

# Troubling Records

## Managing and Conserving Mediated Artifacts of Violent Crime

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Article abstract

Video records created by perpetrators and witnesses of violent crime are increasingly used as evidence in criminal investigations and court proceedings. When these records include the sexual assault, torture, and murder of individuals, they carry significant power to harm those exposed to them, but most importantly, through repeated viewing, they continue to harm those individuals whose suffering is immortalized therein. Using case study methods, including in-depth interviews with those centrally involved in the case, interviews with criminal justice professionals currently working with video evidence of violent crime, and a review of official documents and media reports, this article examines the tragic Canadian case of serial killers Paul Bernardo and Karla Homolka and the videos they recorded of their crimes. We observe that challenging decisions regarding *the handling* of video records of violent crime during the investigation process, the viewing of such records in court, and access to them by the public and press during the criminal justice process continue to be areas of concern and contestation, pitting principles of open justice against those of victim dignity and privacy. However, challenges regarding access to video records do not end with a trial and an ultimate verdict of guilt or innocence; rather, decisions continue to be made about the preservation or destruction, the storing and cataloguing, and access to archived material. In examining questions regarding the preservation and continued use of the records, we conclude that a responsible and ethical approach to these challenges is best achieved through what Caswell called a survivor-centred approach. We suggest that this approach should include recognizing the traumatic potentiality of records, providing safety and support to those affected, recognizing the potential of records to produce and perpetuate injustice, respecting the autonomy and decisions of survivors, and accepting and facilitating the right to be forgotten.

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**ABSTRACT** Video records created by perpetrators and witnesses of violent crime are increasingly used as evidence in criminal investigations and court proceedings. When these records include the sexual assault, torture, and murder of individuals, they carry significant power to harm those exposed to them, but most importantly, through repeated viewing, they continue to harm those individuals whose suffering is immortalized therein. Using case study methods, including in-depth interviews with those centrally involved in the case, interviews with criminal justice professionals currently working with video evidence of violent crime, and a review of official documents and media reports, this article examines the tragic Canadian case of serial killers Paul Bernardo and Karla Homolka and the videos they recorded of their crimes. We observe that challenging decisions regarding *the handling* of video records of violent crime during the investigation process, the viewing of such records in court, and access to them by the public and press during the criminal justice process continue to be areas of concern and contestation, pitting principles of open justice against those of victim dignity and privacy. However, challenges regarding access to video records do not end with a trial and an ultimate verdict of guilt or innocence; rather, decisions continue to be made about the preservation or destruction, the storing and cataloguing, and access to archived material. In examining questions regarding the preservation and continued use of the records, we conclude that a responsible and ethical approach to these challenges is best achieved through what Caswell called a survivor-centred approach. We suggest that this approach should include recognizing the traumatic potentiality of records, providing safety and support to those affected, recognizing the potential of records to produce and perpetuate injustice, respecting the autonomy and decisions of survivors, and accepting and facilitating the right to be forgotten.

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**RÉSUMÉ** Des vidéos créés par des auteurs et des témoins de crimes violents sont de plus en plus utilisés comme preuves dans des enquêtes criminelles et procédures judiciaires. Quand ces vidéos contiennent des agressions sexuelles, de la torture et des meurtres, ils détiennent un pouvoir significatif qui peut nuire aux gens exposés à ces vidéos. De plus, le visionnement répété de ces vidéos peut contribuer à continuer à faire du tort aux personnes dont la souffrance est immortalisée. Utilisant des études de cas, qui comprennent des entretiens en profondeur avec des personnes directement impliquées dans les cas, et avec des professionnels de la justice criminelle travaillant à partir de preuves provenant d'enregistrements vidéo, en plus d'analyser de la documentation officielle et des rapports des médias, cet article étudie les cas tragiques des procès des tueurs en série canadiens Paul Bernardo et Karla Homolka, incluant les vidéos de leurs crimes qu'ils ont eux-mêmes enregistrés. Nous observons que la confrontation des décisions concernant la manipulation des enregistrements vidéo de crimes violents pendant les processus d'enquête, le visionnement des enregistrements en court et l'accès à ceux-ci par le public et les médias pendant les procédures judiciaires continuent d'être des sujets de préoccupation et de contestation, opposant les principes de justice ouverte avec la vie privée et la dignité des victimes. Les interrogations associées à l'accès aux vidéos ne s'arrêtent pas lorsqu'il y a un procès et lorsqu'un verdict ultime de culpabilité ou d'innocence est prononcé. Des décisions continuent d'être prises concernant la préservation ou la destruction des documents, ainsi qu'en rapport à l'hébergement, à la mise en archives et l'accès subséquent au matériel. En évaluant des questions clés associées à la préservation et l'utilisation continue des documents, nous affirmons qu'une approche responsable et éthique face à ces enjeux est mieux servie par ce que Caswell définit comme une approche centrée sur les survivants. Nous suggérons que cette approche doit inclure la reconnaissance du potentiel traumatique des documents, tout en offrant du soutien et un environnement sécuritaire aux personnes affectées. De plus, nous affirmons l'importance de reconnaître le potentiel des documents de produire et perpétuer des injustices, en plus de respecter l'autonomie et les décisions des survivants, tout en acceptant et en facilitant le droit d'être oublié.

## Introduction

Less than 40 years ago, records of violent interpersonal crime used in the administration of justice were physical objects such as photographs, weapons, and items of clothing and text-based documents in the form of police reports and statements provided by those involved in the crime: the accused, victims and survivors, and witnesses. These records, which were largely confined to boxes stored in attorneys' offices and police evidence rooms, would then become animated in the trial through the narratives provided by defence and prosecuting attorneys and the recollections of witnesses.<sup>1</sup> While trials were accessible to those who chose to attend in person, and were reported by the media with accompanying images created by news media artists, the violent nature of the crimes was mediated by others. Gaps existed in the information available, and the gruesome details of events were left largely to imagination.

In the mid-1980s, Sony, followed by JVC and Panasonic, launched the first camcorders for personal use – revolutionizing the manner in which people documented their lives and dramatically impacting many aspects of society, including the administration of criminal justice.<sup>2</sup> Audiences became producers, and moving image content shifted both our understandings of truth and the ways people identified and recalled critical life events, including the commission of violent crime. Today, videos created by perpetrators and witnesses of violent crime are commonly shared on social media platforms,<sup>3</sup> inflaming public opinion before charges are even laid,<sup>4</sup> and are inevitably used as evidence in

1 Jonas Bens, "Affective Witnessing in the Courtroom," *Parallax* 26, no. 3 (2020): 271–85.

2 For example, see Sarah Brayne, Karen Levy, and Bryce C. Newell, "Visual Data and the Law," *Law & Social Inquiry* 43, no. 4 (Fall 2018): 1149–63; Alexa Dodge, "The Digital Witness: The Role of Digital Evidence in Criminal Justice Responses to Sexual Violence," *Feminist Theory* 19, no. 3 (December 2018): 303–21; Nicola Henry and Anastasia Powell, "Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law," *Social & Legal Studies* 25, no. 4 (January 12, 2016): 397–418, <https://doi.org/10.1177/0964663915624273>; Sveinung Sandberg and Thomas Ugelvik, "Why Do Offenders Tape Their Crimes? Crime and Punishment in the Age of the Selfie," *British Journal of Criminology* 57, no. 5 (September 2017): 1023–40; Dale C. Spencer, Rosemary Ricciardelli, Dale Ballucci, and Kevin Walby, "Cynicism, Dirty Work, and Policing Sex Crimes," *Policing: An International Journal* 43, no. 1 (April 2020): 151–65.

3 Kaitlyn Regehr, "In(cel)doctrination: How Technologically Facilitated Misogyny Moves Violence off Screens and on to Streets," *New Media & Society* 24, no. 1 (January 2022): 138–55.

4 Sandra Ristovska, "Strategic Witnessing in an Age of Video Activism," *Media, Culture & Society* 38, no. 7 (October 2016): 1034–47.

criminal court proceedings.<sup>5</sup> But as a system steeped in tradition faces a rapidly changing landscape, vexing questions arise.

Canadian courts first faced these challenging questions in the 1990s, when serial killers Paul Bernardo and Karla Homolka abducted, sexually assaulted, and killed teenaged girls, recording their violent acts on a camcorder. This became one of the first criminal cases globally to position video as the key evidence in the adjudication of horrifying crimes. While Homolka was convicted before the tapes were in police possession, in the case against Bernardo, the videos presented new challenges for balancing the principle of an open court with that of victim privacy in the fair and unbiased administration of justice.<sup>6</sup> In a fair and just society, who should be permitted to view videos that graphically capture the suffering and degradation of another person? What happens to this type of evidence once trial and appeals processes conclude, and how can we guard against potential misuse in the future through what has been termed the “cultural afterlife of criminal evidence”?<sup>7</sup> A quarter of a century after Bernardo and Homolka, these issues are far from resolved in the criminal justice system, yet their cases serve as an instructive starting point.

### Troubling Records

Drawing on the Society of American Archivists’ definition of a record – which includes stored data or information that serves as an extension of human memory and supports accountability – Jessica Tai and colleagues suggest that archival records have traditionally been seen as a fixed form of proof or evidence.<sup>8</sup> Michelle Caswell and Marika Cifor concur, stating that “in the majority of . . . archival studies scholarship, records are seen as tools of legal accountability.”<sup>9</sup> In

5 Amy Kimpel, “Violent Videos: Criminal Defense in a Digital Age,” *Georgia State University Law Review* 37, no. 2 (Winter 2021): 305–425; Alexa Dodge, Dale Spencer, Rose Ricciardelli, and Dale Ballucci, “‘This Isn’t Your Father’s Police Force’: Digital Evidence in Sexual Assault Investigations,” *Australian & New Zealand Journal of Criminology* 52, no. 4 (December 2019): 499–515.

6 Jamie Cameron, “Victim Privacy and the Open Court Principle” (report prepared for the Policy Centre for Victims Issues, Research and Statistics Division, of the Department of Justice Canada, Ottawa, 2013).

7 Katherine Biber, “In Crime’s Archive: The Cultural Afterlife of Criminal Evidence,” *British Journal of Criminology* 53, no. 6 (November 2013): 1033–49.

8 Jessica Tai, Jimmy Zavala, Joyce Gabiola, Gracen Brilmeyer, and Michelle Caswell, “Summoning the Ghosts: Records as Agents in Community Archives,” *Journal of Contemporary Archival Studies* 6, no. 1 (2019): 18.

9 Michelle Caswell and Marika Cifor, “From Human Rights to Feminist Ethics: Radical Empathy in the Archives,” *Archivaria* 81 (Spring 2016): 27.

reviewing the definition of records, Geoffrey Yeo similarly identifies the strong historic links with the concept of evidence.<sup>10</sup> However, it has been asserted that, rather than the static nature and degree of emotional neutrality that this depiction implies, records contain emotional traces that transcend their physical form – including the “ghostly voices” of those who have been harmed.<sup>11</sup> To this end, Yeo characterizes records as “persistent representations of activities, created by participants or observers” who may not be neutral or impartial.<sup>12</sup>

Fiona Murphy suggests that, while we may see archival records primarily as storehouses of memory, they are in fact repositories of “trauma and pain . . . sorrow and loss for many, where unpacified ghosts with unfinished business await.”<sup>13</sup> Archival scholars Anne Gilliland and Michelle Caswell have described this as “the capacity of records and archives to motivate, inspire, anger, and traumatize.”<sup>14</sup> These depictions led Lisa Nathan, Elizabeth Shaffer, and Maggie Castor to coin the term *traumatizing collections* to encompass the “purposeful gatherings of materials that seek to include the records of disruptive, violent histories; efforts to document these events . . . and/or the subsequent activities that engage truth telling, justice, and/or reconciliation.”<sup>15</sup> Exposure to collections such as these has been described as creating “emotional disturbances” by placing individuals within “landscapes of human suffering.”<sup>16</sup>

In 2014, Anne Gilliland called upon archivists to better appreciate the affective impact records can have not only on survivors of traumatic events but also on the archivists who are entrusted with the responsibility for these records.<sup>17</sup> Subsequent

10 Geoffrey Yeo, “Concepts of Record (I): Evidence, Information, and Persistent Representations,” *American Archivist* 70, no. 2 (Fall–Winter 2007): 315–43.

11 Tai et al., “Summoning the Ghosts.”

12 Yeo, “Concepts of Record (I),” 342.

13 Fiona Murphy, “Archives of Sorrow: An Exploration of Australia’s Stolen Generations and Their Journey into the Past,” *History and Anthropology* 22, no. 4 (December 2011): 481–95, 481.

14 Anne J. Gilliland and Michelle Caswell, “Records and Their Imaginaries: Imagining the Impossible, Making Possible the Imagined,” *Archival Science* 16, no. 1 (March 2016): 55–56.

15 Lisa P. Nathan, Elizabeth Shaffer, and Maggie Castor, “Stewarding Collections of Trauma: Plurality, Responsibility, and Questions of Action,” *Archivaria* 80 (Fall 2015): 94.

16 David Gregory, Cynthia K. Russell, and Linda R. Phillips, “Beyond Textual Perfection: Transcribers as Vulnerable Persons,” *Qualitative Health Research* 7, no. 2 (May 1997): 297, 300.

17 Anne J. Gilliland, “Studying Affect and Its Relationship to the Agency of Archivists Since the Yugoslav Wars,” in *Archival Research and Education: Selected Papers from the 2014 AERI Conference*, ed. Richard J. Cox, Alison

research has confirmed the toll that this work can take on archivists.<sup>18</sup> Australian archivists have led the way in developing resources to support archivists who are emotionally impacted by their work. In 2018, Nicola Laurent and Michaela Hart called for a community of care to support archivists experiencing vicarious trauma.<sup>19</sup> More recently, they suggested the development of a global community of archival practice, involving “academics, practitioners and other interested parties, to share resources, skills, learnings and ideas to improve the implementation of trauma-informed approaches and ensure everyone is supported while doing this often difficult and challenging work.”<sup>20</sup> To this end, the Australian Society of Archivists has developed the first online course for archivists who are emotionally impacted by their work.<sup>21</sup> Truly engaging with the needs of survivors and their families requires attention not only to the needs of others but also to those who do this challenging work.

These useful discussions highlight the challenges of working with records that have been collected to shed light on past crimes and injustices with the aims of validating the experiences of those who were harmed and seeking to empower wronged communities and individuals to obtain justice through the ownership of information.<sup>22</sup> In this vein, through the connection of individuals and communities with records that were rightfully theirs, records of atrocities can have “activist potentialities.”<sup>23</sup> But what should the courts and archivists do

Langmead, and Eleanor Mattern (Sacramento, CA: Litwin Books, 2015).

- 18 See, for instance, Katie Sloan, Jennifer Vanderfluit, and Jennifer Douglas, “Not ‘Just My Problem to Handle’: Emerging Themes on Secondary Trauma and Archivists,” *Journal of Contemporary Archival Studies* 6, no. 1 (2019): 20; Cheryl Regehr, Wendy Duff, Henria Aton, and Christa Sato, “‘Humans and Records are Entangled’: Empathic Engagement and Emotional Response in Archivists,” *Archival Science* (May 2022): 1–21.
- 19 Nicola Laurent and Michaela Hart, “Emotional Labour and Archival Practice – Reflection,” *Journal for the Society of North Carolina Archivists* 15 (2018): 13–22.
- 20 Nicola Laurent and Michaela Hart, “Building a Trauma-Informed Community of Practice,” in “Selected Papers from the 2019 Archival Education and Research Institute (AERI 2019),” ed. James Lowry and Tonia Sutherland, special issue, *Education for Information* 37, no. 1 (March 2021): 27.
- 21 Nicola Laurent and Kristen Wright, “A Trauma-Informed Approach to Managing Archives: A New Online Course,” *Archives and Manuscripts* 48, no. 1 (January 2020): 80–87.
- 22 Wendy Duff, Andrew Flinn, Karen E. Suurtamm, and David A. Wallace, “Social Justice Impact of Archives: A Preliminary Investigation,” *Archival Science* 13, no. 4 (December 2013): 317–48; Elizabeth Shepherd, Victoria Hoyle, Elizabeth Lomas, Andrew Flinn, and Anna Sexton, “Towards a Human-Centred Participatory Approach to Child Social Care Recordkeeping,” *Archival Science* 20, no. 4 (December 2020): 307–25.
- 23 H. Aton, W. Duff, and L. Shields, “Emotions in the Archives: Activist Potentialities in Archival Work” (unpublished manuscript, November 11 2022), typescript.

with records that are not only collected during the commission of crime but act themselves as integral elements of the crime itself – humiliating and degrading victims – by recording their suffering?

### Traumatic Potentialities of Video Records of Violent Crime

The last two decades have seen a growing acknowledgement of the role that archives play in the fight for justice. Over the last 10 years, literature has also highlighted the link between this fight and the affective power of archives.<sup>24</sup> Within this general field, there is an expanding body of literature that identifies the “traumatic potentiality”<sup>25</sup> specifically of video records of violent criminal acts (particularly sexual violence) for varying populations, including (1) the direct victims of violent crime;<sup>26</sup> (2) those who, by the nature of their work, must repeatedly view the records;<sup>27</sup> and (3) members of the public who are exposed to violent records distributed through the media and social media.<sup>28</sup>

### Victims

A primary concern about the traumatic potentialities of video records is their impact on victims and families. Through bearing witness to their own victimization by viewing video records, victims may be confronted with aspects

- 24 Marika Cifor and Anne J. Gilliland, “Affect and the Archive, Archives and Their Affects: An Introduction to the Special Issue,” in “Affect and the Archive, Archives and their Affects,” ed. Marika Cifor and Anne J. Gilliland, special issue, *Archival Science* 16, no. 1 (March 2016): 1–6; Anne J. Gilliland, “Moving Past: Probing the Agency and Affect of Recordkeeping in Individual and Community Lives in Post-Conflict Croatia,” *Archival Science* 14, no. 3–4 (October 2014): 249–74.
- 25 Anna Sexton, “Working with Traumatic Records: How Should We Train, Prepare and Support Record-Keepers?” (paper presented at the Archival Education and Research Institute 2019, Liverpool, UK, July 2019).
- 26 Henry and Powell, “Sexual Violence in the Digital Age”; Kaitlyn Regehr, Arija Birze, and Cheryl Regehr, “Technology Facilitated Re-victimization: How Video Evidence of Sexual Violence Contributes to Mediated Cycles of Abuse,” *Crime, Media, Culture* (October 2021): 1–19; Clare McGlynn, Erika Rackley, Kelly Johnson, Nicola Henry, Asher Flynn, Anastasia Powell, Nicola Gavey, and Adrian Scott, “Shattering Lives and Myths: A Report on Image-Based Sexual Abuse” (UK report from an Australian Research Council–funded project DPI70101433, Revenge Pornography: The Prevalence and Nature of Non-Consensual Imagery and the Implications for Law Reform, Durham University; University of Kent; RMIT University; Monash University; University of Auckland; Goldsmiths University of London, 2019).
- 27 Dodge et al., “‘This Isn’t Your Father’s Police Force’”; Kimpel, “Violent Videos”; Regehr et al., “‘Humans and Records are Entangled.’”
- 28 E. Alison Holman, Dana R. Garfin, Pauline Lubens, and Roxane C. Silver, “Media Exposure to Collective Trauma, Mental Health, and Functioning: Does It Matter What You See?” *Clinical Psychological Science* 8, no. 1 (January 2020): 111–24.



of their assaults of which they were previously unaware or that they had repressed. This can both re-ignite previous trauma symptoms and potentially ignite previously unrealized trauma.<sup>29</sup> Further, as their images are evidence in criminal proceedings, the survivors are unable to control their distribution or viewing once electronic distribution of the record has begun<sup>30</sup> – a scenario Katherine Biber has referred to as the “perpetual visibility”<sup>31</sup> of personal shame and suffering. Building on the literature on technology-facilitated sexual violence (TFSV)<sup>32</sup> and image-based sexual abuse (IBSA),<sup>33</sup> scholars have noted that video records of sexual violence can create technology-facilitated cycles of abuse that are perpetrated each time the images are viewed.<sup>34</sup> That is, when sexual and abusive images are shared without the consent of the subject(s) of the records, individuals can experience mental health symptoms that parallel those of a physical assault.<sup>35</sup> The impacts of these assaultive experiences are “all-encompassing and pervasive, radically altering [victims’] everyday life experiences, relationships and activities, and causing harms which permeated their personal, professional and digital social worlds.”<sup>36</sup>

29 Alexandra S. Marcotte and Jessica J. Hille, “Sexual Violence and Consent in the Digital Age,” in *The Palgrave Handbook of Gendered Violence and Technology*, ed. Anastasia Powell, Asher Flynn, and Lisa Sugiura (Cham, CH: Palgrave Macmillan, 2021).

30 McGlynn et al., “Shattering Lives and Myths”; Kaitlyn Regehr and Jessica Ringrose, “Understanding Image Based Sexual Abuse: Changing the Conceptual Frame of ‘Sexting’ to Help Youth Navigate Harmful Online Practices,” *Journal of Social Issues* (forthcoming).

31 Katherine Biber, “Law, Evidence and Representation,” in *Routledge International Handbook of Visual Criminology*, ed. Michelle Brown and Eamonn Carrabine (London: Routledge, 2017), 19.

32 Henry and Powell, “Sexual Violence in the Digital Age”; Nicola Henry and Anastasia Powell, “Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research,” *Trauma, Violence, & Abuse* 19, no. 2 (April 2018): 195–208.

33 Clare McGlynn and Erika Rackley, “Image-Based Sexual Abuse,” *Oxford Journal of Legal Studies* 37, no. 3 (Autumn 2017): 534–61.

34 Marcotte and Hille, “Sexual Violence and Consent in the Digital Age”; Regehr, Birze, and Regehr, “Technology Facilitated Re-victimization.”

35 Samantha Bates, “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors,” *Feminist Criminology* 12, no. 1 (January 2017): 22–42.

36 McGlynn et al., “Shattering Lives and Myths,” 6.

### Professionals Working with Records

A growing body of scholarly work also identifies the impact of traumatic records on those who are exposed by virtue of their work.<sup>37</sup> Archivists, in survey design and qualitative studies conducted by members of our team, described a wide range of reactions, including shock; intrusive thoughts; profound senses of anger, sadness, and despair; and ultimately, at times, disrupted functioning in personal and occupational spheres.<sup>38</sup> Jo Moran-Ellis described a “pain by proxy” in response to working with records of child sexual abuse,<sup>39</sup> while Ben Fincham, Jonathan Scourfield, and Susanne Langer describe intrusive thoughts, disturbed sleep, and discussion of disturbing cases with unwilling relatives and friends as results of reviewing suicide records in a coroner’s office.<sup>40</sup> Within the criminal justice context, the unique qualities of video records – alongside their pervasive use – allow for the transfer of trauma in unprecedented ways, amplifying its impact and causing injury far beyond the original act.<sup>41</sup> Rather than “imagining what it would be like to be in their shoes,”<sup>42</sup> viewers of video records of violent crime are drawn closer to actual events and focus on aspects of offending that would otherwise have been fleeting, imperceptible, or unknowable are immortalized.<sup>43</sup>

Laboratory research confirms that violent or gruesome films consistently generate physiological stress responses (e.g., changes in heart rate and salivary cortisol) and intrusive thoughts (e.g., flashbacks, intrusive memories) in the

37 See, for instance, Sloan, Vanderfluit, and Douglas, “Not ‘Just My Problem to Handle.’”

38 Regehr et al., “‘Humans and Records are Entangled’”; Arija Birze, Kaitlyn Regehr, and Cheryl Regehr, “Workplace Trauma in a Digital Age: The Impact of Video Evidence of Violent Crime on Criminal Justice Professionals,” *Journal of Interpersonal Violence* 38, no. 1–2 (April 2022): 1–36, <https://doi.org/10.1177/08862605221090571>.

39 Jo Moran-Ellis, “Close to Home: The Experience of Researching Child Sexual Abuse,” in *Women, Violence and Male Power: Feminist Activism, Research and Practice*, ed. Marianne Hester, Liz Kelly, and Jill Radford (Buckingham, UK: Open University Press, 1996).

40 Ben Fincham, Jonathan Scourfield, and Susanne Langer, “The Impact of Working with Disturbing Secondary Data: Reading Suicide Files in a Coroner’s Office,” *Qualitative Health Research* 18, no. 6 (June 2008): 853–62.

41 Amit Pinchevski, “Screen Trauma: Visual Media and Post-Traumatic Stress Disorder,” *Theory, Culture & Society* 33, no. 4 (July 2016): 51–75.

42 Kate Coddington, “Contagious Trauma: Reframing the Spatial Mobility of Trauma within Advocacy Work,” in “On Trauma, Geography, and Mobility: Towards Geographies of Trauma,” ed. Kate Coddington and Jacque Micieli-Voutsinas, special issue, *Emotion, Space and Society* 24 (August 2017): 68.

43 Birze, Regehr, and Regehr, “Workplace Trauma in a Digital Age.”

days and weeks following exposures.<sup>44</sup> Scenes depicting sexual violence and gross physical injury may be particularly effective at eliciting trauma-related symptoms.<sup>45</sup> But video records do not simply remain in the courtroom for viewing by those with roles in the justice system; they are also frequently transmitted to the public via the media.

### The Public

As Chris Greer has pointed out, “the relationship between media images and popular consciousness is . . . difficult to unpack” in that the media can orchestrate moral panic and inform the political processes aimed at dealing with social crises.<sup>46</sup> In the case of sex crimes, Greer concludes that the primary aim of media narratives is not to inform, but to shock. He quotes a UK Sunday newspaper editor as stating, “First of all you have to shock, otherwise they’ll not be interested in reading it.”<sup>47</sup> This shock occurs at the expense of the victim, whose intimate personal experience and horror become the focus of media coverage and whose behaviour and virtue ultimately become the subject of public discourse.<sup>48</sup> There is also growing evidence that exposure to a wide variety of forms of violence through the media can have significant emotional impacts on members of the public.<sup>49</sup>

<sup>44</sup> Inna Arnaudova and Muriel A. Hagenaars, “Lights . . . Action: Comparison of Trauma Films for Use in the Trauma Film Paradigm,” *Behaviour Research and Therapy* 93 (June 2017): 67–77; Ella L. James, Alex Lau-Zhu, Ian A. Clark, Renée M. Visser, Muriel A. Hagenaars, and Emily A. Holmes, “The Trauma Film Paradigm as an Experimental Psychopathology Model of Psychological Trauma: Intrusive Memories and Beyond,” *Clinical Psychology Review* 47 (July 2016): 106–42; Anke Weidmann, Ania Conradi, Kathrin Gröger, Lydia Fehm, and Thomas Fydrich, “Using Stressful Films to Analyze Risk Factors for PTSD in Analogue Experimental Studies – Which Film Works Best?” *Anxiety, Stress, & Coping* 22, no. 5 (October 2009): 549–69.

<sup>45</sup> Arnaudova and Hagenaars, “Lights . . . Action.”

<sup>46</sup> Chris Greer, “Sex Crime and the Media: Press Representations in Northern Ireland,” in *Criminal Visions: Media Representations of Crime and Justice*, ed. Paul Mason (New York: Routledge, 2012), 90.

<sup>47</sup> Greer, 106.

<sup>48</sup> Regehr, Birze, and Regehr, “Technology Facilitated Re-victimization.”

<sup>49</sup> Hasida Ben-Zur, Sharon Gil, and Yinon Shamshins, “The Relationship Between Exposure to Terror Through the Media, Coping Strategies and Resources, and Distress and Secondary Traumatization,” *International Journal of Stress Management* 19, no. 2 (May 2012): 132.

### The Current Study

Records are critical components of the justice system – not only during the course of proceedings but also later when they serve as repositories for accountability and re-examination. However, as noted by Wendy Duff and colleagues, “archives can both produce and reproduce justice and injustice in the decisions they make on how they shape the past and engage the present.”<sup>50</sup> During the criminal justice process, access to evidence, including evidence in the form of video records, is governed by strict rules, and the privacy and dignity of individuals involved in the process can be protected by publication bans and restricted access to the court proceedings.<sup>51</sup> Upon completion of the trial, however, evidence is placed in the archives. Biber contends that “courts and legal archives have yet to resolve their processes for permitting post-trial access and use of their records.”<sup>52</sup> She describes chilling examples of a result that is not anticipated or regulated by current legislation: the use of criminal archives as a source of artistic and creative material. Amanda Demeter describes the challenges experienced by archivists who grappled with conflicting obligations in the years following serial killer Ted Bundy’s death, when media sought access to graphic descriptions and photos of women he had victimized.<sup>53</sup>

When considering the preservation or destruction of archival material that documents the humiliation and suffering of an individual, “archives emerge as a contested site of power and silence, of inheritance and disinheritance.”<sup>54</sup> In this respect, Nathan, Shaffer, and Castor ask, “How do those . . . tasked with designing and managing information systems that document horrific events guide their actions when working within the limitations of individual capacities, available resources, and institutional and legal structures?”<sup>55</sup>

50 Duff et al., “Social Justice Impact of Archives,” 319.

51 Biber, “In Crime’s Archive”; Katherine Biber, “Dignity in the Digital Age: Broadcasting the Oscar Pistorius Trial,” *Crime, Media, Culture* 15, no. 3 (December 2019): 401–22.

52 Biber, “In Crime’s Archive,” 1038.

53 Amanda Demeter, “Disgust and Fascination: Feminist Ethics of Care and the Ted Bundy Investigative Files,” *Journal of Critical Library and Information Studies* 3, no. 2 (2021).

54 Jamila J. Ghaddar, “The Spectre in the Archive: Truth, Reconciliation, and Indigenous Archival Memory,” *Archivaria* 82 (Fall 2016): 6.

55 Nathan, Shaffer, and Castor, “Stewarding Collections of Trauma,” 102.

This article is a case study examining the tragic Canadian case of serial killers Paul Bernardo and Karla Homolka and the videos they recorded of their crimes. While the use of video records in the courts was not entirely novel at the time of Bernardo – for instance, film was used in the International Military Tribunal at Nuremberg in 1945,<sup>56</sup> and an 81-second home video was used in the 1992 trial of police officers charged in the beating of US citizen Rodney King<sup>57</sup> – the quantity, quality, and nature of video records in the Bernardo trial was unprecedented. Using multiple sources of information to draw out what is common and what is unique to this case, we address a significant gap in the literature regarding the use of video evidence of violent crime in the criminal justice system<sup>58</sup> as well as struggles in the criminal justice process regarding the preservation and archiving of video records of human atrocity.<sup>59</sup>

In recent years, video evidence has become ubiquitous in the criminal justice system, bringing with it the potential to harm increasing numbers of individuals involved in criminal justice and in the archiving of the records.<sup>60</sup> Yet, as Alexa Dodge and colleagues have noted, the rapid pace of technological advance and the exponential production and transmissibility of video appear to have far outpaced organizational awareness, preparedness, and response.<sup>61</sup> This article reviews the distribution and viewing of video records in Bernardo/Homolka, decisions made regarding the preservation and storing of video records in this case, and continuing challenges regarding (1) the use of video records of violent crime in the administration of justice, (2) the right of the public to view violent video records and the role of the media in distributing violent video images, and (3) the eventual archiving of personal pain and suffering.

56 Sukanya Pillay, "Video as Evidence," in *Video for Change. A Guide for Advocacy and Activism*, ed. Sam Gregory, Gillian Caldwell, Ronit Avni, and Thomas Harding (London: Pluto Press, 2005).

57 Forrest Stuart, "Constructing Police Abuse after Rodney King: How Skid Row Residents and the Los Angeles Police Department Contest Video Evidence," *Law & Social Inquiry* 36, no. 2 (Spring 2011): 327–53.

58 Dodge et al., "This Isn't Your Father's Police Force"; Kimpel, "Violent Videos."

59 Biber, "In Crime's Archive"; Ghaddar, "The Spectre in the Archive."

60 Dodge et al., "This Isn't Your Father's Police Force"; Kimpel, "Violent Videos"; Nathan, Shaffer, and Castor, "Stewarding Collections of Trauma."

61 Dodge et al., "This Isn't Your Father's Police Force."

## Method

This research adopted a qualitative case study approach<sup>62</sup> to examining the use and treatment of video records in the Bernardo/Homolka trial in order to determine challenges encountered at the time and challenges that continue for the criminal justice system.

### Case Study

Case studies are defined as holistic and in-depth analyses of persons, events, decisions, policies, and institutions in natural, real-life contexts.<sup>63</sup> They involve deep and careful consideration of multiple factors, which include the nature of the case, the historical context, the physical setting, and institutional and political contextual factors.<sup>64</sup> They are seen to be exceptionally useful for understanding particular experiences, and for generating and testing new theories, in that they allow researchers to uncover complex sets of decisions and interactions and to examine the effects these decisions and interactions have over time.<sup>65</sup> Case study has been referred to as a triangulated form of research, with triangulation occurring between the data, the investigators, the theories employed, and the methodologies.<sup>66</sup> Rather than adopting a single method of research to inform the analysis, case study research is characterized by using “a palette of methods” and “analytical eclecticism.”<sup>67</sup> Multiple sources of data are

62 Sharan B. Merriam, “Qualitative Case Studies,” in *International Encyclopedia of Education*, 3rd ed., ed. Penelope Peterson, Eva Baker, and Barry McGaw (Oxford: Academic Press, 2010); Robert E. Stake, “Qualitative Case Studies,” in *The Sage Handbook of Qualitative Research*, 3rd ed., ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: SAGE Publications Inc, 2005).

63 Sarah Crowe, Kathrin Cresswell, Ann Robertson, Guro Huby, Anthony Avery, and Aziz Sheikh, “The Case Study Approach,” *BMC Medical Research Methodology* 11, no. 1 (June 27, 2011): 100, <https://doi.org/10.1186/1471-2288-11-100>; Nerida Hyett, Amanda Kenny, and Virginia Dickson-Swift, “Methodology or Method? A Critical Review of Qualitative Case Study Reports,” *International Journal of Qualitative Studies on Health and Well-Being* 9, no. 1 (May 7, 2014): 23606, <https://doi.org/10.3402/qhw.v9.23606>; Helen Simons, *Case Study Research in Practice* (London: SAGE Publications Ltd, 2009); Gary Thomas, “A Typology for the Case Study in Social Science Following a Review of Definition, Discourse, and Structure,” *Qualitative Inquiry* 17, no. 6 (July 2011): 511–21.

64 Robert E. Stake, “The Case Study Method in Social Inquiry,” *Educational Researcher* 7, no. 2 (February 1978): 5–8.

65 Crowe et al., “The Case Study Approach”; Joe R. Feagin, Anthony M. Orum, and Gideon Sjoberg, *A Case for the Case Study* (Chapel Hill, NC: University of North Carolina Press, 1991).

66 Feagin, Orum, and Sjoberg, *A Case for the Case Study*.

67 Hyett, Kenny, and Dickson-Swift, “Methodology or Method?,” 2; Robert E. Stake, *The Art of Case Study Research*

collected and analyzed in a manner that draws together naturalistic, holistic, ethnographic, phenomenological, and biographic research methods.<sup>68</sup>

To this end, this research engaged in dialogues with police investigators; civilian digital analysts; legal professionals (court reporters, lawyers, and judges); and forensic mental health professionals,<sup>69</sup> using the long-interview method of data collection<sup>70</sup> in support of thick description and credibility.<sup>71</sup> In addition, the researchers engaged in the collection and review of multiple documents including court decisions, legal case notes, government reports, and media reports. The proposal was approved by the Human Subjects Research Ethics Board at the University of Toronto.

Six criminal justice professionals who were directly and intensely involved with the Bernardo investigation and trial participated in interviews ranging from 45 to 120 minutes in length. These included an investigating police officer, two members of the legal defence team, a court reporter, a forensic mental health professional who consulted and testified on the case, and a government attorney. Thus, perspectives on the use and impact of video evidence in this case were gathered from those with different lenses on the system and those who dealt with the case at different stages in the process. Ten additional professionals were interviewed to provide a broader context of the use and effects of video evidence at the time of the interviews. Six of these participants worked in policing: they included members of large urban or national policing organizations, detectives or supervising senior officers with investigative experience, and a civilian analyst. Four additional participants were members of the legal profession, including prosecuting attorneys and a judge. Years of practice of the participants was significant, ranging from 4.5 years to more than 50 years. Questions focused on the handling of video records and the observed impact of the records on victims and professionals.

(Thousand Oaks, CA: SAGE Publications Inc, 1995); Thomas, "A Typology for the Case Study in Social Science Following a Review of Definition, Discourse, and Structure," 512.

68 Stake, *The Art of Case Study Research*.

69 Names and identities of interviewees are withheld to maintain confidentiality.

70 Grant McCracken, *The Long Interview* (Thousand Oaks, CA: SAGE Publications Inc, 1988).

71 Cynthia A. Lietz and Luis E. Zayas, "Evaluating Qualitative Research for Social Work Practitioners," *Advances in Social Work* 11, no. 2 (2010): 188–202.

We note that some voices are absent from our interviews: those of the surviving victims, those of surviving family members, and those of members of the jury. Given the extreme levels of violence and trauma, we believed it was unethical to reach out to them for the purposes of an academic inquiry. We have however included their voices in a mediated form – that is, through the recollections and impressions of those centrally involved in the case, through judicial decisions and comments arising from the trials, through reports arising from government inquiries into the case, and through newspaper reports.

### Data Analysis

In the case study approach, the case is developed in a relationship between the researchers and the informants.<sup>72</sup> In this case, further conversations between researchers, participants, and other experts allowed for the clarification of concepts and integration into an emerging theory. Using approaches first identified by Robert Stake,<sup>73</sup> the process of data analysis begins with deep engagement with the data, allowing researchers to elicit themes from which meaning emerges; this is known as categorical aggregation.<sup>74</sup> Next, researchers establish patterns and relationships among categories. Finally, they engage in naturalistic generalizations, supported by thick and rich data, which allow the reader to make judgments regarding the extent to which the findings should inform other cases. Coding, as an iterative and reflexive practice, is context dependent, never complete, and never reaches a fixed endpoint.<sup>75</sup> Nevertheless, in this study we aimed to demonstrate saturation and conceptual rigour through our emergent conceptual model and theoretical explanations of the current data.<sup>76</sup>

72 Stake, "The Case Study Method in Social Inquiry."

73 Stake, "The Case Study Method in Social Inquiry."

74 John W. Creswell and Cheryl N. Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 4th ed. (Thousand Oaks, CA: SAGE Publications Inc, 2016).

75 Victoria Clarke, Virginia Braun, and Nikki Hayfield, "Thematic Analysis," in *Qualitative Psychology: A Practical Guide to Research Methods*, 3rd ed., ed. Jonathan A. Smith (London: SAGE Publications Ltd, 2015).

76 Jacqueline Low, "A Pragmatic Definition of the Concept of Theoretical Saturation," in "Special Issue on Grounded Theory," ed. Hans Bakker, special issue, *Sociological Focus* 52, no. 2 (April–June 2019): 131–39.



## Results

In June 1991, 14-year-old Leslie Mahaffy was abducted, tortured, and killed by Paul Bernardo and his then-wife, Karla Homolka. Less than one year later, 15-year-old Kristen French was held captive over three days, tortured, and then killed. Emblematic of the advent and accessibility of hand-held recorders as well as the emergence of new dimensions to sexual and criminal offending, Bernardo and Homolka video-recorded the violent sexual assaults they committed on Leslie Mahaffy and Kristen French during their captivity. They also recorded their assaults on two other teenaged girls whom they drugged into submission: Homolka's sister Tammy (who died of asphyxia while unconscious) and a victim known only as Jane Doe. These videos were later discovered and became central evidence in criminal court proceedings.

### Video Records in the Cases of Bernardo and Homolka

In discussing this case, it is important to first outline challenges in the investigative process that resulted in the central contribution of video records to the ultimate conviction of the accused. First, a cluster of sexual assaults believed to have been committed by a serial rapist (later revealed to be Paul Bernardo) occurred in Scarborough, an eastern suburb of Toronto, between 1987 and 1990. DNA evidence was obtained from Bernardo in 1990 in relation to the Scarborough Rapist case, but test results were not forthcoming until 1993.<sup>77</sup> The abductions and murders of teenagers Leslie Mahaffy and Kristen French, in 1991 and 1992, occurred almost 150 kilometres away and were not initially identified as connected in any way to the assaults in Scarborough. The death of Tammy Homolka was initially deemed natural but unexplained, although later evidence revealed that she had been drugged to unconsciousness and sexually assaulted by Bernardo, who was aided and abetted by her sister Karla. Justice Archie Campbell, who was asked to undertake a review of the Bernardo investigation, summarized the challenges as follows:

The Bernardo case shows that motivation, investigative skill,  
and dedication are not enough. The work of the most dedicated,

<sup>77</sup> Archie Campbell, *Bernardo Investigation Review: Report of Mr. Justice Archie Campbell*, prepared for the Solicitor General and Minister of Correctional Services (Toronto: The Review, 1996).

skilful, and highly motivated investigators and supervisors and forensic scientists can be defeated by the lack of effective case management systems and the lack of systems to ensure communication and cooperation among law enforcement agencies.<sup>78</sup>

News that there were video records of the rape and torture of four young women, three of whom were later found dead, was disclosed to the police by Homolka in 1993. In the end, the tapes proved to be the critical evidence leading to the ability to charge and prosecute Bernardo for these horrifying crimes, making this the first time in Canadian legal history that a major sexual assault and serial murder case rested on the existence of video records of the crime.

### **Video Records in the Administration of Justice**

The unprecedented nature of video records at the time of the Bernardo case is apparent when we consider the manner in which the criminal justice system, and experienced professionals within it, struggled to determine what role this evidence should play in the administration of justice. The first issue that arose with respect to the handling of the videos was whether Bernardo's initial lawyer (Ken Murray), who had retrieved the tapes from Bernardo's house without the knowledge of police or the courts, was required to surrender them or whether they were privileged communication. Realizing he was in uncharted territory, Murray recused himself from the case and retained as counsel one of the most senior members of the criminal bar, but, according to a participant in our study, the senior lawyer "didn't know what to do and to cover himself, he went to the Law Society. [In response], the Law Society established an ad hoc committee of three to decide what to do with the tapes and came up with the decision that they were to be put in a sealed envelope and handed to the judge in open court, without comment, at the next appearance."

A second issue surrounded access to the tapes during the trial preparation period. Participants in this project recall vividly the contents of the "critical tapes," which included sexual activities between Bernardo and Homolka as well as the details of the offences they committed. What was not clear was who should have access to the tapes. Those we interviewed were clear about their obligation of confidentiality and steadfastly remained committed to this obli-

<sup>78</sup> Campbell, *Bernardo Investigation Review: Report of Mr. Justice Archie Campbell*.

gation in order to protect the victims and their families. Despite this, graphic details of the contents of the tapes and the horrifying assaults on teenaged girls can continue to be found in the popular press and in academic articles.<sup>79</sup>

This leads to the third issue: that is, to what degree did the media and ultimately the public have a right to access the video records? As in many other jurisdictions,<sup>80</sup> the principle of an open court is foundational to Canadian common law. Former Chief Justice of the Supreme Court of Canada Beverley McLachlin, in addressing this issue,<sup>81</sup> drew upon the words of philosopher Jeremy Bentham, who was first quoted in the United Kingdom House of Lords in 1913<sup>82</sup> and later by Justice Brian Dickson in the Supreme Court of Canada:<sup>83</sup> “Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”<sup>84</sup> The Chief Justice also, however, identified the costs to open justice, which in her view included loss of privacy, particularly for victims; a disruption of trial fairness due to the inflamed passions of jurors; and distortion caused by sensational and salacious press:

The technological advances of recent decades have put new pressures on the open court principle and have created new dilemmas for the courts, the media and the public. . . . the omnipresent and immediate reach of modern dissemination networks makes it increasingly apparent that openness may exact costs – costs that require judges and the media to reassess the means by which they further the principle of open justice.<sup>85</sup>

<sup>79</sup> Specific references intentionally missing.

<sup>80</sup> Biber, “Dignity in the Digital Age.”

<sup>81</sup> Beverley McLachlin, “Courts, Transparency and Public Confidence – To the Better Administration of Justice,” *Deakin Law Review* 8, no. 1 (January 2003): 1–11.

<sup>82</sup> *Scott v. Scott*, [1913] AC 417.

<sup>83</sup> *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175.

<sup>84</sup> Jeremy Bentham, *Publicity in the Court of Justice* (London: n.p., 1790).

<sup>85</sup> McLachlin, “Courts, Transparency and Public Confidence,” 2.

Chief Justice McLachlin concluded that “although Bentham did say that publicity is the soul of justice, I think he would agree that publicity is really her servant.”<sup>86</sup> Biber, in her analysis of media access to the Oscar Pistorius trial in South Africa, described this as “the tangled relationship between dignity and justice.”<sup>87</sup>

Under section 486(1) of the Canadian Criminal Code,<sup>88</sup> the public can be excluded from trial proceedings for all or part of the proceedings in order to protect the privacy of victims or witnesses. In the case of Bernardo, there were complex issues at play regarding the accountability of the criminal justice system, as the parents of Kristen French and Leslie Mahaffy fought to keep graphic videos of their daughters’ victimization out of the public domain. Similarly, counsel for Jane Doe argued that every time tapes of the assault on the unconscious Jane Doe were played, she was further violated, and that public viewing was an unreasonable invasion of her privacy, dignity, and autonomy.<sup>89</sup> In the case of Homolka, in 1993, Justice Francis Kovacs “impose[d] a near-blanket publication ban on the proceedings,”<sup>90</sup> which included the public and the foreign press, concluding that the right to a fair trial outweighed the right to freedom of the press. Of note, the judge apologized that he could not consider his “real concern for the psychological well being of victims” and for the “untold agony” that the discovery of the videos caused the victims’ families but, rather, needed to confine his considerations to issues surrounding a fair trial for the other accused party, Bernardo.<sup>91</sup>

In the Bernardo trial, the issue of whether to allow the introduction of video records was raised. In a report prepared for the Department of Justice, entitled “Victim Privacy and the Open Court Principle,” law professor Jamie Cameron observed, with respect to the Bernardo trial, that the “privacy and dignity interests of the victims and their survivors could scarcely have been more compelling”<sup>92</sup> and “playing the tapes in open court could only be experienced

<sup>86</sup> McLachlin, 11.

<sup>87</sup> Biber, “Dignity in the Digital Age,” 401.

<sup>88</sup> Criminal Code, R.S.C. 1985, c. C-46, s. 486(1) (Can.).

<sup>89</sup> Bruce A. MacFarlane and Heather Keating, “Horrible Video Tapes as Evidence: Balancing Open Court and Victims’ Privacy,” *Criminal Law Quarterly* 41, no. 4 (February 1999): 413.

<sup>90</sup> Cameron, “Victim Privacy and the Open Court Principle,” 64.

<sup>91</sup> Cameron, 64, 66.

<sup>92</sup> Cameron, 63.

by the . . . families as a cruel and even a barbaric act.”<sup>93</sup> The Crown counsel in Bernardo’s trial did not seek to exclude the public but rather sought to balance the desire for an open court with the need to protect the privacy of victims, survivors, and their families by suggesting that only the audio from the tapes be played for the open court, to which the trial judge agreed.<sup>94</sup> The image portion would be visible via screen to only the judge, counsel, jurors, and any necessary court administrators, while the audio would be available to all others. In this way, the court sought to protect victims and their surviving family members from what has been recognized as further victimization due to the “private, personal, sensitive or humiliating” nature of video records.<sup>95</sup>

However, the approach did not protect those exposed to the evidence, with or without video, from traumatic stress symptoms,<sup>96</sup> nor was it intended to. In his decision, Justice Patrick LeSage stated,

I am satisfied that the *harm* that flows from the public display of this videotape far exceeds any benefit that will flow from the exposure of sexual assault and child pornography. When I refer to *harm*, I am not suggesting that individual members of the public need to be protected from the *harm* that may flow from viewing these videotapes. . . . By *harm*, I am referring to the injury that most likely will be occasioned upon the surviving family members of these three young girls if the videos are played in open Court. *The families will suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown described it . . . is publicly displayed.*<sup>97</sup>

### Video Records, the Media, and the Public

The trial of Paul Bernardo received television and print media coverage that was unprecedented in Canada.<sup>98</sup> Over the course of the four-month trial, media booths

<sup>93</sup> Cameron, 67.

<sup>94</sup> MacFarlane and Keating, “Horrorific Video Tapes as Evidence.”

<sup>95</sup> Biber, “In Crime’s Archive,” 1034.

<sup>96</sup> Birze, Regehr, and Regehr, “Workplace Trauma in a Digital Age.”

<sup>97</sup> Cameron, “Victim Privacy and the Open Court Principle,” 67.

<sup>98</sup> Neil Vidmar, “The Canadian Criminal Jury: Searching for a Middle Ground,” *Law and Contemporary Problems* 62, no. 2 (Spring 1999): 141–72.

were set up along streets that were jammed with communications equipment. Long queues of people waited in line for hours, hoping to be admitted as spectators and directly witness some of the most disturbing evidence ever presented in a Canadian court, and hawkers sold “hang Bernardo” T-shirts.<sup>99</sup> A participant in our study described the media as “insatiable” and recounted: “People felt that they had a right to see what was there, what he did, what he captured. And they had no idea what they wanted to see. No idea.”

As Cameron notes in his review of victim privacy and open courts for the Department of Justice, “the media have a large role . . . in controlling what issues the public is encouraged to see as important.”<sup>100</sup> He adds,

The media promotes a culture of publicity which thrives on the details of private lives, whether the object of attention is a celebrity, a public figure, or an unlucky individual whose life has taken a turn which can be sensationalized for profit. There can be no doubt that the victims of crime are among those who are unwillingly thrown onto the public stage.<sup>101</sup>

In the case of Bernardo, “without the media making themselves the story – much of the debate of the ban would not have occurred.”<sup>102</sup> Ann Riehle concurs, suggesting that bans serve to sensationalize a case beyond reasonable proportions. But even at that time, publication bans were unenforceable – given that information was easily shared across borders.<sup>103</sup> Indeed, despite a publication ban in Canada, 14 percent of Canadians and 26 percent of people in Ontario, the province in which the trial was occurring, reported having obtained prohibited details of the Bernardo case from the American press.<sup>104</sup> Further, perhaps

<sup>99</sup> Vidmar, “The Canadian Criminal Jury”; John Cairns, “Recounting the Bernardo Trial: First Person Exploits into the Unknown,” *SaskToday*, July 30, 2020, <https://www.sasktoday.ca/north/in-the-community/recounting-the-bernardo-trial-4152324>.

<sup>100</sup> Frank Davey, quoted in Cameron, “Victim Privacy and the Open Court Principle,” 65.

<sup>101</sup> Cameron, 1.

<sup>102</sup> Davey, quoted in Cameron, 65.

<sup>103</sup> Ann Riehle, “Canada’s Barbie and Ken Murder Case: The Death Knell of Publication Bans,” *Indiana International & Comparative Law Review* 7, no. 1 (January 1996): 193.

<sup>104</sup> Mary L. Young and David Pritchard, “Cross-Border Crime Stories: American Media, Canadian Law, and Murder in

due to the absence of full information, the press initially focused on a fairy-tale narrative, glorifying the couple as “Ken and Barbie Killers.”<sup>105</sup> Leslie Mahaffy’s mother spoke at a victims’ memorial conference in 1993 and shared her views on the publicity around her daughter’s death:

Sadly, my daughter died for two people’s entertainment. Her death should not become anyone else’s entertainment. . . . What the police, judge and jury hear is one thing. The details do not have to be made public. To do so causes our family further pain and I feel the motive for publishing them is simply profit.<sup>106</sup>

Similar sentiments were expressed regarding the murder of Reeva Steenkamp by Oscar Pistorius in South Africa two decades later. Biber notes, “Whilst she was not well-known prior to her death, the identity of her killer and the tawdry nature of her death brought her posthumous celebrity.”<sup>107</sup> Biber further quotes columnist Danielle Bowler as stating,

Reeva Steenkamp’s death has been turned into something that has market value. The proliferation of books on the trial, from journalists to ex-girlfriend’s mothers and now Steenkamp’s own mother, raises a question about the limits of journalistic ethics, the influence of capitalism, our supposed right to see it all, and concern for how to give Steenkamp a voice and maintain her dignity.<sup>108</sup>

Additionally disturbing in the Bernardo case was the manner in which even the mainstream media dealt with Jane Doe, who was 15 when she was befriended, groomed, and ultimately drugged and sexually assaulted by Homolka and

the Internet Age,” *American Review of Canadian Studies* 36, no. 3 (November 2006): 407–26.

<sup>105</sup> Riehle, “Canada’s Barbie and Ken Murder Case”; Romayne S. Fullerton, “Representing the Reprehensible: Fairy Tales, News Stories & the Monstrous Karla Homolka,” *Atlantis: Critical Studies in Gender, Culture & Social Justice* 31, no. 1 (September 2006): 91–99.

<sup>106</sup> Sue Careless, “Battling Society’s Cold Curiosity Debbie Mahaffy Speaks Out For Victim’s Rights,” *The Interim*, July 27, 1993, <https://theinterim.com/issues/marriage-family/battling-society%E2%80%99s-cold-curiosity-debbie-mahaffy-speaks-out-for-victim%E2%80%99s-rights/>.

<sup>107</sup> Biber, “Dignity in the Digital Age,” 402.

<sup>108</sup> Danielle Bowler, cited in Biber, “Dignity in the Digital Age,” 404.

Bernardo.<sup>109</sup> In a 1997 episode of the Canadian Broadcasting Corporation (CBC) program *Fifth Estate*, a brief video clip shows Jane Doe lying on the floor. While her face is obscured, her body and voice are not. Now, a quarter of a century after it aired, the episode remains easily found on the CBC website.<sup>110</sup> The continued availability of this footage on the CBC site can clearly be seen as evidence of the “cultural afterlife of criminal evidence.”<sup>111</sup>

### Archiving the Video Records

A final issue regarding handling of the tapes surrounded the question of what should be done with the tapes once the trial was completed. Given that the publication ban would expire after the Bernardo trial and appeals were concluded, the families applied for orders to destroy the video evidence in order to protect their deceased daughters from the public violation of their privacy and dignity.<sup>112</sup> A police officer and an attorney in our study provided arguments against the destruction of the tapes. They were confident that the data could be safely stored and feared that, as memories faded and public interest moved on, a record of the horrific nature of the crimes and of the risk Bernardo presented to the community might be lost. They noted that the tapes “were under lock and key. . . . no one else would have had any [access] at all. The whole point of the Crown’s case was these were securely locked in bank vaults, and no one would ever see them except if needed in a parole hearing.” Yet, as Biber has noted, while strict rules govern the collection, admission, and interpretation of evidence at trial, archived evidence may continue to be accessed by artists, scholars, journalists, or others, who can potentially use it in ways that are insensitive or even dangerous.<sup>113</sup>

Acting for the government, an attorney in the Bernardo case grappled with weighing the pursuit of justice with the families’ requests for victims’ privacy and their wishes to destroy non-consensual sexually explicit and abusive imagery of their daughters:

<sup>109</sup> Barry Brown, “Teen Outlines Relationship with Bernardos,” *The Buffalo News*, August 9, 1995, [https://buffalonews.com/news/teen-outlines-relationship-with-bernardos/article\\_9ad83a57-d507-5417-ad88-57cbe6dbbd59.html](https://buffalonews.com/news/teen-outlines-relationship-with-bernardos/article_9ad83a57-d507-5417-ad88-57cbe6dbbd59.html).

<sup>110</sup> Specific location intentionally missing.

<sup>111</sup> Biber, “In Crime’s Archive.”

<sup>112</sup> Cameron, *Victim Privacy and the Open Court Principle*.

<sup>113</sup> Biber, “In Crime’s Archive.”



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

The outcome was that, even though the Crown was successful in its petition to have the records retained, the tapes were burned:

After the hearing on the Court of Appeal, the then-attorney general of the day, with the co-operation of the police . . . made a decision in conjunction with the families, to destroy the tapes. . . . [I]t's not the first time, and it won't be the last time, where you win the case on legal principles, but in fact a decision is made. . . . I think the families were there, they burned them, literally, in a can with gasoline was how they lit it, so they were destroyed.

News reports from the time reported that the tapes were incinerated at an undisclosed location in an emotional ceremony with the victims' families.<sup>114</sup> In describing the event, Kristen French's mother explained, "Every time those tapes were viewed, it was a violation of, of the girls involved. And, to know that's not going to happen again, means a lot. There were tears. I was sure Kristen was looking down and saying, thank God."<sup>115</sup>

<sup>114</sup> Kirk Makin, "Burning of Bernardo Tapes Gives Solace to Families," *Globe and Mail*, December 22, 2001, <https://www.theglobeandmail.com/news/national/burning-of-bernardo-tapes-gives-solace-to-families/article4158131/>; Canadian Broadcasting Corporation, "Tapes Made by Bernardo Destroyed," CBC News, December 21, 2001, <https://www.cbc.ca/news/canada/tapes-made-by-bernardo-destroyed-1.256053>.

<sup>115</sup> *Ken and Barbie Killers: The Lost Murder Tapes*, episode 4, "The Trial," aired December 13, 2021, on CTV, <https://www.ctv.ca/shows/ken-barbie-killers-the-lost-murder-tapes>.

### Video Records of Violent Crime in the Present Day

Today, a quarter of a century later, video records of violent crime are ubiquitous. A prosecuting attorney in our study indicated, “In today’s world, 95% of the cases involve some form of video evidence. I think it is a rarity now to have a case that doesn’t have some small element of video evidence incorporated into it, so hundreds and hundreds of cases.” A police officer concurred: “Video that we gather as part of the investigation is so important in what we do, to the point where actually we’re having difficulty in the courts where if we don’t have it, it’s viewed as not happening. So, it has become probably one of the most important things that we have.”

Thus, the use of violent and graphic digital content, including text message conversations and Internet search histories as well as video and audio evidence, is intensifying across all domains of policing and criminal justice.<sup>116</sup> A recent qualitative analysis of 70 semi-structured interviews and two focus groups with Canadian sex crimes investigators found that many investigators felt overwhelmed, ill-equipped, and ill-prepared to deal with the rapid influx of digital evidence in sexual violence cases.<sup>117</sup> Not only was the volume of evidence a considerable challenge, but lack of training and education on how to access, manage, and handle the content was also problematic in understaffed and under-resourced contexts.<sup>118</sup>

In the decades following Bernardo, challenges regarding the handling and use of video evidence continue.<sup>119</sup> The investigation and prosecution of cases involving online child sexual abuse material and the impact on victims has received increasing attention in recent years.<sup>120</sup> Consequently, the handling of

<sup>116</sup> Brayne, Levy, and Newell, “Visual Data and the Law.”

<sup>117</sup> Dodge et al., “This Isn’t Your Father’s Police Force.”

<sup>118</sup> Dodge et al., “This Isn’t Your Father’s Police Force.”

<sup>119</sup> Cheryl Regehr, Kaitlyn Regehr, and Arija Birze, “Traumatic Residue, Mediated Remembering and Video Evidence of Sexual Violence: A Case Study,” *International Journal of Law and Psychiatry* 81 (Mar–Apr 2022): 101778.

<sup>120</sup> Jennifer Martin, “It’s Just an Image, Right?: Practitioners’ Understanding of Child Sexual Abuse Images Online and Effects on Victims,” *Child & Youth Services* 35, no. 2 (July 10, 2014): 96–115, <https://doi.org/10.1080/0145935X.2014.924334>; Jennifer Martin and Ramona Alaggia, “Sexual Abuse Images in Cyberspace: Expanding the Ecology of the Child,” *Journal of Child Sexual Abuse* 22, no. 4 (May 2013): 398–415; Andrea Slane, Jennifer Martin, Jonah R. Rimer, Angela W. Eke, Roberta Sinclair, Grant Charles, and Ethel Quayle, “Professionals’ Perspectives on Viewing Child Sexual Abuse Images to Improve Response to Victims,” *Canadian Review of Sociology/Revue canadienne de sociologie* 55, no. 4 (October 2018): 579–96; Andrea Slane, “From Scanning to Sexting: The Scope of Protection of Dignity-Based Privacy in Canadian Child Pornography Law,” *Osgoode Hall Law Journal* 48,

digital evidence of child sexual abuse throughout the justice process – including the viewing, reproduction, distribution, and subsequent archiving of such evidence – is strictly controlled under existing child pornography laws.<sup>121</sup> Similar rules are notably missing in regard to digital evidence of sex crimes and other violent crimes against adults. For example, “there is no extant South African jurisprudence which recognizes a right to dignity after death.”<sup>122</sup>

Furthermore, the preservation or destruction of videotaped survivor testimonies was the subject of heated disputes in the aftermath of the Indian Residential Schools Settlement Agreement in Canada.<sup>123</sup> Information in the records identified survivors, witnesses, and perpetrators and detailed horrific abuse and violence, psychological harm, and resultant self-harm. As Jamila Ghaddar notes, “To say that these records contain sensitive information is to understate the case.”<sup>124</sup> While survivor groups sought to have the information destroyed, the Government of Canada opposed the destruction, stating that they were government records. In ruling that the records would be destroyed unless survivors gave their explicit consent to their preservation, Justice Paul Perell stated, “It is the survivor’s story to tell and it is the survivor’s individual decision that must be respected.”<sup>125</sup> His decision to compel the destruction of records unless otherwise directed by the survivor was subsequently upheld by both the Ontario Court of Appeal and the Supreme Court of Canada. This decision is consistent with the European Union’s General Data Protection Regulation with respect to the “right to be forgotten,” also known as the “right to erasure” or the “right to obscurity.”<sup>126</sup> In this respect, Ashley Vavra suggests that, for individuals who have experienced a traumatic incident, particularly one of a high-profile nature, it is merciful to provide a way

no. 3–4 (Fall–Winter 2010): 543–93; Andrea Slane, “Legal Conceptions of Harm Related to Sexual Images Online in the United States and Canada,” *Child & Youth Services* 36, no. 4 (December 8, 2015): 288–311, <https://doi.org/10.1080/0145935X.2015.1092837>; Annie Zanobini, “Protecting Victims: Limiting Discovery of Child Pornography in California,” *Georgetown Journal of Legal Ethics* 29, no. 4 (Fall 2016): 1461–82.

121 Zanobini, “Protecting Victims.”

122 Biber, “Dignity in the Digital Age.”

123 Nathan, Shaffer, and Castor, “Stewarding Collections of Trauma.”

124 Ghaddar, “The Spectre in the Archive,” 11.

125 Perell, cited in Nathan, Shaffer, and Castor, “Stewarding Collections of Trauma,” 109.

126 As discussed in the International Federation of Library Associations and Institutions, “IFLA Statement on the Right to be Forgotten,” IFLA, February 15, 2016, <https://www.ifla.org/publications/ifla-statement-on-the-right-to-be-forgotten-2016/>.

to prevent further harm each time the individual's name is searched.<sup>127</sup>

## Discussion: Applying a Survivor-Centric Approach to Managing Troubling Records

Video records represent real events and possess “the unique tangibility of a real moment captured in material form.”<sup>128</sup> When these events include the sexual assault, torture, and murder of individuals, these records carry significant power to harm those exposed to them, but most importantly, through repeated viewing, they continue to harm those individuals whose suffering is immortalized. Challenging decisions regarding the handling of video records of violent crime during the investigation process, the viewing of such records in court, and access to them by the public and press during the criminal justice process continue to be areas of concern and contestation, pitting principles of open justice against those of victim dignity and privacy.<sup>129</sup> As one of the first high-profile cases to hinge on video evidence, Bernardo/Homolka exemplified the difficult decisions and fraught nature of this terrain.

Challenges regarding how to handle video records do not end with a trial and an ultimate verdict of guilt or innocence; rather, decisions continue to be made about the preservation or destruction, the storing and cataloguing, and access to archived material.<sup>130</sup> However, these decisions occur largely outside the public eye. This places considerable responsibility on those who oversee these records. Caswell and Cifor recently commented, “Archival labour . . . is a means of taking responsibility, of caring for bodies of records, and mostly importantly, the bodies of those whose lives are implicated in them. The most vital archival responses will be marked by care.”<sup>131</sup> That is, viewed through a feminist ethics

<sup>127</sup> Ashley N. Vavra, “The Right to Be Forgotten: An Archival Perspective,” *American Archivist* 81, no. 1 (Spring–Summer 2018): 100–111.

<sup>128</sup> Biber, “In Crime’s Archive,” 1040.

<sup>129</sup> Biber, “Dignity in the Digital Age”; Cameron, *Victim Privacy and the Open Court Principle*; McLachlin, “Courts, Transparency and Public Confidence.”

<sup>130</sup> Biber, “In Crime’s Archive.”

<sup>131</sup> Michelle Caswell and Marika Cifor, “Revisiting an Ethics of Care in Archives: An Introductory Note,” in “Radical Empathy in Archival Practice,” ed. Elvia Arroyo-Ramirez, Jasmine Jones, Shannon O’Neill, and Holly A. Smith, special issue, *Journal of Critical Library and Information Studies* 3, no. 2 (2021): 1–6.

lens, archivists have a unique role as caregivers who are affectively responsible to those individuals “about whom records are created, often unwittingly and unwillingly,”<sup>132</sup> as well as to themselves, other archivists, archive users, and the larger community.<sup>133</sup>

Building on the work of Caswell and Cifor, and focusing on the rights of donors and subjects of troubling archives, Itza Carbajal contends that “an empathetic archivist would anticipate ways to mitigate overly abusive, unwelcomed, or exploitative intrusion and invasion of a donor’s private matters whether by an institution or a user.”<sup>134</sup> She adds, “By utilizing an ethics of care, which introduces ‘a web of mutual affective responsibility’ between archivists and donors, both donors and archivists can learn how to contribute to practices of transparency, empathy, respect, and awareness into the archival paradigm.”<sup>135</sup>

In this respect, Caswell earlier noted, “repositories do not own records documenting atrocity, but have been entrusted to care for such records by survivors and victims’ families, who ultimately dictate the conditions under which such records are maintained.”<sup>136</sup> To this end she recommended a *survivor-centred approach* to human rights archives, which easily translates to video records of violent crime. A survivor-centred approach builds on the principles of the trauma-informed model proposed by the US Substance Abuse and Mental Health Services Administration (SAMHSA): realizing that trauma has a widespread impact on individuals, families, and communities; recognizing signs and symptoms of trauma in clients, staff, and others; integrating trauma knowledge into policies, programs, and practices; and avoiding re-traumatization.<sup>137</sup> Implementation of the trauma-informed model includes the following approaches:

<sup>132</sup> Caswell and Cifor, “From Human Rights to Feminist Ethics,” 23.

<sup>133</sup> Demeter, “Disgust and Fascination.”

<sup>134</sup> Itza A. Carbajal, “The Politics of Being an Archival Donor: Defining the Affective Relationship Between Archival Donors and Archivists,” in “Radical Empathy in Archival Practice,” ed. Elvia Arroyo-Ramirez, Jasmine Jones, Shannon O’Neill, and Holly A. Smith, special issue, *Journal of Critical Library and Information Studies* 3, no. 2 (2021): 1–26.

<sup>135</sup> Carbajal, “The Politics of Being an Archival Donor.”

<sup>136</sup> Michelle Caswell, “Toward a Survivor-Centered Approach to Records Documenting Human Rights Abuse: Lessons from Community Archives,” in “Special Double Issue on Archives and Human Rights,” ed. Michelle Caswell, special issue, *Archival Science* 14, no. 3–4 (October 2014): 307–22, 316.

<sup>137</sup> Laurie Leitch, “Action Steps Using ACEs and Trauma-Informed Care: A Resilience Model,” *Health & Justice* 5, no. 1 (2017): 1–10.

providing an environment that promotes physical and emotional safety; creating an organizational climate that involves a shared purpose and openness to learning and change; respecting, collaborating with, and empowering service users as decision makers; and providing peer support for staff.<sup>138</sup> Applying and expanding on these principles and approaches, and the work of Caswell, we would suggest five elements as foundational to applying a survivor-centric approach to troubling records involving video evidence of violent crime.

### **1. Recognizing the “Traumatic Potentiality”<sup>139</sup> of Video Records of Violent Crime**

Participants in the current study described in vivid detail the traumatic impact of video records of violent crime on individuals whose suffering was immortalized, on their families,<sup>140</sup> and on those who viewed the records through their work or involvement in the criminal justice process.<sup>141</sup> Similarly, our previous work has demonstrated the emotional impact on archivists of working with violent imagery and other troubling content.<sup>142</sup> A survivor-centred approach must begin by recognizing that records are not neutral and have the potential to profoundly affect a broad range of people.

### **2. Providing Safety and Support for Those Affected by Troubling Records**

With the recognition of the traumatic potentiality of records comes an obligation to create an environment of safety, where individuals can experience and share their distress and obtain necessary supports. Krista McCracken and Skylee-Storm Hogan apply the survivor-centred approach with community members who are survivors of the Shingwauk Residential School in Western Canada. They describe the approach as rooted in relationships, kinship ties, and kindness, noting that “caring for the people connected to archival records is just as important as caring for the records.”<sup>143</sup> Safety and support must also be

<sup>138</sup> Substance Abuse and Mental Health Services Administration, *SAMHSA’s Concept of Trauma and Guidance for a Trauma-Informed Approach* (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014), [https://ncsacw.samhsa.gov/userfiles/files/SAMHSA\\_Trauma.pdf](https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf).

<sup>139</sup> Sexton, “Working with Traumatic Records.”

<sup>140</sup> Regehr, Birze, and Regehr, “Technology Facilitated Re-victimization.”

<sup>141</sup> Birze, Regehr, and Regehr, “Workplace Trauma in a Digital Age.”

<sup>142</sup> Regehr et al., “‘Humans and Records are Entangled.’”

<sup>143</sup> Krista McCracken and Skylee-Storm Hogan, “‘That’s My Auntie’: Community-Guided Residential School

extended to those who work with victims and the records of their victimization. As we have previously noted, organizations employing archivists must create a culture that acknowledges the challenges of the work and provides supports for archivists shouldering these challenges.<sup>144</sup>

### 3. Recognizing that "Archives Can Both Produce and Reproduce Justice and Injustice"<sup>145</sup>

Despite the best intentions of individuals in the criminal justice system to limit access to the video records during the Bernardo and Homolka trials, contents of the tapes became public knowledge, and one segment of the tape related to Jane Doe remains publicly available. As noted above, one observer remarked, the playing of the tapes "could only be experienced by the . . . families as a cruel and even a barbaric act."<sup>146</sup> Biber provides chilling examples of the use of criminal archives in the creation of art and entertainment, leading to the perpetual visibility of personal shame and suffering.<sup>147</sup> Alexa Dodge, in investigating the non-consensual sharing of sexual images, suggested that such practices "allowed these sexual assaults to be temporally extended and to continue to haunt their victims in a very tangible way."<sup>148</sup> She further cites Judith Butler as stating that the record itself allows the event to "continue to happen."<sup>149</sup> These are clear examples of the potential for records to produce and reproduce injustice.

### 4. Respecting the Voice and Decisions of Those Whose Trauma Is Captured in the Records

Caswell suggests that "a survivor-centered approach to human rights documentation dictates that survivors of human rights abuse and victims' family members take an active role in making decisions about how such records are appraised,

History," *KULA: Knowledge Creation, Dissemination, and Preservation Studies* 5, no. 1 (June 2021): 1–6, 6.

<sup>144</sup> Regehr et al., "'Humans and Records are Entangled.'"

<sup>145</sup> Duff et al., "Social Justice Impact of Archives," 4.

<sup>146</sup> Cameron, "Victim Privacy and the Open Court Principle," 67.

<sup>147</sup> Biber, "Law, Evidence and Representation."

<sup>148</sup> Alexa Dodge, "Digitizing Rape Culture: Online Sexual Violence and the Power of the Digital Photograph," *Crime, Media, Culture* 12, no. 1 (2016): 65–82, 68.

<sup>149</sup> Judith Butler, quoted in Dodge, 68.

described, digitized, and accessed (if at all).”<sup>150</sup> Thus, survivors and victims’ families should be viewed not as passive agents but, rather, as individuals who should be afforded self-determination and agency.<sup>151</sup>

A survivor-centred approach is one in which survivors, both those who have themselves experienced victimization and those who are surviving family members of individuals who lost their lives to violence, “maintain control over the decision-making processes related to records documenting their abuse, regardless of the nature of the institution – intergovernmental, governmental, or non-governmental – that maintains custody over such records.”<sup>152</sup> Caswell suggests a model of shared stewardship in which “repositories do not own records documenting atrocity, but have been entrusted to care for such records by survivors and victims’ families, who ultimately dictate the conditions under which such records are maintained.”<sup>153</sup>

### 5. Accepting and Facilitating “The Right to Be Forgotten”<sup>154</sup>

Intimations of a survivor-centred approach can also be found in recent archival codes of ethics that contain provisions acknowledging records as potential sources of trauma and asserting the archivist’s obligation to respect the sensitivities at stake in the preservation and disclosure of those records. The Association of Canadian Archivists’ 2017 Code of Ethics, for example, includes provisions that “recognise that discrimination, trauma or violence may . . . have a bearing on how the records are described, preserved, and accessed.”<sup>155</sup> It goes on to state, “We respect the privacy of the individuals who created or are the subjects of records, especially persons and communities who had no voice in the creation, transmission, disposition, or preservation of records.”<sup>156</sup>

<sup>150</sup> Caswell, “Toward a Survivor-Centered Approach to Records Documenting Human Rights Abuse,” 315.

<sup>151</sup> Carbajal, “The Politics of Being an Archival Donor.”

<sup>152</sup> Caswell, “Toward a Survivor-Centered Approach to Records Documenting Human Rights Abuse,” 308.

<sup>153</sup> Caswell.

<sup>154</sup> Vavra, “The Right to Be Forgotten.”

<sup>155</sup> Association of Canadian Archivists, *Code of Ethics and Professional Conduct* (Ottawa: Association of Canadian Archivists, 2017), 2, [https://archivists.ca/resources/Documents/Governance%20and%20Structure/aca\\_code\\_of\\_ethics\\_final\\_october\\_2017.pdf](https://archivists.ca/resources/Documents/Governance%20and%20Structure/aca_code_of_ethics_final_october_2017.pdf).

<sup>156</sup> Association of Canadian Archivists, 3.



In many of the cases in which a survivor-centred approach can be applied, the records are used by the affected individuals and their communities to seek social justice, often through an educative and truth-telling process. At times, however, as noted above, it is the view of survivors and families that justice is best served through destruction of the records. This is particularly challenging in cases where the victims are deceased. For instance, as a participant in our study asked, “Whose privacy rights is it anyway?” In 2004, the United States Supreme Court ruled that the National Archives and Records Administration (NARA) could deny a Freedom of Information (FOI) request and refuse to release death-scene photographs of former Deputy White House Counsel Vincent W. Foster Jr. to the public. In his decision, Justice Anthony M. Kennedy cited a “well-established cultural tradition’ of respecting death-scene images, in particular, and ‘a family’s control over’ them throughout history.”<sup>157</sup> The Department of Justice concluded that “the concept of ‘survivor privacy’ now is an entirely solid part of the FOIA landscape.”<sup>158</sup>

## Conclusion

In 2014, Anne Gilliland called upon archivists to better appreciate the affective impact records can have on survivors of traumatic events and on archivists.<sup>159</sup> More recently, Michelle Caswell has entreated the archival profession to “take emotions seriously in tandem with an analysis of power, to acknowledge them as valid bases for knowing, as valid bases for archival theory and practice, and most importantly, to address emotions in relation not just to our own personal lives but also to dominant oppressive power structures.”<sup>160</sup> From this perspective, archivists are urged to engage in processes that “challenge, subvert, undermine,

<sup>157</sup> United States Department of Justice, “FOIA Post (2004): Supreme Court Rules for ‘Survivor Privacy’ in Favish,” United States Department of Justice, April 9, 2004, <https://www.justice.gov/oip/blog/foia-post-2004-supreme-court-rules-survivor-privacy-favish>.

<sup>158</sup> United States Department of Justice, “FOIA Post (2004).”

<sup>159</sup> Gilliland, “Studying Affect and Its Relationship to the Agency of Archivists Since the Yugoslav Wars.”

<sup>160</sup> Michelle Caswell, “Feeling Liberatory Memory Work: On the Archival Uses of Joy and Anger,” *Archivaria* 90 (Fall 2020): 148–64, 153.

make possible, change” in order to dismantle systemic oppression.<sup>161</sup> In the case of video records of violent crime, this may involve supporting those who choose to have records of their victimization removed from the gaze of others – affording them the right to be forgotten<sup>162</sup> – including by incinerating the evidence.

<sup>161</sup> Caswell and Cifor, “Revisiting an Ethics of Care in Archives.”

<sup>162</sup> International Federation of Library Associations and Institutions, “IFLA Statement on the Right to be Forgotten.”

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