Google, and Twitter, were

monitored, tracked, and stored by the United States Federal Government (USFG) as part of

counterterrorism measures. Though this massive collection of information was done without

public knowledge or informed consent, the USFG justified its decision as a "necessary tradeoff"

for the good of the public, an argument that numerous politicians extended through the all too

familiar aphorism, "If you have nothing to hide, you have nothing to fear." Yet, in monitoring

information about U.S. citizens, foreign nationals, ally nations, and terrorist suspects, the USFG

cast each as a potential suspect. Consequently, the USFG not only challenged checks and balances to power in a democratic society in its massive surveillance program, it also recast the construction of society toward a surveillance state where information itself comes to constitute identity and where data and internet traffic are determinants of culpability.

Even today, the problem of unwitting data mining persists. Over the past three years, Cambridge Analytica (CA), a data collection and aggregation enterprise owned by hedge fund billionaire Robert Mercer and headed by Steve Bannon during from 2014 to 2016, amassed the personal data of over 50 million users (Picchi & Carissimo, 2018). Using quizzes and manipulating Facebook's API, CA obtained scores of information from users who took the quizzes, as well as the personal information of users who were connected to those who took the quizzes (Aleem, 2018). Though the problem was documented back in 2015 when *The Guardian* published a story that revealed that US Senator Ted Cruz hired CA to help his campaign market specific ads and target voters based on their psychological profiles (Davies, 2015), Facebook did little to resolve the issue at the time. Facebook, instead, allowed and perhaps even expected that data could and would be harvested without users' permission. Though Facebook might not have anticipated that user data would be harvested in mass as it was with CA, Facebook never implemented greater safeguards that allowed individuals to control and manage who accessed their information when the initial problem was reported (Davies, 2015; Romano, 2018). When the revelations of the expansive breech broke in 2018, Facebook finally acknowledged its complicity. After days of silence as news outlets reported the story and as the #deleteFacebook hashtag exploded on Twitter (Romano, 2018), Mark Zuckerberg apologized and offered "new solutions" aimed at policing organizations accessing user data and granting users more control in managing access to information by third parties.

Yet, there will be no mass exodus from Facebook even if users massively and hastily delete their profiles. Because Facebook owns Instagram and What's App, both popular mobile applications around the world, user data will always be subject to data mining and manipulation. Even as Facebook races to adjust its API and reconfigure the technology, then, the streams of data that individuals produce in accessing connective media and sharing content on them always potentially exposes individuals in ways they are not aware. Only after the fact does such manipulation appear to be a problem, too, and only minimally as most users have adjusted to accept that they have no legitimate control over their data online (Nissembaum, 2010).

Regardless of whether one uses social media or not, then, the array of digital media and social web that now essentially structures society compel individuals to participate by responding to the hails of content shared by individuals, organizations, and media. In this sense, individuals participate in what Althusser (1971) called "interpellation." Recognizing themselves in the hail of broader domains of social life, culture, and politics (Althusser, 1971; Barney et al., 2016; see also Jenkins et al., 2009, 2013; Rambukanna, 2015; Tufecki, 2017 regarding connectivity and convergence through the social web and social media), individuals respond by participating through any and all channels available, of which digital media and the social web are readily available and easy to enlist (for most). Indeed, while Althusser (1971) described interpellation as the process of hailing, hearing, and responding to broader ideological formations (namely, authority in a lawful exclamation), its extension in digital media and the social web echoes to the root of its conception: individuals become subjects through their participation, and through participating—whether in-person or online—they inscribe themselves in the social order. Participation has become such a contextual feature of everyday life in the contemporary West due in part to its extension in digital media, that Barney et al. (2016) argue we now occupy the

conjunction of the "participatory condition," as participation in everyday activities comprises being in the world.

Yet, while Barney et al. (2016) accurately label our contemporary moment, the way visuality increasingly supplants experiential engagement through connective media it also casts our interactions as streams of content for consumption and disposal. As a result, we produce images of ourselves for each other and we voyeuristically watch one other, observing what we assume people think about us and sharing our comments to inscribe ourselves in the social order. We rely on imagery to constitute others and ourselves, and we create our own contexts for the content we consume, leading to a reliance on imagery that fundamentally, and paradoxically, disassociates us from one another.

This dissertation ultimately explores this paradox. Chapter Two charts the history of "public" and "private" as conditions and contexts, and explores how both terms are implicated in sociality and codified in law. Drawing connections to the gradual emergence of newer visual technologies, I demonstrate how our usage of technology continues to challenge the conditions and contexts of "public" and "private" in how we relate to each other, in how we relate to authority, and in our understandings of law. In exploring these three dynamics, I rely on three case studies where technology, imagery, and law intersect to expose the conflicting nature of "public" and "private" as they pertain to digital media and the social web and our participation with and through them. Each case study also highlights rules, procedures, institutional practices, statues and laws to reveal how "public" and "private" are treated with regard to information, individuals, and the institutions represented. Although there were and will continue to be multiple examples to explore, I chose these three case studies because each highlights the extreme failures of technology and law, and the devastating harms posed to individuals and

collectives as imagery spreads across digital media and the social web. As legally resolved cases, each case study was also chosen because each highlights ramifications for society in our contemporary moment that allow us to further consider the effects of our communication practices through technology, the ways technology both extends and delimits what we know about self and other, and the ways law fails to account for contexts and conditions of public and private.

Chapter Three, *Who Watches the Watchmen?: Contextualizing (Counter)Surveillance and Threats to Authority*, explores the fatal shooting of Oscar Grant by Bay Area Rapid Transit (BART) officer, Johannes Mehserle. Situating the scene through court documents, testimony, and descriptions of the cellphone videos that captured the event almost in its entirety, I clarify how individuals employed visual media to monitor authority figures and how such practices extend the "camera wars" earlier engendered by the specter of the Rodney King Jr. beating of 1992. Similar to the Rodney King Jr. beating, where George Holliday videotaped the events from an apartment balcony overlooking a freeway in Los Angeles, numerous passengers of the BART train recorded the altercation between Oscar Grant and the BART officers on the scene. Drawing connections to both authorial narratives of the event and the contextualization of the event captured in the various cellphone videos, I argue that surveillance of those in power or authority, or "sousveillance," works to check police power in situating events. Yet, I clarify that such practices also fundamentally support the perpetuation of the information state, which may ultimately serve the interests of the state in monitoring all individuals and indirectly disciplining them for any actions they engage in when taken out of context.

Chapter Four, *Damage Without Injury: The Harms of Visuality in Our Technologically Mediated Society*, investigates the death of Nichole "Nikki" Catsouras and the spread of the

images of her dead body via email by Officers Aaron Reich and Thomas O'Donnell of the California Highway Patrol (CHP). Exploring the events surrounding the death of Nikki and the subsequent actions by the CHP and the Catsourases, I clarify how imagery becomes constituted as visual content that, in turn, decreases personal accountability for one's actions and objectifies those depicted in the imagery.

This occurs through the process Hillis (2009) calls "middle ground" wherein the visual, intermediary form displayed on a screen becomes "fused" with the physical, material form at a distance and elsewhere in the mind of the viewer, as if they are one and the same. Extending the affective elements of "middle ground" within the broader nature of the "participatory condition" we occupy (Barney et al., 2017), I argue that visuality becomes reality as imagery increasingly stands in for the corporeal form of another and in so doing denies her actual presence, casting her as information to be disposed of. This not only allows people to disembody the person(s) depicted (or what Hillis [2009] calls the "source/body"), but as a circumstance of the participatory condition, I contend that it also affords people reduced accountability for the effects of their actions as they become so disassociated from each other in the content they share with abandon. As a result, individuals shame and cyberbully others, fomenting greater entitlement to personal feeling (i.e., "truthiness") over fact, context, and empathy as content spreads beyond any one person's control.

Chapter Five, *Police (In)Action: The Limits of Law in Protecting the Individual*, charts the yearlong investigation into the alleged rape of Rehteah Parsons, a teenage girl from Nova Scotia, Canada. Exploring events surrounding the dissemination of an image of the alleged act in progress and the events leading to the creation of a new law to protect individuals from cyberbullying known as the Cyber-safety Act, I argue that police and prosecutors maintain and

reproduce systemic patriarchal practices that fuel and shape legal and popular conceptions of rape, victims, and consent (see Johnson 2017; Yung, 2017 for more detailed account of rape and rape culture). In interrogating the roles police and prosecutors play in classifying evidence and in interpreting and applying laws to protect individuals, I argue that law enforcement acts with profound authority as gatekeeper, which crucially shapes broader understandings of law, rape, and what counts as "private" or "personal" information across digital media and the social web.

My aim in exploring these case studies and the emergent challenges to how we relate to each other, how we relate to authority, and how we understand "public" and "private" in practice and law is to encourage greater sympathy and empathy in how we relate to each other. Somewhere along the way in our expansive use and affiliation with connective media we have come to disconnect from each other. Users of social media experience less of each other as they visualize one another as the images they produce, project, share and consume on the screen. Through visuality users are quicker to assume, and quicker to judge and shame each other due to the speed, accessibility, and range of digital media and the social web. Images stand in for users, though they are not the actual user. As a condition of social media, individuals cannot seem to escape the idea that they "must" produce and manage the images created and shared for others online. Through social media, society appears so obsessed with image and imagery, yet individuals continue to do very little to change it. Instead, users of social media perpetuate the ideas that what appears to be is all there is, and who we appear as online to be is who we are. In order to change this, we, as a society, must better understand how we got to this point, what the parameters are in technology and law, what the stakes are for individuals and collectives, and what we can do together to re-humanize each other as technology and law depersonalize us as images and words. I hope this project does just that.

CHAPTER TWO:
PUBLIC AND PRIVATE: HISTORY, CONDITION, CONTEXT

Introduction

Before exploring the contemporary social and technological forces and formations that

structure our current conjuncture, an understanding of the conditions of public and private is

necessary. Whereas the concept of public (hereafter referred to as public) historically shaped

understandings of political life, communal interaction, and class, the concept of private (hereafter

referred to as private) historically shaped understandings of personal life, friends, family, and the

home. While both public and private developed alongside each other over time, this chapter

considers public and private separately in order to contextualize the socially normed dichotomy.

I ultimately argue against any spatial binary, however, as I expose the performative duality

between public and private, particularly as it pertains to a contemporary conjuncture where both

are inextricably interwoven as if they are one and the same when individuals participate with one

another as information through connective media.

Performing Public

While history proves that public and private primarily functioned as spatial oppositions,

the foundations for public and private as informational contexts guided by social interaction were

also apparent in their original sense. In particular, public comes from the Latin *pūblicus*, which is

a blend of *poplicus*, as in "of the people," and *pūbes*, as in "adult men" ("Public"). As the

combination of terms indicates, the classical understanding of public was restricted to

landowning men who, by status and gender, represented society. However, this understanding of

public neglects the more spatial and political undertones of the term, which are most apparent in two corollary terms that contextualize public in historic practice: *forum* and *res publica*.

In Latin, *forum* comes by way of *foras*, which meant "outdoors," and *fores*, which meant "(outside) door" ("Forum"). Thus, *forum* in classical Latin meant, "what is out of doors," a classification that clarified that everything that existed outside the doors of an enclosure surrounding a home was, essentially, a public space. Understood this way, *forum* constituted the spatial associations of "the public place of the city" where people interacted with one another ("Forum"). Moreover, in a practical sense, a forum was also a very real physical space in ancient Rome where men assembled to discuss "judicial and other business"("Forum"). Therefore, *forum* highlights the rudimentary spatial association we attribute to public today, particularly as a "space where one is easily observed" and a place of "political engagement" ("Public").

Similarly, *res publica* contextualizes the sociopolitical associations we attribute to public in our common usage today. In Latin, *res publica* meant "common good" and it was understood as an idea and an action that the polity engaged in as citizens (Sennett, 1977). As an ideational extension of *pūblicus*, *res publica* refined and expanded public life to include the political and collective obligation each citizen had in maintaining society and social order. In redefining the vested interests of an individual within the interwoven interests of all found in the community, then, *res publica* became an idea that citizens enacted as part of their ritualistic practice of engaging in the commons with others of the society (Sennett, 1977). Thus, *res publica* resembles our contemporary understanding of "republic," again highlighting the sociopolitical connections we see in republic as "a collection of elected representatives engaged in civic duty" for a group or a society. Yet, *res publica* also constitutes the interiority and exteriority of public, not in a strict spatial sense, *per se*, but rather as "a collection of individuals of a similar nationality,

background, or other collective identity" ("Public"). In ancient Roman society, this interior was embodied in its classically rooted sense of "adult men" who owned land and represented society. As the dominant class, this group constituted the collective identity of the public, particularly as they shared common ethnic and racial backgrounds, social affiliations, beliefs, and values. Those of differing ethnic and racial backgrounds were cast as the exterior, which meant that they were not represented as a part of the public (see Sennett, 1977). Moreover, since the dominant class determined the social and political order of society, it also claimed public life as its realm. As a result, *res publica* ultimately shaped the discursive formation of public and its interiority as one of elite or high class.

This discursive formation of public persisted throughout much of European history, most notably in monarchical societies that relied on it to create and maintain social order. Ordained into their heighted status by a "Higher Authority," monarchs and nobles supported this discursive formation because it granted them power, which they wielded and managed in designating title and class, shaping social interaction across class, granting land, and determining the affairs of public life and the populace by extension (Sennett, 1977).[6] By codifying these practices in law, monarchs not only secured their power, they also instilled a sense of identity and place for themselves and others. This "sense of place" was most apparent in laws about clothing and laws about socialization in specific spaces.

Although peculiar by today's standards, class distinctions were historically evident in clothing designated by class. Sumptuary laws in London and Paris from the 13th Century up to the mid 18th Century specifically regulated the type of clothing a person could wear based on his or her class and/or trade (Sennett, 1977). Monarchs and nobles dressed in finer, ornate garb to

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[6] To remain cogent, I highlight only the most relevant examples monarchies used to maintain class distinctions. The two I highlight relate most closely to my discussion of technology in the next section. For a more elaborate explanation, see Sennett's (1977) *The Fall of Public Man*.

distinguish status and to draw attention to their presence in public. A carpenter, on the other hand, was forbidden from wearing the finer clothing of a lord, as this was a violation of station and social norms. Instead, a carpenter and others of lower classes and trades wore simpler apparel, which was often regulated by their respective guilds. This visual demarcation in clothing ultimately served three purposes. First, it regulated class as a visual array one could easily discern in public and in interaction, which allowed a person to "maintain" to his or her class and find safety and communality in mutual affiliation. Second, it guided social interaction across class by allowing both parties to visually encode and decode the proper social etiquette necessary for address and communicative interactions. In particular, it standardized social protocols for formal address, which ultimately eased tensions across class and provided a semblance of genuine interaction (Sennett, 1977; see also Giddens, 1986). Third, it lessened social mobility, which worked to temper dissent by relegating individuals to their respective classes and/or trades. As ornate garb was legally restricted to certain echelons of society and—practically speaking—more expensive than laypeople could afford, individuals were fundamentally constrained by politics and economics, thereby limiting their abilities to change their social status. In regulating the clothing a person could wear, therefore, monarchs and nobles enacted a decidedly visual interplay of encoding and decoding formality that found its support in law and social identity, and helped ensure their control of the social order.

Today, stratification of class in clothing is neither a matter of sumptuary law nor is it as visibly apparent. Yet, the emphasis on image and the "social protocols" of promoting and projecting a particular visual array to be encoded and decoded by others are inflected in contemporary practices through digital media and the social web. As individuals adorn their profiles with curated images that obscure their blemishes and highlight their best features—often

with photo editing—they give off an appearance that attracts the attention of others in a particular, positive light. The profile, therefore, extends aspects of bodies from the past adorned according to everyday "norms," yet it is a mannequin on display to others, for others.

The historical limitations of social space, similarly, further supported monarchical control. Limiting the confines of "the public sphere" to the royal court, most monarchies actively excluded specific classes from participating in the affairs of state (Habermas, 1991). As a result, monarchies further affirmed their power by strategically refining public life, in its *res publica* root, as the physical space that the elite primarily occupied. In this way, monarchies ensured that the interior of public remained in the hands of the elite. Yet, since the elite and the people they represented in court shared a similar national background and other collective attributes, the spatial division of "the public sphere" recast the exterior of public to also include the vast expanse of the capital city, like London or Paris (Sennett, 1977). Therefore, the streets, parks, shops and pubs of the city operated as spaces where an individual performed his identity and reinforced class as he socialized with unknown others (Goffman, 1959). In this way, individuals not only interacted with one another, or at least maintained a semblance of interaction across class, they also performed and collectively shared in public identity as a people.

The discursive formation of public that supported the elite interior and its claims to public life dissolved in the late 17th Century. While 17th Century French society visibly maintained social order in its division of "le public" between "la cour et la ville," or the court and the city (Sennett, 1977), the rise of Louis XIV and the French Revolution slowly fissured these divisions in space (Fraser, 1992; Habermas, 1991; Livingstone, 2005). For example, "la cour," which constituted the spatial and ideological interior of public, expanded under Louis XIV's rise to power as he allowed nobles *and* the rising mercantile class to participate in the court.

Recognizing the growing economic power the mercantile class was acquiring through market-based trade and the effects this new development posed for the State, Louis XIV granted this rising class a more prominent voice in the court. This move both tempered the elite, whom Louis XIV distrusted, and inadvertently redefined public life around the growing economic forces of "la ville" that were to fragment the highly classed spatial interior of pre-Revolutionary French public life (Habermas, 1991; Sennett, 1977).

To meet these changes, the nature of urban life also shifted. In particular, guilds, a staple of the city, began to disappear as social class became increasingly fluid due to the rise of the market economy (Habermas, 1991; Sennett, 1977). Afforded new liberties due to newfound wealth, the mercantile and bourgeoisie classes of the late 17th and early 18th centuries explored the fluidity of class by dressing in the clothing of different classes. Thus, individuals experimented with their identities through clothing, not necessarily to "jump" class, but rather, to be recognized as distinct individuals out in the city (Sennett, 1977). As a result, sumptuary laws governing dress slowly fell out of fashion, which ultimately allowed individuals more power and control over their social identities as they adorned their bodies to be recognized by specific others and to affiliate themselves with specific groups.

As monarchical societies reorganized, socially and politically, around the rising mercantile class and the shifts brought about by the market economy, the understanding of public changed to more closely resemble its contemporary social and material forms. Citizens of mid 18th Century Paris and London understood public to mean, "a region of social life located apart from the realm of family and close friends." Unlike the earlier socially stratified conception of public, the term was now understood to encompass a realm that included a relatively wide diversity of acquaintances and strangers formerly obscured or restricted from public life

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(Sennett, 1977, p. 17). Therefore, while public became a term of discomfort for the elite who previously championed the dichotomy it once maintained in society, the term now permitted individuals of lesser status the possibility of social mobility. As an individual crafted himself in the clothing with which he adorned himself, and as he connected with others in public, he participated in public life and progressively inscribed himself in the social order of everyday life. Indeed, as obvious class distinctions by attire continued into the 19th Century (Giddens, 1986; Sennett, 1977), the spatial and performative shifts in public brought about by the rise of the mercantile class shaded public toward how it is widely understood today: the observable space outside the home where one interacts with others in his community, as well as the wide expanse through which a society's members communicate messages to one another ("Public"). And as distinctions by clothing and title/address began to fade in the mid-19th Century in most parts of the world, the "sentiment of responsibility" in distinguishing others out in public and regarding them formally also gradually eroded (Le Bon, 1895/1960). As a result, being out in public today entails being outside the home, as well as greater choice as to whom and to how one communicates.

Performing Private

Private, like public, derives from classical Latin. Etymologically, "private" is derived from *prīvātus*, which meant, "withdrawn from public life" ("Private"). In this way, the term operated in direct opposition to public; however, according to the Oxford English Dictionary, the term also operated as both an adjective and a noun that entailed more than an opposition to public life. As an adjective, private indicated a condition, as in "restricted for the use of a particular person or persons"; "peculiar to oneself, special, [and] individual"; a state of being, as in "a private person, not holding public office," as well as "belonging as private property"

("Private"). As a noun, private denoted an individual "who holds no public office," who was "a private person," as in "an individual" who kept to herself ("Private"). Here, both forms of the term highlight a spatial connotation. First, physically, as in one's property outside of public space, as well as being either outside of public purview or withdrawn from public life. Second, interpersonally and psychologically within the company of particular individuals, as well as within the conceptual space of one's mind. In its classical conception, then, the term originally communicated a relatively flexible array of conditions and qualities, each in relative opposition to public.

As the meaning of private developed over time, it took on largely personal connotations that were not entirely spatial. According to the Oxford English Dictionary, private became associated with "close" and "intimate" in the 8th Century, marking its early transition toward a particular person, event, or with regard to particular information ("Private"). During this time, the term guided interactions between close individuals who felt they could share personal, and therefore, private information with one another that would stay within the intimate context in which it was shared. As these close associations continued into the 12th Century, private expanded its associations, becoming synonymous with the adjective "confidential," as a condition of a person, event, or with regard to particular information. The nouns "confidant" and "close friend," also become synonymous with "private," both denoting the way that privacy became contextually bound to particular individuals and the information they shared ("Privacy"; see also Nissenbaum, 2010 regarding historic contexts of privacy). As the meaning of privacy expanded beyond spatial contexts, it became a quality germane to dyadic interactions and small groups of trusted individuals, such as close-knit communities.

It is worth noting a now obsolete interpretation of the term private arose during the late

14th Century. John Wyclif—an English philosopher, theologian, reformer, biblical translator, and

seminary professor at Oxford—applied the term to the mendicant orders of the Christian faith as

a way of distinguishing their distinct practices of asceticism ("Private").[7] So applied, the term

clarified the intimate communal associations of private as well as finessed the term's more

common exclusionary aspect of segmenting information and practices from others. Developed in

the context of religious orders, this definition defined private as a condition of an individual

"living according to distinct religious rules; set apart by distinct beliefs, religious practices"

("Privacy"). Specifically, as an individual followed the precepts of the religious order, and as he

communed with others who held the same beliefs and practices, he and the others together

formed mutual associations of affinity that brought them together as a private community that

was exclusionary to outsiders who did not know about or share its distinct beliefs and practices.

In this context, then, private not only constituted the intimate connotations accorded it from the

8th Century onward—which were inclusive of those from a particular religious in-group—but it

also included the exclusionary dimension of the term witnessed in being set apart from others,

either by space, grouping, or informational context.

Though this interpretation of private faded during the early 15th Century, largely due to

attacks on monasticism, it fueled transformations of private that developed in the mid 15th

Century. Beyond expanding private as an inclusive condition of particular groups and

individuals, this interpretation gave rise to the common expression "privy to" and also the term

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[7] A proponent of the ideal of poverty, Wyclif used the term to extol the virtues asceticism, which initially put him in line with the mendicant orders to which he applied the term: the Franciscans, Augustines, Dominicans, and Carmelites ("Privacy"; Urquhart, 1912). Yet, as the Catholic Church and its numerous orders expanded and acquired property, Wyclif later challenged the imperial nature of the Church and its growing acquisition of and reliance on possessions. This put him at odds with the mendicant orders that once supported him, as they came to rely on alms. Arguing against these "sects," as he later referred to the orders, Wyclif urged the church to abolish all monastic orders to reclaim the holiness of the faith (Urquhart, 1912).

"privacy." A common expression in Middle English, "privy to" verbally signaled when specific information "belonged to one's own private circle" ("Privy"). In this way, the condition of being privy to particular information was entirely a matter of one's affiliations and the quality of one's relationship with specific others. Therefore, the various practices of private borne out of the mid 15th Century recast private by extending it beyond its classical spatial associations to include the wider array of contexts governed by the condition of one's associations and the quality of one's relationships (see Petronio, 2002 regarding privacy management in interpersonal contexts). For example, during the 15th Century, an individual might choose to disclose private information outside of the home when he communicated with others of his service or guild. Given the mutual context of their shared interactions and depending on the quality of their relationship, a baron's valet and his footman, for example, might discuss personal affairs with one another that they would not discuss with others employed by another baron since they would not be privy to the affairs of the estate at which the first baron's servants worked. Furthermore, since these servants shared a mutual social context, these conversations could occur within the service quarters of the property or they could occur out in public, depending on how comfortable the servants felt discussing information with one another in the settings in which they interacted.

Concurrently, in highly stratified societies of the 15th Century, an individual of a lower social class was not necessarily privy to the affairs or practices of a higher social class; instead he was largely relegated to his station in society. For example, even though a valet served his lord, he would not be allowed to partake in the various social gatherings—whether mundane or extravagant—his lord was party to unless the lord extended him an invitation, which was a rare occurrence. Additionally, the differences between high and low class afforded those of higher status the unrestrained opportunity to inquire about the affairs of those socially beneath them;

yet, an individual from a lower class would be found "out of turn" if he inquired about the affairs of someone from a higher class (Sennett, 1977; Petronio, 2002). Members of lower social strata had far less social leverage they could employ against their more stately counterparts, at least until the early 18th Century when the aforementioned rise of the mercantile class reorganized society and practices of public and private expression (Habermas, 1991; Sennett, 1977).

In addition to the expression "privy to," "privacy" emerged as a common term in the mid 15th Century. As an extension of private, privacy marked "a condition of being alone, undisturbed, or free from public attention, as a matter of choice or right" ("Privacy"), and its interpretation has remained relatively stable into modern times. Like private, privacy operated as an oppositional term to public, which expanded beyond its initial associations with "outside (the home)" and "common good" during the first half of the 14th Century to encompass the condition of being "generally known" and the quality of being "open to general observation or view; carried out without concealment" ("Public"). Molded by its spatial and communal foundations, public progressively included an awareness of others as they communed with the vast and interactive audience outside the home as individuals collectively performing identity albeit within the confines of their roles and social classes (Fraser, 1992; Habermas, 1991; Livingstone, 2005; Sennett, 1977). Carefully managing their verbal and nonverbal expressions in the purview of the vast and interactive audience outside the home, individuals collectively performed their identities with others to maintain their personal public images (Goffman, 1959, 1966; Petronio, 2002; see also Giddens, 1986 regarding socialization as ordered in structuration). This not only promoted a semblance of sociability across social classes (Sennett, 1977), it reaffirmed public and private as mutually constitutive processes of shared communicative performances.

An individual, for example, a valet, performed public image—his "front stage" performances—through his social class and role as a valet in his physical appearance and clothing, and in how he conducted himself in his deliberate and spontaneous communication with others (Goffman, 1959, 1966). Specifically, his physical appearance and clothing would be neat and appropriate to his class; he would appear well dressed, but perhaps not in the most recent fashion (see Sennett, 1977 for more elaboration on how physical appearance dictated sociality). In his deliberate communication with others, he would speak properly and avoid slang. He might also deliberately avoid shameful individuals of lower classes, such as prostitutes and beggars, whose association might mar his public image. Unconsciously, he might even avoid particular places where a proper gentleman should not be seen, such as underground clubs or back alleys where unsavory individuals might congregate. Yet, in all of these public performances of his identity, he also performed private as he consciously guarded information about himself that he deemed relative to specific place, familiar affiliations, or to his self. Thus, he relied on privacy—or the spaces where he enacted his "backstage" performances—in the home, with close friends and family, or in his own personal solitude to protect him from the excruciating gaze of the public (Goffman, 1959; 1966; Sennett, 1977).

Conversely, as I discuss in detail later, digital media and the social web collapse these historically inflected spatial demarcations of public and private by promoting a singular space where private and public are on display together at once. Personal thoughts, feelings, and expressions that would otherwise be private, backstage performances contained within a particular audience are, instead, cast as front stage, public performances that are widely available to countless individuals across space and time. Utterances and images composed long ago and/or in jest amongst friends become subject to the vast gaze of others who may lack familiarity with

the source and the context. Because public entails a much more massive audience than one contained in a geographic space or set location, individuals can and do become victims of the varied and emergent "social norms" developing across digital media and the social web. To combat this, individuals either attempt to maintain public and private as separate spaces by eschewing digital engagement to the extent they can, however limited, or they manage expressions and depictions shared as they internalize the infinite gaze of others. Therefore, the return to one's self in solitude or with close, intimate others—private space—recedes more and more to the thoughts of the individual, the only "space" as yet publicly inaccessible.

Demarcations of Public and Private in Law

As terms and as practices, public and private mutually define specific spaces, possessions, conditions, and interactions from opposing sides of a relatively stabilized spectrum. Despite these historic spatial demarcations, however, public and private intersect in law, but often in seemingly contradictory ways. In American law, in particular, "privacy" is alluded to but never fully stated as a right. Nowhere is privacy specifically mentioned in the Constitution; rather, privacy is embodied in the 1st, 3rd, 4th, 5th, 9th, and 14th amendments where each outline a sense of privacy protection from indemnity or public censure (Nissenbaum, 2010). Indeed, while individuals make claims to privacy as a matter of personal right, privacy protections are abstract and highly contextual in law, especially as newer technologies change the ways we practice, understand, and value privacy (Alderman & Kennedy, 1995; boyd, 2011; Warren & Brandeis, 1980/2010).

Regardless of the equivocal place privacy maintains in law, people believe they have a fundamental right to the quality of "intimate information" and to a space protected from the purview of the public. Etching out frameworks for privacy in practice, individuals, philosophers,

and legal scholars often cite the text of the 4th Amendment to justify privacy as a personal right. However, the language of the 4th Amendment only outlines individual protection from unreasonable search and seizure without probable cause and due process in the law. The 4th Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S. Const. amend. IV)

The 4th Amendment, therefore, does not wholly constitute a right to privacy, at least not in contemporary personal invocations and conceptions. Rather, when James Madison authored the Constitution in 1787-1788, he wrote the Amendment to grant individual protections to property on the heels of the Revolutionary War. Madison reflected on the transgression of personal space that occurred when British soldiers commandeered colonists' houses for boarding and military purposes. To ensure protection for personal possessions, Madison articulated security for landowning citizens in a classic conception of public and private space. Thus, Madison's words reflect a particular time when the context of public and private existed in a spatially dichotomous relationship.

Madison and the other Founding Fathers fundamentally relied on this binary understanding of public and private space dominant during their time. With all things private inextricably tied to personal possession, Madison and the Founding Fathers never fathomed a day when public and private might collide unless there was probable cause to investigate a person. Yet, freedom of the press and, later, the advent of newer visual technologies such as the snap camera and the x-ray would, over time, test and challenge this binary, as they expanded accessibility to what was, at the time, private.

The presidency of John Adams, for example, saw the first societal challenges to the public-private binary as it clashed with the freedom of the press. When France and England went to war in 1792, shortly after the Revolutionary War, President Washington declared American neutrality as America traded with both England and France. Despite neutrality in the war, England and France seized the ships of those that traded with their enemies. The Jay Treaty of 1795 settled the commandeering of American vessels with England, but also angered the French government, which stepped up its efforts in undermining American trade with England. By the time Adams assumed office in 1797, he faced a tense political relationship with France that bordered on war. He sent a diplomatic commission to France to negotiate the end of the seizure of merchant ships. The American commission, however, failed to formally negotiate with the French, as it refused to pay the bribes that the French commission demanded. When the dispatches of the failed American diplomatic commission were later released to Congress in 1798, leading to the XYZ Affair, the Democratic-Republicans and those that supported them in the press railed against Adams. Making a mockery of his political prowess in drawings shared in newspapers, the Democratic-Republicans and the press angered Adams.

Infuriated by the outpour of what he believed to be slanderous depictions of his likeness in drawings from those who found his international engagements with France questionable, Adams passed the Alien and Sedition Acts. The first three acts restricted the movements and actions of foreigners, who posed security risks to the government. The fourth and final act took aim at the press, declaring it a criminal offense to publish "false, scandalous, and malicious writing" against the government and government officials. Thus, Adams made it legal, albeit in a temporary law, to prosecute those who mocked the actions of government officials and/or

reported false information. This extended to reporters, members of the government, and even private citizens.

Although the Alien and Sedition Acts concluded with Adams' presidency, the ongoing critiques of public officials and everyday affairs continued in the sensational reportage found in "yellow journalism." The historic equivalent of modern tabloid journalism, "yellow journalism" heightened aspects of stories by fabricating, obfuscating, and/or excluding information about people and particular events. Most notably, the yellow press' 1898 reportage of the sinking of the USS Maine in Cuba contributed to public sentiment that inflamed tensions between America and Spain.[8] Exhorting the public to "Remember the Maine" and sharing drawings of the bombing and photographs of the wreckage, the yellow press swayed public opinion, which eventually contributed to the declaration of war with Spain in 1898. The dissemination of imagery coupled with incendiary sentiment—whether true or exaggerated—by the yellow press, therefore, demonstrated the power of imagery and information to challenge the coherency and context of public events and phenomena, as it continues to do today through digital media and in our interactions across the social web. The primary difference today, however, is that the legally inflected binary of public and private is dramatically challenged by the amplification of information as public by default once shared online, regardless of how personal or private it may be.

Technology, Imagery, and Challenges to the Public-Private Binary. Historically, visual technologies such as the x-ray and snap camera collapsed the extant distinctions between spatial and embodied spaces of public and private life. The advent of the x-ray in 1895 challenged commonplace notions of public and private by drawing focus to the private space of

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[8] William Randolph Hurst and Joseph Pulitzer led the yellow press. Proprietors of the "New York Journal" and the "New York World," both Hurst and Pulitzer supported war with Spain for its alleged cruelties to the people of Cuba.

the body. In the process of illuminating the skeletal structure of a body, the ghostly contrast of black and white exposed an individual's internal organs. In exposing the "private parts" of a human body, the x-ray stripped the skin away, making it "just another wrapping, something to be removed to reach what was more valid beneath it" (Kevles, 2007, p. 28).

Comparably, during the late 19th Century, the snap camera complicated the spatial boundary between public and private when individuals, usually journalists, used it to expose otherwise private facts and personal affairs of notable public figures (Solove, 2007). As journalists visually splayed formerly private facts on the front page of newspapers, the snap camera slowly promoted the photograph as evidence *and* testimony in the public eye. Offering imagery as an allegedly complete representation of a person or an event removed from original accounts from any individual or persons depicted, the emergent photographic mode of visual content directed interpretation toward the eyes of the viewer (see Althusser, 1971; Bolter & Grusin, 2000; Peters, 1999; Warren & Brandeis, 1890/2010).

Incensed by these emergent invasions of privacy revealed in the various uses of the camera that contributed to surveillance, Samuel D. Warren and Louis D. Brandeis, prominent lawyers of the late 19th and early 20th centuries, argued that "instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'" (1980/2010, p.195/p.6). Cognizant of the potential invasion to one's right to privacy exposed by newer technologies, even beyond the scope of the snap camera, Warren and Brandeis argued for personal protections in U.S law (Peters, 1999). Noting that privacy invasions caused "*damnum absque injuria*" or damage/loss without (physical) injury, Warren and Brandies authored a tort to grant justice to those who were

psychically or publicly marred by an invasion of privacy (1980/2010). In establishing personal privacy protections for individuals within the confines of their homes, the tort granted individuals the opportunity to seek recompense for the personal, psychic damage that occurred due to the visible broadcast of private facts and private performances. The tort also limited personal privacy protections. Since an individual willingly disclosed personal facts to others, regardless of the space in which he shared that information, the disclosure was not considered wholly private. Instead, it was considered vaguely public. Consequently, the tort fundamentally reified the extant spatial binary in law as it ignored expectations to privacy in public and in specific contexts (see Nissenbaum, 1997, 2010 regarding contexts of privacy).

Despite its shortcomings, Warren and Brandies' tort established new conditions of privacy in American law. The ulterior uses of newer visual technologies and the innumerable unforeseen ways each newer technology remediated attributes of previous media (Bolter & Grusin, 2000) later challenged privacy as a condition governing personal information (Nissenbaum, 2010). The use of film and the moving image at the end of the 19th Century, for example, further complicated the "spatial binary" articulated by Madison by, again, collapsing private into public in a similar fashion as the snap camera and photograph had done. Moreover, since film and the moving image captured an individual's movements across space and time, the challenges to the spatial binary in law became more expansive, reflecting newer contexts already remediated by the camera and photograph. Notably, the perceived authenticity—the "immediacy"—of the moving image and the potential for heightened surveillance further challenged privacy law to conceptualize how and when certain movements and interactions across space worked to constitute private action (Bolter & Grusin, 2000; Nissenbaum, 2010; see also Humprheys, 2011). Personal recordings of private events in one's residence could now

potentially become public as a matter of information if shared beyond the original context, just as had happened with photographs in the past. Even recordings of physical public spaces, which later became a method of observation utilized by law enforcement, challenged the privacy of the individual. For example, when surveillance cameras became part of major metropolitan cities like London and New York in the 1970s, individuals decried the loss of privacy, particularly since their "private" movements from one public place to another now became subject to continual documentation, aggregation, and analysis by an outside authority (Nissenbaum, 2010). Indeed, while an individual moved about the city of his own accord, the presence of surveillance engendered by the omnipresent lens of the camera now threatened to expose his otherwise private facts.

The visual components of digital media and the social web, coupled with the growing emphasis on visuality, engender similar concerns for privacy today. Whereas the photograph and film extended private information into public, connective media amplify the anxieties associated with potential violations to privacy further as content is easily replicated and manipulated, indefinitely stored, and shared across vast audiences (Baym, 2010; Marwick & boyd, 2011). As previously noted, the projection of the self on the screen in static or animated imagery—one's telepresence—becomes the means through which people connect and share with each other, as well as objectify and harm one another. Cast as a telepresence, any other can potentially seize the individual and objectify her at a distance, making her into a telefetish that is manipulated to fit the ideas and beliefs of those who encounter her visual content, at least until the power of the fetish has diminished (Hillis, 2009). As users share visual content through digital media and the social web, therefore, they fundamentally surrender their privacy for the sake of connection. In so doing, individuals not only expose themselves to potential harms that emerge when an image

spirals out of control, they also become commodified by others and the social media platforms they use. The vast array of networked technologies that structure digital media and the social web, then, erode privacy as individuals and entities seize each other in content and treat each other as information to be engaged to the extent that this information entrances the audience until such time as it is disposed of when said audience feels it has lost its allure.

Privacy as Control and Access to Information. In light of the progressive collapse of private and public into each other through technology, it's necessary to consider how both access and control of personal information are constituted within the discourse of privacy. Gavinson (1980) argues that "privacy is a limitation of others' access to an individual" and that "a loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him" (p. 421). Gavinson's arguments align with the U.S. legal definition of privacy, which highlights an invasion of privacy as the public disclosure of a private fact "which would be offensive and objectionable to the reasonable person, and which is not of legitimate public concern." Yet, today's networked digital technologies upset this "threshold" delineation in the law. With networked digital technologies constantly tracking users through their searches, purchases, and personal statements (Mayer-Schönberger, 2011; Rosen, 2009); and with social media recasting disclosure and sharing as "default" social norms (Baym, 2010; boyd, 2008, 2011; boyd & Hargittai, 2010); privacy is no longer a matter of limiting others' access to an individual, but rather the ability, however limited, to control the excess of information available about oneself in one's interactions online.

The widely and wildly accessible nature of information online ultimately complicates the ability to control the flow of personal information for both the individual and the collective. Since information is gathered in each action online and stored in proprietary databases, the

individual lacks the ability to exert control over how and where her information is used. Beyond

her individual actions online, she must also contend with what others may share about her. Since

others can, and are encouraged to, share information through digital media and the social web,

she has limited control over what may get published, and what may be seen to comprise her. In

particular, if others post photos of her online and tag her in them, their actions—whether benign

or malicious—can reveal personal moments in time that would otherwise be unseen and

unknown to the public. How she is seen and known becomes constantly comprised in the

information she discloses, the information that is shared about her, and the excess of information

always available at the hands of the expansive collective that monitors, tracks, and mutually

constitutes her in her interactions and digital presence online. In this way, the collective shapes

the all-encompassing collage of information about an individual, whether this collective actively

participates in sharing or not, by monitoring her through participatory surveillance that, at its

best, helps build affirmation as people connect to one another and find community (Baym,

2010), and, at its worst, restricts expression to the point that an individual self-censors, feels

threatened, and/or potentially harms herself due to the weight of the public reprimand leveled

against her when her expressions are taken out of context (Mayer-Schönberger, 2010). The end

result is a collapse of the experience of "public" and "private" in offline and online spaces, as

well as a growing shift in social norms. Our engagement with digital media and the social web,

in line with Warren and Brandeis' prescient predictions, continue to shift our understanding of

public and private and how we understand others and ourselves.

Disciplining Others and Ourselves

Technology and tools alter our relationship to the world. Whether we use a clock for

marking time or, more contemporarily, a computer for searching, the way through which we see

and understand the world is affected by our usage of technology (McLuhan, 1995; see also Innis, 1951). Contemporary digital technologies dramatically alter our relationship to the world through the availability of information, the perpetual streams of content, and the increasing capacity to store massive amounts of data. Thus, where analog technologies like the clock allowed humans to alter their physical relationship to their environment and the world around them, contemporary digital technologies facilitate a new understanding of one's relationship with the world through increased ease of access to and processing of information (see Innis, 1951 regarding time-binding and space-binding media). In this way, digital technologies function as more immersive "intellectual technologies"—technologies that expand *and* constrict our mental capacities as individuals process the world as streams of information created, shared, and readily available in ways it was not as easily accessible before (Bell, 1974; Carr, 2008; Stiegler, 1998).

In particular, the invention of the mechanical clock and the adoption of time zones highlight to the ways in which intellectual technologies alter human action. As both Harold Innis (1951) and Joseph Weizenbaum (1976) argue, the mechanical clock altered human biology, coordinating it around a mechanized system that quantified time in rejection of human senses. As Nicholas Carr (2008) notes, with the advent of the clock we began to stop listening to our senses for when to rise, to sleep, and to eat, and instead started to create and obey a new social order of life. The advent of widely available means of understanding mechanical time through the clock fundamentally altered social, political, and personal spaces around time with the end result of further abstracted boundaries of "public life" and "private life."

Digital technologies extend this abstraction and do so through greater storage, visuality, diffusion, and deindividuation. With the increasing capacity to store data across multiple nodal points in geographic space and over time, digital technologies alter human practices of

remembering and forgetting. Just as the mechanical clock slowly reordered human biology around arithmetical time, digital media and the social web have changed the ways we know, remember, and forget by offering "perpetual" storage and "constant" engagement as we are hailed to participate.

As Viktor Mayer-Schönberger (2010) elaborates, the storage capacity available through digital technologies shifts human abilities to remember and recall from a mode of biologically inclined forgetting to one of technologically augmented remembering. Where humans previously forgot particular events over time, as humans are inclined to do, the technological mediation facilitated by digital storage shifts the norm from forgetting toward remembering. What Mayer-Schönberger finds so troubling about this shift is not that humans must now constantly remember events of the past. Rather, he worries that the massive stores of information continuously archived by our networked digital technologies and across the social web freeze an individual in time and, more crucially, constrain human agency interpersonally, socially, and politically. As individual identity is conflated with content that is shared and acquired online, Mayer-Schönberger argues that individuals are interpreted through the constellation of information available that is fundamentally removed of context. Our awareness of this "perfect" catalogue of the past that is readily available and stored in databases, then, forecloses greater possibilities to forgive one another, as well as recognize that we change over time. Through technology and the externalization of memory afforded by it, individuals are predisposed to remember, and as they do, they become biased by the stores of information they access to inform their opinions and guide their actions.

Whether individuals learn self-censorship or attempt to avoid using digital media and the social web, they are implicated in the networked nature of the technologies that now so crucially

structure society. A consequence of the "participatory condition" of our current conjuncture (Barney et al., 2016), individuals participate in the broader domains of social life, politics, and culture as they enlist or become a product of technology in their everyday activities. Where an individual chooses to shop, what she buys, and even her spatial movements encompass participation at the social, cultural, and political levels of everyday life. Choices in where she shops, what she buys, and what she looks at in a store contribute to an elaborate profile of the individual that is digitally catalogued by omnibus advertising companies and sold to numerous agencies and advertisers (Cohen, 2012; Magnet, 2011). Transactions with credit and debit cards create digital records with banks, creditors, and companies that further codify the individual in terms of worth—an investment, a credit score, and purchasing power. Even her spatial movements become a product of marketers and security forces, which use them to make sense of how individuals maneuver space and engage with product.

What emerges from our engagement with connective media, then, is a linear record of content accessible to multiple entities and others who may manipulate the information removed from its original context. Fearful of how this information can incur incalculable damage to an individual's reputation over time, Mayer-Schönberger (2010) argues that individuals must learn to err on the side of caution by self-censoring to minimize any unforeseeable retaliatory action for past transgressions. Yet, such practices cannot fully ensure protection for anyone given that information is gleaned in the choices, transactions, movements, *and* interactions that an individual engages in on a daily basis. Caught within the web of networked technologies at our fingertips and all around us, we become composites of the information collected, amalgamated, and codified with or without our consent and knowledge.

Disciplinary power, then, comes to exercise greater influence over each individual and her actions in *all* arenas of life. Uncertain of who is watching and what they might do with the information garnered, the individual cedes control over the social situation to technology and the collective (boyd, 2008, 2011). Attempting to compensate for this loss of control, the individual engages in the "illusion of control" online by manipulating her privacy settings where available (boyd, 2008, 2011), and also practicing restraint in personal expression. As a result, the individual begins to internalize the watchful gaze of the always unknown other who imposes the "generalized order" upon her (Foucault, 1975). Stripped of true mechanisms of control, yet strangely vested in the "illusion of control," the individual's agency becomes bound to contexts where she believes she can control the information about herself. Yet, because information is always potentially accessible through digital media and the social web, even despite privacy settings or personal restraint, public and private clash again and again to reveal that information is in the eye of the beholder. Thus, how one is seen, known, and remembered is a process and product of what one produces and what others share about one, with or without one's consent.

Beyond the problem of access, then, the problem of conflation of medium with memory continues because context is collapsed by the medium itself (Mayer-Schönberger, 2010; see also Hillis, 2009). We lose essential referential information that would properly inform us of the phenomena we observe though digital media and the social web. As context is obscured or distorted by connective media, agency is similarly constrained as individuals primarily rely on visual content to depict self, know others, and socially participate. The end result of this process of digital remembering is a threefold reverberation of panopticism a la Foucault (1975): power relations become subtle, operating almost invisibly, as individuals cede power to a wide array of mechanisms that bind the individual to both the technological and political forces at work;

subject to judgment by others (e.g., family, friends, former romantic partner, employers, institutions, and society by and large) through the networked technologies, individuals increasingly censor themselves and police each other; finally, individuals limit their expressions to conform to collective taste in emergent social norms or they stay silent out of fear of retaliatory actions with unknown consequences. Of central concern here is that expression itself is the hallmark of a democratic society, yet it is continually under assault by digital media and the social web *and* how we use them to deny or distort each other's presence.

Technologies of Subjugation and Social Order

When Foucault began his study of the prison system, he was well aware that the mechanisms of control exerted on the bodies of prisoners extended beyond the enclosed space of the prison. In his genealogical exposition of the panoptic practices that shaped the modern prison system, Foucault uncovered the power relations that disciplined the body at a distance in practice and in perception. Noting the strong hierarchical organization of the prison system, Foucault argued that the vast separation of power relations between the surveyor (i.e., the prison guards) and the surveyed (i.e., the prisoners) engendered pliancy in the latter (1975). Operating through "disciplinary power," Foucault argued that this panoptic system constrained human action to produce a human being who could be treated as a "docile body" (Dreyfus & Rabinow, 1982; Foucault, 1975). Once docile, Foucault argued that the system further exerted control over the individual in its implied power. Internalizing the disciplinary mechanisms of surveillance and punishment for unsuitable actions, individuals became productive members of the system out of fear of officially sanctioned disciplinary retaliation on their bodies.

Beyond the prison walls, Foucault argued that other institutions such as the military, schools, and factories exerted similar forms of disciplinary power on the individual. With the

intent of producing a docile yet productive subject, disciplinary power was employed to constrain undesired actions with the intent of duly producing the individual as an object of and for the State. Thus, mechanisms of discipline slowly spread, subtle and seemingly innocuous as they filtered into political and organizational settings and came to structure social order (Dreyfus & Rabinow, 1982; Foucault; 1975).

Foucault linked the rise of mechanisms of discipline to the apparatuses of State Control. He examined the military and the police as two institutions where disciplinary power organized and enforced the will of the state through strategic practices of surveillance and plays of power (1975, pp. 213-215). Within the military, disciplinary power primarily operated to structure the enlisted troops under the purview of the State, trained to effectively protect the State from external forces that would harm the social harmony within. Comparably, disciplinary power within the police system focused inward to the bodies contributing to the State. The police system functioned by monitoring the everyday activities of individuals to keep them in line with the greater social order of the State (Williams, 2007). In this fashion, then, the police system functioned as a ground-level mechanism of sovereign power. The scope of the State primarily expanded by and through the flow of disciplinary power that linked one system of authority and control to another through an interconnected web of power relations for the sake of social order.

Extending Foucault, Helen Nissenbaum (2010) points out that the multimodal network of digital storage media ultimately contributes to a longstanding image of the individual as information. That is, in allowing personal information to be accessed and stored across multiple network nodes, disciplinary mechanisms become increasingly difficult for the individual to identify *per se*. The problem here is not that the mechanisms are invisible; rather, it is that mechanisms are so diffuse and seemingly unassailable such that the individual fails to recognize

the various social forces that now have access to and power over an his or her information. As a consequence of this "digital diffusion," the individual slowly loses any sense of "personal" and "private" information in the face of a growing "public awareness" of the self (Foucault, 1975; Nissenbaum, 2010;). In essence, then, the neo-panoptic power afforded by digital storage technologies turns the "all-seeing" gaze increasingly inward, not simply to the individual qua society, but rather toward the individual's sense of self and her expressions of that self.

In the most extreme fashion, these disciplinary mechanisms can seem to enmesh the individual. If individuals are unable to point to the stores of information that may incriminate or, at the very least, implicate them, then the neo-panoptic power potentially constrains individual agency in how they express themselves and in what is known about them. Operating out of uncertainty for how one's actions will be perceived, both in the present and in the future, the individual curtails self-expression to comply with what she observes around her. The "backstage" of the individual gives way to the "front stage" (Goffman, 1959), and she performs only the self she knows will be seen by all, as case study chapters exemplify. Compliant to the social order in which she is enmeshed, she not only acts as if she is being watched, she remains constantly skeptical of others and the diffuse systems of information that may exert their power on her at any time. She may, for example, avoid sharing her political beliefs, fearing judgment from others if ever she changes her positions. She may delete old posts, or she might delete her account altogether. Or she may go so far as to create separate accounts: a public-facing one where she is seen and known, and "personal," perhaps even disposable, ones where she believes (however naively) she can engage with others with little to no repercussions.

Digital media and the social web ultimately compel us to think about the diffuse nature of our information and our likeness in the content we share about others and ourselves. In

participating through digital media and the social web, and as we are hailed to through the "participatory condition" (Barney et al., 2017), users lose sight of the traces of information they cede to others. Individuals may also overlook the accumulation of personal information available in our email accounts, online database searches, purchases, and through social media that, through terms of service, become the property of the service providers and other entities enmeshed in the network of interconnected technologies (Mayer-Schönberger, 2010; Nissenbaum, 2010; see also Kirschenbaum, 2008 regarding storage capabilities of technologies). Email messages and database searches reveal personal interests and curiosities, shaping the ads individuals encounter online, as well as potentially revealing proclivities some individuals would rather keep private from others. Individual purchases and debts contribute to credit records, which determine and shape purchasing power, interest rates, as well as personal relationships. In the name of convenience and ease, individuals share the self as through carefully chosen bits and pieces they use to adorn their profiles on social media. Through their profiles, users allow others to visualize this carefully curated version of the self as they wish to appear, yet users are also at the mercy of any who would use the information shared online without accounting for context. And when individuals are no long a part of the network, either through personal volition or death, their information remains—a specter of the life "lived" on display for the consumption of others.

CHAPTER THREE:
WHO WATCHES THE WATCHMEN?:
CONTEXTUALIZNG (COUNTER)SURVEILLANCE
AND THREATS TO AUTHORITY

Introduction

"Get the fuck off the train," Police Officer Anthony Pirone shouted at Oscar Grant in the early morning hours of January 1st, 2009 at the Fruitvale Bay Area Rapid Transit (BART) station in Oakland, California. Complying with the demand, Grant slowly exited the train to join three other men who were sitting against the platform wall where Police Officer Marysol Domenici was stationed. Grant sat down, visibly shaken. Officer Pirone then returned to the train for another passenger believed to be involved in the allegedly drunken New Year's Eve altercation to which he and Officer Domenici had been dispatched to investigate (*People v. Mehserle*, 2009/2012). Numerous bystanders' phones suddenly snapped on, recording the scenes before them as Officer Pirone returned to the train.

Standing at the doors of a car, Officer Pirone screamed at Michael Greer, telling him to step off the train before he reached for Greer to force him off the train. As Pirone pulled Greer from the train by the back of his neck, Greer thrust about wildly. Attempting to subdue Greer, Pirone pushed him and knocked him off balance before sweeping his legs in a takedown maneuver. Pirone then handcuffed Greer, pinning his body to the ground with his knee, as Grant and the three other detained men rose to their feet and shouted, "This is fucked up, this is fucked up" (*People v. Mehserle*, 2009/2012). Officer Domenici hastily urged the detained men to "stand down," but they continued to shout. Sensing that the situation might escalate further, Pirone

stood and moved toward the platform wall to provide support for Domenici, who now urged the detained men to return to a seated position. Protesting, the men moved in around Domenici until Pirone drew closer to the wall and struck Oscar Grant in the face with his fist. Forcing Grant to the ground, Pirone then unleashed his Taser and threatened to use it, as Domenici drew her Taser and pointed it at the protesting men. "Don't tase me," they shouted as they raised their hands and slowly lowered their bodies against the wall.

With the allegedly drunken and disorderly individuals restrained, Officers Pirone and Domenici began to secure the detention area, but the tumult continued from the train as four men from one of the passenger cars approached. Domenici turned toward these men and ordered them to keep their distance. They shouted at her, decrying the display of violence they witnessed, but were soon intercepted by back-up forces dispatched to the scene: Officers Johannes Mehserle and Jon Woffinden. Moving in on both the detained men and the four moving toward Domenici, Officers Mehserle and Woffinden enacted pacification tactics. Mehserle drew his Taser and pointed at the detained men, who began protesting once again, as Woffinden drew his baton and ordered the four men approaching Domenici to back away. Amidst the ensuing commotion, Pirone—the primary responding officer in charge of the scene—ordered Merhserle to arrest Oscar Grant, who had not been handcuffed like the three other detained men.

Grant stood up, shouting, "Who can we talk to?" as Officers Pirone and Mehserle advanced toward him. Pirone yelled at Grant, calling him a "bitch-ass nigger" before knocking Grant to his stomach and pinning his head to the ground with his knee (*People v. Mehserle*, 2009/2012). Grant cried, claiming he couldn't breathe. "I quit. I surrender. I quit[,]" Grant continued (*People v. Mehserle*, 2009/2012). Mehserle then ordered Grant to give up his arms to handcuff him, but Grant argued that he could not move with his neck and upper back pinned by

Pirone. Mehserle pulled at Grant's right arm once, twice, and then again, but it remained

restrained under his body. Exclaiming that he could not get Grant's hands free to cuff him,

Mehserle yelled that he was going to tase Grant (*People v. Mehserle*, 2009/2012). Tugging at his

right leg multiple times, Mehserle finally secured his device and pointed at Grant's back.

Mehserle then pulled the trigger of his gun, firing the ill-fated bullet that would end Grant's life.

      Documented by various passengers using video applications on their mobile devices, the

events surrounding the detainment and mortal wounding of Oscar Grant highlight ongoing

concerns over the use of "necessary force" and also contribute to emerging discussions about the

contested applications of surveillance and the role technology plays in both supporting and

challenging authority and vindicating victims. Spontaneously captured by and informally

directed at the police dispatched to the scene, the video documentation at the Fruitvale train

station not only resituates the actions of both the officers and the men detained that night, it also

challenges the formal written records of authority figures that serve as legal record and so justify

the use of "necessary force." In this way, these video recordings serve as a form of "cop

watching" and mobile sousveillance (Huey, Walby, & Doyle, 2006); however, the impromptu

nature of these recordings both expands and contests the practice of "cop watching," first, by

subsuming circumstantial voyeurism as both a tool for social justice and a threat to authority,

and, second, by making a case for perpetual documentation as a means of personal protection,

public discourse, and media spectacle.

      Exploring the circumstances surrounding Oscar Grant's death, the array of visual

evidence captured during the altercation at the Fruitvale train station, and the court proceedings

that ultimately led to Officer Mehserle's involuntary manslaughter conviction, this chapter first

contextualizes two perspectives of surveillance: first, as a perceived neutral, yet authoritative

form of documentation through visualization; and, second, as a "bottom-up" account of authority—also known as "sousveillance" (Mann, Nolan, & Wellman, 2003)—that often, though not always, coincides with social justice goals. Extending these perspectives to the mobile video technologies highlighted in the Grant case, this chapter then examines how circumstantial voyeurism functions as a form of sousveillance that perpetuates a discourse of information excess, which relies on imagery to affectively (re)shape public opinion. Similar to the late 19th Century when imagery was used in the American yellow press to galvanize public support for war against Spain, here sousveillance aims to resituate the relationship between citizens and the state by creating a "countervisuality" that challenges the commonly accepted authorial narrative. Concurrently, as a form of information power, the information excess produced by sousveillance is also supported by greater authorial systems of information aggregation and analysis. Focusing on this tension between surveillance and sousveillance, this chapter questions the allegedly emancipatory nature of documentation and visual evidence, and in so doing also assesses the role visual technologies play in law and law enforcement.

Surveillance and The Seat of The State

Surveillance is an idea and a practice that serves a variety of functions. Derived, in theory, from the classical work of Jeremy Bentham in "The Panopticon Writings" (1787/1995), the concept of surveillance serves the authoritative practice of monitoring, or the "perpetual inspection," of incarcerated individuals within an enclosed, yet all-encompassing structure that allows a central authority figure to watch each person housed within. Although the word "surveillance" is not used by Bentham, and his design for the panopticon never was built, *per se*, the Foucaultian-identified practice of a centralized authority monitoring others, criminal or otherwise, has developed into an social institution with far reaching powers. The modern prison

tower, for example, embodies aspects of Bentham's ideas, yet the conceptual formation of the panopticon and the practice of surveillance extend well beyond prison walls.

Beginning with historic authority figures such as kings and lords who enlisted forces to monitor and manage lands and holdings, surveillance primarily functioned as a form of containment under the veil of security (Garland, 2001). Subjects of a lord or king maintained his land through various agricultural practices and trades, and, through the social contract, the lord or king protected them from outside threats in exchange for their services. This exchange, as discussed in Chapter Two, required the formation of a hierarchical social organization that could exercise force over subjects in place of the lord or king while also maintaining his legitimacy and power. Employing guards, surveyors, and later, beadles and constables throughout the 1600s, lords and kings ceded part of their authority to institutional figures who would act on their behalf and report to them. Rudimentary, unorganized, and subject to corruption by wealthier vassals in its earliest iterations (Garland 2001; see also Williams, 2007, regarding organization, development, and institutionalization of watchmen), the system of enforcement and protection through intermediary authority figures gradually stabilized into a force that operated as an essential arm of the State whenever and wherever the key figures of the State could not be present. Under this arrangement, guards and other military forces protected the population from outside threats at the will of the lord or king, while the budding interior force ensured taxes were collected through constables and beadles, and that local areas were monitored and protected by watchmen who understood the local population.

To ensure that the interior force maintained a level of legitimacy on par with the salience of military forces, kings and lords issued edicts that granted tax collectors and watchmen the abilities to use force, publically humiliate perpetrators, and, in extreme cases, punish the

fraudulent and the culpable. As the interior force became a greater feature of everyday life from the 1600s into the 1700s, it increasingly legitimated its presence by force of consequence (Neocleous, 2000; Williams, 2007). Tax collectors obtained monies through threat of violence and incarceration (Garland, 2001). Thugs and thieves, similarly, faced violence, incarceration, and death at the hands of watchmen working in tandem with military forces. By leveraging the threat of injury to self or loss of life, the interior force became a powerful entity that steadily shaped local practices as it curtailed the actions of individuals, criminal or otherwise.

As a newer, developing presence of authority, the interior force did not enlist the bellicose tactics of the military. Unlike the militant arm of the state, the interior force maintained the fine line between individual agency—now increasingly restrained by force of consequence— and state power. It could not, therefore, exercise a degree of aggressive force that might alienate subjects and citizens, yet neither could it be so lenient so as to render itself ineffective and cede control to the hands of the military. New tactics and procedures, in the form of coercive soft power, became the means through which it acted, enforced laws, and further fortified its presence (Neocleous, 2000). Among the array of soft power tactics employed by the interior force, none became more pervasive or powerful than surveillance. Through physical observation, information gathering, and ongoing documentation, bands of watchmen relied on the monitoring of others to prevent crimes, keep track of suspicious individuals and known criminals, and produce evidence of malicious intent in the event witnesses or other concrete evidence were not readily available. Surveillance allowed watchmen to convey an aura of authority, and as they gained power to use force against unlawful individuals, watchmen found support in local communities, the personal interests and day-to-day safety of which became the focus of their efforts (Neocleous, 2000). In Colonial America in the late 1600s, for example, city watch and

slave patrols gradually became features of local communities as white elites sought to protect their business interests. In cities, businesses, which previously employed personal guards to protect their properties when closed or not in service, increasingly relied on night watchmen to secure their premises. Similarly, nighttime patrols of plantations emerged as common practice. Slave owners, however, also employed hard power in the form of violent public displays that were intended to curtail the behaviors and actions of slaves and any sympathizers (Williams, 2007). As citizens found greater security in watchmen forces that demonstrated greater presence and capabilities in preventing crimes and routing out those who might harm them, their loved ones, and their business interests, the interior force became a key feature of state power and social order.

In the early 1700s in major cities in England and the United States, local watchmen of a particular borough banded together with those from other boroughs, and their surveillance services expanded from night watches to round the clock monitoring. Watchmen also began to work with their counterparts in other towns and cities to coordinate shifts and discuss known issues and perceived threats. These discussions fostered a centralized store of knowledge about criminal activity each band of watchmen could refer to and rely on, and they also justified the importance of an ongoing interior force mediating between the state and the lives of citizens. In having a working shared knowledge about a town or city, borough by borough and population by population, watchmen forces grew throughout the 1700s and became centralized networks of enlisted officials who could predict criminal acts with greater accuracy, monitor suspicious individuals with more awareness, and provide more physically present and perceptibly stronger security (Williams, 2007).

Networked, institutionalized, and visibly positioned within various cities and towns by the late 1700s and early 1800s, these watchmen became the discernable arm of the state we now know as the police. By subdividing and diversifying the presence of the state into more localized forces vested with authority, state power extended its presence and reach into the lives of its subjects, citizens, and, eventually, others perceived as enemies. No longer constituted as a singular entity in the key figure of state, state power instead became an array of social organizations and institutions that served the central authority by performing specific functions aimed at managing, controlling, and curtailing the actions of individuals which might threaten social stability, national unity, and sovereign power (Neocleous, 2000). State power, therefore, became both the insurer and destroyer of life through law and its military and police forces that upheld the law (see Foucualt, 1977 regarding biopower; also Graham, 2010 regarding police force, militarization, and externalization of threat). Able to intercede in the everyday affairs of individuals and able to affect whole populations within its geographical confines through police action and those beyond its borders through military action, state power came to support surveillance, information gathering, and record-keeping. It did so to maintain control at a distance and, where necessary, to eliminate perceived threats.

Who Watches Whom?: Police Power and Policing the Police

Direct observation and informant-based surveillance allowed watchmen to carry out their mission, and, in many ways, fostered a deeper connection between them and the communities they served (Williams, 2007; see also Biber, 2007 regarding direct observation and witness testimony). Yet, as newer technologies emerged—the various uses of which had yet to be fully determined—authority figures and citizens learned new ways to share information. Such practices created more awareness of the personal lives of everyone and exposed and abstracted

new aspects of the physical body, as well as empowered the state to further encroach upon the lives of citizens and enemies alike. In particular, as visual technologies such as the camera became further integrated into the practices of law enforcement, technology allowed police forces to catalogue individuals and gradually create visual records as early as the mid 19th Century.

As the camera became integrated within law enforcement, it was perceived as producing a neutral, ostensibly objective depiction of individuals in the form of photographic evidence that could be used in legal proceedings (Chinn, 2000). Compared to witness testimonies, which were potentially biased and fallible, photographs came to be seen as a means of establishing objective truth (Biber, 2007). Photos depicted a scene, they positioned a person in time, and they documented a person's actions to the extent they were captured in images. In so doing, law enforcement objectified citizens as products of the state that could pose potential threats to State power (Neocleous, 2000). The growing repository (and arsenal) of photographs of individuals not only became a form of record keeping for law enforcement, then, it was also a form of power that could potentially be used against any individual if employed without his knowledge and consent (Wall & Linneman, 2014). Therefore, as laws granted police the power and authority to maintain social order, photographic evidence and record sharing imbued the police with hegemonic authority that visually distributed state power across geographic space to citizens, a condition encapsulated in what Nicholas Mirzoeff (2011) calls "visuality."

The visual field of photography, however, was limited as it only portrayed individuals and scenes as stationary objects frozen in time. As newer visual and, later, biological technologies such as finger prints and the video camera emerged in the 19th and 20th Centuries, respectively, police forces gradually integrated them into their practice. In particular, as video

cameras became more reliable and portable, police began to use them to produce newer forms of evidence and records. In-car cameras or dashcams, which were introduced in the 1960s and later generally integrated into American police force practices in the mid 1980s due to the grassroots efforts of Mothers Against Drunk Driving (MADD), allowed police to document culpable individuals during routine stops and police chases (IACP, 2004). Compared to stationary images, the moving image introduced greater context, as it constituted action in a tangible form one could visualize. Yet, as a tool employed by law enforcement, in-car cameras further supported the authorial accounts of police by capturing a single angle of the altercation framed from the perspective of law enforcement. Video, therefore, expanded the visuality of police, yet it also engendered questions about police action and authority in practice as individuals were further enabled to "witness" scenes in ways they were not able to before.

Against the hegemonic visual field of the state perpetuated by institutions of authority through technology, people and communities frequently targeted by the police and other state institutions gradually enlisted visual technologies such as photography and video to challenge authority, ensure greater accountability, and create a counter-visuality that resituates the relationship between the state and its citizens though "sousveillance" (see Mann et al., 2003). Employing technology to scrutinize police action and keep police accountable through the tactic of "countersurveillance" (Huey et al., 2006; Monahan, 2006), activist groups, alternative media, and everyday citizens have turned the camera (and other forms of evidence) on police to recast the dynamic social force of the (moving) image in their favor, or, at the very least, to disrupt the authority so often claimed by the police. Kindled in part by George Holliday's filming of the 1991 beating of Rodney King Jr. by Los Angeles police officers, which led to a fiery media spectacle and rebellious riots in 1992, countersurveillance tactics have become more public,

pervasive, and—through newer technological applications—more subtle, spreadable, and unplanned.

In formal cop watch programs, citizens and activists publically document and share the actions of the police they monitor, track, and record in photos, videos, and audio recordings. By documenting the array of actions and abuses executed by police and other authority figures, formal cop watch programs have publically pressured police forces to conduct themselves with greater integrity. Leveraging personally documented audiovisual evidence in public to spark public discourse, protests, media spectacle, and, in extreme cases, riots, formal cop watch programs aim to provide greater context that properly situates the "objective" accounts provided by authority figures (Huey et al., 2006). Originating in Berkeley, California in 1990 when Copwatch, a formal, voluntary copwatch program, was formed, cop watch programs and organizations have since expanded across America, Canada, and Europe as a response to the potentially abusive practices of police forces.

Impromptu recordings of police action through cell phones, correspondingly, have also contributed to the project of countersurveillance, yet the unplanned nature of these recordings does not wholly serve the ongoing counter-archive that "sousveillance" portends. Indeed, impromptu recordings, facilitated by cellphone and proprietary mobile video applications that upload to a data cloud and others such as the American Civil Liberties Union's "Police Tape" and the ACLU Blue app, help contextualize police action as it 'naturally' occurs; but they, too, are subject to interpretation and a critique of context. While these applications and recordings allow concerned citizens and targeted individuals to "securely and discreetly record and store interactions with the police" as a part of their direct experience (ACLU-NJ, n.d.), they may obfuscate the context of any encounter by omitting circumstantial information and relying on

stereotypical, often "implicitly" racist, interpretations of police. Concurrently, "objective" evidence found in official police footage must also contend with context and the omission of circumstantial information to manage its visuality (Wall & Linneman, 2014; see also Biber, 2007). Yet, the formalized nature and routine procedure of documenting suspicious others supports the hegemonic power of the police—and therefore the state—which profoundly affords police footage greater authority in the eyes of law. Hence, the ultimate contribution of subversive, unplanned recordings to the project of countersurveillance is a form of deconstruction—of actors, actions, motives, and outcomes.

If the most powerful contribution of impromptu recordings is the deconstruction of authorial narratives, then perpetual documentation through circumstantial voyeurism might be the best technique individuals enlist to counter the visuality of the state maintained by the police and other institutions of authority. Yet, because circumstantial voyeurism contributes to a fetishization of staring—of discreetly watching and sharing information about self and other regardless of social status, situation, or future effects—it finds oblique support in the greater authorial systems of information aggregation and analysis (Wall & Linneman, 2014). By indirectly and inadvertently contributing to the accretion of personally identifiable information and the categorization of individuals through narrowly defined social scripts and media frames based on classifications of race, ethnicity, sex, and age, circumstantial voyeurism fundamentally positions the police and the policed in prearranged roles that both affirm authority and perpetuate the visuality of the state by way of "perceived" threats (Mirzoeff, 2011; Neocleous, 2000). Therefore, even as circumstantial voyeurism invites others to witness an event devoid of context and to participate in the interpretation of the event in attempts to situate the context, the rhetoric

of the "perceived threat" to self, to institutions of authority, and/or to the state works to support the necessity of surveillance, documentation, and force to maintain social order.

Due to the ongoing documentation of police through formal watch programs and impromptu recordings that often position police as perpetrators of vicious acts through antagonistic frames, countersurveillance has been met with uncertainty, hostility, and outright aggression. As a challenge to the visuality of the state, the practice of "watching the watchers" has led to what Tyler Wall and Travis Linnemann (2014) describe as a figurative and literal "war on cameras": figuratively, as police forces feel threatened by the potential misrepresentation of the public documentation of their duties; and, literally, as police forces have confiscated, deleted, and destroyed visual evidence captured by bystanders. While photographing and recording police in public are legal, the documentation and public critique of police practices—whether intentional or accidental, formal or unplanned—poses a threat to police power as it falls outside the authority of the police who are keen on deciding what is and is not authorized (Wall & Linnemann, 2014). Photographs, videos, and audio recordings by non-authority figures, despite the perhaps ironic support such uses confer on the overall ethics of surveillance, provide unauthorized accounts that challenge the singular, unified narrative police rely on to affirm their authority and maintain social order.

Camera Wars in the Case of *People v. Mehserle*

The fatal shooting of Oscar Grant was not the only shocking occurrence at the Fruitvale BART station in Oakland, California on the morning of January 1st, 2009. As Grant lay bleeding on the ground from the bullet that pierced his back, the situation escalated beyond the officers' abilities to craft a conclusive narrative of subduing the drunken and disorderly and maintaining control of the scene. Officers saw passengers from various train cars with cellphones pointed at

them, anyone of them having potentially documented the entire event from the moment they started recording. Attempting to contain the array of evidence housed on these devices, police demanded that passengers hand over their phones. Though the police had no legal authority to confiscate the cell phones, they behaved as if they had the authority to do so. Officers coerced passengers to comply with their orders and even swiped some of the devices out of the hands of passengers (Miller, 2009).

Yet, though they seized numerous devices, they failed to seize control of the scene. As the train finally left the station, the police could only wait to see what would happen next. Within minutes of returning home, several witnesses who had retained their phones uploaded their videos to YouTube. Including descriptions with "police brutality," "unnecessary force," and "another black death" (*People v. Mehserle*, 2009/2012), the numerous videos captured the aggressive use of force by police officers and soon generated a media spectacle when local news media picked up the story and used the videos to galvanize the local public to demand justice for the death of Oscar Grant.

Formal evidence in the shooting death of Oscar Grant came from autopsies of Grant's body, witness testimony, platform surveillance video, and cellphone videos taken by five BART passengers. Because surveillance footage was limited in capturing the events surrounding the shooting, the prosecution moved to admit the cellphone videos that BART passengers recorded before, during, and after the event (*People v. Mehserle*, 2009/2012). Taken by Karina Vargas, Tommy Cross, Daniel Liu, Margarita Carazo, and Jamil Dewar, the five videos broadened the scope of the case by contrasting against the narratives provided by each officer dispatched to the scene and by further challenging the defense's testimony of an accidental shooting motivated by circumstantial stress. A form of informal, impromptu cop watching, these videos became crucial

evidence in *People v. Mehserle* (2009/2012), particularly as they provided insight into Officer Johannes Mehserle's state of mind and actions, and as they resituated the context of that fateful morning through various angles and perspectives.

Because the prosecution charged Officer Mehserle with second-degree murder, voluntary manslaughter, and the lesser verdict of involuntary manslaughter, all circumstantial evidence centered on the question of intent to kill. Using the cellphone videos to highlight the aggressive force exerted by Officers Pirone and Mehserle during the altercation, the prosecution argued that Pirone's physically hostile actions initially compelled passengers to record the events, which appeared both indecorous and unbefitting of an officer on duty during New Year's Eve (*People v. Mehserle*, 2009/2012). Citing Pirone's forceful handling of Greer as confirmed by witness testimony, the prosecution reasoned that it was Pirone's display of unrestrained force that inextricably intensified the situation and later motivated Mehserle to employ aggressive force (*People v. Mehserle*, 2009/2012).

Using the cellphone videos to corroborate this claim, the prosecution posited that Pirone's erratic actions and intense takedowns of both Greer and Grant not only subdued both, they also carried the intention of quelling the uproar emerging from the passenger cars as the men previously detained by Prione protested the extreme use of force. When Mehserle arrived on the scene, therefore, the atmosphere was already charged with hostility, fear, and distrust. The prosecution argued that Mehserle fed off of Pirone's aggressiveness as he approached Grant and followed Prione's orders (*People v. Mehserle*, 2009/2012). Again, citing the cellphone videos, the prosecution noted that the situation escalated when four other men from one of the passenger cars approached Officers Domenici and Woffinden. Although Woffinden managed to pacify them, the perceived threat of instability between the detained men and the crowd of onlookers,

the prosecution reasoned, contributed to Mehserle's heightened emotional stress and lack of mental acuity. Provoked by Pirone and attempting to quell the growing tumult, Mehserle reached, not for his Taser as he had claimed, but rather his gun to forcibly subdue Grant and thereby to indirectly subdue the crowd.

As the prosecution established its case against Mehserle through witness testimony, autopsies of Grant's body, and cellphone videos, the defense dismantled the question of intent to kill. While video evidence exposed Pirone's aggressive actions, the defense argued that it did not indicate that Mehserle had a malicious intent to kill Grant or any others that early morning (*People v. Mehserle*, 2009/2012). Citing the cellphone videos, the defense argued that the shooting was accidental, particularly as the expression of shock appeared on the faces of both Mehserle and Pirone after the intense display of force took a deadly turn. To support this claim, the defense brought a nonlethal force expert to the stand and questioned him on the training and usage of Tasers by the police force and the emotional stress that may impair personal judgment during a contentious event (*People v. Mehserle*, 2009/2012). The expert testified that all California police forces, like many of their national counterparts, were trained in the usage of Tasers and, in California, had to complete eight hours of training. The training highlighted how to use the device, and the possible physical harm it could cause to victims with medical conditions, whether stated, known, or unknown.

The expert conceded that, in times of crises, impaired judgment due to heightened emotional stress led individuals trained in nonlethal force to sometimes lose track of their devices on their person, which could ultimately result in increased physical altercations between police and assailants and the use of unintended lethal force (*People v. Mehserle*, 2009/2012). Cross-examining the expert, the prosecution argued that Officer Mehserle had received training

in nonlethal force and that he knew which side of his person his firearm was on and which side his Taser was on. The expert conceded this fact, but rebutted that extreme circumstantial stress provoked by tension on the scene can lead to a demonstrated effect in officers misidentifying the location of the nonlethal option on their person (*People v. Mehserle*, 2009/2012).

Citing the cellphone videos that showed Mehserle struggling to grasp the device at his right side and the look of horror on his face immediately after he fired his gun, the defense reasoned that he did not shoot Grant with the intention of killing him. Conceding that Pirone escalated the tension of the scene, the defense posited that Mehserle became a victim of extreme emotional stress that clouded his judgment and led to his misidentification of his Taser. Against the indictment of voluntary manslaughter, the defense furthered that Mehserle, having arrived late to the scene, only intended to subdue Grant and the other detained men per Pirone's orders. Noting that Mehserle followed Prione's demands to try and cuff Grant and that Mehserle exclaimed that he was going to subdue Grant upon his inability to get a hold of Grant's wrists, the defense reasoned that the cellphone videos—along with witness testimonies and official police records—only confirmed Mehserle's inability to conduct himself "with a clear head" in stressful altercations (*People v. Mehserle*, 2009/2012). According to the defense, the failure was that Mehserle not only misidentified nonlethal force on his person, but also that he, and other police officers, were not adequately trained in real-life scenarios that demanded the use of nonlethal means to subdue individuals. As a result, the defense concluded that Mehserle did not fail to perform his legal duties on the fateful night; instead, they argued, his actions were symptomatic of the failure of police forces far and wide to employ nonlethal tactical training as extensively as lethal tactical training (*People v. Mehserle*, 2009/2012).

As the prosecution and defense rested their cases, the jury began deliberation. Reviewing the charges of second-degree murder, voluntary manslaughter, and the lesser verdict of involuntary manslaughter, the jury deliberated the extent to which Mehserle was aware of his actions in the heat of the moment. Focusing on the cellphone videos, the jury assessed witness and expert testimony alike and determined that Mehserle was not fully aware of his person or his actions (*People v. Mehserle*, 2009/2012). Considering the three indictments against Mehserle, the jury reached its verdict and found him guilty only of the lesser charge of involuntary manslaughter. Citing Mehserle's failure to uphold his duties to protect the lives of others, the jury concluded that Mehserle did not willfully kill Oscar Grant; instead, Mehserle exercised decidedly poor judgment due to misidentification of his Taser and his poor mental acuity during the heated event.

The Contextual (Picture) Frame

The "camera wars" highlighted in *People v. Mehserle* (2009/2012) demonstrated how visual evidence contextualized the events surrounding the death of Oscar Grant. By turning the camera on police officers in an unplanned and circumstantial act of watching, witnesses employed technology to document, share, and make sense of the violent display of police force they experienced. This allowed visual evidence not only to contrast the typical legal record furnished by police forces in trials, it also galvanized the public to reconsider how police enforce order and how they physically exercise their authority. Because these impromptu recordings illustrated a microcosm of the perceived racist displays of force performed by police, moreover, they performed the project of countersurveillance. By contributing to the ongoing documentation and counter-archive of police force, these videos challenged the authoritative narrative of the

police by broadening the context of the shooting to include various interpretations, perspectives, and voices cast as authority due to their direct experiences of the scene.

These videos and the eventual hearing, however, only momentarily challenged the visuality of the police. Subject to interpretation, the videos broadened the context so crucial to making sense of the event, yet they also exposed the racial politics surrounding police force and the almost innate system of power accorded to the visual image (Biber, 2007; see also Williams, 2007). Summoning the specter of the 1991 beating of Rodney King Jr. by Los Angeles police officers, the videos of the Oscar Grant shooting were used to highlight the ways *specific* officers dispatched to the scene exerted extreme force toward racial others and further enlivened the entrenched socio-political concerns surrounding the police's visuality (see Wall & Linneman, 2014).

The documentation of Officer Pirone's expressions and actions, in particular, demonstrated his racist motivations that undoubtedly shaped both the intensification of the event and its fateful outcome. In violently manhandling Greer and Grant, and in purportedly calling them "niggers" (*People v. Mehserle* 2009/2012), Pirone's actions resurrected the specter of Rodney King Jr. and its racial tensions. As a white man of authority armed with weapons and supported by capable counterparts, Pirone always had more power and agency than any of the men he was tasked with handling on the scene due to his position alone. His display of extreme force coupled with racist undertones, therefore, only extended the hegemonic supremacy of the police acting to pacify perceived threats most noticeably found in bodies of difference (see Wall & Linneman, 2014; see also Williams, 2007). Pirone's actions, more so than Mehserle's, then, perpetuated the culturally entrenched bias against authority and its association with domineering

white patriarchy (see Mirzoeff, 2011).[9] It was Pirone, the primary responding officer tasked with both handling the detainment of aggressors and maintaining peace in the situation, who remarkably failed in his duties and whose actions sparked the powder keg of racial tension and police brutality.

Yet, because Mehserle shot Grant and because racial tension and distrust for authority already infused the situation due to Prione's actions, Mehserle became the central incendiary figure charged with the failure "to protect and to serve." The damning evidence contained in the videos challenged the police's visuality, or rather, the hold on authority and ability to maintain order in the public eye (Wall & Linneman, 2014). Against the police's visuality, media coverage of the Grant case established the context of the shooting by abstracting the primary actors from the videos and placing them in reductive, dichotomous frames. Positioning Mehserle as the sole police officer and aggressor who killed Grant, an innocent black man, media coverage affirmed the visual evidence as "definitive proof" *without* broader consideration of the other actors who shaped the event and its outcome (see Biber, 2007 regarding context of photographic ways of knowing and the taxonomy of knowledge associated with visual evidence). In "captioning the event" for the public, the media shaped its context; its captioning overly emphasized racial tensions through its reductive framing, which ultimately resulted in an attack on the character of Mehserle and other police officers rather than a deconstruction of the police's visuality.

Despite the diversification of context that the cellphone recordings illuminated about that early morning, media coverage, reductive interpretations, and culturally entrenched distrust of authority fundamentally shaped the way in which the footage was received by the public. Rather

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[9] Pirone claims he did not call any of the detained men by the racial slur. Video evidence, moreover, does not conclusively show that Pirone said the racial slur. Numerous eyewitness testimonies, that corroborated Pirone's aggressive actions, however, cited his racial invective as the motivating force behind their recordings and willingness to testify against him and Mehserle.

than combat the police's visuality in the legal proceedings, these impromptu recordings instead became part and parcel of the case that ultimately *recontextualized* the authority of the police to maintain order and *properly* carry out its duties. These unplanned recordings, therefore, contributed to the counter-archive (and arsenal) of information championed by the practice of countersurveillance, yet they also afforded both news media and law to interpret the event and establish contexts that primarily supported their particular, and often narrow, frames (Wall & Linnemann, 2014; see also Biber, 2007).

Whereas news media portrayed the case through the frame of "police brutality" in the court of public opinion, law placed the burden of proof on the prosecution to demonstrate whether Mehserle intended to kill Grant. Because the defense assumed the benefit of presumption, as it does in all cases, it only needed to cast "reasonable doubt" on any of the arguments brought forth by the prosecution. In supporting the State, moreover, the defense had the added advantage of citing legal precedent that affirmed police authority (see Wall & Linneman, 2014 regarding evidence and law as fundamental support for State authority). Therefore, as the prosecution established its case against Mehserle through witness testimony and the impromptu recordings, it challenged the authority of the police and their abilities to properly execute their duties. Against the dominant visuality of the police supported by the law and further affirmed by the defense, the prosecution wrestled with intentionality and ultimately failed to indict Mehserle on charges of second-degree murder and voluntary manslaughter.

Despite these failings, shaped in part by the lack of conclusive evidence regarding Mehserle's motivations and mental state, the prosecution did succeed in challenging the police's visuality and opened up a public dialogue that critiqued the use of force in pacifying assailants and witnesses alike. Aided by the impromptu recordings, which crucially illustrated the context

of the event beyond the singular narrative proffered by police, the prosecution showed that the

police failed to properly perform their duties with respect to the safety of those they were

enlisted to protect and serve. Mehserle's indictment for involuntary manslaughter served as both

a punishment *and* a warning to police.

At the same time, Mehserle's indictment fueled greater distrust of the public by police

forces far and wide. Seen by police as an attack on police visuality and the authority of the State,

the final verdict of *People v. Mehserle* (2009/2012) contributed to an enduring negative reception

of cop watching, cameras, and, increasingly, social media by police forces. While the verdict

attempted to temper police force by holding police officers accountable for their actions, it

reproduced concerns that countersurveillance threatens police visuality by challenging the

authority of the police to respond to and manage crime scenes.

When those from "below" turn the camera on those in power, institutions of authority

fear how their actions and image will be taken out of context. Yet, as this chapter highlights,

countersurveillance and the visual array of evidence it illuminates remain subject to context and

interpretation. Consequently, countersurveillance does not necessarily generate all the

emancipatory ideals of information sharing that it portends. Though countersurveillance aids in

the deconstruction of an event by a single source or from multiple sources, the evidence is still

subject to interpretation in the court of law and in the minds of those who view it. Within the

confines of law, visual ways of looking and knowing still contend with the systems of authority

that support and reify "necessary" action to maintain social order (Biber, 2007). Visual evidence

may, therefore, serve institutions of authority *more* as law fundamentally supports them and as

the alleged "objectivity" of authority figures often carries greater influence in legal proceedings.

As *People v. Mehserle* highlights, and as Chapter Five extends, law must be made to better contextualize non-State evidence. Whether evidence is collected through countersurveillance tactics from mobile devices or an individual obtaining screenshots of harassing messages shared online, law must adapt to better represent the diversification of "authority" that is produced as digital media and the social web encourage and rely on greater documentation of self and other. As visual evidence in the form of photographs, videos, and images has become a form of personal expression and documentation of everyday life as part of the "participatory condition" (Barney et al., 2016), it has become a means through which citizens speak to each other and to society. When law primarily supports accounts from authority figures because they are deemed to be "neutral," then, it does violence to democracy by ignoring or outright denying the voices of the citizens that law itself is supposed to protect.

Where visual evidence is perceived as a threat to authority and the State, it appears that the culturally entrenched visuality of the State and the police must be met, not *only* with visual evidence, but also with additional and adequate forms of contextualization that resituate the role of police to protect and serve. Perceived as "unauthorized" and "abstracted from the source" (Wall & Linnemann, 2014), evidence produced by countersurveillance tactics contrasts the alleged "objectivity" of authorial narratives to expose inconsistencies in testimony and action. In contrasting the hegemonic visuality of the State (Mirzoeff, 2011), these forms of evidence essentially contest the application of police power and, by extension, the power of the State by (re)introducing subjectivity and extending context. Countersurveillance tactics, therefore, *appear* to contribute to the destabilization of authority in the eyes of law enforcement, yet they fundamentally operate to clarify and reestablish the relationship between citizen and State by drawing attention to "necessary force" and "intent," and giving great voice to citizens in legal

proceedings. In so doing, countersurveillance tactics implicitly bring the question of integrity to bear on those entrusted to protect us from unnecessary harm and the systems that support them with the aim of making sure justice is equally applied to *all*.

CHAPTER FOUR:
DAMAGE WITHOUT INJURY: THE HARMS OF VISUALITY
IN OUR TECHNOLOGICALLY MEDIATED SOCIETY

Introduction

Weeks after the freeway collision that ended Nichole "Nikki" Catsouras' life, her father, Christos Catsouras, a Los Angeles real-estate agent, opened an email that appeared to contain a property listing. In an instant, the severed head of Nikki appeared on the screen captioned with the words: "Woohoo Daddy! Hey daddy! I'm still alive" (Bennett, 2009). Christos had not seen this image before, neither had he seen any of the other photographs taken by California Highway Patrol officers at the site of his daughter's fatal collision. Yet, this gruesome image could not be unseen, and, as the entire Catsouras family would soon realize, it would be only one of many photographs of Nikki to surface online.

The photographs of Nikki's dismembered body quietly spread from the California Highway Patrol (CHP) officer's cameras to individuals neither connected to the ongoing investigation into the collision nor the Catsouras family. Initially sent via email by two CHP officers to their family and friends, the images were quickly forwarded on to others, posted to websites, and saved on personal computers and mobile devices from which they would later resurface and recirculate across the internet and mobile technologies. As the photographs of Nikki's body spread across the web, they not only exposed the sometimes dark and fundamentally diffusive power of digital sharing, they also exemplified the ease through which images become decontextualized as they traverse time and space through digital

technologies. Stemming from the misconduct of two CHP officers, the postmortem replication and dissemination of Nikki's body in images resituates the trust and authority placed in police and authority figures by, first, showing how documentation becomes a tool and a means of power over individuals, even in an act of dereliction; and, second, how digital technologies outpace current law, leading to potentially grave consequences for individuals, their families, and institutions of authority.

This chapter begins with the events surrounding Nikki's death and the family's lawsuits against the CHP. It examines the implications of the verdicts adjudicated in these lawsuits in order to argue that individuals collectively render the source/body depicted in an image shared online as separate from its embodied corporeal form, and that they do so by overlooking the importance of body materiality in relation to context and social attachments to others in favor of emphasizing an initially personalized, and subsequently collective, online interpretation of this body's identity and context. Afforded physical, emotional, and personal distance from the source/body though connective media, individuals engage in a form of disassociation that allows them to fetishize and objectify the source/body, progressively rendering it a malleable object of public interpretation that becomes infused with personal beliefs, social values, and/or collective judgments of morality until such time as it has lost its charms as a fetish object.

Even as the source/body becomes an object of intense social approbation or humiliation, it remains an abstraction of the person depicted; yet the humiliated person (assuming she or he is alive) and those with whom she or he associates profoundly feel the effects of this collective interpretation. I call this process "crowdsourced morality," and contend that it seems to place on the person in question not only a contemporary "scarlet letter" that serves to categorize and distinguish "aberrant behavior" juxtaposed to the categorizer's personal feelings about order in

the world (read: truthiness) or otherwise decorous social norms, but that it is also a product of the technologies individuals use that extends their distance from the original source/body as well as extending the collective engagement with it as an object of commentary and critique.[10]

Cannot Be Unseen: Resituating the Scene

In the early afternoon of October 31st, 2006, Nikki Catsouras slipped past her mother, grabbed the keys to her father's Porsche, and took off from her home in his car. As it roared to a start, Nikki's mother, Lesli, ran from the kitchen to see Nikki backing toward the road. Though Lesli screamed for her daughter to come back, Nikki sped down the road. Uncertain of Nikki's mental state due to her frequent bouts of psychosis stemming from hereditary brain conditions, Lesli called her husband, Christos, in the hope that he could track Nikki down before she hurt herself or someone else. Christos, who happened to be driving back to work after lunching at the house, reassured his wife that he would find Nikki and then drove in the direction in which she allegedly disappeared.

Weaving through traffic, Christos glimpsed a sign to report drunk drivers and, in a moment of panic, called emergency services to report his daughter and seek assistance. As the dispatcher obtained the necessary details of the stolen vehicle, Christos noticed two California Highway Patrol (CHP) cars speed past him. Concerned, Christos inquired about any recent accidents in the area. The dispatcher replied that an accident had occurred in the area, but that details could not be immediately provided. The dispatcher assured Christos that police had been

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[10] My theory of crowdsourced morality differs from its articulation in artificial intelligence (AI). In AI, crowdsourced morality is a term referring to a developmental process where AI learns to act ethically based on a framework composed of an aggregation of collective moral views of a crowd on various issues. The logic behind crowdsourced morality in AI is that it can help technologies respond in ethical ways that an average person might respond. For example, if a self-driving car is speeding toward pedestrians in a crosswalk, should it attempt to hit a light pole? Should it hit three adults but spare all children? In this work, crowdsourced morality follows a similar logic in that individuals share their opinions and thoughts to foment collective action in favor or against a phenomenon, but there is no connection to technologies learning from and responding to the aggregation of responses from the crowd.

dispatched to look for his daughter and that they would update him immediately if they found her or the Porsche.

Christos continued his search, but after driving around for almost two hours without any updates or leads the reality of the moment began to set in. He drove back toward the toll road where he had seen police cars dispatched. Nearing Alton Parkway, he noticed that the road was closed and flooded with first responders and patrol vehicles. Pulling up to the blockade, he stepped out of his car and asked the nearest officer for specifics about the accident. The responder evaded Christos's questions, urging him to step away from the blockade to let the police continue their investigation. Beyond the officer, Christos saw a crane pulling debris from the accident scene. The glimmering of a chrome wheel caught Christos's eye, and that was when he knew.

Christos decided to return home until he had proof of the horrific loss he already felt. Met by his visibly shaken wife, Christos informed her that the police would arrive soon and as they waited for the police, Helen, their next-door neighbor and friend, gathered with them as red and blue lights approached their house. An officer exited his car and asked to speak with Christos and Lesli. Helen urged everyone to come into her home. Christos and Lesli agreed, following Helen into the house with the officer and coroners behind, who once inside, explained the details of the accident: A black 911 Porsche Carrera registered under Christos Catsouras was involved in a fatal accident. The occupant was a single teenage female. Traveling around 100 miles per hour, the vehicle had spun out of control after clipping another car while attempting to pass and sailed end-over-end across the southbound lanes until it collided with a concrete tollbooth. The occupant died instantly. No others were harmed in the accident.

Christos asked to see Nikki or any remnants of her, but the officer declined his request. Unbeknownst to Christos and Lesli, Nikki's body had been so gruesomely torn apart during the accident that the coroner would not allow them to identify her body (Bennett, 2009). Instead, the officer assured Christos and Lesli that the CHP would take care of the ongoing case and inform them of the final findings. Soon after, Lesli and Christos informed Nikki's siblings of her death. Two weeks later, Lesli's brother, Geoff, received a call from a neighbor who told him about some disturbing photos he had received in an email. Images of the crash site and Nikki's body appeared in his inbox, masked as a chain email. Geoff began investigating the matter. He enlisted the aid of Pepi Catsouras, Christos's brother. Together, Geoff and Pepi contacted various senders and recipients of the emails, and asked them to cease forwarding the email, delete the images, and to tell others to do the same. Geoff then contacted the CHP and inquired about the dissemination of the photos. Geoff learned that someone from the CHP offices with access to the case file emailed photographs to others outside of the force. When Geoff pressed for a name and a motive, the sergeant he spoke with assured him that the situation would "just blow over" and that he needed to remain calm (Catsouras, 2012, p. 102). Geoff, however, knew that the situation was escalating, and that he had to get to Christos and Lesli before either received one of the emails or news of the circulating images.

Geoff and Pepi drove to the Catsouras's and explained the situation to Lesli. From there, they set up a base of operations: Pepi monitored emails and sent requests to individuals, while Geoff created a list of people who spread the emails in order to track down the original sender. When Christos came home from work, they notified him about the peculiar situation before them. The family worked together to stop the spread of the images, but it was too late. In the days that followed, the images appeared on various websites, some dedicated to "hardcore

pornography and death," and others as seemingly innocuous as a fake MySpace page dedicated

to Nikki Catsouras (Bennett, 2009). Despite Geoff's requests to remove the images, individuals

continued to share them online and even to threaten him and the Catourases for infringing on

their purported right to free speech (Catsouras, 2012, p. 115). Worse, there was no way to stop

the spread of the images, which became linked to the search term "Catsouras" on almost every

search engine, causing them, for example, to pop up alongside Christos's name and his realty

listings. The situation seemed never-ending until Geoff uncovered information about how the

photographs might have spread beyond the CHP offices: Whoever initially emailed the photos

sent them to his or her friends and family as "a Halloween prank" (Catsouras, 2012, p. 113).

Lesli and Christos then turned their frustrations toward the police who had promised to protect

their family.

A call to the coroner's office provided information that served as the grounds for the

eventual lawsuit. The coroner expressed her condolences to the Catsourases and asked if the

CHP was helping them figure out who leaked the photographs. When Christos told her that the

CHP had not helped at all, the coroner was taken aback. She told him that she knew the photos

circulating online didn't belong to her office. "If these were my photographs, they'd be

considered illegal. These types of photographs require a court order and a judge's signature

before they can be released to anyone. It's also illegal to uncover the body and take photographs

during a coroner investigation. These photographs were taken *during* a coroner investigation,"

she said (Catsouras, 2012, p. 121, emphasis added). She further explained crucial details about

the coroner investigation process: "When we're finished with our investigation, we cover the

body before we open the scene to the other investigating agency. . . .Nothing should be disturbed

until my investigation is complete. . . .We [also] don't take pictures of our own people picking

up body parts. That's not a relevant part of any type of investigation" (Catsouras, 2012, p. 121). This discussion, and future inquires with the CHP, revealed that CHP officers dispatched to the scene took the photos and shared them without the direct knowledge or consent of the CHP. New questions and tensions emerged. Why hadn't the CHP notified the Catsouras of this particular development? Who was at fault? Were the people behind it being punished? Whom could they now trust?

Soon after this revelation, Christos met with a CHP officer who told him that someone in the department leaked 9 of the 50 photographs taken during the department's investigation. Yet, despite this lapse in protocol, the officer assured him that the agency "broke no law" in sharing the photos (Catsouras, 2012, p.123). Christos inquired how leaking facts to the public from a crime scene did not compromise the investigation. Instead of a direct answer, the officer explained that the CHP had begun an internal investigation into the leak two weeks earlier and that Christos would have to wait until the internal investigation was complete before CHP headquarters would render any judgment.

Dissatisfied with the account, Christos called the FBI, seeking any advice or assistance he could get. He told them that the photographs belonged to the CHP and had been leaked from its office during the investigation. The FBI agent explained that the CHP was not supposed to leak materials under investigation to the public, whether the investigation was ongoing or not. The agent then clarified that the FBI had no jurisdiction with state government records, so the FBI could not get involved with the case. "You'll have to get the CHP to handle [the photographs online] for you. Legally, those photos belong to the state of California. It's up to them to get their property off those websites," the agent concluded (Catsouras, 2012, p. 129). The agent then urged Christos to seek legal counsel. Thereafter the family filed a formal complaint about the

release of the photos, retained attorney Keith Bremer as legal representation, and enlisted Reputation Defender, a then-recent web startup that claimed to defend the reputation of individuals online, and to help remove photographs from the internet.

While the family waited to hear the findings from the CHP internal investigation, Bremer and Reputation Defender worked together to remove the images from the internet. Issuing cease and desist letters and authoring coding that obscured the results of search terms, the team tried to make the photos harder to find. Their efforts, however, fell short. The family had no legal basis to compel website owners to remove the images after all. And no amount of coding could completely hide them from search engines or stop the images from populating new sites (Bennett, 2009). There was only one option left: The family would sue the CHP and whoever was behind the original leak of the images to hold them accountable.

As the family initiated its suit, the Department of the California Highway Patrol released the findings of its internal investigation. They revealed that two dispatch supervisors, Aaron Reich and Thomas O'Donnell, admitted to releasing the photographs in violation of CHP policy. Yet, while the department recognized that both Reich and O'Donnell had violated departmental policy, it reaffirmed that their actions had not infringed upon any governmental regulations or statutes (Avila, 2007; *Catsouras v. Department of the California Highway Patrol*, 2010). In spite of this, Officer O'Donnell was suspended for 25 days without pay, while Officer Reich quit the CHP citing "unrelated reasons" pertaining to any impending litigation (Avilia, 2007; Bennett, 2009; *Catsouras v. Department of the California Highway Patrol*, 2010). Accompanying the release of the internal review was a letter of apology to the Catsouras family. It assured the Catsourases that the department had begun to take the necessary action to prevent similar incidents from happening in the future.

Trials and Tribulations

Although the Department of the California Highway Patrol denied legal culpability on the reasoning that no existing laws or statutes were violated, the Catsourases moved forward with the suit. Eight causes of action were filed against the CHP and Officers O'Donnell and Reich.[11] In response, the CHP filed a demurrer as to the first and sixth causes of action, which held the CHP in violation of its duties as a state agency and negligent supervision and retention, respectively. As the case moved forward, the plaintiffs dismissed the sixth cause of action against the CHP in recognition of the substantial burden of proof required to combat the Department's internal review and suspension of O'Donnell. The court, meanwhile, sustained the demurrer as to the first cause. Citing that the CHP was not a "person" for the purpose of 42 U.S.C. § 1983, more commonly known as Section 1983, the court maintained that the CHP had 11th Amendment immunity that protected it from monetary relief in suit.[12]

With the first and sixth causes dismissed, defendants Reich, O'Donnell, and the Department of the California Highway Patrol motioned for a summary judgment, which asked that the CHP be absolved of any wrongdoing since all factual issues were already remedied by the internal investigation and the subsequent suspension of those found culpable. The motion for

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[11] The Catsourases, hereafter referred to as plaintiffs, asserted eight causes of action: (1) violation of section 1983 (all defendants) (see next footnote for further detail about Section 1983); (2) negligence (O'Donnell and Reich); (3) negligent infliction of emotional distress (O'Donnell and Reich); (4) intentional infliction of emotional distress (O'Donnell and Reich); (5) invasion of privacy (O'Donnell and Reich); (6) negligent supervision and retention (CHP and O'Donnell); (7) tortious act or omission of public employees (Gov.Code, §§ 820 , subd. (a), 820.8) (O'Donnell and Reich); and (8) vicarious liability of public entity (Gov.Code, § 815.2 , subd. (a)) (CHP).

[12] 42 U.S.C. § 1983 is more commonly referred to as "Section 1983." I will refer to it in its more common usage from here on. Section 1983 states, "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

summary judgment argued that the case need not be tried because the Department and its

employees violated neither state nor national statue. Referencing Section 1983 in extension of

the dismissal of the first cause, the summary judgment advanced that Reich and O'Donnell:

primarily acted within their capacities as state officials tasked with enforcing state laws, which

nullified claim of negligence; neither knowingly nor intentionally harmed the Catsouras family

in initially sharing the photographs online, which nullified claims to infliction of emotional

harm; and, as the internal investigation affirmed, violated no current legal statutes pertaining to

privacy invasion because the victim had no legal claim to privacy as deceased (*Catsouras v.*

Department of the California Highway Patrol, 2010). So reasoned, Judge Steven L. Perk granted

the defendants' motion for summary judgment, and Reich and O'Donnell were removed as

individual capacity defendants.

With the primary perpetrators no longer deemed individually liable through summary

judgment, the case was to be dismissed. Protected by Section 1983 and 11th Amendment

immunity, the CHP could *not* be sued for negligence, emotional harm, and privacy invasion as a

single entity. Although Judge Perk felt the officers' actions were "utterly reprehensible," he

dismissed the case citing no existing laws allowing for punishment (*Catsouras v. Department of*

the California Highway Patrol, 2010).

The plaintiffs appealed the court's decision to the California Court of Appeal. During the

lengthy wait before the case was heard, the CHP made efforts to work with the Castouras family

by issuing cease and desist notices based on those authored by the Catasouras' lawyers and

Reputation Defender. Yet, despite the added "authority" of law enforcement alongside the efforts

of the Catsouras's legal and technical team, few images were removed. Instead, many website

owners cited their 1st Amendment rights to maintain the images, arguing that the images were

public domain due to freedom of information and due to the public nature of the accident on a

state highway in view of the public (Catsouras, 2012; *Catsouras v. Department of the California

Highway Patrol*, 2010). When the CHP and Reputation Defender escalated the cease and desist

notices to the companies hosting the image-laden sites, they were met with another legal

impasse. Section 230 of the Communications Decency Act, approved by Congress in 1996,

protected the web-service hosts from liability for the speech of individuals using their services.[13]

Absolved of responsibility through this legislation, web-service hosts denied the cease and desist

requests, and so the images of Nikki continued to spread.

In June of 2009, a year after the initial filing, the California Court of Appeal for the

Fourth District finally heard the case. Reviewing the summary judgment from the trial court,

constitutional law surrounding free speech, legal statutes pertaining to official duty in office for

law enforcement and other state agencies, as well as written arguments of the plaintiffs and

defendants, all three appellate court justices reversed Judge Perk's grant of summary judgment.[14]

Authoring the court's opinion for the appellate court, Justice Eileen C. Moore rejected

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[13] Title V of the Telecommunications Act of 1996, more commonly referred to as Section 230 of the
Communications Decency Act, states, "No provider or user of an interactive computer service shall be treated as the
publisher or speaker of any information provided by another information content provider." It provides immunity
from liability for providers and users of an interactive computer service that publish information provided by others.
With regard to the Catsouras case, website hosting providers like Wordpress and Blogger, among others, were
immune since they did not directly publish the images of Nikki and merely provided a service through which
individual site owners, of their own volition, published content they wished to share.

[14] In trial courts, a judge or jury hears the testimony of witnesses and reviews physical evidence, exhibits, and
documents, and then decides which version to believe and reaches a decision. Appellate courts, by contrast, do not
decide an appeal by taking new evidence or reassessing the credibility of witnesses who testified in trial court.
Rather, they review the written record to determine if the trial court properly interpreted the law and used the correct
procedures when considering the case. Appellate courts typically consist of three justices. If a majority of the
appellate court justices agree with the written record, appeal is denied and the trial court does not rehear the case
unless new, valid charges are filed. Whenever an appellate court reverses the decision of the trial court, however, it
almost always allows the trial court to rehear the case using the correct laws and procedures. With grant of summary
judgment in the trial court of Catsouras v. the Department of the California of Highway Patrol by Judge Perk,
testimony, physical evidence, and exhibits were not available for review since the case was dismissed. Instead, the
three appellate court justices reviewed Judge Perk's reasoning for grant of summary judgment, and then called for a
review of the parties' written arguments to determine if Judge Perk properly interpreted the law and properly
adjudicated the case before him.

O'Donnell and Reich's objections to culpability since evidence pointed to the fact that they deliberately emailed 9 of 50 "gruesome death images to their friends and family members on Halloween–for pure shock value" (*Catsouras v. Department of California Highway Patrol*, 2010). Finding that the trial court erred in sustaining the demurrers as to the invasion of privacy cause of action from both O'Donnell and Reich, the appellate court argued that damages were sustained to the family without physical injury through the dissemination of the death images to members of the public unrelated to the investigation. Although California law provided surviving family members no right to privacy in the context of written media discussing, or pictorial media portraying, the life and death of a decedent, the appellate court clarified that "the publication of death images [was] another matter" (*Catsouras v. Department of California Highway Patrol*, 2010).[15] According to the appellate court, the surviving Catsourases had a common law privacy right in the dissemination of any death images of Nikki due to the sheer gruesomeness of the depiction of her body in death and the foreseeable devastation these images would cause the family members seeing them.

The appellate court further found the trial court erred with regard to the demurrers as to the causes of action for intentional infliction of emotional distress and negligence. The court reasoned that "the CHP and its officers owed a duty of care not to place the [death images of Nikki] on the internet for the purposes of vulgar spectacle" (*Catsouras v. Department of*

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[15] California law is clear that in any cause of action for invasion of privacy, the context of the violation belongs to the individual in life and expires along with her or him in death. Nikki Catsouras' privacy, therefore, could not be violated as decedent. Yet, the death images of Nikki could cause harm to the living—to her family members—and, within the circumstances of the case, would violate the otherwise private nature of their loss, grieving processes, and memory of Nikki.

California Highway Patrol, 2010).[16] For the appellate court, the issue at hand was not a matter of

freedom of the press; rather, it was a matter of dereliction of duty by CHP officers. "It was not in

furtherance of the investigation, the preservation of evidence, or any other law enforcement

purpose, to deliberately make a mutilated corpse the subject of lurid gossip" (*Catsouras v.*

Department of California Highway Patrol, 2010). To support this ruling, the court applied three

factors from *Rowland v. Christian* (1968): foreseeability, moral blame, and the prevention of

future harm. Given the relatively unrestricted nature of the internet, the appellate court found the

conduct of the CHP and its officers "morally deficient" because it was "perfectly foreseeable"

that the public dissemination of images of the disembodied remains of Nikki would traumatize

her family and put them at grave emotional distress *into the future* (*Catsouras v. Department of*

California Highway Patrol, 2010, emphasis added). Elucidating the seriousness of its ruling and

the duty of care owed to the greater public by law enforcement, the appellate court further

reasoned:

> We rely upon the CHP to protect and serve the public. It is antithetical to that
> expectation for the CHP officers to inflict harm upon us by making the ravaged
> remains of our loved ones the subjects of Internet sensationalism. It is important
> to prevent future harm to other families by encouraging the CHP to establish and
> enforce adequate and effective policies to preclude its officers from engaging in
> such acts ever again (*Catsouras v. Department of California Highway Patrol*,
> 2010)

So reasoned, the appellate court found the trial court fundamentally erred in granting

summary judgment in favor of the CHP, except in the demurrers to the first cause of action for

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[16] A duty of care is a legal obligation that is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. The claimant must be able to show a duty of care imposed by law that the defendant breached. Breaching a duty, in turn, may subject an individual to liability. The duty of care may be imposed by operation of law between individuals with no current direct relationship, but eventually become related in some manner, as defined by common law. Duty of care, therefore, is a formalization of the social contract between individuals and between individuals and the state. As such, it is not a requirement that duty of care be defined by law, but rather that it will develop through the application and continual understanding of common law. A duty of care is also a tort law, which means that it applies to civil wrong(s) that unfairly cause someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act.

all defendants. The reversals authored by the appellate court, moreover, held O'Donnell and

Reich liable as individual capacity defendants for the second, third, fourth, and fifth causes of

action of the suit, which in turn made the CHP liable under Government Code section 815.2,

subdivision (a).[17] The plaintiffs, therefore, could now seek relief for the damages indicated in

almost all of the causes of action.

Justice is a slow process. While the appellate court largely ruled in favor of the plaintiffs,

Reich filed an amended claim alleging that emailing photographs was covered under the 1st

Amendment because he was acting in the public interest. From 2010 to 2011 in the appellate

court, Reich and his attorneys argued that he emailed the photographs—from his home—as a

public service announcement to his recipients regarding the dangers of drunk driving, despite the

Catsouras' postmortem examination revealing a blood-alcohol content of zero (Hardesty,

2011).[18] His attorneys further argued that the photographs were no more public than those

anyone in view of the accident could have taken, and that neither he nor O'Donnell could have

known that the images would spread so rapidly and so easily directly target the Catsourases.

The appellate justices, however, disagreed that Reich's actions constituted protected

speech. Indeed, while Reich contended that his emails included a cautionary message about the

dangers of drunk driving per the call Christos Catsouras made to dispatchers, none of the emails

he sent were provided to the court during the time of his appeal. Reich argued that he deleted all

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[17] California Government Code 815.2. subdivisions (a) and (b) state, "(a) A public entity is liable for injury
proximately caused by an act or omission of an employee of the public entity within the scope of his employment if
the act or omission would, apart from this section, have given rise to a cause of action against that employee or his
personal representative. (b) Except as otherwise provided by statute, a public entity is not liable for an injury
resulting from an act or omission of an employee of the public entity where the employee is immune from liability."
Therefore, because the reversals authored by the appellate court re-cast O'Donnell and Reich as individual capacity
defendants, the CHP became a liable entity for the actions of its officers in *Catsouras v. Department of the
California Highway Patrol* (2010).

[18] Toxicology reports indicate that Nikki did have trace amounts of cocaine in her system. According to Nikki's
parents (2012), Nikki had taken cocaine the night before the accident, which contributed to her psychotic episode.

of the emails he sent in compliance with CHP protocol after the internal review. Yet, when the justices questioned whether any of the initial recipients of Reich's emails still had them, Reich's attorneys conceded that they hadn't investigated. Without evidence to the contrary, the justices filed a final ruling on the matter stating, "Any editorial comments that Reich may have made with respect to the photographs are not before us. In short, there is no evidence at this point that the e-mails were sent to communicate on the topic of drunk driving" (*Catsouras v. Department of Highway Patrol*, 2010; Hardesty, 2011). In addition to this, the appellate court ordered Reich to pay the Plaintiffs' litigation costs related to the appellate court and further ruled that the initial trial court costs could be pursued by the family in the lower courts.

With the appellate court's final ruling clarified, the case returned to trial court in early June of 2011.The attorneys for both parties continued negotiations while awaiting a court date. With the law refined in favor of the plaintiffs, the defendants sought a settlement that would prevent the exorbitant costs of continued litigation and a jury trial. Over the next seven months, the parties deliberated. Finally, on January 30th, 2012, a little over five years after the tragic death of Nikki, the CHP reached a settlement with the Catsourases. Under the terms of the settlement, the family received about $2.37 million in damages. In a statement issued that same day, CHP spokesperson Fran Clader stated, "No amount of money can compensate for the pain the Catsouras family has suffered. […] It is our hope that with this legal issue resolved, the Catsouras family can receive some closure" (Rojas, 2012).

Despite helping lead to the creation of a law that secures rights to images of the deceased and despite the end of litigation through settlement, the family remains vigilant and wary to this day. The death images of Nikki remain online and appear, even now, in almost any search including "Catsouras." New sites carry the images, and individuals with a morbid fascination for

death within the United States and around the world maintain them. The law that the family

fought so hard for and won with incredible cost to their livelihood and futures, ironically, does

not secure family members' protection from seeing any of the images at any time, or protect

them from new ways the images might be used to haunt and traumatize them in the future. The

law the family helped create, though, does secure greater privacy protections for others, and may,

for a time, prevent the kind of postmortem tragedy that others continue to live with to this day.

In an age where the internet has become crucial to everyday life, the Catsourases use it

with caution. It is impossible for them to avoid using it altogether, though. The family's loss is a

horror that is forever attached to each through the connective technologies that structure society.

The internet allows for this deconstruction of the individual as a composite of images, text, and

data removed of the fleshy embodiment and familial attachments to which she or he is

inextricably materially tied. This visuality the internet offers—the ability to see and be seen, to

search and be searched, to store and be stored—creates both an excess and an absence of each of

us through the information anyone can share: We, like Nikki, are increasingly the digital

presence we collectively create and shape through at times excessive online sharing—a sharing

that always has the potential to continue into the future beyond even our own existence. Yet

online all users, like Nikki, are also the absence of the body and its physical and psychic

attachments, as user both individually and collectively become disembodied subjects of the

words, images, and data they share without much forethought through technology.

Crowdsourcing Morality

As people are encouraged to share aspects of their lives *and* the lives of others through

digital media and the social web, situations akin to those that befell the Catsouras's are less and

less uncommon. Indeed, Jon Ronson's *So You've Been Publicly Shamed* (2015), a New York

Times bestseller, documents accounts of various individuals whose lives were cast awry when

something posted online by themselves or others was taken out of context, leading to situations

that spiraled out of control. Though not as devastating as the Catsouras's tragedy, the accounts in

Ronson's book highlight the deeply virulent nature of online shaming. Positing parallels to

concepts of "group madness" first developed by 19th Century physician Gustave Le Bon and of

"contagion" witnessed in Philip Zimbardo's infamous 1971 Stanford Prison Experiment, Ronson

extends the idea that individuals lose behavioral control when immersed in the "digital crowd"

promoted on social media.[19,20] While Ronson doesn't claim that the digital crowd constitutes a

near-complete devolution of the individual toward a more primal state as Le Bon historically

asserted of physically co-located gathering, he argues that social media induce an almost

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[19] Gustave Le Bon's (1895/1960) conception of "group madness" is most often cited in Sociology with reference to Contagion Theory or the Contagion Perspective (Turner & Killian, 1972). Written over 20 years after the Paris Commune of 1871 where revolutionary crowds burned numerous buildings to the ground before the rise of the Third Republic, Le Bon suggested that anonymous individuals precipitated collective, almost primal outbursts in physically co-located settings, forming a "group mind" or "group madness." He notes, "…that the individual forming part of a crowd acquires, solely from numerical considerations, a sentiment of invincible power which allows him to yield to instincts, which, had he been alone, he would perforce have kept under restraint. He will be the less disposed to check himself from the considerations that, a crowd being anonymous, and in consequence, irresponsible, the sentiment of responsibility which always controls individuals disappears entirely" (Le Bon, 1895/1960, p 30-31). In Le Bon's comment on the "the sentiment of responsibility" we also see the inflection of "public" from Sennett's analysis, as class distinctions maintained social order and, for a time, inhibited individuals from engaging in indecorous behaviors that might threaten said social order. Although Le Bon's conceptualization of the "maddening crowd" was regarded favorably after publication and well into the early 20th Century as a way of explaining crowds and social protests, Sociology and other fields have largely discredited Le Bon and Contagion Theory since the 1960s. Contemporary research and discussions regarding crowds and collective behavior instead favor the idea that most physically co-located crowds develop in three stages (i.e., assembly, gathering, and dispersal) where individuals participate and organize with others they know through some friendly or familial social tie, often with distinct purposes, and with deference to agents of social control (i.e., police officers) who often enlist "negotiated management" through the usage of protest permits (see Aveni, 1977; Couch, 1968; della Porta & Reiter, 1998; McPhail, 1991, 1997; McPhail et al., 1998; McPhail et al., 2006).

[20] Philip Zimbardo's 1971 Stanford Prison Experiment was an experimental study where young college students were assigned roles as either prisoners or prison authority figures. A highly immersive prison simulation, college students assigned the role of prisoner were picked up by real local police in a simulated arrest, labeled as numbers, and locked up in cells. Students who were assigned roles of authority such as "guard" and "warden," conversely, formulated a set of coercive rules governing prisoner behavior from the start of the experiment and exercised their power to the point of adverse psychological harm to the students labeled as prisoners. Zimbardo (2008) ultimately concluded that students assigned authority roles engaged in contagion as they rationalized their acts of dehumanization due to deindividuation that afford guards relative anonymity through their "standard uniforms" and "silver reflecting sunglasses" and the relative anonymity bestowed upon prisoners labeled as numbers.

"anarchic" group mentality fueled by the availability of content shared online. This "mob mentality" develops when individuals encounter and share content, feeding into individuated digital feedback loops where individuals receive acknowledgement from and encourage engagement with others. Ronson, however, does not clarify the conditions or the mechanics that structure this emergent practice; neither does he examine the central role of sight in shaping perceptions online as a performative spectacle of both the environmental condition of participation and normative visuality in emerging media.[21]

As public and private collapse into each other through technology, individuals increasingly fail to recognize or even understand public and private as separate contexts and conditions. The wide public availability of personally created content and the encouragement to share more only further perpetuates this notion. Content is, therefore, not only public by default online, it is also presented as material to be encountered and engaged—followed, liked, challenged, or ignored. Interpellated into greater participation as an environmental condition of digital media and the social web (Barney et al., 2016; see also Althusser, 1971), individuals respond by creating, sharing, and categorizing content as they connect with others across space and time. Unlike physically co-located gathering, which contemporary sociological research suggests entails known social ties and rational organizing with social control agents and authority figures (Aveni, 1977; Couch, 1968; della Porta & Reiter, 1998; McCarthy, 2005; McPhail, 1991, 1997; McPhail et al., 1998; McPhail et al., 2006), digitally-mediated gathering

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[21] Here I use the term "normative visuality" to draw attention to the more localized practices and behaviors of collectives that often attempt to situate and redefine normative social behavior of self and other. My conceptualization echoes Nicholas Mirzoeff's (2011) conception of "visuality," in which state power exercises and performs its authority through various practices and technologies to maintain hegemonic appearances and control; however, my emphasis here draws attention to the ways the internalization of such visuality—or "governmentality" (see Foucault, 1957)—in collectives and individuals renders it as a "normal" social practice of curtailing and controlling the seemingly aberrant behaviors of others.

(or, more aptly, "converging") is not necessarily initiated through known social ties, and, further, is rarely a collaborative, orchestrated effort with social control agents and authority (Jenkins, 1992; Jenkins et al., 2009, 2013; Rambukkana, 2015; Tufecki, 2017). Instead, as a circumstance of the "participatory condition," anyone across space and time with access to content created and shared online is given the opportunity to participate in whatever logic that entails. Anyone, for example, can become a "friend" or a "follower" of another online across a wide range of social web platforms, regardless of the lack of familiarity and knowledge with the person they friend or follow. As a result, individuals coalesce around content—imagery and text—they and others easily create and readily share online, making privacy less a collective condition of being unobserved by others and more a personal choice in whether to share content or not. Participation online, then, is more nuanced because the media and technologies that enable it operate through: *visuality* over embodied experiential engagement, as participation online foregrounds imagery and text *and* does not presuppose physical engagement beyond sight (Hillis, 1999, 2009); *diffusion*, as content easily spreads and anyone with access can converge around content in a variety of ways (Jenkins, 1992; Jenkins et al., 2009, 2013); and *deindividuation*, as content is increasingly disassociated from the source/body and its context (Hillis, 2009; see also Zimbardo, 2008 regarding deindividuation reducing personal accountability).

Taken in sum, these attributes allow individuals to easily share and forward content; form collective "publics" where they converge and participate together, often through the categorization of content in hashtags and/or group specific pages; and even formally organize in the liminal spaces between online and offline in the formation of collectives for fan communities, advocacy groups, and protests (Jenkins, 1992; Jenkins et al., 2009, 2013;

Rambukkana, 2015; Tufekci, 2017). Yet, these attributes also illuminate a dark side of the

"participatory condition." As sight on its own supersedes other experiential ways of knowing in

participation through digital media and the social web, individuals are enabled, encouraged, and

even incentivized to *primarily* relate to each other, our society, and our world through visuality.

Hailed to envision and engage content shared online as information as yet to be interpreted

(Hillis et al., 2013; see also Barney et al., 2016 regarding information though the participatory

condition), individuals respond by substituting the absent physicality of the source/body with

imagery (and text) and their own interpretations of these. When this occurs, online content is

refashioned as an intermediary text further disassociated from its embodied corporeal form, a

process that Hillis (2009) identifies as leading to the production in online settings of a virtual

"middle ground."

A brief excursus highlights the application of the idea of middle ground within my

broader argument. Middle ground is a parallel concept to "middle voice," which is a literary

technique employed by an author to induce a reader to sympathetically identify with a character

in the text. As the reader interprets the character in written word, the reader negotiates the

author's ideas in a way that both inflects the ideas induced by the author and, concurrently,

allows the reader to negotiate the author's depiction within his or her own perspective.

Comparably, visual content shared online comes to occupy a "middle ground" as the viewer

seizes the visual array in a sense-making interplay of perceptual schema, personal experiences,

and affective engagements and sees the imagery as analogous to the user (Hillis, 2009). Unlike

middle voice, which implies a particular understanding inscribed by the author (read: authorial

voice) that may or may not elicit similar personal interpretations through the array of connotative

meanings in words within the mind of the reader through characters and/or the written word,

authorial middle ground extends personal interpretations by rendering the author/subject as a visible object associated to a physical referent—a face, a body, or a physical form juxtaposed to a setting—contained within the visual display apprehended by the viewer (Hillis, 2009). Visual content online, therefore, seem to immediately "embody" the materiality of the phenomena it represents by seeming to fuse the image depicted *on* the screen to the subject *within* the visual frame whose material form remains *behind/beyond* the screen elsewhere, a process that Hillis (2009) refers to as "telepresence."

Despite the ostensibly dynamic nature of appearing both "materially here and seemingly there at the same time," telepresence ultimately compresses the source/body as data envisioned by the viewer in digital spaces.[22] So physically and temporally distanced from the source/body, the viewer is free to interpret the Janus-faced telepresence, not as a reproduction of the otherwise animated corporeal form frozen in a moment in time, but instead as a "material trace of the object or person on the other end of the transmission"—a "telefetish" (Hillis, 2009, p. 90). Imagery in digital spaces, therefore, constitutes experience of another in a way that not only suggests that an image now stands for full and immediate presence within a viewer's affective interpretations (Hillis, 2009), but also, *crucially*, as an otherwise precise target that points to the source/body and those associated with it when the viewer objectifies the visual form in affiliation with or criticism of it.

As an image spreads across digital spaces, then, it becomes an ongoing public interpretive product(ion) for the countless viewers who engage it. Increasingly removed from the

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[22] While Hillis (2009) primarily refers to telepresence in the more interactive forms of avatars and personal webcams in his analysis, he critically notes that telepresence compels an individual to become one with an image, which I extend here as it pertains to all of the subjects in my case studies. I also deliberately use "subject" instead of "author" in comparing middle voice and middle ground because the author of content shared online may or may not be the subject seized in interpretation. Due to the visual, diffuse, and deindividuated attributes of participation through digital media and the social web, any individual can share content that renders another visible to others who are distanced from the source/body depicted.

context in which the image was produced as it spreads beyond its original nodal point (see Jenkins et al., 2009, 2013), viewers interpret the image in relative anonymity, or in "deindividuation," as they are physically, temporally, and/or emotionally distanced from the object or person depicted (see Zimbardo, 2008). Further masked by their profiles on the social web (Coleman, 2014), yet also fundamentally operating at a distance from the object or person depicted in an image (Hillis, 2009), individuals operate with reduced personal accountability as they participate with little to no consequence for their actions. As a result, viewers ultimately ascribe their perceptions onto the object or person depicted, and as they do, they dehumanize the source/body by substituting its corporeal form with imagery.

In coming to regard imagery as somehow equivalent to the totality of a human, personal perceptions of the source/body supersede embodied, experiential engagement of the material form that might otherwise temper affective responses aimed at harming the individual(s) depicted. Thus, when individuals share the imagery with others in email or in posts on social media, coupled with their personal sentiments, they shape and reshape the discourse surrounding the imagery. Casting their personal sentiments out to the digital crowd, individuals engage in crowdsourced morality, they crowdsource moral judgment to not only add the power of the collective to their individual interpretations, but also to inflect broader collective beliefs and values aimed at supporting or, as is often the case, curtailing the behavior of others. Thus, in contrast to Le Bon's conception of "group madness," which presupposes a total loss of individual rationality to the crowd, and in contrast to the rational organizing of known social ties leading to sensible collectives articulated by contemporary sociology, crowdsourced morality illuminates a middle path. Content is not simply encountered in online participation; rather, it is engaged as it either confirms or challenges an individual's personal beliefs and values within

middle ground. Whether in affirmation or negation, individuals share content, and as they do, they contribute to the shaping of its context and its place in the broader discourses of social order. As more and more individuals converge around particular content, collectives form, imbued with the power to resituate with reduced accountability the coherency of the object or person on the other end of a transmission.

Crowdsourced morality demonstrates the affective power of middle ground and telefetish in the wider social imaginary (see Turner, 1982 regarding social drama). When, for example, Reich and O'Donnell produced and shared the images of Nikki through email, they irrevocably cast Nikki's corporeal form as content to be interpreted, shared, and spread across digital media and the social web by anyone who encountered it. They framed Nikki's body as a "Halloween Prank," as content removed of the interpersonal, social dimensions it was accorded in life and in death. Although the horrific events that befell the Catsourases occurred over 10 years ago, crowdsourced morality continues today in ways that highlight greater personal, cultural, and political divisions between individuals. Here are three recent examples that highlight the growing disassociation between individuals as they objectify one another through visuality.

On February 17, 2017, an Airbnb host cancelled the reservation of Dyne Suh, a then 25-year-old law student as Suh and her friends were minutes away from the cabin, stuck in the snow on the mountain road. Suh had previously texted the host to inquire if two friends and two dogs could be added to the reservation, and was told that it would be fine. Within minutes of arriving at the cabin, Suh texted to ask how they might pay for the additional guests on the reservations, only to be met with a reply she did not expect. Tami, the host, responded, "If you think 4 people and 2 dogs ate getting a room fir $50 a night on big bear mountain during the busiest weekend of the year ..… You are insanely high" (Wang, 2017). Suh noted their earlier conversation and then

protested to the host, stating she would notify Airbnb of this issue. Tami then replied, "Go ahead. I wouldn't rent to u if u were the last person on earth. One word says it all. Asian." Suh then stated, "Good job. Say goodbye to Airbnb," to which Tami replied, "it's why we have trump" (Wang, 2017).

Suh then took pictures of the exchange and posted them to Facebook page where her friends began to search for information about the host (see Figure 3). Digging through the information provided on the Tami's Airbnb profile, Suh's friends found the LinkedIn profile of one Tami Barker, which appeared to match up with the Tami on Airbnb. From there, crowdsourced morality took full effect. Suh's friends found Tami's place of work and organizations she was part and then encouraged others to email her friends, family, and co-workers (see Figure 4). One friend even posted links to Tami's work email and her community newspaper, stating, "If you wanna out the bitch to her community, here's their news paper. Ruin her. Half my family is Asian and members, including dad, have faced disgusting treatment by Trump supporters. I'm sick of this shit." With the social shaming escalating and spreading from Suh's Facebook page to others and then to local news media, Tami was soon banned from Airbnb for violating their "Open Doors" policy that emphasizes inclusiveness of all individuals, regardless of race, gender, and sexual orientation.
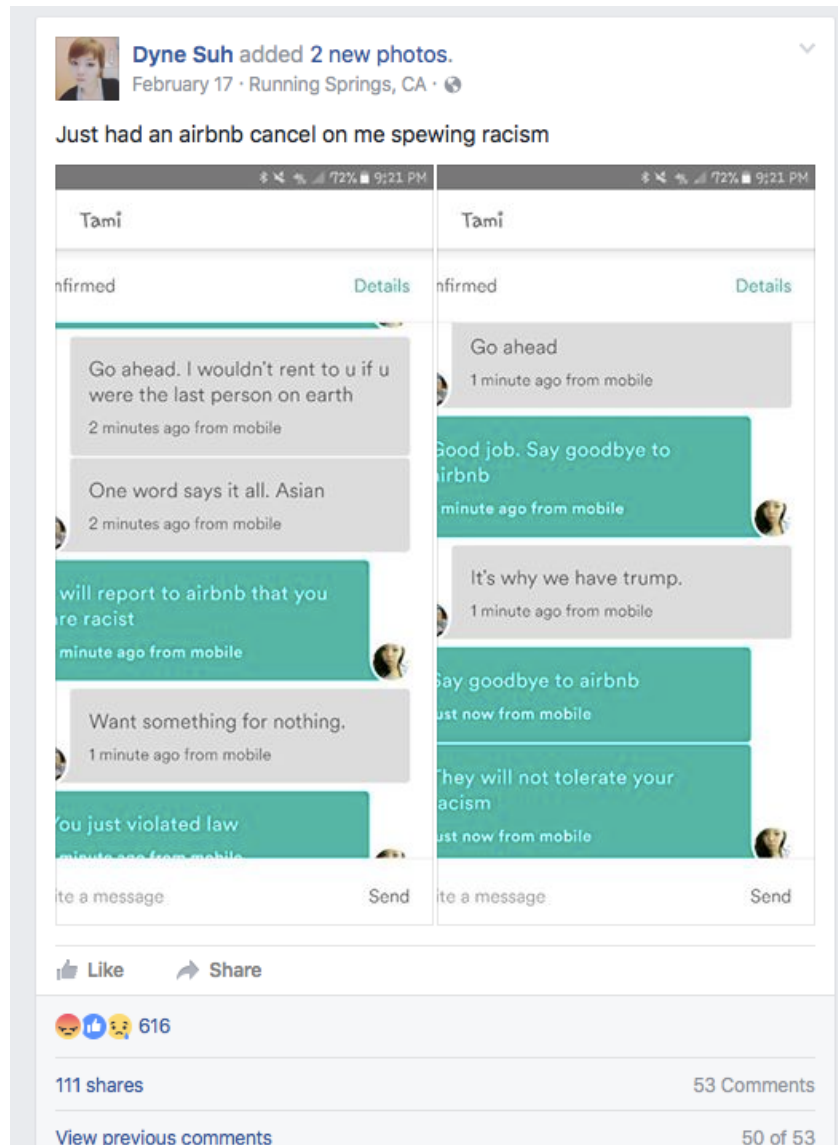
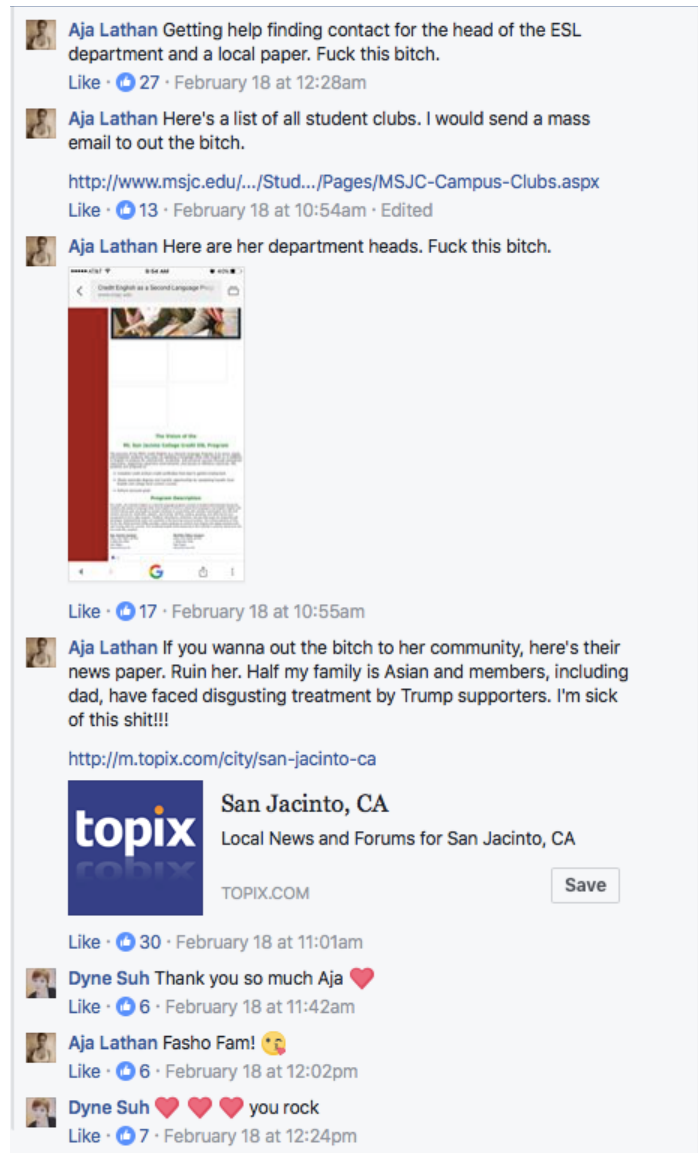**Figure 3: Dyne Suh's Post on Facebook with Excerpts of Her Airbnb Conversation.**

Figure 4: Dyne's friends respond, crowdsourcing morality in action.

Beyond the micro-level between individuals communicating through apps, texts, and social media, crowdsourced morality also occurs at the societal and political levels. With the rise of "fake news" as a right-wing moniker for anything seemingly at odds with a partisan's worldview, President Trump and many individuals who support him have not only aligned themselves in an apparent mission against media outlets deemed "fake," they have spread content that greatly, and often violently, disparages journalists as "enemies of the state." Notably, in early July of 2017, President Trump tweeted a video clip that first appeared on reddit under the subreddit /The_Donald in which he is seen pummeling a wrestler with the CNN logo superimposed on his face with the caption, "#FraudNewsCNN #FNN" (Kacynski, 2017). Shared with over 33 million followers, the tweet read more as incitement to violence than as a joke, due to the violent imagery and the preceding rhetoric from the President, and in the bigoted, violent comments associated with it by the original creator, HanAssholeSolo, on reddit (Kacynski, 2017). From there, users on twitter retweeted the President's tweet, often including comments supporting violence against journalists and critiquing the state of "fake news," and dehumanizing journalists as purveyors of content and even as content themselves.

In response to the tweet and video, CNN investigated how the President obtained the tweet and who was behind the original video. Although The White House denied that the clip came from reddit, the original creator, HanAssholeSolo, took credit for it, and even initially expressed great enthusiasm for the President's usage of it (Kacynski, 2017). Yet, as journalists at CNN identified the person behind the post, HanAssholeSolo issued a formal apology and subsequently deleted all of his other posts. In his apology he stated,

> To people who troll on the Internet for fun, consider your words and actions conveyed in your message and who it might upset or anger. Put yourself in their shoes before you post it. If you have a problem with trolling it is an addiction just like any other addiction someone can have to something and don't be embarrassed

to ask for help. Trolling is nothing more than bullying a wide audience. Don't feed your own self-worth based upon inflicting suffering upon others online just because you are behind a keyboard (Kacynski, 2017).

Despite this admission of guilt, individuals beyond this situation, and even the President himself, continue to cast imagery itself as transmission of content. In so doing, they ignore or deny the profound consequences this may pose to the object or person(s) depicted, they also upset authority in all its forms by casting publicly shared information as all there is to be known.

In a similar fashion to moral outcry from President Trump with "fake news," numerous individuals have also taken to social media without the presumed authority of the President to shame others after events involving gun violence. In particular, after over 500 thousand people protested in Washington D.C. on March 24, 2018 as part of the March for Our Lives movement, an image of Parkland shooting survivor, Emma Gonzalez, circulated online. Posted to Twitter by Gab, a social media platform popular with conservative users, the image depicted Emma Gonzales tearing up the Constitution of the United States. Yet, this image was entirely doctored. Originally taken from a video still produced in conjunction with Teen Vogue in which Gonzalez tears up a target practice poster, the doctored image quickly spread on Twitter and Facebook (Mezzofiore, 2018). Though no one has claimed responsibility for the doctored image at this time, the creation and spread of this image appears to be a form of crowdsourcing morality to feed into fears that this movement could threaten the 2nd Amendment by attacking one of the most visible figureheads of the movement in Gonzalez. The spread of the image also ignores the movement's five-point policy agenda, which federal courts have ruled to be wholly compatible with the 2nd Amendment since none of them call for a full ban of all firearms (Ingraham,

2018).[23] In response to the spread of the image, Philip Pricardi, Teen Vogue's Chief Content Officer contextualized the original video and image by tweeting to the public on Twitter. Noting that the viral image was photoshopped, Pricardi went on to add that "the fact that we even have to clarify this is proof of how democracy continues to be fractured by people who manipulate and fabricate the truth" (Mezzofiore, 2018). In resituating the context of the image, Pricardi helped fend off the expanse of crowdsourcing morality online, but his words alone do not stop numerous individuals from believing that the doctored image is real and that the movement is merely a hoax funded by celebrities. Indeed, his rebuke of the creation and spread of the image may even feed into this narrative that some ultra-conservative individuals believe.

Coherency and context of information are, therefore, increasingly challenged, contested, and shaped by the crowd online that becomes the authority leveraging its interpretation into action against an individual or "other" group. Whether crowdsourced morality transpires to shame a racist and potentially cause her to lose employment, to denigrate and devalue the integrity of an entire profession, or to portray a survivor of gun violence as anti-American, context, fact, expertise, and even reality itself become matters of individual interpretation at a distance. The voices of many begin to drown out exculpatory evidence, creating a destabilization of social order, democratic processes, and law. Authority is no longer assumed to be expertise, as individuals source and sustain their worldviews through filtered content that often affirms their own beliefs (Nichols, 2017; Pariser, 2011), further contributing to the false dichotomy of "us versus them" and the greater disunity of *us* and *them*.

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[23] The five points of the policy agenda are to fund gun violence research; strengthening the Bureau of Alcohol, Firearms, Tobacco, and Explosives; calling for universal background checks; a ban on high-capacity magazines; and a ban on assault rifles. While these policies may restrict access to firearms and ban access to specific classes of weaponry, none of them fully ban guns.

An Image Is Worth A Thousand Words

Digital media and the social web do more than extend our communicative abilities beyond a localized geographic space as some media scholars suggest (Baym, 2010; boyd, 2008, 2012; Marwick, 2013; Marwick & boyd, 2011a, 2011b; Van Dijck, 2012, 2013); they fundamentally promote visuality as the primary means through which individuals engage each other and come to "know" the world around them (Hillis, 2009; Hillis et al., 2013; Jenkins, 1992; Jenkins et al., 2009, 2013; Nichols, 2017). Whether imagery is shared "privately" in emails intended for family and friends, tweeted in the public space of Twitter, or reposted on a Facebook group page urging a company to fire a person, the coherence of the object or person depicted is suddenly rendered massively public, a visual spectacle open to the interpretation of the vast audiences that encounter it, engage it, and circulate it as content.

Imagery, therefore, comes to have greater power over individuals and their understandings of context, fact, and reality as it spreads across digital media and the social web as content, which works to minimize interest in embodied, experiential engagement of the object or person depicted (Hillis, 2009). As a consequence of distance, authorial intent is no longer contained within text (Nichols, 2017), as the context of content is increasingly constituted in the broader public collective that interprets and shapes its meaning within the intermediary space of the middle ground. It is not that images no longer retain an innate context (if they ever did, as Althuser reminds us), but rather that the uncoupling of the materiality of the object or person in content shared through digital media and the social web has allowed individuals and collectives to ascribe meaning in ways that profoundly affect the "other" behind the transmission, as well as shape broader social discourses and social norms.

Indeed, while digital media and the social web "unite" people by bringing them together as they share self-generated content (Baym, 2010; Jenkins, 1992; Jenkins et al., 2009), the emphasis on the visual within these platforms ultimately blinds people from the reality of one another. Reimagined as imagery and/or cast as content, individuals no longer have to experience the messy, complicated reality of one another and can, instead, align themselves with those like themselves and those things they "like" as a public display for others (Pariser, 2011; Turkle, 2010). As an all too common practice of the participatory condition and crowdsourced morality today, individuals can and do vehemently critique the things they do not like, easily inciting others to do the same.

Furthermore, as *Catsouras v. Department of California Highway Patrol* highlights, authority figures are not wholly exempt from the harms that occur when corporeal form is transubstantiated as content in transmission. While all police officers are trained to at least give the appearance of disinterest from their subjects in an attempt to keep clear records that are free of an account of the emotions that would be inherently present in any confrontation, they may still form a visceral connection to their subjects, for better or worse, that affects how they respond on the scene and the ways citizens interpret their responses and actions thereafter. Even as the institution of law enforcement acknowledges that there is a power imbalance between itself and everyday citizens, individual officers may not fully recognize this disparity and the ways their actions further shape and reshape the sociopolitical relationship with authority. When the credibility of authority figures is questioned and when police appear to be protected by law even as they have done wrong, as witnessed in both *Catsouras v. Department of California Highway Patrol* and *People v. Mehserle* for disparate yet related reasons, a message is sent that authority is somehow exempt from being held accountable to those it is enlisted to protect and

serve. As a consequence, greater suspicion of authority in its abilities to establish truth, order, safety, and security emerges, giving rise to challenges to authority in countersurveillance, protest, and even outright violence.

As the Catsourases learned in their fight with the Department of California Highway Patrol, a lack of trust in authority speaks volumes about human nature and our relationship with one another. Laws appear to protect those in authority, practically making them exempt from suit in demonstrated harms to those they are tasked with protecting. Laws, too, can only do so much to reclaim what is lost, particularly as technology now allows for the kinds of online disciplining practices achieved through crowdsourced morality. "Justice," therefore, is rendered less a system meted out by common law and a greater social contract, and more a practice enlisted by individuals and collectives using digital media and the social web to shape and decree morality from afar, with little to no accountability for their actions. Taking content at face value—as all there is to be seen and known in the moment of capture—individuals, as "shamers-in-chief," now increasingly become judge and jury by framing another's identity through imagery alone, by adjudicating another's scruples through their actions frozen in time, and by then converging together to bring the "authority" and power of the crowd to bear on those deemed "culpable" until such time as another individual gets framed, like the fetish, and then discarded when inoperable.

CHAPTER FIVE:
POLICE (IN)ACTION: THE LIMITS OF LAW
IN PROTECTING THE INDIVIDUAL'S PRIVACY AND BEYOND

Introduction

In April 2013, Ross Landry, then Justice Minister of the Canadian province of Nova

Scotia, introduced a striking and novel piece of legislation: the Cyber-safety Act. Outlining legal

protections for victims of cyberbullying, creating a unit tasked with investigating complaints of

cyberbullying, and clarifying procedures for identifying, pursuing, and penalizing cyberbullies,

the Act was the first of its kind in Canada. Passing into law that August, the Cyber-safety Act

allowed for the creation of a CyberScan unit that became fully operational in September 2013.

The unit pursued 820 cases of alleged cyberbullying until the Supreme Court of Nova Scotia

struck down the law in December of 2015. Seen as too broad and far-reaching by Supreme Court

Justice Glen McDougall, the law was struck down because it was deemed to violate the Charter

of Rights and Freedoms, particularly as it infringed upon the right to life, liberty, and security of

the person.

Created as a reaction to the suicide of Rheteah Parsons, a young woman who took her life

following the yearlong investigation of her alleged rape that concluded that there was

"insufficient evidence to lay charges," the law attempted to assuage the harms of overlooking

and ignoring hurtful communications and bullying online. Although the law granted the Royal

Canadian Mounted Police (RCMP) more power and authority to pursue perpetrators of online

harassment, it fundamentally failed because of the ambiguous and arbitrary nature of language of

the law and the entrenched categorization of what counts as evidence in cases involving

technologically mediated communications. Using the Segal Report, which was charged after the

death of Rehteah Parsons with investigating the errors committed by police investigating claims

brought forward by Parsons, and the Milton-Pepler Report, which investigated the errors in

school policies that may have contributed her death, I draw attention to the yearlong

investigation of the alleged rape of Rehteah Parsons, the creation of the Cyber-safety Act, and

the reasons the Act was overruled.

To understand better the contemporary landscapes of digital media and the social web

that enable crowdsourced morality and, in turn, pose challenges to police power and law, this

chapter extends the theory of crowdsourced morality to the law. Building on analysis from the

previous chapters in which I establish the role of imagery in both challenging authority and

decontextualizing the source/body, this chapter focuses on the role of law in protecting

individuals as they are constituted in the aforementioned intermediary space of the "middle

ground" enabled by the ubiquity of digital media and the social web. I explore the flexible, yet

precarious nature of law as it is made to respond to newer contexts across digital media and the

social web. I argue that law enforcement fails to apply the law equally in cases where digital

media reveal new threats to the individual, and that such unequal application leads to harm for

individuals as their personal lives become a public spectacle for any to partake in online.

Additionally, in exploring the failure of law and law enforcement, I question the role law plays in

contextualizing victims' and bystanders' narratives, particularly as it enables and promotes the

voices and experiences of certain individuals over others. I also critique the ways law constitutes

evidence, and I argue that it often fails to recognize "non-State" evidence because it is not

codified in law or law has not caught up to considerations of "private" and/or "personal"

information online. Finally, I explore the problematic nature of creating a proactive framework

in law that attempts to ensure remedies for individuals who have had their lives upset by content

shared online without their consent. Because consent is "assumed" in sharing content from

offline to online in Western societies (boyd, 2012), and because Western societies enshrine

various forms of free expression in law, I argue that law itself cannot solve the contemporary

predicaments with the spread of information online until we, as a society, encourage greater

contextualization of information and greater practices of consent.

Rape Law or Rape Culture?: Conceptions of Rape, Victimization, and Consent

Canadian law criminalizes "sexual assault" in Section 265 of the Canadian Criminal

Code.[24] Defined as sexual contact with another person without that person's consent, the law

clarifies consent in Section 273.1(1) as "the voluntary agreement of the complainant to engage in

the sexual activity in question" (*Criminal Code*, 1985). The absence of consent defines the crime

of sexual assault, and since 2011 crimes of sexual assault have been further interpreted to include

the provisions that a person must have an active mind during the entirety of sexual activity in

order to consent and that individuals cannot give consent in advance of sexual activity (see *R. v*

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[24] The word "rape" is not used in the Canadian Criminal Code. After explaining the law as it stands in Canada, I will use "sexual assault" and "rape" interchangeably to correlate problems with rape laws across modern Western societies.

J.A., 2011).[25] Yet, despite these progressive shifts in ongoing affirmative consent in Canada (and

parts of the United States), the criminal justice system and its representative parties in law

enforcement and the judiciary continue to reproduce systemic patriarchal practices that fuel and

shape both the legal and popular imaginations of rape, victimization, and consent.

Sexual assaults are ambiguous and, therefore, problematic for the criminal justice system

because they challenge the popular imagination of rape depicted in media and historically

inflected in law. "Stranger danger" is a historically popularized, societally accepted conception

of rape and it usually includes a scenario in which a woman is randomly assaulted by a man who

is a stranger to her while she attempts to escape or fight off her attacker (Johnson, 2017; Randall,

2010; Yung, 2017). The emphases on the "randomness" of the attack, the attacker as an unknown

"stranger," the "attempt" to defend oneself, and the notion that such assaults happen to women

exclusively have had both societal and political effects on how rape is conceptualized and

understood, even as laws have shifted beyond these archaic conceptions. While the majority of

sexual assaults are committed by someone the victim knows (Johnson, 2017; see also McGregor

et al., 2000), police, prosecutors, and even the media continue to respond to and describe sexual

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[25] R. v J.A. was a criminal law case regarding consent in the case of sexual assault and was decided by the Supreme Court of Canada. The alleged offense involved J.A. having consensual sexual activity with, K.D., his long-term partner. During the activity, K.D. consented for J.A. to choke her. K.D. knew that she might lose consciousness, and after about three minutes, she did. While K.D. was unconscious, J.A. tied K.D. up and performed sexual acts on her. K.D. could not recall consenting to the sexual activity J.A. performed on her while unconscious. When she regained consciousness, they resumed consensual activity. On July 11, 2011, K.D. made a complaint to the police that the activity was not wholly consensual, leading to charges of aggravated assault, sexual assault, attempting to render a person unconscious in order to sexually assault them, and breaching a probation order. At trial, the judge acquitted J.A. of aggravated assault and choking, but found that K.D. did not consent to the activity, or that if she did, she did not legally consent. J.A. was found guilty of sexual assault and breaching his probation order. On appeal, the Court of Appeal for Ontario ruled in favor of the defendant, J.A., concluding that there was insufficient evidence to conclude that K.D. did not consent to the sexual activity. The majority also ruled that persons can consent to sexual activity to take place even after they are rendered unconscious. The dissenting judge, however, argued that consent for the purpose of sexual assault required an active mind during the sexual activity in question. At the Supreme Court of Canada, the majority ruled only on the consent in the case of sexual assault. The Court reviewed the definition of consent for sexual assaults in Section 273.1 of the Criminal Code of Canada and the majority concluded that a person can only consent to sexual activity if she is conscious throughout that activity. If a person becomes unconscious during the sexual activity, then she legally cannot consent, whether or not she consented earlier.

assaults in ways that emphasize either "stranger danger" or the rare false reports of rape (Yung, 2017). The classic discursive strategy of using passive voice further complicates understandings of rape. Rather than employ active voice to describe rape (e.g., "40-year-old man sexually assaults woman in back alley"), rape is described as something that *happens to* women (e.g., "she was raped," "20-year old woman sexually assaulted") (see Johnson, 2017; Yung, 2017 regarding popular conceptions of rape). Such framing removes the subject and renders him invisible so as to make it seem that the action happened without a motive or without a subject; it also encourages a deep-seated aura of skepticism with respect to the victim that pervades organizational knowledge, society, and culture.

Within the institution of law enforcement, the overwhelming, deeply embedded cultural beliefs about rape manifest in how many police officers approach victims and how they determine whether an allegation of criminality is true. The strong biases against alleged rape narratives lead police to approach complainants with skepticism or aggression and to frame information in a way that "takes ambiguous information and forms it in an understandable pattern to which the agency can respond to in routine fashion" (Gilsinan, 2012, p. 102). Police contextualize, process, and frame complainant testimony, actions or lack thereof, and emotional and mental states in ways that then align with cultural norms about rape, which reify a dichotomy between a credible, "good" victim who was "innocent" and "fought of the attacker," and a questionable, "bad" victim whose "actions or sexual history" put her at fault (Benedet, 2010; Corrigan, 2013; Johnson, 2017; Randall, 2010).

Characterizing the victim, consequently, is crucial in establishing a case, but such characterizing is problematic as it is filtered through personal, institutional, and cultural lenses, just like crowdsourced morality. Victims, whether in person or online, become an ongoing

production of massively public dialogue where they are decontextualized and objectified at a distance as others (here, the police) project their beliefs, values, and morals onto them. Victims who challenge the historically stereotypical ways that law enforcement assumes victims should behave or appear in their emotional affect, sexual history, race, sex, and gender ultimately pose dilemmas for the criminal justice system and society at large (Benedet, 2010; Gotell, 2008; Johnson, 2017; Randall, 2010; Yung, 2017). Often, differences from the "normed" perceptions of victimhood lead police to classify rape as either a lesser crime or a non-criminal event (Gilsinan, 2012). Further, in the rarer instances where a case moves to trial, defense counsels often employ the use of myths and stereotypes about rape to undermine the credibility of the victim, even where rape shield laws are designed to prevent such practices (Craig, 2014; Johnson, 2017; Yung, 2017). When this occurs, the victim's sexual history and past actions can become implicated in the allegation of rape and, in turn, can affect perceptions of consent. Intoxicated victims, for example, are often seen as defying standards of sexual safekeeping by placing themselves at risk, even if they did *not* become intoxicated of their own volition (Benedet, 2010). Intoxication, therefore, introduces doubt between "legal consent" and "moral consent" in the case, which the defense can exploit. After all, legally, the fact that a complainant was intoxicated does *not* negate her or his capacity to consent, neither does lack of memory mean the complainant did not consent at one point (McCabe, 2017). Even where the Canadian Criminal Code has clarified that an individual must have an active mind during sexual activity to consent, then, myths and stereotypes of the "ideal" victim pervade the criminal justice system and continue to test the application of the sexual assault law in practice.

Research also suggests that, across the United States and Canada, police and prosecutors complicate how rape is reported and documented. Laying charges in sexual assault cases is also

highly political, as charges affect crime statistics, police department response rates, city safety

indexes, as well as the reputation of police officers, prosecutors, and other political authorities. In

Nashville, Tennessee, for example, Police Chief Ronal Sherpas claimed great successes in

reducing crime in the city over a span of six years. Yet, from 2004 to 2010, the department's

numbers did not align with annual crime reports conducted by the FBI and the Tennessee Bureau

of Investigation, which showed that crime rates were on the rise. An investigation into the

discrepancy later revealed that, under Sherpas' guidance, police officers deliberately

underreported rape cases or classified them as "matters of record" to claim a significant decrease

in crime rates (Williams, 2011).[26] Hundreds of rape cases were later reclassified, but Sherpas

continued on in his career *without* reprimand and eventually, for a time, became the

Superintendent of the New Orleans Police Department. Furthermore, Yung (2017) explored the

lack of investigation by police departments in forcible rape cases in America and found that not

only are rapes highly underreported by the police, but also rape kits are often not obtained. When

rape kits are obtained, Yung found that police often do not test them, leading to as many as

400,000 untested rape kits by 2014. Further, in rare instances where evidence is obtained from a

rape kit, Yung (2017) note that the prosecution rarely introduces it at trial due to "spillover

effects," such as lengthy delays in processing rape kits, that may affect institutional reputations.

Similarly, McGregor et al. (2000) found that an "estimated 94% of sexual assault cases never

come to the attention of the criminal justice system" in Canada because victims feel they will not

be believed or that they are somehow to blame.

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[26] In Nashville, TN, as well as other states, a "matter of record" does not show up in in crime statistics because it is
not reported as a crime or a criminal investigation. A "matter of record" refers to anything—testimony, evidence,
rulings and sometimes arguments—that has been entered into the formal written public record of a court, which can
be proved by the production of that record. Matters of public record are generally available to the public unless state
law or court order prevents them from being released. For example, many courts refuse to release the names of
minors who are victims of sexual assault.

The power and authority police and prosecutors exercise in pursuing a case and laying

charges, allows them to act as gatekeepers who shape legal and popular discourses of rape

through their action and inaction. As a criminal charge, moreover, rape must be proved "beyond

a reasonable doubt," as the consequence of a conviction is the loss of liberty to the accused. A

judge or jury must have little to no doubt that there was criminal intent on the part of the

accused, that the act occurred, and, in some instances that there was malice. With such a high

burden of proof, then, it is conceivable that police and prosecutors primarily pursue cases where

they believe they have substantial evidence to ensure a conviction. Further, police and

prosecutors are duty bound to respect due process, which secures the accused the right to defend

himself or herself against the allegations. Yet, in instances where a case moves to trial,

evidentiary burdens make a rape conviction harder to secure because any ambiguity associated

with consent introduces doubt that the sexual activity was unwanted. Therefore, as Yung (2017)

and Johnson (2017) conclude, the institutional "culture of skepticism" that infuses the criminal

justice systems of America and Canada, respectively, *fundamentally* shape whether evidence is

collected or not, what evidence counts, and whether a case is worth pursuing based on a

combination of evidentiary burdens, evidence collected, and personal discretion.

Evidentiary Burdens and the Limits of Law: Laying Charges in the Rehteah Parsons Case

Amidst laws that have reaffirmed ongoing affirmative consent and an active mind to

consent, the prevailing standard of "beyond a reasonable doubt" remains lofty and often

problematic for victims of sexual assault because intervening circumstances such as intoxication

introduce doubt in consenting to sexual activity (Benedet, 2010). In Rehteah Parson's sexual

assault allegation, then, intoxication and the lack of DNA evidence contributed to an enormous

burden of proof, even as visual evidence was present to establish that sexual activity of some

kind took place. Despite the facts that Rehteah could not recall consenting to sex or to being photographed during sex, the image of a young man penetrating her from behind as he gestured a thumbs up while she vomited was not enough to establish criminal intent. Rehteah had attended the party of her own volition, she drank of her own volition, and she did not report the alleged assault until five days after the incident when DNA evidence was no longer present (Segal, 2015). Only when she found out about the photo and its circulation on social media did Rehteah report the case (Milton & Pepler, 2015).

Left with few evidentiary means to secure a criminal charge of rape, Detective Constable (D./Cst.) Patricia Snair of the Halifax police's Sexual Assault Investigation Unit (SAIT) began the investigation by interviewing Rehteah, pursuing phone records of the accused, and attempting to interview individuals who attended the party where the incident occurred. During a preliminary interview with Rehteah conducted on November 29th, 2011, Snair identified both alleged sexual assault and child pornography offenses, as Rehteah was a minor (Segal, 2015). Attempting to establish intent through evidence, Snair worked to collect BlackBerry Messenger (BBM) data associated with the various phone numbers Rehteah disclosed. Snair also contacted Constable Jason Hill, the police school liaison officer at Cole Harbor High, which Rehteah and the suspects attended. Snair believed that organizing interviews at the school would expedite the process, as this strategy had been employed in previous cases with success (Segal, 2015). Yet, the school administration blocked her efforts, arguing that the interviews could not be carried out on school property because the incidents did not occur at the school.

In the months that followed, Snair actively pursued all angles of the case. Eventually obtaining from on of Rheteah's friends a copy of the photo of Rehteah that circulated in Cole Harbor High, Snair explored the child pornography angle with the Royal Canadian Mounted

Police/Halifax Regional Police's (RCMP/HRP) Integrated Internet Child Exploitation (ICE) unit. Learning the means through which the maximum amount of evidence could be collected, Snair prepared and filed two production orders. The first, filed with BlackBerry's corporate parent, Research In Motion (RIM), attempted to capture and preserve the data of the cellphones of three suspects so it could be used in the ongoing investigation. The second production order, filed with the telecommunications service providers, attempted to unearth the specific text messages of the suspects implicated in the investigation, as this information would greatly aid in contextualizing the events of the evening and possibly establish motive.

Complying with the first order in December, RIM preserved text messages, BBM data, emails, and pictures sent to or from the cellphones of the three alleged suspects for the period from November 12 to November 23 of 2011. With the data preserved, Snair worked to obtain a court-issued production order to unlock the specific phone numbers and PINs so she could process the second production order and obtain the data directly from the telecommunication service providers (Segal, 2015). Snair continued to pursue interviews with individuals who may have been involved while she waited for the court-issued production order to process. Blocked by the school, Snair interviewed Rehteah's friend Lucy and Lucy's mother, and a second friend, Amanda, who had initially informed Rehteah of the photo.[27] Snair learned that Lucy and her mother attempted to take Rehteah home the night of the incident, but neither could get her to leave the house. Neither reported seeing the alleged rape. Similarly, Amanda was not at the party, and claimed she could not remember who she had received the photo from before informing Rehteah about it.

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[27] As is customary in sexual assault cases due to threat of retaliation, names of bystanders, the accused, and, *usually*, the victim(s) are masked. I've used the pseudonyms used in The Segal Report.

During this time, Rehteah transferred schools twice. One month after transferring to Dartmouth High shortly after the spread of the alleged rape photo at Cole Harbor High, she decided to transfer again in early December. Rehteah notified the principal and school liaison of the circulating photo, but no authority took any disciplinary action (Milton & Pepler, 2012; Segal, 2015).

In February, Snair obtained the phone numbers and PINs of the suspects, which she used to retrieve the cellphone data from the two telecommunication service providers of the suspects. Filing the second production order, Snair waited approximately 30 days before the providers returned most of the cellphone data including text messages for three of the four numbers in the capture. From late March 2012 to the end of April 2012, Snair combed over the text messages and noted that "while they corroborated various aspects of the allegations, they did not provide any indication as to who sent or received the impugned photo" (Segal, 2015, p. 15). Further, no messages "confirmed" Rehteah Parsons was sexually assaulted.

From April 2012 to June 2012, Snair tracked down the individual who gave Rehteah the photo and attempted to interview other potential witnesses. Rachel, a friend of Rheteah's who received the photo, agreed to meet with Snair. Rachel informed Snair that she asked Lucy for the photo, which she later forwarded to Rehteah three days after the party. Snair determined that neither Rachel nor Lucy held malice for Rehteah in sharing the photo. Continuing the investigation, Snair sought an interview with the mother of two of the boys present the night of the incident—Max and Adam in the Segal Report (2015)—and whose house had been the place where the alleged rape took place. Based on previous interviews she had conducted, Snair knew the boys' mother had also been present at the house for part of the evening. Snair left numerous voicemails with the boys' mother, but was unable to reach her throughout June.

At the end of June, prompted by threats Rehteah had received online via social media, a meeting was held with Snair, Sergeant Legere (Snair's supervisor), Rehteah, Leah Parsons (Rehteah's mother), Glenn Canning (Rehteah's father), and Verona Singer, a Victim Services case worker. During the meeting, Leah expressed concerns that the investigation was taking too long, but was assuaged by Sgt. Legere who noted that such investigations can take up to a year to complete (Segal, 2015). Rehteah then shared the threats she had received online, and a video interview was conducted. A determination was made that the threats were unrelated to the ongoing investigation, and they were assigned to patrol for investigation.

From July 2012 to August 2012, Snair continued to reach out to Max and Adam's mother, as well as another potential witnesses At the end of July, Adam picked up the phone, and Snair informed him that she was conducting an investigation and wanted to speak with him, Max, and his mother, as well as two other potential witnesses, Eric and Josh. Snair advised him to have his mother contact her to schedule a time to meet. While Snair waited to hear back from Max and Adam's mother, she called Eric's mother and convinced her to have Eric come in to provide a statement. In late August, Eric met with Snair and a video interview was conducted. At the end of August, Snair received a voicemail from Max and Adam's mother. She provided her email address and indicated that it was the best way for Snair to reach her. Snair sent an email in which she clarified that she was "investigating a sexual assault that would have taken place at her home while she was present for a certain period of time, as well as child pornography offences" (Segal, 2015, p. 17). Snair asked to meet with her and her sons. A day later, Max and Adam's mother agreed to meet, but then hesitated to pin down a date until she spoke with her husband.

In early September 2012, Snair emailed the mother to arrange a time to meet. During this time, Leah Parsons contacted Snair for an update. Snair disclosed that she was pursuing

interviews and that she would update Leah accordingly. On September 19th, Max and Adam's

mother replied to Snair, declining to meet. That same day Snair reached out to Josh, who agreed

to meet with her. Because he was a minor, Snair advised him to speak with his parents and call

her back to arrange a time. On October 9th, Snair left a voicemail with Josh. He later returned

the call and asked if it was mandatory for them to meet. Snair informed Josh that it was

voluntary at that time, and he subsequently declined.

On October 26th 2012, Snair once again met with ICE. She and Corporal Jadie Spence

reviewed the file and agreed that they had sufficient evidence to arrest Adam and Josh for

distributing child pornography, and Eric for possessing child pornography (Segal, 2015). They

discussed the need to seize the phone pursuant to arrest, and that a warrant would be required to

search the phones once they were seized. From here, Snair contacted the RCMP Technological

Crime Unit and learned that it could possibly retrieve evidence of a photo to or from a

Blackberry, even if it had been deleted.

That same day, Snair met with her supervisor, Sergeant Legere, to discuss whether

charges could be laid in either offense. Upon review of the file, both determined that the sexual

assault charge might be challenging, and, thus, decided to seek the advice of Crown counsel.

According to the Segal Report (2015), "They were of the view that, based on memory issues,

conflicting evidence and internal inconsistencies in Rehtaeh's account, there was insufficient

evidence to proceed with the laying of that charge" (p. 18). As for the child pornography offense,

both Snair and Legere believed they had sufficient evidence to lay charges. They planned to

proceed with arrests and seize the suspects' phones.

Days later, on October 30th 2012, Snair consulted with Crown counsel, Shauna

MacDonald. Upon review of the file, Ms. MacDonald determined that no sexual assault charges

would be laid. An experienced sexual assault prosecutor, Ms. MacDonald clarified that the "memory/reliability issues, as well as credibility issues stemming from inconsistencies between Rehtaeh's first and second statement, between her statements and text messages she had sent, and between her statement and Lucy's statement" made it such that there was no reasonable prospect of conviction (Segal, 2015, p. 22). Upon review of the child pornography offense, Snair and Ms. MacDonald sought the advice of senior Crown Counsel responsible for child pornography and cyber offenses. At the time, they were unable to get a hold of the senior specialist, and so determination of proceeding with the charge was temporarily stalled.

During the same day, Leah Parsons called the police and complained about the length of the investigation and the attitude of Snair. The responding officer informed Leah he would review the case and follow up with her. The responding officer reviewed the file and met with Legere. Both agreed that "a considerable amount of work had been done," and Legere agreed to follow up with Leah (Segal, 2015, p. 19).

The next day Legere spoke with Leah and informed her that, following a Crown consultation, there was insufficient evidence to lay sexual assault charges. Legere shared that senior Crown counsel was currently reviewing the child pornography offense. Legere then concluded the conversation, agreeing to follow up with Leah about the findings.

On November 2nd, 2012, Snair spoke with junior Crown counsel, Peter Dostal. He informed her that the Crown would "not be in a position to proceed with child pornography charges" (Segal, 2015, p. 19). Dostal explained that, if the sexual assault allegation was no longer part of the charges, it might avail the photographer a "personal use defense" (Segal,

2015, p. 24).[28, 29] Dostal also believed it would be hard for individuals to determine whether the

subjects depicted were underage or not, even though Rehteah could identify herself in the photo.

Upon further discussion with Dostal, Snair indicated that it was, "her interpretation that the

Crown was 'not willing' to proceed with charges of child pornography or sexual assault" (Segal,

2015, p. 19). Snair then discussed the case with Legere, and both determined no charges would

be laid.

One year after the initial incident, on November 14, 2012, Legere finally reached Leah to

discuss the case. Legere explained that the police had consulted with the Crown and informed

her that the child pornography charges were not going to be laid. Here, Leah claims police told

her it was a "he said, she said" case and that there was insufficient evidence to lay charges

("Rape, bullying," 2013). Legere also explained that he would notify the suspects and their

families, cautioning them against such behaviors in the future.

Upon Leah's request that Legere be the one to inform Rehteah, Legere phoned her on

November 16th, 2012. During this phone call, Legere clarified that no charges would be laid

(Segal, 2015). He explained the results of the investigation. Rehteah indicated that she

understood. After the conversation, Legere emailed Leah, letting her know he had spoken with

Rehteah, and attempted to connect them with Victim Services.

In early December 2012, Snair contacted the suspects' families to inform them that no

charges would be laid. Meeting with each of their families over a span of three days, Snair

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[28] This defense allows individuals who engage in lawful sexual activity to record their activity, provided it is for their own private use. Possession of imagery is, therefore, lawful if those individuals consented to its creation *and* that the picture is only kept for their own use and has therefore *not been* distributed to others.

[29] On this point the Segal Report is clear that the Crown failed Rehteah Parsons. Because the image had been distributed to numerous individuals, there was no reasonable claim to a "personal use defense." Instead, the junior Crown counsel relied on the circumstantial evidence to ascertain that, without the allegation of sexual assault, doubt could be cast as to whether the individuals consented to its creation.

obtained assurances that the parents would talk with their children about the seriousness of their actions. On December 7th, 2012, Snair closed the file and filed a concluding report.

After Rehteah learned that no charges would be laid, Leah claimed that Rehteah became increasingly depressed. In addition to the school transfers as the photo circulated from one school to another, Rehteah was bullied for more than a year after the alleged sexual assault. Leah claimed that Rehteah was slut-shamed at school and online, and that she received solicitations for sex from strangers (Newton, 2013; "Rape, bullying," 2013). In March 2013, Rehteah sought mental health services for suicidal thoughts from IWK Healthcare Center (Milton & Pepler, 2015; "Rape, bullying," 2013), but she did not free herself of them.

On April 5th, 2013, Rehteah hung herself in the bathroom of her mother's home. Leah found Rehteah after breaking down the door, but Rehteah was already comatose. Rehteah was rushed to a hospital. There she was put on life support until her family made the decision to take her off of it on April 7th (Jauregui, 2013). On April 8th, Rehteah passed away.

According the Segal Report (2015), Leah Parsons received a private message on Facebook from Josh the day after Rehteah passed away. That same day, when the Chief of Police and Chief Superintendent met with Rehteah's parents, Leah shared the email with them.[30] With new disclosures revealed upon review of the email, the Chief of Police and Chief Superintendent promised to take another look at the file. Around this time, too, the hacktivist group known as Anonymous became involved in the case, creating the campaign "#OpJustice4Rehteah." On April 10, 2013, Anonymous released a formal statement online wherein the organization

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[30] According to a post from Glen Canning's blog dated August 9th, 2013 (the day *after* charges were laid against both Josh and Adam), Josh revealed everything about that evening to Leah after hearing Rehteah died. "He told her everything he knew. He said Rehtaeh seemed fine with everything. He stated she gave permission even when she was throwing up and that she was willing even though they had to carry her around and dress her when they were finished. He said he didn't want to live with the title rapist and that it was the most hurtful thing he could imagine. He said he was sorry, and that he cried when he found out Rehtaeh had died. He said he regrets giving a thumbs up and smiling as the photo was taken. But, he says, '..I cannot lie to you and say we all did not rape her, I can tell you for sure that I did not rape her…'" (Canning, 2013).

demanded that the RCMP act swiftly to provide justice for Rehteah's family or else the names of the alleged rapists would be revealed ("#OpJustice4Rehteah," 2013; "Rehteah Parsons suicide," 2013).

Over the next two days, social media exploded. "Nova Scotia" trended on twitter and social media lit up with Anonymous' hashtag as countless people claimed to identify the names of the alleged rapists ("Rehteah Parsons mom calls," 2013). The outpouring of condemnation compelled Leah to ask the public to respect her family's privacy and let the justice system mete out the final verdict. In response to Leah, Anonymous ultimately decided not to reveal the names of the alleged rapists out of respect for the family ("'Anonymous' won't release names," 2013; "Rehteah Parsons mom calls," 2013). Concurrently over the same two-day period, the RCMP worked quickly to capture and preserve information related to Josh's Facebook page and emails from April 8 to April 10 (Segal, 2015). Once Facebook complied, the National Child Exploitation Coordination Centre (NCECC) reviewed the preserved data. Shortly after, the RCMP issued a press release regarding the re-opening of the investigation (Segal, 2015; "Rehteah Parsons case to be reopened," 2013).

From April 2013 to August 2013, the RCMP reviewed Snair's extensive case file alongside the recently captured evidence in Josh's Facebook message to Leah Parsons and collected additional information. On August 8th, 2013, the RCMP/HRP then laid charges against Josh and Adam. Josh was charged with distribution of child pornography, while Adam was charged with distribution and creation of child pornography (Segal, 2015).

Criminal trial proceedings ensued, and in September of 2014 Adam, then 20, entered a guilty plea on the charge of creation of child pornography. The Crown withdrew the charge of distribution of child pornography, as it appeared Adam had only sent the photo to Josh (Bruce,

2014). Given that Adam was a minor at the time of the crime, however, and under guidance of

Canada's Youth Criminal Justice Act, Judge Gregory Lenehan was limited in the penalties he

could mete out. In November 2014, noting that the young man had battled mental health issues

since the incident, Judge Lenehan sentenced him to a conditional discharge and 12 months of

seeing a probation officer ("No jail for Canadian man," 2014). In outlining his decision, Judge

Lenehan delivered a strong rebuke to the young man:

> "In a few seconds, (you) set in motion a series of events that led to a great deal of
> shame, humiliation, anger, despair, anguish, loss, hurt and destruction for (the
> girl), for her family, for you, for your family, for the entire community" ("No jail
> time in high-profile pornography case," 2014).

The judge also ordered Adam to write an apology letter to the family and to abstain from contact

with Rehteah's parents and the other suspect on trial. Although Rehteah's parents desired a

harsher penalty, they felt that the judge ultimately delivered justice since the Youth Criminal

Justice Act prevented more severe sentencing ("No jail time in high-profile pornography case,"

2014).

Later that same month, Josh, then 19, pleaded guilty to one charge of distribution of child

pornography. He admitted that he sent the photo to two young women at his school, and that the

photo spread across social media thereafter ("Second young man pleads guilty," 2014). Two

months later, Judge Lenehan sentenced him to one year of probation and required him to submit

a DNA sample to a national databank. Noting that this young man "stole from [Rehteah] her

dignity, privacy and self-respect," Lenehan offered a broader contextualization of the entire case:

> "I suspect that through this process and the notoriety of it, there have actually
> been a number of people saved from the humiliation that Ms. Parsons suffered.
> It's tragic to think that it took her (death) before anyone really listened" (Bruce,
> 2015).

So ruled, the judge also ordered Josh to take part in the provincial sexual offender treatment program and receive mental health counseling. At trial's end, Josh apologized, noting, "If I knew what one picture could do, there would not have been that one picture" (Bruce, 2015). Indeed, all it took was one picture to end Rehteah's life, and one picture to vindicate her death.

What Counts as "Evidence"?: Gatekeeping in Law

With an understanding of the work conducted by Snair and the RCMP/HRP and a deeper contextualization of the case than condensed media reports, I now turn to consider the ways the case progressed in attempting to meet the various evidentiary burdens in both offenses. In analyzing these evidentiary burdens, I highlight how law enforcement determined what counted as evidence and whether charges could be made based on the "reasoned" interpretations by authority figures. I also critique what counts as "viable" evidence, as law enforcement failed to consider and include the ongoing harassment Rehteah experienced online, which she documented and shared with the RCMP.

Throughout the investigation into the alleged sexual assault of Rehteah Parsons, numerous problems emerged in the collection of evidence and its interpretation. While the Segal Report (2015) reveals that the RCMP rightly concluded that there was not enough evidence to lay charges in the sexual assault offense, it also highlights numerous areas where police and prosecutors acted as gatekeepers based on personal discretion and their interpretations of the law. This is not to say that any of the authority figures were wholly "wrong" in the process or in their interpretations, but rather that a greater duty of care was not exercised during the process with respect to the exigent issue of cyberbullying and the year-long torment Rehteah suffered.

While Rehteah did not report the alleged rape until after she learned of the circulation of a photograph depicting her engaged in a sexual act to which she did not recall consenting (Milton

& Pepler, 2015), the lack of broader contextual evidence became a central consideration in whether to lay charges in the sexual assault offense. Without more detailed testimony from witnesses and suspects, which Detective Constable Snair had tried to obtain over a series of months (Segal, 2015), there was not enough "hard evidence" to move forward with charges. As the Milton and Pepler report (2015) makes clear, Rehteah's school, Cole Harbour, stymied Snair in her attempts to interview potential witnesses and suspects. Cole Harbor school administrators knew about the seriousness of the allegations, but took no further action because Rehteah transferred to another school as the investigation ensued (Milton & Pepler, 2015). As a result, school administrators ignored any accountability to their former student, Rehteah, and also asserted authority in ways that inadvertently protected bystanders from being more involved in the investigation. Therefore, when Snair sought interviews directly with individuals, the added "veil of deniability" cast by Cole Habrour administrators contributed to a reduction in personal accountability in bystanders and a reticence to participate, as the interviews and the investigation were not deemed crucial enough to warrant broader attention. Even when reports of bullying and cyberbullying surfaced, school administrators remained uninvolved and did not share this information with any of the three schools Rehteah had subsequently transferred to over the next year (Milton & Pepler, 2015).

Coupled with the lack of DNA evidence, Rehteah's memory issues due to intoxication, and inconsistencies between her first and second statements, the lack of witness/suspect testimony became the death knell for the sexual assault charge in the investigation. When Snair met with Crown counselor Shauna MacDonald to seek guidance about potential charges, MacDonald made it clear that there was no reasonable prospect of a conviction since there was reasonable doubt as to Rehteah's credibility, especially when compared to the testimony

obtained from Lucy (Segal, 2015).[31] Even though Snair collected a great deal of evidence in

obtaining the photo, text messages, and some testimony, the suspects' phones and digital traces

of the photo were never obtained during the initial investigation. Curiously, digital information

on Facebook, Instagram, YouTube, Twitter and other online sites was also *not* included as

evidence, even though Rehteah collected, preserved, and shared it with police over the course of

the year-long investigation (Ross, 2013). Instead, the information from online sources was met

with either skepticism or outright dismissal, as police and prosecutors focused exclusively on the

evidence Snair obtained in-person during the investigation (Segal, 2015).

Furthermore, even if legal procedures mandated strict protocols in the collection of

evidence, the Segal and the Milton-Pepler Reports highlight that authority figures at all levels

largely ignored the seriousness of the cyberbullying, *even as it was connected to the case*.

Casting "evidence" as only that which could be obtained through in-person seizure, the police

fundamentally failed to consider the digital information online that may have related to the case

and could be captured and preserved in the same way that the cellphone data was during the

investigation. As a result, police reproduced the "culture of skepticism" even as they had reason

to believe the digital information might pertain to the case.

It is perhaps ironic, therefore, that digital information shared online on the boys'

Facebook pages and Rehetah's social profiles became the impetus for reopening the case after

Rehteah's death. As Anonymous threatened to expose the alleged rapists and called others to put

pressure on the police through the #OpJustice4Rehteah hashtag that trended on Twitter,

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[31] Lucy was a friend of Rehteah's who attended the party with her. As previously noted, she and her mother attempted to remove Rehteah from the house that evening, but Rehteah claimed she was "too tired" and did not leave with Lucy and her mother (Segal, 2015). It appears that Lucy provided a more lucid account of the evening, having consumed significantly less alcohol than Rehteah, though, by the reports obtained for this analysis, there is no definitive way to know the accuracy of Lucy's account compared to the other testimonies obtained by Detective Constable Snair.

crowdsourced morality manifested in intense public scrutiny directed toward the RCMP online and offline. As the RCMP received both the Facebook email that Josh sent to Leah Parsons *and* the package of digital information mined across various platforms and electronically delivered to police by Anonymous (Ross, 2013; Segal, 2015), it is no surprise that the RCMP was suddenly "compelled" to reconsider the case as crowdsourced morality placed social pressure on them to act or face greater embarrassment. Though the RCMP claimed new evidence emerged that wasn't from online sources, a review of the Segal Report (2015) makes it clear that Josh's email rekindled the investigation.

Despite this reversal of policy and the subsequent convictions, Crown counsel initially acted as a gatekeeper in the laying of charges in the creation and distribution of child pornography. Again, when Snair and her supervisor, Legere, discussed the case before meeting with Crown counsel, they believed they already had enough evidence to warrant laying these charges (Segal, 2015). Yet, after the meeting, Snair was left with the impression that the Crown was "not willing" to proceed with the charge of child pornography due to concerns surrounding identification of the individuals depicted (Segal, 2015, p. 19). A day later, Snair's impression was solidified after a conversation with junior Crown counsel, Peter Dostal, who explained that, without the underlying allegation of sexual assault, the case appeared to fall to a "personal use defense" that would nullify the charge of child pornography (Segal, 2015, p. 22). Yet Dostal and his supervisor, senior Crown Craig Botterill, overlooked the fact that the photograph was *not* for personal use, as it was distributed to numerous individuals without the knowledge or consent of all parties depicted (White, 2015). Indeed, with the photo publicly disseminated the day after the alleged rape, it became the primary means through which others engaged in crowdsourced morality to shame and torment Rehteah first at Cole Harbor High and then as she transferred

from school to school to school. In relying only on the circumstantial evidence collected by

Snair, then, the prosecution foreclosed possibility of the child pornography charges until "new

evidence" emerged that was, paradoxically, already part of the investigation.

Once again, the gatekeeping role that authority figures exercise fundamentally shapes the

constitution of evidence, as well as its preponderance. Relying on law, legal procedure, and

personal discretion, police and prosecution construct and reconstruct a case through the

collection and codification of evidence that nonetheless still may not fully capture and

contextualize the case. As both the victim and evidence are subjected to diverse interpretations in

the ongoing process of an investigation, institutional and popular influences of "rape" and "rape

culture" continue to affect the laying of charges and also inflect a patriarchal understanding of

the law. Indeed, while Rehteah's statements may have been inconsistent, as many rape victims'

statements can be after experiencing such trauma (Benedet, 2010; Johnson, 2017; Randall, 2010;

Yung, 2017), the dereliction of duty to protect Rehteah by including the ongoing digital

information she collected *during* the initial investigation remains a haunting reminder that those

in authority control the flow of information, what counts as evidence, and whether a case ever

sees trial.

In the end, both child pornography convictions were hollow victories for Rehteah and her

parents. They could not reclaim their loss, but in their loss, were able to spark provincial,

national, and international conversations about cyberbullying. Compelled by Anonymous and the

power of crowdsourced morality that targeted the RCMP, the Nova Scotia provincial

government responded to the tragic death of Rehteah by introducing the Cyber-safety Act days

after her death. While not a remedy to her alleged rape and death, the passage of the bill

remedied what authority figures believed to be the most exigent and salient issue overlooked in the investigation: online harassment.

Cultural Shifts in Sharing Information: Lessons from the Cyber-safety Act

As digital media and the social web have produced an "always on" media landscape that casts any digital disclosure as "public by default, and private through effort" (boyd, 2012), crowdsourced morality has become an outcome of the intersection of what technology allows for and various human desires and drives. Consequently, Rehteah's image became a public spectacle the moment it was shared without her knowledge or consent. From there, as with the imagery of Nikki Catsouras and Oscar Grant, the image spread due to its graphic nature, allowing individuals the opportunity to imbue it with their own thoughts and beliefs in the "middle ground" of digital space and then to victim-blame and, therefore, dehumanize the person behind the image.

The passage of the Cyber-safety Act into law, therefore, sought to ameliorate the numerous failings by law enforcement in the Rehteah Parsons case by ensuring greater protections for individuals and their information online. The Act established a special taskforce known as CyberScan and imbued this unit with the powers to identify, pursue, and penalize online offenders through protection orders (*Cyber-safety Act*, 2013). The Act afforded police a more discernable presence online that, it was thought, would curtail harassment online. It also expanded the power and authority of police into digital space, an environment that no law had previously ever fully addressed, leading to new tactics of surveillance, data collection, and punishment that, however, the Supreme Court of Nova Scotia would find infringed upon individual rights to life, liberty, and security of the person.

CyberScan became fully operational in September 2013. A new unit of the local RCMP, its primary mission was to "provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying" (*Cyber-safety Act*, 2013, p. 2). The Cyber-safety Act (2013) defined cyberbullying as

> any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way.

So defined, the law allowed individuals (legally referred to as applicants) to seek protection orders from the CyberScan unit if they could demonstrate harassment online from a bully (legally, a respondent). If issued, a protection order had wide ranging powers including: the ability to restrict the actions of the respondent(s); public identification of the respondent(s); allowing suit of the respondent, and, if the respondent was a minor, holding parents liable for the damages; and, in extreme cases where the respondent failed to curtail his or her behaviors, confiscating, for a limited time, that respondent's phone and other electronic devices, as well as requiring the respondent to "discontinue receiving service from an Internet service provider" (*Cyber-safety Act*, 2013; "New anti-cyberbullying act," 2013). Police, therefore, had greater power and authority to intervene on the part of victims, where they were previously restricted in law; and victims legally had a right to sue for damages if they could adequately demonstrate harms in tort.

Between September 2013 and December 2015, Nova Scotia regulated cyberbullying, as the Cyber-safety Act initiated new legal procedures for assessing tortious damage in online communications and harassment. In one high-profile case, actress-turned-politician Lenore Zann

sought a protection order after a teenager posted a topless photo of her on Twitter and refused to take it down. After working with the CyberScan team and police, who apparently intervened in a more informal fashion by speaking with the teenager and his parents, Zann dropped her complaint (MacDonald, 2013). In another instance, however, the owner of Halifax's largest tabloid magazine, Parker Rudderham, attempted to bring suit against a Cape Breton woman and her son for "cyberbullying" tweets about him (Kimber, 2014). The definition of cyberbullying in the Cyber-safety Act was broad in its scope and interpretation, and it became increasingly unclear where free speech stopped and cyberbullying began. Even as Roger Merrick, the CyberScan Team Director, and his team actively worked to dismantle cyberbullying cases informally through one-on-one discussions with individuals and educational efforts, the law was met with concerns about infringement on freedom of speech.

In August 2015, the law met its first constitutional challenge. In this particular case, Giles W. Couch sought a protection order from the CyberScan Team when he noticed that his former business partner, Robert Snell, began posting vague, threatening messages he felt were aimed at him (*Couch v. Snell*, 2015). Mr. Couch was granted a protection order *ex parte*, without notice to Mr. Snell, after police reviewed numerous messages posted by Mr. Snell from July 2014 to December 2014. Thereafter, the protection order prohibited Mr. Snell from engaging in cyberbullying of Mr. Couch, directly or indirectly communicating with or about Mr. Couch, and implored him to remove all comments from social media that might be directly or indirectly associated with Mr. Couch (*Couch v. Snell*, 2015). When Mr. Snell did not remove numerous messages, Mr. Couch took him to court, and the case made it to the Supreme Court of Nova Scotia.

After review of the case, Honorable Justice Glen G. McDougall found that neither the plaintiff nor the defendant were beyond reproach in their online communications (*Couch v. Snell*, 2015). Yet, he found that Mr. Snell's actions online had, in fact, crossed a line when they intended to embarrass and shame Mr. Couch prior to a CTV News interview to discuss cyber security. At that time, Mr. Snell posted on his Google+ account, "That is brilliant, almost like asking a plumber for medical advice. #news." Snell posted such messages across all his social media, and the veiled messages appeared to attack Mr. Couch for months. Consequently, Justice McDougall ultimately decided to reconfirm the protection order on August 25, 2015, citing that "Mr. Snell engaged in cyberbullying of Mr. Couch […] and that behavior was likely to continue" without the protection order (*Couch v. Snell*, 2015, p. 19).

Still, Justice McDougall also found the definition of "cyberbullying" too broad and vague. Questioning the legality of the application of the law, McDougall argued that the definition itself did not necessarily include the role of malice—the desire to do harm or cause mischief to others. Instead, he noted that "the statutory definition of cyberbullying includes conduct where harm was not intended, but ought reasonably to have been expected," thereby opening the law to a constitutional challenge (*Couch v. Snell*, 2015, p. 21).

Upon further review, McDougall struck down the law. Citing concerns with the arbitrariness, overbreadth, gross disproportionality, and vagueness of the law centering around the definition of "cyberbullying," McDougall outlined the numerous ways the law, while well meaning, infringed upon freedom of speech. In particular, he found that, without a clear definition of cyberbullying that included malice and clear mechanisms to remedy and prevent cyberbullying, the law was too imprecise to warrant even a temporary stay of it (*Couch v. Snell*,

2015). So moved, the CyberScan Team could no longer conduct investigations, leaving roughly 20 active cases in limbo at the time the law was overruled (Corfu, 2017).

Since the law was struck down, there have been rumblings in Nova Scotia to revise and revive the law to protect both youth and adults. In fact, as of this writing, legislation has been discussed and is to be introduced later in 2018 (Gorman, 2017). Yet, of fundamental concern, whether the new law is passed or not, is the ongoing tension between freedom of speech and governmental control. Any new iteration of the Cyber-safety Act will continue to contend with the thin line between personal expressions, arbitrary social rules of appropriateness, and government authority to determine what is and is not acceptable.

While the Cyber-safety Act was well intentioned, and while any new law will likely be in the same vein, the policing of expression online fundamentally threatens free speech when it attempts to prevent individuals from expressing their thoughts. Regardless of whether that speech is personal opinion or borders on hatespeech, freedom of speech protects individual expression in person and online to the extent that it is not wholly inflammatory, an incitement to violence, or outright hatespeech in most Western democracies. Of course, where threats are made online and become perpetual and personal to the point of destroying the safety, dignity, and respect of the individual, the law should expand to protect the individual, especially if there is a "gap" in law that does not fully ensure legal protections. In Rehteah Parsons' case, however, it was not the absence of law that failed her. Rather, it was the failure by police to account for digital information in an ongoing practice of unequal application of laws that were already in place and the failure of will to enforce them with a duty of care to Rehteah that led to the failure of law and law enforcement to protect her and her family. Thus, the creation of the Cyber-safety Act was (and any new iteration(s) will likely continue to be) a response to the public outcry for

justice to be served where law enforcement had failed. Instead of looking to new laws, however, justice can already be served *if* attitudes and ideas about sexual assault, evidence, and the role of bystanders change on the part of those charged with enforcing the law.

Resulting Action, Waiting for Resolution

In an attempt to understand the extent of the problem and address it, the Nova Scotia government, in 2013, mandated external reviews of the local schools and the RCMP/HRP. These reports clarified where mistakes were made in the process. The Milton-Pepler Report (2015) addressed numerous areas where Nova Scotian schools needed to do a better job of handling harassment and sexual aggression. The Segal Report (2015) addressed the failings of the police to exercise greater duty of care to the victim. Notably, the Segal Report provided 17 recommendations from improvements to policies, evidence collection procedures, and actions relating to cyberbullying and sexual assault. The Attorney General of Nova Scotia has since fully implemented almost all 17 recommendations outlined by Murray Segal and displays them on its website (*The Crown of Nova Scotia*, 2017).

While acknowledging systemic problems can help to fix law for the future, the law is still too slow to address the exigent harms faced by those threatened by the spread of personal or otherwise private content across the public spaces of digital media and the social web. As previous chapters indicate, when content is shared across digital media and the social web, it is cast and understood in visuality that allows individuals to interpret and create context in "middle ground" and also to engage it with reduced personal accountability to the individual(s) depicted. So if law alone cannot solve the contemporary problems we face with digital media and the social web, what recourse is there?

Looking to our contemporary moment, there are numerous responses to the misapplications of legal recourse, but they, too, are problematic. As a response to cultural and institutional skepticism with respect to the victim, the heightened evidentiary burdens for rape cases, and the lack of formal charges for alleged rapists, victims have turned to social media to unite with others and mete out justice in the absence of adequate legal statutes to prevent abuse. Born from the October 2017 revelations of Hollywood producer Harvey Weinstein's sexual misconduct and the call to action by the actress Alyssa Milano who encouraged women to share "Me too" in their status updates and tweets online, the #MeToo movement has become a collective force aimed at problematizing rape culture and exposing perpetrators in all arenas of society across the United States, Europe, South America, the Middle East and beyond (Kohmami, 2017). The #MeToo movement has galvanized women and men into speaking out about the abuses they have faced and endured with the aims of bringing justice to bear on the men who perpetrated it *and* facilitated it. As a result, numerous Hollywood producers, executives, and actors, as well as politicians, television hosts, athletic coaches, and university officials have come under intense scrutiny for their actions and past conduct that directly or indirectly supported these abuses.

Notably, the recent conviction of former USA Olympic gymnast team doctor Larry Nassar of child abuse and sexual assault highlights the magnitude of the #MeToo movement in shaping the discourse of sexual assault in the United States. After more than 150 women and girls testified in court that Nassar sexually abused them over the past two decades, he was sentenced to 40 to 175 years in prison (Levenson, 2018). Thereafter, the domino effect took hold. USA Gymnastics cut ties with the Karolyi Ranch in Texas, which had been the official US Women's National Team Training Center since 2001. The entire board of USA Gymnastics

stepped down at the demand of US Olympic Committee (USOC) Chief Executive Scott Blackmun. The USOC has also called for an independent third-party investigation to examine the institutional practices that allowed the abuses to go undetected for so long. Under public pressure that the school response was not enough, Michigan State President Lou Ann Simon resigned, as well as three other athletic officials at the school (Hanna, 2018). Additionally, the NCAA began investigating Michigan State for its handling of the allegations against Nassar to see if it violated any of the national organization's rules. Numerous civil lawsuits against Michigan State and USA Gymnastics have also been filed, each further examining the extent of culpability and each further kindling the fire of #MeToo as more and more women and men speak up about sexual assault.

In a similar fashion, the "March for Our Lives" movement that spread across Facebook, Twitter, and Instagram has heightened awareness of concerns around gun violence. A response to the shooting on February 14, 2018 at Marjory Stoneman Douglas High School in Parkland, Florida that left 17 people dead, the movement has united people to formally protest in Washington, DC on March 24, 2018. It has also united people across social media platforms and encouraged them to engage their politicians who have failed to pass any gun restriction legislation over the past two decades. In particular, CNN moderated a live town hall on February 21, 2018 where survivors of the shooting decried Florida Senator Marco Rubio for his historic support of unrestricted access to guns, and NRA Spokesperson Dana Loesch for inciting violence in her numerous videos, tweets, and public appearances. Additionally, the formal protest inspired concerned citizens across the United States to do the same at their state capitals, leading to over 400 citywide protests. In uniting with Everytown for Gun Safety, a nation-wide volunteer movement founded on ending gun violence, the March for Our Lives movement has also

increased the visibility of the sensible gun law platform online amongst teenagers, young adults, and parents who now follow and subscribe to Everytown's updates on social media and in text messages. With over 500 thousand protesters marching in Washington D.C. and thousands more marching in other cities in the United States, the March for Our Lives movement, like the #MeToo movement, appears to be gaining momentum as more and more people converge through technology to collectively reshape the discourse of gun control.

While collective organizing through social media hashtags appears to serve social justice and possibly create resulting action *when* individuals form collectives online and engage collectively offline, it is not without its potential complications. Collective organizing enables individuals to collectively argue for greater protections through mounting social pressure. Yet, it becomes a form of crowdsourced morality when it results in indictments of the totality of any individual and their family and friends without a greater awareness of context or by denying context altogether. In particular, while the #MeToo movement has ushered in a tide of ousters for many who have engaged in sexual harassment and/or sexual assault, some questionable indictments have also emerged. In Canada, the Progressive Conservative (PC) party leader, Patrick Brown, dropped out of the Ontario PC leadership on January 24, 2018 race after months of refuting what he has called "false" and "slanderous" misconduct charges (Blackwell, 2018). Whether the allegations are true or not, as they remain unproven at the time of this writing (Wallace, 2018), outraged individuals and constituents have shamed, verbally attacked, and threatened Brown and his family through tweets and Facebook messages (Blackwell, 2018). Though no one has physically attacked Brown or his family at this time, the allegations have had a dramatic effect on the Brown, the Ontario PC party, and Ontario that highlights how crowdsourced morality affects individuals, collectives, and society. As users exercise their

democratic rights, therefore, they must also be careful to allow everyone—public figures, private citizens, public and private institutions, accusers and the alleged accused—the opportunity for a swift and fair review.

Where collective organizing from online to offline falls short, other options include redesigning technology, in part, to respond to prevailing social concerns like skeptical sources of information, as well as policing content on social media. Facebook, for example, has recently updated its algorithms in an attempt to decrease the amount of posts users see from brands, businesses, and media (Wagner, 2018). In promoting posts from family and friends, the site is attempting to address the abundance of Russian-backed sources of information that promulgated the site during the 2016 election. Additionally, Facebook, Google, and Twitter, are currently redesigning their dashboards to label the source of campaign advertisements in similar ways that are standard in broadcast commercial advertisements (Romm & Wagner, 2018).

Additionally, Twitter, Facebook, and Instagram attempt to police "inappropriate" content through the usage of "terms of service" and "community standards," as well as "concern reports" that allow any individual to report content she or he finds objectionable. In particular, Facebook launched a pilot program at the end of 2017 where users volunteer full, uncensored nude images of themselves, which are then reviewed by Facebook workers. After a "fingerprint" of each submitted image is created, Facebook workers—not an algorithm—then track similar images and determine if malicious posts by other users qualify as revenge porn (Cox, 2017). Facebook claims that the full, uncensored images will only be held for a limited time, and that they will be blurred after they've been entered into the database that only a limited taskforce of workers can access. The irony, of course, is that a person must submit an image of herself or himself, and thereby publicly expose herself or himself, in order to *potentially* protect or regain her privacy.

Yet, the (absent) presence of authority does not wholly inhibit people from sharing content online freely and with reduced personal accountability to others. Individuals still share content that, 20 to 30 years ago, could never have had as vast an audience as it can today. Moreover, content that is shared is subject to interpretation and wide sharing. What one finds offensive, another may not. As a result, at least as far as organizational authority goes, unless the content depicts harm to or the death of an individual, it remains visible on these platforms, and it is further shared across connective media potentially into perpetuity.

Where organizations are limited in policing content on their platforms, individuals and collectives increasingly monitor content and engage in crowdsourced morality. When content is not removed after it is flagged for review by site authorities, individuals and collectives can either demand the content be removed or attempt to contextualize the content and fend off those who attempt to shame and dehumanize the individual(s) depicted and those with whom they associate. In the former instance, for example, YouTube users shamed Logan Paul into deleting a video that he created wherein he makes fun of the dead body of a Japanese man he and his crew found in Aokigahara, Japan's "suicide forest" (Griffiths, 2018). In the latter instance, comparably, numerous fans of Maddie Ziegler, pop star Sia's famous dancer, came to her defense on YouTube, Facebook, Twitter, and Instagram when a video of then 13-year-old Maddie flashing her breasts was leaked after her iCloud was hacked (Garrett, 2016). As the video spread, fans collectively organized to report the content and compel users and sites to remove the content, as the video was child pornography.

Beyond engaging through technology, reconfiguring it, and policing content, as a society we can teach greater media literacy and encourage better understandings of consent. In the former, individuals need to gain greater skill in learning to contextualize information and

determine the merits and credibility of content. In the latter, individuals, not just men, need to better understand and then accept whether someone wishes to mutually engage in an activity *and*, more important, whether content should be shared in the first place if another person has not authorized it to be shared.

Whatever we as a society ultimately decide to do, it must be done it with respect for one another. In casting others and ourselves in visuality, our reality of others and ourselves around us becomes obscured to the point that we easily dehumanize each other without thought to the effects of our actions. Only when we decide to recognize each other as humans and not as imagery, content, and data can we begin to change.

CHAPTER SIX: HANUNTED BY SPECTERS,
WE ARE THE SPECTATORS

Digital media and the social web continue to challenge the ways we understand self, other, society, and the world around us. As we have become spectators observing each other through connective media, we engage each other at a distance that not only affords each of us greater convenience in choosing when, where, and what to communicate to others, but also a greater disassociation from one another. Individuals increasingly engage digitally, and as they do, they disengage interpersonally. Users of social media construct and curate images of themselves, communicating to one another through their profiles. Users contribute to the construction and (de)contextualization of one another in what they share about each other, and users are duly shaped by what others share about them.

As our identities become increasingly projected onto the screen, we become commodified assemblages of the content shared by others and ourselves—continuously manufacturing the self as information for ongoing consumption by others. Whereas, in the past, the process was an active construction on display in physical public spaces accompanied by physical gestures and adorning the body in clothing by organized by social station to differentiate the self, today the process is less discernably dichotomous by class, more diffuse across space and time, and more rapidly engaged. Digital media and the social web collapse the space between public and private, making *all* content shared online "public by default, and private through effort," this is true even when someone shares content without the expressed permission, consent, or knowledge of the subject of that content.

A consequence of the aforementioned "participatory condition" and shifting understandings of socialization enabled by our usage of digital media and the social web, this dark turn in communication online highlights the central problem of "visuality as reality" that increasingly organizes our relationships with self, other, society, and the world around us. Supplanting embodied, face-to-face experiential engagement for online communication that features the visible and often renders text subservient, nuanced practices of communication online not only drive users into further physical isolation from one another, these practices also contribute to greater selection and confirmation biases that encourage "truthiness"—personal feeling over recognition and acknowledgement of others. Users deny each other's presence, they participate with abandon, and only when (or if) they are confronted with the reality of the consequences of their actions do they take pause to consider what is wrong with how they interacted with one another. This is the process I call crowdsourced morality and it not only infuses all of the cases I explore in this dissertation, it also permeates our contemporary moment and requires deeper consideration of the precarious position of privacy in modern Western societies at the interpersonal, organizational, and cultural levels.

Before I go on to discuss the broader social dimensions of the project, I will first explain the delimitations and limitations of this project. After contextualizing the parameters of the project, I explore avenues for future investigative research and practical engagement. Finally, I conclude with some parting thoughts about the ways connective media affect us interpersonally, organizationally, and culturally.

Delimitations and Limitations

I made deliberate choices that focused the work and influenced the interpretations in the course of developing this project. In choosing case studies where nuanced communication

practices and technology engendered newer tensions between law enforcement, law, and citizens, I focused on extreme examples where death, race, rape, violence, and threat of violence were highlighted. While I chose these case studies to highlight the failures of law, law enforcement, and individuals in accounting for the physical presence of the source/body behind/beyond the screen, I recognize that these extreme examples are not wholly representative of broader legal discourse and legal resolution in the United States and Canada, nor the experiences of all users of digital media and the social web in contemporary Western societies. Indeed, each case study in this work is but a snapshot in time that attempts to crystalize the state of law in conceptualizing public and private and the ramifications of such interpretations in law for our contemporary moment and the future, and only in contemporary Western societies.

In choosing these case studies, then, my aim was to highlight, describe, and consider the severe consequences posed to any individual when the social contract and the mechanisms and apparatuses that support it fail. As a result, I recognize that my analysis may appear morose and alarmist at times, even though my intention was to expose the devastation wrought by such failures and the uncertain ways law enforcement, law, technology, and individuals and collectives respond now and into the future. In providing a deep description of each case through resituating the scene of each tragic event, then, my aim was to humanize the victims and those associated with them by describing the loss, damage, and harms as it affected the victims and those associated with them. Yet, words alone cannot capture all the action, and I realize that I was not able to fully illustrate nor describe all the ways individuals and collectives beyond the victim and her or his family and friends engaged in acts of resistance, remembering, and forgetting.

Additionally, in highlighting the perils of each tragic event, my theory of crowdsourced morality illuminates a more negative valence than the conceptualization may actually entail. Since I started this project, social movements such as Me Too and March for Our Lives have emerged that—while I label them as collective virtual organizing here—broaden the conceptualization of crowdsourced morality in so far as they, too, use imagery and the collective leveraging of morality to foment engagement and action online *and* in person. In recognizing these movements and the ways that they encourage users to engage online and then collectively organize as individuals in person, I see that the theory of crowdsourced morality may, in fact, entail a broader neutral valence that encompasses both positive and negative aspects as it is taken up in particular practices, on particular platforms, and as it enlists imagery to encourage greater collective action where law has failed to address systematic and historic abuses and harms.

Beyond the negative valence of crowdsourced morality, I recognize that my historiographical account of public and inflect a noticeably soft-technological determinist framework. While these interpretations serve my project, as each case study looks at the intersection of technology and law in accounting for public and private information, I recognize that public and private carry different interpretations in various contexts. Yet, as a consequence of the participatory condition we occupy where digital media and technology structure so much of the modern world and continue to envelope more and more of it, I stand by my interpretations as I believe they elucidate deeper considerations of public and private that society needs to consider and embrace if there is ever to be greater change in creating privacy as a collective value that can become further enshrined in law and protected and policed by collectives.

Finally, since I started this project, social media have shifted from spaces of sociality to spaces of greater curation, branding, and surveillance capitalism. As platform developers such as

Facebook, Google, and Twitter have developed over the past 20 years, each has increasingly commodified users by codifying them in capturing their behavioral data on their sites, across other sites, and in responses to content through reaction icons and nuanced sharing practices enabled by the technology in use. As a result, spreadability of content has become less a means of social connection—of which social media were founded on—and more of a mechanism through which developers, advertisers, researchers, and other third parties monitor, itemize, and manipulate individuals and collectives with profound effects interpersonally, organizationally, and culturally. While I am aware of these changes and further intrigued by the current developments and sociopolitical effects of this shift as witnessed in the coverage of Facebook and Cambridge Analytica, at the time of selecting and writing up each case study for analysis, I was not inclined to focus on the "anti-ethics" of developers and other related entities. Given the parallels between these developments and my work, however, my future research will trace the technical, social, and political continuities of these shifts as they, too, profoundly shape interpretations of public and private.

Future Research

With an understanding of the parameters and limits of this project, it is clear there are many avenues for future investigative research and practical engagement. Future research should consider, contextualize, and juxtapose broader interpretations of public and private from other modern democracies. Countries like Germany and Japan, for example, champion privacy as a greater collective value by enshrining it in laws that provide greater legal protections and control for individuals in how and where their information and imagery are used and distributed. Japan, in particular, relies on a collective understanding that one must obtain the consent of anyone that can be easily identified in an image before that image can be posted online. If one cannot obtain

the consent of the person(s) in the image, he or she can only post the image if they somehow obscure the face, body, or presence of the person(s) who did not consent.

Additionally, as noted in the previous section, future research should trace and describe the historic shifts and continuities of social media and the ways surveillance capitalism has influenced content creation and circulation, as well as understandings of public and private information. Given the revelations of the Cambridge Analytica data breech on Facebook, and the likelihood that other sites and platforms such as Google, Twitter, and Amazon, also expose personal information of their users to threat of capture, itemization, and manipulation, future research might turn a critical lens on the ways developers and corporations negate and erode privacy through near incessant tracking and monitoring. Future research might also critique the ways such practices fundamentally alter democracy by always already potentially delimiting the ability of any citizen to express himself or herself without threat of exposure that may silence him or her.

Beyond investigative research, this project highlights numerous areas for practical engagement. Because social media and visual technologies have become environmental through the "participatory condition" we occupy (Barney et al., 2016), interventions should be made in at least three places where they may secure greater change in resituating privacy as a collective value: schools, law enforcement agencies, and social media. Schools are centralized locations of education that inculcate and instill knowledge and values that make adolescents and young adult productive citizens of the State, as Foucault reminds us. Yet, they are also places of sociality and socialization where communication online poses dramatic effects in person. In sharing this work with students through workshops, public speaking engagements, and public performances, I

believe this work can help adolescents become more informed about their sharing practices and the effects these practices have on others and themselves now and into the future.

Similarly, as police officers have struggled to control the spread and flow of imagery captured by others, I believe sharing this work with law enforcement agencies may help them forge better connections with the communities they serve. As this project makes clear, law fundamentally supports law enforcement in ways that appear problematic to citizens when there appears to be evidence that contrasts the allegedly detached authorial narratives of police officers. I therefore, believe that sharing lessons from these case studies with law enforcement agencies may help the distrust in authority that appears to be growing as digital media and the social web enable the spread of imagery and the crowdsourcing of morality.

Lastly, in light of the Cambridge Analytica scandal on Facebook, I believe this work can be shared with social media developers and engineers. While Mark Zuckerber and Sheryl Sandberg apologize for their 'optimistic belief' that connecting individuals across the world could not possibly lead to egregious violations of privacy or harm, it is clear that they were complicit in allowing capitalist interests influence their decisions to not provide greater controls for users. Regardless of if these platforms are 'free' and, therefore, allow developers and third parties to mine and use the data of users, they dramatically affect the ways individuals understand self, other, and society as the data stands in for the individual and can be used to manipulate the individual in turn. If social media developers and engineers will listen, despite the documented history of ignorance, then connection might be broadened to include greater considerations of privacy that allow an individual control over his or her information and the integrity of his or her image.

Contextualizing our Contemporary Moment

When individuals are confronted with content, whether acceptable or objectionable, individuals participate by treating it as information to be engaged or discarded, consumed and shared. Across digital media and the social web, users treat each other in much the same way. Relationships online are constituted as a series of interactions displayed on the screen *for others*, documented, disclosed, and disposable to vast audiences who are encouraged to participate without an awareness of the context of the interaction or the coherence of the person(s) depicted. User's visual representations stand in for their physical presence; they become the person, though they are not the person. Individuals appear to others across time and space in digital content, and as individuals do, they straddle the divide between how they appear and who they are. Flattened in imagery, users attempt to imbue our digital personae with "who they are;" they adorn our profiles in similar ways that we historically adorned the body for the public, using images, comments, and content to breathe "life" into an otherwise two-dimensional (tele)presence.

Lindsey Stone, for example, tried to highlight her sarcastic humor and wit when she shared a picture of herself flipping off the "Silence and Respect" placard at the Arlington National Memorial. Though only shared with her friends on Facebook, it was seen as objectionable after one of them shared it with another outside her friend group. In that moment it was stripped of context. Regardless of whether others believed the photo was inappropriate or not, its spread beyond its original context allowed others to objectify and demonize Lindsey as this wholly vile, unpatriotic figure. Cast as information in imagery and totally encapsulated in the image, the photo allowed its growing audience to create its own associations with the image through "middle ground." The audience cast Lindsey's image/telepresence as a "telefetish" by

imbuing it with their own beliefs and feelings about her actions and affectively and effectively encouraging others to do the same as the photo spiraled beyond Lindsey's control.

In supplanting the visual for embodied in-person engagement, the digital crowd engaged in crowdsourced morality. Organizing to shame Lindsey and to demand she lose her job—while never bothering to contextualize the event, question the authenticity of the image, or understand the person behind/beyond the visual frame—the digital crowd leveraged collective morality against a precise target it could label and shame. Lindsey not only lost her job, she also became a social pariah, as the image continues to follow her online to this day.

The tragic events surrounding the deaths of Oscar Grant, Nikki Catsouras, and Rehteah Parsons, similarly, highlight the contemporary obsession with visuality and the intrusive nature of crowdsourced morality. As each case study illuminates, visuality and digitally shared content in the form of videos, emails, and photographs fundamentally destabilizes the coherence of the individual(s) depicted. Physically distanced from those portrayed in imagery, the visual is substituted for the corporeal from, and as this occurs it becomes easier to dehumanize one another, to shame, to victim-blame, and to feel little, if any, accountability for what one says or does in response to the visual.

In Oscar Grant's case, "countersurveillance" videos contextualized the actions of authority figures in mishandling Grant. Those same videos, however, also affectively and effectively obscured the racism of Officer Pirone, which was not captured on film. Instead, the videos highlighted the naiveté of Officer Mehserle the moment he fired his gun instead of his taser and then twisted the coherency of the moment to fit prevailing anti-authority discourses in broadcast media. In this way, the videos performed the project of countersurveillance and contributed to a kind of crowdsourced morality seeking justice for the unnecessary loss of life at

the hands of those entrusted to protect the citizenry and society. Yet, in fixating on Officer Mehserle in the moment of the fatal shooting and solely blaming him, the digital crowd overlooked the broader context of the event that Officer Pirone fomented through his aggressive actions and overt racism. Crowdsourced morality, therefore, delimited the parameters of the case by flattening the circumstances of the event into a concise anti-authority narrative intended to (re)kindle racial tensions between the police and the policed in similar ways to the aftermath of the Rodney King Jr. beating.

Nikki Catsouras' death also highlighted the ways an individual becomes decontextualized as well as the effects such practices have on those affiliated with the individual. When Officers Reich and O'Donnell shared the images of Nikki, they cast her corporeal form as information to be consumed and discarded, and stripped her and her family of any dignity she might have maintained in death. Rather than elicit greater empathy for the tragic loss of life, the ways the images circulated manifest the perverse desires of those who encountered them in email and across social media in the process of crowdsourced morality. Appearing on death-porn sites, blogs, "private" Facebook group pages, and even in text messages later sent to Nikki's sisters, the images objectified Nikki as content intended to shock or elicit curiosity or perversely gratify. By supplanting corporeality with visuality, individuals not only claimed "freedom of expression" in sharing the horrific images, they largely denied any accountability for the emotional harms they inflicted and continue to inflict on the Catsourases as the images remain online even today.

Lastly, as the yearlong sexual assault investigation of Rehteah Parsons clarified, law and law enforcement failed to exercise a holistic duty of care to the individual, even when significant harms existed in content shared on digital media and the social web. While the RCMP and Detective Constable Patricia Snair followed protocol in investigating the sexual assault and child

pornography offenses, they ignored the ongoing torment Rehteah faced as the image of her alleged rape spread across her school and hometown to digitally follow her wherever she went. Rehteah could not escape the image, even as she transferred across three different schools. Instead, the image became the visual frame of reference that stood in for her presence and somehow became more important, the telefetish of crowdsourced morality that ultimately allowed others to shame her into suicide.

Stone, Grant, Catsouras, and Parsons, living or deceased, are the specters haunting our present moment. Their tragedies expose the ways individuals deny each other's presence through digital media and the social web as they suspend one another in imagery. In this conflation of visuality and the broader reality, users almost seem to forget that the physical referent—the object, figure, body, or person—depicted in the frame exists beyond the pixelated edges. Individuals fixate on these brief moments of capture, visualize them as all encompassing of that moment or those moments in time, and then project their thoughts, feelings, and beliefs on to them, as they are so easily enabled to as a circumstance of the "participatory condition."

The (Police) State

If digital media and the social web complicate earlier modern conceptions of self and other, they also challenge the ways we understand authority and State power. As we use digital media and the social web to share information about others and ourselves, we also use connective media to contextualize, critique, and destabilize the role, power, and presence of authority and State power in our personal lives and across society. Prompted to participate through the expansive array of digital media and social web available to us, we respond and inscribe ourselves into the social order through sharing and sharing in information that confirms or challenges our beliefs, values, and notions about society. This practice is not only

demonstrated in each of the case studies explored in this dissertation, it is increasingly

experienced in many places across the digitally connected world, especially in the emergent

divide between liberal and conservative ideologies that casts authority and State power as

increasingly contested spaces of order, safety, and security. Each case study highlights elements

of this emergent divide, drawing attention to the various practices individuals/citizens and

authority figures enlist in enforcing law.

Countersurveillance tactics, discussed in the chapter on Oscar Grant, stress the growing

concerns for how authority figures exercise "necessary force" and further demonstrate how

"sousveillance" operates to check police power, contextualize events, and challenge "objective"

authorial narratives. These ongoing "camera wars" between citizens and those representing State

power highlight a distrust of authority in equal application of enforcement, and offer a scathing

critique of those entrusted to enforce the law. If, on balance, citizens of diverse backgrounds and

ethnicities see, visualize, feel, and experience the application of enforcement as unequal in these

moments captured for others to see, can society trust the integrity of law and law enforcement?

Given the specters of Oscar Grant, Michael Brown, Eric Garner, and Walter Scott—all unarmed

black men killed by police officers in the United State in high-profile cases over the past five

years—among countless other shootings captured on film and shared across connective media

over the last ten years, coupled with reduced charges or "not guilty" verdicts for law

enforcement, the answer appears to be no. This is not to say that law enforcement is some great

societal ill out to get anyone who isn't white. Rather, it suggests that the historic origins of police

power are not wholly divorced from the application of enforcement today. Practices of law

enforcement appear to be entrenched. Ideas about race, ethnicity, and class continue to shape—

even if unconsciously—law enforcement, leading to concerns about how systemic the problem may be and what, if anything, can be done to solve it.

Likewise, concerns about the role of authority in protecting individuals from unnecessary harm, as well as institutional attempts to absolve guilt when harm occurred, further highlight distrust in authority to exercise a duty of care to individuals and their families. Unnecessary harm is observed in each case study, but it occurs in different ways and is absolved by authority and law through different practices. Where Oscar Grant was shot and killed, authority figures and the defense originally claimed the shooting was in "self-defense." Yet, as cellphone video showed that Grant was neither violent nor armed, authority figures later repudiated their original, default claim. Using the testimony of an expert in nonlethal force tactics, the defense worked to absolve Officer Mehserle of a duty of care, casting his dereliction of duty instead as a result of external factors at the organizational level.

Comparably, when Reich and O'Donnell shared photographs of Nikki Catsouras' dismembered body with friends and family through email, they did not exercise a duty of care to Nikki, her memory, or her family and friends. Instead, they acted without a full awareness of the eventual harm that would be caused if and when the photos spread beyond those to whom they were sent. Once again, law enforcement attempted to absolve itself not once, but twice. Initially, the Department of California Highway Patrol pardoned itself by conducting an internal review and claiming that the officers and the agency itself "broke no law" in sharing the photos. When the Catsourases challenged this claim and the case went to trial, the CHP absolved itself again. Claiming 11th Amendment immunity protected the CHP from monetary relief in suit, the defense was granted a motion for a summary judgment, which clarified that the CHP be absolved on the

grounds of the internal review and the disciplinary action administered at the organizational level.

Similarly, the RCMP absolved itself in Rehteah Parsons' case. In ignoring the cyberbullying Rehteah experienced and the digital evidence she collected and shared with the RCMP, law enforcement delimited the parameters of the initial investigation. Conforming to entrenched institutional ideas about sexual assault, the RCMP not only interpreted the sexual assault law within a narrow scope, it exercised tremendous authority in determining what counted as evidence, what charges were laid, and whether the case saw trial. Moreover, as the Nova Scotian Cyber-safety Act became law following Parsons' death, it failed to address the problems with the case itself: the unequal application of laws that were already in place and the will to enforce them to mete out justice. Thus, whatever becomes of any future Nova Scotia law, it should not surprise if, in part, it continues to be a performance of State power to account for its own failings when, instead, the State needs to address systemic institutional attitudes and ideas about evidence, sexual assault, and the role digital media and the social web play in (re)shaping ongoing investigations.

Where law defaults to protect and sustain State power in instances where authority figures are negligent, the deployment of absolution becomes a performance of denying culpability in the eyes of victims, their families, and the public. Such performances afford authority figures exemption, which appears contradictory to the role, power, and presence of authority, particularly as authority is entrusted and obligated to protect *everyone* in society, apply law *equally*, and uphold a duty of care to *all* involved. As harms occur—whether accidental or intentional and whether visible or inconspicuous—authority figures must fully recognize the power they wield and the ways their actions affect broader social understandings of their

presence and roles in the lives of all citizens. Authority figures must act with greater care in handling individuals and in handling ongoing investigations.

In an era where seemingly almost every action is subject to capture through digital media and the social web, citizens must also avoid collapsing authority figures as imagery and ascribing stereotypes to those who serve. While countersurveillance tactics expose the actions of authority figures for the public, the resulting photos, films, and voice recordings are still subject to distortion, decontextualization, and manipulation at the hands of individuals and organizations. Citizens must, therefore, critically contextualize the media they consume in order to better understand the event(s), the actors, and the actions taken. Becoming more literate by mining multiple sources, interrogating personal beliefs and the beliefs of others, and questioning the actions taken on all sides, citizens can resituate authority and State power by collectively uniting both through reformulated technology and increasingly in person with each other to reaffirm the meanings of order, safety, and security as conditions equally applied and granted to those who abide by the law.

Extended As We Are

In Greek Mythology, Narcissus was a hunter known for his beauty. Proud, he held disdain for any who loved him. He is said to have rejected all his suitors. Nemesis, an incarnation of Aphrodite as revenge, noticed Narcissus's strange obsession. She lured him to a pool where he glanced his reflection in the water and fell in love with it; not realizing it was merely an image. Unable to leave the beauty of his reflection, Narcissus stared longingly into the water until he lost his will to live.

Marshall McLuhan (1964) argues that the West interprets the myth of Narcissus incorrectly by assuming that Narcissus fell so in love with his image that he drowned. Drawing

connections to technology, McLuhan notes that the water performs as a technology—a mirror—that exteriorizes Narcissus's body. Seemingly extended elsewhere yet not really so, Narcissus became narcotized by his image, not because he was so in love with himself that he could not turn away; but rather, because the extension of himself provided a release from his embodied corporeal form. Narcissus was *narcotized* by the illusion of existing elsewhere, even though this meant that he effectively negated the reality of his material form in his watery transfixion.

In social media, which elevate the visual akin to Narcissus starring into the water/mirror, users become suspended in the image of themselves reflected outward into the wide waters of the world in their profiles; they perceive this image as a mirroring of themselves in digital media and the social web, as all that can be known or understood in the contemporary environment that constantly hails everyone to participate through sharing and sharing in information. Users also perceive others as their images, and they assume their presence in visuality, envisioning them as they visualize themselves projected on the screen and elsewhere.

Yet, like Narcissus transfixed by the watery extension of himself, users seem to ignore the fact that the projection on the screen and elsewhere is *only* an image. This Janus-faced representation of the self, of appearing both "materially here and seemingly there at the same time" in imagery, flattens physicality into a two-dimensional form by making visual data to be consumed in digital spaces. The visual reproduction is taken as a totalizing encapsulation of "the material trace of the object or person on the other end of the transmission" without acknowledgment of the broader corporeality not captured in the frame. Imagery in digital spaces, therefore, constitutes experience of self and other in a way that not only suggests that an image now stands in for full and immediate presence within a viewer's affective interpretations (Hillis, 2009), but also, *crucially*, as an otherwise precise target that points to the object or person(s)

depicted as the viewer objectifies the visual form in affiliation with or criticism of it. Imagery is no longer the capture of ephemerality, it is increasingly the containment of reality; it delimits, it divides, and it denies.

Preoccupied with image, users fail to see beyond the narrow frame, to see the damage they do to each other when they objectify one another as only that splayed on the screen. They deny each other's presence, and as they do, they grow more insular, preferring to keep to themselves and to give of themselves only in ways that they can control and only in ways that confirm what they believe. Individuals online become victims of themselves through digital media and the social web, and they make victims of those who do not conform to what they believe is "appropriate" or "right" without taking the time and energy to contextualize and understand one another. They grow more isolated and they encourage their insular interpretations in others, leading to greater selection bias, confirmation bias, and truthiness. As a result, society is dichotomized, and empathy, disagreement, and vulnerability are cast aside.

The aforementioned vociferous divide between liberal and conservative ideologies in chapter four—really, between one another—in the most recent US election cycle and in contemporary politics and everyday life illuminates the reality of crowdsourced morality at the cultural level. The idea that there are only two sides—that "you're either with us or against us"— is a false dichotomy that directs people to take sides for the purpose of weaponizing belonging (Brown, 2017). In occluding the reality that other alternatives exist, the dichotomy compels individuals to align with a particular idea or set of ideas and actively "other" those envisioned as oppositional through shaming. The results are a denial of broad informed discussion, a forgoing of engaged disagreement as a result of championing individual personal beliefs, and an erosion of civility due to the online denial of the humanity of "the other."

With digital media and the social web it is easier to economize physical distance and use it to constrain and contain relationships with others as individuals curate their images to appear as they wish to be seen. Individuals come to shield themselves from vulnerability. Words and images shared through connective media become a form of armor, a layer of protection from betraying the façades constructed for others and preventing individuals from seeing the direct, physical and harm caused to others. Rather than reveal ourselves to each other in the richness and complexity of our feelings and emotions online, which are nuanced and can be painful to express and confront, individuals insulate and hide from each other. In choosing to focus on themselves and in choosing visuality of experiential engagement, they dispense with civility and its necessarily more fully embodied dynamics.

Resituating Presence in Place of Absence

In exploring the numerous dilemmas society faces today with connective media, imagery, law, and police power, this work aims to resituate presence as a practice of engaging with one another and engaging with difference. Instead of looking to law or technology to save us, this work highlights the need for collective, embodied solutions through technology and in face-to-face interaction and organizing to help ameliorate the predicaments posed by the collapse of public into private by technology. In exposing the harms experienced by individuals and their friends and families, as well as the harms posed to context, fact, and truth, this work also highlights the need for greater empathy in how people relate to each other online and in person.

Rather than argue that individuals should resist Facebook and eschew all forms of social media, which is not realistic or really possible given the "participatory condition," this work turns attention to recognizing that everything is contextual and that context is the key to greater understanding. Society can and—per the "participatory condition"—must, enlist digital media

and the social web to foster and create greater connection and context. Individuals can start by using connective media to bring people together, from online to in-person. For example, Make America Dinner Again uses social media to connect individuals of different, diverse backgrounds for real, in-person dinners where all are invited to discuss their politics and beliefs so long as they are civil and respectful of each other. As its site notes, where there are avenues to protest, to donate, to fight, and to be heard, "Make America Dinner Again is an avenue to listen" (Make America Dinner Again, 2018). In encouraging embodied, co-present engagement and listening, Make America Dinner Again creates context for self and other as it attempts to instill greater empathy in individuals by asking them to get comfortable with the uncomfortable—by being vulnerable—in talking with others and respecting disagreement and difference.

Comparably, as individuals come together with others through the interplay of technology and crowdsourcing morality, movements can emerge when the visual spectacle in hashtags, memes, and images shared online carry over offline in physical, embodied actions such as rallies and protests. #MeToo and March for Our Lives, for example, encourage individuals and collectives to personally disclose their experiences in order to humanize the victims and survivors of violence. In owning their stories and willingly sharing them with others through technology, victims and survivors use vulnerability to resituate the visuality of the body as it is marked by violence and the harms of inaction. This self-disclosure, in turn, invites others to empathize and self-disclose, broadening the visibility of the movement and further amplifying the call to action for greater accountability in law and in authority figures and bystanders.

Connective media can also be used to clarify context, resituate fact, and challenge dehumanization. Facebook, Google, and Twitter, as mentioned in Chapter Five, are implementing changes to their services that will reconfigure the visibility of content, as well as

label questionable accounts and sources of information. Technology can, therefore, be designed or reprogrammed, in part, to help individuals better understand context and help protect individuals from having certain personal information massively publicized. Though, as the news of data aggregation by Cambridge Analytica on Facebook in 2018 highlights, redesigning the technology itself may not be enough if users themselves do not change their attitudes toward their information and the ways it can be used, managed, and manipulated by others. As a society, then, we need to change how we engage with each other through digital media and the social web by resituating context, disagreement, and presence.

Interpersonally, because nuance in argument is unclear online due to lack of nonverbal cues and because crowdsourced morality affords individuals greater opportunities to take content out of context, individuals can question the content shared and ask questions of each other online and in person. When individuals do not ask questions, they become bystanders who merely observe. As bystanders, individuals perpetuate problems through their silence, which not only implies acceptance, but also further affords a vocal minority the power of appearing as the majority. In this complicity, bystanders allow others to control the narrative and, typically, the outcomes. Asking questions, however, encourages others to clarify context and defend their positions, putting the burden of proof and the onus of defensibility on them. At the same time, asking questions allows for making sense of a person's thoughts and feelings, giving greater insight into their beliefs and values. Though asking questions alone will not bring everyone together, it will help individuals begin to better understand one another and may provide opportunities for them to find areas where they agree that may lead to newer solutions and change.

As this work highlights, speaking and asking questions are powerful means to change perceptions. When most of Rehteah's peers and school officials did nothing as the photo of her alleged rape circulated, they allowed her torment to continue. Though they were not her attacker, they effectively joined forces with her attackers as they perpetuated the trauma she faced. Through their silence or ignorance, they subjected Rehteah to a far greater harm: isolation. The voices of the minority then gradually became a majority, a cacophony that drowned out any hope of redemption for Rehteah. Conversely, when the passengers of the BART train recorded Officers Pirone and Mehsherle and shared their videos with others, they challenged the otherwise authorial narrative of the police to clarify context, resituate fact, and challenge the dehumanization of Oscar Grant. These passengers resituated the events of that evening by giving voice to those would otherwise be silenced. These passengers opened up a dialogue about police power and law enforcement, putting the police on the defensive as charges were laid. The victory here wasn't the conviction; rather, it was a moral victory in encouraging others to speak for justice, even if justice is slow to respond.

The project of presence—of speaking and asking questions and of greater awareness of each other—also entails a greater understanding of the media individuals consume. Organizationally and culturally, society needs to develop and reconfigure technologies and algorithms, and society needs to encourage greater literacy in the media individuals rely on. No one can assume that the media individuals use, enlist, and rely on provides adequate context or accurate detail in all that is shared. Citizens must, therefore, (re)learn: to understand consent in sharing information; to form opinions based on a wide assessment of information; to question the credibility and purpose of information shared; and to critically assess easily altered imagery.

Individuals must recognize that the content they share—however accurate or apocryphal, seemingly insignificant or substantial—shapes the world and shapes everyone in turn.

In recognizing the conditions of the present moment that always already potentially connects users to others, yet also suspend individuals in physical disconnection from one another experientially, users need to continue to find ways to engage each other with greater vulnerability, curiosity, and civility. In supplanting experiential engagement for visuality, users have disengaged from one another and they allowed themselves to become consumed by what they visualize rather than what they experience. To combat this, users need to approach each other with openness, even if it is scary, lonely, and makes people feel vulnerable. As Brene Brown (2017) notes, individuals need to get curious about each other and ask questions. Individuals need to step outside the safety of their filter bubbles, echo chambers, and ideological bunkers to individually empathize and collectively problem-solve. As a society, everyone needs to work to reestablish civility—the act of "claiming and caring for one's identity, needs and beliefs without degrading someone else's in the process" (Spath & Dahnke, 2017)—and everyone needs to encourage it in each other. Individuals need to get comfortable with the uncomfortable and engage each other in the hope that everyone can all learn and grow for the better, as our *res publica* roots once maintained. Otherwise, as spectators, we will continue to stare longingly into the screen and we will fall victim to our own cultural Nemesis. Unlike Narcissus, though, our Nemesis is not some external ethereal other luring us to our demise; rather, our Nemesis is us who deny each other our presence in our transfixion with imagery.

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