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## Conceptualizing the Right to Privacy: Ethical and Legal Considerations

*Publication is a self-invasion of privacy.  
The more the data banks record about each one  
of us, the less we exist.*

Marshall McLuhan

### **Preliminaries**

We all care about our privacy. We all would like to keep some part of it outside the public domain. However, this is becoming increasingly difficult as technology advances and the media are struggling to fill time slots and empty pages. When news is becoming entertainment (infotainment) and private stories become public spectacle, individual lives can be mercilessly exposed to the glaring spotlight of unwanted publicity. In delineating the boundaries of intrusion, distinctions are made between children and adults; between public figures and ordinary citizens; between people who choose to live in the spotlights, and ordinary citizens who stumble into the public forum, and between ordinary citizens doing something of public significance and those who do not. I discuss the tragic death of Princess Diana and then examine the Quebec *Charter of Human Rights and Freedoms* and Chapter III of the *Civil Code of Quebec [1994]* that were invoked in a recent Supreme Court case, *Les Editions Vice-Versa Inc. v. Aubry* concerning the use of a person's photo without asking for her permission. Siding with the Court's majority in this case it is asserted that the public's right to know does not allow scope to magazines to take photos of people to decorate their covers without the people's consent.

I should explain the rationale for addressing these two case studies. Diana's complicated relationships with the British media and the *Aubry* case in Canada have attracted attention in the respective countries. In  
\_\_\_\_\_ a way, the two stories exemplify the two different cultures: the British \_\_\_\_\_

and the French-Quebec culture. The British media give less credit to privacy than their French counterparts.<sup>1</sup> The two stories also supplement one another and exemplify the public-private distinction when the media intrudes on people's privacy. The Diana story is different from the Canadian *Aubry* case in several aspects. Diana was a celebrity whereas Aubry a private person; Diana was constantly reported in the newspapers whereas Aubry's photo was used only once for artistic and commercial purposes; Diana's case evoked public moral outrage whereas Aubry's case was minor by comparison involving violation of the law; Diana tried to avoid going to courts whereas the *Aubry* case was resolved by the courts; Diana's case is far more complicated involving many intricate issues: the use of the media to blunt Royal power; the ability, or inability, to sustain privacy when one party encourages media coverage and utilizes the media for private purposes. In addition, there is the further issue of children as a protected class of people.

However, there are also similarities between the two cases: both raise a host of legal and ethical considerations; both were **not** cases of photojournalism; instead, the attractive images of both Diana and Aubry were splashed on journals' covers with the purpose to increase sales of newspapers; the privacy of both women was intruded upon without their consent; both felt that they were exploited by the media to advance their own partisan interests. Both cases illustrate the need to outline boundaries to free expression and free press.

With due appreciation for the liberal inclination to provide wide latitude to freedom of expression, we must also acknowledge the "democratic catch" and the need for prescribing the scope of tolerance. The right to free expression and free media, supplemented and strengthened by the concept of the public's right to know, does not entail

1 In the United States, freedom of expression and public information prevail over the right to privacy except where the information's sole purpose is commercial. In the United States, the mere idea of establishing of a body like the British Press Complaints Commission, discussed *infra*, would set a firestorm of debate. The absolute language of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press," is taken almost literally. Cf. Philip Meyer, *Ethical Journalism* (Lanham, Maryland: University Press of America, 1987), pp 3-16; <http://caselaw.lp.findlaw.com/data/constitution/amendment01/>

the freedom to invade individual privacy without ample justification.<sup>2</sup> The media should adopt some social responsibility standards to retain some credibility in the eyes of the public.<sup>3</sup>

In the liberal framework, the concept of “rights” is understood in terms of a need that is perceived by those who demand it as legitimate and, therefore, the state has the responsibility to provide it for each and every citizen. Rights are primary moral entitlements for every human being. In this context one could differentiate between rights that guarantee certain goods and services, like the right to welfare and to healthcare, and rights that protect against certain harm or guarantee certain liberties, like the right to freedom of expression and to exercise choice.<sup>4</sup>

Another pertinent distinction is between an individual’s rights with regard to the state or government and an individual’s rights with regard to his or her fellow citizens. Rights, conceived to be legitimate, that must be met by the state (e.g., the right to life, to shelter, and to associate), justify taking political actions to fulfill them. Rights regarding other individuals who act illegitimately justify the use of coercive measures against those individuals either by concerned citizens (right to self-defence, to privacy, or to protect one’s property) or by the state.<sup>5</sup>

2 See Section 8 of the *Canadian Charter of Rights and Freedoms*, and Article 17 of the *International Covenant on Civil and Political Rights*: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” U.N.T.S. No. 14668, Vol. 999 (1976).

3 Cf. Commission on Freedom of the Press (Hutchins Commission), *A Free and Responsible Press* (Chicago: University of Chicago Press, 1947); Robert W. McChesney and John C. Nerone (eds.), *Last Rights: Revisiting Four Theories of the Press* (Urbana and Chicago: University of Illinois Press, 1995), esp. pp. 77–124. See also Dan Caspi, “On Media and Politics: Between Enlightened Authoritarianism and Social Responsibility,” in R. Cohen-Almagor (ed.), *Israeli Democracy at the Crossroads* (London: Routledge, 2005).

4 Cf. R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave, 2005), p. xiii.

5 For further discussion on the concept of rights, see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); Roland J. Pennock and John W. Chapman (eds.), *Human Rights* (New York: New York University Press, 1981); L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1989); Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996);

The chapter argues that free expression does not include the right to do unjustifiable harm to others.<sup>6</sup> Indeed, one of the four key principles of Sigma Delta Chi, the Society of Professional Journalists' Code of Ethics, is to minimize harm. It says, "ethical journalists treat sources, subjects and colleagues as human beings deserving of respect." The Code further instructs journalists to show compassion for those who may be affected adversely by news coverage and to avoid pandering to lurid curiosity, maintaining that the "pursuit of the news is not a license for arrogance."<sup>7</sup>

## Privacy

Marshall McLuhan saw changes in the dominant medium of communication as the main determinant of major changes in society, culture and the individual. Print created individualism, mass production and privacy.<sup>8</sup> But the telephone, in turn, evicted people from the privacy

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Annabel S. Brett, *Liberty, Right and Nature* (Cambridge: Cambridge University Press, 1997); Samuel Walker, *The Rights Revolution* (New York: Oxford University Press, 1998); Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 1998); John R. Rowan, *Conflicts of Rights* (Boulder, Col.: Westview Press, 1999); Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000); R.G. Frey, "Privacy, Control and Talk of Rights", *Social Philosophy and Policy*, Vol. 17 (2000): 45–67; William A. Edmundson, *Introduction to Rights* (Cambridge: Cambridge University Press, 2004).

6 Canadian Charter of Rights and Freedoms, section 1; *R. v. Keegstra* [1990] S.C.J. No. 131, 3 S.C.R. 870; *Canadian Human Rights Commission et al. v. Taylor et al.* [1990] 3 S.C.R. 892, 75 D.L.R. (4th); *R. v. Butler* [1992] 1 S.C.R. 452.

7 Founded in 1909 as Sigma Delta Chi, the Society of Professional Journalists is the US's largest and most broad-based journalism organization. SPJ is a not-for-profit organization made up of more than 10,000 members dedicated to encouraging the free practice of journalism; stimulating high standards of ethical behavior; and perpetuating a free press. Sigma Delta Chi's first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984 and 1987. The present version of the Society of Professional Journalists' Code of Ethics was adopted in September 1996. <http://spj.org/awards/SDX98/rules.htm#society>; <http://spj.org/ethics/ethics.pdf>. See also Ontario Press Council, *24th Annual Report* (Toronto, Ontario, 1996), p. 79.

8 <http://www.aber.ac.uk/media/Documents/tecdet/tдет12.html>. For further discussion,

of their homes as barrages of phone calls offering anything you can imagine, from creative ways to decorate your home to fantastic cruises to not-so-isolated islands, interfere with our tranquility at all hours of the day, including the weekends.<sup>9</sup> As modes of communication developed, our privacy has been eroding. Large segments of the media have shifted to entertainment, and the sensational media prefer to intrude on private matters at the expense of analyzing social, cultural, scientific and political matters.<sup>10</sup> We witness far more gossip and a tendency to popularize the news, and the tabloids around the globe have specialized in character assassinations and incidents of intrusion on privacy. The large sensational narratives are taking so much space that they drive out discussion about politics.

According to the Angus Reid polling firm, two out of three Canadians think the media are guilty of sensationalizing scandals, and more than one-third (35 per cent) have actually boycotted certain media because of their extensive intrusive reporting. Almost two-thirds (65 per cent) feel reporting delves too deeply into the personal lives of public figures.<sup>11</sup>

This phenomenon, of course, is not uniquely Canadian. We are living in an age when news is becoming infotainment and intruding on private lives is a widespread phenomenon. One of the characteristics of the modern media is their intrusiveness. In today's world the leaders of democracies and celebrities are continuously watched, even hounded. Political leaders and public figures live in a media bubble where their every move is likely to be observed. Their public faces can almost never be taken off, and their private lives can be mercilessly exposed to the glaring spotlight of unwanted publicity. The willingness of public figures to have themselves aired demonstrates both the seductiveness and the reach of the media.<sup>12</sup>

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see Harold A. Innis, "The Bias of Communication," in *The Bias of Communication* (Toronto: University of Toronto Press, 1964), pp. 33–60.

9 Paul Levinson, *Digital McLuhan* (London: Routledge, 1999), p. 134.

10 See the critique of H. A. Innis, *The Press* (Toronto and London: Oxford University Press, 1949).

11 "Most of us feel reporters pry too much into lives of public figures," *Globe and Mail* (October 10, 1998), p. C3.

12 David Taras, *The Newsmakers: The Media's Influence on Canadian Politics* (Ontario, Canada: Nelson Canada, 1990), p. 235.

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In a public lecture delivered at Columbia University in 1995, The Right Honorable Brian Mulroney said that the personal abuse by the media that leaders suffer nowadays has become an unfortunately high – but necessary – price for them to pay for the privilege of service in democracies. He maintained that politicians are not the only ones tracked by the media, or by individuals masquerading as journalists: they are only the most numerous and the most visible. Prime Minister Mulroney called for responsibility and accountability by the media as they fulfill their “indispensable roles as vigorous critics and faithful chroniclers of our lives and times.”<sup>13</sup>

### **Public figures v. ordinary individuals**

In this context it is important to distinguish between public figures and ordinary citizens. Public figures are more susceptible to media invasion of their privacy. Justices L’Heureux-Dube and Bastarache of the Canadian Supreme Court said that “It is generally recognized that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest. This is true, in particular, of artists and politicians, but also, more generally, of all those whose professional success depends on public opinion.”<sup>14</sup>

Ordinary citizens are usually of no interest to the public and therefore do not, generally speaking, attract media attention. For instance, ordinary people attending a funeral are not, generally speaking, photographed. In the first instance, there should be a very good reason to send a photographer to a funeral to take such pictures (for instance, when covering a funeral of a hostage killed by terrorists), and the photographer is obliged to ask for permission prior to taking the photos.<sup>15</sup> Celebrities

13 The Right Honourable Brian Mulroney, public speech delivered at Columbia University, New York (March 20, 1995).

14 *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R. 591, Section IV of their judgement, at 616.

15 Death as a result of war is a very different matter. In the United States, the debate over privacy, secrecy, and the public’s right to know has flared up at the Pentagon over a very sensitive subject: the photographing of soldiers’ coffins as they are shipped home. See *Cbsnews.com* (April 23, 2004).

and politicians who attend funerals might be photographed and usually this conduct does not raise any controversy. Politicians attend those funerals as part of their public responsibilities, and celebrities not only do not mind the presence of the camera; often they welcome it.

Having said that, some standards of decency should be kept. For many years some organs of the media have exhibited poor taste by speculating that some dead celebrities are alive (the most notable examples being Elvis Presley and Marilyn Monroe). They excelled themselves by grossly claiming that one known celebrity, alive and kicking, had actually died. They repeatedly alleged that Paul McCartney died long ago. It does not matter that McCartney continues to produce songs and to hold concerts. The tale has become one of the cult stories associated with the Beatles. I always wondered, what does McCartney himself think about this? How does he feel about the allegations that he actually died, and that an imitator (he himself) took his place and exploits McCartney's reputation? In the summer of 1997 I had contacted a senior editor in the British press and through him asked Sir Paul for a response. After a while the editor returned to me, saying that Sir Paul has no interest in commenting on the issue. Maybe the story is for his advantage, making him some sort of a legend during his lifetime, literally greater than life. Apparently, he does not take offence being described as a phony imitator. Other celebrities might regard such an innovation differently.

In any event, public figures have experience in dealing with the media, and could gain access to present their side of the story, to voice their content or discontent, and to respond to allegations and gossip. Now let us turn to another interesting question: Whether the media are entitled to intrude on private matters of public officials when these matters do not directly concern their work and office.

If, for instance, a public figure known and respected for preaching family values, decency among couples and honesty in marriage, is found to be betraying his wife, the media have a right to break the news and bring the issue to public attention. The public is entitled to know that the person who spoke so eloquently about family values does not espouse those values at home. The issue is different when the public figure has made his reputation in other spheres, unrelated to his family life, and the conduct in his private life does not affect his public duties. Most broadsheet papers would not cover the infidelity story, while most of the popular press would probably publish the story in the name of

public's right to know. Most broadsheet papers don't consider as valid the argument that if a person is betraying the closest person to him or her, i.e., the spouse, then that person might cheat also on other matters in which he or she is less personally involved. Interestingly, the Israeli media has hardly ever exposed infidelity stories. They believe that the confines of the bedroom should remain intact. At most, they hint about such affairs without specifically identifying the adulterer. The only infidelity affair that became public during the 1990s was connected with Bibi Netanyahu, and the details of this episode were revealed by Netanyahu himself in a public television broadcast.<sup>16</sup>

What about sexual orientations of public officials? Many of us believe that sexual orientation is both immaterial and irrelevant to virtually all public sectors. Still, for a significant proportion of the population having a homosexual or bisexual orientation is immoral. Some would see the "right" and "normal" sexual orientation as a necessary qualification for holding public office. Personally, I do not conceive this view as persuasive enough to intrude on one's privacy. I am not aware of one single study that substantiates the claim that homosexuals are less capable than heterosexuals to carry out public responsibilities. However, others would resort to practical reasoning and argue that a homosexual candidate should disclose his or her sexual orientation because otherwise he or she might subject him or herself to blackmailing and to other pressures that might compromise the candidate's performance. The same argument can also be made about infidelity. Lies might necessitate coverups and misconduct. Information that some parts of the public – even a small part – deems relevant should be made available. The person who wishes to have information about a candidate's marital infidelity can be understood as saying that, in a democracy, the determination of the nature of a public office and its qualifications are as important to him or her as this personal preference is important to the adulterer.<sup>17</sup>

16 See Anat Balint, "Directing Itself: The Netanyahu Family and the Papparazzi", *The Seventh Eye*, Vol. 11 (October 1997): 6–11 (Hebrew).

17 Cf. Frederick Schauer, "Can Public Figures Have Private Lives?" in Ellen Frankel Paul, Fred D. Miller, Jr. and Jeffrey Paul (eds.), *The Right to Privacy* (New York: Cambridge University Press, 2000), pp. 293–309.

For this reason I cannot agree with Dennis Thompson who argues that citizens do not need to know about the drinking habits of an official because the alleged effects can be discovered by observing his actions on the job.<sup>18</sup> Alcohol, like drugs, might affect one's judgement and people should be aware that their representative has a soft spot for certain drinks and/or drugs that might cloud one's ability to make delicate decisions. Furthermore, some people would like to know about such a habit before electing or nominating someone for a responsible position. Many people don't have the time and energy to inquire about such habits themselves and they trust the media to disclose this information, upon obtaining it, to the public. Many people would not like to take the risk and discover that their representative is drunk at a moment of crisis. Then it might be too late. In this context, former president of Israel, Ezer Weizman, disclosed many years after the 1967 Six Day War that the Chief of Staff at that time, Yitzhak Rabin, collapsed on the eve of the war and asked Weizman check spelling to replace him. Weitzman was his deputy at the time. He refused, Rabin collected himself and led the Israeli army to victory. Later it also became public that Rabin had a drinking problem.<sup>19</sup> The Israeli public deserved to know all this before the outbreak of the 1967 fateful war and before Rabin was elected to further high positions.

Yet, I wish to refrain from the sweeping generalization that **everything** is relevant. Some boundaries need to be introduced. A major consideration in coming to decide the confines of privacy is the consequences of the official's action on the political/social process. In all the examples pointed *supra*, infidelity, hidden sexual preferences, addiction problems, those kinds of behavior might affect the official's performances and his or her ability to function. But, is this the only consideration?

Suppose a public figure beats his wife in bed as part of their sexual foreplay. If this is done with the wife's consent, then this fact should not be revealed to the public. I don't think that consenting violence

18 Dennis F. Thompson, "Privacy, Politics, and the Press," in John R. Rowan and Samuel Zinaich, Jr. (eds.), *Ethics for the Professions* (Belmont, Cal.: Wadsworth, 2003), p. 395.

19 Weitzman told all this in public and specifically to me in a private discussion we had in 1986.

might affect his public behavior. The case is different if the wife does not consent to the beating. Then it is just another version of domestic violence. Should this be revealed to the public? Now, if you focus all attention to the effect this behavior might have on the official's public conduct, it might be argued quite persuasively that domestic violence has no bearing on performing one's duties. The wife can complain to the police, and then there will be repercussions against the beater. But it is difficult to argue that this repugnant behavior might instigate coverups, commonly in use to hide infidelity stories that might have an effect on one's conduct.

It might be argued that if a certain behavior goes against the majority's norm, then that behavior needs to be exposed. I don't find the argument of majorities and minorities convincing. The majority may hold a norm which at another point of time may seem to be repugnant. Such, for instance, was slavery in North America. Nowadays, the majority may think homosexuality is repugnant. At another point of time homosexuality may be conceived as normal. Indeed, in Greek and Roman times homosexuality was conceived differently.<sup>20</sup> Majority opinion should not be considered as grounds for invasion of privacy.

My argument is that domestic violence should be exposed in public because the public needs to be aware of such a behavior, whether or not it has a bearing on one's public duties. One of the basic foundations of liberal democracy is not to harm others. Any action that causes physical harm to individuals or groups, for any reason other than self-protection, ought to be curtailed.<sup>21</sup> When this underpinning is broken, the public has the right to know. Violence against women is vile, goes against the underlying values of democracy, and should be fought against and curtailed. Violence against weak parties is something wrong. It is wrong *qua* unjustified violence, even if no one is aware of its existence.

20 Cf. Craig A. Williams, *Homosexuality: Ideologies of Masculinity in Classical Antiquity* (New York: Oxford University Press, 1999).

21 Cf. R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression*, esp. chap. 1.

## Public figures v. ordinary citizens who stumble into the public forum

Another pertinent distinction is between public figures who choose to live in the spotlights, and ordinary citizens who stumble into the public forum. On occasion, people stumble unintentionally into the spotlight, under circumstances that are not under their control. They, for instance, commit a significant public act, like saving a family from a fire, or rescuing a public figure from danger. The media should publish the heroic deed of the individual but should refrain from intruding into his or her private life that is of no importance to the public. A good example in this context is the Oliver Sipple story. Sipple was the ex-marine who knocked a gun out of the hands of a would-be assassin of then American President Gerald Ford. Shortly after the incident, it was revealed by the media that Sipple was active in the San Francisco gay community, a fact that had not been known to Sipple's family, who thereupon broke off relationship with him. His entire life was shattered as result of this publication. The good deed he had done brought about extremely harmful consequences for Sipple.<sup>22</sup> If the person who had stumbled into the public forum would prefer to remain in the public eye and to harvest more attention by further deeds or expressions, then he or she is no longer a private citizen and should accept the pros and cons involved in public life. But many of those who stumbled may wish to regain their privacy and return to normal life. With regard to these people, the media should refrain from intruding into their private lives and should respect their privacy, especially when exposure of certain details could harm one or more of the people involved.<sup>23</sup>

Look, for instance, at the painful story of the massacre of fourteen women in Montreal in December 1989. During the days that followed, there was what one writer describes as "a savage hunt" for gossip from

22 See R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, Fla.: The University Press of Florida, 1994), pp. 113–115.

23 Section IIB(b) of the Quebec Press Council's *The Rights and Responsibilities of the Press* (second edition, 1987) holds: "Media and journalists should distinguish between matters of public interest and public curiosity. The publication of information concerning the private life of individuals is acceptable only to the extent that it is in the public interest."

neighbors and friends, and the ravaged faces of mourners. Information on the victims was gleaned from every possible source, invading people's privacy in the pursuit of a story. The killer's mother had to go into hiding, and her private life was reported in minute details taken from divorce papers.<sup>24</sup> The fact that her son was a killer legitimized crossing all ethical borders. In another case, a Canadian woman and her child were killed during a skyjacking in Malta in November 1985. When the husband returned to Canada, a "milling crowd of reporters, photographers and TV cameramen" met him at the airport. The man told them that they were not invited to the funeral.<sup>25</sup> After this episode, it was said that the encounter prompted soul searching in the newsrooms as editors weighed the news value of the event against the human grief and pain involved.

In this context it should be noted that the CBC's *Journalistic Standards and Practices* holds: "An individual's right to privacy is cherished in Canada... The invasion of an individual's privacy is repugnant. Privacy in its broadest sense means being left alone. It means protecting an individual's personal and private life from intrusion or exposure to the public view."<sup>26</sup> Democracy has an interest in protecting the privacy and tranquility of the home. That interest was recognized by the Israeli<sup>27</sup> and

24 Ronald D. Crelinsten, "Victims' Perspectives," in David L. Paletz and Alex P. Schmid (eds.), *Terrorism and the Media* (Newbury Park, Cal.: Sage, 1992), p. 217.

25 *Ibid.* p. 219.

26 See also Section VI of the Statement of Principles for Canadian Daily Newspapers, Canadian Daily Newspapers Publishers Association, adopted in April 1977: "Every person has a right to privacy. There are inevitable conflicts between the right to privacy and the public good or the right to know about the conduct of public affairs. Each case should be judged in the light of common sense and humanity." Quoted in Nick Russell, *Morals and the Media* (Vancouver: UBC Press, 1995), pp. 123, 199. For further discussion, see Sandra L. Borden and Michael S. Pritchard, "Conflict of Interest in Journalism", in Michael Davis and Andrew Stark, *Conflict of Interest in the Professions* (New York: Oxford University Press, 2001), pp. 73–91; Judith Lichtenberg, "Truth, Neutrality, and Conflict of Interest," in John R. Rowan and Samuel Zinaich, Jr. (eds.), *Ethics for the Professions* (Belmont, Cal.: Wadsworth, 2003), pp. 379–386.

27 H.C. (High Court of Justice) 456/73. *Rabbi Kahane v. Southern District Police Commander* (was not published); Shamgar J.'s judgement in F.H. 9/83. *Military Court of Appeals v. Vaaknin*, P.D. 42 (iii), 837, 851.

the American<sup>28</sup> Supreme Courts in several decisions. Justice Frankfurter wrote in one of his prominent rulings: “Homes are sanctuaries from intrusions upon privacy and of opportunities for leading lives in health and safety.”<sup>29</sup> Similar reasoning was enunciated by Justices Black and Brennan. Justice Black held that a person’s home is “the sacred retreat to which families repair for their privacy and their daily way of living,” “sometimes the last citadel of the tired, the weary, and the sick,” wherein people “can escape the hurly-burly of the outside business and political world.”<sup>30</sup> In turn, Justice Brennan said:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual “to be let alone” in the privacy of the home.<sup>31</sup>

Here Brennan echoed what Warren and Brandeis had written in a classic article where they spoke of the right to be let alone and of privacy, referring to the “precincts of private and domestic life” as sacred.<sup>32</sup>

28 Cf. Justice Douglas in *Public Utilities Commission v. Pollack* 343 U.S. 451, 467 (1952). See also *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969); *City of Wauwatosa v. King* 182 N.W. 2d 530, 537 (1971). See also West’s Legal News, “Supreme Court Denied Certiorari in Anti-Abortion Demonstrators’ Picketing Case,” *West’s Legal News* 3061, 1995 WL 910586 (October 19, 1995).

29 *Martin v. City of Struthers* 319 U.S. 141, 153 (1943).

30 *Gregory v. City of Chicago*, 394 U.S. 111, 125, 118, 89 S.Ct. 946, 953–954, 950, 22 L.Ed.2d 134 (1969).

31 *Carey v. Brown* 447 U.S. 455, 471 (1980). In *Rowan v. United States Post Office Department*, 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), Chief Justice Burger stated that the concept that “a man’s home is his castle” into which not even the king may enter, has lost none of its vitality. For further discussion, see R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression*, chap. 2; Richard J. Arneson, “Egalitarian Justice v. the Right to Privacy?” in Ellen Frankel Pail, Fred D. Miller, Jr. and Jeffrey Paul (eds.), *The Right to Privacy*, pp. 91–119.

32 Samuel Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard L. Rev.*, Vol. 4 (1890), 289–320.

### **Intruding into the private life of previously well-known people**

William James Sidis was a famous child prodigy in 1910. His name and prowess were well-known due to the efforts of his father who developed complex ideas on child training. When young Sidis was 3.5 year-old he could use a typewriter. By the time he was 5, Sidis was able to read, write and speak English, was an expert accountant, and had begun to study French and Latin. He wrote a textbook on anatomy and another on English grammar. At the age of 8 Sidis entered high school and in six weeks he had completed the mathematical course and had begun writing an astronomy book. Then he also plunged into the studies of German and Russian. Boris, the proud father, took care to issue bulletins to the press detailing all these (and other) achievements. The press complied and followed William and praised Boris for the so-called “successful” implementation of his “advanced” theories. At the age of 11 Sidis lectured to distinguished mathematicians on Four-Dimensional Bodies at Harvard. At 16 he graduated from Harvard College, amid considerable public attention. He was declared to be, according to the *New York Times*, “the most learned undergraduate that has ever entered the Cambridge institution.”<sup>33</sup> Since then, however, his name appeared in the press only sporadically as Sidis sought to live as unobtrusively as possible, until *The New Yorker* published quite an unflattering article about him in 1937.

*The New Yorker* did features on past personalities under the title “Where are they now.” The article on Sidis was printed with the subtitle “April fool,” playing on the fact that William was born on April 1. The reporter described Sidis’ early accomplishments and the wide attention he received, then recounted his general breakdown and the revulsion that Sidis felt for his former life of fame. The article described how Sidis tried to conceal his identity, his chosen career as an insignificant clerk, his enthusiasm for collecting streetcar transfers and for studying the history of a certain American-Indian tribe, and his proficiency with an adding machine. The untidiness of Sidis’ room, his curious gasping laugh, his manner of speech, his wary eyes and other personal habits

— 33 “Sidis could read at two years old,” *New York Times* (October 18, 1909), p. 7. —

were commented upon at length. The article portrays William's lodgings, "a hall bedroom of Boston's shabby south end" and the man at the age of thirty-nine, "large, heavy... with a prominent jaw, a thickish neck, and a reddish mustache."<sup>34</sup> The article ends by saying that the little boy who lectured in 1910 on the fourth dimension to a gathering of learned men was expected to grow up to be a great mathematician, a famous leader in the world of science but, in the words of Sidis himself, "I was born on April Fools' Day."<sup>35</sup>

Sidis sued for violation of privacy. The issue at hand was not whether the article was true. Sidis who so desperately wanted to be let alone and to live his life away from the public eye was exposed in a cruel fashion. The court recognized that, saying "the article is merciless in its dissection of intimate details of its subject's personal life," maintaining that the article may be fairly described as "a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life."<sup>36</sup>

However, despite the sympathy for Sidis Judge Clark found for the defendant, saying that "Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy."<sup>37</sup> Notice the language: Clark is recruiting "everyone" for this assignment of trumping the plaintiff's privacy. I hasten to think that there would be quite differences of opinion among "everyone" regarding the exact point at which public interest in obtaining information becomes dominant. This point is not clarified in the judgement. Clark maintained, "At least we would permit limited scrutiny of the 'private' life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a 'public figure.'"<sup>38</sup> Indeed, "thrust upon him" is the correct phrase, as William was a child, incapable of independent, autonomous decision making, when he became a public figure due to the endless efforts of his father to push him to the spotlights. When he was able to break free and to stand

34 Jared L. Manly, "Where are they now?, April fool!" *The New Yorker* (August 14, 1937), pp. 22-26, at 25-26.

35 *Ibid.*, p. 26.

36 *Sidis v. F-R Publishing*, 113 F2d 806 (2nd Cir., July 22, 1940), at 807-808.

37 *Ibid.*, at 809.

38 *Ibid.*

on its own, Sidis opted for anonymity. The court essentially says that once a public figure, always a public figure. There is no escape. Even if you like to be forgotten, you cannot. You owe to the public the right to inform them about major developments in your life, however tragic and personal those might be. The fact that Sidis never made a decision to become a public figure, and when he was able to control his life he chose the exact opposite of being one, was insignificant for the court.

In 1937, Sidis was no longer a public figure for some time. He was not a retired public official who may be still held accountable for past actions. He was not a celebrity who relishes the limelight. Quite the opposite. Sidis did whatever he could to sink into oblivion. Intruding into his privacy in the name of popular curiosity is unjustified and unethical. Granted that there is public interest in Sidis. The public is interested in many things, including state's security, official secrets, capturing Osama Bin-Laden, sexual behavior of supermodels and politicians, and how much money one's neighbor earns. This does not mean that the media should provide all data of interest. The court's decision was erroneous and damaging. Four years after the court decision Sidis died unemployed and destitute.<sup>39</sup>

Privacy is intimately associated with our most profound values, our understanding of what it means to be an autonomous moral agent capable of self-reflection and choice. Its violation is demeaning to individuality and an affront to personal dignity.<sup>40</sup> Jean Cohen contended that a constitutionally protected right to personal privacy is indispensable to any modern conception of freedom,<sup>41</sup> whereas Avishai Margalit asserted that the institutions of a decent society must not encroach upon personal privacy.<sup>42</sup> However, when one opens today's newspapers, especially the tabloids, one could read many details that concern very private aspects of the other. One of the most intrusive forms of reporting is media gossip.

39 Anthony Lewis, "The Right to Be Let Alone," in Craig L. LaMay (ed.), *Journalism and the Debate Over Privacy* (Mahwah, N.J.: Lawrence Erlbaum, 2003), p. 64.

40 Amitai Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999), p. 191.

41 Jean L. Cohen, "Rethinking Privacy: The Abortion Controversy", in Jeff Weintraub and Krishan Kumar (eds.), *Public and private in Thought and Practice: Perspectives on Grand Dichotomy* (Chicago: University of Chicago Press, 1997), p. 137.

42 Avishai Margalit, *The Decent Society* (Cambridge, Mass.: Harvard University Press, 1996), p. 201.

## Yellow Entertainment

By yellow entertainment I refer to gossip about events that are of little social value but are of interest to the public. Reporting of these events feeds the voyeuristic needs of many of us, to various extents. Many of us enjoy learning the details of what is thought to be unattainable by the common people. If I cannot be like the “beautiful people,” at least I would like to know about their lifestyle: what living in a castle with servants is like; the pros and cons of living with three wives; what it is like to be an idolized rock star; what a famous basketball player eats for breakfast; why he chose to divorce his wife. Many of these gossip events can be quite banal. For instance, millions of women are pregnant around the globe at any given time. The media usually do not regard this as newsworthy. But it might attract public interest if the concerned woman is a soap opera star or a leading actress in one of the commercial comedy series. Many viewers of “Melrose Place” would be very interested in knowing that their favorite character is actually pregnant in her private life. They would begin to ponder and speculate about various questions: Will the character she acts out in the series become pregnant as well? Will the series’ producers try to conceal her pregnancy? Will the star finally get married? Will a replacement be found in case the pregnancy does not fit the producers’ plans? Will they decide, God forbid, to terminate the filming of the series during the advanced months of pregnancy? These are top priority questions for the captive followers of the series.<sup>43</sup>

In Israel, the gossip columns adopted some ethical standards in reporting about celebrities and public figures. They never report about their children, believing children should be left out of the public scene and their privacy should be maintained. Gossip reporters never do outing of homosexuals who prefer to remain “in the closet,” and they would never publish material that might bring about the breakdown of families. Consequently, they may say that a minister, or a senior public official, or a famous singer is having extramarital affair, but they will keep his or her name anonymous.

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<sup>43</sup> For further discussion, see R. Cohen-Almagor, *Speech, Media, and Ethics*, chap. 5.

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The British press has been constantly under public scrutiny during the past two decades. At the end of the 1980s there was a growing uneasiness with regard to the functioning of the press. It was decided to set up an inquiry committee to consider the behavior of the press and to suggest remedies. In particular, the issue of privacy was in the forefront of concern. The first report of June 1990 concluded with the view that “the press should be given one last chance to demonstrate that non-statutory self-regulation can be made to work effectively. This is a stiff test for the press. If it fails, we recommend that a statutory system for handling complaints should be introduced.”<sup>44</sup> However, both the 1990 Calcutt Report and the earlier Younger Report<sup>45</sup> recommended that no general tort of invasion of privacy be introduced.<sup>46</sup>

The press failed the test and in January 1993 a second report was issued by Sir David Calcutt QC, arguing that the Press Complaints Commission (PCC) was not an effective regulator of the press. Sir David maintained that the PCC did not “hold the balance fairly between the press and individual. It is not the truly independent body which it should be. As constituted, it is, in essence, a body set up by the industry, and operating a code of practice devised by the industry and which is over-favorable to the industry.”<sup>47</sup> Accordingly the report recommended the replacement of the self-regulatory body of the press with a statutory regime designed to ensure that privacy “is protected from unjustifiable intrusion, and protected by a body in which the public, as well as the press, has confidence.”<sup>48</sup>

Sir David thought that his recommendations were “designed to make a positive contribution to the development of the highest standards of

44 Home Office, *Report of the Committee on Privacy and Related Matters* (London: Her Majesty’s Stationary Office, June 1990), Cm 1102, at 73. Sir David Calcutt Report.

45 Younger Report, Cmnd 5012 (1972), para. 659.

46 Privacy is protected in Art. 12 of the UN Declaration of Human Rights and Art. 17 of the International Covenant on Civil and Political Rights as well as in Art.8 of the European Convention on Human Rights. Cf. Michael J. Beloff, “Politicians and the Press”, in Jack Beatson and Yvonne Cripps (eds.), *Freedom of Expression and Freedom of Information* (Oxford: Oxford University Press, 2002), p. 76.

47 Sir David Calcutt QC (January 1993) *Review of Press Self-Regulation* (London: Her Majesty’s Stationary Office), Cm 2135, at xi.

48 Calcutt, 1993, at xiv.

journalism, to enable the press to operate freely and responsibly, and to give it the backing which is needed, in a fiercely competitive market, to resist the wildest excesses.”<sup>49</sup> The government, however, did not accept his recommendations. The feeling was that the formation of a statutory regime might hinder freedom of expression and the right of the public to know. However, the proprietors who formed the PCC out of necessity, fearing a possible governmental intervention, understand after Princess Diana’s death that it is up to them to make the necessary accommodations, otherwise voices for governmental regulations might be reheard, possibly with greater public support.

The London press is arguably the most competitive market in the print industry worldwide. Soon enough the tabloids had realized that Princess Diana was their best sales promoter. Her picture on the front page may prompt people to buy their journal instead of another. Diana became the most photographed person in the world. The tabloids were willing to pay enterprising and shameless photographers millions of dollars for capturing Diana in her private moments. The more private, the better. Tapes of Dianna’s intimate phone conversations were leaked to the media, she was watched by spy agencies, and journalists dissected her every move. Ex-lover James Hewitt betrayed her trust and published a humiliatingly juicy and detailed account of their affair for a very nice sum of money. According to one report, the widely circulated photo of Diana embracing boyfriend Dodi al-Fayed netted the photographer more than \$3.2 million, an incentive that drove paparazzi to break any ethical boundary on the book in search for a quick fortune.<sup>50</sup>

On August 31, 1997, the Princess of Wales was killed in a shocking road accident in Paris. Princess Diana and Dodi al-Fayed were trying to escape some paparazzi photographers who raced after their car. Princess Diana was exceptional among celebrities because she insisted upon continuing to live as normal a life as possible despite the constant surveillance to which she was subjected. Princess Diana understood the

49 Calcutt, 1993, at 63. I asked Sir David to grant me an interview during the summer of 1997 but he refused, saying that he had shifted his interests to other spheres.

50 Charles J. Sykes, *The End of Privacy* (New York: St. Martin’s Press, 1999), p. 190. For discussion on ways to combat paparazzi journalism, see Rodney A. Smolla, “Privacy and the First Amendment Right to Gather News”, *George Washington L. Rev.*, Vol. 67 (1999): 1097.

power of the media and frequently used them and manipulated them for her own advantage. One can say that Diana confused public interest with public prurience. Although the paparazzi made her life very difficult in her last years, Princess Diana never filed a complaint against newspapers (under Section 8, Harassment, of the Code of Practice).<sup>51</sup> Even after her pictures were taken in a gym and subsequently published in the *Daily Mirror* (November 7, 1993), she chose not to complain and to resolve the matter through conciliation.<sup>52</sup> The court was therefore denied an opportunity to consider the limits of publicity when it comes to photos taken in a private place, without the public figure's consent.<sup>53</sup>

To a large extent Diana's image was built by the media that, in turn, used her to sell newspapers. You need two to tango, and the two – Princess Diana and the media – were eager to dance. Starting in 1991, she began recording the story of her life and her troubled marriage for journalist Andrew Morton, who took pains to conceal Diana's actual involvement until after her death. Largely as the result of her own revelation, the public came to know what drugs she took, which psychologists and spiritualists she consulted, the size of her waist, the frequency of her

51 The Oxford English Dictionary defines harassment as to trouble, worry, make repeated attacks on.

52 In August 1996, the Princess of Wales obtained an injunction restraining a named freelance press photographer from coming within 300 meters of her, wherever she might be, because of fear of harassment; and there have been cases where injunctions have been obtained to restrain publication of photographs taken of the Princess and other members of the Royal family in intimate settings, by means of telephoto lenses, etc. The general rule is that the taking of photographs cannot in itself be controlled (except where it is likely to cause a breach of the peace), unless the interference with the subject's life is so significant that it amounts to serious and probably intentional harassment. See Helen Fenwick and Gavin Phillipson, "Confidence and Privacy: A Re-examination," *Cambridge Law Journal*, Vol. 55, No. 3 (November 1996): 447–455, at 448–450. In *Hellewell v. Chief Constable of South Yorkshire* [1995] 1 WLR 804 Laws J. said that if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would amount to a breach of confidence and the law would protect a right of privacy, although the name accorded to the cause of action would be breach of confidence (at 807).

53 For further discussion concerning newspaper publishing photographs of the claimant taken without his consent in a brothel, see *Jamie Theakston v. MGN Ltd.* [2002] EWHC 137 (QB) QBD (Ouseley J) 14/2/2002.

vomiting, her 1982 attempt at suicide by throwing herself down a flight of steps, her therapies, and her various emotional turmoil.<sup>54</sup> Throughout her final years, she confided details of her married life and her romances to close journalists, often with the expectation that the stories would be published across the front pages of the newspapers. And as she came to resent the press, she went on BBC *Panorama* program to discuss her failing marriage. The program was watched by 21 million people in Britain and millions more around the world.<sup>55</sup> Princess Diana admitted her affair with James Hewitt, opening virtually every aspect of her life to scrutiny. Diana even publicly portrayed how she told her sons that she and Charles were splitting up and about how she and her sons discussed their father's relationship with her rival, Camilla Parker-Bowles, who was the third wheel in her marriage to Charles.<sup>56</sup>

Princess Diana was struggling against a far superior opponent, the Royal Court, and soon enough realized that her main, perhaps only, asset were the media. This was the only sphere in which she was able to compete against the court, and win. She knew what a good picture was and supplied those photos that were printed all over the world and helped newspapers to increase their sales. She attracted wide public attention and provided endless numbers of stories for the reporters and photographers who followed her. What she did not understand is that she could not choose which pictures should be taken, and which not; which photographers could accompany her during her trips, and which should not follow her. Princess Diana was disgusted and appalled by the behavior of the unscrupulous paparazzi photographers who made their living by recording her private moments. The famous British dictum, My Home is My Castle, was transformed when Diana was concerned to Her Castle Is Our Golden Peepshow. Apparently, Diana failed to recognize until her very last day that when you open the door for the media they would enter in force, to make the most of this opportunity to make some profit.<sup>57</sup>

54 Andrew Morton, *Diana: Her True Story* (NY: Simon and Schuster, 1992).

55 Karen Sanders, *Ethics and Journalism* (London: Sage, 2003), p. 79.

56 Charles J. Sykes, *The End of Privacy*, p. 191.

57 Mr. Robin Esser, Consultant Editor of *The Daily Mail*, argued that Princess Diana was obsessive about her image. It was not rare for her to phone our Royal reporter a few times a week, sometimes a few times a day. Princess Diana was on the phone with him regularly every week for the past 2–3 years. Interview with Mr. Esser

Following Princess Diana's tragic death, many people in England called for a re-examination of the tension between the right to freedom of expression and the right to privacy. Lord Wakeham, Chairperson of the Press Complaints Committee declared immediately after Princess Diana's funeral (September 6, 1997) that the PCC will need to ponder ways to protect the privacy of Princes William and Harry so that they will not have to go through the agonizing experiences that their mother lived almost daily after she became the Princess of Wales. Lord Wakeham said he was "extremely concerned" about what will happen as the Princes reach the age of 16,<sup>58</sup> conceding that the PCC's Code of Practice might change after consultation with editors.<sup>59</sup> Lord Wakeham's statement followed the pledge made by Earl Spencer, Princess Diana's brother, during her funeral. The outraged Earl committed himself to protect her children from the media, not allowing them "to suffer the anguish that used regularly to drive you [Diana] to tearful despair."<sup>60</sup> Of course, all people concerned realize that it is not enough to join the Press Council and to subscribe to its Code of Practice. Although almost all newspapers in England subscribe to the Code, this is more of a lip service.<sup>61</sup>

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(October 20, 1997). Mr. Charles Moore, Editor of the *Daily Telegraph*, said that Princess Diana was regularly in touch with senior people in the paper, like himself, the Royal affairs reporter, and another senior member who is close to the Royal family. Interview with Mr. Moore on October 21, 1997.

- 58 Clause 12 of the PCC Code of Practice holds that "children under sixteen should not be interviewed or photographed on subjects involving their personal welfare without the consent of a parent or other adult responsible for them." For further discussion see Lord Wakeham's speech at St. Bride's Institute (August 23, 1995), in *Moving Ahead* (Press Complaints Commission, 1995).
- 59 Alison Boshoff, "Curbs on Press to Protect Princes," *The Daily Telegraph* (September 8, 1997), p. 1.
- 60 "Earl Spencer's Funeral Address," *The Sunday Telegraph* (September 7, 1997), p. 2. The most recent controversy regarding Diana concerned the CBS News program "48 Hours Investigates" which showed two pictures taken by paparazzi at the scene of the August 31, 1997, accident in Paris. It was the first time a major media outlet has published pictures of the injured princess. See "Anger At CBS Use Of Diana Photos", CBS News (April 23, 2004).
- 61 For further discussion, see Lawrence M. Friedman, "The One Way Mirror: Law, Privacy and the Media", *Stanford Public Law and Legal Theory Working Paper Series*, Research Paper No. 89 (March 2004).
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There have been some interesting cases about the scope of privacy under the UK Human Rights Act 1998 (came into effect on October 2, 2000) which incorporates the European Convention on Human Rights (ECHR).<sup>62</sup> Article 8 of the ECHR has been used in a whole range of contexts, from phone tapping to the use of medical records in court; from the rights of children whose parents are deported to the right to have records altered.<sup>63</sup> It was held in a case brought by the ex-news anchor Anna Ford who had been photographed through a long distance lens on a beach that she had no reasonable expectation of privacy in a public place, and that if she wore a bikini in public she could not object to being photographed.<sup>64</sup> It was also used to restrain a magazine from publishing unauthorized photographs of Michael Douglas and Catherine Zeta-Jones taken at their wedding.<sup>65</sup>

62 Article 8 of the ECHR provides: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

63 Michael J. Beloff, “Politicians and the Press,” in Jack Beatson and Yvonne Cripps (eds.), *Freedom of Expression and Freedom of Information*, p. 82.

64 I am grateful to Geoffrey Marshall for this piece of information. For further discussion on privacy and English law, see Sir Brian Neill, “Privacy: A Challenge for the Next Century,” in Basil S. Markesinis (ed.), *Protecting Privacy* (Oxford: Oxford University Press, 1999), pp. 1–28. See also *Naomi Campbell v Mirror Group Newspapers Ltd* where it was held that the media to conform with Art.8 European Convention on Human Rights should respect information about aspects or details of the private lives of celebrities and public figures that they legitimately chose to keep private, certainly “sensitive personal data” under the 1998 Act, unless there was an overriding public interest duty to publish consistent with Art.10(2) of the Convention. Striking the balance between Art.8 and Art.10 of the Convention and having full regard to s.12(4) of the 1998 Act, the court held that Campbell was entitled to the remedy of damages and/or compensation. Cf. *Campbell v Mirror* [2002] EWHC 499 (QB) QBD (Morland J) 27/3/2002. <http://www.cs.mdx.ac.uk/staffpages/cgeorge/PrivacyIssues.doc>.

65 *Michael Douglas, Catherine Zeta-Jones and Northern & Shell PLC v. Hello! Ltd* CA (Brooke LJ, Sedley LJ, Keene LJ) 21/12/2000.

*Les Editions Vice-Versa Inc. v. Aubry*

Quebec is the only province in Canada to have enacted quasi-constitutional provisions<sup>66</sup> about privacy for the private sector.<sup>67</sup> The Quebec *Charter of Human Rights and Freedoms* holds that “Every person has a right to the safeguard of his dignity, honour and reputation,” and that “Every person has a right to respect for his private life.”<sup>68</sup> In turn, Chapter III of the *Civil Code of Quebec [1994]* holds:

35. Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) entering or taking anything in his dwelling;
- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;
- (4) keeping his private life under observation by any means;
- (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) using his correspondence, manuscripts or other personal documents.<sup>69</sup>

66 Rod MacDonald notes in his comments that it is accurate to characterize these two documents as “quasi” constitutional because, even though they take precedence over other legislation unless excluded, they are in no way entrenched as against subsequent Parliamentary activity. Personal communication on February 19, 2002.

67 The first legislation designed to protect privacy in the private sector was enacted in 1993 with the *Loi de protection des renseignements personnels dans le secteur privé*. For examination of existing legislation, international laws and initiatives relating to privacy and freedom of information as well as voluntary codes of conduct for Canadian businesses to ensure the safety of their clients’ personal information see Media Awareness Network: Media Issues – Privacy, <http://www.media-awareness.ca>; <http://www.screen.com/mnet/eng/issues/priv/laws/laws.htm>

68 Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c C-12.

69 Chapter III, “Respect of Reputation and Privacy,” *Civil Code of Quebec [1994]*. It is argued that the Quebec privacy laws are too broad, having unintended effects on historical research because they impede the development of access to archival holdings. See Joanne Burgess, “The Right to Privacy in the Private Sector: What is

Both statutory provisions were invoked in a recent Supreme Court case, *Les Editions Vice-Versa Inc. v. Aubry*.<sup>70</sup> The case was concerned with Ms. Aubry who brought an action in civil liability against a photographer and the publisher of a magazine dedicated to the arts, for taking and publishing a photograph showing her, then aged 17, sitting on the steps of a building. The photograph was published without her knowledge and consent. *Les Editions Vice-Versa* sold 722 copies and the photograph was drawn to Aubry's attention by a friend who bought a copy of the magazine. Aubry sued for damages in the amount of \$10,000, half as compensatory damages and the other half as exemplary damages. The trial judge recognized that the unauthorized publication constituted a fault and ordered the *Vice-Versa* magazine to pay her \$2,000. The majority of the Court of Appeal for Quebec affirmed this decision, saying that the unauthorized publication of the photograph constituted an encroachment of her anonymity, which is an essential element of the right to privacy. Even in the absence of bad faith, the dissemination of Aubry's photo without her knowledge and consent was wrongful. Then the magazine appealed to the Supreme Court.

The majority of the Court, *per* L'Heureux-Dube, Gonthier, Cory, Iacobucci and Bastarache JJ., dismissed the appeal, holding that the right to one's image is an element of the right to privacy under the Quebec *Charter*. One of the purposes of the *Charter* is to protect people from compulsion or restraint. If the purpose of the right to privacy is to protect a sphere of individual autonomy, it must include the ability to control the use made of one's image. In this case, the appellants are liable *a priori*, because the photograph was published when the respondent was identifiable. The artistic expression of the photograph cannot justify the infringement of the right to privacy it entails. The majority of the Court maintained:

An artist's right to publish his or her work is not absolute and cannot include the right to infringe, without any justification, a fundamental right of the subject whose image appears in the work. It has not been shown that the public's interest in seeing

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at Stake for Historians and Historical Research," Canadian Historical Association (Summer 1998), pp. 26–27. See also <http://www.cam.org/~ihaf>.

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70 *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R. 591.

this photograph is predominant. In these circumstances, the respondent's right to protection of her image is more important than the appellant's right to publish the photograph of the respondent without first obtaining her permission.<sup>71</sup>

The minority of the Court, *per* Lamer CJ. and Major J., accepted the appeal. Lamer CJ. wrote that mere infringement of a right or freedom does not necessarily constitute fault. This case cannot be resolved "merely by relying upon the respondent's right to her image or the appellant's freedom of expression; the rights concerned must also be balanced."<sup>72</sup> Lamer CJ. acknowledged that the right to privacy "certainly includes a person's right to his or her image," and he agreed with his colleagues that the right to one's image is "primarily a personality right, an interest of an extrapatrimonial nature."<sup>73</sup> Consequently, the dissemination of Aubry's image constituted a violation of her privacy and of her right to her image. Lamer CJ. said that "in the abstract" to appropriate another person's image without her consent to include in a publication constitutes a fault. He also thought, and I concur, a reasonable person would have been more diligent and would at least have tried to obtain Aubry's consent to publish her photograph. Furthermore, Lamer CJ. said, and I agree, that the appellant did not do everything necessary to avoid infringing the respondent's rights.<sup>74</sup>

So why did Lamer CJ. and Major J., accept the appeal? Because, in their opinion, there was no evidence of damage. The respondent's statement that her classmates laughed at her did not in itself constitute

71 *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R. 591. In his comments on this essay, Joe Magnet argues that *Aubry* is a property type case following a well-established property law doctrine in Canada as to the ownership of the image. Magnet thinks that the privacy aspect in this case, while interesting, is a side issue. Rod MacDonald elucidates the point by commenting that there is a famous 1973 court case involving a comedian Yvon Deschamps whose image was used by an automobile company in an advertising campaign without his consent. Cf. judgement of Rothman J. in *Deschamps v. Renault Motors* (1977), *Cahiers de droit* 937 (Quebec Superior Court, 1972). For a brief description of the case, see J.E.C. Brierley and R.A. Macdonald, et al. *Quebec Civil Law* (Toronto: Emond Montgomery, 1993), pp. 156–157.

72 *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R. 591, at 604.

73 *Ibid.*, at 605.

74 *Ibid.*, at 605.

sufficient evidence of prejudice, as it did not provide any information about how she felt. Nor was there any evidence that Ms. Aubry had become a “well-known figure” or that the instant proceedings and the media coverage they received increased her notoriety.

I side with the majority in this case. The majority court also resorted to the balancing method, weighing one against the other the right to information and the right to privacy. They acknowledged that a photograph of a single person can be “socially useful” because it serves to illustrate a theme. But that does not make it acceptable if it infringes on the right to privacy. The majority did not consider it appropriate to adopt the notion of “socially useful” for the purposes of legal analysis. The artistic expression of the photograph, which was alleged to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails.<sup>75</sup> As the justices said, since the right to one’s image is included in the right to respect for one’s private life, it is manifest that every person possesses a protected right to her image. This right arises when the subject is recognizable. Consequently there is a breach of the person’s right to her image, and therefore fault when the image is published without permission. In the name of the public’s right to know, magazines should not send photographers to the streets to take photos of people to decorate their covers without the people’s consent. It is one thing to publish a group photograph, when none of the faces is identifiable, and quite another to zoom in on one person and circulate his or her photo. It is one thing to take a photo of a public place where people are depicted *en masse* and quite another to use a public place as a background for showing a person who is the true subject of the photo. Justices L’Heureux-Dube and Bastarache have noted these differences in their judgement. They wrote that public interest prevails when a person appears in an incidental manner in a photograph of a public place. An image taken then can be regarded as an anonymous element of the scenery, even if it is technically possible to identify certain individuals. Since “the unforeseen observer’s attention will normally be directed elsewhere, the person ‘snapped without warning’ cannot complain. The same is true of a person in a group photographed in a public place.”<sup>76</sup>

<sup>75</sup> *Ibid.*, at 618.

<sup>76</sup> *Ibid.*, at 617.

Such a person cannot object to the photograph's publication if she is not the principal subject.

In the case at hand, I do not see any reasonable justification or legitimate purpose in invading anyone's privacy without his or her consent. The arguments for freedom of expression and freedom of information in this context are simply not persuasive. No harm would be done if the photo of Aubry were to be replaced with a photograph of another young, beautiful woman who consented, or even was paid to appear on the magazine's cover. There are enough women who would be delighted to appear on a cover. The issue of prior knowledge and consent of those photographed are not immaterial. Of course, if consent is granted then no problem arises. But people should enjoy the freedom to remain anonymous if they so desire. For Aubry, this was not an abstract issue but a concrete contravention of her right to privacy. Her friends and peers at school teased her, and she felt humiliated. I side with the majority who thought that a teenager's damages are the logical, direct and immediate consequence of the fault, and that Aubry's sensitivity and the possibility of "being teased by her friends are eminently foreseeable."<sup>77</sup>

Furthermore, young Ms. Aubry did not do anything that is of public interest. She was just sitting in a shopping mall. There is a difference between a person who does something of public significance, and a person who, say, strolls the streets. If someone, for instance, is polishing a new public sign, or symbol, that person who is totally unknown to the public might be photographed not because of who he is, but rather because of what he does. In December 2001 newspapers around the world showed workers cleaning and shining the Euro signs, posted in order to promote awareness of the new currency in Europe. Even in this instance I would urge photographers to ask the workers whether they mind that their faces will be shown in public newspapers while they polish the shining yellow Euro signposts.

Chief Justice Lamer argued in his dissent that Ms. Aubry's statement, "people laughed at me," does not in itself constitute sufficient evidence of damage, because it did not provide any information about how she felt.<sup>78</sup> But surely no one would like to be laughed at. This statement

<sup>77</sup> *Ibid.*, at 620.

<sup>78</sup> *Les Editions Vice-Versa Inc. v. Aubry*, para. 32 in Lamer CJ.'s judgement.

shows that Ms. Aubry felt that the dissemination of her photo was wrong, and that it did cause her moral prejudice. As the Court of Quebec held, to learn through teasing by friends that Aubry's picture had been published in a prestigious, large-circulation magazine without her even knowing that her picture had been taken and without her authorization merits compensation for the humiliation, discomfort and upset suffered as a result of the invasion of her privacy. The majority of the Supreme Court adopted this opinion thinking that there was sufficient evidence regarding the discomfort and upset felt by Aubry as a result of the publication.<sup>79</sup>

Another issue concerns the commercial aspect of this affair. The magazine had used Aubry's photo because its editors thought that her looks would attract people's eye and the magazine's sales would be increased. It is only fair that Aubry should have her share in the business.

Cases like *Aubry* are different from cases involving public officials and celebrities. Diana had no say in taking her photograph and published it when appearing in public places. This is a price she had to pay for being "Queen of Hearts," and one should bear in mind that Diana had gained a lot in terms of publicity and fame. She protested against taking unauthorized private photos. Thus, consent is required to publish photos of ordinary citizens that were taken either in public or in private spheres, whereas when public officials and celebrities are concerned consent is required when photos are taken only in the private sphere.

## Conclusion

Marshall McLuhan said that as we transfer our whole being to the data bank, privacy will become a ghost or echo of its former self and what

79 *Les Editions Vice-Versa Inc. v. Aubry*, paras. 614–618, 621–622 of the majority judgement delivered by L'Heureux-Dube and Bastarache JJ. MacDonald added that the flaw in Lamer's argument is that it implicitly denies that the invasion of privacy can be a tort *per se*, like trespass to land. MacDonald maintained that to date the private law has been much more solicitous of protecting the integrity of land, than it has the integrity of people. For further discussion on privacy law in Canada, see <http://www.privacyinfo.ca/>

remains of community will disappear.<sup>80</sup> While this vision may have been exaggerated, we undoubtedly pay a price for developing the advanced technology we have today. Privacy has been eroding.

People are constantly gaining information about us. They see what we do, what we buy, what we look at, and the like. If they know who we are, and if they have enough financial incentive, they can record this information. If we engage in computerized transactions with them, such recording becomes very easy, as does combining this information with still other information tied to our names. If the transactions are personalized—if we voluntarily turn over information about ourselves that facilitates our business arrangement—then they will have even more information to record. And once they've recorded this information, they can easily communicate it to others.<sup>81</sup>

Jeffrey Rosen notes that privacy is a form of opacity, and opacity has its values. We need more shades, more blinds and more virtual curtains. By respecting the boundaries between public and private speech and conduct, a liberal state can provide sanctuaries from the invasions of privacy that are inevitable in social interactions.<sup>82</sup> The right of the ordinary people to protection of their image is more important than the right to publish photographs without obtaining permission.

An American case that comes to mind is *De Gregorio v. CBS*.<sup>83</sup> It concerned a news broadcast entitled “Couples in Love in New York” showing briefly the plaintiff, a married man, walking hand-in-hand with an unmarried female co-worker on a city street. When De Gregorio noticed that he was filmed he demanded the TV crew to destroy the film, advising the production manager that he was married and that his

80 [http://scholar.google.com/scholar?hl=en&lr=&q=cache:hRZqgP8A8EcJ:www.foothill.edu/~kmanske/Lecture\\_notes/PDF/Media\\_Culture.pdf+Marshall+McLuhan+privacy](http://scholar.google.com/scholar?hl=en&lr=&q=cache:hRZqgP8A8EcJ:www.foothill.edu/~kmanske/Lecture_notes/PDF/Media_Culture.pdf+Marshall+McLuhan+privacy)

81 Eugene Volokh, “Personalization and Privacy”, *Communications of the ACM*, Vol. 43, Number 8 (2000), pp 84–88, available at <http://delivery.acm.org/10.1145/350000/345155/p84-volokh.html?key1=345155&key2=8521300211&coll=GUIDE&dl=ACM&CFID=48608443&CFTOKEN=41371649>

82 Jeffrey Rosen, *The Unwanted Gaze* (New York: Random House, 2000), pp. 223–224. For critique of Rosen, see Robert C. Post, “Three Concepts of Privacy”, *Georgetown Law Journal*, Vol. 89 (June 2001): 2087.

83 *Carl De Gregorio v. CBS Inc.*, 473 N.Y.S.2d 922, Supreme Court of New York (March 14, 1984).

female friend was engaged to be married. Therefore, it would not “look good” to have a film of this hand-holding episode shown on television. The manager ignored his plea, a five second segment of the plaintiff and his friend were included in the footage and, subsequently, De Gregorio sued CBS alleging invasion of privacy, intentional infliction of emotional distress, *prima facie* tort and defamation.

The court ruled that plaintiff’s five-second appearance on the broadcast without speaking or being identified by name was merely an incidental use and, thus, cannot form the basis for liability under the civil rights statute; the fact that the defendant may have earned a profit from the broadcast does not alter its right to depict matters of public interest. Moreover, since there was no false representation in the broadcast, constitutional principles of freedom of the press preclude any redress for the film clip.

As a matter of law, the court judgement may be the right one. However, the behavior of the TV crew is ethically flawed. The broadcast included numerous shots of couples walking down Fifth Avenue holding hands, romantically walking through Central Park, or embracing in other public places. Upon the explicit request of De Gregorio not to include him in the film, the film manager should have complied with the request. There was enough material without this specific scene. Furthermore, showing the plaintiff and his friend was not a crucial news item. It was no news at all. In the name of free speech, free press and the public’s right to know, the CBS crew had no qualms to potentially harm two individuals for no good cause or reason.

The two fundamental background rights underlining every democracy are respect for others and not harming others.<sup>84</sup> They should not be held secondary to considerations of profit and personal prestige of journalists and newspapers. Media freedom does not entail, nor does it protect, the taking of unlimited measures designed to increase the sales of a newspaper or promoting the ratings for certain broadcasts.

Journalists should see people as ends and not as means – a Kantian

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84 Ronald Dworkin, “Liberalism,” in *A Matter of Principle* (Oxford: Clarendon Press, 1985), pp. 181–204; *idem*, *Taking Rights Seriously* (London: Duckworth, 1976); R. Cohen-Almagor, “Between Neutrality and Perfectionism,” *Canadian J. of Law and Jurisprudence*, Vol. VII, No. 2 (1994): 217–236.

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deontological approach.<sup>85</sup> This view implies the ability to control the power that lies in the hands of media professionals when reporting in the name of the people's right to know might cause unjustified harm to others. These instances should be distinguished from incidents when the harm is justified. For instance, when a person acts corruptly, and there is evidence to prove it, the media are allowed, and even obliged, to look into the issue and bring it to public scrutiny. This is what is meant when calling the media "the watchdog of democracy."

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85 See Immanuel Kant, *Foundations of the Metaphysics of Morals* (Indianapolis, Ind.: Bobbs-Merrill Educational Publishers, 1969). For further discussion, see Joseph Raz, *Value, Respect, and Attachment* (Cambridge: Cambridge University Press, 2001), esp. pp. 140–151. For elaborated analysis of the right to privacy v. public's right to know, see R. Cohen-Almagor, *The Scope of Tolerance* (London: Routledge, 2006), chaps. 2 and 3.

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