Equality at Stake: Connecting the Privacy/Vulnerability Cycle to the Debate about Publicly Accessible Online Court Records

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A considerable amount has been written about the privacy implications of publishing court and tribunal records online. In this article the authors examine the linkages between privacy and vulnerability for members of marginalized communities and, drawing on Calo's "vicious cycle" of privacy and vulnerability, suggest that publicly accessible online court records represent an equality issue as well. Drawing on social science research and privacy theory, the authors demonstrate the potentially disproportionate effect of online court records on members of marginalized communities. They then examine Canadian case law, legislation and policy that impose restrictions on public disclosure of information from court proceedings and disclosure of information within court proceedings to highlight a limited pre-existing recognition of the privacy/vulnerability cycle. In conclusion they suggest that removal of personal information from court records made publicly available online would serve to protect both privacy and equality rights.

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> [T]he more information you have about a person or group, the greater the potential to take advantage of them. The fewer advantages a person or group already enjoys, the lesser their ability to resist expectations and requirements of turning over information in exchange for support. The result is a vicious cycle which bears great exploration and may militate in favor of stronger privacy protections for the chronically vulnerable.
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> Ryan Calo[1]

1. Ryan Calo, "Privacy, Vulnerability, and Affordance" (2017) 66:2 DePaul Law Review 591 at 597.

I. Introduction

Court and tribunal records from around the world are increasingly publicly accessible online. These initiatives offer, as we and others have noted, ground-shifting opportunities for improved access to justice and for the transparency of court proceedings; however, they simultaneously raise serious privacy issues for those involved, willingly or unwillingly, in those proceedings.[2] In this article we explore the complex and iterative relationship, characterized in the epigraph by Calo, between publicly accessible, unredacted, online court records and marginalization, vulnerability and inequality. Specifically, we suggest that members of equality-seeking communities stand to be disproportionately negatively affected by online publication of court records incorporating personal information. In this way, online court records constitute not only a privacy problem, but an equality problem as well. This further dimension adds urgency to the need for privacy and equality-respecting approaches to online publication of court and tribunal records.

We advance our argument in Parts II and III. Part II examines literature and social science evidence relating to privacy and vulnerability, suggesting that members of marginalized communities in Canada, including poor and homeless persons, those suffering from mental illness, racialized minorities and Indigenous peoples, will be disproportionately negatively affected by publicly accessible online court records. Drawing on Calo's "vicious cycle" analogy, we offer three reasons in support of this assertion: (i) members of certain marginalized communities are over-represented in many types of court proceedings; (ii) the impacts of marginalization may force members of these communities to engage with the justice system; and (iii) potentially stigmatizing information

2. Jane Bailey & Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2017) 48:1 Ottawa Law Review 147; Natalie A MacDonnell, "Disability Disclosure in the Digital Age: Why the Human Rights Tribunal of Ontario Should Reform its Approach to Anonymized Decisions" (2016) 25:1 Journal of Law and Social Policy 109; Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) at 5.

about these individuals in court records renders them vulnerable to increased discrimination and other kinds of harms. Part III looks at the degree to which Canadian law has recognized and responded to the privacy/vulnerability cycle in relation to court and tribunal records. After examining court rulings about publication bans and rules relating to disclosure within proceedings, this section specifically examines privacy protections afforded to certain vulnerable groups, including children, sexual assault complainants (who are disproportionately likely to be women) and persons with disabilities, as well as public commentary relating to online publication of court records. Some of these decisions and commentators implicitly or explicitly recognize the privacy/vulnerability cycle that connects a lack of privacy with exposure to inequality and discrimination, thereby offering at least some analysis that can be used to support removing personal information from publicly accessible online court records. The conclusion recommends a response that disrupts the "vicious cycle" without presuming or suggesting that members of equality-seeking communities *must* or *ought* to conceal certain information about themselves.

II. Examination of the Privacy/Vulnerability Cycle in the Literature

Jeffrey Rosen, in *The Unwanted Gaze*, noted that "[t]he ideal of privacy … insists that individuals should be allowed to define themselves, and to decide how much of themselves to reveal or conceal in different situations".[3] Rosen's remarks are echoed in Nissenbaum's concept of information privacy as "contextual integrity".[4] According to Nissenbaum, privacy violations occur when personal information is used in ways that are incompatible with norms of appropriate use and appropriate distribution.[5] The ability to control the use and dissemination of

3. Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Vintage Books, 2000) at 223.
4. Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79:1 Washington Law Review 119.
5. *Ibid* at 125.

information about oneself is important. Intimate relationships depend on a delicate interplay between concealment and disclosure.[6] Privacy offers us personal autonomy, and supports important social values including democracy.[7] While it can and has been used to shield abuse of members of equality-seeking groups from public scrutiny and censure,[8] it can also afford members of equality-seeking groups, including women, opportunities for "replenishing solitude and independent decision making," as well as freedom from censure, surveillance and pressures of conformity.[9] Everyone, including members of equality-seeking groups, needs – and deserves – privacy.

A. Privacy and Vulnerability

Nonetheless, there are many cases in which privacy is closely, and negatively, tied to vulnerability and marginalization. Economic marginalization and lack of privacy go hand in hand. Some have argued that privacy is becoming a "luxury good",[10] available primarily to those who can afford to pay to achieve it.[11] This is particularly true online, where 'free' services are in fact purchased with the currency of personal information, and the price of freedom from online surveillance is paid in cash – either by use of services hidden behind "paywalls", or through the purchase of privacy-protecting technologies and software. Those living in

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6. Sandra Petronio & Irwin Altman, *Boundaries of Privacy: Dialectics of Disclosure* (Albany: State University of New York Press, 2002).
7. Nissenbaum, *supra* note 4 at 128-29.
8. Catharine MacKinnon, *Toward a Feminist Theory of the State* (Massachusetts: Harvard University Press, 1989) at 191.
9. Anita L Allen, "Still Uneasy: Gender and Privacy in Cyberspace" (2000) 52:5 Stanford Law Review 1175 at 1179. See also Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991) at 164-65.
10. Julia Angwin, "Has Privacy Become a Luxury Good?" *The New York Times* (3 March 2014), online: NY Times <www.nytimes.com/2014/03/04/opinion/has-privacy-become-a-luxury-good.html>.
11. Michael Rosenberg, "The Price of Privacy: How Access to Digital Privacy is Slowly Becoming Divided by Class" (2016) 20:1 UCLA Journal of Law and Technology 1.

poverty can afford neither, and as a result cannot benefit from the privacy protection that these purchases support. In the United States, many have argued that Fourth Amendment protection is reduced for the poor,[12] specifically because they are less able to afford to buy homes.[13] Although the issue has not been widely addressed in Canada, some empirical research suggests that homeless people's contacts with law often involve invasion of their section 8 rights under the *Canadian Charter of Rights and Freedoms*.[14] These individuals are vulnerable to arbitrary search and seizure because they lack a prototypical 'home' within which they would be presumed to have an expectation of privacy. Technological advances in surveillance may further erode the privacy of those living in poverty.[15] GPS tracking technologies, for example, are more easily deployed against the urban poor, since their vehicles are more likely than those of wealthier citizens to be parked in a public location and thus be accessible for the placement of the devices.[16] Poverty, then, leads to conditions in which

12. John Berry, "Nowhere to Hide: How the Judiciary's Acceptance of Warrantless GPS Tracking Eliminates the Practical and Legal Privacy Enjoyed by the Poor" *Social Science Research Network* (2011), online: SSRN <https://ssrn.com/abstract=1949387>; Christopher Slobogin, "The Poverty Exception to the Fourth Amendment" (2003) 55:1 Florida Law Review 391; Kami Chavis Simmons, "Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing" (2014) 14:2 University of Maryland Law Journal of Race, Religion, Gender & Class 240.
13. See Justin Stec, "Why the Homeless are Denied Personhood Under the Law: Toward Contextualizing the Reasonableness Standard in Search and Seizure Jurisprudence" (2006) 3:2 Rutgers Journal of Law & Urban Policy 321; Mark A Godsey, "Privacy and the Growing Plight of the Homeless: Reconsidering the Values Underlying the Fourth Amendment" (1992) 53:3 Ohio State Law Journal 869.
14. Carol Kauppi & Henri Pallard, "Homeless People and the Police: Unreasonable Searches and Seizures, and Arbitrary Detentions and Arrests" (2009) 1:6 Conference of the International Journal of Arts and Sciences 344, online: Open Access Library <openaccesslibrary.org/images/MAL231_Henri_Pallard.pdf>.
15. Amelia L Diedrich, "Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment" (2011) 39:1 Hastings Constitutional Law Quarterly 297.
16. Berry, *supra* note 12.

privacy is more difficult to attain, or easier to invade.

The privacy of members of vulnerable communities can be, and is, compromised by surveillance directed toward those communities. Surveillance of welfare recipients has in some cases been justified on the basis that they are receiving assistance from the state,[17] but others have argued that this surveillance most significantly affects single, racialized mothers.[18] In the United States, many jurisdictions require welfare recipients to undergo government mandated drug testing.[19] Techniques of public health screening and surveillance are also selectively directed towards vulnerable members of society. One example is a drug-screening program for pregnant women, enacted by the Medical University of South Carolina in the late 1980's.[20] The program, designed to reduce the impact of prenatal cocaine use on fetuses, was directed specifically toward women who had not obtained prenatal care and those with a previous history of drug or alcohol abuse. If the woman tested positive, the results were turned over to the police, and the woman was threatened with prosecution in order to force her into treatment. A great deal has been written about the legality of the program, along with analyses of the US Supreme Court decision that determined that the testing violated

17. Mike Dee, "Welfare Surveillance, Income Management and New Paternalism in Australia" (2013) 11:3 Surveillance & Society 272; Krystle Maki "Neoliberal Deviants and Surveillance: Welfare Recipients Under the Watchful Eye of Ontario Works" (2011) 9:1/2 Surveillance & Society 47; Paul Henman & Greg Marston, "The Social Division of Welfare Surveillance" (2008) 37:2 Journal of Social Policy 187.
18. John Gilliom, *The Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy* (Chicago: University of Chicago Press, 2001).
19. Celia Goetzl, "Government Mandated Drug Testing for Welfare Recipients: Special Need or Unconstitutional Condition?" (2013) 15:5 University of Pennsylvania Journal of Constitutional Law 1539.
20. Lawrence O Gostin, "The Rights of Pregnant Women: The Supreme Court and Drug Testing" (2001) 31:5 Hastings Centre Report 8. See also Kristina B Wolff, "Panic in the ER: Maternal Drug Use, the Right to Bodily Integrity, Privacy, and Informed Consent" (2011) 39:5 Politics & Policy 679.

Fourth Amendment rights.[21] For our purposes, however, the fact that this program was ruled unconstitutional is less relevant than the fact that the testing, and the negative effects emanating from it, were highly discriminatory, affecting primarily low-income and racialized women. This is just one of many examples where surveillance is directed at vulnerable populations, with predictable and often negative results.

There exist myriad examples of selective use of privacy-compromising technologies by police against members of marginalized communities. In Canada, DNA technology and "voluntary" DNA collection programs have been deployed in the context of law enforcement initiatives relating to violence against Indigenous women and girls. These include an initiative involving the collection of DNA and other personal information from women (often Indigenous women) engaged in what have been termed "vulnerable lifestyles", as well as an initiative involving the collection of DNA from men living in a remote First Nations community that was the site of the violent death of a young girl.[22] Police stops of racialized youth, particularly young men, are so common that the phrase "driving while black" has become part of the public lexicon.[23] For example, recent data from Ottawa indicate that police there are disproportionately likely to target Middle Eastern and black drivers for "random" traffic stops.[24]

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21. See *e.g.* Andrew E Taslitz, "A Feminist Fourth Amendment? Consent, Care, Privacy, and Social Meaning in *Ferguson v. City of Charleston*" (2002) 9:1 Duke Journal of Gender Law & Policy 1.
22. Jane Bailey & Sara Shayan, "Missing and Murdered Indigenous Women Crisis: Technological Dimensions" (2016) 28:2 Canadian Journal of Women and the Law 321.
23. David A Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters" (1999) 84:2 Minnesota Law Review 265.
24. Ontario Human Rights Commission, *OHRC Response to the Race Data and Traffic Stops in Ottawa Report*, (Ontario: OHRC, 18 November 2016), online: OHRC <www.ohrc.on.ca/en/ohrc-response-race-data-and-traffic-stops-ottawa-report>; Lorne Foster, Les Jacobs & Bobby Siu, "Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts" (Ottawa Police Services Board and Ottawa Police Service, October 2016) at 3 online: Ottawa Police <https://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf>.

Not only do conditions of marginalization – *e.g.* poverty – make people more vulnerable to privacy intrusions; privacy intrusions have the potential to increase the effects of marginalization. As Kimberly Bailey points out, "because privacy makes an individual less vulnerable to oppressive state social control, the deprivation of privacy can be an important aspect of one's subordination".[25] Michele Estrin Gilman makes a similar point about the impact of privacy intrusions (in this case, on the poor), suggesting that "the poor as a group suffer extreme privacy violations, which in turn pose a barrier to self-sufficiency and democratic participation".[26]

Privacy violations can increase marginalization by signaling that the victims lack social standing or somehow *deserve* the intrusion.[27] The widespread practice of "carding", for example, signals to others that those stopped by police might be dangerous, thus potentially altering attitudes and behavior toward them. Increased surveillance – and the lack of privacy that it entails – increases the risk that *some* wrongdoing will be identified. Paul Henman and Greg Marston, for example, discuss the "risk logic" of compliance activities in the Australian social security system.[28] That system uses statistical profiling to identify clients who share characteristics with those who have in the past "been incorrectly paid" (read: committed welfare fraud). Even though individuals identified as having these characteristics may never themselves have "been incorrectly paid," they are subjected, by virtue of their statistical resemblance to the group who *have,* to increased surveillance – which, by its very nature, increases the likelihood that "incorrect payments" will be identified. The system is a self-reinforcing feedback loop that creates an underclass within the larger

25. Kimberly D Bailey, "Watching Me: The War on Crime, Privacy, and the State" (2014) 47:5 UC Davis Law Review 1539 at 1542.
26. Michele Estrin Gilman, "The Class Differential in Privacy Law" (2012) 77:4 Brooklyn Law Review 1389 at 1395.
27. See Craig Konnoth, "An Expressive Theory of Privacy Intrusions" (2017) 102:4 Iowa Law Review 1533 for a discussion of this point. See also Julilly Kohler-Hausmann, "'The Crime of Survival': Fraud Prosecutions, Community Surveillance and the Original 'Welfare Queen'" (2007) 41:2 Journal of Social History 329.
28. Henman & Marston, *supra* note 17 at 200.

(and vulnerable) group of those receiving social benefits from the state. Jessica Roberts explicitly ties a lack of privacy to discrimination, noting that "[u]nlawful discrimination … frequently requires discriminators to have knowledge about protected status".[29] Roberts' analysis suggests that privacy may be important to prevent discrimination.[30] While we do not believe that privacy protections could or should supplant equality-based anti-discrimination measures and education, in a context in which identifiability as a member of particular marginalized communities is the basis for discrimination, it seems logical to suggest that privacy intrusions have the potential to foster discriminatory practices and thus privacy protection could help to reduce discrimination.

B. Connecting the Privacy/Vulnerability Cycle to Court Records

Calo identifies the relationship between privacy and vulnerability as a "circle" or "cycle": "the more vulnerable a person is, the less privacy they tend to enjoy; meanwhile, a lack of privacy opens the door to greater vulnerability and exploitation".[31] In the remainder of this paper, we explore one version of this "vicious cycle", examining the links between privacy, vulnerability, and the open (and increasingly online) publication of court records.

We have argued elsewhere that although public access to court records is consistent with the open court principle, which supports transparency of court proceedings, public access to unredacted court records, particularly if placed online, presents significant and unwarranted privacy risks to those involved in court processes.[32] These files often contain information that is deeply personal and potentially very sensitive, including identifying information, financial information, details about relationships, and

29. Jessica L Roberts, "Protecting Privacy to Prevent Discrimination" (2015) 56:6 William and Mary Law Review 2097 at 2097.
30. *Ibid* at 2101.
31. Calo, *supra* note 1 at 591.
32. Bailey & Burkell, *supra* note 2.

details about health status.[33] The release of this information exposes litigants, witnesses and others identified in the court processes to a variety of risks, including identity theft and extortion.[34] Those identified in the records can suffer dignity harms when highly personal information such as the details of a marital breakdown become publicly available.[35] When the information in the records includes details about protected status, there is also the risk of discrimination.[36]

Members of marginalized communities stand to suffer the most significant privacy harms from open court records that include names along with a vast array of other identifying, and often highly personal, information. In the following section, we identify three bases for this argument: first, members of marginalized communities are over-represented in many kinds of court proceedings; second, in order to contest (and potentially redress) the impact of marginalization, members of these communities are forced to engage with the justice system; third, the potentially stigmatizing information that is revealed about these individuals in court records leaves them vulnerable to increased discrimination and other harms.

1. Vulnerable Populations Over-Represented in Court Proceedings

Members of equality-seeking groups bear a larger privacy burden related to open court records to the extent that they are over-represented among those identified in those court records. Few statistics exist to document the demographic characteristics of individuals involved in the court system as defendants or parties, and even less evidence exists with respect

33. Peter A Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) 79:1 Washington Law Review 307; Sujoy Chatterjee, "Balancing Privacy and the Open Court Principle in Family Law: Does De-Identifying Case Law Protect Anonymity?" (2014) 23:1 Dalhousie Journal of Legal Studies 9; Bailey & Burkell, *ibid* at 148.
34. Bailey & Burkell, *ibid* at 175.
35. Chatterjee, *supra* note 33 at 97.
36. Roberts, *supra* note 29 at 2101.

to witnesses and others (*e.g.* children in family court cases) who are discussed in court proceedings. Nonetheless, analysis of involvement with the criminal justice system and examination of factors related to child protection issues and the incidence of justiciable problems strongly suggests that members of equality-seeking groups are likely to be over-represented in court records.

Involvement with the criminal justice system is correlated with a range of overlapping marginalizing conditions. There is widespread recognition of the negative correlation between socioeconomic status and involvement with the criminal justice system: those lower on the socioeconomic scale are over-represented in the system.[37] The limited body of research on the relationship between homelessness and the criminal justice system suggests that homeless individuals, including street-involved youth, are at an increased risk of involvement with the criminal justice system.[38] A 2002 report on homeless individuals in Calgary, for example, indicated that over three-quarters had at some point in their lives been incarcerated,[39] and homelessness and incarceration have a reciprocal relationship: homelessness increases the risk of incarceration,

37. Ruth R Kipping et al, "Multiple Risk Behaviour in Adolescence and Socio-Economic Status: Findings from a UK Birth Cohort" (2015) 25:1 European Journal of Public Health 44.
38. Sylvia Novac et al, "Justice and Injustice: Homelessness, Crime, Victimization, and the Criminal Justice System" (2006) Centre for Urban and Community Studies, online: University of Toronto <www.urbancentre.utoronto.ca/pdfs/researchprojects/Novacet-al-207-JusticeHomeless2006.pdf>; Employment and Social Development Canada, "Mental Health Courts: Processes, Outcomes and Impact on Homelessness" by Sue-Ann MacDonald et al, (Montreal: Université de Montreal, May 2014), online: Canadian Observatory on Homelessness <www.homelesshub.ca/sites/default/files/ HKDFinalReport_2014.pdf >.
39. Helen Gardiner & Kathleen Cairns, "2002 Calgary Homelessness Study" *Calgary Homeless Foundation* (October 2002) at 46, online: CHF <http://homelesshub.ca/sites/default/files/Calgary%20 Homelessness%20 Study%202002.pdf>.

which is in turn associated with higher rates of homelessness.[40] Among women who have been incarcerated, poverty is strongly associated with recidivism, and thus involvement anew in criminal justice proceedings.[41]

In the United States, race is strongly associated with arrest history, particularly for males, with black males having a much higher probability of arrest record than any other group.[42] Canadian data show a similar picture, indicating that black inmates are over-represented in the incarcerated population.[43] In Canada, a similar situation exists with respect to the Indigenous population. Indigenous people make up 4.3% of the general population, but 24.6% of the inmate population.[44] Indigenous *women* are even more over-represented, comprising 35% of federal prison inmates, and are Canada's fastest growing prison population.[45] Gender non-conforming youth, and particularly youth identifying as transgender, are more likely to be involved with the youth

40. "Criminal Justice, Homelessness & Health" *National Healthcare for the Homeless Council* (2011) online: NHCHC <www.nhchc.org/wp-content/uploads/2011/09/CriminalJustice2011_final.pdf>.
41. Kristy Holtfreter, Michael D Reisig & Merry Morash, "Poverty, State Capital, and Recidivism Among Women Offenders" (2004) 3:2 Criminology & Public Policy 185.
42. Robert Brame et al, "Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23" (2014) 60:3 Crime & Delinquency 471.
43. As of 2015, the "federal incarceration rate for Blacks [was] three times their representation in Canadian society". See Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015*, by Howard Sapers (Ottawa: OCI, 26 June, 2015), online: OCI <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>.
44. *Ibid*.
45. *Ibid*.

criminal justice system.[46]

In a 2012 report, the Mental Health Commission of Canada[47] noted the over-representation in the criminal justice system of those living with mental health issues; this issue may be particularly acute among youth.[48] This over-representation, also observed in the United States, has been attributed in large part to deinstitutionalization.[49] Although there is growing recognition that mental illness is unfairly criminalized in Canada,[50] programs designed to divert those with mental illness before they are charged (police-based diversion programs) are of limited effectiveness given the lack of treatment options for those living with mental illness.[51] Persons with intellectual disabilities are also over-represented in the criminal justice system,[52] in part as a result of their lack of understanding

46. Angela Irvine, "We've Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Nonconforming Youths in the Juvenile Justice System" (2010) 19:3 Columbia Journal of Gender and Law 675; Jerome Hunt & Aisha C Moodie-Mills, "The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System" *Center for American Progress* (29 June 2012), online: Center for American Progress <https://www.americanprogress.org/issues/lgbt/reports/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/>.
47. Mental Health Commission of Canada, *Changing Directions, Changing Lives: The Mental Health Strategy for Canada* (Calgary: MHCC, 2012), online: MHCC <strategy.mentalhealthcommission.ca/pdf/strategy-images-en.pdf>.
48. Michele Peterson-Badali et al, "Mental Health in the Context of Canada's Youth Justice System" (2015) 19:1 Canadian Criminal Law Review 5.
49. Gary Chaimowitz, "The Criminalization of People with Mental Illness" (2012) 57:2 Canadian Journal of Psychiatry 1.
50. *Ibid* at 5.
51. *Ibid*.
52. Jessica Jones, "Persons with Intellectual Disabilities in the Criminal Justice System" (2007) 51:6 International Journal of Offender Therapy and Comparative Criminology 723.

of court processes and their rights within those processes.[53] Within the criminal justice system, defendants with mental health issues can in some circumstances be diverted to special mental health courts,[54] "designed to deal with accused persons who are experiencing mental health difficulties with understanding and sensitivity".[55] Defendants must meet strict criteria before diversion to these special courts: primary among these is the condition that the individual must be diagnosed with a mental disorder.[56] The mere fact of diversion to these courts, therefore, reveals meaningful and likely stigmatizing information about the individual whose case is diverted. Despite this, mental health court records[57] and the results of appeals from those courts are *not* routinely anonymized across Canada.[58]

Over-representation of marginalized populations is not limited to

53. Susan C Hayes, "Prevalence of Intellectual Disability in Local Courts" (1997) 22:2 Journal of Intellectual & Developmental Disability 71. See also Voula Marions et al, "Persons with Intellectual Disabilities and the Criminal Justice System: A View from Criminal Justice Professionals in Ontario" (2017) 64:1 Criminal Law Quarterly 83.
54. Steven K Erickson, Amy Campbell & Steven J Lamberti, "Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Action" (2006) 42:4 Community Mental Health Journal 335.
55. "Mental Health Court" *Legal Aid Ontario*, online: Legal Aid Ontario <lawfacts.ca/mental-health/court>.
56. See for example the eligibility for Mental Health Court in Nova Scotia: See, "Nova Scotia Mental Health Court Program" *Courts of Nova Scotia*, online: Courts of Nova Scotia <www.courts.ns.ca/Provincial_Court/NSPC_mental_health_program.htm>.
57. For example, hearings in and records relating to Vancouver's Downtown Community Court are public.
58. See, for example: *R v E*, 2012 NLCA 26. We have chosen to anonymize citations that raise the very privacy and equality concerns discussed in this article.

the criminal justice system. In Canada[59] and elsewhere,[60] Indigenous children, and thus their parents, are at increased risk for involvement in the child welfare system. Similarly, parents with intellectual disabilities constitute a higher proportion of child protection cases than would be expected given the prevalence of intellectual disabilities in the general population.[61] One study of the BC child protection system documented a litany of intersecting challenges facing those (mostly women) involved in that system, including domestic violence, mental health issues, poverty, and addiction issues; that study also noted the over-representation of Indigenous mothers in the child protection cases they reviewed.[62] Although child welfare system proceedings are protected from public access, in many of these cases there are concurrent criminal and/or family proceedings that do *not* automatically receive such protection;[63] thus, the greater involvement of individuals from equality-seeking groups in these matters is likely to be associated with involvement in other justice system proceedings that *do* present privacy risks.

Members of vulnerable groups including Indigenous peoples, immigrants, those receiving social assistance, members of ethnic minorities, and those living with disabilities are more likely to experience justiciable problems such as personal injury, family breakdown, or issues

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59. Nico Trocmé, Della Knoke & Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78:4 Social Service Review 577.
60. Clare Tilbury, "The Over-Representation of Indigenous Children in the Australian Child Welfare System" (2009) 18:1 International Journal of Social Welfare 57.
61. Stephon Proctor & Sandra Azar, "The Effect of Parental Intellectual Disability Status on Child Protection Service Worker Decision Making" (2013) 57:12 Journal of Intellectual Disability Research 1104.
62. Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC Law Review 435.
63. Canada, Department of Justice, "Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective" by Nicholas Bala & Kate Kehoe (Ottawa: DOJ, 2013), online: DOJ <www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child_protection.pdf>.

with assistance programs.[64] These problems, moreover, tend to occur in clusters: for example, legal problems related to separation are often accompanied by problems with domestic violence, and other issues related to family breakdown such as custody and access.[65] Similarly, individuals living with disabilities are not only more likely to experience these types of problems; they also experience *more* such problems.[66] To the extent that members of marginalized groups recognize their problems as *legal* problems or are involved with others who do, they may be more likely to be involved, and involved more intensely, with the civil justice system.

Many of these risk factors intersect in the lives of affected individuals, with a compounding impact on the likelihood that the individual will be involved with the court system. Mental health issues and drug use are elevated among the homeless population.[67] People with mental health challenges often live in poverty, while mentally ill and homeless adults are more likely to be involved in the criminal justice system if they also experience substance misuse and previous victimization.[68] Indigenous peoples are more likely than the general population to live in conditions of homelessness.[69]

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64. Canada, Department of Justice, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians", by Ab Currie (Ottawa: DOJ, 2007), online: DOJ <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf>; Alexy Buck, Nigel Balmer & Pascoe Pleasence, "Social Exclusion and Civil Law: Experience of Civil Justice Problems Among Vulnerable Groups" (2005) 39:3 Social Policy & Administration 302.
65. Pascoe Pleasence et al, "Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators" (2004) 1:2 Journal of Empirical Legal Studies 301.
66. A O'Grady et al, "Disability, Social Exclusion, and the Consequential Experience of Justiciable Problems" (2004) 19:3 Disability & Society 259.
67. Katherine H Shelton et al, "Risk Factors for Homelessness: Evidence from a Population-Based Study" (2009) 60:4 Psychiatric Services 465.
68. Laurence Roy et al, "Profiles of Criminal Justice System Involvement of Mentally Ill Homeless Adults" (2016) 45:1 International Journal of Law and Psychiatry 75 at 79.
69. Novac et al, *supra* note 38.

An exhaustive review of the relationship between vulnerability and justice system involvement is beyond the scope of this paper, but the pattern is clear: people who are socially marginalized are more likely to be involved with the justice system (or at least with certain aspects of it). Those individuals involved in the system are also vulnerable to the privacy harms that result from being identified in court records. Those harms, therefore, are differentially affecting specific groups – the socially marginalized who are, by virtue of a wide range of factors, more likely to be in the courts.

2. Addressing Marginalization in the Courts

Marginalized individuals suffer harms related to their marginalized status – and one way to address these harms is to seek relief in the courts or through administrative tribunals. These situations constitute a kind of double jeopardy or recursive effect: vulnerability leads to involvement with the justice system, which leads to loss of privacy, including privacy with respect to vulnerable status, which in turn can lead to increased discrimination.

Homeless individuals, for example, have been involved in court proceedings that test their right to erect shelters in public parks[70] or on city property,[71] with the result that their names are made public along with details of their homeless status. 'Safe Streets' legislation, passed in Ontario[72] and in British Columbia,[73] prohibits "aggressive solicitation of persons in public places", allowing police to issue tickets for panhandling. Given that the individuals so charged are typically living in conditions of poverty, it is not surprising that the tickets often go unpaid. At least one individual has been taken to court over unpaid fines.[74] This individual opted to participate in press interviews about the case, and thus forewent his privacy with respect to the court proceeding and personal information

70. *Abbotsford (City) v S*, 2015 BCSC 1909.
71. *J v Victoria (City)*, 2011 BCCA 400.
72. *Safe Streets Act*, SO 1999, c 8.
73. *Safe Streets Act*, SBC 2004, c 75, online: BC Laws <www.bclaws.ca/civix/document/id/complete/statreg/04075_01>.
74. *R v W*, 2016 ONCJ 96.

about himself and his situation.[75] Nonetheless, his *option* to maintain privacy with respect to private matters including his homeless status would have been wiped out by the public nature of the court proceeding. In other cases, individuals have been charged under Ontario's *Safe Streets Act* for soliciting an individual waiting at a bus stop[76] or offering to clean car windows for passing motorists.[77] Although the disclosures in most of these records are limited to the names of the individuals involved and the activities they are charged with undertaking (which by extension label the individuals as street-involved), one of the records goes into much greater detail, revealing highly personal information about the social history and mental health of the individual charged with the offence. In these cases, there is a direct link between marginalized status (homelessness, for example) and the appearance before the courts.

The relationship between vulnerability and involvement is even more direct in the case of human rights tribunals, where it is precisely an experience of alleged discrimination on the basis of protected grounds that brings the individual to the tribunal. Some other tribunals and boards, including the Veterans Appeal Review Board, routinely remove identifying information on the grounds that it is "personal information not relevant to the decision".[78] Likewise, the Social Benefits Tribunal of Ontario holds hearings in private because of the sensitive personal

75. "Ontario Judge Drops $65,000 in Fines Against Former Homeless Man" *Toronto Metro* (4 October 2016), online: Metro News <www.metronews.ca/news/toronto/2016/10/04/judge-drops-65k-in-fines-against-former-homeless-man.html>.
76. *R v F*, 2013 ONCJ 718.
77. *R v B* (2005), 248 DLR (4th) 118 (ONSC).
78. Canada, Veterans Review and Appeal Board, "Decisions" (Ottawa: VRAB, 30 March 2016), online: VRAB <www.vrab-tacra.gc.ca/Decisions/Decisions-eng.cfm>.

information involved in the cases.[79] Many individuals involved in immigration and refugee proceedings are there precisely because they are members of equality-seeking groups. The status of sensitive information revealed in these hearings is complex: proceedings before the Refugee Protection Division and the Refugee Appeal Division are private *unless* decisions are before the Federal Court for judicial review, and proceedings before the Immigration Appeal Division and the Immigration Division are public. Human rights tribunals in Canada, however, default to the identification of parties involved in human rights cases. The Human Rights Tribunal of Ontario ("HRTO"), for example, tells potential applicants that "the hearings and decisions of the HRTO are public except in very special circumstances … and the tribunal's decisions, which include the applicants' names and relevant evidence, are made publicly available through legal reporting services".[80] We will return to the HRTO's practices with respect to anonymization in Part III below.

3. Records Reveal Stigmatizing Information

Open records of human rights tribunal proceedings reveal not only the name of the applicant, but also details of the alleged discrimination including the basis for that alleged discrimination (unless the applicant is successful in taking the often-costly step of seeking a publication ban or some other form of confidentiality order). Thus, for example, in the records of these cases we can come to learn that an applicant suffers from depression, is pregnant, lives with a learning disability, identifies as transgender, or is homeless. These details are not *incidentally* revealed as part of the tribunal proceeding – they are *necessarily* revealed since they

79. Social Justice Tribunals Ontario, "Social Benefits Tribunal: Legislation and Regulation" (Ontario: SJTO, 2015), online: SJTO <www.sjto.gov.on.ca/sbt/legislation-and-regulation/>. Similarly, the Child and Family Services Review Board bans publication of evidence and decisions, and allows only anonymized versions of its decisions to be posted on CanLII, and the Landlord Tenant Board retracts the names of tenants from its decisions before allowing them to be posted on CanLII.

80. Human Rights Tribunal of Ontario, "Frequently Asked Questions" (2015) online: SJTO <www.sjto.gov.on.ca/hrto/faqs>.

often constitute the basis of the claim that is substance of the proceeding. Moreover, the personal information that is exposed in these records leaves the individual vulnerable to *further* discrimination. Thus, public access to these records can contribute to a "vicious cycle" of vulnerability.

The concern is not unfounded. One complainant who was found by the BC Human Rights Tribunal ("BCHRT") to have experienced discrimination based on a mental health issue[81] was in front of that same tribunal seven years later, again alleging discrimination based on mental illness.[82] In that second complaint, which the Tribunal determined was justified, it was alleged that the respondents enacted their discrimination on the basis of information gleaned from the *earlier* human rights case – in other words, their knowledge of the mental illness could at least in part be attributed to an earlier, and public, human rights complaint.[83]

Presumptive openness of court and tribunal records constitutes, for litigants, witnesses, and others named in the court process, *forced* disclosure of personal information. Given the option, people make careful and thoughtful decisions about to whom, when, and where to disclose personal information.[84] This may be particularly true for stigmatizing conditions, where the potential consequences of disclosure include discrimination, social isolation, and even physical danger. Many individuals living with a disability, for example, choose *not* to disclose, in large part for fear of discrimination, especially with respect to employment.[85] Individuals in the work force dealing with mental health issues who choose not to disclose cite fear of discrimination as the primary reason.[86] Many living with positive HIV status carefully balance the psychological advantages

81. *G v The Law Society of British Columbia (No. 4)*, (2009) BCHRT 360.
82. *G v Purewal and another*, (2017) BCHRT 19.
83. *Ibid*.
84. Petronio & Altman, *supra* note 6.
85. Lita Jans, Steve Kaye & Erica C Jones, "Getting Hired: Successfully Employed People with Disabilities Offer Advice on Disclosure, Interviewing, and Job Search" (2012) 22:2 Journal of Occupational Rehabilitation 155.
86. Debbie Peterson, Nandika Currey & Sunny Collings, "'You Don't Look Like One of Them': Disclosure of Mental Illness in the Workplace as an Ongoing Dilemma" (2011) 35:2 Psychiatric Rehabilitation Journal 145.

of disclosure against the costs in terms of stigma and social inclusion.[87] While disclosure of transgender identity can have positive impacts on psychological well-being and personal relationships, it also raises the risk of loss of relationships and even physical violence.[88] Notwithstanding the potential destigmatizing effects,[89] disclosure of a marginalized status can harm the individual involved.[90] It has been compellingly argued that we should not force such disclosures,[91] since the practice could contravene constitutional protections,[92] and might even be considered immoral.[93]

Over-representation of marginalized communities in court and tribunal proceedings, often *because* of the impact of marginalization, combined with the potentially stigmatizing information that is revealed about individuals in court records leaves members of these communities disproportionately vulnerable to further discrimination and other harms. The potential for these harms stand to be exacerbated by widespread publicly-accessible online access to court records. We turn now to examine some of the limited instances in which Canadian law has recognized and responded to this "vicious cycle".

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87. Geneviève Rouleau, José Côté & Chantal Cara, "Disclosure Experience in a Convenience Sample of Quebec-born Women Living with HIV: A Phenomenological Study" (2012) 12:1 BMC Women's Health 37.
88. M Paz Galupo et al, "Disclosure of Transgender Identity and Status in the Context of Friendship" (2014) 8:1 Journal of LGBT Issues in Counseling 25.
89. See *e.g.* Arjan ER Bos et al, "Mental Illness Stigma and Disclosure: Consequences of Coming Out of the Closet" (2009) 30:8 Issues in Mental Health Nursing 509; Grace J Yoo et al, "Destigmatizing Hepatitis B in the Asian American Community: Lessons Learned from the San Francisco Hep B Free Campaign" (2012) 27:1 Journal of Cancer Education 138.
90. Roberts, *supra* note 29.
91. Talia Mae Bettcher, "Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion" (2007) 22:3 Hypatia 43.
92. Anne C Hydorin, "Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation" (2003) 30:2 Hastings Constitutional Law Quarterly 237.
93. Susan J Becker, "The Immorality of Publicly Outing Private People" (1994) 73:1 Oregon Law Review 159.

III. Recognition of the Privacy/Vulnerability Cycle in Canadian Law

Notwithstanding that in most cases the privacy of those involved with court proceedings is not protected, our purpose in this section is to identify situations where Canadian law has explicitly or implicitly recognized the privacy/vulnerability cycle as a justification for limiting publication related to, or disclosure within court proceedings involving members of marginalized communities. In tandem with situations in which Canadian courts and legislatures have recognized the privacy/vulnerability cycle in the context of disclosure of information to the *public* about court proceedings, are privacy-justified rules that limit *both* what must be produced in litigation and what can be done with it afterward. We begin by briefly discussing publication bans, which limit *public* access to information about court proceedings, and then turn to case-by-case privilege and deemed/implied undertakings, which impose terms relating to disclosure *within* litigation. In both cases, the law recognizes the privacy/vulnerability cycle and expresses concern about the impact of process-imposed vulnerability on the administration of justice. We note the transition in this law from recognition of a *general* privacy/vulnerability cycle to limited recognition of special risks to specific equality-seeking communities: children and sexual assault survivors in particular. After discussing publication bans, case-by-case privilege and deemed undertakings, we explore other legal manifestations of concern for children and sexual assault survivors before turning to consider more sporadic legal acknowledgments of the privacy/vulnerability cycle relating to other equality-seeking groups. Finally, we consider policy development and commentary focused on the privacy/vulnerability cycle in the context of *online* court records, which supports our concern about the potential for *online* records to exacerbate the cycle for equality-seeking communities.

A. Publication Bans and the Privacy/Vulnerability Cycle

The open court principle is highly venerated in Canadian law. It provides that, as a general rule, court processes and court records should be

publicly accessible. Openness is said to build "public confidence in the integrity of the judicial system by allowing members of the public to hold judges to account".[94] The common law principle in favour of openness is also mirrored in provincial, federal and territorial statutes and policies governing court proceedings.[95] Nevertheless, Canadian courts and legislators have recognized that, in certain circumstances, open access can undermine justice or come at too great a cost to other democratic values in a variety of ways. As a result, certain statutes and common law principles provide for courts and certain other decision-making bodies to determine on a case-by-case basis whether there should be an exception to that rule. These case-by-case decisions are to be made with reference to the Supreme Court of Canada's decisions in two seminal cases relating to publication bans, *R v Mentuck*[96] and *Dagenais v Canadian Broadcasting Corp*.[97]

In *Mentuck*, the Supreme Court of Canada held that a publication ban should only be issued where:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[98]

In *Dagenais*, the Supreme Court of Canada pointed to a long list of competing considerations of sufficient weight to warrant a publication ban. At least three of these implicitly recognize the way in which a lack

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94. Bailey & Burkell, *supra* note 2 at 152.
95. See *e.g. Courts of Justice Act*, RSO 1990, c C43, ss 135, 137; Provincial Court of British Columbia, "Access to Court Records" Policy Code ACC-2 (British Columbia: 28 February 2011) online: Provincial Court BC <www.provincialcourt.bc.ca/downloads/public%20and%20media%20access%20policies/ACC-2%20-%20Access%20to%20Court%20Records.pdf>
96. 2001 SCC 76 [*Mentuck*].
97. [1994] 3 SCR 835 [*Dagenais*].
98. *Mentuck*, *supra* note 96 at para 32.

of privacy can exacerbate inequality and vulnerability, namely: protecting vulnerable witnesses (*e.g.* children, sexual assault complainants); reducing the stigma of conviction for young offenders, thereby increasing the possibility of rehabilitation; and encouraging reporting of sexual offences by reducing the fear of notoriety of becoming a complainant.[99]

The issues of protecting children and targets of sexual violence came together in *AB v Bragg*.[100] The Supreme Court of Canada held that a teen girl who sought a publication ban on the content of a Facebook page in which she was subjected to "sexualized cyberbullying", should be allowed to proceed using a pseudonym on a preliminary application for disclosure.[101] Relying on the decisions in *Dagenais* and *Mentuck*, and noting research showing that "allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities",[102] as well as the lasting harms of the publicity of sexualized online attacks, Abella J, writing for the Court, concluded:

> If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.[103]

Here the Court explicitly recognized the "vicious cycle" of a lack of privacy and the "*inherent* vulnerability of children".[104] In addition, Abella J noted that "[i]n the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting".[105] In this way, the cycle of gender inequality and lack of privacy in court proceedings

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99. *Dagenais*, *supra* note 97 at paras 883-84.
100. 2012 SCC 46 [*Bragg*].
101. *Ibid* at paras 22, 26.
102. *Ibid* at para 26.
103. *Ibid* at para 27.
104. *Ibid* at para 17 [emphasis in original].
105. *Ibid* at para 25.

is evident, although the Court did not explicitly discuss the plaintiff's situation in these terms. The plaintiff had already suffered a sexualized online attack (which included someone impersonating her and posting a photo of her), a kind of attack disproportionately suffered by women and girls, who are also more likely to be shamed in relation to exhibitions of their sexuality.[106] A refusal to grant AB a degree of privacy in relation to her legal proceeding would have re-subjected her to further gendered scrutiny and attack – a classic illustration of the "vicious cycle" between the vulnerability of marginalized populations and a lack of privacy in court proceedings. Although AB was ultimately able to proceed under a pseudonym, her right to do so came at the cost of appeals all the way to the Supreme Court of Canada – a price most people, particularly those from many marginalized communities, are unlikely to be able to pay.

B. Case-by-case Privilege and Deemed/Implied Undertakings

In contrast with publication bans, which focus solely on public access to information about court proceedings, case-by-case privilege and deemed/implied undertakings impose limits relating to procedures internal to litigation. In both cases the focus is on balancing privacy with other kinds of public interests. In some cases, Canadian courts explicitly or implicitly connect privacy with vulnerability, and the risk that exposing litigants to too much vulnerability will jeopardize their right and ability to seek legal remedies. Thus, despite the truth-finding goal of litigation and the idea that disclosure of all relevant information best serves that goal, parties need not produce *all* relevant documents within litigation. As the British Columbia Court of Appeal, per Southin JA, noted in *Interclaim Holdings Limited v Down*:

> Suffice it to say that, in my opinion, … the notion that everybody is entitled to have access to everything filed in civil proceedings … in contradistinction to having the right to be present at every proceeding in which a final judgment is sought should be canvassed again. A legal system which has no decent respect

106. Jane Bailey, "'Sexualized Online Bullying' Through an Equality Lens: Missed Opportunity in *AB v. Bragg*?" (2014) 59:3 McGill Law Journal 709.

> for the privacy of litigants is as tyrannical as a legal system in which rights are determined behind closed doors.[107]

Documents subject to privilege represent an important exception to the general disclosure rule.[108] While the traditional categories of privilege protect the solicitor-client relationship (solicitor-client privilege) and the process of litigation (litigation privilege), in *Slavutych v Baker et al*, the Supreme Court of Canada confirmed that those categories are not closed[109] and adopted a four-part test for determining on a case-by-case basis whether materials claimed to be confidential should be exempt from disclosure. This privilege applies to communications that: (i) originate in confidence; (ii) where confidence is essential to the relationship in which the communication arose; (iii) that relationship is one that should be "sedulously fostered; and (iv) the interests served by protecting against disclosure outweigh the interest in getting at the truth to correctly resolve the litigation.[110]

In applying this four-part test in the context of a civil sexual assault case in *M(A) v Ryan*, where the defendant sought production of records from the plaintiff's psychiatrist, the Supreme Court of Canada found that if psychiatrist-patient confidence was broken, it could jeopardize a patient's willingness to seek treatment.[111] Justice McLachlin (as she was then) writing for the majority, noted that such an outcome was to be avoided, especially in the context of survivors of "sexual abuse [who] often suffer trauma, which, left untreated, may mar their entire lives".[112] In reaching this conclusion, the Court relied on constitutional protections for privacy *and* equality, noting:

> A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The

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107. 2003 BCCA 266 at 32.
108. Although the existence of relevant documents over which privilege is claimed must be disclosed. See *e.g. Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, s 30.02(1) [*Ontario Rules of Civil Procedure*].
109. *Slavutych v Baker et al*, [1976] 1 SCR 254.
110. *M(A) v Ryan*, [1997] 1 SCR 157 at para 20 [*M(A)*], referring to *Slavutych.*
111. *Ibid* at paras 25-26.
112. *Ibid* at para 27.

> intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress.[113]

McLachlin J also rejected the argument that a plaintiff forfeits the right to privacy by commencing litigation, finding:

> I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.[114]

This reasoning subsequently carried over into analysis of the privacy rights of sexual assault complainants in the context of the deemed undertaking.

The deemed and implied undertaking rules[115] generally prohibit disclosure of "pre-trial documentary and oral discovery for purposes other than the litigation in which it was obtained".[116] Although these rules do not place similar restrictions on documentary and oral discovery that make their way into the public record during trials or motions, they nevertheless reflect recognition of the privacy/vulnerability cycle and its potential impact on the administration of justice. In *Juman v Doucette*, the Supreme Court of Canada, per Binnie J, pointed to privacy protection as one of two related rationales for these undertakings:

> The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of

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113. *Ibid* at para 30.
114. *Ibid* at para 38.
115. The implied undertaking exists as a product of common law, while deemed undertakings are typically reflected in provincial Rules of Civil Procedure. See *e.g. Ontario Rules of Civil Procedure*, *supra* note 108, s 30.1.
116. *Juman v Doucette*, 2008 SCC 8 at 21.

> disclosure necessary to satisfy that purpose and that purpose alone. ... There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery.[117]

That the imposition of such limits can be of particular importance in the context of civil and criminal proceedings relating to sexual assault was recognized at first instance in *SC v NS* where the defendant in a criminal sexual assault trial used documents produced by the complainant in a civil sexual assault proceeding in order to impeach her during her testimony at the criminal trial.[118] The Court's finding that the deemed undertaking prevented the defendant from using the documents in another proceeding without first seeking leave of the court was overturned on appeal. However, the observations of Matheson J with respect to privacy remain apt. Justice Matheson rejected the defendant's argument that the plaintiff had given up her right to privacy by initiating the civil action, reasoning:

> If that choice defeated all privacy interests, the deemed undertaking would not exist. Instead, the court and the *Rules of Civil Procedure* have acknowledged that plaintiffs remain entitled to some measure of protection of their privacy and are entitled to limitations on the use of their discovery evidence outside the proceedings for which the discovery was compelled.[119]

Finding that "[t]he primary concern underlying the undertaking is the protection of privacy – discovery is an invasion of the right of an individual to keep one's evidence and documents to oneself",[120] Matheson J went on to note the privacy/vulnerability cycle recognized in *Criminal Code*[121] restrictions on use of complainant's medical or counselling records in a sexual assault trial. In particular, she noted that parliamentary adoption of those restrictions and a detailed process for determining whether such records could be used:

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117. *Ibid* at paras 25-26.
118. 2017 ONSC 353; overturned 2017 ONSC 556 [*SC*].
119. *Ibid* at para 80.
120. *Ibid* at para 39.
121. RSC 1995, c C-46 [*Criminal Code*].

> Parliament has recognized that the compelled production of personal information may deter complainants of sexual offences from reporting the events to police and from seeking the necessary treatment, counselling or advice; that production may breach a person's right to privacy and equality; and that the production to the accused of such information may be necessary in order for an accused to make full answer and defence.[122]

We turn now to discuss specific exceptions to openness in relation to children and sexual assault complainants found elsewhere in Canadian law in order to highlight the role that recognition of the privacy/vulnerability cycle plays in relation to each, paying particular attention to explanations for exceptions that connect privacy, vulnerability and membership in equality-seeking communities.

C. Children and the Privacy/Vulnerability Cycle

The connection between the privacy/vulnerability cycle and marginalization is most consistently demonstrated in Canadian law with respect to the protection of children in court proceedings. Here we provide examples from two areas: child welfare and family law proceedings, and the *Youth Criminal Justice Act* ("*YCJA*").[123]

1. Child Welfare and Family Law Proceedings

In addition to the examples discussed in part A above, Canadian courts also connect privacy with the vulnerability of children in the context of provincial child welfare legislation[124] and in family law proceedings.[125] Although child welfare legislation can incorporate both provisions that initially presume in favour of openness *and* those that initially presume against openness, here we focus on the former. In *Chatham-Kent Children's Services v AH*, the Ontario Superior Court of Justice allowed a media request to vary an order excluding the public from a hearing by allowing access to a redacted copy of the transcript of an *in camera* hearing in

122. *SC*, *supra* note 118 at para 95.
123. SC 2002, c 1 [*YCJA*].
124. See *e.g. Child and Family Services Act*, RSO 1990, c C11, s 45(8); *Child and Family Services Act*, SS 1989-90, c C-7.2, s 26 [*CFSA*].
125. See *e.g. Provincial Court Act*, RSBC 1996, c 379, s 3(6) [*Provincial Court Act*].

a child protection proceeding involving the disappearance of several children who had been apprehended from the jurisdiction.[126] Although citing *Bragg*, and other criminal and family law cases, Templeton J noted that the case before him was not a criminal, civil matter or family law matter, but a child protection proceeding. He concluded that restrictions on public access to the transcript were necessary because:

> in certain circumstances, the protection of a vulnerable child and that child's privacy may well go beyond merely the name of the child in protection proceedings. Children who are the subject of an application by the state for intervention are also allegedly vulnerable in their environment at home, at school and/or in their neighbourhood. They are subject to the conduct and attitudes of the adults who interact with them. Disclosure to others of the intimacy of their lives is beyond their control. Without the ability or opportunity for critical thought, they are swept into a process of the balancing of rights of others and in that process, it can be difficult to hear their voice. ... In other words, the child's world and privacy are inextricably linked to an investigation of the parent's.[127]

As a result, Templeton J concluded that in child protection matters, "the need to shield a vulnerable child rests not only on the child's chronological age but also and perhaps more significantly, the factual circumstances in which the child lives or has been placed".[128]

In contrast, while citing similar authorities to those relied upon in *AH*, the Saskatchewan Court of Queen's Bench, per Rothery J, concluded in the context of child protection proceedings in *R(MN) v Saskatchewan (Minister of Social Services)* that the CBC could publish the name of a parent accused of harming her children, provided that they gave advanced notice of the broadcast to the Department of Social Services in the area where her children resided.[129] Rothery J found that although section 26(2) of the *Child and Family Services Act*[130] permitted publication bans where publication would not be in the best interests of a child involved in the hearing or would likely identify a child, "[t]he court is not permitted to weigh the effect of the publication on the parents of the child. Thus,

126. 2014 ONSC 1697 [*AH*].
127. *Ibid* at paras 42-43.
128. *Ibid* at para 44.
129. (1999), 179 Sask R 238, (QB) at para 28 [*R(MN)*].
130. *CFSA*, *supra* note 124.

unless the publication of the parent's name affects the child, there is no justification for the limitation of the freedom of expression".[131]

Meanwhile, in British Columbia, rules of court impose stringent restrictions on public access to court records relating to child welfare proceedings, family law cases and separation agreements,[132] and various statutes restrict publication of information in family and children's matters that would likely disclose the identity of a child or party.[133] As a result, although BC offers the most extensive online access to court records in Canada through Court Services Online ("CSO"),[134] public access is available only in relation to civil and criminal cases (with certain exceptions discussed further below), and *not* in relation to family law cases.

2. Youth Criminal Justice Act

The *YCJA* came into effect in 2003, replacing the *Young Offenders Act*, which had been in place since 1984.[135] The *YCJA* creates a specialized framework for dealing with children under the age of 12 and young people between the ages of 12 and 18 who are involved in criminal offences.[136] It recognizes society's responsibility to "address the developmental challenges and the needs of young persons and to guide them into adulthood", as well as the "special guarantees" of children's and young people's rights and freedoms, and the goal of "effective rehabilitation and reintegration" of

131. *R(MN)*, *supra* note 129 at para 26.
132. British Columbia, "Court Record Access Policy" (Vancouver: Supreme Court of British Columbia, 2011) at 21, online: <www.courts.gov.bc.ca/supreme_court/announcements/BCSC%20Court%20Record%20Access%20Policy%20-%20February%2014%202011.pdf>.
133. See *e.g. Provincial Court Act*, *supra* note 125, s 3(6).
134. British Columbia, "Welcome to Court Services Online" Court Services Online, Version 3.0.0.04, online: Courts of British Columbia <https://justice.gov.bc.ca/cso/index.do>.
135. Canada, Department of Justice, "Canadian Youth Justice Legislation: A Chronology" (Ottawa: Department of Justice, 2015), online: DOJ <www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/yjc-jaac.html>.
136. *YCJA*, *supra* note 123, s 2(1).

young people into society after involvement in criminal proceedings.[137]

Restrictions relating to publication, records and information about young people are imposed in Part 6 of the *YCJA* as one means of addressing these objectives. For example, section 110(1) prohibits (subject to specific exceptions) publication of the name of any young person dealt with under the *YCJA*, or any other information about them that would identify them, while later sections in Part 6 impose limitations on creation, access to, and destruction of records related to *YCJA* investigations and proceedings involving young people.[138] Generally, breach of the publication ban is a criminal offence.[139] According to the Department of Justice:

> The rationale for protecting the privacy of young persons through publication bans is in recognition of their immaturity and the need to protect them from the harmful effects of publication so that their chances of rehabilitation are maximized.[140]

The cycle connecting privacy, vulnerability and youth is explored in some detail in a number of Canadian cases and has been reiterated frequently in parliamentary debate.[141]

In *FN (Re)* the Supreme Court of Canada found that section 110(1) protected already vulnerable youth made more vulnerable by publication, while at the same time achieving broader societal goals. Writing for the Court, Binnie J, noted:

> Stigmatization or premature "labeling" of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society

137. *Ibid*, preamble.
138. *Ibid*, ss 110-29.
139. *Ibid*, s 110.
140. Canada, Department of Justice, "Publication Bans" (Ottawa: Department of Justice, 2015), online: DOJ <www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/publi-publi.html>.
141. See *e.g. House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 067 (29 May 2001) at 4343 (Odina Desrochers); *House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 036 (26 March 2001) at 2217 (Reg Alcock); *House of Commons Debates*, 37th Parl, 1st Sess, Vol 137, No 036 (26 March 2001) at 2217 (Ken Epp).

> is best protected by preventing recurrence. Lamer CJ, in Dagenais … pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for "young offenders"".[142]

Abella J, writing for the majority in *R v DB* the Supreme Court of Canada, cited social science research and international instruments recognizing the negative impact of media on young people, in support of the conclusion that the *YCJA* restrictions on publication afforded necessary protection to youth because of the "greater psychological and social stress" they would be vulnerable to upon publication.[143] The majority cited expert testimony before the Standing Committee on Justice that indicated that "you'd be hardpressed to find a single professional who has worked in this area who would be in favour of the publication of names", and appellate authority from Quebec and Ontario emphasizing the "damage" that "stigmatizing and labelling" a young person could do to their self-image and self-worth.[144] In light of this, the majority, per Abella J, found that lifting a ban on publication should be seen as an element of sentencing that "renders the sentence more severe".[145] However, the majority also tied the right to privacy protection to a presumed "diminished moral culpability" of young persons, noting that children's "lack of experience with the world warrants leniency and optimism for the future", and concluding that "offenders who act out of immaturity, impulsiveness, or other illconsidered motivation are not to be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals".[146] Obviously, this particular aspect of the explanation of the privacy/vulnerability cycle cannot and should not be extended to adults from other equality-seeking groups.

Relying in part on *DB*, the Ontario Court of Justice, per Cohen J,

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142. 2000 SCC 35 at para 14.
143. 2008 SCC 25 at para 87 [*DB*].
144. *Ibid* at paras 84-85.
145. *Ibid* at para 87.
146. *Ibid* at para 62-63, quoting, respectively, Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 103-04 and Gilles Renaud, *Speaking to Sentence: A Practical Guide* (Toronto: Carswell, 2004) at 10.

in *Toronto Star Newspaper Ltd v Ontario* pointed to the *YCJA* restrictions on publication as one indication that the proper administration of justice requires consideration of young people's privacy rights.[147] Cohen J denied a media request for access to victim impact statements and pre-sentence reports in three cases involving young offenders convicted of serious crimes. She found that the *YCJA* publication restrictions were connected to the presumed diminished moral culpability of young people, but were also rooted in protecting their "dignity, personal integrity and autonomy" as required by the *Convention on the Rights of the Child* and the *Canadian Charter of Rights and Freedoms*.[148] The reasoning in *Toronto Star*, which the Supreme Court of Canada cited with approval in *Bragg*,[149] has also been relied upon by other Ontario courts as a touchstone for protecting young people when determining whether court-connected materials relating to them ought to be disclosed.[150]

D. Sexual Assault Complainants and the Privacy/ Vulnerability Cycle

A number of *Criminal Code* provisions that connect the privacy/ vulnerability cycle with inequality relate to sexual assault complainants. Here we focus on two such provisions: prohibition of the publication of identifying information about sexual assault complainants and restrictions on the use of complainants' past sexual history at trial.

1. Prohibitions on Publication of Identifying Information

The *Criminal Code* includes numerous provisions that initially presume in favour of openness, but grant judges discretion to impose restrictions relating to hearings and publication of identifying information. For

147. 2012 ONCJ 27 at paras 33-48 [*Toronto Star*].
148. *Ibid* at paras 43-47. See: *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
149. *Bragg*, *supra* note 100 at para 18.
150. See *e.g. R v Beckford and Stone*, 2012 ONSC 7365; *Chief of Police v Mignardi*, 2016 ONSC 5500.

example, under section 486.31 a judge *may*, on application by the prosecutor or a witness, order non-disclosure of a witness' identity.[151] Under section 486.4 a judge *may* order non-disclosure of information that could identify a witness or victim in the context of proceedings involving sexual offences.[152] However, under section 486.4(2), a judge *must* order non-disclosure of identifying information relating to a witness under 18 or a victim in proceedings involving sexual offences if the witness, victim or prosecutor applies for such an order.[153] In considering the constitutionality of this provision in *Canadian Newspapers Co v Canada (Attorney General)*,[154] the Supreme Court of Canada connected the cycle of privacy and vulnerability to the broader societal objective of encouraging reporting of widely under-reported sexual offences. Lamer J (as he then was), writing for the Court, noted:

> In the present case, the impugned provision purports to foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban ... is to favour the suppression of crime and to improve the administration of justice.[155]

In this way, the Court recognized the connection between privacy and vulnerability, finding that it weighed in favour of imposing limitations on publication. However, it tied the concern about protecting against vulnerability to goals relating to the administration of justice, rather than to protecting the privacy rights of an equality-seeking group *per se*. This, combined with the fact that the *Criminal Code* provision permits the decision about publication to be taken out of a sexually assaulted woman's hands by allowing the prosecutor to make the application, raises questions about how effectively it addresses the privacy/vulnerability cycle for women, who are disproportionately likely to be victims of sexual

151. *Criminal Code*, *supra* note 121, s 486.31.
152. *Ibid*, s 486.4.
153. *Ibid*, s 486.4(2).
154. [1988] 2 SCR 122.
155. *Ibid* at para 15.

violence.[156]

2. Restrictions on the Use of Complainants' Past Sexual History

The *Criminal Code* also addresses the privacy rights of sexual assault complainants by imposing limits on use of the complainant's past sexual history. Section 276 of the *Criminal Code*, requires an accused who seeks to bring forward the past sexual history of a complainant in a sexual assault case to first bring a motion for leave to do so.[157] In deciding whether to allow such evidence, the court must consider, among other things, "the need to remove from the fact-finding process any discriminatory belief or bias" and "the potential prejudice to the complainant's personal dignity and right of privacy".[158] Publication, broadcast or transmission of information relating to the application is prohibited unless the evidence is determined admissible or the judge orders the determination and reasons to be published.[159] While it is at best unclear whether this provision is actually applied in a way that positively affects equality,[160] the reasoning underlying the provision *does* connect privacy, vulnerability and equality.

In *R v Mills*[161] the Court, referring to its reasons in *M(A)* (discussed above in Part III.B)., upheld the constitutionality of *Criminal Code* amendments that protected against what Justice L'Heureux-Dubé had previously referred to as "extensive and unwarranted inquiries into the past histories and *private lives* of complainants of sexual assault", a practice she said "indulges the discriminatory suspicion that women

156. For further discussion, see Jane Doe, "What's in a Name? Who Benefits from the Publication Ban in Sexual Assault Trials?" in Ian Kerr, Valerie Steeves & Carole Lucock, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009) 265.
157. *Criminal Code*, *supra* note 121, s 276.
158. *Ibid*, s 276(3)(d), (f).
159. *Ibid*, s 276.3.
160. For further discussion see Lise Gotell, "When Privacy is not enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alberta Law Review 743.
161. [1999] 3 SCR 668 [*Mills*].

and children's reports of sexual victimization are uniquely likely to be fabricated".[162] Noting privacy's "underlying values of dignity, integrity and autonomy",[163] McLachlin and Iacobucci JJ, writing for the majority in *Mills*, went on to connect the privacy/vulnerability cycle to equality in the context of compelled disclosure in court proceedings:

> When the boundary between privacy and full answer and defence is not properly delineated, the equality of individuals whose lives are heavily documented is also affected, as these individuals have more records that will be subject to wrongful scrutiny. Karen Busby cautions that the use of records to challenge credibility at large will subject those whose lives already have been subject to extensive documentation to extraordinarily invasive review. This would include women whose lives have been documented under conditions of multiple inequalities and institutionalization such as Aboriginal women, women with disabilities, or women who have been imprisoned or involved with child welfare agencies.[164]

E. Other Equality-Seeking Groups and the Privacy/Vulnerability Cycle

Although Canadian law involving young persons and sexual assault complainants more consistently (but certainly not *always*) acknowledges the privacy/vulnerability cycle and its connection to equality, there is at least a limited recognition of the cycle in relation to certain other equality-seeking groups. This pattern is repeated in the human rights tribunal cases to which we now turn.

As discussed in Part II.B.2. above, certain court and tribunal rules and procedures also recognize and attempt to mitigate the "vicious cycle" of privacy loss and vulnerability, although the rationale for defaulting in favour of access in some cases where clearly vulnerable community members are involved and not in others involving equally vulnerable participants remains unclear. Nonetheless, here we explore HRTO practices that suggest privacy/vulnerability rationales for limiting access

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162. *R v O'Connor*, [1995] 4 SCR 411 at paras 122-23 [emphasis added].
163. *Mills*, *supra* note 161 at paras 80-81 [emphasis omitted].
164. *Ibid* at para 92, citing Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9:1 Canadian Journal of Women and the Law 148 at 161-62.

to records and/or proceedings.

As noted above, human rights proceedings, based as they are on claims related to social locations that render individuals and groups vulnerable to discrimination, would seem to provide classic examples of situations in which the privacy/vulnerability cycle is likely be at play. Many human rights tribunals in Canada are authorized to preclude public access to hearings and to limit access to their case files on a case-by-case basis.[165] Hearings before the HRTO, for example, "are open to the public" unless the Tribunal orders otherwise,[166] and all written decisions are publicly available.[167] The HRTO *may* order protection of the "confidentiality of personal or sensitive information where it considers it appropriate to do so", but unless otherwise ordered, in its decisions it *must* use initials to identify children under 18 and the representative of children under 18 in the proceeding.[168] HRTO's practice direction states anonymization of decisions will *only* happen in two circumstances: to protect children's identity or in "exceptional circumstances".[169] As such, we again see a prioritization of children's privacy.

MacDonnell's analysis of HRTO decisions relating to requests for confidentiality suggest that success in such cases is more likely for

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165. See *e.g.* Alberta Human Rights Commission, *Procedural Manual for Tribunal Hearings*, at 10-11, online: ABHRC <https://www.albertahumanrights.ab.ca/Documents/Procedural_Manual_September_2015.pdf>; British Columbia Human Rights Tribunal, *Rules of Practice and Procedure*, Rule 5, online: BCHRT <www.bchrt.bc.ca/shareddocs/rules/RulesOfPracticeAndProcedure.pdf >.
166. Human Rights Tribunal of Ontario, *Rules of Procedure*, Rule 3.10, online: <www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedure.html#3>.
167. *Ibid*, Rule 3.12.
168. *Ibid*, Rule 3.11, 3.11.1. The HRTO *may* also use initials for other parties if it is necessary to protect a child's identity, at Rule 3.11.1.
169. Human Rights Tribunal of Ontario, *Practice Direction on Anonymization of HRTO Decisions*, online: SJTO <www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Anonymization %20of%20HRTO%20Decisions.html>.

minors, applicants claiming sexual harassment,[170] and where a ban has issued in a related criminal case. Anonymization has also been ordered in a handful of cases where the sexual orientation or gender identity of the applicant was in issue.[171] In contrast, confidentiality requests in cases involving claims related to race, ethnic origin, creed, place of origin or ethnic origin, or which raised the issue of reprisal were unsuccessful, while requests in cases involving disability produced mixed results.[172] In a case decided after MacDonnell's analysis, a request on the basis of being a recipient of social assistance was rejected.[173]

The HRTO imposes a high standard for obtaining confidentiality with respect to disability, notwithstanding social science evidence documenting the continuing stigma attached to mental illness and the negative employment, insurance, parenting and other life repercussions that can result from disclosure of mental illness.[174] For example, in *K v Northern Initiative for Social Action*, the HRTO concluded that "[a] general claim that there is still stigma associated with mental illness is insufficient" to justify anonymization.[175] In light of this approach, it seems logical to suggest that those who prefer not to have their disabilities publicly disclosed in HRTO decisions will be deterred from seeking relief,[176] just as the Supreme Court of Canada in *Bragg* found child victims of "online sexualized cyberbullying" were likely to be deterred from seeking a legal remedy in the absence of some form of

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170. MacDonnell, *supra* note 2. However, anonymization in sexual harassment cases is not automatic: *B v H*, 2012 HRTO 212.
171. MacDonnell, *ibid* at 115-8.
172. *Ibid* at 118-9.
173. *C v Ontario (Community and Social Services)*, 2016 HRTO 691. This decision seems particularly paradoxical in light of the fact that the Social Benefits Tribunal of Ontario (and indeed all other Social Justice Tribunals in Ontario other than the HRTO) anonymize their decisions in some way: MacDonnell, *supra* note 2 at 136.
174. MacDonnell, *ibid* at 122-123.
175. 2014 HRTO 136 at para 9. See also *F v Toronto Transit Commission*, 2017 HRTO 514 at paras 27-28; *K v Toronto Police Service*, 2012 HRTO 1374 at para 20.
176. MacDonnell, *supra* note 2 at 125.

confidentiality.[177] Deterring claims by those who prefer not to disclose their disabilities arguably undermines their right to equal benefit and protection of the law in the same way that disclosure of the identities of sexual assault complainants without their consent triggers their equality rights, as found by the Supreme Court of Canada in *Mills*.[178]

Notwithstanding concerns around HRTO practice in relation to disability and certain other grounds of discrimination, in situations where the HRTO *does* decide to order anonymization of its decisions, its reasons sometimes acknowledge the privacy/vulnerability cycle. In *GG v 1489024 Ontario Ltd*, for example, the HRTO ordered anonymization in a case involving allegations of sexual harassment.[179] Although Adjudicator Whist noted that the mere fact that "issues of a personal or sensitive nature" would not be enough to justify anonymization, he concluded that the case fell "within one of the exceptional situations" where anonymization was appropriate, citing a "risk of disclosure of highly sensitive information" in a case where the applicant had "already been subject to a sexual assault arising out of the facts that form the basis" for her complaint.[180]

F. The Privacy/Vulnerability Cycle and Online Court Records: Commentary and Policy

Policymakers have also articulated concerns about the privacy/vulnerability cycle in considering the implications of online accessibility of court records. In British Columbia, for example, the Provincial Court issued a direction to prevent remote online access to non-conviction information,

177. *Bragg*, *supra* note 100.
178. *Criminal Code*, *supra* note 121, ss 486.31, 486.4, 486.4(2).
179. 2012 HRTO 824.
180. *Ibid* at para 9.

stays of proceedings and peace bonds after specific periods of time.[181] The direction specifically refers to submissions filed as part of a public consultation on the issue that illustrate the privacy/vulnerability cycle and unjust stigma arising from the use of non-conviction information to judge individuals' suitability for jobs and rental accommodation.[182] Justice Bielby of the Alberta Court of Queen's Bench expressed similar concerns about allowing "ready public access to the names of unconvicted accused" in *Krushell*, noting that:

> [s]tatutorily prescribed punishments for the convicted would pale in many cases in comparison to the de facto punishment created by posting [such] information… for the benefit of the gossip and the busybody.[183]

In light of these concerns, the Court rejected an access to information request for disclosure of daily court dockets by an applicant who proposed to post them on the internet. Additionally, courts in BC and Alberta have chosen not to post certain kinds of decisions on their websites, such as those relating to family law, child protection and divorce,[184] and, as noted above, family court records are not publicly accessible on BC's CSO.

The Office of the Privacy Commissioner of Canada ("OPC") has also issued access guidelines for federal tribunals governed by the *Privacy Act*[185] with respect to addressing the privacy/vulnerability cycle aggravated by

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181. Memorandum from the Provincial Court of British Columbia (March 2016) Policy regarding criminal court record information available through Court Services Online, at 7, online: Provincial Court BC <www.provincialcourt.bc.ca/downloads/NewsReleases/Provincial%20Court%20Post-Consultation%20Memorandum%20-%20CSO%20Criminal%20Information.pdf>. Non-conviction information has to be removed within 30 days of the entry of the acquittal, withdrawal or dismissal. Information on stays of proceedings has to be rendered inaccessible 1 year after entry of the stay. Information relating to peace bonds has to be rendered inaccessible once the bond has expired.
182. *Ibid* at 3-4.
183. *Alberta (Attorney General of) v Krushell*, 2003 ABQB 252 at para 49 [emphasis omitted].
184. Gary Dickson QC, "Administrative Tribunals, Privacy and the Net" (2009) 6:12 Canadian Privacy L Rev 65 at 73, online: Perma <https://perma.cc/A9L9-59C7>.
185. RSC 1985, c P-21.

online access to court records noting:

> When personal information is made available on the internet, individuals are at greater risk of identity theft, stalkers, data profilers, data miners and *discriminatory practices*; personal information can be taken out of context and used in illegitimate ways; and individuals lose control over personal information they may well have legitimately expected would be used for only limited purposes.[186]

Additionally, the OPC has questioned whether "the broad public needs to know the names of individuals involved or requires access to intimate personal details through decisions posted widely on the internet",[187] expressing the view that "the right to open courts does not outweigh the right to privacy" so that both should exist in equilibrium.[188] In line with these concerns, in 2008, the OPC recommended that Service Canada should either depersonalize or post only summaries of the Office of the Umpire decisions on the internet, noting that these appeals related to personal information about employment insurance.[189]

Similarly, the Saskatchewan Information Privacy Commissioner ("IPC") recommended that the Automobile Injury Appeal Commission mask the identity of applicants before posting their decisions online.[190] Subsequently, the IPC's 2004-5 annual report highlighted the connection between online disclosure of personal and health information and "such

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186. Office of the Privacy Commissioner of Canada, "Guidance Document: Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals" (February 2010) at 2, online: OPC <publications.gc.ca/collections/collection_2013/priv/IP54-48-2010-eng.pdf> [emphasis added].
187. Jennifer Stoddart, "Setting the 'Bar' on Privacy Protection" (speech delivered at the Canadian Bar Association Legal Conference and Expo, Quebec City, 17 August 2008), online: OPC <https://www.priv.gc.ca/en/opc-news/speeches/2008/sp-d_080817/>.
188. Canadian Judicial Council, "Synthesis on the Comments on the JTAC's Discussion Paper on Open Courts Electronic Access to Court Records and Privacy", by Lisa Austin & Frederic Pelletier (Ottawa: January 2005) at 10, online: CJC <https://www.cjc-ccm.gc.ca/cmslib/ general/news_pub_techissues_Synthesis_2005_en.pdf>.
189. Dickson, *supra* note 184 at 66.
190. *Ibid* at 78.

problems as identity theft, marketing opportunities, commercial data bases, personal safety of victims of domestic violence and stalking".[191] Ultimately, the Commission adopted a policy of using initials in its decisions.[192]

In 2005 the Canadian Judicial Council's Judges Technology Advisory Committee issued its *Model Policy for Access to Court Records in Canada*.[193] That policy stated that it did not endorse making all court records accessible online, and specifically adverted to the privacy/vulnerability cycle, noting that "new technologies increase the risks that court information might be used for improper purposes such as commercial data mining, identity theft, stalking, *harassment and discrimination*".[194] It recommended, among other things, that courts "prohibit the inclusion of unnecessary personal data identifiers and other personal information in the court record" and that judges avoid disclosure of personal data identifiers and limit disclosure of personal information in their judgments.[195] It also recommended that judgments be made available online, but that steps be taken to prevent indexing and cache storage by online bots, so as to avoid searchability on general search engines like Google.[196]

The privacy/vulnerability cycle and the special concerns it raises for members of equality-seeking communities in the context of online court records is sometimes explicitly, but more often implicitly, recognized in Canadian case law, legislation, court and tribunal rules and procedures, as well as in commentary from privacy commissioners and policy makers. While explicit reference to the cycle is more likely to surface in the context of specific vulnerable populations, including young people and sexual assault complainants (who are disproportionately likely to be women),

191. *Ibid*.
192. Dickson, *supra* note 184.
193. Canadian Judicial Council, "Model Policy for Access to Court Records in Canada" (Ottawa: Judges Technology Advisory Committee, 2005), online: CJC <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>.
194. *Ibid* at iii, vii [emphasis added].
195. *Ibid*, ss 2.1, 2.3.
196. *Ibid*, s 4.6.1.

it is occasionally also implicitly recognized in practices of anonymization in relation to decision making about members of other equality-seeking communities. These existing, albeit limited, acknowledgments of the privacy/vulnerability cycle, combined with concerns about widespread online dissemination and increasingly sophisticated data profiling techniques, provide a foundation and context ripe for reflecting on the relationship between privacy and equality and for developing effective measures to intervene in the privacy/vulnerability cycle.

IV. Conclusion

Although privacy at law has been abused by members of privileged groups to the disadvantage of less privileged groups, privacy, properly conceived, can also be intimately connected to autonomy, self-determination and collective social rights and values, like equality.[197] As Calo has argued, members of marginalized communities are often accorded less privacy and subjected to greater surveillance, which in turn exacerbates their exposure to further discrimination and marginalization.[198] The justice system frequently contributes to this "vicious cycle", through the over-representation of members of marginalized communities in court proceedings either against their will or in order to contest or seek redress for the results of their marginalization. It need not, however, perpetuate the "vicious cycle" of privacy and vulnerability when it comes to public access to court records. This has been recognized (albeit to a very limited degree) in the context of certain vulnerable groups, particularly children and sexual assault complainants, as well as in other privacy-based limits imposed in relation to litigation. And it need not, and should not, perpetuate that "vicious cycle" in the context of *online* public access to court records.

Calo, in the epigraph, suggests that stronger protections for the

197. See Jane Bailey, "Towards an Equality-Enhancing Conception of Privacy" (2008) 31:2 Dalhousie Law Journal 267.

198. For further discussion of the surveillance/discrimination cycle in relation to marginalized populations, see Rachel E Dubrofsky & Shoshana Amielle Magnet, *Feminist Surveillance Studies* (Durham, NC: Duke University Press, 2015).

chronically vulnerable may be in order. While we agree with the logic and moral appeal of this argument, specifying restrictions on online access to court records for chronically vulnerable communities raises at least three problems. First, identification of the "chronically vulnerable" seems to necessitate creation of hierarchies of vulnerability that, in light of the multiplicity of matrices of domination at play in the world,[199] may neither be equality-enhancing or possible to do. Second, the identification process would have to be an ongoing one as the sources and grounds and intersections of vulnerability due to social location shift and reshape themselves. This would inevitably seem to leave certain marginalized communities vulnerable and exposed until such time as their plight was recognized by the courts and incorporated into some form of privacy-protective, equality-enhancing measure. Third, as MacDonnell has pointed out, automatic "protections" for certain marginalized groups could serve to reinforce the stereotypes and discrimination against which they are intended to push back[200] by uniquely depriving members of those groups the autonomy to determine whether they wish to conceal that information about themselves.

For these reasons, and recognizing that there is no perfect solution, we return to the recommendation we put forward as a result of a prior analysis that specifically focused on the privacy issues relating to online public access to unredacted court records.[201] There we proposed maintaining public access to court records in its current form (and subject to whatever limitations laws that rein in the open court principle allow), while "introducing appropriate 'friction' in the process of accessing court records" online.[202] This could include redacting personal information from court records (including anonymizing judgments) before they are made accessible online, restricting search visibility and protecting access

199. See Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016).
200. MacDonnell, *supra* note 2 at 144.
201. Bailey & Burkell, *supra* note 2.
202. *Ibid* at 182.

to documents.[203]

We recognize that this response goes further than necessary to intervene specifically on the privacy/vulnerability cycle because it provides a level of obscurity for both those who are members of equality-seeking groups and those who are not. However, it offers two attractive outcomes. First, it does not presume that members of certain marginalized communities *must* want to conceal information about themselves because it is *necessarily* stigmatizing or something to be ashamed of. Instead it assumes that a certain level of concealment is important to the dignity of *all* persons in the context of easy and widespread access to digital records. Second, in making that assumption, it removes the costly onus of bringing a motion to displace a presumption of openness in a proceeding from the shoulders of a party seeking privacy protection. This aspect of our proposed response could be of particular benefit to individuals from marginalized communities who are unaware of the possibility of seeking such protections and/or who are not in a financial position to press for them before a court or tribunal.

203. *Ibid* at 181, referring to Woodrow Hartzog & Frederic D Stutzman, "Obscurity by Design" (2013) 88:2 Washington Law Review 385.