

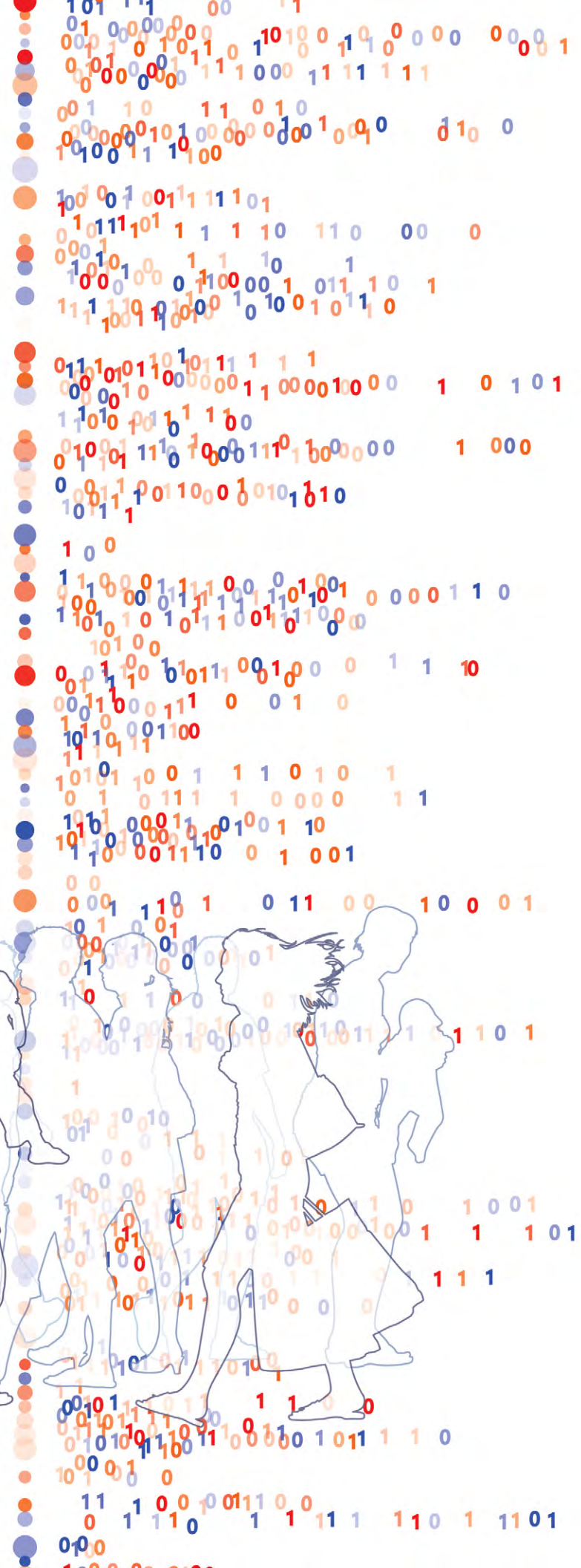
Law Commission of Ontario
AI IN CRIMINAL JUSTICE PROJECT

Annex B: Project Case Studies

April 2025



LAW COMMISSION OF ONTARIO
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About The Law Commission of Ontario

The Law Commission of Ontario (LCO) is Ontario's leading law reform agency.

The LCO provides independent, balanced, and authoritative advice on complex and important legal policy issues. Through this work, the LCO promotes access to justice, evidence-based legislation and policies, and public engagement on important law reform issues. The LCO is independent of stakeholder interests and is committed to a public interest perspective for every project.

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More information about the LCO and this project is available at: <https://www.lco-cdo.org>.

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The LCO AI in Criminal Justice Project Paper Series

- Paper 1 Introduction and Summary: LCO AI in Criminal Justice Project
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Ryan Fritsch, Counsel, LCO
- Paper 2 Use of AI by Law Enforcement
Ryan Fritsch, Counsel, LCO
- Paper 3 AI and the Assessment of Risk in Bail, Sentencing, and Recidivism
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- Paper 4 AI at Trial and on Appeal
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- Paper 5 AI and Systemic Oversight Mechanisms in Criminal Justice.
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Marcus Pratt, Senior Advisor, Policy Department, Legal Aid Ontario, and Chair of the LAO Test Case Committee
Jagtaran Singh, Legal Counsel Ontario Human Rights Commission
- Annex A Executive Summary and Consultation Questions
- Annex B Project Case Studies

Project materials are available online:

<https://www.lco-cdo.org/CrimAI>.

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Contents

- 1. Introduction.....6**
- 2. Scenario: How AI Could Impact an IPV Case?.....8**
 - A. Scenario Context and Background..... 8
 - B. Case Study Scenario: Law Enforcement Synopsis: Alleged Incident of IPV 10
- 3. Case Studies: Paper 3, AI and the Assessment of Risk in Bail, Sentencing, and Recidivism 12**
 - A. Case Study 1: Does AI Produce Expert Opinions? 12
 - B. Case Study 2: How might AI-generated photographic evidence interfere with bail and sentencing? 14
- 4. Case Studies: Paper 4, AI at Trial and On Appeal..... 16**
 - A. Case Study 1: How Body-Cam Evidence is Challenged in Court 16
 - B. Case Study 2: Are Intoxilyzers a Good Example of a Mixed Legislative and Court Approach to Regulating Technology? 18
- 5. Endnotes..... 20**



1. Introduction

This document is presented as Annex B to the Law Commission of Ontario's (LCO) [AI in Criminal Justice Project](#).

This Annex introduces a case study scenario showing how the introduction of AI into the prosecution of offences is likely to raise new issues and challenges in the criminal trial process, especially the already complex and challenging credibility assessments.

Section 2 below introduces the case study.

The case study deals with an alleged incident of assault related to Intimate Partner Violence (IPV). Intimate partner violence can include physical, sexual, emotional, psychological, and financial abuse and other harms. It largely occurs in private without witnesses, and in circumstances where the victim and other affected individuals (oftentimes children) are emotionally attached to, and may be financially dependent upon, the perpetrator of the violence. It is not uncommon that abuse is longstanding before law enforcement becomes involved and that repeated violence and resulting trauma impacts the victim's ability to be precise about past events.

Criminal courts are frequently called upon to make findings in the context of "complainant said / accused said" type trials that arise from fact scenarios not dissimilar to the one described here.

Documentary evidence plays a prominent role in such scenarios. It is routine that the parties are cross-examined on old emails, voice mails, text messages, and greeting cards exchanged over the course of the relationship. Allegations that a complainant is vindictive or has fabricated allegations of IPV to gain some kind of advantage, such as securing custody of children or laying claim to property, are common.

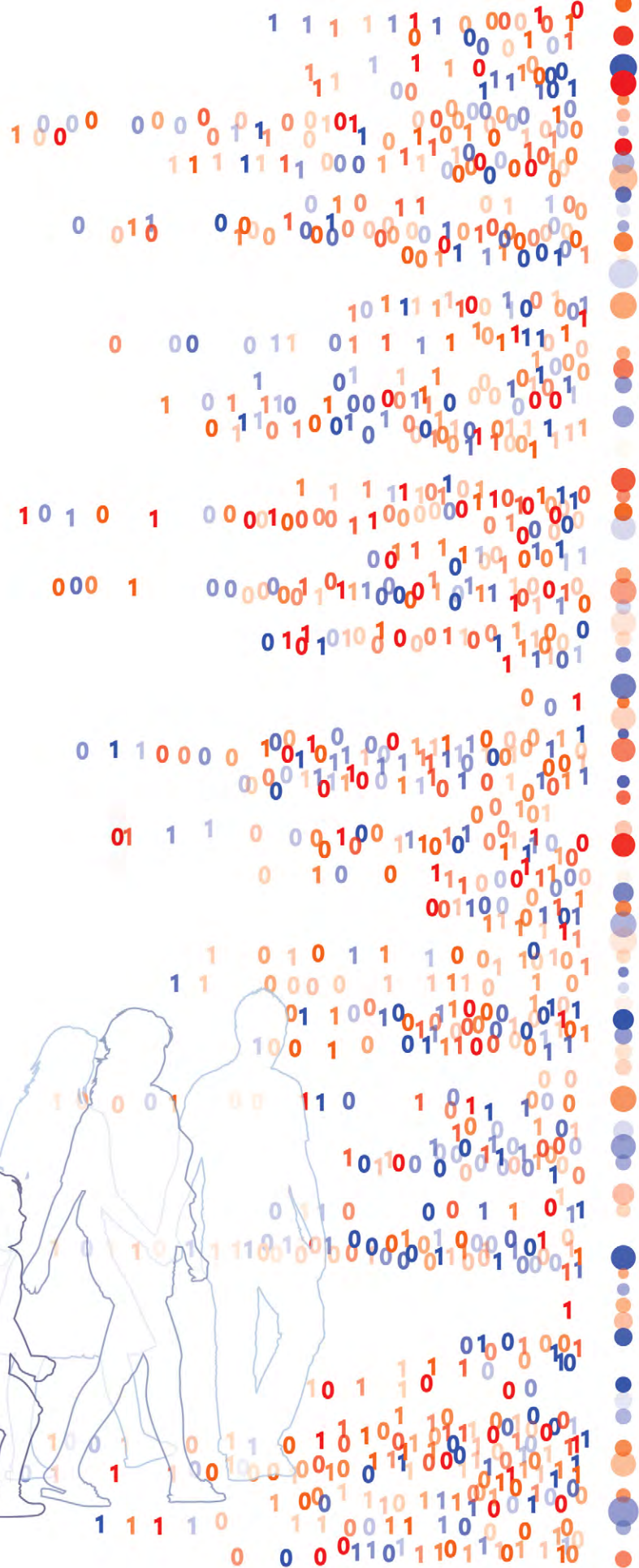
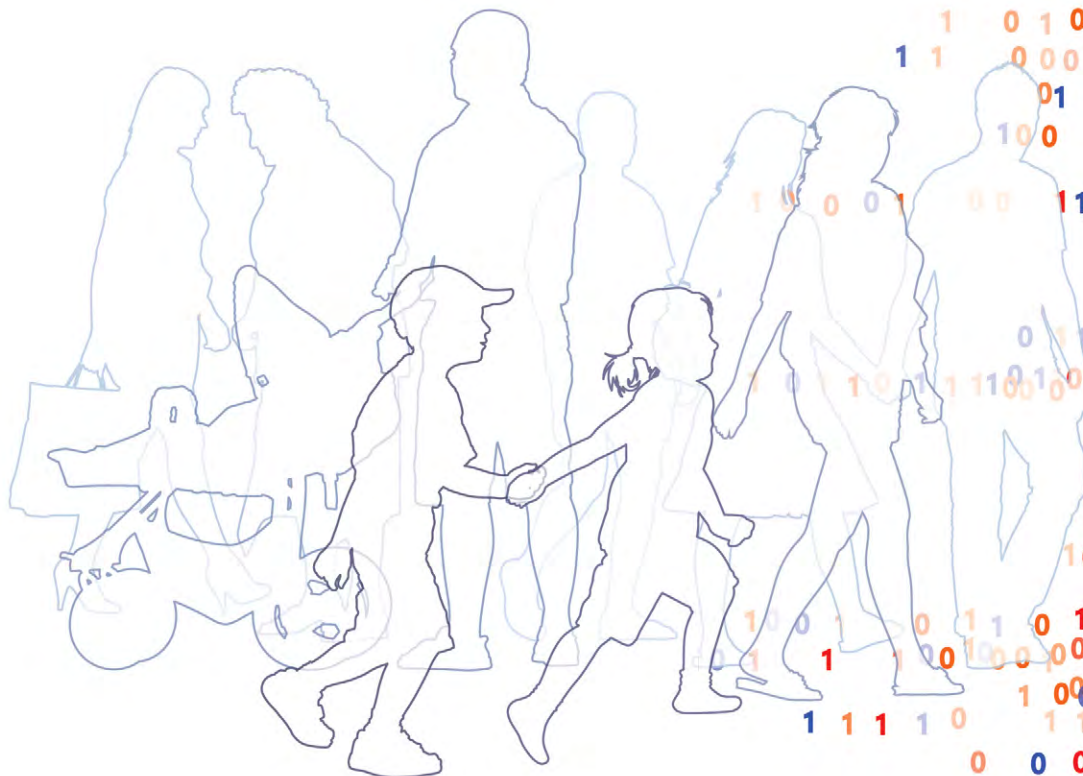
The introduction of AI into the prosecution of offences related to intimate partner violence is therefore likely to further confound the criminal trial process, especially the already complex and challenging credibility assessments that must be undertaken when assessing whether proof has been established beyond a reasonable doubt. AI systems may be used in a variety of ways, for instance, to generate convincing "deep fake" evidence; to assess risk of violence or suitability of a caregiver for children; or to assist unrepresented parties with their legal proceeding and submissions.

Section 3 below explores how the case study and the use of AI in a criminal proceeding may impact the adjudication of bail and sentencing. These issues are explored in LCO’s AI in Criminal Justice Project Paper 3, *AI and the Assessment of Risk in Bail, Sentencing, and Recidivism*.

Section 4 below explores how body-worn camera (BWC) video might play a role in an IPV proceeding. These issues are explored in LCO’s AI in Criminal Justice Project Paper 4, *AI at Trial and On Appeal*. Section 4 concludes with consideration of how the regulatory scheme for law enforcement and courts to efficiently rely on intoxilyzers merits consideration as a model for creating a regulatory and certification scheme for AI systems that might be used by law enforcement.

The case studies and discussion are the product of the respective paper authors.

All the Issue Papers and other Project materials are available online: <https://www.lco-cdo.org/CrimAI>.





2. Scenario: How AI Could Impact an IPV Case?

A. Scenario Context and Background

The style and tone of this hypothetical is reminiscent of a law enforcement investigation synopsis. These are typically provided to prosecution, defense and the court if charges were pursued.

The case study deals with an alleged incident of assault related to Intimate Partner Violence (IPV).¹ Intimate partner violence can include physical, sexual, emotional, psychological, and financial abuse and other harms. It largely occurs in private without witnesses, and in circumstances where the victim and other affected individuals (oftentimes children) are emotionally attached to, and may be financially dependent upon, the perpetrator of the violence. It is not uncommon that abuse is longstanding before law enforcement become involved and that repeated violence and resulting trauma impacts the victim's ability to be precise about past events.

At trial, cross-examination is often used to discredit victims. Cross-examine may attempt to highlight factors like:

- past expressions of reluctance to report;
- delayed disclosure;
- prior denials of abuse and / or false explanations as to the cause of injuries suffered;
- recanting; and
- common myths and stereotypes, such as past sexual history.

Criminal courts are frequently called upon to make findings in the context of “complainant said / accused said” type trials that arise from fact scenarios not dissimilar to the one described here.

A person accused of an offence related to IPV may attempt to argue or characterize the incident in different ways that can include:

- Accident;
- Self-Defence (codified in s. 34 of the Criminal Code);
- Defence of property;
- Fabrication; and
- Honest but mistaken belief in consent.

Sometimes people accused of an offence related to IPV may make other arguments, including that the “fight was a mere trifle” or happened by consent. There is caselaw saying why these arguments aren’t usually applicable in the IPC context.²

It is routine that the parties are cross-examined on old emails, voice mails, text messages, and greeting cards exchanged over the course of the relationship. Complainants are confronted with images of “happy times” and frequently pressed to acknowledge that they too engaged in physical violence against the accused. Occasions on which both parties claim that they simply “fought,” that the other is the perpetrator of the abuse and/or that they acted in self defence, mean that the police and Crown counsel are required to assess appropriate charges, if any, through the lens of whether there is / who is the dominant aggressor. In a similar vein, allegations that a complainant is vindictive or has fabricated allegations of IPV to gain some kind of advantage, such as securing custody of children or laying claim to property, are common. For this reason, prior discreditable conduct or similar fact evidence has frequently been deemed admissible for several purposes including:

- Narrative
- Proof of animus
- To establish the nature of the relationship between the parties
- To suggest general disposition on the part of the accused to commit the act in issue, “domestic” assault
- To support the complainant’s explanation regarding why she did not leave or report the abuse earlier
- To rebut recent fabrication.³

The introduction of AI into the prosecution of offences related to intimate partner violence, is likely to further confound the criminal trial process, especially the already complex and challenging credibility assessments that must be undertaken when assessing whether proof has been established beyond a reasonable doubt.

The complications and issues that AI may introduce are explored more specifically and in greater detail in each paper. Examples of these issues include:

- Deep fake evidence: in which AI is used to generate convincing images, audio or video that may appear no less reliable or credible than other evidence.
- Risk assessments: AI-enabled risk assessments may be used to predict the likelihood of violence based on personal characteristics and history.⁴ These could be used to inform criminal sentences and establish patterns of likelihood of either the complainant or accused being the instigator. AI-enabled risk assessments may also come from a variety of sources, each with varying standards and practices for the use of AI-enabled risk assessment. Some actuarial risk assessment tools are already known to be less accurate when predicting recidivism risk for Indigenous individuals. AI risk assessment tools have the potential to exacerbate or introduce new issues of cultural bias.
- Mental health and emergency services: AI-enabled ChatBots are increasingly used as an entry point for distressed persons seeking assistance. Evidence of searches for such bots, or transcripts or other meta-analysis of the conversations could potentially be used against the person seeking help.

- Trial fairness: Canadian jurisprudence frequently emphasizes that “The ultimate aim of any trial, criminal or civil, must be to seek and to ascertain the truth” and in a criminal trial, that “the search for truth is undertaken to determine whether the accused before the court is, beyond a reasonable doubt, guilty of the crime with which [they are] charged.” AI is known to have challenges with biased and discriminatory training data; a black box inexplicability for its outputs; often a lack of external validation or scientific rigor; and other inherent weaknesses. Courts may struggle to conduct a fair trial in which AI-enabled content, predictions or recommendations are admitted, properly interpreted, or relied upon.
- Access to justice: Many criminal investigations and prosecutions will resolve before trial on the strength of the apparent evidence and contextual factors. But assessing the reliability and efficacy of AI-generated content, predictions, and recommendations requires considerable time and expertise of legal counsel, technologists, and others. This calls into question reasonable access to justice for accused, complainant, and others involved.

B. Case Study Scenario: Law Enforcement Synopsis: Alleged Incident of IPV

Police respond to a 911 call originating from a residence in which a woman, man and young child are discovered upon police attendance.

The 911 audio records crying, screaming, shouting, thumping and banging.

Dialogue is audible but much of what is said cannot be discerned. At various points, the child can be heard to scream: *No! No! Mummy? Mummy? Please!* A woman’s voice cries out: *Will you never stop?* A male voice shouts: *You still want to hurt me? You still love hurting me, don’t you? and Look what you’ve done now!*

Other facts include:

- The man is 45 years old.
- He has no criminal record.
- He grew up in a downtown Toronto neighbourhood of Regent Park neighbourhood but now lives in North York.
- He did not finish high school
- He does not have steady employment, has worked previously doing construction, and is not working at the moment
- The woman and the man have never married and are not currently cohabitating, but they have lived together in the past. They have had an on-again, off-again romantic relationship for many years.
- The woman and the man are the child’s parents.
- The man has previously assaulted the woman. He has never been charged for doing so.
- The woman has an alcohol use disorder.
- The police have attended her residence many times due to noise and complaints of domestic disturbances because of calls from both the woman and neighbours.

This time, when the police arrive at the residence, the woman tells them the man assaulted her. She says he grabbed her by the arms, pushed and pulled her roughly, put his hands around her throat and squeezed. She shows the police the redness on her arms and neck which she indicates is the result of the assault.

The man denies the woman's allegations and says it was actually the woman who assaulted *him*. He presents images to the police in which he appears injured, including black eyes, cut lip, and other bruising. There are no visible injuries to the man on this occasion, although he claims the woman slapped, pushed and threw things at him. He also gives the police some images in which the woman is brandishing large kitchen knives. He says they were taken when she threatened and assaulted him in the past. She provides police with audio recordings in which a voice that sounds like the accused is heard making threats of physical violence. It is not clear from the recording who the threats are directed towards.

The man tells police that she has been doing computer searches to figure out how to send him to jail and get custody of their child. He thinks it's ironic that she calls police when "the fights don't go her way" because "she gives as good as she gets."

When producing the photos he adds that she was threatening to stab him on this occasion and that he grabbed her by the arms and throat in self defence.

She provides a KGB videotaped statement⁵ in which she indicates that her mental health and addictions counsellor knows all about the fact that he likes to hit her when he drinks and strangle her if she fights back.

She states that she really only goes to her counsellor to deal with her anger and depression about how the man blackmails her to have sex all time with naked photos she stupidly let him take of her a long time ago when she was so in love with him.

Tonight, everything started because he got mad about finding her diary. He says he knows that she is going to try and send him to jail.

He said that she is going to regret hurting him like that because he is going to send everyone they know the photos he has of her. She told him to go ahead. She doesn't even care anymore.

He advised her that "it's not the ones you're thinking of. I've got pictures of you doing it with other guys." He told her you're not the only one who knows how to work a computer.

She said that he showed her a "porn photo" of her having sex with a couple guys but her face is "photo shopped." She said that she uses her diary to deal with her anger and to keep track of stuff to tell her counsellor about.

She used Sophia Chat⁶ because her counsellor was also trying to get her to leave him for good and thought that Sophia Chat would help her to make up her mind to do so, once and for all. She thinks he saw that too because he has her password and always checks the search history on her laptop. She said her counsellor's plan obviously worked because she was fed up and called 911 today. She advises the fight also revolved around the whereabouts of her diary and she worries that he stole it because she couldn't find it this morning despite looking everywhere for it.





3. Case Studies: Paper 3, AI and the Assessment of Risk in Bail, Sentencing, and Recidivism

In Paper 3 in this series, a key question arises about how to characterize AI-based risk assessments. One approach is to consider them as opinion evidence. Section 3.4 of that paper explores these issues. Sections 3.5 and 3.6 then consider the impact of AI-enabled sentencing and post-sentencing risk assessment on a proceeding, as well as the practical challenges in questioning and contesting such assessments.

The example below shows how the accused in the case study outlined above may be treated under existing law.

A. Case Study 1: Does AI Produce Expert Opinions?

The accused has no criminal record. While the complainant alleges that there is a history of him assaulting the complainant but never being charged, there is no conventional judicial history that the Crown or Court can rely on, in bail or sentencing court, to demonstrate a higher risk of re-offence.

Yet the algorithmic risk assessment tool can consider the group characteristics shared by the accused and similarly situated individuals, from which to forecast a likelihood of re-arrest.

The Case Study’s rudimentary example may demonstrate the importance of defence counsel requesting the inputs in advance of the hearing. Based on his age, this accused would have grown up in Toronto’s Regent Park neighbourhood in the 1980s and 1990s. This may be an input the algorithm considers in its risk assessment. Growing up in Regent Park during this period is a characteristic that an accused shares with a group that makes up the data on which the algorithm produces its prediction.

This neighbourhood was notorious for crime and violence throughout that period. A “revitalization” movement in the early 2000s saw investment and housing and commercial development in this area, stemming that previous notoriety (see “Hey, what happened to Regent Park?”, Toronto Star, July 15, 2023).⁷

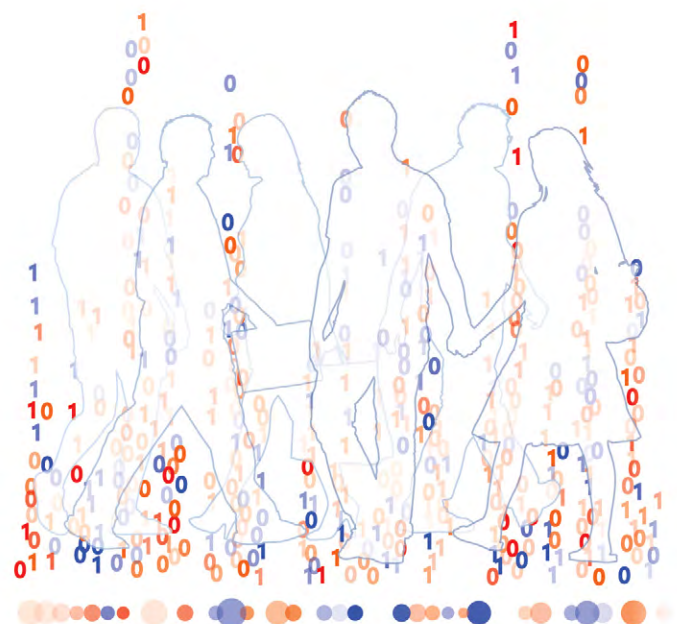
In an area where crime and violence were more predominant, as a matter of common sense and human experience, there would likely have been a more aggressive police presence there during that time. As such, as a matter of common sense and human experience, the younger men living and growing up in that area during that time may well have had a higher arrest rate.

So does the algorithm’s forecast, based at least in part on this shared group characteristic, stay relevant or probative in light of the accused’s current circumstances? The accused does not live in that neighbourhood now, and he is no longer a young man – he is some 25 years removed from that period. Does the risk assessment score, produced in part on historical data of others from a tumultuous time and place, remain relevant when the accused’s current circumstances – age & maturity, geography – are now different? Or are we as practitioners to accept that the “black box” is working its “magic,” seeing patterns and drawing inferences on the basis of millions of observations that humans cannot appreciate, and trust that algorithm’s forecast remains reliable in light of all the circumstances?

Further, the accused’s circumstances are that he did not finish high school and is sporadically employed. The algorithmic risk assessment produces a re-arrest risk score based on arrest rates for a group which shared those education and employment characteristics.

But what if at the bail hearing or sentencing hearing evidence was elicited that the accused did not finish high school because of a learning disability? And that his failure to secure employment currently stems from needing to take lengthy periods off to help take care of an elderly relative?

Defence counsel may submit at bail or sentencing that in this light, the failures to complete his education and obtain steady employment do not reflect irresponsibility or instability. Is it an issue that the algorithm’s calculation based on the group’s shared characteristics may fail to contextualize some of the inputs on which it bases its score? If the risk assessment doesn’t consider why people in the group didn’t finish school or weren’t working, does that affect its probative value or relevance to the issue of the accused’s re-arrest risk?



B. Case Study 2: How might AI-generated photographic evidence interfere with bail and sentencing?

This case study relies on the Case Study Scenario from section 2.

Where counsel is instructed by the client to tender photographic evidence on sentence, what are counsel's ethical obligations if there are concerns it may be AI-generated? Do the Law Society of Ontario *Rules of Professional Conduct*⁸ as currently stated provide the appropriate guidance and direction?

How might AI-generated photographic evidence interfere with bail?

The accused may instruct counsel to tender the images where he appears injured with black eyes, cut lip and other bruising at the bail hearing. In theory this could raise the inference that the accused was being attacked and sought to defend himself. This may provide some evidentiary support for counsel to raise self-defence as a live triable issue that further justifies the accused's release.

The problem in this instance is that while the accused's position is that the complainant "slapped, pushed and threw things at him," there are no visible injuries on this occasion. Tendering the images in light of the absence of visible injuries may well serve to hinder the accused's credibility at this stage. This may raise another concern that counsel needs to be alive to in the AI age: being vigilant over client instructions to tender photographic evidence where its authenticity is not supported in light of other circumstances.

Arguably, the other images of the complainant brandishing the knife may be tendered, not as proof of what happened that day but as proof of the complainant's prior aggression, to raise a possible self-defence triable issue at the bail stage as a ground for release.

The Criminal Code has codified some evidentiary rules pertaining to bail hearings in s.518(1). Subsection e) states that: "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case."

In *R v Downey*, [2018] OJ No6133, para 10 Durno J. notes that "the meaning of credible or trustworthy has proven somewhat elusive... the phrase might best be considered as a measure by which the court can determine the weight to be assigned to proffered evidence. This issue is traditionally evaluated by the availability of effective means of testing dependable evidence."

Perhaps previously, on the whole, the admission of photographic evidence at a fast-paced and expeditious bail hearing may have been accepted as an accurate and reliable record of what it purported to capture.

But what if now, at the dawn of a growing proliferation of AI-generated images, the Crown is advised by the officer in charge of the accused's apparent proficiency with computers and the apparent superimposed "porn photo"? What if these circumstances raise a concern to the Crown that the complainant's knife wielding images are AI-generated? Without technology that can authenticate the images, can the Crown argue that the credibility and trustworthiness of the images are attenuated because it has not had the opportunity to test them in these circumstances? Will the Crown's inability to test the authenticity of the images here in turn affect the weight that a Justice of the Peace can apportion to the images in these circumstances?

How might AI-generated photographic evidence interfere with sentencing?

The Commentary under Rule 5.1-1, discussing the lawyer's role as an advocate, indicates that in an adversarial proceeding the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, "however distasteful." This must be done in a fair and honourable manner without illegality, and the lawyer has a duty to treat the tribunal with candour.

The Commentary under Rule 5.1-1 states specifically as defence counsel, notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence not known to be false or fraudulent. Under Rule 5.2-1(e) a lawyer cannot knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence.

By the sentencing stage, the judge has either rejected the accused's self-defence argument or the accused has admitted an assault without any legal justification. Nevertheless, in keeping with counsel's obligation to raise every issue and advance every argument, the photos of the complainant brandishing kitchen knives may still serve to contextualize the offence: while the accused committed the assault on this occasion, it was done in a relationship where he was repeatedly "on guard," subjected to violence and aggression. While the elements of the offence are made out, perhaps the offence in these circumstances may be construed as fearfully pre-emptive or reactive. This may attenuate the accused's moral culpability.

But does the complainant's statement to the police that the accused said, "You're not the only one who knows how to work a computer" and the allegation of the superimposed "porn photo" raise a concern that these knife-wielding images might be AI-generated? Is this concern more palpable to counsel where the accused asserted to them previously that photos of his injuries reflect what happened at the time of the assault, when he had no injuries observed? Do all these discrepancies place counsel in a position where they "know" the knife-wielding images provided by the accused must therefore be false or AI-generated – "false evidence" – thus precluding counsel from relying on them pursuant to the Rules commentary?

If not, what if the Crown, aware of the same circumstances, objects to the admission of the knife-wielding images at sentencing for mitigation? In the developing landscape of AI-generated images, what will the process be to prove the authenticity of the pictures on a balance of probabilities under s724(3) (b)? Will technology exist to do so, or will the accused have to testify and give evidence under oath about how the photos were taken and stored? Will this raise further obligations on counsel to prepare clients to testify and be cross-examined on these issues, and advise them of the ensuing possible jeopardy in doing so?



4. Case Studies: Paper 4, AI at Trial and On Appeal

A. Case Study 1: How Body-Cam Evidence is Challenged in Court

Criminal trials in Ontario treat body worn camera (BWC), dash cam, and in car camera videos tendered as they do other video, image, and audio files. The party seeking to tender the recording must authenticate it, either by way of admission from the opposing party or through a witness who can establish the circumstances in which the recording was made and vouch for its accuracy (i.e., that the video is a fair and accurate representation of the events depicted and has not been altered). A video tendered remains an exhibit for identification until such time as the authentication criteria are established. The authentication witness will often be the “maker” of the video (the officer assigned to the camera equipped cruiser or wearing the camera) but other witnesses, including the individual recorded, may establish authentication. Once authenticated, the video will be marked as an exhibit, and its contents can be considered for their truth by the trier of fact, including during deliberations.

Authenticated video exhibits may be relied upon both by judges and juries to, among other things, prove identification:

Through tumultuous events [the video camera] continues to record accurately and dispassionately all that comes before it . . . It is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused as the perpetrator of the crime.”⁹

But the clarity and quality of the video and the opportunity to observe the accused will determine the weight to be placed upon it. Where quality of the recording is a concern, expert evidence may be called on that point. Witness testimony may also be offered to address differences in an accused’s appearance between the time of the recording and the time of trial.¹⁰

Transcripts of the recording's contents may be filed to assist the trier in their review, particularly now, when vendors of these camera systems also offer law enforcement the opportunity to procure automated (AI generated) transcription. However, admission of the transcript is dependent upon the trial judge's discretion. Regardless, it is the video recording and not the transcript which constitutes evidence. And *viva voce* evidence regarding the recording's contents remains relevant. For example, a trial judge who, in listening to an audio recording, arrives at a different view of the evidence, a view which varies from the *viva voce* evidence of a witness and undermines the witness' credibility, must permit an opportunity for the witness to be confronted with the contrary view.¹¹

In short, body worn camera, dash cam and in car camera videos will be introduced into the criminal trial process for several purposes: to refresh a witness' memory or as past recollection recorded; to corroborate a witness or impeach credibility; as the basis for expert commentary (i.e., regarding police use of force or by an accident reconstructionist); to establish identity; and to assert or refute alleged *Charter* violations. A video camera has been described as "*a constant, unbiased witness with instant and total recall of all that it observed.*"¹² Thus, litigators seek to leverage the persuasive power of video. Yet, while its potential to be dispositive of issues is often realized, experience has also shown that the introduction of video footage may significantly protract litigation.

Police acquisition and implementation of body worn cameras, dash cams, in car cameras and other similar video technology provides a simple and particularly pertinent current example of the criminal justice system's efforts to grapple with the impact of "new" technologies. The cameras have been directly responsive to legitimate societal demands for police accountability, transparency and enhanced public trust. They offer a solution to significant criminal justice objectives, just as artificial intelligence does. AI extends a promise to deliver efficiencies, reduce costs and human resource demands, and to enable more effective law enforcement with tools ranging from probabilistic genotyping to predictive policing.

In court, video is a familiar format. The law, rules of evidence, and means by which video evidence is tested are well established. However, the downstream impacts to Crown, accused, defence counsel, court and other justice stakeholders have been significant as those parties have endeavoured to adapt policy, practice, and processes to cope with vast and ever-increasing volumes of multimedia evidence generated by the various camera systems. Video evidence must be accessed, reviewed, redacted, shared, viewed, presented, filed as an exhibit, and/or stored at various stages and by multiple parties from investigation through to prosecution and appeal including, in some instances, by sole practitioners, duty counsel, and self-represented accused.

Again, while video evidence is not new to criminal trials and appeals, the current volume of video, and the new technological supports required to handle that volume, present fresh and specific problems to solve. Moreover, the impacts and issues are numerous and varied depending upon the stakeholder and the context. In short, the criminal justice system's experience with body worn camera, dash cams, and other recent technology has been that the introduction of the technology preceded the introduction of the supports necessary to equip the system and its participants to contend with those impacts.

Practical questions ranging from how does the Crown disclose hundreds of gigabytes of BWC, dash cam, and other video evidence to a self-represented accused living in a remote community with limited bandwidth to policy questions such as under what circumstances require an officer to activate / justify an officer deactivating body worn camera have emerged? Given the unique and unprecedented nature of AI and the risks posed, all stakeholders in the criminal justice system must guard against an "implement first, ask questions and solve problems later" approach.

The imminent and foreseeable impact of AI on criminal trials and appeals must be clearly identified. The criminal justice system must ensure that the requisite “infrastructure”, policy, and law reform initiatives are put in place so that the system and its participants are equipped to grapple effectively with AI.

For example, considerations and questions include:

- The impacts upon the province’s Crown Attorney’s Offices, defence counsel, accused, courts, other trial participants and justice stakeholders as multiple new and different AI systems are implemented in quick succession and / or simultaneously
 - from a change management perspective
 - from a consistency of format perspective (think MacBook versus PC).
- Ability of institutions and practitioners to fund, procure and put the technology to use.
- The Crown and other public justice sector agencies’ ability to engage and utilize AI technology while protecting sensitive data and the privacy interests of the accused, victims and witnesses, and the public servants in their employ.

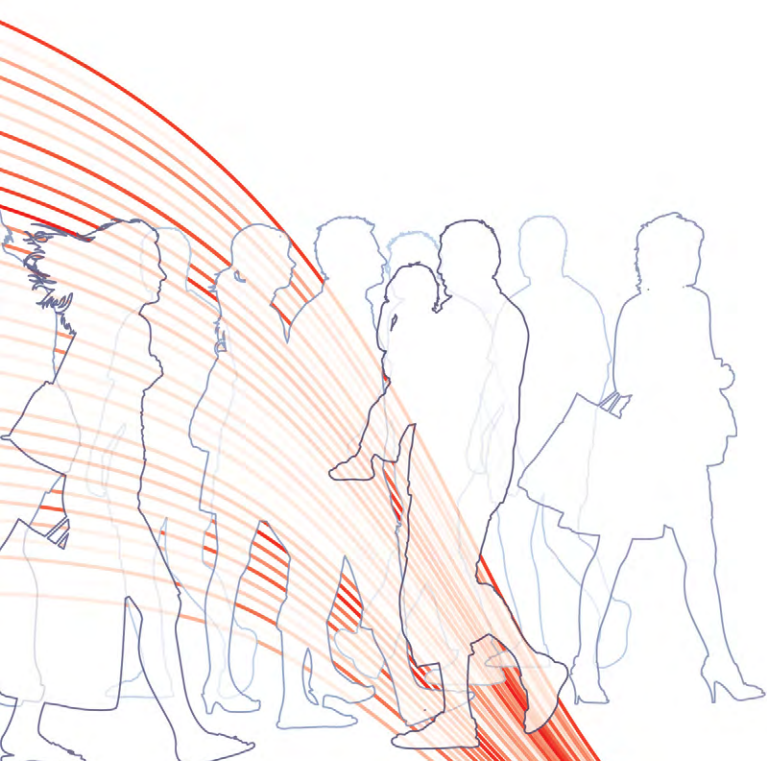
B. Case Study 2: Are Intoxilyzers a Good Example of a Mixed Legislative and Court Approach to Regulating Technology?

Two case studies practically illustrate how the concerns expressed, and law examined in section 2 above play out. Both suggest (and invite questions) as to how existing criminal law standards relative to technology can hold AI to account. The studies also provide some insight into what other approaches may be necessary should existing standards and processes fall short or have significant limitations and drawbacks.

The impaired driving context is familiar to the profession and public alike. Technology utilized in the investigation and litigation of impaired driving is relatively simple, straightforward, and specific when compared to the scope and breadth of AI tools that do or will exist. Nevertheless, litigation in the drinking and driving sphere may have utility as we contemplate the way criminal cases involving AI will be adjudicated at trial and on appeal.

Impaired driving provides a valuable lens through which to examine and assess a variety of well-established methods available to support and constrain the permissible use of technology, and the evidence it affords, in a criminal trial. First, police authority to stop vehicles to investigate impaired driving is derived from both statute and common law. The authority is further subject to constitutional scrutiny during the trial and appellate process. Second, the technological devices qualified for use and the procedures employed in the collection and analysis of breath, blood and urine samples are also clearly defined by statute and in relevant regulations.

For example, in the case of blood samples, the *Criminal Code* requires that blood samples must be taken only by a qualified medical practitioner or a qualified technician and received into approved containers and subsequently sealed.¹³ Two blood samples must be taken.¹⁴ In the case of breath samples, the evidence generated via analysis performed is admissible at a criminal trial only when



it is established that the devices (approved screening devices and approved instruments) were tested prior to sample collection to confirm that they were functioning properly and/or they were operated by a qualified technician. In the case of blood and urine samples, expert evidence regarding the analysis, and founded upon well established science, is required before the results of analysis can be relied upon to establish the accused's blood alcohol concentration.

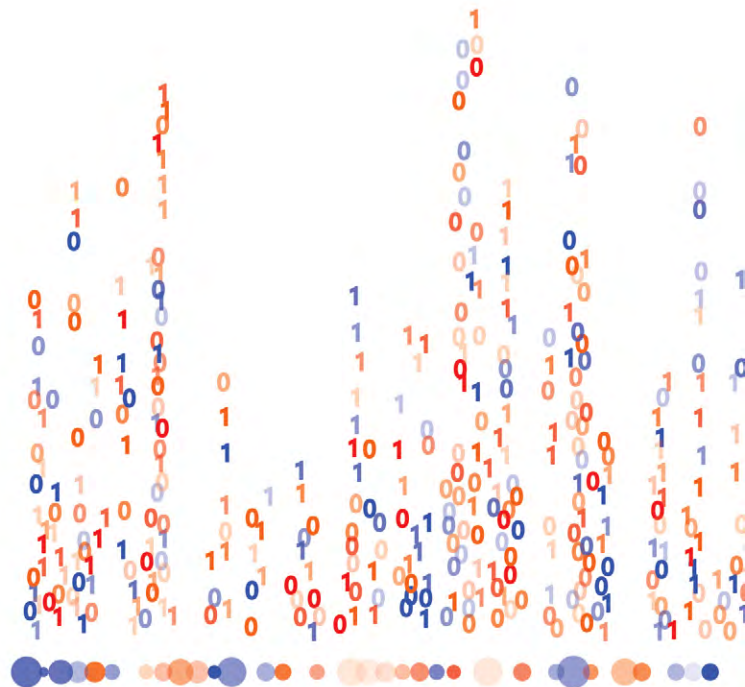
Further constraints include the fact that the purpose to which the evidence afforded can be put is dependent upon the device and/or procedure in question. The results of a properly calibrated approved screening ("roadside") device are admissible solely to support an arresting officer's reasonable grounds to arrest and make a breath demand.

Whereas the results of the analysis performed by an approved instrument (i.e., intoxilyzer) are admissible as substantive proof of the offence. The statutory presumption outlined in section 320.31(4) of the *Criminal Code* permits reliance on the results of the analysis of breath by the approved instrument to establish the accused's blood alcohol concentration at the time of driving, when the other conditions of the relevant provisions are met.

Each of the above requirements play a critical role in prescribing permissible use of the technology in question and ensuring the integrity of the evidence introduced at trial. The clear legislative scheme and rigorous procedural requirements, promote transparency and bolster the right to make full answer and defence; while holding the Crown accountable to establish that its evidentiary burdens have been met at each stage of the investigatory and criminal trial process.

The above safeguards also serve to mediate the persuasive power of technology and go a considerable distance to ensure trial fairness. The statutory and regulatory requirements are further buttressed by the constitutional protections which are bestowed by the *Charter* and expansively articulated in the body of jurisprudence which continues to develop as impaired driving cases are litigated.

The standards and safeguards that configure and constrain the admission of technologically acquired evidence in the impaired driving context have not been relaxed due to the prevalence of impaired driving and the frequency at which courts must preside over impaired driving trials. As AI's use and impact increases throughout our society, it will become truly ubiquitous and will eventually affect every phase and facet of a criminal trial. The ubiquity of AI and the volume of evidence that will be AI generated and / or collected and processed via AI will not justify relaxing the standards and safeguards that govern its use and admission. The impaired driving context provides a useful example of the type of framework that might be employed to govern "AI evidence" and the consistent rigour with which standards and safeguards must be applied.



5. Endnotes

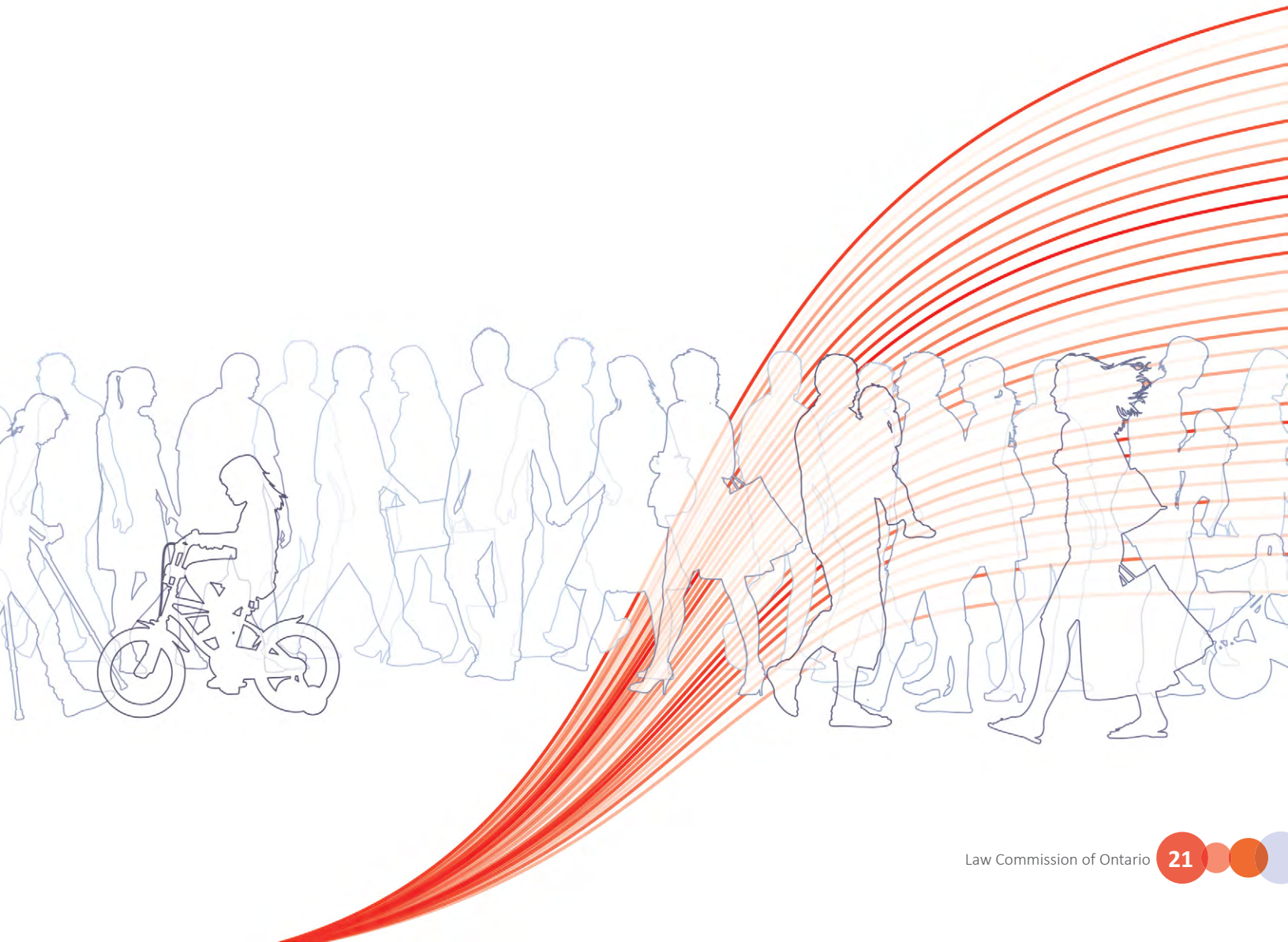
1 There's no Criminal Code offence of IPV. A non-exhaustive list of Criminal Code charges that could be related to intimate partner violence include:

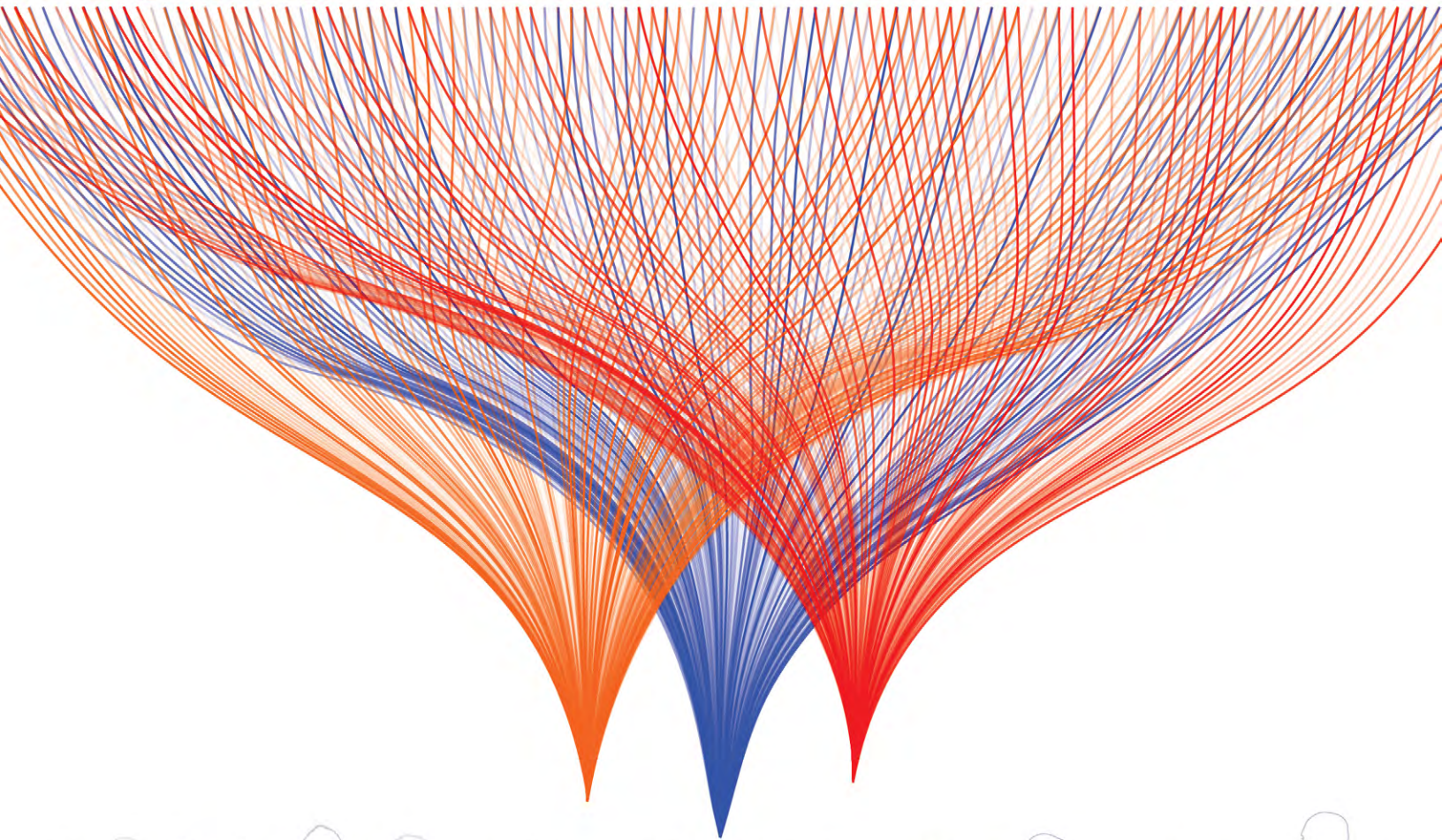
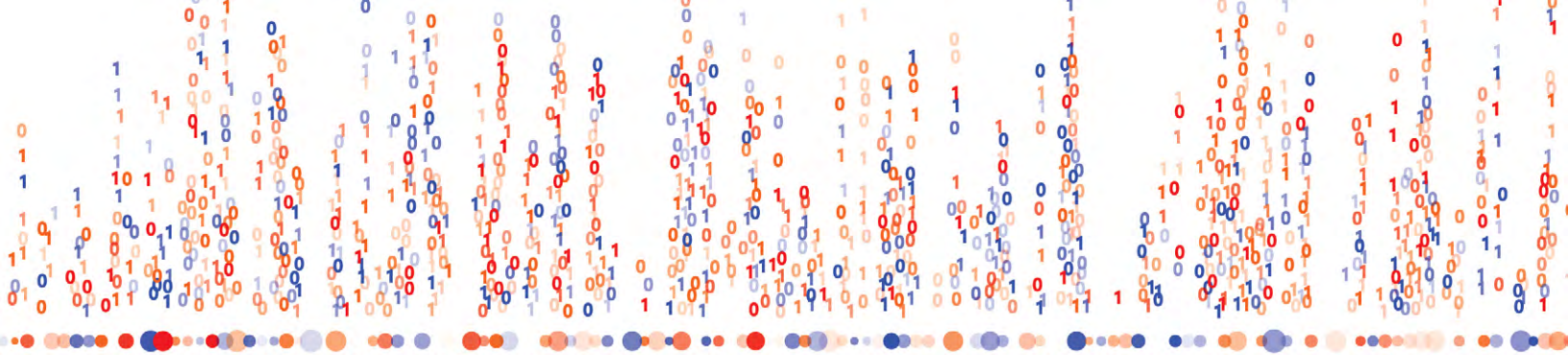
- publication of an intimate image without consent (s 162.1);
- criminal negligence, including that which causes death or bodily harm (ss 219-221);
- homicide (ss 229-231, 235);
- causing bodily harm using firearms and traps (ss 244-248);
- criminal harassment (s 264);
- uttering threats (s 264.1);
- assault and bodily harm (ss 265-269);
- sexual assault (ss 271-273);
- kidnapping (s 279);
- abduction (ss 280-283);
- breaking and entering (s 348);
- intimidation (s 423);
- intimidation of a criminal justice system participant (s 423.1);
- intimidation to impede a person from obtaining health services (s 423.2); and
- mischief to property (s 430).

Additionally, legislative amendments have introduced an offence of “coercive control” but has not yet been enacted.

- 2 The defence of *De Minimis Non Curat Lex* is not available. Ontario courts have indicated that the “de minimis” defence (premised upon the principle that the law does not concern itself with trifles) ought not to apply to cases of intimate partner violence or breaches of bail in that context (see: *R. v. Carson* (2004 O.J. No. 1530 (C.A.) at para. 25; *R. v. Stewart* (1996] O.J. No. 2704); *R. v. Juliano* (2002 O.J. No. 699)). It has also been held that “In cases involving allegations of physical and sexual abuse in the course of an ongoing relationship, courts have frequently admitted evidence of discreditable conduct to assist the court in understanding the relationship between the parties and the context in which the alleged abuse occurred” (*R. v. D.S.F.* (1999 O.J. No. 688)). However, consent fight is a defence constrained by: (1) s. 265(3) of the Criminal Code- no consent is obtained where a complainant submits or does not resist because of physical force, threats or fear of force, fraud, or exercise of authority, and (2) common law – consent is not a defence where bodily harm is caused or intended (see: *R. v. Jobidon* (1991 2 S.C.R. 714); *R. v. Paice* (2005 SCC 22)). Some courts have held, not applicable in cases of intimate partner violence between men and women (because consent is vitiated) when there is an application of sufficient force capable of causing an injury that is more than trivial (for instance see: *R. v. Bruce* (1995 55 BCAC 62); *R. v. Shand* (1997 Can LII 3459); *R. v. Ram* (2022 ONCJ 347)).
- 3 See: *R. v. D.S.F.* (1999 O.J. No. 688); *R. v. Batte* (2000 O.J. No. 2184) at para. 103; *R. v. J.H.* (2020 ONCA 165); *R. v. R.G.* (2021 ONCA 800) at para. 19).
- 4 See for instance: Public Safety Canada, “Evaluation of Risk Assessment Tools for Indigenous Individuals with a History of Sexual Crimes: A Response to Ewert case (2018), online: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2023-r002/index-en.aspx>. See also *Ewert v. Canada* (2018 SCC 30), online: <https://canlii.ca/t/hshjz>.
- 5 For a brief explanation of KGB statements see: [https://en.wikipedia.org/wiki/R_v_B_\(KG\)](https://en.wikipedia.org/wiki/R_v_B_(KG)).
- 6 Sophia.chat is a website that offers “a chatbot to help people suffering from abuse. 24/7, anonymous, wherever you are in the world. I can help you: Gather potential evidence. Assess your rights. Learn about your options.” See: <https://sophia.chat/>.
- 7 The Toronto Star, “Hey, what happened to Regent Park?” (July 15, 2023, updated August 16, 2024), online: https://www.thestar.com/life/home-and-garden/hey-what-happened-to-regent-park/article_f04b7f37-6a47-505e-bc10-325cb67c588e.html.

- 8 Law Society of Ontario, Rules of Professional Conduct (November 1, 2000; amendments current to June 28, 2022), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>.
- 9 *R. v. Nikolovski* (1996 3 SCR 1197) at paras 21, 23.
- 10 *R. v. Nikolovski* (1996 3 SCR 1197) at paras 31-32.
- 11 *R. v. Turpin* (2011 ONCA 193) at para 36.
- 12 *R. v. Nikolovski* (1996 3 SCR 1197) at para 21.
- 13 *Criminal Code* (RSC 1985, c C-46), s 320.28(7), online: <https://laws-lois.justice.gc.ca/eng/acts/c-46/>.
- 14 *Criminal Code* (RSC 1985, c C-46), s 320.28(8), online: <https://laws-lois.justice.gc.ca/eng/acts/c-46/>.





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