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Dignity, Intersectional Gendered Harm, and a Flexible Approach: Analysis of the Right to One's Image in Quebec

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INTRODUCTION

Canada is one of many countries that has recently enacted laws to address the risk of an emerging instance of harm — the sharing of one's image without their consent on the internet.[1] This harm can happen at alarming speeds and on a massive scale in terms of exposure.[2] In tandem, there is a growing body of scholarly work in English on the dignity-focused aspects of the civil tradition, particularly in Canada, which has dealt with this phenomenon for multiple decades.[3] More specifically, dating back to the 1970s, Quebec has recognized the right to one's image (*droit à l'image*),[4] which is the closest civil law

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[1] Clare McGlynn, Erika Rackley, Ruth Houghton, "Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse" (2017) 25:1 Fem Leg Stud 25 at 25. At the time of writing, the Government of Canada has also issued a technical paper and discussion guide outlining a proposal for legislation that would hold "online communication services" and "online communication service providers" legally responsible for five types of online content, including the non-consensual distribution of intimate images online. See Government of Canada, "Have your say: The Government's proposed approach to address harmful content online" (29 July 2021), online: < www.canada.ca/en/canadian-heritage/campaigns/harmful-online-content.html > .

[2] Cynthia Khoo, "Deplatforming Misogyny: Report on Platform Liability for Technology-Facilitated Gender-Based Violence" (2021) Women's Legal Action Fund Report at 62-70; Jane Bailey & Jasmine Dong, "Toward Survivor-Centred Outcomes for Targets of Privacy-Invasive TFVA: Assessing the Equality-Affirming Impact of *Jarvis*" in Christopher Hunt & Robert Diab, eds, *The Last Frontier: Digital Privacy and the Charter*, (Thomson Reuters Press) [forthcoming].

[3] See e.g. Suzie Dunn, "Identity Manipulation: Responding to Advances in Artificial Intelligence and Robotics" (Paper delivered at We Robot 2020, Ottawa, 2 April 2020) at 10 [unpublished]; Andrea Slane, "From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law" (2010) 48:3/4 Osgoode Hall LJ 543; Lisa Austin, "Privacy and Private Law: The Dilemma of Justification", (2010) 55:2 McGill LJ 165; Pamela Hrick, "The Potential of Centralized and Statutorily-Empowered Bodies to Advance a Survivor-Centred Approach to Technology-Facilitated Violence Against Women" in Jane Bailey, Asher Flynn & Nicola Henry, eds, *Emerald International Handbook of Technology-Facilitated Violence and Abuse* (UK: Emerald, 2021).

approximation of private liability based on invasion of privacy or publicity rights. As explained further below, while the conception of privacy in North American common law is generally rooted in the value of freedom from interference by government or other people and has evolved in a piecemeal fashion,[5] the right to one's image in Quebec is a legal framework emanating from the continental European tradition that has historically been focused on prioritizing one's right to self-determination as a corollary to dignity in the context of community.[6]

This article draws on critical feminist theory[7] and the framework of intersectionality[8] to examine how courts in Quebec have begun — and are poised — to respond to the phenomenon of the non-consensual sharing of images, particularly if they are of an intimate or sexual nature. Dunn's work has demonstrated that Quebec's dignity-focused approach to the protection of identity and privacy ought to guide the development of similar civil recourse provided in common law Canada.[9] This paper fills a gap by identifying the affordances and gaps of Quebec's legal approach from the vantage point of equality-seeking groups, with a particular focus on the gendered dimensions of this harm. Notably, analysis has been limited to ten legal decisions from the Quebec jurisdiction that met certain inclusion and exclusion criteria as outlined below.

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4 Pierre Trudel, "Le droit de la personne sur son image" in Vincent Gautrais, Catherine Régis & Laurence Largenté, eds, *Mélanges en l'honneur du professeur Patrick A. Molinari* (Montréal: Éditions Thémis, 2018) at 353.

5 Giorgio Resta, "Personnalité, Persönlichkeit, Personality" (2008) 1:3 Eur J Comparative L & Governance 215; Jane Bailey, "Towards an Equality-Enhancing Conception of Privacy" (2008) 31:2 Dal LJ 267 at 273; Karen Eltis, "Can the Reasonable Person Still Be 'Highly Offended'? An Invitation to Consider the Civil Law Tradition's Personality Rights-Based Approach to Tort Privacy" (2008) 5:1/2 U Ottawa L & Technology J 199 at 205 [Eltis, "Can the Reasonable Person Still Be 'Highly Offended'?"]; Karen Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age" (2018) 63 McGill LJ 553 [Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable?"].

6 James Q Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113:6 Yale LJ 1151; Resta, *ibid*; Elisabeth Logeais & Jean-Baptiste Schroeder, "The French Right of Image: An Ambiguous Concept Protecting the Human Persona" (1998) 18:3 Loy LA Ent L Rev 511; Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable?", *ibid*.

7 See e.g. Moira Aikenhead, "A 'Reasonable' Expectation of Sexual Privacy in the Digital Age" (2018) 41:2 Dal LJ 273.

8 See e.g. Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford LJ 1241; Alexa Dodge, "Trading Nudes Like Hockey Cards: Exploring the Diversity of 'Revenge Porn' Cases Responded to in Law" (2021) 30:3 Soc & Leg Stud 448 [Dodge, "Trading Nudes Like Hockey Cards"].

9 Dunn, *supra* note 3.

In the Canadian context, the landmark Supreme Court case of *Aubry c. Éditions Vice Versa Inc.* recognized in 1998 that the right to one's image in Quebec is an aspect of the right to one's private life and personality rights, which are protected in both the *Quebec Charter* and the *Civil Code of Quebec*.[10] Below, I briefly outline the sources of law that set out the right to one's image in Canada and Quebec, solidifying that the civil tradition in Quebec's private law prioritizes the protection of dignity in privacy infringement claims involving images. I also analyze several image rights cases that fall within specific parameters to show that judges in Quebec do not consistently understand the sharing of women's images as a matter of gender-based violence.[11] In line with work by Aikenhead focused on Canada's criminal response to NCDII (non-consensual disclosure of intimate images), my findings also reveal that judges in Quebec at times incorporate stereotypical biases regarding the responsibilization of complainants when analyzing invasion of privacy claims.[12]

A dignity-based approach is one important condition enabling judges to analyze the gender-based violence that describes the use of images — particularly ones of a sexual nature — featuring equality-seeking groups without their consent.[13] This article is significant for the way it demonstrates that a dignity-based approach is clearly not necessarily enough to incentivize judges in Quebec to consider the larger societal issues at play when analyzing the right to one's image as an aspect of privacy or one's private life.

However, the final prong of my analysis begins to demonstrate that the legal notion of the right to one's image in Quebec also holds promise for being broader in scope, and for being able to capture a wider range of unwanted activity regarding the use of one's image. This article focuses on the gender-based aspects of the non-consensual taking and sharing of images. Yet, as we shall we, many of the complainants vying to win their invasion of privacy case in Quebec court were not only women; in many cases they were also racialized, were often religious minorities, and, in one case, the complainant was a trans woman. Quebec's dignity-based approach to civil privacy claims — in contrast to the piecemeal approach that defines the rest of Canada's colonial, common law system regarding civil privacy claims over sexual images[14] — is therefore likely better equipped to respond to a wider range of circumstances involving rights in the use of one's image and likeness for the benefit of numerous equality-seeking communities, such the LGBTQ2S+ community, religious minorities, and racialized people.

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[10] *Aubry c. Éditions Vice Versa Inc.*, 1998 CarswellQue 4806, 1998 CarswellQue 4807, (*sub nom.* Aubry v. Éditions Vice-Versa inc.) [1998] 1 S.C.R. 591 (S.C.C.) [*Aubry*].

[11] Bailey & Dong, *supra* note 2.

[12] *Aikenhead, supra* note 7.

[13] *Ibid.*; Bailey, *supra* note 5; Slane, *supra* note 3.

[14] McGlynn et al, *supra* note 1 at 28.

1. THE CONTEXT

The law in Canada has rapidly evolved in the last decade to account for the era of online, user-generated content. Dubbed the "web 2.0" by tech consultants in by-gone times,[15] ours is an era where it is easier than ever to record, publish, alter, and share media such as written texts, images, videos, games, or any other form of experience or content online.[16] The democratization of content creation has also extended and enabled new forms of harm, exacerbating previously existing systemic inequalities between different groups of people. Scholars McGlynn et al, responding to the onslaught of laws enacted around the world seeking to combat some notion of "revenge porn,"[17] importantly relabelled the issue as a matter of "image-based sexual abuse."[18] Use of this term is intentional: it captures a wide array of practices that have as a common denominator the harassment and abuse predominantly against women and girls,[19] with examples including the use of images without consent (e.g., sharing, editing, etc.), extortion, stalking or voyeurism online, and rape or death threats, among many other emergent types of harm.[20]

> Women are, indeed, disproportionately targeted and affected by these behaviours, and there are other variables that also warrant consideration. Writing to the United Nations Special Rapporteur on Violence Against Women, researchers at the Citizen Lab observed that "[d]iscrimination on the basis of gender identity, gender expression, sexual orientation, disability, race, ethnicity, Indigenous status, age, religion and other factors also compound, exacerbate and complicate experiences of gender-based violence."[21]

More specifically, they also pointed to a breadth of reports demonstrating that Indigenous women, people of colour, those with precarious immigration statuses, and sex workers face additional barriers when seeking legal protection against online violence, abuse, and harassment.[22] Work by Khoo serves as an

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[15] Lev Grossman, "You — Yes, You — Are TIME's Person of the Year," *Time* (25 December 2006), online: <http://content.time.com/time/magazine/article/0,9171,1570810,00.html>.

[16] Nicola Henry et al, *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (New York: Routledge, 2021) at 2.

[17] See e.g. Yuan Stevens, "'Revenge Porn,' Tort Law, and Changing Socio-Technological Realities: A Commentary on *Doe 464533 v ND*" (2017) 15 CJLT 337.

[18] McGlynn et al, *supra* note 1.

[19] *Ibid.* at 40; Henry et al, *supra* note 16.

[20] McGlynn et al, *supra* note 1 at 36, 28.

[21] Citizen Lab, Munk School of Global Affairs, "Submission of the Citizen Lab (Munk School of Global Affairs, University of Toronto) to the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Dubravka Simonovic" (2 November 2017) at 2, online (pdf): *University of Toronto* <citizenlab.ca/wp-content/uploads/2017/11/Final-UNSRVAG-CitizenLab.pdf> [perma.cc/UH9R-39EL].

important reminder that analysis of technology-facilitated gender-based violence necessarily includes trans women, trans men, as well as nonbinary individuals, given that such activity "is rooted in, arises from, and is exacerbated by misogyny, sexist norms, and rape culture" as examples of the systemic oppression that has long occurred against these communities both before and since the inception of the internet.[23]

The tragic suicides in the early 2010s of two Canadian teenagers, Rehtaeh Parsons and Amanda Todd, can be seen as the lynchpins leading politicians and lawmakers to take seriously the issue of image-based (sexual) abuse in Canada.[24] Common to the story of both teens is the experience of having their images captured — while nude or engaging in sexual activity — in the context of the coercion and intimidation by boys or men, leading to tragic and lasting harm on them as individuals and on their communities writ small and large. There had been previous high-profile cases of image-based harassment and violence online involving Canadian teenagers, but the "intense media coverage and public outcry in response to Todd's and Parsons' suicide" spurred the enactment of numerous legal initiatives at the provincial and federal levels in Canada starting in 2013.[25]

Currently, numerous provinces (Nova Scotia, Newfoundland, Alberta, Manitoba, and Prince Edward Island) have enacted statutory tort law that specifically seeks to address the "non-consensual distribution of intimate images."[26] British Columbia, Saskatchewan, Manitoba, and Newfoundland have also had statutory invasion of privacy torts at their disposal for several years,[27] and Saskatchewan amended its privacy law to explicitly account for NCDII in 2018.[28] Numerous other statutory bases exist for certain privacy violation cases,[29] as well as related common law torts, including defamation, invasion of privacy,[30] breach of confidence, and intentional infliction of mental

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[22] *Ibid*.

[23] Khoo, *supra* note 2.

[24] Carissima Mathen, "Crowdsourcing Sexual Objectification" (2014) 3:3 Laws 529.

[25] Mylynn Felt, "The Incessant Image: How Dominant News Coverage Shaped Canadian Cyberbullying Law" (2015) 66 UNBLJ 137 at 145.

[26] *Intimate Images and Cyber-protection Act*, SNS 2017, c 7 (NS); *The Intimate Image Protection Act*, CCSM, c I87 (MB); *Intimate Image Protection Act*, SNL 2018, c I-22 (NL); *Protecting Victims* of *Non-consensual Distribution* of *Intimate Images Act*, RSA 2017, c P-26.9 (AB); *Intimate Images Protection Act,* RSPEI 1988, c I-9.1 (PEI). Notably, this list of pieces of legislation does not include changes to provincial education law responding to cyberbullying; see e.g. Felt, *ibid*.

[27] *Privacy Act*, RSBC 1996, c 373 (BC); *Privacy Act*, RSS 1978, c P-24 (SK); *Privacy Act*, CCSM c P125 (MB); *Privacy Act*, RSNL 1990, c P-22 (NL).

[28] *Privacy Act*, RSS 1978, c P-24, ss 7-8; Government of Saskatchewan, "Legislation To Support Victims Of 'Revenge Porn' Takes Effect" (17 September 2018), online: < https://www.saskatchewan.ca/government/news-and-media/2018/september/17/privacy-act >

[29] Barbara von Tigerstrom, "Direct and Vicarious Liability for Tort Claims Involving Violation of Privacy" (2018) 96:3 Can Bar Rev 539 at 542.

distress,[31] the analysis of which is out of scope for this article. There is currently little case law involving interpretation of Saskatchewan's amended privacy law, though at the time of writing two sets of cases have involved substantive application and examination of Nova Scotia's[32] and Manitoba's NCDII laws.[33]

At the federal level, s 162.1 of the *Criminal Code* came into force in 2015, making it a crime to share a person's intimate image without their consent.[34] When s 162.1 was enacted, Aikenhead feared that judges would fail to interpret NCDII as gender-based violence.[35] Building on her work assisting the Women's Legal Action Fund's intervention in the landmark decision of *R. v. Jarvis*, Aikenhead demonstrated the critical need to recognize the harms of NCDII as gendered in nature and premised on the objectification of women; she also admonished judges to ensure that conceptions of an "ideal" victim do not impact their interpretations of (a) whether NCDII has occurred, (b) the seriousness of NCDII, or (c) victims' privacy expectations.[36] Along with work by Dunn on dignity,[37] Aikenhead's work served as a foundational piece in this article's analysis, and will be referred to in depth below.

Recent work by Dueck-Read also sought to respond directly to Aikenhead's calls to the judiciary. Writing in 2020, Dueck-Read analyzed a random selection of the now several dozen criminal cases that cite s 162.1.[38] This important work, though necessarily and intentionally limited in its scope, concluded that judges are thankfully not consistently perpetuating rape myths and discriminatory stereotypes common to sexual assault when they analyze s 162.1.[39]

Further analysis of the factual situations that could be captured by s 162.1 demonstrates that there is a wide range of circumstances that fall out of the "paradigmatic scenario of a man distributing intimate images to harass or abuse his female partner/ex-partner," highlighting the need for increased research with

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30 *Jones v. Tsige*, 2012 ONCA 32, 2012 CarswellOnt 274 (Ont. C.A.).

31 Suzie Dunn & Alessia Petricone-Westwood, "More than 'Revenge Porn': Civil Remedies for the Nonconsensual Distribution of Intimate Images" (Paper delivered at the 38th Annual Civil Litigation Conference, Mont-Tremblant, November 2018).

32 *Feser v. Candelora*, 2021 NSCA 49, 2021 CarswellNS 430 (N.S. C.A.)

33 *Doucet v. The Royal Winnipeg Ballet (The Royal Winnipeg Ballet School)*, 2019 ONSC 6982, 2019 CarswellOnt 19977 (Ont. S.C.J.).

34 *Protecting Canadians from Online Crime Act,* SC 2014, c 31.

35 Aikenhead, *supra* note 7.

36 *Ibid.* at 275; *R. v. Jarvis*, 2019 SCC 10, 2019 CarswellOnt 1921, 2019 CarswellOnt 1922 (S.C.C.).

37 Dunn, *supra* note 3.

38 Alicia Dueck-Read, "Judicial Constructions of Responsibility in Revenge Porn: Judicial Discourse in Non-Consensual Intimate Image Distribution Cases — A Feminist Analysis" (2020) 43:3 Man LJ 357.

39 *Ibid.;* Alexa Dodge, "Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph" (2016) 12:1 Crime, Media, Culture 65.

an intersectional lens looking at the multiple, overlapping aspects of identity that may also fall outside the confines of cis, heterosexual and/or white woman.[40]

It is clear that scholars have made concerted and important efforts to examine Canada's criminal law and common law response to the use of a person's sexual image without their consent. Yet along with Dunn, I seek to contribute to the growing body of literature examining the legal concepts that exist particularly in Canada's civil law tradition rooted in French colonization of Quebec and that may be relied on to protect one's image rights and right to self-determination.[41] Much like Dueck-Read, I position this article in direct conversation not only with Aikenhead but also with Dunn, who have both advocated for a dignity-based approach to judicial examinations of invasion of privacy claims in Canada involving one's image. Beyond the specific focus of image-based rights, Quebec authors such as Karen Eltis have contributed significantly to the argument that Quebec's dignity-based approach is best equipped to address the harms caused in the digital age.[42] Indeed, as described in further depth below, the protection of privacy in Quebec shows significant promise for those in pursuit of dignity-based analyses of the use of a person's image without consent and particularly for equity-seeking communities. The notion of the right to one's image in Quebec stands in contrast to the liberty-based and piecemeal approach to privacy protection that emerged in North America's common law;[43] Quebec's law over images has been developed to explicitly reproduce the rights to one's private life and to personality (rooted in continental Europe) as aspects of individual dignity and collective human flourishing.[44]

In short, a dignity-based approach to non-criminal invasion of privacy claims for image-based (sexual) abuse already explicitly exists in Canada, albeit in the francophone civil law tradition. This article fills a critical gap in research by further examining the mechanics of the right to one's image in Quebec, analyzing whether judges adequately recognize such related harms as gender-based violence when adjudicating the right to image cases, and assessing the strengths of Quebec's flexible system in comparison to the relatively stringent and narrow approach of Canada's common law tradition when it comes to equality-seeking communities.

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40 Dodge, "Trading Nudes Like Hockey Cards," *supra* note 8 at 2, 4, 14.

41 Dunn, *supra* note 3.

42 "Can the Reasonable Person Still Be 'Highly Offended'?", *supra* note 5.

43 Slane, *supra* note 3; Austin, *supra* note 3; Avner Levin & Mary Jo Nicholson, "Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground" (2005) 2:2 U Ottawa L & Technology J 357.

44 Whitman, *supra* note 6; McGlynn et al, *supra* note 1; Resta, *supra* note 5.

2. THE RIGHT TO ONE'S IMAGE IN QUEBEC

In Quebec, a legal concept exists that finds no exact equivalent in the common law tradition that marks the rest of colonial North America: personality rights, rooted in a concept of dignity.[45] The term "personality rights" in the civil tradition can generally be distinguished from the notions of publicity rights or the tort of misappropriation of personality, both of which exist in the rest of Canada's common law tradition and have come to focus on the proprietary or economic interests one has in their image or identity.[46] Instead, perhaps the closest approximation to the notion of personality rights in the common law tradition is the legal concept of the right to privacy, which "works as the main tool for the conceptualization of dignitary interests both in the law of torts and in constitutional law."[47]

The tort-based privacy actions found in Canada's common law tradition have an interrelated, yet separate, history (and trajectory) from the right to one's image that exists in Quebec's civil law tradition. Without being exhaustive, work by Dunn,[48] Eltis,[49] Levin and Nicholson,[50] Potvin,[51] Rigaux,[52] Siegel et al,[53] Slane,[54] Trudel,[55] as well as Whitman[56] all shine a light on the key differences between these two legal modes of operating and the values that animate them. For the purposes of this article, a key underlying difference between the two legal traditions generally involves the fact that "common law has taken privacy as a starting point, and this has historically been based on the idea of (negative) liberty," whereas "the cornerstone of the civil law model has been personality, which was originally bound up with the notion of dignity."[57]

Through case law's interpretation of codified civil law, the legal tradition in Quebec has evolved over the course of decades to protect privacy rights

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45 Eltis, "Can the Reasonable Person Still Be 'Highly Offended'?", *supra* note 5.

46 Dunn, *supra* note 3 at 30, 34.

47 Resta, *supra* note 5 at 222.

48 Dunn, *supra* note 3.

49 See e.g. Eltis, "Can the Reasonable Person Still Be 'Highly Offended'?", *supra* note 5; Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable?", *supra* note 6.

50 Levin & Nicholson, *supra* note 43.

51 Louise Potvin, *La personne et la protection de son image : étude comparée des droits québécois, français et de la common law anglaise* (Cowansville: Éditions Yvon Blais, 1991).

52 François Rigaux, *La protection de la vie privée et des autres biens de la personnalité* (Bruxelles: Bruylant, 1990).

53 Ariane Siegel et al, "Survey of Privacy Law Developments in 2009: United States, Canada, and the European Union" (2009) 65:1 Bus Lawyer 285.

54 Slane, *supra* note 3.

55 Trudel, *supra* note 4.

56 Whitman, *supra* note 6.

57 Resta, *supra* note 5 at 241.

associated with one's image.[58] The core pieces of legislation governing private affairs in Quebec are the *Civil Code of Quebec*[59] (the *Civil Code*) and the Quebec *Charter of Human Rights and Freedoms* (Quebec's *Charter*),[60] typically cited in tandem with each other as invoked by the complainant. Importantly, unlike Canada's *Charter of Rights and Freedoms* as part of the *Constitution*,[61] the *Quebec Charter* is enforceable against all people (and not just the state).[62] In common law Canada, one might turn to a right of action under statute or a common law tort in the case of defamation or the non-consensual sharing of images.[63] However, in Quebec, one's extra-contractual right of action in such a case is found within both the *Civil Code* and Quebec's *Charter*.

As hinted at earlier, Quebec's *Charter* is rooted in a dignity-based approach to the protection of fundamental human rights and freedoms.[64] It protects fundamental freedoms such as the right to freedom of expression (s 3),[65] the positive rights to the safeguard of one's dignity, honour, and reputation (s 4) [66] as well as respect for one's private life (s. 5), [67] the "full and equal recognition and exercise of [one's] human rights and freedoms, without distinction, exclusion or preference" (s. 10),[68] and the right to cessation from interference with such rights as well as compensation for moral or material prejudice resulting from such interference (s 49).[69] None of these rights are absolute. Limits to these rights can be fixed by law, and these fundamental freedoms must be exercised with "a proper regard for democratic values, public order, and the general well-being of citizens in Quebec."[70]

At the outset of the *Civil Code*, all people are granted the right to their "name, reputation and privacy" as a fundamental aspect of their "personality rights" (s 3).[71] The right to privacy under the *Civil Code* is also enshrined in ss 35

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58 See e.g. Potvin, *supra* note 51 at 214, who observes that case law dating back to at least 1969 recognized the principle of human rights over one's image and likeness.

59 *Civil Code of Quebec*, CQLR c CCQ-1991, [*Civil Code* or *CCQ*].

60 *Charter of Human Rights and Freedoms*, CQLR c C-12, [*Quebec Charter* or Quebec's *Charter*].

61 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

62 *Quebec Charter*, *supra* note 60, s 49.

63 See also Barbara von Tigerstrom, *Information and Privacy Law in Canada* (Toronto: Irwin Law, 2020) at 137 [von Tigerstrom, *Information and Privacy Law*].

64 *CCQ*, *supra* note 59.

65 *Quebec Charter*, *supra* note 60, s 3.

66 *Ibid.,* s 4.

67 *Ibid*., s 5.

68 *Ibid*., s 10.

69 *Ibid*., s 49.

70 *Quebec Charter, supra* note 60, s 9.1. See also von Tigerstrom, *Information and Privacy Law, supra* note 63 at 134.

to 41 of the law, with s 35 safeguarding the right to respect of one's "reputation and privacy," while using a person's "name, image, likeness or voice" is one act among others that may be considered the invasion of privacy of a person.[72] These *Civil Code* provisions came into effect 1994 and were enacted with the explicit purpose of being in harmony with Quebec's *Charter*.[73] The *Civil Code* has also recreated a similar general tort liability found in the French Civil Code, which imposes a duty not to cause injury to others and can be relied on to hold someone liable for bodily, moral, or material damages owed to another person.[74]

The Supreme Court confirmed in the 1998 *Aubry* decision what courts in Quebec had flirted with by that point for some time; namely, that the right to one's image indeed exists in Quebec and is an aspect of the right to one's private life as well as an aspect of one's personality rights.[75] According to Trudel, a right in one's image is also a quasi-patrimonial right,[76] drawing on the French legal tradition in which one is afforded the positive right to economically benefit from one's image.[77] This helps to explain why a person of a certain level of notoriety in the French and Québécois legal traditions has historically enjoyed the exclusive right to use their image for advertising or commercial purposes,[78] in light of the need to balance this right with the right to freedom of expression.[79] Work by Eltis also demonstrates that privacy rights are inalienable and that intrusions of privacy are "faults," with the result that the damage they cause is actionable whether or not the harm occurred in a private setting or in the context of providing tacit consent.[80] A violation of privacy can be found in Quebec even if the image is not reprehensible, given that privacy and reputation are distinct (yet

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71 *CCQ*, *supra* note 59, s 3.

72 *Ibid*., ss 35-41.

73 Adrian Popovici, "L'altération de la personnalité aux yeux du public" (1995) 28:1 La Revue juridique Thémis. Prior to this point, there was no provision or set of provisions in Quebec that proclaimed the existence of the right to respect for one's private life; H Patrick Glenn, "Le secret de la vie privée en droit Québécois," (1974) 5:1 Éditions de l'Université d'Ottawa 24 at 25. Note as well that there were precursors to these provisions in the *Civil Code of Quebec,* including the *Loi portant réforme au Code civil du Québec du droit des personnes, des successions et des biens,* LQ 1987, c 18; see e.g. Potvin, *supra* note 51 at 414.

74 *Supra* note 59, s 1457; see also Logeais & Schroeder, *supra* note 6 at 514.

75 *Aubry, supra* note 10; Trudel, *supra* note 4.

76 Pierre Trudel, "Droit à l'image: la vie privée devient veto privé: *Aubry c Editions Vice-Versa Inc* [1998] IRCS 591", (1998) 77:3/4 Can Bar Rev 456.

77 Logeais & Schroeder, *supra* note 6.

78 Potvin, *supra* note 51 at 217.

79 von Tigerstrom, *supra* note 63 at 136.

80 Eltis, "Can the Reasonable Person Still Be 'Highly Offended'?", *supra* note 5 at 205. See also France Allard, "Les droits de la personnalité" in *Collection de droit: Personnes, famille et successions* (Editions Yvon-Blais, 2005-06) at 59-77 on the inalienable nature of such rights as privacy. See also *Aubry, supra* note 10.

interrelated) rights.[81] The civilian approach to privacy is therefore flexible to various environments and is adaptable to technological developments.[82]

Interestingly, courts in Quebec have also long turned to the tort of defamation for certain cases involving the right to one's image or likeness, despite it being a creature of the common law.[83] Notably, s 954 of the *Code of Civil Procedure* in Quebec has historically prevented small claims courts from hearing defamation claims,[84] thus only some of the cases analyzed in this article involve defamation; all are nonetheless rooted in assessments of Quebec's *Charter* and the *Civil Code*.

The approach to image rights in Quebec is rooted, as mentioned, in the importance of safeguarding dignity. The majority of the Supreme Court in *Aubry* stated that the right to privacy includes the right to control one's image.[85] However, the court also emphasized the view that at the heart of privacy is the negative right to be free from coercion or constraint:

> When the values at issue in a case must be balanced, it is important to bear in mind that our law is characterized by recognition of interrelated rights whose purpose is to strengthen the democratic ideal. Individual freedom is at the heart of that ideal**.** Dickson J. (as he then was) stated the following in this regard in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at pp. 336-37:
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only . . . blatant forms of compulsion . . . [but also] includes indirect forms of control which determine or limit alternative courses of conduct available to others.[86]

This emphasis potentially stands in contrast or in addition to the positive, collective rights at the heart of the right to personality and one's image in both France and Germany, with the German iteration particularly ensuring individual self-determination over one's information as "as a means of facilitating human flourishing and the progress of society," where "fulfillment of one's own

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[81] von Tigerstrom, *supra* note 63 at 136.

[82] Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable?", *supra* note 5.

[83] Joseph Kary, "The Constitutionalization of Quebec Libel Law, 1848-2004" (2004) 42:2 Osgoode Hall LJ 229; Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable?", *ibid.*

[84] *Code of Civil Procedure*, CQLR c C-25.01, s 954.

[85] *Aubry, supra* note 10 at para 52.

[86] *Aubry, supra* note 10 at para 64, citing *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295 (S.C.C.) at para. 95.

personality could not be achieved simply by retreating into a sphere protected by external interferences and enclosing an *isolated* individual (as implied by Warren and Brandeis' right to be let alone), but only by engaging in *social* activities."[87]

I intentionally aim to echo here findings by Bailey and other scholars that the concept of privacy "serves not just individual interests but also common, public and collective purposes,"[88] such as the social interest in nourishing relationships or the production or advancement of substantive equality for equality-seeking groups.[89] I explain relevant aspects of the mechanics of judicial interpretation for the right to one's image below when necessary; however, the focus in this article is on the discourse that is used (or not) by judges relating to protected grounds under discrimination law such as gender, race, ethnicity, religion, and gender identity as examples of such equality-seeking groups.

3. ANALYZING GENDER-BASED AND INTERSECTIONAL VIOLENCE IN IMAGE RIGHTS CASES

Despite the dignity-based approach that undergirds determinations of the right to one's image, this limited study indicates that judges in Quebec only sometimes acknowledge the collective, gendered aspects of the harm of violations of privacy, particularly when the plaintiff has other aspects of identity that make them more vulnerable to harm. At times, judges also perpetuate individualized "responsibilization narratives" that compare complainants to an "idealized victim,"[90] with counter-productive results in the face of the dignity-based right to one's image.

(a) Methods and Framework

This article involves analysis of 10 legal decisions in Quebec courts regarding the right to one's image in the context of an image being taken, used, and/or shared without consent.[91] I found these cases through a note-up search on

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87 Resta, *supra* note 5 at 234, 237-38.

88 Priscilla M Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (Chapel Hill: University of North Carolina Press, 1995) at 221, cited in Bailey, *supra* note 5.

89 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982), cited in Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (New Jersey: Roman and Littlefield, 1988), cited in Bailey, *ibid.*

90 Aikenhead, *supra* note 7 at 131.

91 *Aubry, supra* note 10; *Sourour c. Clavet*, 2009 QCCA 942, 2009 CarswellQue 4328 (C.A. Que.) [*Sourour*]; *Awada c. Magnan*, 2018 QCCS 3023, 2018 CarswellQue 5889 (C.S. Que.) [*Awada*], affirmed (*Magnan c. Awada*, 2018 QCCA 1852, 2018 CarswellQue 10022 (C.A. Que.)); *A c. Corp. Sun Media*, 2009 QCCQ 3263, 2009 CarswellQue 5514 (C.Q.) [*A v Sun Media*]; *Blanc c. Éditions Bang Bang inc.*, 2011 QCCS 2624, 2011 CarswellQue 5880 (C.S. Que.) [*Blanc v Bang Bang*]; *Trudeau c. AD 4 Distribution Canada inc.*, 2013 QCCS 2678, 2013 CarswellQue 5789 (C.S. Que.) [*Trudeau*], affirmed (2014 QCCA 1740, 2014

Quicklaw for cases in Quebec involving s 5 of Quebec's *Charter*[92] using the search terms "publier," "image," and "vie privée." These search parameters were determined by the applicability of Quebec's *Charter* to cases involving the non-consensual sharing of images, as described above. These inclusion and exclusion criteria were intentionally applied in order to limit the number of cases analyzed to a reasonable amount and to draw on the use of eligibility criteria common to qualitative studies used for such methods as systematic reviews, meta-analyses, and ethnographic research, which facilitates accountability, transparency, and reproducibility in the scholarly context.[93]

I engaged in textual analysis of all cases found using the search terms above in order to include in my analysis only the cases with facts involving non-consensual activity related to a person's image (and not, for example, written text about that person).[94] I also included only those with a "positive" Quicklaw signal, showing that the case analyzed is good law (meaning it has not received merely neutral or cautionary treatment, and it has not been reversed), and included the cases that had no known case history, indicating the case could be interpreted by courts in various ways.[95] I excluded administrative tribunal cases and one case initiated by a minor who lacked capacity, a topic which is out of this article's scope.[96] The original language for all decisions found is French, and all quotations produced in this article are translations by the author into English.

CarswellQue 9382, 2014 CarswellQue 14688 (C.A. Que.)); *Hammedi c. Cristea*, 2014 QCCS 4564, 2014 CarswellQue 9635 (C.S. Que.) [*Hammedi*], leave to appeal refused (2014 QCCA 1936, 2014 CarswellQue 10510 (C.A. Que.)); *N.G. c. F.B.*, 2017 QCCS 5653, 2017 CarswellQue 11341 (C.S. Que.) [*NG v FB*]; *Pia Grillo c. Google inc.*, 2014 QCCQ 9394, 2014 CarswellQue 14252, 2014 CarswellQue 11310 (C.Q.) [*Pia Grillo*]; *Amin c. Journal de Montréal*, 2015 QCCQ 5799, 2015 CarswellQue 8197 (C.Q.) [*Amin*].

92 *Quebec Charter, supra* note 60; I chose this section because the provision concerns respect for one's private life, which appeared to me to be the functional equivalent to both criminal and civil laws in the rest of Canada that prohibit the non-consensual disclosure of intimate images. The search results are up to date as of July 7, 2021.

93 See e.g. Cecilia Maria Patino & Juliana Carvalho Ferreira, "Inclusion and exclusion criteria in research studies: definitions and why they matter" (2018) 44:2 Jornal brasileiro de pneumologia : publicacao oficial da Sociedade Brasileira de Pneumologia e Tisilogia 84; Timothy Meline, "Selecting Studies for Systematic Review: Inclusion and Exclusion Criteria" (2006) 33 Contemporary Issues in Communication Science & Disorders 21.

94 Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London & New York: Routledge, 2003).

95 Of course, this method has limitations. For example, there are cases that can still be relied on despite Quicklaw's judgment of how the courts have treated them (see e.g. *Goulet c. Gazette (The)*, 2010 QCCQ 8057, 2010 CarswellQue 9910 (C.Q.), varied 2012 CarswellQue 5820 (C.A. Que.)).

96 *Shen c. Commission scolaire de Montréal*, 2018 QCCQ 1800 (C.Q.).

(b) The Gendered and Intersectional Nature of the Right to One's Image

The ten cases analyzed for this article demonstrate that the right to one's image has important gendered dimensions; the facts of all cases involved plaintiffs who were women.[97] This is consistent with the fact that women's bodies are routinely subject to the objectification of their likeness in the form of images, with objectification defined broadly here as "when one person uses another without taking into account, or ignoring or being indifferent to, that person's desires."[98]

In the case of *Aubry*, the photographer, a man, took and published a photo of a teenage girl without her permission.[99] In *N.G. c. F.B.*, a vengeful male ex-lover shared a photo of the complainant with her new partner.[100] In *Sourour*, a male politician posed in a photo with a Black, Muslim woman who had come to Quebec as a refugee and shared her image without her permission on thousands of political pamphlets.[101] In *Awada*, a Brown, Muslim woman's image was used and her reputation tarnished by a White, male blogger who repeatedly associated her with violent terrorist groups.[102] In another case involving a Muslim woman (*Amin*), a male journalist on a day off surreptitiously took a photo in public of the complainant, who was wearing a niqab, and later used her image in a news article to discuss the "culture shock" of seeing her in a small town in Quebec.[103]

While other cases involved complainants who were women, the gendered aspects were complicated by various factors involving the identity of the defendants at hand. For example, in still another case involving a Muslim woman (*Hammedi*) — though this time also involving her children's images — an Arab, female blogger took photos of the plaintiff's children found on a mosque's website and reproduced them on her own blog in order to criticize the religious community's practices as outdated and anti-feminist.[104] In *Pia Grillo*, the female complainant made her case against the tech giant Google, claiming rights in the Google Maps street view image of her in front of her house taken and shared without her consent, with her face blurred and chest partially showing.[105] In the case of *A c. Corp. Sun Media,* the female complainant's photos were taken and shared by another female journalist (the defendant) as part of an undercover infiltration into a community known for being a cult. In that case, however, the

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[97] *Aubry, supra* note 10; *Sourour, Awada, A c. Corp. Sun Media, Blanc c. Éditions Bang Bang inc., Trudeau, Hammedi, N.G. c. F.B., Pia Grillo*, *Amin, supra* note 91. Two of the cases also involved men as co-plaintiffs (*A c. Corp. Sun Media* and *Hammedi*, *supra* note 91).

[98] Mathen, *supra* note 24 at 541.

[99] *Aubry*, *supra* note 10.

[100] *N.G. c. F.B.*, *supra* note 91.

[101] *Sourour, supra* note 91.

[102] *Awada, supra* note 91.

[103] *Awada, supra* note 91 at para 13.

[104] *Hammedi, supra* note 91.

[105] *Pia Grillo, supra* note 91.

photos were taken at the direction of the defendant's boss, who wanted a quick answer and who "didn't like journalists that lack enthusiasm," leaving the journalist perhaps with little choice but to hesitantly say yes to the task.[106]

In other cases, circumstances relating to aspects of the complainant's identity add other layers to the gendered aspect of the rights and harms. In the case of *Blanc c. Éditions Bang Bang inc.,* a trans woman was mocked by a man who edited a piece of art by superimposing her face on that of a bearded man along with a title, both of which (her pasted face and the title) seemed to imply that her true identity was a man, but were ambiguous enough to be interpreted in multiple ways.[107] In *Trudeau,* the complainant's actual image was not involved per se, but she sought an injunction and damages regarding a pornographic film that used multiple elements to allude to her identity after she gained notoriety for violent arrests she undertook while working as a police officer in the wake of the 2012 Quebec student protests.[108]

This small sample indicates that Quebec is no exception to the reality that the sharing of one's image without consent is often a matter of gender. More than this, these cases demonstrate that there are a wide array of circumstances that complicate any presumption that the women who seek justice and equality in these cases are uniformly White, come from a particular religious background (i.e., Judeo-Christian), or are cisgender, among other axes of oppression. Understanding the intersectional aspects of image rights matters because, as alluded to earlier, using a person's image without their consent disproportionately impacts not only women, but also racialized communities, religious minorities, LGBTQ2S+ members, and disabled people,[109] and it frequently involves "deploying intersecting oppressions such as misogyny, racism, homophobia, transphobia, classism, ableism, and colonialism."[110]

The misuse and non-consensual sharing of one's image is an example of a privacy invasion that operates to control, constrain, and limit expressions of identity that do not conform to the status quo.[111] This activity takes advantage of structural inequities to perpetuate discriminatory stereotypes and reinforce

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[106] *A c. Corp. Sun Media, supra* note 91 at para 54.

[107] *Blanc c. Éditions Bang Bang inc., supra* note 91.

[108] *Trudeau, supra* note 91.

[109] Suzie Dunn, "Technology-Facilitated Gender-Based Violence: An Overview" (2020) at 17, online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/static/documents/documents/SaferInternet_Paper%20no%201_0.pdf> [Dunn, Technology-Facilitated GBV].

[110] Bailey & Dong, *supra* note 2.

[111] *Ibid;* Dunn, Technology-Facilitated GBV, *supra* note 109 at 17; Nasreen Rajani, "Intersectionality & Technologies To End Violence Against Women" (2020), online (pdf): *The Learning Network* <www.vawlearningnetwork.ca/img/Nasreen_Nov_24_-presentation.pdf> [unpublished]; Abigail Curlew, "Vigilantism & Transmisogyny: Digital Violence Against Women and Hate Motivated Violence" (2020), online (pdf): *The Learning Network* <vawlearningnetwork.ca/webinars/upcoming-webinars/Slides_Final_Copy.pdf> [unpublished].

systems of oppression such as sexism, homophobia, transphobia, racism, ableism, classism, and colonialism.[112] As depicted in the real-life cases below, the non-consensual sharing of a person's image often has the result of shaming them, drawing unwanted attention to them, silencing them, humiliating them, and/or perpetuating stereotypical beliefs about them that are harmful and discriminatory. These are impacts that decision-makers ought to aware of and attuned to as they advance image rights in Quebec.

(c) Judicial Recognition of Invasions of Privacy in Quebec as Gender-Based and Intersectional Violence

However, in the cases reviewed, the judges do not consistently recognize the intersectional and gendered aspects and the possibility of gender-based violence associated with the image rights claims in Quebec. In only two cases do the courts explicitly mention the gendered aspect of the nature of the behaviour involving the complainant and defendant.[113] Judges do explicitly acknowledge, in three cases, the gendered aspect of the case's facts when it intersects with other aspects of the complainant's identity (race/ethnicity, religion, gender identity).[114] In two other cases, a generous reading of judges' intent allows me to perceive *implicit* acknowledgment that gender-based violence is at play.[115] In four cases, the judges made neither explicit nor implicit mentions of gender-based violence while analyzing the complainant's right to their image.[116] A caveat worth adding here is the fact that, out of the cases examined, only one involved the use of the complainant's sexual image.[117] This invariably shaped the judges' examinations of the right to one's image as an individual — as opposed to collective — matter; the wide variety of circumstances in which a person can claim the right to their image in Quebec may make it difficult for judges to ascertain the societal issue of gender-based violence at play in these cases. It is plausible that had the images been of a sexual nature in the nine other cases examined for this article, that this would have provoked judges to engage in more analysis of this issue as one of gendered violence. Put another way, the right to one's image in Quebec is not targeting one specific type of activity such as NCDII, making it a challenge to identify patterns in the communities whose rights are continually at stake.

As mentioned, in only two cases did the judge explicitly acknowledge the gendered aspects of the violation inflicted on the complainant. While summarizing the nature of the videos and images shared in *Awada*, the judge observed — almost as an aside — that "the remarks concerning her are clearly

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[112] Bailey & Dong, *supra* note 2; Khoo, *supra* note 2 at 10; Azmina Dhrodia, "Unsocial Media: A Toxic Place for Women" (2018) 24:4 IPPR Progressive Review 380.

[113] *Awada, N.G. c. F.B., supra* note 91.

[114] *Blanc c. Éditions Bang Bang inc., Awada, Hammedi, supra* note 91.

[115] *Sourour, Pia Grillo, supra* note 91.

[116] *Aubry, supra* note 10; *Trudeau, A c. Corp. Sun Media, Hammedi, supra* note 91.

[117] *N.G. c. F.B., supra* note 91.

sexist and often humiliating." (35) In *N.G. c. F.B.*, the court could not help but acknowledge the gender-based violence that can be associated with vengeful former partners who are men.[118] The judge in that case even referenced the plaintiff's integrity: "But above all, he aggravated the situation by attacking the integrity of the plaintiff and denigrating her to her new spouse in order to break up their relationship."[119] Out of the ten image rights cases analyzed, these two cases were the only examples I found in which a judge explicitly acknowledges the larger, systemic issue of harassment, violence, and abuse that is exacted on women on a regular basis in Canadian society.

However, several judges did explicitly acknowledge that the complainant's identity as a woman, in conjunction with other aspects of her identity, indeed rendered her more vulnerable to harm. For example, the judge in *Blanc c. Éditions Bang Bang inc*. emphasized throughout his decision that the plaintiff was a trans woman and had experienced great strife throughout her multi-year transition process. He ended the decision with the following:,

> Ms. Blanc is a public figure. Her choice to come to terms with her transgender status is certainly not an invitation to ridicule her for free or without justification. Moreover, it does not protect her from comments, remarks, irony and humor, protected by freedom of expression, to which all the characters who choose to work in the public arena are subject, in particular in the field of opinion.[120]

The court nonetheless framed the plaintiff as a public figure and the edited image as a caricature, thereby foregoing any in-depth examination of the image's impact both on her as an individual and on the trans community as a group that has an interest in substantive equality.

In the case again of *Awada*, the judge decided to reproduce a significant chunk of the submissions by the expert witness, who acknowledged the deeply sexist and racist remarks that marked the defendant's posts:

> It is necessary to recall the words of the expert Paul Eid which the Tribunal endorses:
>
> *It is in the light of this ideological prism that the idea hammered out like a leitmotif in the videos takes on its meaning ... according to which Ms. Awada would embody the emblematic figure of these alienated "midinettes" [derogatory word similar to seamstresses] and instrumentalized by fundamentalist Islamist movements (note in passing the sexist connotation of the term "midinette" ... to reinforce the idea according to which*

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[118] *N.G. c. F.B., supra* note 91.

[119] *Ibid* at para 76.

[120] *Blanc c. Éditions Bang Bang inc., supra* note 91 at para 82.

> *veiled women campaigning for the free choice to wear the hijab would be naive, simple girls, under the influence).*
>
> [. . .]
>
> *I consider that the analysis of the videos and the publications filed in evidence reveal several discursive processes — supported by visual montages — typical of anti-Muslim racism as it is currently expressed in Quebec, and more generally in the West.*[121]

Is it laudable indeed that the judge reproduced at great length such expertise on anti-Islam sexism and racism in Quebec, Canada, and the West. Similarly, and without commentary on the judges' ultimate decisions, the courts could not help but explicitly acknowledge the intersections of gender and notions of race in the cases of *Amin* and *Hammedi* given that the facts of the cases also concerned conceptions of women's rights when it comes to religious face coverings.[122]

In other instances, a generous reading of judges' decisions to emphasize certain factual circumstances could be seen as implicitly acknowledging the gendered dynamics of the case. The court in the case of *Sourour*, in determining whether invasion of privacy had occurred, focused primarily on aspects of the plaintiff's identity such as her religion and the fact that she was a racialized former refugee — factors that are implicitly related to her identity as a woman and to her decision to wear a head covering.[123] In essence, the court decided that the complainant had consented only to having her photo taken, and not to it being shared.[124] The court specifically addressed the plaintiff's lack of self-determination over her religious and ethnic origins due to the image-sharing activity: "It is one thing to dress to respect your religion and to be proud of your origins," the court opined, "but it is quite another to allow your image to be used to promote political ideas."[125]

When the plaintiff Pia Grillo made her case against Google, the judge acknowledged that Pia Grillo was "greatly disturbed by [the] situation" and "was the subject of several derogatory comments and mockery at work, in particular concerning her breasts."[126] The judge also decided to repeat elements of the letter Pia Grillo says she sent Google:

> This puts me, my house, my vehicle and my family members that I live with at the mercy of potential predators. I feel very vulnerable knowing

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[121] *Awada, supra* note 91 at para 255.

[122] *Amin, Hammedi, supra* note 91.

[123] *Sourour, supra* note 91.

[124] *Ibid.* at paras 41-45.

[125] *Ibid.* at para 47.

[126] *Pia Grillo, supra* note 91 at para 13.

> that the information is available to anyone with internet access. The damage has been done.[127]

Implicit in these words, from what I observe, is the understanding that women are particularly vulnerable to harassment such as stalking and violence that occur near or in their own homes; in this case, it is possible that the judge is implicitly emphasizing the gendered aspects of such violence.

In other decisions, the court expressed neither explicitly nor implicitly an understanding of the gendered nature of image rights cases. The court in *Trudeau* made no mention of the gender dynamics at play in the plaintiff's case, most notably that she was a woman in the male-dominated profession of policing.[128] In the case of *A c. Corp. Sun Media*, the judge implied that the harm involved was of a gendered nature when he held that commenting on the female complainant's body and the way she dressed (e.g., "the tall slim blonde with tight clothes") is a component of the right to respect for one's private life.[129] The idea that the judge saw comments on one's anatomy and manner of dress as an implicitly gendered matter rests on my assumption that it is a known fact that women's bodies are routinely objectified in society, often without regard for their desires.

Further, I observed that courts in Quebec (and elsewhere) may be selective with regards to *who* may benefit from particular extensions of the right to one's image. In the case of *Hammedi*, which was decided after *A c. Corp. Sun Media*, the court completely ignored the fact that the defendant's news article was centred entirely on the way the complainant dressed. A key difference between *Hammedi* and *Sun Media* is that the plaintiff in the former was a religious minority. It seems the court may selectively apply new components of the right to respect for one's private life (e.g., discussions of anatomy or manner of dress) in ways that may be detrimental to religious minorities in Quebec and Canada.[130]

The journalist in *Hammedi* similarly commented on the plaintiff's eye makeup, saying that her eyes behind her niqab were "surprisingly highlighted, in a very coquettish or flirtatious way, with an outline of sky-blue eyeshadow."[131] The defendant — similar to the defendant in *A c. Corp. Sun Media* — actually admitted to taking photos of the complainant in a secretive manner so as to avoid being informed that she did not consent to her image being taken.[132] Yet the court conveniently lumped together its analysis of s 5 (right to one's private life) with s 4 (right to honour and reputation) of Quebec's *Charter*.[133] The judge

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[127] *Ibid.* at para 16.

[128] Statistics Canada, "Police personnel and selected crime statistics" (8 December 2020), online: < www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid = 3510007601 > . The fact that she was a police officer who came to be known for violence and brutality in her arrests of civilians is an added dimension that I will not address in this article.

[129] *A c. Corp. Sun Media*, *supra* note 91 at para 184.

[130] *Hammedi, supra* note 91.

[131] *Ibid.* at para 13.

[132] *Ibid.*

ultimately agreed with the defendant that his comments on parts of her anatomy and manner of dress were not likely to damage the complainant's honour and reputation,[134] dismissing all bases of her claim despite the factual similarities to *A c. Corp. Sun Media*. The court also did not appear to examine in any detail the cultural dimensions at hand, ignoring the plaintiff's argument that her honour was affected because it is forbidden to wear makeup while wearing a niqab.[135] By sidestepping any analysis of the plaintiff's honour in this regard and the interests held by Muslim communities, the court not only demonstrated ignorance of gender-based violence but also ignored conceptions of harm against religious minorities, which often intersect with racialized communities in Canada.

In the earlier case of *Aubry*, the Supreme Court mentioned only in passing the fact that the complainant was a teenage girl. Again, a very generous reading of judicial intent allows us to conclude that these mentions constitute an implicit acknowledgement of the gendered dynamics at play in the case (i.e., when a strange man takes a photo in a public setting of a teenage girl without her consent — thereafter reproducing and distributing her image, again without her consent, and profiting off of that distribution).[136] To the court's credit, the majority did not trivialize the harm experienced by the teenage plaintiff when upholding the assessment of damages, and in fact stated that they, too, "detect[ed] a violation of dignity" despite the plaintiff describing what could be seen as "merely" being laughed at by people at her school.[137] This is important from legal standpoint; the Supreme Court in *Aubry* did not incorporate a notion of the "reasonable person" in the standard of proof required to assess whether invasion of privacy had occurred under s 5 of Quebec's *Charter*.[138] Instead, the court adopted something more akin to strict liability, holding that a fault (as understood in the civil law tradition) has occurred as soon as the image is published without consent and enables the person to be identified (notwithstanding the existence of exceptions to this rule). Under *Aubry*, the plaintiff's (dare I say subjective) experience of prejudice is only needed to determine the amount of moral and/or punitive damages, but not necessarily whether a s 5 violation of Quebec's *Charter* has occurred.[139] The dignity-based approach concretized by the court with the case of *Aubry* also demonstrably facilitates — and requires — assessment of the complainant's expectations of how their image would be used when determining damages.[140]

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[133] *Quebec Charter*, *supra* note 60, ss 3-4.

[134] *Hammedi, supra* note 91 at paras 57-58.

[135] *Ibid*. at paras 60-61.

[136] *Aubry*, *supra* note 10.

[137] *Ibid* at paras 70-71.

[138] *Aubry*, *supra* note 10; *Quebec Charter*, *supra* note 60, s 5.

[139] *Aubry*, *supra* note 10; *Quebec Charter*, *supra* note 60, s 5.

[140] *Aikenhead, supra* note 7 at 142.

The above analysis makes clear that — despite the theoretical foundation that one's right to one's image in Quebec is dignity-based — judges still vary in their consideration of when (and whose) dignity is worth protecting. This is evidenced by the fact that judges at times acknowledge the gendered nature of the rights to one's image in Quebec, but do so (a) seldomly or implicitly, (b) only when compounded with other notable aspects of the plaintiff's identity that render them vulnerable to discrimination, and at times may (c) fail to acknowledge the need to preserve the collective dignity of women when assessing the right to one's image.

(d) Responsibilization and the "Ideal Victim" of Invasion of Privacy

The courts in the cases I reviewed also incorporated stereotyped understandings of an "ideal victim" for such invasion of privacy claims. At times, it appears that judges have some inkling of understanding of the gendered aspects of the case before them. In other moments, the courts themselves perpetuate and exacerbate harmful stereotypes that lay blame on complainants whom they believe ought to behave in particular ways.[141]

In *Aubry*, the judges at both the Supreme Court and provincial appellate levels did not necessarily undermine the harm experienced by the plaintiff, but the appeal court put certain biases on display by commenting on her physical appearance.[142] The appeal court observed that the photo in question depicted "the image of a blonde woman, young, pretty, dressed in pants, a black sweater, a little thoughtful, her head turned slightly to the left."[143] The court in *Awada* made similar remarks about the complainant's appearance when they described her as "a bright, articulate young woman of remarkable beauty and elegantly wearing a flattering and colorful veil" when she appeared on a popular Quebecois talk show prior to experiencing the torrent of abuse she faced from the defendant.[144] These seemingly innocuous observations of the plaintiff's perceived level of beauty can, indeed, be harmful insofar as they tacitly presume — and engender — a parallel between complainants deemed worthy of flattery from the judiciary and the level of protection that they are afforded. (Perhaps not surprisingly, both of these plaintiffs, deemed attractive, won their cases in court.) When judges appraise a complainant's level of attractiveness, it raises concerns about *who* is complimented, and about the farther-reaching implications of the judges' assessments. Writing about the problem of typecasting of African American women in US media, Collins, cited in work by Chancer, observed that a necessary corollary of a "good" (or in this case attractive) woman is the "bad"

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[141] *Ibid*. at 127.

[142] *Aubry, supra* note 10.

[143] *Aubry c. Éditions Vice Versa Inc*., 1996 CarswellQue 704, 1996 CarswellQue 3109, (*sub nom*. Aubry v. Duclos) 141 D.L.R. (4th) 683 (C.A. Que.), affirmed 1998 CarswellQue 4806, 1998 CarswellQue 4807 (S.C.C.).

[144] *Awada, supra* note 91 at para 3.

(or unattractive) women, which rest on — and perpetuate — gendered as well racial biases.[145]

Most troublingly, I observed a tendency by the court in *N.G. c. F.B.* to assign responsibility to the complainant for the abuse she experienced by her ex-partner.[146] This is significant for critical feminist scholars; this was the only case that fell in this study's fairly broad inclusion criteria that dealt with the use of a sexual image without consent. Throughout the judge's reasoning, there are numerous instances of the judge attempting to hold the plaintiff accountable for the invasion of privacy enacted by her ex-partner. For example, the judge decided to believe the defendant, who claimed that the complainant sent him nude photos of herself (versus her claim that he accessed them without her consent). He stated that his belief was compatible with the complainant's behaviour, which he attributed to her "constant desire to try to seduce men that she romantically [saw], to offer them photos of herself in 'sexy' outfits, while never really severing emotional ties with them."[147]

The judge in *N.G. c. F.B.* also implied that the plaintiff was unreliable because he had learned throughout the hearings that she had had multiple romantic partners at one time: "Indeed, the plaintiff maintained links with M ... while she was in a relationship with the defendant and she had an affair with the latter while she is in a relationship with H ..."[148] He did not stop there, writing, "Her way of being and acting may possibly suit her, but she should not be surprised that her partners do not share the same vision of things as her."[149] In this vein, he later added, "The fact that the plaintiff herself transmitted the photos to the defendant possibly *demonstrates a certain recklessness on her part,* but their unlawful use almost four years later also confirms a malicious intention on the part of the defendant who waited for a good time to use it."[150]

In short, the judge drew a tenuous connection between the plaintiff's previous sexual experiences (that he appeared to understand as promiscuous) with his perception of the plaintiff's reliability as a witness, while chastising her decision to send nude images of herself in the past. By scrutinizing the *plaintiff's* previous sexual relationships in his determination of the *defendant's* responsibility, the judge can be seen as engaging in a spectrum of gendered, potentially harmful behaviour that lies at the heart of the claim that he is meant to be adjudicating (women's right to autonomy and dignity). He also explicitly states his belief that the plaintiff was being reckless when she sent the sexual

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[145] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Boston: Unwin Hyman, 1990), cited in Lynn S Chancer, *Reconcilable Differences: Confronting Beauty, Pornography, and the Future of Feminism* (Berkeley, CA: University of California Press, 1998) at 162.

[146] *N.G. c. F.B., supra* note 91.

[147] *Ibid.* at para 47.

[148] *Ibid.* at para 48.

[149] *Ibid.* at para 49.

[150] *Ibid.* at para 96, emphasis added.

images to the defendant, implying that the behaviour that needs to be corrected is hers, and not primarily the abusive behaviour that formed the basis of her claim of invasion of privacy.

By highlighting the gender-based assumptions and stereotypes that have made their way into Quebec's case law on the right to one's image, I hope to shine a light on important opportunities for learning and growth in the Canadian legal and judicial community in efforts to ensure substantive equality and dignity.

4. THE FLEXIBILITY OF PERSONALITY RIGHTS IN QUEBEC

All hope is not lost. My findings suggest that Quebec's dignity-based approach for privacy claims is poised to readily capture a broad range of situations, not just those involving "intimate images, and not just for certain people (e.g., White, cis, attractive women). For example, consider the few aspects of identity — or grounds for protection from discrimination — that were present in the ten cases examined in this article:

- *Aubry* — age[151]
- *Sourour* — race/ethnicity, religion, immigration status[152]
- *Blanc c. Éditions Bang Bang inc.* — gender identity[153]
- *Hammedi* — race/ethnicity and religion[154]
- *Amin* — race/ethnicity, religion, and age[155]

These cases demonstrate that numerous experiences and identities that currently are not as easily protected in the North American common law's narrow conception of NCDII are protected under Quebec's image-related rights. Quebec's broader notion of the right in one's image is more flexible, pliable, and ought to develop so as to safeguard dignity and provide substantive equality to a wider range of communities.

Technological development is also sure to enable new kinds of image-based abuse online that go beyond the scope of artefacts such as sexual images or static images. For example, New York State recently extended the right to publicity to cover synthetic or manipulated media such as deepfakes.[156] However, one key problem with the common law approach is its capacity for "entrapping" phenomena in certain rigid logics.[157] Publicity rights, an extension of property

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[151] *Aubry, supra* note 10.

[152] *Sourour, supra* note 91.

[153] *Blanc c. Éditions Bang Bang inc., supra* note 91.

[154] *Hammedi, supra* note 91.

[155] *Amin, supra* note 91.

[156] Matthew F Ferraro & Louis W Tompros, "New York's Right To Publicity And Deepfakes Law Breaks New Ground" (19 December 2020), online: *Mondaq* <www.mondaq.com/unitedstates/media-entertainment-law/1017984/new-york39s-right-to-publicity-and-deepfakes-law-breaks-new-ground>.

[157] Resta, *supra* note 5 at 226.

rights, can transform the object of protection (i.e., one's image) into a commodity and stand in opposition to the right to privacy as an extension of identity.[158] By relying on the liberty-based, rigid, piecemeal approach in common law to protect one's self-determination over one's likeness, this can eschew approaches (such as Quebec's right to one's image) that were crafted to protect personality rights, privacy, and dignity for both individuals and communities, often regardless of the kind of image involved.

5. WAYS FORWARD

There are numerous promising institutional initiatives that have emerged in Canada that seek to help those whose sexual images have been shared without their consent.[159] There is a growing movement advocating for the development in Canada of a decision-making body or bodies that provide recourse to those whose images (intimate images in particular) are being shared without their consent through technological means.[160] Currently, NeedHelpNow.ca, an initiative of the charity Canadian Centre for Child Protection, provides information and guidance to young people who "have been negatively impacted by a sexual picture/video being shared by peers."[161] Nova Scotia's CyberScan Unit also readily provides information to people of any age who have been the victim of cyberbullying or whose sexual image was shared without their consent.[162] CyberScan's accessibility and focus on solutions stood out from other remedial avenues; its staff members can contact the alleged perpetrator of harm with a view to informally resolving the dispute, all while providing advice, negotiation, mediation, and "restorative practices" to the people involved. They can also help complainants receive protection orders ranging from injunctions to damages.[163]

Principles in the common law (including private law) must develop "in step" with the values enshrined in the federal *Charter* rights.[164] More research is, indeed, needed on the possibility, and perhaps growing importance, of the courts'

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[158] *Ibid.* at 240.

[159] There are numerous other projects, particularly in the US, seeking to help victims of NCDII. See e.g. Cyber Civil Rights Initiative, "Revenge porn Laws", online: *Cyber Civil Rights Initiative* < www.cybercivilrights.org/revenge-porn-laws/ > .

[160] Khoo, *supra* note 2; Hrick, *supra* note 3.

[161] NeedHelpNow.ca, "About", online: *NeedHelpNow.ca* - < needhelpnow.ca/app/en/about > .

[162] Communications Nova Scotia, "Intimate images and cyber-protection: support for victims" (6 June 2018), online: *Cyberscan* < novascotia.ca/cyberscan/ > ; Alexa Dodge, *Deleting Digital Harm: A review of Nova Scotia's Cyberscan Unit* (Halifax: Dalhousie University, 2021).

[163] *Ibid.*

[164] Department of Justice Government of Canada, "Charterpedia - Section 32(1) — Application of the Charter" (9 November 1999), online: < www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art321.html > , citing *Dolphin Delivery Ltd. v. R.W.D.S.U., Local*

consideration of fundamental rights when it comes to privacy disputes between private parties.

In sum, I have canvassed above the current sociolegal landscape in Canada regarding the non-consensual distribution of images, contrasting the common law response with Quebec's system that safeguards positive rights over one's image as a subset of one's private life (which is intimately linked to the notion of personality rights stemming from continental Europe). Drawing on the ten image rights cases, this article identifies that, despite the existence of a dignity-based approach to the adjudication of privacy claims over images, judges in Quebec's civil tradition are not consistently or adequately acknowledging the gendered, societal nature of harms associated with cases involving the right to one's image. They are still, at times, perpetuating certain responsibilization narratives or conceptions of the "ideal" victim when deciding upon the right to one's image in Quebec in the context of sexual images (though many of the cases examined did not involve nudity or depictions of sexual acts). Nonetheless, the legal concept of the right to one's image in Quebec is flexible enough to respond to many types of complainants and various kinds of images (not just those defined as "intimate" or containing nudity or sexuality), holding promise to broaden the scope of whose dignity can be better safeguarded in Canadian law.

580, 1986 CarswellBC 411, 1986 CarswellBC 764, (*sub nom.* R.W.D.S.U. v. Dolphin Delivery Ltd.) [1986] 2 S.C.R. 573 (S.C.C.).