

## Challenging the Carceral Imaginary in a Digital Age: Epistemic Asymmetries and the Right to Be Forgotten

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**Abstract.** This paper argues that debates regarding legal protections to preserve the privacy of data subjects, such as those involving the European Union's *right to be forgotten*, have tended to overlook group-level forms of epistemic asymmetry and their impact on members of historically oppressed groups. In response, I develop what I consider an abolitionist approach to issues of digital justice. I begin by exploring international debates regarding digital privacy and the *right to be forgotten*. Then, I turn to the long history of informational asymmetries impacting racialized populations in the United States. Such asymmetries, I argue, comprise epistemic injustices that are also implicated within the patterns of racialized incarceration in the United States. The final section brings together questions regarding the impact of such epistemic injustices on incarcerated peoples and focuses specifically on the public availability of criminal histories in online search databases as a fundamental issue within conversations regarding digital justice. I thus conclude by building from the work of contemporary abolitionist writers to argue that the underlying concerns of an individualized *right to be forgotten* should be transformed into a collective effort to undermine societal carceral imaginaries.

**Keywords:** epistemic asymmetry; prison abolition; transformative justice; the right to be forgotten.

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[es] Desafiando el imaginario carcelario en la era digital: Asimetrías epistémicas y derecho al olvido

**Resumen.** Este artículo sostiene que los debates sobre las protecciones legales para preservar la privacidad de los interesados, como los que involucran el derecho al olvido de la Unión Europea, han tendido a pasar por alto las formas de asimetría epistémica a nivel de grupo y su impacto en los miembros de grupos históricamente oprimidos. Ante esto, desarrollo lo que considero un enfoque abolicionista de los problemas de justicia digital. Empiezo explorando los debates internacionales sobre la privacidad digital y el derecho al olvido. Luego, paso a la larga historia de asimetrías de información que impactan a las poblaciones racializadas en los Estados Unidos. Estas asimetrías, sostengo, comprenden injusticias epistémicas que también están implicadas dentro de los patrones de encarcelamiento racializado en los Estados Unidos. La sección final reúne preguntas sobre el impacto de tales injusticias epistémicas en las personas encarceladas y se centra específicamente en la disponibilidad pública de antecedentes penales en bases de datos de búsqueda en línea como un tema fundamental dentro de las conversaciones sobre justicia digital. Por lo tanto, concluyo construyendo a partir del trabajo de los escritores abolicionistas contemporáneos para argumentar que las preocupaciones subyacentes de un derecho al olvido individualizado deben transformarse en un esfuerzo colectivo para socavar los imaginarios carcelarios de la sociedad.

**Palabras clave:** asimetría epistémica; abolición de la prisión; justicia transformativa; derecho al olvido.

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Questions regarding epistemic asymmetries between knowers are not new to epistemology. Skeptical concerns regarding *the problem of other minds* as formulated through the work of René Descartes, for example, are prefaced on the claim that epistemic agents have unique and direct access to the content of their own minds, but not that of others. Such concerns lead to questions regarding the inferential relations to the beliefs, perceptual states, and forms of evidential reasoning of other knowers (e.g. Avramides, 2000; Cassam, 2015). Within feminist epistemology and epistemic injustice scholarship, authors like Kristie Dotson (2011) note that there are systemic asymmetries between speakers and audiences within the epistemology of testimony, and theorists like Charles Mills (2007), José Medina (2013), and Gaile Pohlhaus, Jr. (2011) have underscored how there are trenchant asymmetries that distinguish what subordinate social groups must know about dominant groups and what dominant groups know about subordinate groups. For this latter group of researchers, epistemic asymmetries are not matters of happenstance, nor solely issues

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of epistemological significance. Rather, epistemic asymmetries within studies of epistemic injustice and feminist epistemology often reveal underlying power asymmetries and relations between subordinate and dominant racial, ethnic, gendered, and sexual groups.

Largely disconnected from these discussions in epistemology, another series of debates has emerged within data ethics and journalism ethics regarding epistemic asymmetries and rights to privacy. That is, within the European Union (EU), protections for a *right to be forgotten* have been proposed and accepted as part of the EU's General Data Protection Regulation (GDPR). According to the EU, the *right to be forgotten*, generally speaking, involves the right of a *data subject* to request that a *data controller* (e.g. a search engine) remove or erase the data subject's personal data from a given database, search results, or other public forum (GDPR, 2016). While each of the terms of this debate are contested, the initial legal case through which the issue emerged helps demonstrate some of the relevant institutions and issues involved. Namely, in 2009, Mario Consteja González issued a request to the publisher of the Barcelona-based newspaper, *La Vanguardia*, to remove his name from an announcement made in 1998. The announcement in the newspaper listed González' name as associated with the auctioning of property that had been repossessed due to his outstanding social security debts at the time of the publication (Bunn, 2015, p. 341). González argued that since his debt issues had long been resolved, such information was no longer relevant to the public. When the newspaper refused to comply with his request, González contacted Google Spain and the Spanish Data Protection Agency [*la Agencia Española de Protección de Datos*] to request that the search engine remove the links to this announcement and his name. Over the next five years, this case would eventually make its way to the Court of Justice of the European Union, and the high court decided, among other directives that: "the data subject [shall have the right ... to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him [*sic*], save where otherwise provided by national legislation" (Google v. Spain, 2014).

While the full debate regarding this *right to be forgotten* has expanded outside the context of the EU, for the purposes of this paper, I am interested in the terms through which data ethicists and media scholars justify the removal or erasure of personal data through this rights-based framework. Unlike an abstract tension between individual privacy and public interest, legal historian of technology and communication, Meg Leta Jones has called the underlying efforts embedded within the right to be forgotten a kind of "digital redemption" (Jones 2016, p. 29). Jones uses this term to describe the effort to embrace, within digital spaces like online search databases and forums, the idea that "an individual may preclude another from identifying him or her in relation to his or her past" (Jones, 2016, p. 29). Jones places this work within the context of a restorative justice framework, an approach to justice that is dedicated to "preserv[ing] the rights and dignity of both victims and offenders" within a given socio-legal setting (Exline et al., 2003, p. 338). With such considerations in mind, in this paper, I offer an abolitionist approach through which to address the terms by which we might consider the right to be forgotten within the context of the United States. To frame this analysis, I begin by exploring the international debates regarding a right to be forgotten. Then, in the second section, I turn to the long history of informational asymmetries impacting racialized populations in the United States. Such asymmetries, I argue, comprise epistemic injustices that are also implicated within the patterns of racialized incarceration in the United States wherein people of color, and particularly Black people, make up a vastly disproportionate share of the country's 2.3 million incarcerated people (Sawyer and Wagner, 2020). The final section brings together questions regarding the impact of epistemic injustice on incarcerated peoples, and focuses specifically on the public availability of criminal histories in online search databases as a fundamental issue within conversations regarding digital justice. Accordingly, I propose that while the right to be forgotten may work toward an individualizing framework of redress for formerly incarcerated people, a penal abolitionist approach, which seeks to reshape the collective terms through which societal harms and moral accountability are understood, demands a more extensive form of digital intervention. That is, addressing digital forms of epistemic injustice requires eliminating the historically sedimented systemic asymmetries among incarcerated and non-incarcerated peoples, and the racialized, ableist, and gendered forms of exposure that these asymmetries entail. I thus conclude by building from abolitionist writers, including Perry Zurn (2021) and Liat Ben-Moshe (2020), to argue that the underlying concerns of an individualized *right to be forgotten* should be transformed into a collective effort to undermine societal carceral imaginaries.

## Memory, Privacy, and the Right to be Forgotten

Philosopher of privacy law, Anita Allen frames a number of issues that are pertinent to the study of memory, privacy, and forgetting. She writes in "Dredging up the Past: Lifelogging, Memory, and Surveillance" (2008) that there are significant political and ethical concerns that emerge alongside the development of digital technologies that may allow people to *life-log*. *Lifelogging* is a phrase developed by human geographers Martin Dodge and Rob Kitchin (2007) in the context of computing ethics. They describe lifelogging as "a form of pervasive computing consisting of a unified digital record of the totality of an individual's experiences, captured multimodally through digital sensors and stored permanently as a personal multimedia archive" (p. 431). The central idea here is that wearable technologies, networked and shared databases, as well as advanced digital storage capabilities will develop the ability to monitor, track, and save the totality of an individual's life experiences. With respect to privacy concerns, Allen notes that although "[b]iological memory serves us well ... it is highly selective and fallible" (2008, p. 50). Lifelogging, she

suggests, may well aid in the shift from neural or other forms of human memory practices to digital storage of data that contains human memories. She notes a number of appealing aspects of this possibility, including opportunities for advanced forms of self-analysis and introspection (2008, p. 52). Additionally, lifelogging could aid in increasing human intimacy and accountability within our social relationships, including during processes of mourning or separation from loved ones.

Alongside these suggested benefits, however, Allen also describes some relevant considerations regarding the extant relations of power that shape human uses of memory-enhancing technologies. She asks:

In a world of lifelogs, what would happen to beneficial forgetting, breaking with the past, and moving on? What would it mean for interpersonal relationships to know that shared experiences are probably being recorded? How will intimacy, confidentiality, and privacy be affected? Question[s] of freedom and compulsion arise. Who will have the right to forbid, restrict, initiate, or require lifelogging? And what of power relations? Won't the powerful become even more powerful if lifelogging can be imposed and lifelogging content may be accessed by others? Who will have the right to access the content of a person's lifelog? What, especially, will be the lifelogging related entitlements of parents, employers, and the government? And what of access by spouses, researchers, business partners, accountants, lawyers, and private physicians presumed to have confidential and/or fiduciary relationships with the individual? (2008, pp. 53-54).

Outlining a stark array of means by which such technologies may confront human users within our current institutional structures and intimate lives, Allen foregrounds issues for a dystopic future and issues for our current digital era. While a dystopian world of lifelogging can be found in fictional works like Jorge Luis Borges' short story *Funes the Memorious* (1942, see also, Quian Quiroga, 2012) and the episode "The Entire History of You" in the Netflix series *Black Mirror* (Armstrong 2011, see also Papailias, 2020), within our current digital environs, Allen points to the ways in which power relations shape our access, rights, and protections available through digital memory technologies.

In this sense, the *right to be forgotten* picks up on these very issues of how accessible the information of one's life is to others, what impact digital memory technologies have on our own self narratives and ways of relating to one another, and what legal rights people have regarding to those relations and narratives. Analysing digital memory technologies and rights, Noam Tirosh (2016) adds to the general claim in Allen that memory is a biological process, but extends this idea into the political and cultural methods by which memory rights emerge. He discusses the forms of memorialization and institutional norms that shape practices of remembering and their associated legal instantiations. He notes among such practices establishing specific annual days of remembrance for national or historical events, and differing declarations and conventions within international law that illustrate such memory practices (2016, p. 646). Among these the United Nations' Declaration on the Rights of Indigenous Peoples makes an explicit reference to the rights of Indigenous peoples

to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect, and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies, and visual and performing arts and literature. (2007).

The discourse of memory as a specific *right* or its converse, erasing/eradicating memory, Tirosh states, emerged distinctly from some of these institutionalized memory practices (2016, pp. 646-647). Against such positive rights and institutional practices of remembering, the more negative right to be *forgotten* emerged as a debate between freedom of expression and individual privacy (Tirosh, 2016, p. 647). For example, within the European Commission, when the first debates regarding a right to remove one's private information was introduced in 2010, the then-vice president for the commission described the right as necessary to protect the privacy of people given the growth of social media networks (Tirosh 2016, p. 650).

Along similar lines, Jones (2016) argues that issues of privacy and memory in the digital age are driven by the rapid availability of private information through search engines and social media. For example, she details cases of nonconsensual pornography and exposés of individuals' involvement with hate groups being shared and tracked via YouTube, Google, and various online news outlets (2016, pp. 2-3). To emphasize the point, she writes:

Imagine the worst thing you have ever done, your most shameful secret. Imagine the cringe-inducing incident somehow made its way online. When future dates or employers or grandchildren search your name, that incident may be easily discoverable. In a connected world, a life can be ruined in a matter of minutes and a person, frozen in time. (Jones, 2016, p. 3).

This focus on the availability of information tracks not just the current production of media in the digital world, but also the remediation of old media now placed on new online platforms. One example Jones describes details a case of a 73-year-old drama teacher who was fired from her position at a private high school in Montreal, Canada, where she had taught for 15 years without incident. The teacher was dismissed due to the surfacing of several 1960s and early

1970s erotic films in which she had appeared when she was in her 20s in France. When students at the school found clips from the videos online, the school summarily refused to renew her contract. They stated in their justification for her dismissal that “the Internet had ushered the ‘erotic portion of [her] career into the present’” (Jones, 2016, p. 4).

For many commentators, the right to be forgotten brings a new issue of the need for *redemption*, *privacy*, and novel forms of harm that did not exist prior to the rapid and expansive availability of information in our digital landscape. The EU’s right is prefaced on this, and one interpretation of such a right is to ensure a *right to erasure*, wherein an individual has the right to request that online content, acquired through the subject’s active content creation (e.g. an image that the data subject posted years ago), or content made available about the data subject by another party (e.g. someone else posts an image of the data subject), can be requested to be deleted by a data controller who processes the availability of that content, such as Google or YouTube (Bunn, 2015, p. 338). Within the GDPR, the right to erasure hinges on a) whether the available data is “no longer necessary in relation to the purposes for which they were collected or otherwise processed,” b) if “there is no other legal ground for the processing [of the data],” c) no overriding legitimate grounds for the processing [of the data], and d) the data “have been unlawfully processed,” among others (EU, 2016). These categories cover a wide range of potential cases and issues, including, for example, nonconsensual pornography (e.g. hacked images or revenge porn), and cases, like those in *Google v. Spain* wherein the data subject argued that the information was no longer relevant for the purposes for which it had been collected and processed.

Yet, as Xue et al. (2016) have argued through studying UK online media, the most common themes among websites that have been delisted through the exercise of a data subject’s right to be forgotten within the GDPR are: violent crime, road accidents, drugs, murder, prostitution, financial misconduct, and sexual assault (p. 389). This list of the most common ways in which this right is exercised has thereby raised concerns and criticisms of the protections offered through the GDPR. The right to be forgotten has been heavily criticized within the United States, for example, as critics allege that such protections threaten to suppress forms of information that would be valuable to the public, including criminal records. Currently, no analogous *right* exists within the United States, and opponents of such a legal protection in the U.S. argue that a right to be forgotten would violate a first amendment right to free speech as written in the U.S. Constitution (Larson, 2013; Werro, 2009; Sanders, 2019). Along such lines, Amy Kristin Sanders (2019) argues that the reach of the GDPR to non-EU data controllers, which includes restricting access to delisted sites for non-EU data controllers when accessed from EU member states, threatens to constrain journalists’ *watchdog* role in disseminating important information to the public. Additionally, the conservative think tank, the American Enterprise Institute for Public Policy Research submitted a statement to the U.S. Senate Judiciary Committee on the GDPR and a California state statute dedicated, in part, to protecting privacy rights for California residents in 2019. Their statement listed ten problems with the GDPR, including that the GDPR “silences free speech and expression,” and is a “privacy overreach” and that “the needs of public safety will supersede data protection” (Layton, 2019, pp. 5-7). The general concern in these critiques appears to be that citizens will be blocked from useful information that could protect them from harm if something like the GDPR’s *right to be forgotten* were implemented in the United States. This would constitute a form of censorship, they claim, and governmental institutions as well as nefarious individuals and groups could seek to suppress important public information through such data regulations.

In response to similar concerns, however, critical legal theorists of race have long argued that defenses of the U.S. first amendment are often used to protect citizens within *dominant* racialized, gender, sexual, and class groups in society (Matsuda et al., 1993; Delgado and Stefancic, 2018). Moreover, the groups who are, in fact, most vulnerable to harm in terms of physical and sexual assault, housing insecurity, educational and financial discrimination, and so on—groups such as African Americans, immigrants, poor people, disabled people, and queer and trans people—are least likely to benefit from first amendment protections. Along such lines, in a pivotal essay on this issue, Charles R. Lawrence III (1993) notes that racist speech, including racial slurs, racist humor, and white supremacist student groups on college campuses have been permitted under claims that such acts are protected under the first amendment. Lawrence states, regarding such claims:

I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with the elimination of racism—we have advanced the cause of racial oppression and placed the bigot on the moral high ground, fanning the rising flames of racism. Above all, I am troubled that we have not listened to the real victims, that we have shown so little empathy or understanding for their injury, and that we have abandoned those individuals whose race, gender, or sexual orientation provokes others to regard them as second-class citizens. (1993, p. 57).

Lawrence’s caution and one central argument in this piece is that free speech claims overlook the forms of harm caused by racist acts, including racial slurs and the historical trauma and patterned discrimination that constitutes the hermeneutical content of anti-Black racist speech (1993, pp. 73-74). In this sense, under first amendment protections, the impact of the regulation of racist speech on the person who desires to use or publish a racial slur is being prioritized over the group- and individual-level harms that are caused through the perpetuation of racist speech. Toward this end, in the following section, to underscore this issue within the debates regarding the right to be forgotten and data privacy, I turn to the history of racialized informational asymmetries in the United States, and the forms of epistemic violence that are often overlooked within debates regarding data privacy and data protections.

## The Long *Durée* of Unjust Epistemic Asymmetries

As mentioned above, Lawrence notes the deep skepticism among many members of Black U.S. communities regarding the protections offered through the first amendment. He writes:

Most Blacks—unlike many white civil libertarians—do not have faith in free speech as the most important vehicle for liberation. The first amendment coexisted with slavery, and we still are not sure it will protect us to the same extent that it protects whites. (1993, p. 76).

This historical reminder that the “first amendment coexisted with slavery” is a telling means through which to examine privacy rights in the United States. Most obviously, the constitutional basis on which such rights are prefaced surfaced within a social context of legally-sanctioned racial violence and chattel slavery. Such violence has included the often grotesque spectacle of the beatings, lynchings, maimings, and sexual assault of enslaved Black peoples, and an associated print culture of images, advertisements, and descriptions of these acts of brutality permitted under the law. Saidiya Hartman (1997) has examined the functions of such “scenes of subjection” whereby quotidian acts of violence committed against enslaved Black peoples in the United States serve to shape the very terms of U.S. conceptions of freedom, individualism, and rights. Turning to 19th century, Hartman details the debasing forms of minstrelsy, forced performances of dance and song, and the spectacle of slaves lined-up on auction blocks, as sources of pleasure for white audiences, both pro-slavery and abolitionist alike. The spectacle of “suffering and shuffling were complimentary” she writes (1997, p. 29), and such forms of violation coexisted with privacy and defamation laws that protected only white citizens. Unlike the insulating protections offered to white individuals to avoid defamation and libel, the common practice of forcing slaves to dance, sing, and perform for white audiences depicted a scene of contentment and acceptance assumed to exist among enslaved peoples. These were performances of projected happiness of Black subjects under conditions of racial servitude, a scene which, Hartman argues, offered solace, security, and pleasure to the white audiences who benefited from the institution of slavery (2007, pp. 42-43). Hartman is also careful to outline how white abolitionists taking part in arguing against slavery in the 19th century likewise participated in “bringing close” the suffering of enslaved peoples in order to seek to understand and justifiably condemn the practice (2007, p. 20). White abolitionist argumentation of the 19th century, as seen through the directive by William Lloyd Garrison to Frederick Douglass to “Give us the facts [and] we will take care of the philosophy,” suggest a desire for proximity to and mastery of narratives of Black suffering (*the facts*), while issues of legitimation, authority and freedom, are rendered possible only through white discourse and debate (Douglass, 1855, p. 361).

Such scenes of suffering constitute what I consider in this paper the long *durée* of epistemic injustices regarding epistemic asymmetries between white Americans and Black Americans, Indigenous communities, and communities of color in the United States. While racialized enslavement in the U.S. produced a number of spectacular scenes of Black suffering, the spectacle of racialized violence has continued long after the formal abolition of slavery in 1865. For example, Amy Louise Wood (2009) has examined the period of U.S. history from 1890 to 1940 wherein the circulation and sale of photographs and postcards by white Americans of scenes of lynching of Black victims was common. Wood argues that the pro-lynching movement of this period was emboldened, justified, and normalized through the circulation of such scenes of anti-Black violence. Notably, although laws governing the spectacle of public executions emerged in the 19th century, including laws preventing newspapers from describing the gory details of such events, these laws were often outright ignored by presses or were directly contested on first amendment grounds (Bessler, 2006, p. 121; Wood, 2009, p. 28). The use of the first amendment and claims to free speech in this context begins to point to a long history of privacy rights in the United States being used, as Lawrence suggests, to protect the racist actions of white communities, and to legally and extralegally dismiss the demands from Black communities and other communities of color. Additional examples of such uses of the first amendment include defenses by anthropologists to study and refuse to return the skeletal remains of a prehistoric man found on federal lands to the Umatilla people and other Indigenous nations of the region who claimed the right to return and rebury the remains through the Native American Graves Protection and Repatriation Act (Hibbert, 1998/1999; Zimmerman and Clinton, 1999).

While not always successful in the courts, such claims to first amendment rights suggest that a U.S. *freedom of expression*, similar to its invocation in the right to be forgotten, can be wielded as a weapon against communities of color. Toward this end, Lawrence writes that often first amendment advocates argue that “minorities have benefited greatly from first amendment protection,” including the rights of the politically aggrieved to assemble and protest peacefully (1993, p. 76). Yet, as Lawrence also notes, differing interpretations of what is considered “peaceful” protest often render Black communities “undeserving” of first amendment protections (1993, p. 76). That is, Black protestors are often deemed criminal, disruptive, or unlawfully assembling, while the racist actions they are protesting remain unaddressed (1993, p. 76). Given this inconsistent application of first amendment protections, Lawrence writes of a “doubt to the existence of a symmetry between official reactions to racism and official reactions to protests against racism” (1993, p. 76). Concerns regarding such a judicial asymmetry point to a series of injustices that undergird informational asymmetries between differing racial, ethnic, and gender communities in the U.S. In addition to the asymmetrical practice of scenes of subjection mentioned above, Charles Mills (2007) points out that Black American theorists of race and racism such as W.E.B. Du Bois, James Baldwin, and James Weldon Johnson have

each highlighted the epistemic differentials regarding what kind of information Black people are expected to know about white people (pp. 17-18). He writes:

Often for their very survival, blacks have been forced to become lay anthropologists, studying the strange culture, customs, and mind-set of the *white tribe* that has such frightening power over them, that in certain time periods can even determine their life or death on a whim. (2007, pp. 17-18).

Moreover, as Ralph Ellison's classic work in Black existentialism, *Invisible Man* (1952) describes, white Americans can routinely misperceive, ignore, reduce, and refuse to consider the complexity and depth of the lives of Black Americans. Mills describes this form of misperception, misjudgment, and disavowal of knowledge about Black Americans, *white ignorance*, and Mills' body of scholarship within social epistemology examines various ways in which such epistemic and political asymmetries bear differential impacts on racial groups (1997; 1998; 2003; 2007; 2017).

Within the context of media and communication studies, Safiya Umoja Noble (2014) argues that spectacles of anti-Black violence continue to be commodified and circulated in the U.S. She describes how the lack of accountability for the deaths of young Black Americans such as Trayvon Martin in 2012 and Renisha McBride in 2013, have aided in legally and extralegally justifying and supporting a "right to be afraid of blackness" (p. 12). That is, white property owners, or those in proximity to white power structures, who kill Black people out of fear are part of a long history of such injustices. Noble writes:

These long-standing rights for property owners in the United States are inextricably tied to the lack of rights for black people to question the disproportionate accumulation and exercise of *more rights* for whites, including the right to kill based simply out of *the fear of blackness*. (2014, p. 15).

With this, the circulation of media and images associating blackness with criminality is *big business*, she states (Noble 2014, p. 15). As with the circulation and sale of lynching postcards, the circulation and sale to popular media of racialized suffering is not new. Noble argues that

spectacles of zoos, circuses, and world's fairs and expositions are important sites that predate the Internet by more than a century, but it can be argued and is in fact argued here that these traditions of displaying native bodies extend to the information age and are replicated in a host of problematic ways in the indexing, organization, and classification of information about Black and Brown bodies—especially on the commercial web. (2018, p. 94).

The racialized and sexualized displays of Black and brown peoples are thus precursors to the modern-day spectacles of Black and brown suffering circulated through social media, digital pornography sites, and online news outlets. Noble points to these concerns as a problem regarding group representations online, which she distinguishes between the individualizing functions of the EU's right to be forgotten, which focuses on representations of an individual data subject (2018, p. 122). Moreover, beyond derogatory group representations online, there are also concerns regarding social reliance on large corporations like Google to supply public information. This is concerning, she notes, because companies like Google are private corporations who profit from the controlling of information, and such privatized industries are also growing as public funding for other "important memory institutions" such as universities, schools, libraries, and archives are losing support and resources. Noble thus points to further ways in which data controllers like Google profit from the dissemination of information about racial groups, whether fallacious or truthful.

Importantly, Noble points to the online platforms that feature images of people who have been arrested. She writes that "police database mug shots are the fodder of online platforms," and that the dissemination of such images "disproportionately impacts people of color, particularly African Americans, who are overarrested in the United States for crimes that they may not be convicted of in court" (2018, pp. 123-124). Moreover, profiting from this kind of public information, companies such as *UnpublishArrest.com* and *Mugshots.com* offer services to people who have been arrested to request that Google delist their mugshots from search queries for fees ranging between \$399 for one arrest to \$1, 799 for five arrests (Noble 2018, p. 124). This practice is part of a broader *mugshot industry* that can be traced back to the mid-19th century. According to Eumi Lee (2018), police stations in San Francisco and New York City began collecting and displaying daguerreotypes of prisoners in public galleries in the 1850s (pp. 563-564). With the spread of photographic techniques and the rise of criminal anthropology, the cataloging and analysis of criminal images became part of a broader forensic paradigm. While used internally by police, such images also became common in print media, including newspapers and circulars that regularly published local mugshots and arrest records. Today, print tabloids like *Cellmates*, *Just Busted*, *Jail House Rocs*, *The Slammer* and digital sites such as *BustedMugshots.com*, *MugshotsUSA.com*, and *Florida.Arrest.com* comprise a *mugshot industry* that profits from the sale of print media or ad space that relies on images of recently arrested adults.

Importantly, mugshot industries rely on first amendment protections that hold that reprinting and circulating mugshots and arrest records is merely sharing information that is already available to the public. Within this case history,

*Cox Broadcasting Corp v. Cohn* was a 1975 case involving the request of a father to prevent a television station from broadcasting the name of his 17-year-old daughter, who had recently been raped and killed in Sandy Springs, Georgia. The court sided in favor of the broadcasting company, declaring that

crimes, arrests, and prosecutions are ‘without question events of legitimate concern to the public’ and the interest in allowing the press to report freely on such matters outweighs the rape victim’s privacy interests “when the information involved already appears on the public record” (420 U.S. 469 (1975)). (cf. Rostron, 2013, p. 1326).

Under such legal precedent, the courts recommend that if news outlets are permitted to reprint public information, and if states wanted to prevent media outlets from publishing this content, they must first prevent public police records from including victims’ names. Shifting the responsibility to police records management, the courts sidestepped the role that news outlets and online media outlets have in publicizing police records.

For this reason, the legal issue of publicizing crime, arrest, and prosecution records in the United States appears to prevent legislation that would grant persons a *right* to request that such information be removed from searchable databases. Here, as Noble has argued, there is a disproportionate impact on communities of color in the United States. That is, as stated in a 2018 report submitted to the United Nations on racial disparities in the U.S. legal system:

African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. (The Sentencing Project, 2018, p. 1).

Thus, the group-level vulnerability for African Americans and Latinx communities regarding the potential distribution and circulation of arrest and conviction information is disproportionately higher than that of white Americans. Along these same lines, data justice activists have been careful to mark the disparate impacts that data sharing and informational vulnerability have on historically oppressed groups, including specifically Black, Indigenous, Latinx, and queer and trans communities. A recent declaration titled the “Feminist Data Manifesto-No” details a series of refusals and commitments by the collective. One such proclamation is that data educators, researchers, and practitioners should:

refuse to operate under the assumption that risk and harm associated with data practices can be bounded to mean the same thing for everyone, everywhere, at every time. We commit to acknowledging how historical and systemic patterns of violence and exploitation produce differential vulnerabilities for communities. (Cifor et al., 2019).

This statement advances a central claim that appears to be lacking within contemporary legal debates regarding the right to be forgotten and appeals to free speech protections. Namely, as Noble and other scholars argue, data justice requires deep connections with the histories of injustice and their novel forms within emerging data technologies and practices. In this final section, I turn specifically to analyses of the carceral dimensions of the right to be forgotten, and thus develop an abolitionist strategy regarding anti-carceral organizing work on the web.

### **Transformative Informational Justice in the Digital Age (2000)**

Ruha Benjamin (2019) and Simone Brown (2015) are among the data justice scholars and practitioners who have made significant contributions to debates regarding systemic racial injustices within the emerging data-driven sciences. Among their respective contributions, Benjamin notes the forms of differential vulnerability mentioned above, including the ways in which emerging technologies create differing forms of risk for Black and other racialized communities. Benjamin writes in this regard: “Some technologies fail to see Blackness, while others render Black people hypervisible and expose them to systems of racial surveillance” (2019, p. 99). Tellingly, she continues by exploring such differential treatments of Black and white people created via technological advancements in photography, including, specifically, the practices among photography educators and engineers to standardize images of white people within film exposure processes. The result was, as one photographer stated on the matter, “film stock’s failures to capture dark skin aren’t a technical issue, they’re a choice” (quoted in Benjamin, 2019, p. 104). As such, the continued failures among facial recognition software to sufficiently locate and categorize the faces of dark-skinned people points to a longer history of racist practice embedded within the technologies themselves. Whiteness functions as the norm and thus white and light-skinned people become the benefactors of the optimal uses and enhanced benefits of many emerging technologies. Accordingly, Black and dark-skinned people are thus systematically misperceived and misjudged through such technologies, which often includes the risk of being wrongly identified as other people,

or being objectified as nonhuman and associated with animality, all forms of anti-Black racism and colonialism that long predate the development of facial recognition software.

Additionally, regarding such differential vulnerabilities, Brown highlights a discussion within surveillance studies regarding the labeling and targeting of certain groups for heightened risk and thus increased surveillance. Following the work of Didier Bigo (2008), Brown traces Bigo's concept of the *ban-opticon*, a portmanteau of the words *ban* and Michel Foucault's use of the term *panopticon* used to describe a modern distribution of relations of power. Bigo characterizes the ban-opticon in the following manner:

The ban-opticon is then characterized by the exceptionalism of power (rules of emergency and their tendency to become permanent), by the way it excludes certain groups in the name of their future potential behavior (profiling) and by the way it normalizes the non-excluded through its production of normative imperatives, the most important of which is free movement (the so-called four freedoms of circulation of the EU: concerning goods, capital, information, services and persons). (2008, p. 32).

From this, Brown proceeds to underscore how the technological designs of slave ships during the trans-Atlantic slave trade shaped modern forms of surveillance and racialized power relations that are often overlooked in contemporary surveillance studies, and that continue to impact Black communities today (2015, pp. 43-50). Thus, the ways in which stop-and-frisk policies and other forms of racial profiling that could be considered under Bigo's conception of the ban-opticon, have their precedent in the security and surveillance of Black people during and after the legal institutionalization of slavery in the United States.

Building from the respective works of the critical data justice scholars discussed above, this final section seeks to reframe the discussion of the right to be forgotten in terms of the differential vulnerability and informational asymmetries that impact currently and formerly incarcerated peoples. While the legal parameters of a specific *right* to be forgotten are mired in individualist concerns regarding privacy rights, the broader group-level harms that emerge from the sale and circulation of arrest and criminal records online continues to have a long-term detrimental impact on communities of color. That is, alongside the need to address the harm committed against victims of crime, penal abolitionists have long argued, there is a need to "restore both the criminal and the victim to full humanity, to lives of integrity and dignity in the community" (Prison Research Education Action Project, 1976). Rather than a punitive model for addressing community harms, abolitionists underscore restorative and transformative models for the social causes of crime. For example, Nils Christie's pivotal 1977 essay "Conflicts as Property" argues that many courts of law seek to commodify community conflict and remove the causes and necessary responses to community conflicts and harm from the very people who are most impacted by them. Christie notes "[c]onflicts become the property of lawyers" who are in the business of adjudicating with courts the proper handling of the resolution of community conflict. The conditions in which conflicts and crimes occur are often beyond the purview of court decisions, and such legal appropriation of community harms often leads to a "depersonalisation of social life" for those who have been harmed.

When this point is considered through the terms of epistemic injustice, the claim here becomes that the systems of punishment, including the racialized trends in mass incarceration in the United States, rely on forms of differential epistemic considerations. For example, drawing from Mills's work on issues of epistemic injustice, George A. Martínez (2020) offers a comprehensive analysis of U.S. legal discourses of race, and thus seeks "to reveal the magnitude of the negative impact of the production of ignorance in the legal context on various racial minority groups" (p. 509). Using examples of U.S. law pertaining to Native Americans, Mexican-Americans, immigration law, and other highly racialized facets of the legal system, Martínez demonstrates a long history of misinterpretation and misrepresentation of racialized groups that function to enable white communities to remain in a dominant social position. Additionally, extending the work of Miranda Fricker (2007), Yaqui legal scholar Rebecca Tsosie (2017) argues that U.S. courts often perpetuate hermeneutical injustices in cases involving Indigenous claims that harms have been committed to their ways of life, including the destruction or privatization of their traditional territories (p. 361). She underscores how "the dominant society draws upon its understanding of the historical circumstances and its assumptions to discount the experiences of the indigenous group," including failures to address the harms caused by corporations to the traditional homelands of Indigenous nations. She considers the 1989 Exxon Valdez oil spill and the 2008 case of the *Navajo Nation v. U.S. Forest Service*, in which both cases demonstrated a patterned refusal in the courts to consider the hermeneutic content of claims made by the Indigenous communities impacted by the forms of ecological devastation being committed. In these cases, the community impact of the harms committed go unaddressed, including the destruction of Indigenous ways of life by settler colonial institutions and private companies.

Accordingly, abolitionism is as much a constructive project as it is a demand to end prisons and punishment. Black American abolitionist scholar and activist, Angela Davis makes this point succinctly through a description of the slavery abolitionist project of W.E.B. Du Bois. She writes:

[Following the legal ending of slavery in the U.S., ] Du Bois argued that the abolition of slavery was accomplished only in the negative sense. In order to achieve the *comprehensive* abolition of slavery—after the institution was rendered illegal and black people were released from their chains—new institutions should have

been created to incorporate black people into the social order ... [S]lavery could not be truly abolished until people were provided with the economic means for their subsistence. They also needed access to educational institutions and needed to claim voting and other political rights, a process that had begun, but remained incomplete, during the short period of radical reconstruction that ended in 1877. Du Bois thus argues that a host of democratic institutions are needed to fully achieve abolition—thus abolition democracy ... There is a direct connection with slavery: when slavery was abolished, black people were set free, but they lacked access to the material resources that would enable them to fashion new, free lives. Prisons have thrived over the last century precisely because of the absence of those resources and the persistence of some of the deep structures of slavery. They cannot, therefore, be eliminated unless new institutions and resources are made available to those communities that provide, in large part, the human beings that make up the prison population. (pp. 91-93).

Davis' framing of abolition democracy as a goal toward which to strive includes rebuilding institutions, resources, and social imaginaries that will lead to making prisons socially *obsolete* (2003). Within this, Davis points to the importance of imagining and designing our collective and institutional projects for a world that does not rely on prisons and punishment to address social problems. She thus considers it "a great feat of the imagination to envision life beyond the prison" (2003, p. 19).

Building from these prescient insights regarding the need for new anticarceral imaginaries, we can turn here specifically to the harms caused by online mugshot databases and criminal records. Contrary to the legal interest in concerns with public safety that have protected their distribution online and in print journalism, we must attend to the carceral imaginaries that the rapid availability and ubiquity of criminal photographs and information support. For these reasons anticarceral organizations have long supported the practice of refraining from conducting background checks on individuals with whom they are organizing or corresponding. For example, the Prisoner Correspondence Project, a volunteer-run organization dedicated to supporting increased communication and correspondence with currently incarcerated LGBTQ people, states the following in a "Frequently Asked Questions" section on their website:

Do you do background checks on your inside penpals? No, we do not screen our inside penpals. We have chosen not to do this for a number of reasons. People serving time have next to no control over how they are represented as prisoners or as individuals. We consider it central to the intention of the project that our inside members have autonomy over how they are represented, and what people on the outside know about them. This is in part motivated by acknowledging the extent of surveillance that incarcerated people are subjected to, and the lack of privacy afforded to them. Running background checks and online searches on our inside penpals contributes to the system of punitive surveillance that we want to resist. Further, we believe that the charges that lead to incarceration can never fully explain the complexities of any case or the systemic forces that land people in prison. Our mandate is to offer support for incarcerated gay, queer, trans, and similarly identified people, and this is not contingent on the reason they're incarcerated. (Prisoner Correspondence Project, 2021).

Notably, this organization lists a number of forms of informational injustices that impact currently incarcerated people, including, importantly for the purposes of this paper, lack of privacy rights. Similarly, "Ban the Box" initiatives, which seek to remove questions from job, housing, and social welfare applications regarding whether the applicant has ever been convicted of crime, are efforts to address the systemic epistemic asymmetries that formerly and currently incarcerated peoples confront. For this reason, the ability to transform carceral imaginaries to anti-carceral imaginaries means divesting from the epistemic asymmetries that impact currently incarcerated peoples.

Along such lines and similar to the insights of Benjamin mentioned above, abolitionist philosopher Perry Zurn describes a "spectacle-erasure formation" of curiosity that renders specific populations hypervisible, while simultaneously erasing and disavowing the ways in which a given population is systematically marginalized, reduced, and objectified (2021, pp. 149-150). Describing specific formations of curiosity that have impacted disabled people, Zurn critiques the systemic ableism that comprises the modern history of curiosity, including discussions of curiosity from Plato's *Republic* to contemporary psychological research today (2021, pp. 152-158). Against such exoticizing and damaging perceptions, Zurn highlights the work of disability and anti-carceral activists who have sought to subvert exoticizing and exploitative forms of curiosity by refusing to comply with the normative demands of compulsory ableism and carcerality. In a parallel manner, work by abolitionist disability justice scholar Liat Ben-Moshe (2020) argues that abolition requires a radical "dis-epistemology." By "dis-epistemology," Ben-Moshe refers to

letting go of attachments to forms of knowledge that rely on certainty (the definitive consequences of doing or not doing); prescription and professional expertise (tell us what should be done); and specific demands for futurity (clairvoyance, or what will happen). (2020, p. 125).

A key feature of such a dis-epistemology for abolitionism is that it is not equivalent to *not knowing* or an epistemology of ignorance. Rather, this approach is, in the author's works, "about having the strength and humility to collectively experiment while creating the world anew" and letting go of attachments to specific forms of knowledge that fuel carceral imaginaries (2020, p. 129).

Building from this core work within abolitionist knowledge formations, I want to conclude that, beyond the legal debates of the *right to be forgotten*, political demands emerging from the long history of informational asymmetries that have impacted historically oppressed communities requires a novel normative framework for digital memory studies. Such a framework must include the social and symbolic dimensions of a broader carceral imaginary that creates forms of spectacle-erasure for persons convicted of crimes. To move beyond the individualized framings of privacy rights and a generic *public interest* within digital memory studies, we must interpret the digital sharing of information as itself shaped by attachments to a carceral imaginary that considers prisons and punishment a necessary response to crime and community harms. Against such formations, we can recall, as Benjamin's work suggests, given the agential dimensions of our technological developments, including those that make the rapid availability of information searchable and accessible online, "we can choose otherwise" and transform group-level differential vulnerability and exposure within our technological practices and habits (2019, p. 104).

Consider, in this vein, one recent effort to transform the functionings of such carceral imaginaries in the digital world. View-Through is a 2017 Miami, Florida-based collaboration with artist Julia Weist that organized thousands of people to repeatedly search in Google for six lines of poetry written by incarcerated students in a south Florida prison. The poetic lines were placed after the autofill response "Miami inmates are ..." which sought to reconfigure Google's algorithmic search predictions in the Miami-Dade area. The poems included lines like the following, all written by incarcerated authors: "Miami inmates are sunbathing underwater," "Miami inmates are what becomes of the chicken before I fry it up," "Miami inmates are a device used to tell time," "Miami inmates are light of the world, bone of men," "Miami inmates are items of furniture for frightened people to lie down and rest upon," and "Miami inmates are believing in the unseen" (O, Miami.org, 2021). View-Through's poetic interventions in Google's algorithm-driven search trends attempt to thwart the stigmas of incarceration that arise through the autofill functions of Google, and whose analytics reveal the fears, misperceptions, and misjudgments cast at a group-level on incarcerated people. Against such patterned algorithmic-driven forms of oppression, View-Through thus utilized Google's search predictions that are based on search volume in a given geographic region to circulate the poetry of the incarcerated students. The effort included over 2,000 participants in the region who collectively searched for the specific lines of poetry by the students, and public advertisements on billboards and park benches across Miami stating, simply, "Stop Googling 'miami inmates.'" These advertisements were more than a directive to the public to refrain from indulging in a carceral imaginary, i.e. to stop searching for pernicious group-level images and information regarding the population of incarcerated people in Miami. That is, the billboards and ads also played on the spectacle-erasure curiosity of passersby. When told *not* to engage in some activity, the activist collective anticipated that many people who viewed the ads would, in fact, search for the phrase. By specifically anticipating forms of spectacle-erasure increasing the search volume and their own planted poetry in the autofill, they circulated self-authored materials by incarcerated peoples that would thwart the carceral imaginaries of curious searchers.

Exchange for Change, the education program sponsoring the View-Through project, stated the following regarding the importance of the work:

Often we use labels to categorize those behind razor wire—prisoners, criminals, cons, inmates, felons—words that differentiate "them" from "us." But one out of every 35 Americans has a family member or friend that has been in jail, prison, or on probation. It is no longer "them" but "we." Labels kill creativity. They kill a conversation. They kill humanity. *View-Through* introduces new language to inspire a new way of thinking. Through poetry this project introduces metaphors and images that defy stereotypes and labels. (2021).

In an effort to reduce the deathly ("kill creativity ... kill a conversation ... kill humanity") impact of the carceral imaginary, View-Through gives primacy to the imaginaries of incarcerated peoples to shift and question the predictions and results that arise through Google's search engines. One poet for the project, Eduardo Martinez, notes of the line of poetry that he contributed to the project, "Miami inmates are sunbathing under water":

We're drowning in very, very murky waters and we're trying to break through. We're trying to break the surface. At the same time we're doing something under this water that a lot of people aren't seeing. We're writing, we're succeeding, we're alive, we're surviving, we're not what you think we are. (WLRN, 2017).

This statement about the collective forms of life, desires, creativity, and survival among incarcerated people is crucial in a city like Miami that continues to incarcerate Black people at higher rates than any other population, and with Black Hispanic populations in the region receiving the highest rates of arrest, pretrial detention, conviction, and incarceration (Peterson and Omori 2018, p. 5). Against these racial and cultural patterns of harm, View-Through has circumvented the process of making individualized requests to major data controllers like Google, and has sought collective methods to challenge the perpetuation of the carceral imaginary itself. Although the right to be forgotten seeks to offer forms of "digital redemption" to individuals, addressing the long histories of oppression in the United States and elsewhere will likely continue to require such creative, collective efforts to undermine the informational asymmetries that such oppressions produce.

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