Balancing Freedom of the Press and the Right to Privacy:

Lessons for China

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ABSTRACT

The conflict inherent in balancing freedom of the press and the right to privacy invariably presents some controversial legal issues. In addressing the legal dilemmas posed by these competing interests, an in-depth analysis of the conceptual value of these two equally important rights becomes a preliminary starting point. Through its exploration of the history and development of the press and privacy laws in both the United States and Canada, this thesis examines the fundamental values enshrined in these two rights. The author holds that the freedom of the press contains no privilege under the law, but that it serves as the means to promote the public's right to know in a democratic society, while the right to privacy offers an individual the autonomy to regulate his private affairs. By analyzing arguments of "pubic interest," "public figure," and "public privacy," the author compares the theoretical approaches to and practical attempts at striking a balance between the interests of the press and the privacy of the individual in the United States and Canada. Finally, the essay proposes how these experiences may contribute to the construction of relevant Chinese laws.

RÉSUMÉ

Le conflit inhérent à la liberté d'équilibrage de la presse et à la droite à l'intimité présente invariablement quelques issues légales controversées. Dans l'adressage les dilemmes légaux ont posé par ces intérêts de concurrence, une analyse détaillée de la valeur conceptuelle de ces deux droites également importantes devient un point de départ préliminaire. Par son exploration de l'histoire et du développement des lois de presse et d'intimité aux Etats-Unis et au Canada, cette thèse examine les valeurs fondamentales enchassées dans ces deux droites. L'auteur soutient que la liberté de la presse ne contient aucun privilège en vertu de la loi, mais cela qu'il sert de moyens de favoriser le droit du public de savoir dans une société démocratique, tandis que la droite à l'intimité offre à un individu l'autonomie pour régler ses affaires privées. En analysant des arguments "d'intérêt publique," "figure publique," et "intimité publique," l'auteur compare les approches théoriques et les tentatives pratiques à frapper un équilibre entre les intérêts de la pression et l'intimité de l'individu aux Etats-Unis et au Canada. En conclusion, l'essai propose comment ces expériences peuvent contribuer à la construction des lois chinoises appropriées.

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Introduction

Today's world is increasingly driven by a combination of information and entertainment values, which are promoted by the explosion of different means of communications in the form of both traditional media, such as print, radio, television, and film, and newly developed technology, like the Internet.

However, while people enjoy the convenience of mass media and being kept informed of ongoing events, they also find that mass media pries into every corner of their social lives, thereby threatening the individual's "right to be let alone" and causing the unnecessary exposure of private matters to the eyes of public. This is where conflicts of interest may arise.

In order to reconcile the two conflicting rights of the freedom of the press and the individual's right to privacy, laws in different countries have offered a series of doctrines. On one hand, both the freedom of the press and the right to privacy have their constitutional grounds and should be equally cherished. In some circumstances, despite the vagueness of such phrases, the test of "newsworthiness", "public interest" or "public figure" may legally justify the press' intrusion into private life. On the other hand, the law protects individual rights from the press' antennas by interpreting the contents of the privacy dimension flexibly and by applying the above tests to the newsgathering and publication process on a case-by-case basis.

Though the law has employed various approaches in its attempt to balance the conflicting rights, some questions for further discussion remain. For example, what exactly is "freedom of the press"? Does the concept of the "fourth estate" and its role in our society place it in a special position under the law? Should the intrinsic value of privacy merely be closely related with secrecy? How can "public interest" be properly defined? As a genuine reason for publishing the private information, should an "interest" be judged according to the knowledge of an editor or a reasonable person? Does the status of "public figure" denote that a celebrity must sacrifice all of his or her private facts as a byproduct of gaining this fame and public attention?

Numerous theorists and lawyers have been working toward the answers to these long-debated questions. Through a review of such former literature, this thesis intends to identify and explore the interesting and fundamental issues that have arisen through the day-to-day business of journalism and the continuous claims of individuals. The issues studied in this thesis are not an exhaustive listing of all of the present questions; rather, they are illustrative points that require more alternative solutions. Considering the underdeveloped and at times misunderstood theories about the freedom of the press and the right to privacy, the author also expects that this thesis might serve as a reference for the future legislation of mass media and privacy laws in China.

Chapter I Freedom of the Press: A Special Freedom under the Law?

As a core principle of liberty, the freedom of the press has been widely recognized as a means of enabling the gathering, publishing, and disseminating of news and opinions in a democratic polity. "The press can serve an indispensable function in informing the public, criticizing the institutions and practices of a society, exposing abuses in government, and generally acting as a counterweight to established centers of power."[1] This crucial role played by the press, which includes but is not limited to print, broadcasting, and electronic media,[2] has become a key element for the understanding and evaluation of democracy. It is apparent that what an independent, free and vigorous "fourth estate" means to the public.

A. The Watchman Oversteps into the Private Yard

Despite its valid, indeed crucial function, the press sometimes may seem too vigorous to consider its reconciliation with other interests of the society in which it functions.[3] As the public has noticed, the press has frequently contradicted the rights essential to the welfare of the individual. Particularly with the daily evolution of technology, the press is increasingly able to encroach people's right to privacy. Generally speaking, in the newsgathering stage, the press often intrudes on the individual's solitude without prior consent. In the publication stage, the disclosure of embarrassing private facts, the dissemination of inaccurate stories, or the appropriation of another's name or likeness under the umbrella of "newsworthiness" puts the related parties in the spotlight of the social arena.[4]

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[1] Pnina Lahav, ed., *Press Law in Modern Democracies* (New York: Longman Inc., 1985) at i.

[2] By "press", in this thesis, I mean all the media of mass communication as we have known today, such as newspapers, magazines, tabloids, books, radio, broadcast TV, films, documentaries, docudramas, Internet, etc. It is my personal opinion that this term should be interpreted as what it is commonly understood by the general public.

[3] Those interests in tension with freedom of the press include the national security, fair trial, internal order such as the censorship and control of obscenity, copyright, etc. Though these conflicting interests deserve equally important attentions and studies, it is not the mission of this thesis to cover such issues. The freedom of the press in this thesis, unless otherwise elaborated under specific contexts, is generally discussed in aspect of its conflict with individual's right to privacy.

[4] See T. Barton Carter, Marc A. Franklin & Jay B. Wright, *The First Amendment and the Fourth Estate: The Law of Mass Media*, 4th ed. (New York: The Foundation Press Inc., 1988) at 156-59; some scholar also believes there are roughly three categories of invasion of privacy, without

1. When the Press is Uninhibited

The licentiousness of the press extends beyond what can be categorized within the above branches, and the controversial issues in question are far from illuminated debates. For example, the media has followed police officials on raids, with "glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera."[5] It is common practice for the press to report on matters of public interest; however, can the implied consent of the parties therefore be presumed? As "a highly intrusive physical, electronic, or mechanical invasion of another's solitude or seclusion,"[6] "intrusion" includes the use of high-tech equipment to survey, wiretap, and secretly record activities or conversations taking place in the private sphere. The popularization of miniature eavesdropping or photographing equipments has increased the number of illegal interceptions, the content of which might be distorted out of context and depicts the conversants as criminals to blow off people's porches instead of teachers planning a strike for their pay rise.[7]

In terms of publishing embarrassing information, questions of media behavior deserve more attention. Is it necessary to name a rape victim in the coverage of a crime story even if the information is gained through access to the public record?[8] Though such stories are unquestionably without legitimate public concern, should journalists be aware that "the stigma attached to rape really can be reduced by rape education and not by the further victimization of a potential rape survivor"?[9] In programs or columns like "Where Are They Now?," is it legally justified to report in detail the present situation of a person who was accomplished at an early

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mentioning the false light branch because some states in the United States do not recognize the false light as a tort. See Thomas Bivins, *Mixed Media: Moral Distinctions in Advertising, Public Relations, and Journalism* (Mahwah: Lawrence Erlbraum Associates, Inc., 2004) at 140.

[5] *Green Valley School Inc. v. Cowles Florida Broadcasting, Inc.*, 327 So.2d 810 at 819 (Fla.App. 1976).

[6] *Restatement (Second) of Torts*, § 652B (1977).

[7] See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

[8] See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d. 328, 1 Med.L.Rptr. 1819 (1975); see also *Florida Star v. B.J.F.*, 109 S.Ct. 2603, 491 U.S. 524 (1989).

[9] William Borders *et al.*, *The Public, Privacy and the Press: Have the Media Gone Too Far?* (Reston: American Press Institute, 1992) at 44.

age but later tried to live a lonely life after his talents has faded away?[10] Despite the accuracy of the information, is it professionally right to publish it without considering the grievous mental anguish and humiliation the person may suffer from the public scorn, ridicule, and contempt resulting from such merciless exposure? Of course, embarrassing private facts are not limited to these examples; sexual matters, finances, criminal behavior, health history etc. all fall in this category.

In terms of inaccurate stories, the press often disseminates highly offensive false publicity about someone with knowledge of, or reckless disregard for such falsity.[11] Consequently, the involved individual appears before the public in a false position. He may find that his image has been distorted by a cover photo portraying him as one of the frivolous, insensitive, and callous middle-class blacks discussed in the article;[12] or he will be shocked with those embellishment and fictionalization of his story through the addition of unrealistic plots, dialogue, characters, scenes, and endings. Though the press praised his behavior as "a heart-stopping account of how a family rose to heroism in a crisis" of a hostage event, his mind of peace of mind was effected and his relocation in search of seclusion from public attention was finally in vain, not to mention the depiction of nonexistent mistreatment by the convicts of the family members, such as uttering a "verbal sexual insult" at his daughter.[13]

In appropriation,[14] people's names or pictures are published without their permission for commercial or trade purposes in such contexts as advertisements, posters, trademarks, etc. The person whose name or likeness has been appropriated suffers more than economic loss from the implied endorsement. As a private person, a young girl was "greatly humiliated by the scoffs and jeers of persons who recognized her face and picture" after her picture was used without

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[10] *Sidis v. F-R Publishing,* 113 F2d 806 (2nd Cir., 1940).
[11] See *supra* note 6 § 632E (1977).
[12] *Arrington v. New York Times,* 5 Media L. Rep. 2581 (N.Y. Sup. Ct. 1980), *aff'd,* 433 N.Y.S.2d 164, 6 Media L.Rep. 2354 (App. Div. 1980), *aff'd in part,* 449 NY.S.2d 941, 8 Media L. Rep.1351 (N.Y. 1982), *cert. denied,* 459 U.S. 1146 (1983).
[13] *Time, Inc. v. Hill,* 385 U.S. 374, 1 Media L. Rep. 1791 (1967).
[14] In fact, the tort of appropriation is to protect something akin to a property right in one's own use or benefit of personality and image. In essence, it is a right of publicity. But it does not mean this tort committed by media has nothing to do with the invasion of privacy.

her knowledge in a widely circulated flour advertisement.[15] Similarly, a TV news anchor was dismayed to find that the signature greeting used to start his program had been appropriated for the promotion of "The World's Foremost Commodian" portable toilet, as the implied endorsement gave audiences and consumers the erroneous impression that their favorite star was representing this very product.[16]

2. Ethical Concerns

In addition to these legal concerns about the media's behavior as it relates to personal privacy, some issues also straddle the line between law and morality, making them more controversial from an ethical perspective. For instance, is it proper for journalists to lie to interviewees in order to get their story? The intentional misrepresentation of a journalist's identity usually occurs in investigative reports, especially undercover ones. To aid health officials in the crackdown on quackery in their region, two journalists posed as a couple seeking medical advice and were admitted to the home clinic of the plaintiff of *Dietemann v. Time, Inc.*,[17] where the diagnosis process was secretly recorded as evidence. In response to the plaintiff's claim of invasion of privacy, the court said, "one who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves."[18] To this day, the court has not changed its attitude towards deceptive conduct in the media's newsgathering process. In a similar case, the court held that a reporter entering a medical lab through misrepresentation to surreptitiously videotape inaccurate medical tests did not constitute fraud, because the lab manager inevitably risked its test information by imparting message to strangers.[19] In the wake of such decisions, can it be understood as morally right for the press to cheat the "cheats"? Will such behavior harm the press's credibility in the long run?

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[15] *Roberson v. Rochester Folding Box Co.*, 63 N.E. 442 (NY.Y 1902).
[16] *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F. 2d 831, 9 Media L. Rep. 1153 (6th Cir. 1983).
[17] 449 F.2d 245 (9th Cir. 1971).
[18] *Ibid.* at 249.
[19] *Medical Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806 (9th Cir. 2002).

These questions continue in occasions of ambush interviews and reports of accidents or tragedies. In the former, interviewees are trapped suddenly outside their houses or in the streets by aggressive journalists and are forced to answer unexpected interrogations and control their image in front of the camera; in the latter, a TV reporter may stick a microphone in the face of a grieving relative of a suicide or accident victim solely to capture the emotional moment on tape. Photojournalism confronts the same issues. Should some sensitivity or discretion be employed in the decision to publish a photo of an accident scene, such as a mother sunk to her knees in prayer beside the bloody body of her son, hit to death by a car in front of their home?[20] Does the publication's purpose of educating careless drivers in order to prevent future accidents indeed outweigh the emotional distress that the mother will again be forced to endure?

The press' zeal in news-gathering may also jeopardize the safety of its subjects. Driven by the enormous profits arising from celebrity news, the "paparazzi" does not merely aggravates their photographic subjects; in some circumstances, they endanger the lives of the public figures they are trying to reach, as was proven in the tragic death of Princess Diana. So, how important is it to get information? Is it acceptable for a journalist to pursue his or her goal by any possible means and at all costs?

When these troublesome questions begin to emerge before the public, people become confused about the media's influence on their daily lives. Their confusion has been greatly intensified by the present commercialization of the press. More importantly, the press, once a vital watchman and crucial disseminator of important information, has taken on a different function. With this watchman's aggressive steps into the private sphere, people cannot help asking: Is privacy dead?[21] What is exactly the freedom of the press? How free can the press truly be?

B. Behind the "Fourth Estate": For Whose Right to Know

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[20] See Philip Patterson & Lee Wilkins, *Media Ethics: Issues & Cases*, 4th ed. (New York: McGraw-Hill Higher Education, 2002) at 130.

[21] Philippa Strum, *Privacy: The Debate in the United States since 1945* (Orlando: Harcourt Brace & Company, 1998) at 198.

Tradition endows the press with a special mandate to be the "watchman," "watchdog," or "guardian" of the government, to represent the public interests of those being governed, and to keep people reasonably informed of the "marketplace of ideas." It is understandable that "a vigorous democracy cannot settle for a passive citizenry that merely chooses leaders and then forgets entirely about politics...some kind of effective public deliberation is required that involves the citizenry as a whole."[22] Thus, the term "fourth estate" is used today to refer to the mass media as a powerful watchdog in liberal democracy, revealing abuses of state authority and defending the democratic rights of citizens. It is commonly accompanied by an assumption that the media, in order to act as fourth estate, must be independent of the state.

To date, this fundamental value of the press has been enshrined in the constitutions of numerous countries, and in international instruments like the *Universal Declaration of Human Rights.* [23] However, this does not necessarily mean that the freedom of the press is self-evident. The legal recognition of the press and guarantee of its status are little more than abstract doctrines as elusive as the freedom of the press itself. Despite such items as the free-speech-and-press clause in the United States Constitution, "Congress shall make no law...abridging the freedom of speech, or of the press",[24] or under Canada's fundamental freedom provision, "everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,"[25] the freedom of the press is too ambiguous to define in simple words. Accordingly, such conceptual ambiguity may have the following effects: first, though legally recognized and protected, the freedom of the press will be a meaningless concept without any operative interpretation; second, the press may be granted a privileged position under the law, with constitutional protection broad enough to

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[22] Benjamin Page, *Who Deliberates? Mass Media in Modern Democracy* (Chicago: University of Chicago Press, 1996) at 5.

[23] Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers", *Universal Declaration of Human Rights*, GA Res. 217(III), 10 December 1948.

[24] U.S. Const. amend. I.

[25] *Canadian Charter of Rights and Freedoms*, 1982, c. 1, s. 2.

shield it from any interference or liability arising from any contradiction with other interests like, the right to be left alone.

The survival ability of the press, which its prosperity and vigor make self-evident, renders the first question an unnecessary concern. Thus, it is the second that deserves our close observation. As mentioned earlier, today's press is becoming so powerful that it has cast a shadow on people's right to be left alone. Is today's manifestation of the "fourth estate" the one that people used to assume? Does the freedom of the press guarantee unfettered liberty at the cost of the individual's right to privacy?

1. The Value of the Press

A brief review of Anglo-American press law history may help us track the answer. In England, the early stages of the press were coupled with state repression in order to secure the power of the Crown and the Parliament. In England, three prior restraints, the licensing of the press, the doctrine of constructive treason, and the law of seditious libel, were commonly employed for such purposes. Without prior approval, any newspaper publication could be deemed a criticism towards the Crown; therefore, in the 17th and 18th centuries, England's "convictions for seditious libel ran into hundreds."[26] While the English experience was also practiced in colonial America and Canada, such convictions were relatively rare. Any criticism of an assembly or its members was likely to be regarded as a seditious scandal against the government, and was punishable as a "breach of privilege."[27] Some philosophers challenged such systems in these countries, contending that such a stronghold on the press could only lead to tyranny, rather than to the guarantee and realization of the citizen's life, liberty, and property. For example, Sir William Blackstone observed: "[To] subject the press to the restrictive power of a licenser [is] to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of

[26] See Barton, *supra* note 4 at 25.
[27] Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985) at 14.

all controverted points in learning, religion, and government." [28] Likewise, governments that are restrictive in this manner will likely end up with disorder and chaos, because "that repression breeds hate; that hate menaces stable government."[29] In such an environment, how can common peace and good order be achieved? Thus, the guarantee and protection of freedom of speech and a free press gradually made it into the legislative agendas of numerous countries to insure the free flow of ideas to discuss and discover political truths, and to facilitate self-fulfillment through the exercise of such liberty.

The press, which sought to express democratic ideas and beliefs on behalf of people in their darkest days, has found its position under the constitutional law of each country and was liberated from all the shackles imposed before. More importantly, because it can play a leading role of promoting the ideas of an informed citizenry, the freedom of the press has become a synonym for people's freedom of speech. Indeed, if the people were granted the inalienable right of free speech, but denied an effective instrument to exercise it, that freedom would be rendered meaningless and people's capacity to acquire knowledge of the government and officials would be greatly handicapped. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole."[30] Without information regarding the operation of state power, the public can neither monitor government business to prevent any abuse of power or infringement upon fundamental citizen rights, nor vote in a fully informed and intelligent manner to elect representatives according to their interests. This is why "knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives."[31] Hence, as a natural instrument for communication, the press

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[28] Sir William Blackstone, *Commentaries on the Laws of England (1765-69)* (T. Cooley 2d rev. ed. 1872) at 151-52.
[29] *Whitney v. California*, 274 U.S. 357 at 376 (1927).
[30] *Bose Corp. v. Consumers Union*, 466 U.S. 485 at 503-04 (1984); See also *Hustler Magazine v. Falwell*, 485 U.S. 46 at 50-51 (1988).
[31] James Madison, Letter to W.T. Barry, August 4, 1822.—*The Writings of James Madison*, ed. by Gaillard Hunt, vol.9 (1910) at 103.

assumes this mandate of informing the governed, because "the people have no mode of obtaining it [the knowledge of public affairs] but through the press."[32]

With the assumption of this great mandate, the press taken on the role of spokesperson for the people, taking for granted that every active effort it makes is for their sake. The logic translated into a fierce defense of the concept of "the public's right to know," as it arose in the years immediately following World War II when the US government again sought to control in response to national security concerns. Kent Cooper, executive director of the Associated Press in the 1940s and coiner of the phrase "right to know," argued that the citizen should be entitled to have access to fully and accurately presented news, and that since newspapers and broadcasters served the people this right, any method that curbed delivery of any information essential to public welfare and enlightenment would restrain not only the function of the press but also the freedom of citizen; therefore, he argued, "all channels of news must be kept open with equality of access to information at the source."[33] Cooper's arguments at once depicted the political role of the press in upholding the public's right to know, and triggered new discussions of an old liberty, the freedom of the press.

Unlike in the past, the press' emergence as the people's representative has brought about a tricky reasoning for the press to stand before the public, that is, if we do it, we do it for you. Under the cloak of "the public's right to know," the press has made amazing progress and won substantial victories in claiming its freedom.[34] For example, in the United States, the *Freedom of Information of Act* 1974 ensured both the government affairs "in the sunshine" and the statutory rights of access to public records and proceedings. The presumable capacity of the

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[32] U.S., *Minority Report on Repeal of the Sedition Act, Annals of Congress,* 5th Cong. (1799) at 2987.

[33] See Kent Cooper, *The Right to Know: An Exposition of the Evils of News Suppression and Propaganda* (NewYork: Farrar, Strauss and Cudahy, 1956), at xii-xiii, 180.

[34] Interestingly, the freedoms of the press recognized today fall into five broad and discernible components of the "public's right to know", defined by Wiggins, "(1) the right to get information; (2) the right to print without prior restraint; (3) the right to print without fear of reprisal not under due process; (3) the right of access to facilities and materials essential to communications; and (5) the right to distribute information without interference by government acting under law or by citizens acting in defiance of the law" (James R. Wiggins, *Freedom or Secrecy* (New York: Oxford University Press, 1956) at 3-4). This explains how the press can be both a concept inventor and a beneficiary.

press as trustee of the public's right to know was reiterated in the *Pentagon Papers* case, which discussed the press' freedom to publish,[35] and *The New York Times v. Sullivan*, which elaborated upon the standard of what kind of political commentary and criticism on the conduct of officials would constitute libel.[36]

2. Unveiling the Mask of the Old Friend

Undeniably, the press has indeed carried the torch on people's way to liberation and democracy. However, the passage of time is marking subtle changes in this "fourth estate." The mass commercialization of the press began as early as the 1920s and 1930s, with the booming development of radio and television broadcasting.[37] As a result, ownership of mass media outlets has fallen into fewer and fewer hands, and the pursuit of maximizing profit has dominated most of the media's activities. A foreseeable consequence of an industry driven by the pursuit of profit rather than that of information is, when access to public information and the publication of governmental affairs are no longer a question, the media will need something fresh and unique to maintain their audiences. Intruding into the lives of individuals is one method of gathering news and stories to satisfy the public's curiosity partly because the exposure of private facts can even meet others' desires of prying. Frankly speaking, the pursuit of profit does illuminate the media's unbridled intrusion into private life; however, the media may defends and justifies its invasion of privacy with the First Amendment and the concept of the "right to know" it inferred therefrom.

In fact, the suspicion about the press' alleged role as the public's spokesperson emerged long ago. An American justice pointed out, "The so-called 'right of the public to know' is a rationalization developed by the fourth estate to gain rights not shared by others...to improve its private ability to acquire information which is a raw asset of its business....The Constitution does not appoint the fourth estate the spokesmen of the people. The people speak through the elective process and through the individuals it elects to positions created for

[35] *New York Times Co. v. United States*, 403 U.S. 713 (1971).
[36] *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[37] See Steve M. Barkin, *American Television News: The Media Marketplace and the Public Interest* (New York: M. E. Sharpe, Inc., 2003) at 18-34.

such purpose. The press has no right that exceeds that of other citizens."[38] Furthermore, some Canadian scholars argued that since the phase of democratic revolution was over, it is "harder to believe that the press possesses and acquits the same democratic mandate it once did." Therefore, "it is no more absurd to connect their work to democracy than to connect the work of lawyers to the attainment of justice."[39]

Others even contended that the motives of the press should be taken into consideration when interpreting its behavior in a free market economy. US scholar Alexander Meiklejohn, for instance, holds the radical opinion that the radio is not entitled to First Amendment protection because "it is not engaged in the task of enlarging and enriching communication. It is engaged in making money."[40] Anomalous as it might be, Meiklejohn actually intends to arouse attention to the rights and interests of the audience, a group often neglected during the press' claim of freedom. I also agree, in terms of the individual's right to privacy, that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[41] If there is a right to know,[42] it is first a right belonging to the public, the real subject who shall decide for themselves the information in which they are genuinely interested; furthermore, shall decide both the existence and the extent of their own need to know. The press should be aware that "vindicating the 'public's right to know' does not require that all specialized, private, and relatively inaccessible information be 'made public.' It demands, rather, that the public have access to those facts necessary for public judgment about public things," especially to learn and master the art of political judgment.[43]

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[38] *Dayton Newspapers, Inc. v. City of Dayton,* 259 N.E.2d 522 (1970), aff'd, 274 N.E.2d 766 (1971).

[39] Robert Martin & G. Stuart Adam, *A Source Book of Canadian Media Law,* 2nd ed. (Ottawa: Carleton University Press, 1994) at 162-63.

[40] Alexander Meiklejohn, "Free Speech and Its Relation to Self-government", in *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965) at 87.

[41] *Red Lion Broadcasting Co. v. Federal Communications Commission,* 89 S.Ct. 1794 at 1806 (1969).

[42] For more information about whether there is a "right to know", see Everette E. Dennis & John C. Merrill, *Media Debates: Issues in Mass Communication,* 2d ed. (New York: Longman Publishers USA, 1996) at 44-54.

[43] Bathory & McWilliams, "Political Theory and the People's Right to Know", Government Secrecy in Democracies 3-21 (Galnoor edit. 1977) at 8.

While the press can maintain its argument as an agent to serve people's right to know, it should take caution that such a misleading concept could be used as a shield, as an excuse to pursue news and stories by intruding into the private sphere for the sole purpose of sensationalism. The right to know should not be distorted, and the right to know should never cost the privacy of the individual. A wise "fourth estate" will always bear this principle in mind.

C. Responsibility Does Matter: Free Press as Means Instead of End

From a historical perspective, it is clear the contention of the press that its purpose of serving the public's right to know trumps people's right to privacy is inherently flawed. The press has made a vital contribution to the liberation movement, mostly in the name of the people, but one unavoidable fact is that the press has been attempting to claim a privileged position under the law, either by interpreting the legislative intention of the drafters of the constitutions such as *the U.S. First Amendment* or the *Canadian Charter of Rights and Freedoms*, or by inventing some conceptual justification to define the freedom it should enjoy. Nevertheless, while it represents a controlling power of the ruling few, the press itself has become one power among others that may endanger the rights of the individual,[44] for example, the right to privacy, despite the fact that such rights are equally protected as the freedom of the press in the constitution. The press' abuse of power into private sphere would constitute a serious erosion of its trustworthiness, the basis for its gaining its status as "watchdog," "watchman," or "fourth estate." In response, some difficult questions arise: Does the free speech-and-press clause grant more freedom to the press than to individuals? Who shall control this controversial controller? Can't the freedom of the press and right to privacy co-exist and supplement each other?

1. Re-examination of the Law

[44] Some scholars have noticed this subtle change, "The First Amendment, usually though of as a vehicle by which otherwise powerless people can gain power, became another one of the assets held by the powerful." M. Tushnet, "Corporations and Free Speech," in D. Kairys ed., *The Politics of Law* (New York: Pantheon Books, 1982) at 253.

In the past, the press has concentrated too much on interpreting freedom under the constitution in a manner that allows it to ignore the idea that rights and responsibilities should ever remain inseparable. Though the literal analysis of constitutional texts is essential, the press should go far beyond the game of wording and objectively observe the fundamental values reflected therein.

In the United States, by stating that "Congress shall make no law... abridging the freedom of speech or of the press," the framers actually aimed to protect the means through which an individual can protect himself against tyranny and ultimately achieve the pleasure and happiness of life. In their attempts to unfold the framers' intentions, some scholars agreed that "the unlimited guarantee of the freedom of public discussion [protects the speech] of a citizen who is planning for the general welfare,"[45] and that free expression nurtures and sustains the self-respect and autonomous self-determination of the mature person, without which the life of the spirit is meager and slavish.[46] So, what fundamental difference does distinguishing "freedom of the press" from "freedom of the speech" make? In my opinion, such distinctions would be pointless in the sense that each serves to facilitate the individual's pursuit and realization of a happy life. From this perspective, the "institutional press" is no more than an instrument for public welfare and shall, to some extent, be subject to the interest of the members of society. The press clause does not imply special status in the constitution. Rather, it is "complementary to and a natural extension of Speech Clause liberty."[47] Obviously, the press has no more privilege than individuals under the law. For instance, in *Pell v. Procunier* and *Saxbe v. Washington Post*,[48] the court refused to grant the media access to state and federal prisons to interview specific prisoners on the grounds that the media had no more rights beyond those which can be enjoyed by the general public. The freedom of the press has merited special

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[45] Meiklejohn, *supra* note 40 at 39.
[46] See David Richard, "Free Speech and Obscenity Law: Towards a Moral Theory of the First Amendment" (1974) 123 U. Pa. L. Rev. 45, 62.
[47] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), Justice Burger, concurring opinion.
[48] *Pell v. Procunier*, 94 S.C.t. 2800 (1974); *Saxbe v. Washington Post*, 94 S.Ct. 2811 (1974).

mention simply because it has been more often the object of official restraints and because it is regarded as "the best instrument for enlightening the mind of man."[49]

In Canada, section 2(b) of the *Charter of Rights and Freedoms* declares, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" is a fundamental freedom. Though this provision must be given a broad and purposive interpretation, the purpose of the guarantee is quite different from the American approach, which turns the abridgement of the freedom of the press into a fully elaborated philosophy. Instead, the language of section 2(b) and the freedoms it protects flow almost directly from Mill's *On Liberty*, in which he argued that "the peculiar evil of silencing the expression of an opinion is, that is robbing the human race; posterity as well as the existing generation,"[50] and only through the liberty of thought and expression facilitated by the press is the individual's intellectual and personal development enhanced. Therefore, from its very beginning, the Canadian *Charter* has always emphasized the protection of individual's rights and freedoms that should be enjoyed in a democratic society. Section 2(b) confirms that the rights enshrined therein belong to everyone and anyone, and rejects any such special status for the press as a social institution with unique powers. By including the freedom of the press within this provision, the Charter is no more than specifically acknowledging the role of the media as a critical element in informing the public and making possible true freedom of expression on public affairs. In other words, the freedom of the press and other media is an end in itself to ensure individual's autonomy.[51]

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[49] Thomas Jefferson, Letter to M. Corey, 1823, Washington ed. vii, 324. Online: Jefferson Digital Archive, http://etext.virginia.edu/jefferson/.

[50] John Stuart Mill, *On Liberty*, ed. by David Bromwich & George Kateb (New Haven: Yale University Press, 2003) at 87.

[51] Besides the constitutional analysis, some scholars have noticed that "The contrast between American and Canadian law about freedom of press is: Courts in US have turned the First Amendment's provisions forbidding the abridgement of freedom of the press into a fully elaborated philosophy. By contrast, justices on Canada's Supreme Court have only hesitatingly elaborated a theory, and then only within the rather limited framework provided by the *British North America Act*." Robert Martin & G. Stuart Adam, *A Source Book of Canadian Media Law*, 2nd ed. (Ottawa: Carleton University Press, 1994) at 159.

In fact, section 2(b) of the Canadian *Charter* clarified the instrumental value of the press in enhancing personal fulfillment and democracy. It also corrected the wrong impression that the press of the freedom was synonymous with freedom of speech or expression by the people. As some scholar has noticed, the freedom of speech or expression exists "in all its guises and forms—good and bad, crass and erudite,"[52] so certain interests must be protected against the abuse of free expression such as the invasion of privacy, and the freedom of the press must be interpreted from the perspective of responsibility or accountability.

For example, Louis Hodges summarized the media's function into four primary categories: political, educational, mirroring, and bulletin board. He believes it is the media's implied responsibility, rather than right, to be the public's eyes and ears to check whether the government and public officials are acting in the best interests of the people. Moreover, the media shall "mirror" the stories of people to "remind us of the fragility of life, evoke in us a deepened sense of compassion," and provide a public forum for the "marketplace of ideas," so that it can educate people how to "make daily life better, simpler, safer, more comfortable, and often more enjoyable."[53] In addition, the judiciary has also recognized that the press should duly exercise the freedom granted to it under the constitution to serve societal interests, such as "informing and educating the public, offering criticism, and providing a forum for discussion and debate."[54] Actually, Louis' interpretation criticized and further denied the libertarian model of the media, which merely highlighted its watchdog role without considering the possibility of the media's abuse of freedom and irresponsible behavior. This is where the social responsibility model of media works: "the press must also be accountable. It must be accountable to society for meeting the public needs and

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[52] Brian MacLeod Rogers, "Freedom of the Press under the Charter," in *Constitutional Freedom of Expression and the Media: Testing the Limits* (Toronto: Canadian Bar Association-Ontario, 1994) at 176.

[53] Louis W. Hodges, "Defining Press Responsibility: A Functional Approach," *Responsible Journalism*, ed. by Deni Elliott (Beverly Hills: Sage, 1986) at 27-29.

[54] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 at 781 (1978).

for maintaining the rights of citizens and the almost forgotten rights of speakers who have no press."[55]

2. Legal Duty and Media Ethics

The concept of media responsibility eventually broke the myth that constitutional status can immunize mass media from any liability arising from its irresponsible behavior, such as the invasion of privacy. Freedom of the press is not unconditional. Rather, it must perform its duties to society at large through the external control of the law and the self-regulation of its own professional ethics.

Regarding the external control of the law, there have been sufficient judicial decisions to define the media's responsibility. In the United States, *Time, Inc. v. Hill* dealt with a family's experience of being held hostage by convicts being made public in a fictionalized play years after the fact. Justice Harlan contended that a "reasonableness" standard should be applied to the media in such situations, since "other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The 'freedom of the press' guaranteed by the First Amendment...cannot be thought to insulate all press conduct from review and responsibility for harm inflicted....I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it."[56] In *Miami Herald v. Tornillo*, Justice White held: "The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen."[57] In Canada, in *Canadian Newspaper Co. v. Isaac*,[58] the press was held to have no greater right than other members of the public to compel the disclosure of information, thus illustrating the principle that the press is to be treated on an equal footing with other members

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[55] Commission on Freedom of the Press, *A Free and Responsible Press*, ed. by Robert D. Leigh (Chicago: University of Chicago Press, 1947) at 18.
[56] *Supra* note 13, Justice Harlan, concurring/dissenting.
[57] *Miami Herald v. Tornillo*, 94 S.Ct. 2831 at 2842 (1974), Justice White, concurring.
[58] (1988), 63 O.R. (2d) 698.

of the general public.[59] In *Manitoba (Attorney General) v. Groupe Quebecor Inc.*,[60] the court held that the freedom of the press is not absolute, but must be reconciled with the rights of others, including the rights of persons charged with murder to a fair trial. The newspaper publication of the criminal records of persons arrested on murder charges has constituted contempt of court, despite the disclosure of such information by police. All these decisions have informed the press and journalists that, although they may be actively exercising the right to know for the public good, their rights are the same as those of the ordinary citizens; therefore, any attempted invasion of the private sphere necessarily incurs liability at law.

Another aspect of media responsibility is the discussion of journalism's ethical behavior. In developing the five canons with which responsible journalism should comply, Lambeth made special arguments on "humanness" and "stewardship." For humanness, Lambeth believed that journalists bear a natural duty to "give assistance to another in need...do no direct harm, prevent harm." For stewardship, he thought the media has a general responsibility to "manage...life and property with proper regard to the rights of others."[61] Accordingly, some professional organizations have recognized such values. For example, the *American Society of Professional Journalists* has one express privacy protection provision in its *Code of Ethics*, reminding media workers to "recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention," and that "gathering and reporting information may cause harm or discomfort"; therefore, a conscientious journalist shall "treat people with dignity, respect and compassion." He further held that "only an overriding public need can

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[59] The United States also has similar decisions which neither afforded more protection to the press than non-media claimants, nor recognized that the media should have special rights of access to information that were not available to the public. See *Branzburg v. Hayes*, 408 U.S. 665 at 691-92 (1972); *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749 at 773 (1985).

[60] (1987), 59 C.R. (3d) 1, 37 C.C.C. (3d) 421, 31 C.R.R. 313, [1987] 5 W.W.R. 270, 47 Man. R. (2d) 187, 45 D.L.R. (4th) 80 (C.A.)

[61] Edmund B. Lambeth, *Committed Journalism: An Ethic for the Profession* (Bloomington: Indiana University Press, 1986) at 35-37. The other three ethical canons that a journalist shall follow are telling the truth, justice and autonomy.

justify intrusion into anyone's privacy."[62] In the United Kingdom, the *Press Complaints Commission* (PCC) *Code of Practice* has stated that "everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent. It is unacceptable to photograph individuals in private places without their consent."[63]

Following the rational interpretation of freedom under the framework of legal responsibility and ethics, the press can actually perform its old duty as a watchdog on governments while maintaining a good degree of public trust in the "fourth estate." In this sense, the press, with responsibility rather than privilege in mind, can not only enhance people's right to know, but also protect the privacy of the individual. For instance, the press can keep an eye on conduct, either governmental or otherwise, that might jeopardize personal privacy; furthermore, the press can even launch public debate about better solutions for securing the right to be left alone. Similarly, the press may deny any third party requests to disclose the sources of information, particularly those related to corruption, the abuse of power, and the encroachment of the rights of the individual. In this way, the functions of the press do not necessarily oppose privacy. The press is capable of helping, rather than hindering, the privacy of the individual, leading one scholar to wonder "Why journalists can't protect privacy?"[64]

Yes, the freedom of the press and the right to privacy may co-exist, as long as the press acknowledges that its freedom is not for its own sake but rather for the welfare of the citizen whom it serves. The freedom of the press can supplement the right to privacy too, as long as it is remembered that the press "itself must be endowed with self-control, wisdom and responsibility."[65] The press, a guardian at work, would be more conscientious, should it know the dimension of privacy further.

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[62] *Society of Professional Journalists' Code of Ethics*, online: http://www.spj.org/ethics_code.asp.
[63] *Press Complaints Commission Code of Practice*, 2004, article 3, online: http://www.pcc.org.uk/cop/cop.asp.
[64] Anita L. Allen, "Why Journalists Can't Protect Privacy" in Craig L. LaMay ed., *Journalism and the Debate Over Privacy* (Mahwah: Lawrence Erlbraum Associates, Publishers, 2003) at 69.
[65] William H. Marnell, *The Right to Know: Media and the Common Good* (New York: The Seabury Press, 1973) at 4.

Chapter II Right to Privacy: Unfolding the "Right to be Let Alone"

The "right to privacy" is a term used frequently in the realm of law and everyday life as a shield to protect individuals from undesirable exposure in public life and to protect private information. Nevertheless, the exact meaning of the term is not self-evident. First, there have been some heated legal debates regarding whether the concept of "right to privacy" really exists or whether it has a distinct moral interest to be differentiated from other statutory rights. Second, the term "privacy" remains an elusive and controversial notion, whose vagueness and ambiguity in turn lead to a multitude of diverging definitions of "right to privacy," to the extent that earlier researchers observed, "the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."[66] Compared with the "freedom of the press," the "right to privacy" is more problematic in its conceptual and value analysis. A clarified definition is thus crucial for the study of the conflicts and balancing of these two rights.

A. Right to Privacy: A Right without Distinguishing Features?

The "right to privacy" is a contemporary concept dating back just over one hundred years ago. In 1883, irked by tabloid gossip about his daughter's wedding, Samuel Warren discussed this "yellow journalism"[67] situation with his colleague Louis Brandeis. Their article, "The Right to Privacy", published in *Harvard Law Review* in 1890, was a direct response to the unfair and prying treatment of the press into his family life. In the article, Warren and Brandeis accused the press of "overstepping in every direction the obvious bounds of propriety and of decency," and aimed to "consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual." [68] To this, they found none. The defamation laws of slander and libel are in their nature material rather than spiritual; this branch of the law recognizes no principle upon which

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[66] Judith Jarvis Thomson, "The Right to Privacy" (1975) 4 Phil & Pub Aff. 295.

[67] "Yellow Journalism" is a type of journalism in which sensationalism triumphs over factual reporting to increase circulation and readership heavily. The term derives from a color comic strip character "The Yellow Kid" who appeared in early newspapers of this type in 19th United States, and the "yellow journalism" often leads to stories being twisted into the forms best suited for sales by the hollering newsboy.

[68] Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4 Harvard L. Rev. 196-97.

compensation can be granted to victims for mere injury to their feelings, such as mental suffering or loss. By examining court decisions, they finally concluded that "the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."[69] Should there be such a right, a principle may be invoked to protect the privacy of each individual against any invasion either by the all-too-enterprising press, the photographer, or by the possessor of any other modern device for recording or reproducing scenes or sounds. Should there be such a right, the intimacies of the "domestic circle" would be safeguarded from prurient curiosity and gossip, and any mental suffering or pain caused thereby would be redressed. In short, Warren and Brandeis contended that "the growing abuses of the press made a remedy upon such a distinct ground essential to the protection of private individuals against the outrageous and unjustifiable infliction of mental distress,"[70] and that there is an urgent need for a right to privacy.

1. The Debate of the "Right to Privacy" in the United States

Though Warren and Brandeis' concept of "right to privacy" had little immediate effect upon the law after its publication,[71] it gradually became a leading dispute later in the United States, which Judge Biggs described as "a haystack in a hurricane."[72] Among these disputes, the most controversial question is: is there a distinct right of privacy at all? Or, could the privacy claim be conceptually separable from other claims? In answering these questions, the skeptics and supporters launched a debate at the levels of both constitutional and tort law.

At the level of constitutional law, some skeptics challenge whether the US Constitution contains a right to privacy, arguing that since the Constitution is

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[69] *Ibid*, at 205.
[70] William L. Prosser, "Privacy" (1960) 48 Cal L. Rev. 384.
[71] It was not until 1903 that New York adopted a statute, stipulating the right of privacy shall protect privacy interests in an individual's name and likeness. Two years later, the Supreme Court of Georgia became the first U.S. state that explicitly recognize a right of privacy in its tort law in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (1905).
[72] *Ettore v. Philco Television Broadcasting Co.*, 229 F. 2d 481 (3rd Cir. 1956).

silent on such a right and has never specifically mentioned a "right to be let alone" as it has on "freedom of the press" or "free speech," the privacy claim lacks a constitutional basis. However, if the right to privacy was denied solely because it does not appear in the Constitution, a number of fundamental rights should be refused on the same grounds, namely, the right to marry and the right to the pursuit of happiness. Justice Douglas has offered a more persuasive elaboration of this question in *Griswold v. Connecticut*. He states, "specific guarantees in the *Bill of Rights* have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy,"[73] and the right to privacy, thought not to be mentioned anywhere in the Constitution, is actually contained in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments, which are meant to give reality to an even more fundamental right emanating "from the totality of the constitutional scheme under which we live."[74] By these statements, he reconfirms that the maker of the Constitution conferred the "right to be let alone-the most comprehensive of rights and the right most valued by civilized men."[75]

At the level of tort law, skeptics argue that the privacy claims can be totally reduced to property interests, or personal rights not to be touched or observed without consent. It has been argued that "any right to privacy will be a derivative one from other rights and other goods,"[76] so "there is no need to find the that-which-is-in-common to all rights in the right to privacy cluster and no need to settle disputes about its boundaries."[77] In other words, the right to privacy is a second-order right which is not essential to the maintenance of a free society.[78] The logic of such skepticism is that each right in the cluster of the right to privacy can be explained by "another right," such as property rights or rights over persons.

It is this concept of "another right" that is genuinely violated. For example, Judith Jarvis Thomson argues that if "someone looks at your pornographic picture

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[73] *Griswold v. Connecticut*, 381 U.S. 479 at 484 (1965).
[74] *Ibid*, at 494.
[75] *Olmstead v. United States*, 277 U.S. 438 at 478 (1928), Justice Brandeis, dissenting.
[76] H. J. McCloskey, "Privacy and the Right to Privacy" (1980) 55 Philosophy 37.
[77] Thomson, *supra* note 66 at 313.
[78] See Richard A. Epstein, "Privacy, Property Rights and Misrepresentations" (1978) 12 Ga. L. Rev. 463.

in your wall-safe, he violates your right that your belongings not be looked at, and you have that right because you have ownership rights--and it is because you have them that what he does is wrong."[79] William Prosser also agrees that the interest being protected under the right to privacy is not distinct. By examining more than 300 cases, he concluded that the loss of privacy could be divided into four branches rather than one: "Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; Public disclosure of embarrassing private facts about the plaintiff; Publicity which placed the plaintiff in a false light in the public eye; and Appropriation for the defendant's advantage, of the plaintiff's name or likeness."[80] However, there was no single characteristic in common to each branch, and the right to privacy was incoherent.

Supporters of the right to privacy refute such arguments, contending that the right to privacy cannot be named derivative merely because other rights are in whole or in part the expression of the right to privacy, for that logic would also call for the abandonment of criminology, for example, since it is a derivative of sociology and psychology, etc. Even if the right to privacy was a so-called "secondary right," as opposed to a primary right, it is still a distinct grab-bag of property and personal rights in that it can resolve the problems of difficult moral conflicts.[81] Some supporters submitted and analyzed what they called a common interest under the privacy claim, that it is "human dignity and individuality" that "distinguish the invasion of privacy as a tort from other torts."[82] Moreover, allowing the tort of invasion of privacy would afford a flexible category of legal protection to people in those situations not solved by traditional torts, and it would help courts deal with the arising threats to privacy.[83]

2. The Development of Right to Privacy in Canada

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[79] Thomson, *supra* note 66 at 313.
[80] Prosser, *supra* note 70 at 383.
[81] See Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood" (1976) 6 Phil & Pub Aff. 27-28.
[82] Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L. Rev. 1003.
[83] See Paul. Freund, "Privacy: One Concept or Many?" in J. Roland Pennock & John W. Chapman ed., *Privacy: Nomos XIII* (New York: Atherton Press, 1971) at 182.

In Canada, the recognition of "right to privacy" in both tort law and constitutional law is a gradual process. Canada's engagement with the right to privacy is not the radical debate that is occurring in the United States; rather, Canada is taking gradual steps to accommodate this concept in its *Charter of Rights and Freedoms* and tort law categories. This gradual recognition and protection of the right to privacy is largely determined by Canada's close relationship with the English common law system.

In history, the *British North America Act* named Canada part of the English empire;[84] thus, British legal traditions had a great influence on Canadian laws. It is well known that English law has not historically recognized a general right to personal privacy,[85] nor is there a written constitution enshrining the right thereto. The judicial attitude in Britain held that the right to privacy "has so long been disregarded here that it can be recognized only by the legislature."[86] Before the *Constitution Act* of 1982, such English common law principles and traditions made the Canadian judiciary reluctant to recognize a broad right to privacy.

Through the enactment of the *Canadian Bill of Rights* in 1960, the judiciary broadened the protection of individual rights by interpreting the provisions in the statutes, such as "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due

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[84] *British North American Act*, 1867.

[85] *Kaye v. Robertson* [1991] FSR 62; applied in *Khorasandjian v. Bush* [1993] QB 727; confirmed as the law prior to entry into force of the *Human Rights Act* 1998 in *Secretary of State for the Home Dept v. Wainwright* [2001] EWCA Civ 2081. Some scholars observed that "English law gives little clear recognition of privacy rights outside the fields of misuse of information, surveillance and intrusion." (Richard Clayton & Hugh Tomlinson, *Privacy and Freedom of Expression* (Oxford: University Press, 2001) at 35.) It is true that even with the passage of *Human Rights Act* 1998, which incorporates the *European Convention on Human Rights*, particularly its article 8 of a right to respect for "private and family life, home and correspondence", into its domestic law, the United Kingdom still struggles to recognize a general right to privacy, though in some occasion it may agree with the existence of such a right. For example, *in Douglas v. Hello! Ltd.* [2001] 2 WLR 992 at para 126, 1025E, Sedley LJ said: "it [the law] can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy." Also, in *Venables v. News Group Newspapers* [2001] 2 WLR 1038, such a right to privacy was also confirmed. However, in most cases, the courts will reject or give restrictive application to the privacy claim, as proved in *R (Morgan Grenfell) v. Special Commissioners* [2001] STC 965, *A-G's Reference (No. 3 of 1999)*, [2001] 2 WLR 56, *Poplar Housing Association v. Donoghue* [2001] EWCA Civ 595.

[86] *Ibid.* at 71.

process of law."[87] However, unlike the *Bill of Rights* in the United States, the *Canadian Bill of Rights* is not part of the Canadian Constitution. It is a Federal statute whose "lack of constitutional status combined with the Supremacy Doctrine [leaves] the judiciary with little power to broaden the scope of Canadian civil liberties."[88] The right to privacy is one such liberty.

It was not until the passage of the *Constitution Act* of 1982, which incorporated the *Canadian Charter or Rights and Freedoms*, that Canada began to entrench the protection of right to privacy in its constitution, applying it to matters of death, arrest, detention, physical liberty, and other issues related to "life, liberty, and security of the person."[89] With such a constitutional provision, the Canadian judiciary was able to abandon the "frozen right" approach and adopt a more expansive approach when interpreting the right to privacy to protect civil rights.[90] Though an explicit term of "right to privacy" is absent from the Canadian Constitution, there is no radical questioning voice about the existence of such a right from either the judiciary or academia. In *Hunter v. Southam Inc.*,[91] Justice Dickson held that section 8 of the *Charter*, which protects individuals from unreasonable search or seizure, was the constitutional embodiment of the "right to be left alone by other people." In *R. v. Dyment*, another landmark decision, the Supreme Court of Canada declared that "privacy is at the heart of liberty in a modern state," and that, "grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual."[92] Thus, the Court has recognized a constitutional right to privacy, a right at the very core of liberty, and a fundamental *Charter* value to protect the autonomy and dignity of the individual.[93]

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[87] *Canadian Bill of Rights*, S.C. 1960, ch. 44 § 1(a).
[88] Jennifer Coates, "Comparison of United States and Canadian Approaches to the Rights of Privacy and Abortion" (1989) 15 Brook. J. Int'l L. 765.
[89] *Canadian Charter of Rights and Freedoms*, 1982, § 7.
[90] *Regina v. Morgentaler*, [1988] 1 S.C.R. 30 CA.
[91] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, 41 C.R. (3d) 97.
[92] *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427-428, 55 D.L.R. (4th) 503, 66 C.R. (3d) 348.
[93] See also, *B. (R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315 at 369, 122 D.L.R. (4th) 1, La Forest J.; *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235, 44 C.R. (4th) 1, 103 C.C.C (3d)1, L'Heureux-Dube J.

At the level of tort law, Canada has a particular situation, i.e., the Quebec civil law and the Canadian common-law. In fact, the invasion of privacy was first addressed by Quebec civil law, according to the "fault and harm" or "delict" principle. In *Robbins v. C.B.C.*, the defendant, CBC Television, displeased with the plaintiff's letter of criticism to their *Tabloid* program, later published the contents of this letter onscreen with the plaintiff's name and address, asking the audience to telephone the plaintiff to "cheer him up." After the program was broadcast, the plaintiff, a doctor by profession, received a barrage of calls and letters, forcing him to change his phone number and stop providing medical service at his home for a period of time. In response to the plaintiff's claim of invasion of privacy, Judge W.B. Scott held: "what was done was a form of malicious mischief or a premeditated way of causing a public nuisance to the doctor." He went on to say, "I have gone into this matter at some length because we have had no similar case in Canada of which I am aware."[94] The judge found that "fault" [95] had been committed by the defendant, resulting in the persecution of the plaintiff, including severe emotional disturbance, humiliation, and an invasion of one's private life.

Since then, the invasion of privacy has been accepted as a civil liability in Quebec, shaking the rigid common law categories of torts, particularly the debates regarding whether the invasion of privacy should be accommodated. For instance, in *Krouse v. Chrysler Canada*, a case where the photograph of the respondent player was misappropriated by the appellant sports device manufacturer, Justice Estey held that "exposure through the publication of photographs and information is the life-blood of professional sport. Some minor loss of privacy and even some loss of potential for commercial exploitation must be expected to occur as a by-product of the express or implied license to publicize the institution of the game

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[94] *Robbins v. C.B.C.* (1957), [1958] Que. S.C. 152, 12 D.L.R. (2d) 35.

[95] Article 1053: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." Article 1054: "He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things he has under his care; Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed." *The Quebec Civil Code of Lower Canada*, 1866.

itself."[96] The case was decided on the basis of "passing-off." In this case, the court concluded that common law precedents have "not as yet recognized such a right" of privacy; however, the court did not state that no such cause of action should exist.

In *Motherwell v. Motherwell*, the question was further discussed in the most significant appellant decision regarding the privacy issue. There, the appellant continuously harassed the respondents, her father, brother, and sister-in-law with incessant telephone calls and letters. In deciding whether the invasion of privacy claim should be considered, Justice Clement held that: "It is said that invasion of privacy does not come within the principle of private nuisance, and that it is a species of activity not recognized as remedial by the common law. It is urged that the common law does not have within itself the resources to recognize invasion of privacy as either included in any existing category or as a new category of nuisance." [97] However, he continued that "common law demonstrates its continuing ability to serve the changing and expanding needs of our present society," "when the circumstances of a case do not appear to bring it fairly within an established category, they may lie sufficiently within the concept of a principle that consideration of a new category is warranted."[98] Finally, he declared that the respondents "have established a claim in nuisance by invasion of privacy through abuse of the system of telephone communications,"[99] which, according to the nuisance principle, was an indirect interference with respondents' use or enjoyment of land, thus rendering it actionable.

The *Motherwell* decision took a progressive approach to the development of invasion of privacy in Canadian common law, indicating that Canada would not close the door to a general category of privacy tort as did the United Kingdom. Instead, in the following decisions, [100] Canada followed the United States'

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[96] *Krouse v. Chrysler Canada* (1973), 1 O.R. (2d) 225 (Ont. C.A.).
[97] *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62 (Alta. S.C.).
[98] *Ibid.* at 69-70.
[99] *Ibid.* at 74.
[100] *Athans v. Can. Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425, 4 C.C.L.T. 20, 34 C.P.R. (2d) 126, 80 D.L.R. (3d) 583 (H.C.); *Heath v. Weist-Barron School of T.V.(Can.) Ltd.* (1981), 18 C.C.L.T. 129; *Saccone v. Orr* (1982), 19 C.C.L.T. 37 (Ont. Co. Ct.); *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, 38 C.C.L.T. 184; *Roth v. Roth* (1991), 4 O.R.

approach of recognizing a general tort of invasion of privacy. Meanwhile, *Motherwell* also presented an important question: it recognized the invasion of privacy as a form of private nuisance that aims to protect property interests, such as land, home, or office. But the Quebec *Robbins* decision established that the violated of privacy could occur on basis of a loss of mental and emotional peace. Will these two decisions naming a violation of the right to privacy on totally different grounds repeat the diverging debates about the right to privacy in the United States? In other words, is the right to privacy morally distinct or just incidental to the protection of other interests?

These questions have been long debated in the United States. With the growth of privacy law, critics promulgate the above questions, charging that the right to privacy is an arbitrary assortment of interests that lacks moral distinctness and should have been dissolved into another right, like the right to liberty or autonomy.[101] According to Hyman Gross, the US Constitution aims to regulate the governmental conduct, lest it abridge or infringe upon the rights and freedoms of individuals. In this regard, the Constitution seeks guarantee the security that the term "liberty" enshrines. Privacy is a matter of security; it is "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited."[102] If the right to privacy was recognized, it would contradict the logic of Constitution, because this recognition of "privacy" is based on "some loose habits of everyday speech." Moreover, the law only determines what will be made private by legal protection. It has never articulated what privacy is; therefore, people should not be misled "in speaking of a legally recognized interest in privacy or the rights attending it."[103]

Gross raised an important question about the right to privacy: What is the value of privacy? The heated debate on this issue reflects the diverging opinions on the core feature of the right to privacy. In isolating the correct one, it is

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(3d) 740, 9 C.CL.T. (2d) 141 (C.J. (Gen. Div.)). In this case, the judge concluded that there existed a right of privacy in Canada, and remedy should be afforded for the invasion of privacy; *R. v. Salituro* [1991] 3 S.C.R. 654, 50 O.A.C. 125, 9 C.R. (4th) 324.

[101] See Louis Henkin, "Privacy and Autonomy" (1974) 74 Columb. LR 1410.

[102] Hyman Gross, "The Concept of Privacy" (1967) 42 NYU L. Rev. 35-36.

[103] *Ibid.* at 36, 44-45.

indispensable to attempt to disclose what underlies the privacy claim, why privacy is cherished, and whether privacy indeed contains an interest in common worthy of legal recognition and protection.

B. Privacy: Isolation, Solitude, or Intimacy?

Although much literature has discussed privacy and related rights, a consensus on the definition of privacy has never been reached. People tend to understand privacy literally, interpreting it with many synonyms such as secrecy, concealment, intimacy, isolation, solitude, etc. For instance, privacy has been defined as being a condition of "being-apart-from-others" very closely related to alienation,[104] or as representing a form of power and "the control we have over information about ourselves,"[105] "the individual's ability to control the circulation of information relating to him," "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,"[106] or "privacy is control over when and by whom the various parts of us can be sensed by others,"[107] etc.

Given such a diversity of privacy, we may, through the variation of language, conclude that there are basically two interpretations of what privacy should be: one is the "separation-based account," which holds that privacy functions through separation and alienation; another is the "control-based account," which holds that privacy is a control exercised by the individual over his private information. Which account can best capture and reflect the core value of privacy? Does privacy mean complete isolation or separation? Is privacy antagonistic to publicity?

1. Separation-based Account v. Control-based Account

In my opinion, privacy is more than "being let alone." The separation-based account of privacy is only partly right in its description of a private state without

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[104] M. Weinstein, "The Use of Privacy in the Good Life" in J. Roland Pennock & John W. Chapman ed., *Privacy: Nomos XIII* (New York: Atherton Press, 1971), at 94.
[105] Charles Fried, *An Anatomy of Values* (Cambridge, Mass.: Harvard University Press, 1970) at 140.
[106] See generally, Alan F. Westin, *Privacy and Freedom* (New York: Athenaeum, 1968).
[107] Richard B. Parker, "A Definition of Privacy" (1974) 27 Rutgers L. Rev. 281.

unwanted external disturbance, as it fails to define the inner nature and value of what privacy should be. If privacy means a separation or isolation from others, then the individual who is in a complete enclosure could enjoy full privacy because his solitude is not intruded upon and his private information is not disclosed to others. Obviously, such an argument cannot stand: First, there is no absolute separation or isolation from other people because people are social beings who necessarily interact at some level with other individuals. Second, privacy is not essentially individualistic. A grouping of individuals does not necessarily lessen privacy; otherwise any contact with others, including the intimacy between couples and that found among intimate friends, would constitute an invasion of privacy. Thus, lessening people's separation from others is not always a loss of privacy. In this sense, privacy does not necessarily contradict the free functioning of publicity and of the press. The following question thus arises: what is privacy all about?

In answering this question, the control-based account defines privacy more accurately, interpreting privacy as a power of control enjoyed by each individual with respect to any information related to him. In brief, privacy is about control, which "consists of not only the voluntary initiation of a situation, but also the ability to regulate the situation as it develops (which includes the ability to either continue or halt it) and a reasonable expectation of continued control" to one's desired end. [108] For example, inviting a journalist into one's home and participating in an interview does not constitute an encroachment of the interviewee's privacy, because the situation is initiated by the interviewee who can allow the journalist to gather certain information from the dwelling, and can further require how much, when, where, how, and to what extent such personal information should be used. Only if the journalist behaves in a way that surpasses the interviewee's control, such as trespassing, making secret recordings, or using the acquired materials in a manner that contradicts the prior agreement, will there be the violation of privacy. In this circumstance, the interviewee's privacy will

[108] Julie C. Inness, *Privacy, Intimacy, and Isolation* (New York: Oxford University Press, 1992) at 49.

have been violated simply because he is rendered incapable of exercising his regulative ability in accordance with his preferred end.

According to the control-based definition, privacy grants each individual the autonomy to regulate his private affairs, specifically, to define his own boundary between private and public with regard to his life. The individual's possession of such control again supports the argument that privacy and publicity are not necessarily mutually exclusive. Meanwhile, another question has to be looked into: Why do we need such a "control"? Or, why do we cherish privacy so much? Is it true that "privacy seems a less precise way of approaching more specific values, as, for example, in the case of freedom of speech, association, and religion?"[109]

2. The Value of Privacy: Autonomy to Control Intimacy

For some people, privacy is valuable because it not only provides a rational context for people's most significant ends, such as love, trust, friendship, respect, and self-respect, but also for the furthering of these fundamental relationships with different people in a society. "To respect, love, trust, or feel affection for others and to regard ourselves as the objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion."[110] The unlimited gathering of personal information and unrestricted exposure of private life to public, i.e. the loss of privacy, will devalue our notion of ourselves in relationship with others; conversely, privacy will offer us a zone of intimacy to allow "the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love."[111] Thus, people have good reason to object to anything that interferes with their relationships with those "significant others," and "our ability to control who has access to us, and who knows what about us, [as it] allows us to maintain the variety of relationships with other

[109] Harry Kalven, "Privacy in Tort Law: Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp. Probs. 327.
[110] Fried, *supra* note 105 at 140.
[111] *Ibid.* at 142.

people that we want to have... [It] is one of the most important reasons why we value privacy."[112]

For others, they discuss the value of privacy in another perspective other than this relation-promotion account. They claim that privacy's value derives from the respect for personhood. Should a person be regarded as an independent being, he must be entitled to the right to make a rational choice and be a self-determining chooser. Privacy will provide him with such autonomy to determine his choice about how much, to what extent, when, where, and how personal information can be released to public. For example, Stanley Benn explicitly states that a person is a "subject with a consciousness of himself as an agent, one who is capable of having projects, and assessing his achievements in relations to them," "to conceive someone as a person is to see him as actually or potentially a chooser."[113]

Though these two accounts of privacy's value have provided some understanding, some scholars have pointed out the value of privacy more accurately and directly. For example, Julie C. Inness argues that both accounts failed. According to her, the "relationship-promotion" account can indeed promote the creation and growth of positively valued human relationships based on love, liking, or care, but this consequentialist account developed its theory on circularity: because we value these relationships, it follows that privacy's value stems from this. What's more, do close relationships necessarily require privacy for their development? Similarly, the "rational chooser" account protects a realm of autonomy for the individual with respect to his choice. However, it did not distinguish between the value allocated to privacy and that allocated to freedom of choice. Despite its explanation of privacy's non-consequentialist zone of autonomy, this account does not create a morally distinct zone of autonomy for the intimate decisions protected under privacy. Therefore, Inness concluded that

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[112] James Rachels, "Why Privacy is Important" (1975) 4 Phil & Pub Aff. 329.
[113] Stanley Benn, "Privacy, Freedom, and Respect for Persons" in Roland Pennock & John W. Chapman ed., *Privacy: Nomos XIII* (New York: Atherton Press, 1971) at 8-9.

"we value privacy not merely because we value choice, but because we value choice *with respect to intimacy*."[114]

I will agree that the value of privacy does not stop at having choice alone, instead, it is this special kind of choice—intimate choice, i.e., the autonomy of choice with regard to love, care and liking—that captures privacy's value, because "intimate relationships-which give play to love, devotion, friendship as organizing themes in self-conceptions of permanent value in living-are among the essential resources of moral independence."[115] This perspective explains how privacy can protect an individual's freedom of action, while at the same time giving rise to duties of noninterference or nonparticipation in the intimate life of the individual on external parties. To be respected as an independent being, a person should be treated both as a rational chooser and an emotional chooser, and privacy recognizes and protects the individual's capacity to be an emotional chooser by according him a "conventionally defined zone in which others cannot do such things as freely gain access to the agent's body, thoughts, personal information, letters, and so forth--a context for intimacy that generates duties on the part of others not to access the agent."[116] More importantly, providing an individual with such a zone of autonomy and noninterference enables him to develop and sustain a self-concept as an originator of love, liking, and care, which means that before he enters into or engages in close relationships with others, he is capable of constructing what "intimacy" really is to him, identifying who those "significant others" are, and deciding to what extent these others could have access to his private sphere. Thus, an individual can minimize the damage to his self-concept caused by others who assume a false position of intimacy.

As Joseph Kupfer has noticed, "by blurring the distinction between intimate and stranger, the pseudo-intimacy seems to force a 'false' entry into our self-concept," and "when the appearance of intimacy is created through...the loss...of control over who can experience or know about us, our self-concept is

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[114] Inness, *supra* note 108 at 104.
[115] David AJ Richards, *Toleration and the Constitution* (NewYork: Oxford University Press, 1986) at 244.
[116] *Ibid.* at 109.

threatened."[117] I would agree that such an account of "pseudo-intimacy" has disclosed the subtle change in the relationship between the public and the press from the past till the present. Without a concept of privacy or the right to privacy, when people are not accorded legal protection to guarantee them as autonomous beings with the capacity to make intimate decisions, people will likely fail to regulate outward access to their private lives by the press. Instead, they will take the press as their constant and unquestioned spokesman, easily neglecting the fact that as economic interests predominate, the role of the press, their old "intimate" friend changes its face. It fulfills not merely the role of "watchman," but also acts as a profit-seeker that will itself inevitably intrude into people's private lives in order to pursue its maximized commercial welfare. Why the press can often accomplish this goal successfully is partly because it takes advantage of the "intimate" friend status of the people, a false intimacy which has proven to damage people's self-concept. Therefore, "privacy's positive value stems from a principle of respect for persons as autonomous beings with the capacity for love, care, and liking, beings with an invaluable capacity for freely chosen close relationship; this principle dictates the positive value we accord to the agent's control over intimate decisions about her own actions and her decisions about intimate access to herself."[118]

In conclusion, the control-based account of privacy is more accurate in defining both the nature and value of privacy. We cherish privacy because it respects and protects the individual's control over his intimate sphere so that he is able to sustain and develop a self-concept. Likewise, the claim to privacy is clearly based on the merits with which the right to privacy has proven to be a morally distinct right worthy of necessary legal recognition and protection.

C. Under the Umbrella of Right to Privacy

Having explored the interests protected and value enshrined under the right to privacy, we must still examine the privacy laws in practice to complete two purposes: First, whether the control-based arguments we have made about the

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[117] Joseph Kupfer, "Privacy, Autonomy, and Self-Concept" (1987) 24 Amer. Phil. Quart. 86.
[118] Inness, *supra* note 108 at 112.

right to privacy are correct; and second, what sort of information can be categorized and protected under the right to privacy. In doing so, we will conduct a comparative study, exploring privacy laws in the United States and Canada.

1. The "Private Sphere" in U.S. Law

In retrospect of the available legal literature, the United States may have developed more privacy laws than any other country in the world. Many privacy laws can be found in its Federal and state constitutions, statutes, and common law cases. Facing such a broad scope and quantity of privacy laws, some scholars have divided privacy into four categories: "decisional privacy," "informational privacy," "physical privacy," and "proprietary privacy."[119]

The first category, "decisional privacy," refers to issues of sex, reproduction, abortion, marriage, family, religion, and health care, which have been debated at the level of constitutional law. The U.S. Constitution contains no explicit mention of the word "privacy," but scholars believe that privacy interests have long existed in its first ten Amendments, known as the *Bill of Rights*, which guarantee certain freedoms and rights from undesirable intrusion and interference.[120] For example, the Third and Fourth Amendments protect people's homes and secure them from unreasonable searches and seizures; the Fifth Amendment allows privacy of thought and belief by prohibiting compulsory self-incrimination; and the Ninth Amendment guarantees the rights to the people, including the rights of bodily integrity and independent decision-making associated with privacy. Besides the *Bill of Rights*, the new Fourteenth Amendment has been said to be an important source of substantive liberties for individuals, as it asserts that no state shall abridge the privileges of citizens. Among these privileges, the right to privacy is believed to be one of them. The Constitution and its amendments refer only to some abstract principles. They do not mention the term "privacy," nor do they define what privacy is. The Third and Fourth Amendments explicitly protect the

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[119] Anita L. Allen, "Privacy in American Law" in Beate Rossler ed., *Privacies: Philosophical Evaluations* (Palo Alto: Stanford University Press, 2004) at 26.

[120] See Joel Feinberg, "Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution?" (1983) 58 Notre Dame L. Rev. 445.

individual's home, which, I would say, is the first and foremost sphere for an individual to exercise control over his intimate decisions.

Since "The Right to Privacy" article published by Warren and Brandeis, the abstract constitutional principles related to privacy have been well manifested by courts. In *Katz v. United States*,[121] the Supreme Court first announced that each citizen has a reasonable and legitimate expectation of privacy, which should not be intruded upon by government search and seizure. Following this first case, the Supreme Court made several landmark decisions in privacy cases about reproduction, sex, marriage, and even the "right to die." In *Griswold v. Connecticut*, the court held that the Connecticut's anti-contraceptive law criminalizing birth control unconstitutionally infringed upon the married couple's privacy, because "the very idea of allowing the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the notions of privacy surrounding the marriage relationship," [122] and further limited the couple's autonomy to express their affection through sexual interaction. In *Loving v. Virginia*, the Court recognized the privacy interest in interracial marriage on the same ground.[123]

In *Stanley v. Georgia*, the Georgia's law prohibiting the ownership of obscene matter at home was declared unconstitutional because it concerned the privacy of a person's home, a place free from unwanted governmental intrusions and a sanctuary for personal intimacy.[124] Again, in *Roe v. Wade*, the Texas law criminalizing abortion was also judged invalid on the ground that it influenced a woman's "intimate personal decision."[125]

In summary, all these cases have proved that privacy essentially concerns the individual's autonomy to exercise control over his intimate decisions, and that anything threatening or undermining such autonomy is considered a violation of privacy.

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[121] *Katz v. United States*, 389 U.S. 347 (1967).
[122] *Supra* note 73.
[123] *Loving v. Virginia*, 388 U.S. I (1967).
[124] *Stanley v. Georgia*, 394 U.S. 557 (1969).
[125] *Roe v. Wade*, 410 U.S. 113 (1973).

The second category, "informational privacy," focuses on the access to information, confidentiality, secrecy, anonymity, and data protection. For example, the *Privacy Act* of 1974 gives American citizens the right to request, inspect, and challenge their own Federal records and at the same time limits third-party access to such information. Some specific privacy laws, such as the *Family Educational Rights and Privacy Act* of 1973, *the Federal Vido Privacy Protection Act* of 1988, and the *Health Insurance Portability and Accountability Act* of 2000 governs the disclosure of school records, access to medical records, and access to records of film rentals by individuals. Furthermore, some statutes even specify certain types of privacy violation conduct and penalties, such as the *Electronic Communications Privacy Act* of 1986, which regulates the surveillance and interception of telephone calls placed on regular telephones, cell phones, and some communications via email, voicemail, and fax. The *Financial Services Modernization Act* of 2001 provides data protection rules for financial institutions to be used in customer service and business transactions.

Notably, the *Privacy Protection Act* of 1980 ("PPA") recognizes and protects the independence of journalists in the newsgathering process after the case *Zurcher v. Stanford Daily.*[126] According to the *Act*, government officials are prohibited from searching or seizing the "work product" or "documentary" materials of people "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication," unless the person who has the information is suspected of committing the criminal offense of which the communications are evidence, or "there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being."[127] Briefly speaking, "work product" includes materials that are created to convey a message, such as notes, drafts, and film. "Documentary" materials include recorded contents that may be interpreted in a finished product, such as video, audio, and digital records.

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[126] 436 U.S. 547 (1978).
[127] *The Privacy Protection Act* 1978, 42 U.S.C. 2000aa et seq.

In my opinion, this *Act* both protects the freedom of the press valued in the First Amendment and the privacy valued in the Fourth, because by restricting governmental access to the newsroom, journalists have been guaranteed control over their news materials and allowed a space to develop the news according to their own decision, which is extremely important to sustaining the self-concept of the press, i.e. the freedom of the press.

Basically, "informational privacy" will be covered by the tort of the public disclosure of embarrassing private facts. [128] Here, the information disclosed may overlap with those protected under "proprietary privacy." This information, however, is disclosed for the purpose of identifying somebody directly or indirectly, instead of acquiring economic interests. This identification could take the form of revealing personal debt information, whether publication in a newspaper,[129] or the placement of a notice on a public street;[130] publishing a story or work of literature one's past experience as a prostitute[131] or hijacker;[132] and making evident a person's past of drunkenness, adultery, temper, and irresponsibility. [133] Other embarrassing facts might include the patients' medical records and files,[134] people's personality or characteristics and behavior habits,[135] a person's sexual orientation,[136] or the details of a crime victim's story.[137] These awkward or painful truths about a person will expose him to the public, injure his reputation, and disturb his peace of mind, all of which are direct consequences of the loss of control of one's intimacy. Thus, the law needs to make some explicit regulations to secure embarrassing private facts, even if these facts are part of the public record. For example, the N.Y. *Civil Rights Law* §50-b states: "The identity of any victim of a sex offense...or of an offense involving the alleged

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[128] Prosser, *supra* note 70 at 389.
[129] *Trammell v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941).
[130] *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927).
[131] *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931).
[132] *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34, 40 (Cal. 1971).
[133] *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993).
[134] *Banks. V. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939); *Clayman V. Bernstein*, 38 Pa. D. & C. 543 (C.P. 1940).
[135] *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243 (1945), 2nd appeal, 159 Fla. 31, 30 So. 2d 635 (1947).
[136] *Supra* note 8; *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 670 (Cal. App. 1984).
[137] *The Florida Star v. B.J.F.*, *supra* note 8.

transmission of the human immunodeficiency virus shall be confidential. No report, paper, picture, photograph, court file, or other documents in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection."[138]

The third category, "physical privacy," studies access to personal land, possessions, property, and even private conversation. In addition to the Fourth Amendment's constitutional guarantee embracing the sanctity of the home, numerous tort law cases engage with the action of trespass. Generally, any intrusion upon the plaintiff's seclusion or solitude may constitute a violation of his privacy. "One who intentionally intrudes, physically or otherwise, upon the solitude of another, or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person."[139]

Specifically, a person will be held liable for intruding into any completely or semi-enclosed place considered to be the private sphere, for example, the physical observation of and intrusion into a room in which as individual is giving birth,[140] one's home,[141] hotel room,[142] stateroom on a steamboat,[143] etc. The intrusion can also constitute access to personal belongings or possessions, such as the search of one's shopping bag in a store,[144] or a passenger's luggage on a bus.[145]

Furthermore, the concept of "technical trespass" has extended the protection of "physical privacy" to the scope of personal conversations. Any eavesdropping, interception, recording, and further divulgence of private conversations by means of microphone,[146] wiretapping,[147] Dictaphone,[148] detectaphone,[149] or any other

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[138] N.Y. *Civil Rights Law* §50-b (McKinney Supp. 2003).
[139] Supra note 6 §652B.
[140] *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881). This case is considered to be "the first U.S. case in which the right to privacy was mentioned explicitly." See generally, Edward H. Freeman, *The Privacy Papers* xxiii, ed. by Rebecca Herold (Auerbach Best Practices Series, 2002).
[141] *Young v. Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414(1929); *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).
[142] *Newcomb Hotel Co. v. Corbett*, 27 Ga. App. 365, 108 S.E. 309 (1921).
[143] *Byfield v. Candler*, 33 Ga. App. 275, 125 S.E. 905 (1924).
[144] *Sutherland v. Kroger Co.*, 110 S.E.2d 716 (W. Va. 1959).
[145] *Bond v. United States*, 529 U.S. 334 (2000).
[146] *Roach v. Harper*, 195 S.E.2d 564 (W.Va. 1958).
[147] *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931);

electronic device will violate the individual's privacy, even if such an electronic listening device was installed on the outside of a public telephone booth.[150] In terms of the press, journalists who go undercover or disguise themselves to enter any private place, including business offices, and use concealed cameras for the purposes of newsgathering and broadcasting will face allegations of trespassing and the invasion of privacy. Justice Posner has made clear that "there is no journalists' privilege to trespass. And there can be no implied consent in any non-fictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission."[151]

The reason for protecting the individual against trespass of his "physical privacy" is quite clear. Using Parker's words, it is because "privacy [is] defined as control over who can sense us, valuable both for itself and as an empirically necessary condition for the exercise of most other rights and freedoms;"[152] therefore, the place where one can exercise such control over his personal information, namely his home, and the expression by which one convey one's intimacy are protected under the law.

The fourth and last category, "proprietary privacy," refers to control over the attributes of personal identity, namely likeness, photograph, name, voice, or other information. Usually, the invasion of such privacy is protected under two torts regarding the protection of personal identity: one is publicity that places the individual in a false light in the public eye; the second is the commercial appropriation of one's name or likeness. However, there are different opinions about whether these two branches of torts are really matters of privacy. For the "false light," it is said that this branch shall fall within the category of defamation, because publicity about an individual always puts him in a false and defamatory position before the public, so he can sue for libel or slander instead of invasion of privacy. To interpret "false light" as a tort of invasion of privacy just affords the

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[148] *Goldman v. United States*, 316 U.S. 129 (1942).
[149] *Supra* note 121.
[150] *Ibid.*
[151] *Desnick v. American Broadcasting Co. Inc.*, 44 F.3d 1345 (7th Cir. 1995). Posner, concurring opinion.
[152] Parker, *supra* note 107 at 290.

plaintiff an alternative remedy to choose.[153] "Appropriation," on the other hand, is said to be more about proprietary interests than privacy ones.[154] People have insisted that it is offensive "to the reasonable sense of personal dignity," and is therefore related to privacy issue.[155]

In my viewpoint, both damage one's privacy just as the disclosure of embarrassing facts does, the only difference being that "false light" requires distortion, which puts a person in a false position and highlights the reckless state of mind of the actor, while appropriation emphasizes a misdemeanor of using a person's name or likeness for commercial purposes. These two branches well reflect the personal damages suffered as a result of losing control of personal information.

As a conclusion, I would like to quote Robert Ellis Smith's elaboration upon these four categories of the "private sphere" in the United States. He wrote, "Privacy is the right to control your own body, as in the right to an abortion or the right to whatever sexual activities you choose. Privacy is the right to control your own living space, as in the right to be free from unreasonable searches and seizures. Privacy is the right to control your own identity, as in the right to be known by a name of your choice and not a number, the right to choose your own hair and dress styles, the right to personality. Privacy is the right to control information about yourself, as in the right to prevent disclosure of private facts or the right to know which information is kept on you and how it is used."[156] Thus, "decisional," "physical," "informational," and "proprietary" privacy are all about the control of one's own personal affairs in order to develop one's self-expression and self-gratification.

2. The Canadian "Private Zones"

Unlike the United States, where the categories of privacy were absent in judicial decisions, the Canadian court has from its very inception identified the

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[153] See Richard A. Epstein, *Cases and Materials on Torts*, 8th Ed. (New York: Aspen Publishers, 2004) at 1076.
[154] See Prosser, *supra* note 70 at 406.
[155] See Bloustein, *supra* note 82 at 1002.
[156] Robert Ellis Smith, *Privacy* (New York: Archer/Double-Day, 1979) at 323.

"zones of privacy" in *R. v. Dyment*.[157] In order "to find some means of identifying those situations where we should be most alert to privacy considerations," Justice La Forest defined privacy in three zones: territorial, personal, and informational.[158] He did not mention decisional privacy in his categories, partly because the Canadian judiciary gradually recognized the a right to privacy in constitutional law, as opposed to their American counterparts, who seek to find and interpret this right in the intent of Constitution drafters and the wording of the Constitution itself.

As noted earlier, the debate about the right to privacy in Canada occurred mainly in the domain of common law, i.e. whether a general tort of invasion of privacy should be accommodated in common law theory, and how such a tort should be combined with the *Charter* value. Therefore, the "zones of privacy" identified by Justice La Forest are actually a classification at the tort law level. However, this is not to say that Canada has no "decisional privacy" in its privacy laws. Actually, *R. v. Dyment* discussed "decisional privacy" when the court stated that "Grounded in a man's physical and moral autonomy, privacy is essential for the wellbeing of the individual. For this reason alone, it is worthy of constitutional protection."[159] In the recent decision of *Godbout v. Longueil*, the Supreme Court of Canada stated that the purpose of the concept of privacy was to protect a sphere of individual autonomy for all decisions relating to choices which are of a fundamentally private or inherently personal nature.[160] Apparently, the guarantee of privacy is the respect and protection of personal autonomy over private matters.

Now, let's take a look at the three "zones of privacy." The first category, "territorial privacy," is similar to the "physical privacy" defined in the United States, which refers to the places considered to be private, namely home, personal land, a hospital room, a telephone booth, or other places where a "reasonable expectation of privacy" by the individual is appropriate. For example, in *Hunter v.*

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[157] *Supra* note 92.
[158] *Ibid.* at 428.
[159] *Ibid.* at 427; see also *R. v. Duarte*, [1990] 1 S.C.R. 30, 65 D.L.R. (4th) 240, 74 C.R. (3d) 281.
[160] [1997] 3 S.C.R. 844.

Southam Inc.,[161] a case involving entry onto the premises of a corporation to conduct a combined investigation, Justice Dickson held that section 8 of the *Charter*, which protects individuals from unreasonable search or seizure, embodied the "right to be left alone by other people" in the constitutional law. Justice Dickson held that it should also apply to the corporation, which has the same constitutionally protected expectation of privacy as an individual. In *R. v. Nicolucci and Papier*,[162] the Quebec Supreme Court reiterated that the right to privacy enshrined in section 8 of the *Charter* is a fundamental right enjoyed by all people living in Canada, stating that it not only protects people against unreasonable search or seizure in one's home or place of business, but also against unreasonable interceptions of private communications.

Also, in *Saccone v. Orr*, where the defendant *Orr* recorded his private conversation over the telephone with the plaintiff and played the tape at a council meeting, Judge Jacobs wrote: "The whole case of the plaintiff therefore falls on a question of invasion of privacy in the plane [sic] of recorded private telephone conservation between the plaintiff and the defendant" without his knowledge. "[I]t's my opinion that certainly a person must have the right to make such a claim," "for want of a better description as to what happened, this is an invasion of privacy."[163] Thus, in my opinion, it can be concluded that the law does not protect merely the places that are personal or private; rather, it aims to afford a sphere where the individual can exercise his autonomy towards his personal affairs. In this sense, the places in which these functions are carried out, whether a real territory such as a home or a virtual world like the Internet or the memory of a telephone answering machine, are worthy of privacy protection. Any disturbance of, interference in, or intrusion upon this sphere of autonomy will constitute an invasion of privacy.

In fact, some recent decisions have already manifested this argument. In *Roth v. Roth*, the relationship between two neighbors deteriorated after a small dispute. One neighbor launched a campaign of harassment towards another by means of

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[161] *Supra* note 91.
[162] (1985), 22 C.C.C. (3d) 207 (Que. S.C.).
[163] (1982), 19 C.C.L.T. 37 (Ont. Co. Ct.) at 321-22.

verbal harassment, physical assault, property damage, etc. After considering several torts, including trespass, nuisance, assault, battery, and invasion of privacy, Judge Mandel held that the actions of the defendant were so intolerable and offensive that the cumulative effect of these actions had amounted to an invasion of privacy, because the defendant has seriously interfered with plaintiff's basic rights as an individual.[164] Similarly, in *Mackay v. Buelow*, in which a husband continuously harassed his ex-wife through letters and telephone calls, videotaped her through the bathroom window, and disclosed the fact that she had viewed a pornographic film, etc., the court concluded that the defendant had committed an invasion of privacy, a trespass to the person, and the intentional infliction of mental distress.[165] So, it is clear that "territorial privacy" is closely related to the trespass of land, and that these two torts can sometimes be claimed simultaneously by the plaintiff. There is, however, a difference between territorial privacy and the trespass of land.

"Territorial privacy" is not limited to the protection of tangible territory; it extends also to intangible territory. This extension affords the beneficial remedy that the mere tort of trespass to land cannot serve. For example, in *Bernstein of Leigh (Baron) v. Skyviews and General Ltd.*,[166] the defendant repeatedly flew over the land of plaintiff in order to take photographs of the plaintiff and his home. In response to the plaintiff's claim of trespass to land, the court held that no actionable trespass occurred because the trespass to land was defined as "a wrongful disturbance of another's possession of grounds or land." While the defendant in this case had physically penetrated the plaintiff's airspace, he did not materially interfere with any use of the land by the plaintiff. The plaintiff's right to the airspace above his land was interpreted to extend only to such height necessary for the ordinary use and enjoyment of land and the structure upon it. So, Justice Griffith stated: "There is, however, no law against taking a photograph,

[164] (1991), 4 O.R. (3d) 740, 9 C.CL.T. (2d) 141 (C.J. (Gen. Div.)).
[165] (1995), 11 R.F.L. (4th) 403, 24 C.C.L.T. (2d) 184 (Ont. Gen. Div.).
[166] [1978] 1 Q.B. 479.

and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's airspace into one that is a trespass."[167]

Apparently, the plaintiff failed to claim his private sphere from being photographed by others if he sued for trespass to land. His failure derived directly from the "can't" within such tort because trespass to land under such circumstances would be a limited cause of action. However, the awkwardness can be resolved by the claim of invasion of privacy. Still, Justice Griffith held: "But if the circumstances were such that a plaintiff was subjected to harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of privacy as an actionable nuisance for which they would give relief."[168] Such extended protection upon people's private lives has also been confirmed at the constitutional level. Still, in *Hunter v. Southam*,[169] the Supreme Court of Canada has stated that section 8 of the *Charter* not merely protected people's homes and offices against unreasonable search and seizure; rather, this *Charter* value purported to protect people, people's fundamental rights as individuals, not just the places.[170] In this sense, the "territorial privacy" serves the same purpose as the *Charter* value would, i.e., to protect people's autonomy upon their private sphere in order to develop and sustain a self-concept.

The second category, "personal privacy," refers to an individual's name, likeness, photograph, voice, human body, etc., all of which are deemed to be personal, and any publication or misappropriation thereof will result in an apparent link to a person's identity, resulting in the infliction of mental distress, defamation, and even loss of economic interest. Actually, this category of privacy was first discussed in those cases which involved the unauthorized use of a person's name, photo, and likeness for purpose of commercial advertisement or other advantages. At the very beginning, Canada did not recognize the existence of privacy under a commercial background, as discussed earlier in *Krouse v.*

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[167] *Ibid.* at 485.
[168] *Ibid.* at 489.
[169] *Supra* note 91.
[170] See also *R v. Edwards* [1996] 1 S.C.R. 128.

Chrysler Canada Ltd., where the judge held that the use of the respondent player's photograph by the appellant sports device manufacturer was only a tort of "passing off." Later, with the recognition of a general tort of right to privacy in common-law Canada, a claimant in Krouse's position could base his claim on the ground of "proprietary right" instead of the mere commercial value of one's personality.

For example, in *Athans v. Can. Adventure Camps Ltd.*,[171] the plaintiff, a prominent professional water-skier, used a well-known photograph of himself in the act of skiing to promote and market his name and reputation for commercial benefits. Without the plaintiff's consent, the defendant utilized a stylized line drawing of this photograph in a brochure and advertisement to promote a summer camp. Justice Henry quoted the statement made by Justice Estey J.A. in *Krouse v. Chrysler Canada Ltd.*, that "there may well be circumstances in which the Courts would be justified in holding a defendant liable in damages for appropriation of a plaintiff's personality, amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff,"[172] but contrary to the *Krouse* decision, the Justice in this case held the tort of "passing-off" was not established. Instead, he stated, "it is clear that Mr. Athans has a proprietary right in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded." The same decision appeared in *Heath v. Weist-Barron School of Television (Canada) Ltd.*,[173] where the defendant used the name and photograph of the plaintiff, a six-year-old professional actor appearing frequently in television commercials, in various advertisements and promotions of their private school without plaintiff's authorization. The court held that the defendant's motion to strike out the plaintiff's claim should be denied.

The claim of "personal privacy" is not necessarily reserved only for celebrities; it can be claimed by anyone. For example, a photo taken and published by the press without the individual's knowledge and consent would

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[171] (1977), 17 O.R. (2d) 425, 4 C.C.L.T. 20, 34 C.P.R. (2d) 126, 80 D.L.R. (3d) 583 (H.C.).
[172] *Supra* note 96 at 241.
[173] (1981), 18 C.C.L.T. 129 (H.C.).

invade his "personal privacy." In *P.F. v. Ontario et al.*, the plaintiff was serving an 18-month sentence in a correctional service center and was arranged to make a presentation during the Minister of Correctional Services' tour in this facility. The defendant, an accompanying reporter, took a photo of plaintiff's presentation and published it without his consent. The plaintiff sued for invasion of privacy based on section 38 of the *Young Offender Act* which provides a statutory liability of the defendant's conduct, i.e. that no person shall publish by any means any report of an offence regarding a juvenile or of a legal procedure where a young person is involved, no matter whether he is an offender, victim, or witness. [174] The defendant argued there was no common law duty owed to the plaintiff, but Judge W.A. Jenkins wrote: "It is clear to me that the publication of the photograph of the plaintiff was publication of information serving to identify a young person who had been the subject of a disposition under the *Act*."[175] By quoting the decision in *Saccone v. Orr*,[176] the judge believed, "there is at least some foundation for the plaintiff's action." The defendant's behavior was a breach of the plaintiff's right to privacy, and his motion to strike out the plaintiff's statement of claim on the ground that there was no cause of action was dismissed. Obviously, "personal privacy" should be cherished and protected by law simply because all the elements under this category are closely related to or are in fact the basic characteristics of a person, and are of fundamental value to one's self-concept. Therefore, the control of these intimate elements should be duly guaranteed.

The third category, "informational privacy," derives from "the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." [177] Such information is

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[174] § 38 (1): "Subject to this section, no person shall publish by any means any report (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed." *Young Offenders Act*, R.S.C. 1985, c. Y-1.

[175] (1989), 47 C.C.L.T. 231 (Ont. D.C.).

[176] *Supra* note163.

[177] *Privacy and Computers* (A Report of a Task Force Established Jointly by Department of Communications/Department of Justice) (Ottawa: Information Canada, 1972) at 13.

concerned with one's age, height, weight, health, sexual orientation, diary, and medical, insurance, financial, or employment records. The question follows, why shall such an "assumption" stand? The answer can be found in the control-based account of the value of privacy for the reasons discussed earlier: first, should someone be regarded as a person, he must be respected with the autonomy to be a potential chooser; second, within this autonomy there lies a power of control towards one's private affairs, thus rendering him able to regulate others' access to his intimate zones and determine how much, to what extent, when, where, and to whom his personal information should be disclosed. Therefore, in the *Dyment* decision, the court states, "in modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected."[178]

Since the *Dyment* decision, the Canadian judiciary has bore this principle in mind when delivering their decisions. In *Valiquette v. The Gazette*,[179] the defendant newspaper revealed that the plaintiff teacher was suffering from AIDS. The judge granted him recovery damages for the invasion of privacy according to section 5 of *Quebec's Charter of Human Rights and Freedoms*, which provides: "Every person has a right to respect for his private life."[180] Likewise, in *McInerney v. MacDonald*, La Forest J. declared that patients were entitled to access to their medical records, relying upon the fact that "records consist of information that is highly private and personal to the individual."[181]

The "informational privacy" is also protected under Federal and provincial statutes. For example, the *Federal Privacy Act* of 1985 has purported to "extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that

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[178] *Supra* note 93 at 429-30.
[179] [1991] R.J.Q. 1075, 8 C.C.L.T. (2d) 302 (Sup. Ct.).
[180] *Quebec's Charter of Human Rights and Freedoms*, 1975, c. 6, s. 5.
[181] [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415, 12 C.C.L.T. (2d) 225 at 429.

provide individuals with a right of access to that information."[182] Though the *Act* mainly regulates the government control of personal information, its definition of "personal information" can be used as reference for the press in the newsgathering process to avoid the invasion of "informational privacy." According to the *Act*, "personal information" includes information relating to an individual's race, national or ethnic origin, skin color, religion, age, or marital status; information about one's education or medical, criminal, or employment history, or financial transaction records; any identifying number, symbol, or other particular assigned to the individual, as well as the address, fingerprints, or blood type of the individual; correspondence of a private or confidential nature; information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual; information about deceased individuals, etc.[183]

The newly enacted *Personal Information Protection and Electronic Documents Act* of 2000 (known as "PIPEDA") reiterates the respect of the right to privacy of individuals.[184] Moreover, it supplements the *Federal Privacy Act of* 1985 with the definition of "personal health information" regarding the living and deceased, as well as that of "records," which includes "any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record and any other documentary material, regardless of physical form or characteristics, and any copy of any of those things."[185] So, the press should be aware of such privacy provisions under the PIPEDA, which draw a clear line between one's right to control one's own personal information and the business where the gathering, storage, and use of personal information are necessary.

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[182] *The Privacy Act*, R.S. 1985, c. P-21, § 2.
[183] *Ibid.* § 3 (a)-(m).
[184] § 3: "The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances." *Personal Information Protection and Electronic Documents Act*, Assented to 13th April, 2000.
[185] *Ibid.* § 2 (1).

However, some parts of the PIPEDA will not apply to Quebec, whose *An Act Respecting the Protection of Personal Information in the Private Sector*[186] has been deemed substantially similar to the Federal law.

In addition to Federal legislation about "informational privacy," some provinces in Canada have enacted laws to protect the right to privacy for the betterment of their citizens. For example, Manitoba's *Privacy Act* of 1970,[187] Saskatchewan's *Privacy Act* of 1978,[188] British Columbia's *Privacy Act* of 1979,[189] and Newfoundland's *Privacy Act* of 1990.[190] For example, the Newfoundland legislation has explicitly enumerated the conducts leading to the violations of privacy, such as the surveillance of an individual by means of eavesdropping, watching, spying, harassing; the listening to or recording of a conversation; the use of letters, diaries, or other personal documents of an individual; and use of one's name, likeness, or voice for commercial purposes, etc.[191] The statutes in other provinces serve a similar purpose as this one.

By analyzing what has been protected under the title of "right to privacy" in both the United States and Canada, we have concluded that though the "privacy" protected by law can be divided into different categories and the contents of which vary, one common rule is that all the categories reflect the respect of personal autonomy to exercise control over one's private affairs. Besides, we also verified the conclusion reached by a former scholar, who believed that "a group of quite separate and different values that have been assembled under the heading of 'privacy' could be more meaningfully evaluated if they were more accurately catalogued."[192]

The control-based account of privacy is not only accurate, but also explains the common interests protected under the right to privacy. In this sense, I agree

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[186] R.S.Q. 1993, chapter P-39.1.
[187] 1970 (Man.), c. 74.
[188] R.S.S. 1978, C. P-241.
[189] R.S.B.C. 1979, c. 336.
[190] R.S.N. 1990, c. P-22.
[191] *Ibid.* § 4 (a)-(d).
[192] William H. Rehnquist, "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?" (1974) 23 Kan. L. Rev. 1.

that "a case need not be limited to objects within a single zone of privacy."[193] The categories of privacy can indeed overlap with each other. There is no need to draw a clear border between each, because "the essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity--a claim for freedom, if you will, but freedom of a very special kind."[194] As a conclusion, the right to privacy is a distinct right which guarantees a person's autonomy to control his intimate matters in order to develop and sustain a self-concept in a society.

[193] John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1996-1997) 42 McGill L. J. 355.
[194] Ruebhausen & Brim, "Privacy and Behavioral Research" (1965) 65 Columb L. Rev. 1189-90.

Chapter III Newsworthiness: Between Privacy and Public Interest

Although the right to privacy can guarantee one's autonomy to regulate one's personal and intimate affairs and prevent them from being accessed by unwanted others. Such a right, however, does not guarantee the absolute and unconditional protection of the private sphere.

First, the right to privacy is not always individualistic; the exercise thereof should consider the equally important interests and rights of other members in a society. For example, a person's self-control over his own privacy cannot justify the public exposure of the most private part of one's body. In such circumstances, the control over one's personal sphere that the right to privacy in other cases endows has substantially threatened or influenced the interests of the public at large and must therefore be restricted. Therefore, some people have noticed that "self-control is not a 'nice' virtue; it has teeth in it... As a result, the private core of self that dictates control is often assertive or competitive, and it may even be ruthless."[195]

Second, as noted earlier, the right to privacy has an inevitable tension with the freedom of the press, which is derived from humanity's natural desire to know itself and the living world. This intention required individuals to compromise their regulative powers of privacy, whether willingly or unwillingly, for the sake of other competing interests in a society. Thus, the right to privacy may give way to the freedom of the press if a higher legitimate interest served by the latter for the community as a whole prevails over the individual's interest. In this situation, one's claim of the right to privacy fails. According to Mill, this is not only a privilege that society has over its members, but also a duty that the community must fulfill to reform its members' central and self-regarding life choices which are worse and misguiding, because "human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. They should be forever stimulating each other to increased exercise of their higher faculties, and increased direction of their feelings and

[195] Deckle McLean, *Privacy and Its Invasion* (Westport: Greenwood Publishing Croup, Inc., 1995) at 75-76.

aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations."[196] Apparently, the freedom of the press has served this "duty" we owed to each other.

On the other hand, although the right to privacy granted people the autonomy to regulate their private zones, "it is not to disengage the person from the entire web of relations, but to enhance a feature of these relations, to make choices and counterbalances between relationships possible, to afford prospects of deeper relationships."[197] Needless to say, the freedom of the press and the right to privacy are fated to conflict with each other, and the interests served by the press will outweigh personal interest if reports about one's private sphere are newsworthy, if a public figure is involved, or if no reasonable expectation of privacy shall exist.

A. Public Interest: Matters of Legitimate Public Concern

The public interest defense against the claim of invasion of privacy has long existed. Even Warren and Brandeis agreed, "the right to privacy does not prohibit any publication of matter which is of public or general interest."[198] However, they did not elaborate what "public interest" is. This term may seem self-evident enough for lawmakers and judiciary to interpret; however, "public interest" is usually discussed alongside "newsworthiness," an equally vague and ambiguous term that has become a synonym of "public interest" on many occasions, particularly in those cases involving the unauthorized publication of true but embarrassing facts with regard to one's private sphere. The "public interest" or "newsworthiness" privilege justifies the exposure of personal life to the public. The following part will consider these questions: What is the "public interest" at all? Does it mean something that interests and arouses the attention of the public, or that is of fundamental importance for public welfare at large? Further, who will have a final say on this interest: the press, the individual, or the law?

1. Public Interest at a Glance

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[196] Mill, *supra* note 50 at 140.
[197] Ferdinand David Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992) at 21.
[198] Warren and Brandeis, *supra* note 68 at 214.

As discussed earlier, the main function of the press within a democratic society is to facilitate the circulation of the marketplace of ideas in order to keep the people informed. During this process, a special dilemma should be noticed. As the British Judge Aldous observed, "The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know... the media have a private interest of their own in publishing what appeals to the public and may increase their circulation."[199] In fact, this statement has implicated that the press actually bears two basic but very cautious missions: first, to identify and gather the information that is *in* the genuine interest of the public; second, to publish and disseminate this information to serve society at large.

Though these two steps seem simple, they are no easy tasks. For the first, various opinions exist or circulate among the people before they are formally published by the media, all of which arise from the people's "natural desire to know" something in which they are interested. By sharing this information in a relatively small context, a neighborhood, for example, people have satisfied their curiosity to know other people's lives and stories, and take it as a way to keep updated with what's going on in the community and blend themselves into the social group. The best example of such a "natural desire to know" is gossip. Gossip can be about anything in a society, and is commonly understood as unconfirmed information regarding the privacy of a person or unknown facts regarding a situation or event. Gossip reflects, to a certain extent, something interesting to the public; if it did not, it would not be so widely disseminated. But can such information, while it is indeed interesting to the public, be understood as "public interest"?

The answer is negative. As one scholar noticed, "this is simply that the public is interested in knowing – not that there is a public interest in knowing, but just that most people would like and would derive some pleasure from knowing."[200] Gossip sometimes may be distasteful; it is "aimless and effortless, done with no

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[199] *British Steel Corporation v. Granada Television Ltd.*, [1984] AC 1096 at 1168.
[200] David Archard, "Privacy, the Public Interest and a Prurient Public" in Matthew Kieran ed., *Media Ethics* (London: Routledge, 1998) at 90.

purpose other than its own enjoyment."[201] This enjoyment more or less invades the individual's privacy, in that gossip often stems from intimate knowledge, usually originating from people in close relationships or people who are trustworthy. People discuss private information with their intimate friends, entrusting them not to reveal such matters. Unfortunately, some entrusted friends may communicate the acquired knowledge with their own trustworthy friends who may continue the process of dissemination.

In this scenario, gossip triggers the invasion of privacy from the first revelation, whether public or private. The individual discussed suffers not only from the loss of privacy, but also from defamation or other detriments to personal interest. Furthermore, "gossip is informal in the sense that the standards of evidence need not be very high,"[202] thus a wide circulation of gossip regarding a person or event will cause certain misunderstandings, confusion, and panic within a community, and even threatening personal security or social order. Therefore, information that is interesting to the public, such as gossip, does not necessarily mean that it is genuine "public interest." A clear distinction must be drawn between a story that interests the public and a story that is *in* the public interest. To be more specific, this "public interest," meaning the public's curiosity and thirst for the lurid details of any private life, must be distinguished from that "public interest," which means the "value to the public of receiving information of governing importance."[203]

When "public interest" is discussed, an equally important concept of people's "right to know" should also be clarified. This concept is sometimes used to insist that everything the public likes to know is surely in the public interest; however, this is not the case. The so-called "right to know" cannot be interpreted as people's "desire to know."

According to some scholar, the "right to know" can be reduced to two features: "first, the right to read, to listen, to see, and to otherwise receive

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[201] Gabriele Taylor, "Gossip as Moral Talk" in Robert F. Goodman & Aaron Ben-Ze'ev ed., *Good Gossip* (Lawrence: University of Kansas Press, 1994) at 34.
[202] Schoeman, *supra* note 197 at 146.
[203] Edward J. Bloustein, *Individual and Group Privacy* (New Brunswick: Transaction Books, 1978) at 55.

communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others."[204] Undeniably, human beings have a natural instinct to detect and explore the world, and acquire information and knowledge about others and the society, i.e. people always have a "desire to know." But not all the information around an individual falls in this scope of necessary information. The "right to know" is subject to certain limitations when it confronts other interests that deserve protection; for example, privacy interests. Therefore, although the most significant application of the "right to know" lies in the fields of obtaining or gathering information, it must be construed in conjunction with the conception of the right to privacy.

In doing so, Bloustein suggested that the "right to know" should be defined as the "need of the public to know." According to him, insofar as the obtaining of information is necessary or useful in the governing process for the public, it should be protected under the "right to know;" otherwise, it may be prohibited or curtailed as a violation of privacy.[205] Bloustein's position is: the public only has a "right to know" the information which is *in* the "public interest," rather than that which is simply *of* the "public interest." So in this sense, the "right to know," more precisely, the "need of the public to know," cannot be invoked as a defense for uninhibited information-obtaining conduct, such as continuous prying into private life. Rather, the information gathering process should give due respect to the right to privacy, and the information acquired must be within the scope of and to the extent of necessity.

Bloustein's approach seems convincing; however, Merrill noted that in operating this approach, somebody or some group must decide what the "public business" or "necessary information" is for the people to govern themselves.[206] In practice, the court has played the role of this "somebody" in determining or judging the necessity of the information being obtained and disseminated. Very probably, this may result in the censorship of information and eventually

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[204] Thomas I. Emerson, "Legal Foundations of the Right to Know" (1976) 2 Wash. U. L. Q. 2.
[205] See Edward J. Bloustein, "The First Amendment and Privacy: The Supreme Court Justice and the Philosopher" (1974) 28 Rutgers L. Rev. 41.
[206] See Merrill, The "People's Right to Know" Myth (1973) *45 N.Y. Sr. B.J.* at 464.

endanger the "freedom of the press" by imposing prior restraints that have long been broken off.[207] Thus, in order to avoid the court's determination or judgment of the information, another solution is proposed. Instead of examining or filtering what information is necessary, the court may firstly identify what is not necessary for the public's need to know. In other words, the first step for the court should be "to protect the autonomy of the individual by establishing a zone of privacy within which the individual is protected against intrusion by any rule, regulation, or practice of the society in its collective capacity."[208]

Obviously, this suggestion stems from a control-based account of the right to privacy. By keeping a close watch on what has been protected under the private sphere—the information belonging to "people's right not to know"—it is easier for the court to determine what the people need to know. In this sense, when the court is judging what the public has a compelling need to know, "the precise interests and claims of the various groups involved would, of course, be the dominating factor."[209] The privacy interest is one of them, the protection of which is definitely in the public interest because, in a society where the individual's autonomy over his intimate affairs cannot be secured, it is hard to believe that the public as a whole is able to exercise further rights to govern themselves.

After the preliminary task of identifying the information which is *in* the "public interest" in the marketplace, the second task for the media is to publish and disseminate such news to serve society at large. This is the most controversial task, because the media may sometimes refine news materials according to its own interests and label the processed information as news *in* the public interest. Under such circumstances, the media will likely endanger people's right to privacy. On one hand, public interest has been invoked as the justification for the media to engage in the newsgathering and processing activities; on the other hand, public interest may be interpreted or even distorted by the media's self-interest leading it to pry into private lives in order to cater to the public's vulgar curiosity and to maximize its profits. So, Meikeijohn wrote years ago that radio

[207] James C. Goodale, "Legal Pitfalls in the Right to Know" (1976) 29 Wash. U. L. Q. 34.
[208] Emerson, *supra* note 204 at 22.
[209] *Ibid.* at 10.

broadcasting "is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the *First Amendment* does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare."[210]

The crucial question posed by Meikeijohn is that how the media could report and publish the news *in* the genuine public interest rather than those *of* its private interest. In other words, "the inevitable tension between public and private rights ties in with two basic ethical principles in journalism: seek the truth and report it as fully as possible; and minimize harm, i.e. respecting the individual's privacy."[211] This argument points out that the media is a bridge between the public and the individual. It should be granted with the freedom of the press to satisfy the people's right to know. But, in the meantime, it should exercise this freedom in a temperate manner to leave the individual alone and should not abuse its power for the purpose of its own welfare.

In fact, a court decision has discussed the media's position between the public and the individual, in particular, its proxy role of the audience. For example, in *Columbia Broadcasting System, Inc. v. Democratic National Committee (CBS v. DNC)*, Chief Justice Burger wrote that it was the broadcasters, not the members of the public, who should determine which ideas will be broadcast, because listeners may not have the ability to provide thoughtful or intelligent expressions of their own lives. Sometimes, members of the audience had no clear idea of what was best, even though their interests were legally paramount. Thus, Burger held that broadcasters could act as proxies on behalf of the "myopic audience" and should have the determinative power on what to broadcast. Moreover, Burger noted that this was not the absolute endorsement of journalistic rights. Rather, journalistic discretion must be preserved because the broadcasters' interests were subsidiary to those of the listening public. Also, the supervision of certain organizations, such as the *Federal Communications Commission*, is necessary so that the proxies

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[210] Meikeijohn, *supra* note 40.
[211] Johan Retifef, *Media Ethics: An Introduction to Responsible Journalism* (Oxford: Oxford University Press, 2002) at 160.

can remain fair and not confuse the audience. In this case, the court made a clear statement about the relationship between the media's interest and the public interest, but it had to admit that "determining what best serves the public's right to be informed is a task of great delicacy and difficulty."[212]

2. The Test of Public Interest

"Public interest" seems a term too vague and elusive to define, but after clarifying the confusion that what is *of* public interest does not necessarily mean what is *in* public interest, we may be clear that genuine "public interest" refers to information that is of fundamental governing importance to the public, and its scope is wider than the information that merely interests the public. Such a distinction also explains the totally different interpretations of "public interest" by the press and the law.

From the perspective of news theory, "public interest" has been narrowly interpreted according to the definition of news, within the scope of which mass media scholars found it was helpful to distinguish which is newsworthy or *of* public interest from which is not, and which is more newsworthy or *of* public interest from which is less. According to Joshua Halberstam, there are three basic elements that restrict the meaning of news and, hence, the newsworthiness. First, as it typically functions in journalistic discourse, news implies that which is new in the temporal sense of current; second, news is typically anchored to a concrete event; third, reports of events or the presentation of the event constitute news, not the events themselves.[213] So, any publication satisfying these three requirements can be called news and be *of* public interest.

Apparently, Halberstam's illustration of "newsworthiness" or "public interest" is narrower compared with that being elaborated in some court decisions. For example, a report on the current life of a person who was once a public figure may still be newsworthy, although the time span lasts from the past to present. Still, in the United States case of *Sidis v. F-R Publishing*, the court stated, "[it] is

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[212] *Columbia Broadcasting System, Inc. v. Democratic National Committee (CBS v. DNC)*, 412 U.S. 102 (1973).

[213] Joshua Halberstam, "A Prolegomenon for a Theory of News" in Elliot D. Cohen ed., *Philosophical Issues in Journalism* (New York: Oxford University Press, 1992) at 176-85.

not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. At some point the public interest *in* obtaining information becomes dominant over the individual's desire for privacy. 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 is permissible."[214] So, although the plaintiff was a public figure in the past and his story was certainly newsworthy at that period, years later the public may still have justification in knowing the recent developments of his life.

Unlike the definition of newsworthiness by Halberstam, who believed that news should be a temporal occurrence, the law seems to prefer a "continuous public interest" in certain events that gained its popularity in the past and could be brought back to the public eye at a later time. By "continuous public interest," I mean that the public might have no more or less interest in this former public figure; therefore, the law allows the media to put the person in the limelight again because the public still has interest in obtaining the information necessary for general welfare. Obviously, case law has recognized a wider scope of "public interest" or "newsworthiness" than the press did, i.e. private information is disclosed because it will not only entertain or amuse the public, but also inform and educate them. The latter plays a decisive role in interpreting what the "public interest" really is.

But Halberstam is at least right on the last element of the three: that it is not the events themselves but rather the presentation of those events that constitutes news and is thus newsworthy. Here, Halberstam underlines that the media and journalists may play an influential role in defining what is newsworthy and what is of public interest. This argument has already been articulated by some scholars. For example, Herbert Gans has defined news as "information which is transmitted from sources to audiences, with journalists—who are both employees of bureaucratic commercial organizations and members of a profession—summarizing, reefing, and altering what becomes available to them from sources

[214] *Sidis v. F-R Publishing, supra* note 10 at 809.

in order to make the information suitable for their audiences."[215] Gans's viewpoint is similar to Halberstam's in that they both realize the "bridge" position the media and the journalists occupy. According to Gans, news comes from the interplay between journalists, sources, and audiences, and it is fashioned or refined by journalists to be in accordance with the best tastes of their audience, whereby the media's version of newsworthiness is created and the public interest defined by the media is satisfied, and finally the news is "bought" and "sold." So, Gans described the process as "the exercise of power over the interpretation of reality."[216]

Though Gans confirmed part of Halberstam's argument, he did not make the same mistake as Halberstam did. Instead, Gans continued that the "newsworthiness" or "public interest" of a story should be determined by several "subjective considerations" such as political, commercial, and value considerations, meaning that there are no absolute standards of newsworthiness or public interest to follow. Also, the media and journalists can not look at reality only in their perspective. Rather, they should include as many different perspectives in the news as possible in order to represent different sectors and strata of a society. So, he proposed that a "modest degree of multiperspectivism" in which the perspectives of currently neglected groups should be allocated a more representative share of scarce news resources.[217]

In my opinion, Gans tried to offer a comprehensive interpretation of "public interest" or "newsworthiness." It is his belief that a genuine "public interest" or "newsworthiness" lies in the concerns of social members, and that by extracting the commonality from these concerns, the "public interest" and "newsworthiness" can be found. Nevertheless, there are also pitfalls in Gans's theory, because during the newsgathering and producing process, it is unfeasible to include the perspectives of all groups in the news, not to mention the extraction of their common concerns. But Gans's argument urging the media and journalists to look

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[215] Herbert Gans J., *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek, and Time* (New York: Random House, 1980) at 80.
[216] *Ibid.* at 81.
[217] *Ibid.* at 319-22.

at reality from the perspective of their audience has implicitly distinguished genuine "public interest" or "newsworthiness" from the media-defined version thereof; his suggestion also embodied the potential duty that the press shall consider the individual's privacy and other personal interests when interpreting what is newsworthy.

Having observed the pitfalls of Gans's "subjective" standard of "public interest" or "newsworthiness," some scholars raised an "objective" standard that used certain objective ideals, such as justice, wisdom, and other ideals of civilization to guide the media to choose and present the news. For instance, Jay Newman argued that "when gross injustice is committed by or against our fellow nationals or our fellow human beings anywhere in the world, the fact is newsworthy, regardless of our individual and cultural biases and perspectives."[218] In my viewpoint, Newman's argument is in fact another version of Gans's "subjective" standard. Objective ideals, such as justice, have specific meanings in a given society and culture. Judging what is justice or injustice involves the value choice and preference, which are subjective evaluations. Therefore, "public interest" or "newsworthiness" should not be taken in as abstract terms, but be discussed on a case-by-case basis.

These are the attempts that have been made within the legal field. At the very beginning, the law was reluctant to define "public interest" or "newsworthiness," in case it would abridge the freedom of the press. Usually, courts take the media's version of "public interest" or "newsworthiness" for granted, and protect any news "*of* public or general interest" and stories "concerning interesting phases of human activity"[219] under the common law privilege of "newsworthiness." So, even if there were a public disclosure of embarrassing private facts, it did not qualify as an invasion of privacy. Commentators have noted that the defense of newsworthiness may be "so overpowering as virtually to swallow the tort,"[220] leading the media to always prevail in lawsuits because "all human events are

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[218] Jay Newman, *The Journalist in Plato's Cave* (Rutherford: Fairleigh Dickinson University Press, 1989) at 128.
[219] *Ann-Margret v. High Society*, 6 Med. L. Rptr. 1774 at 1776 (S.D.N.Y. 1980).
[220] Kalven, *supra* note 109 at 336.

arguably within the area *of* 'public or general concern.'" [221] Besides, "newsworthiness is defined descriptively, not normatively, and the judiciary is left with a strictly empirical and hopelessly tautological view of the newsmaking process."[222]

To resolve these problems, courts and the statutes have developed certain standards to determine what constitutes "public interest" or "newsworthiness." For example, the "community's notion of decency" standard was employed to balance the conflicts between the freedom of the press and the right to privacy. In the U.S. case of *Sidis v. F-R Publishing*, the court held that only when the publication was "so intimate and so unwarranted in the view of the victim's position as to outrage the community's notion of decency" would privacy claims outweigh the public's interest in information.[223] For instance, "a jury might find that revealing one's criminal past for all to see is grossly offensive to most people."[224] Regrettably, the application of such standard will largely depend on the empirical experiences of the judiciary and juries.

Later, a more workable "test of relevance" standard was proposed. According to Edward Bloustein, the newsworthiness of a report depends on "whether what is published concerning a private life is relevant to the public's understanding necessary to the purpose of self-government."[225] Here, Bloustein differentiated the "communicative value" of a publication, which aims to enhance the subject matter of the article, from its "impact value," the simple purpose of which is to attract and satisfy readers' interests by disclosing lurid gossip about private lives. Although Bloustein would accept at face value the newsworthiness of anything published in the press, he was of the strong opinion that if the principal value of a disclosure of private affairs was impact, this disclosure would have the appearance of "newsworthiness" and thus give way to the right to privacy. He

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[221] *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 at 79 (1971). Justice Marshall, dissenting opinion.
[222] Theodore L. Glasser, "Resolving the Press-Privacy Conflicts: Approaches to the Newsworthiness Defense" in Theodore R. Kupferman ed., *Privacy and Publicity: Readings from Communications and the Law* (Westport: Meckler Corporation, 1990) at 17.
[223] *Sidis v. F-R Publishing*, *supra* note 10 at 808.
[224] *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 542 (1971).
[225] Bloustein, *supra* note 203 at 61.

also believed that privacy was one kind of "public interest" that deserved equal protection as the freedom of the press, so he stated that "in all other cases the right of the publisher should be subject to reasonable restriction in order to protect the public interest in privacy."[226] I agree with Bloustein that genuine "public interest" must be identified from the media's narrowly construed version of "public interest," and it is the former rather than the latter that should be the legitimate public concern.

In addition to the above theories testing "public interest" or "newsworthiness," some statutes have provided basic provisions regarding the conflicts between the right to privacy and the right to publication or disclosure. For example, article 8 of the *European Convention on Human Rights* of 1950 (ECHR) has explicitly stated that "everyone has the right to respect for his private and family life, his home and his correspondence;" however, this right to privacy may be legally interfered with by a public authority in accordance with the law if the disclosure of private information is for the purpose of "public interest," i.e. "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." Likewise, article 10 (2) of the ECHR also sets out some "public interest" factors, including anything "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Accordingly, English law incorporated these two articles of the ECHR into its *Human Rights Act* of 1998 (HRA), particularly in article 12, which prescribed the factors the court should consider when deciding whether to grant any relief to an applicant affected by the freedom of the press. If "it is, or would be, in the public interest for the material to be published," then no relief or order will be granted to the claimant. Though the HRA did not articulate what the "public interest" is, it

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[226] *Ibid.* at 65.

would probably take the contents of article 8 and 12 of the ECHR. Besides, the *Press Complaints Commission (PCC) Code of Practice* is another example that the United Kingdom has followed the two articles of ECHR. The *Code* has articulated that "public interest" includes but is not confined to "detecting or exposing crime or serious impropriety; protecting public health and safety; preventing the public from being misled by an action or statement of an individual or organization."[227] Also, the extent to which the material is in the public domain or would become so will be considered. In addition, if the publication involves any children under the age of 16, an exceptional public interest must be demonstrated to justify the disclosure of private facts.

To sum up, there are diverging interpretations of "public interest" and "newsworthiness" amongst the media and legal professionals. Even within the law, a unified theory of "public interest" and "newsworthiness" remains absent. Nevertheless, the test standards in the United States and the statutes in the United Kingdom have at least made certain points clear: first, genuine "public interest" derives from the necessity of promoting the well-being of the public as a whole; second, an individual's right to privacy can be compromised with "public interest" only in certain circumstances; third, it is the court, rather than the media, that should be active in developing a consistent theory of "public interest" and "newsworthiness," because the media has been endowed with too many objectives, including "making money (since news organizations are private businesses) versus fostering an enlightened public (since they are also public servants); catering to group interests versus seeking a more 'objective' news stance; and merely describing what news sources say versus independently interpreting reality."[228]

Finally, some questions still remain open for a unified theory of "public interest" to address in the future. For example, to whom does the "public" refer: the majority, the mainstream of a society; the minority, the marginal people; or both? To judge whether the publication is of the legitimate public concern, does

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[227] *Complaints Commission (PCC) Code of Practice*, *supra* note 63.

[228] Elliot D. Cohen, *Journalism Ethics: A Reference Handbook*, ed. by Elliot D. Cohen & Deni Elliott (Santa Barbara: ABC-CLIO, 1997) at 45.

the court need to distinguish whether it is the publication by an entertaining press or a serious press? A coherent "public interest" and "newsworthiness" theory must therefore offer solutions to these questions, the elaboration of which will make possible reconciliation between the freedom of the press and the right to privacy.

B. Public Figure v. Private Figure: Fame at the cost of privacy?

The public figure discussion is another instance where an individual's desire to retain personal privacy competes with the vital needs of freedom of the press. Though the public figure issue appears primarily in defamation cases, such a status-based approach can also be used to verify the arguments that have already been made. For instance, can the control-based privacy definition explain why public figures enjoy less privacy than private individuals? Does the status of public figure necessarily mean that a celebrity must relinquish all of his or her private life to publication under the justification of "public interest" or "newsworthiness"? How and where do we draw a line between public figures and private individuals?

1. Higher Reputation, Less Privacy

Traditionally, the common law privilege of fair comment has protected some remarks and reports about public officials, civic leaders, persons taking positions on matters of public concern, and "those who offer their creations for public approval," including artists, performers, and athletes.[229] It is usually believed that these celebrities should enjoy less privacy protection because their status and fame welcome public attention, and because the power gained through their position in society offers them strong control over and redress of personal matters. For example, there is a general argument that "a loss of privacy is the fair price a famous person pays for his fame. The rewards of fame are large-wealth, social status, public recognition, power and influence, and so on."[230] Even the judiciary has recognized the principle that "certain public figures, such as holders of public

[229] Arthur B. Hanson, Libel and Related Torts, ¶ 138 (1969).
[230] Dianne Louise McKaig, "Public Interest as a Limitation of the Right to Privacy" (1952-1953) 41 Ky. L.J. 131.

office, must sacrifice their privacy and expose at least part of their lives to public scrutiny as the price of the powers they attain."[231] When publication has put public figures in adverse positions, such as in defamation cases, they still "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies."[232]

Are these arguments reasonable and convincing? As discussed previously, the right to privacy is the legal guarantee of an individual's autonomy towards his personal or intimate affairs. To sustain and develop a self-concept and to fulfill self-satisfaction, an individual should be endowed with a power of control as such. However, during the course of exercising one's control power, many factors may influence the efficacy of exercising such control, of which the status or position of an individual is an important one. In this regard, a status-based approach of the right to privacy might sound reasonable, in that a person with a big name is always rewarded with higher social status and stronger power and influence than an ordinary person. Therefore, to avoid the potential abuse of power, it is appropriate that some restraints be imposed on celebrities, and that the sacrifice of the right to privacy is deemed one of the restraints. For instance, in the United States, the first statute to protect the right to privacy has specifically provided that the appropriation and use of one's name, picture, or portrait without prior consent for advertising or trade purposes is an invasion of privacy.[233] But "one of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection."[234]

Nevertheless, the concept of "public figure" or "celebrity" is sometimes ambiguous. Moreover, the justification that the more famous a person is, the less his privacy should be deserves close scrutiny. As some have questioned, "where

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[231] *Sidis v. F-R Publishing*, *supra* note 10 at 809.
[232] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 155 (1967).
[233] McKinney's Consol. Laws ch. 6, § 50-51 (1903).
[234] *Spahn V. Julian Messner, Inc.*, 18 N.Y.2d at 328, 221 N.E.2d at 545 (1966).

would be the agreement that public status comes at the price of a loss of privacy?" Will this seemingly persuasive justification be accepted by those "who aspire to that status" or "those who have no choice in the matter" or "those who are born to fame or have it thrust upon them?"[235]

Let's start with the first question: what is a "public figure"? Prosser has defined it as a "person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.'"[236] Others described that "'public figures' are those persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest.' Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done."[237]

According to these definitions, public officials are without question the first category of public figures. Public officials are those who are elected or appointed to serve the public. Due to the effect of their actions on the public and the trust reposed in them by their constituency, they should enjoy the least protection of privacy. More publications and comments about public officials' stories, regardless of their official conduct or private lives, can provide the public with a closer observation of the representatives of the state power, how that power is exercised to guarantee and improve personal and social welfare, whether the public servants are competent enough to fulfill their duties, etc. As elaborated by one court, "the public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."[238]

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[235] Archard, *supra* note 200 at 88.
[236] Prosser, *supra* note 70 at 410.
[237] *Cepeda v. Cowles Magazines & Broad., Inc.*, 392 F.2d 417 at 419 (9th Cir. 1968).
[238] *Garrison v. Louisiana*, 379 U.S. 64 at 78 (1964).

By this reasoning, the law has allowed almost uninhibited freedom of speech and freedom of the press towards stories about public officials, even when the publication and comments were defamatory, unless a public official could prove that "the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[239] Hence, the media can publish or disclose many aspects of public officials' lives, only being held liable for defamation or invasion of privacy if the publication made was "knowingly false or in reckless disregard of the truth."[240] One scholar has argued that this derived from the common law concept of voluntary assumption of risk, which means that as public persons, public officials have assumed a greater risk of being the subject of defamatory statements and disclosure of private lives than private individuals have.[241] Public officials are usually recognized as the "all purpose public figures," and it is now universally understood that certain celebrities, such as superstars and even lesser lights, are also considered all-purpose public figures.[242] The people within the category thus enjoy a lesser degree of privacy than other ordinary people.

It is, however, possible that an ordinary individual is exposed to the public spotlight, thereafter becoming an attractive personage. This is the "limited purpose public figure" doctrine, which considers that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[243] The "limited purpose public figure" differentiated two situations: first, "voluntary public figure," meaning private individuals who, by their fame, mode of living, or occupation, voluntarily place themselves in the public spotlight and are thus open to reasonable public scrutiny;

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[239] *New York Times v. Sullivan, supra* note 36 at 275.
[240] *Pauling v. News Syndicate Co.*, 335 F.2d 659 (1964).
[241] See N Strossen, "A Defense of the Aspirations- but not the Achievements of the US Rules Limiting Defamation Actions by Public Figures and Officials" (1985) 15 University of Melbourne L. Rev. 422.
[242] Don R. Pember, *Mass Media Law*, 2nd. ed. (Dubuque: Wm. C. Brown, 1981) at 174; Thomas L. Tedford, *Freedom of Speech in the United States*, 3rd ed. (State College: Strata Publishing, Inc, 1997) at 92.
[243] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 at 345 (1974). In this case, the U.S. Supreme Court first enunciated the "limited public figure" doctrine and held that the "actual malice" standard on defamation should not be extended to private individuals.

and second, "involuntary public figure," referring to persons who are involuntarily dragged or thrust into public attention and interest. Of the two categories of "limited purpose public figure," the "voluntary public figure" is deemed to enjoy the same degree of right to privacy as the "all purpose public figure." For example, in the United States case of *Gertz v. Robert Welch, Inc.*, the Court found that the "actual malice" standard regarding the right to publication and comment should extend to two types of public figures, i.e. an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and for all contexts," and "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[244]

In my viewpoint, the law offers these two types of public figure the same level legal protection when their lives are exposed to the public eyes because in both cases the individual has expressed explicitly or implicitly that he would like to exercise his control power over his private life or affairs. This expression can be made clearly by conduct when a public official has taken his position and fulfilled his duties thereafter. As the court noted, "some occupy positions of such persuasive power and influence, that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."[245] In a private individual's case, one can express his will to relinquish part of his right to privacy by actively anticipating public occasions and throwing himself into public controversy as do public officials. Therefore, the court, when dealing with a defamation claim from these two types of public figures, will consider the above analysis and take a less sympathetic position toward them, because, "those who seek and welcome publicity, so long as it shows them in a good light, cannot complain about invasion of privacy which shows them in an

[244] *Ibid* at 351.
[245] *Ibid.* at 345.

unfavorable light."[246] Similarly, these two types of public figures will enjoy lesser protection of the right to privacy.

Probably the most problematic "limited purpose public figure" is the "involuntary public figure," whose exposure to the public is against their will. In fact, with the press's transformation from "what was once a cautious and venerable profession" into "a potentially careless and sensationalistic industry,"[247] the likelihood of plaintiffs being "dragged" into controversies has dramatically increased. As this transformation is driven by the important aim of pursuing maximum profit, it "allows news media organizations to turn [an] individual into a public figure through their own coverage of [that] individual. No person, once they become the source of news, public or private, can control the news media's decision whether to cover him or her as part of its reporting."[248] Given this changing role of the media, will the law offer more privacy protection for individuals within the category of "involuntarily purpose public figure"?

Indeed, the individual's unwilling exposure to the public eye is the manifestation that he would prefer to have his control power upon his private life well reserved rather than be waived. As the court stated in the *Hill* case, where a family's experience of being held hostage by convicts was made public in a fictionalized play years later, "Mr. Hill came to public attention through an unfortunate circumstance not of his making, rather than his voluntary actions and he can in no sense be considered to have 'waived' any protection the State might justifiably afford him from irresponsible publicity."[249] Apparently, any person in Mr. Hill's position "has not accepted public office or assumed an influential role in ordering society. He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood" and the invasion of

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[246] *Woodward v. Hutchins*, 1977.
[247] Christopher Russell Smith, "Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine" (2003-2004) 89 Iowa L. Rev. 1422.
[248] Clay Calvert & Robert D. Richards, "A Pyrrhic Press Victory: Why Holding Richard Jewell Is a Public Figure Is Wrong and Harms Journalism" (2002) 22 Loy. L.A. Ent. L. Rev. 312.
[249] *Time, Inc. v. Hill*, *supra* note 13 at 552. Justice Harlan, dissenting opinion.

privacy.[250] Therefore, the "involuntary public figure" should be guaranteed with a higher degree of privacy protection and deserve more recovery than the "all purpose public figure" and the "voluntary public figure."

This, however, begs the question of how to determine whether an individual falls within the category of "involuntary public figure"? The court attempts to observe how involuntary an individual is through "the nature and extent of an individual's participation in the particular controversy."[251] In other words, the more active one's participation in a public controversy is, the lesser one's involuntariness will be. This doctrine seems workable, but in fact courts have had difficulty applying it in real cases.

As Justice Brennan stated, "We have recognized that exposure of the self to others in varying degrees is a concomitant of life in a civilized community. Voluntary or not, we are all 'public' men to some degree... Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction."[252] One court elaborated the point from another side, holding that "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[253]

Due to these difficulties, the court sometimes referred to the media's coverage about an individual to judge how voluntary one is in the participation of public controversy.[254] But as analyzed already, this approach may distort the truth of the case, as it is very probable that an individual's involvement in the media's coverage may be completely passive or even against his will. It is therefore

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[250] *Gertz v. Robert Welch, Inc.*, *supra* note 243 at 351.
[251] *Ibid.* at 352.
[252] *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 at 47-8 (1971).
[253] *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 at 167 (1979).
[254] *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1296-97 (D.C. Cir. 1980). In this case, the justice stated that "the court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment...If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy," and thus the involvement of an individual in the media's coverage can be considered as how voluntary he would like to be in the public controversy.

obviously inaccurate, even wrong, to presume one's involuntariness in public controversy through media coverage. Considering these problems in determining an "involuntary public figure," the courts are often reluctant to make the determination, to try to offer judgment without structured analysis, or to leave the determination open for further consideration. Even today, the courts still rarely discuss the category of the "involuntary public figure;" it is therefore questionable whether this category has come to an end.[255]

In my opinion, when determining whether an individual is an "involuntary public figure" or not, the court should exercise discretion on the bases of several factors, including the objective standard of a reasonable person's expectation of right to privacy in the position of the claimant, whether the public controversy satisfies the "public interest" or "newsworthy" requirements, etc. It is, however, certain that if the preliminary judgment is positive, the individual should be provided with the greatest protection of the right to privacy. Unless a publication about such an "involuntary public figure" meets the standard of absolute truth, an affirmative liability should be placed on the media.

2. "Breathing Space" for Public Figures

Celebrities, regardless of whether they are "all purpose public figures" or "limited purpose public figures," often feel violated by coverage of their personal affairs. Though they must face the exposure of and publication about their lives as a result of their status, they still consider the media's reports to be "the prose version of the strip search."[256] Many political, entertainment, and sports figures would likely agree with the magazine writer who observed, "Journalism today... has become such an odd, arrogant animal [that] it no longer plays by any recognizable rules."[257] The question follows, is there any "breathing space" for public figures? To what extent are their rights to privacy lessened? Does their status mean that they must be stripped bare in front of the public?

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[255] *Wells v. Liddy*,186 F.3d 505, 538 (4th Cir. 1999).
[256] See Neal Gabler, *The Gossip of Mount Olympus*, N.Y. TIMES, Apr. 17, 1991, at A23; see also Jamie E. Nordhaus, "*Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*"(1999) 18 Rev. Litig. 288.
[257] Eric Boehlert, *Junk Journalism*, NATION, Aug. 6-13, 2001, at 4, 5.

The law has already answered these questions in *Sidis v. F-R Pub. Corp.*, where the court states that "certain public figures, such as holders of public office, must sacrifice their privacy and expose at least part of their lives to public scrutiny as the price of the powers they attain. But even public figures are not to be stripped bare. In general, the matters of which the publication should be repressed may be described as those that concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while other are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation."[258] Here, the court discussed the "legitimate connection" doctrine as a line that should be preserved between a public figure's private life and his matters that can be publicized.

In the meantime, "legitimate matters of public investigation," i.e. the "public interest," were also mentioned, but the court did not analyze the relationship between these two. In other words, the court failed to offer the considering factors to judge what part of a public figure's private life should be deemed a legitimate connection with his position and hence be allowed for publication. When there is a justifiable "public interest," shall the "legitimate connection" still prevail? Is it true that if someone "is a public personality and that, *insofar as his professional career is involved*, he is substantially without a right to privacy?"[259]

These questions were touched in the case of *Kapellas v. Kofman* where there involved a truthful revelations about a politician's children.[260] Mrs. Kapellas was a candidate for city council and a mother of six children. The local newspaper printed an editorial that she was not putting her children's needs first and that her performance as a mother was less than adequate. The editorial also mentioned that the politician's children had been in trouble with the local police. She was then sued for invasion of privacy, but the defendants prevailed on demurrer. The court, in response to plaintiff's claim, held that "although the conduct of a candidate's

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[258] *Sidis v. F-R Pub. Corp.*, *supra* note 10 at 809.
[259] *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 at 545 (N.Y. 1966).
[260] *Kapellas v. Kofman*, 1 Cal. 3d 20, 459 P. 2d 912 (1969).

children in many cases may not appear particularly relevant to his qualifications for office, normally the public should be permitted to determine the importance or relevance of the reported facts for itself. If the publication does not proceed widely beyond the bounds of propriety and reason in disclosing facts about those closely related to an aspirant for public office, the compelling public interest in the unfettered dissemination of information will outweigh society's interest in preserving such individuals' rights to privacy."[261] Also, the court stated that "the candidacy of the children's mother... rendered this past behavior significant and newsworthy,"[262] and further enunciated the test for newsworthiness through such factors as "the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety."[263] Thus, the court held that if "the intrusion into an individual's private life is only slight, publication will be privileged even though the social utility of the publication may be minimal. On the other hand, when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere."[264]

Obviously, for public figures, when "legitimate public interest" confronts their needs to preserve their private lives, they should probably give way to the public's right to know because the law would prefer to promote the speech concerning public affairs and the value of the dissemination of information to the mere purpose of protecting celebrities' rights to privacy. As for how relevant the published information is to one's status, the question has been left to public determination. In my viewpoint, I suggest the court take caution when making such a decision. As discussed earlier, legitimate "public interest" is not something simply *of* the public interest, but *in* the public interest. If the former became

[261] *Ibid* at 38-39.
[262] *Ibid* at 27.
[263] *Ibid* at 36.
[264] *Ibid.*

predominant, it is very likely that a celebrity's right to privacy would be endangered and unduly restrained due to the public vulgar curiosity.

For example, following the *Kapellas* reasoning, should the sexual orientation of a public figure be disclosed to the public so that the public can determine whether such information is closely related to one's suitability for a public position? Perhaps not. According to Hilary, "the idea that public individuals abandon all rights to a private life reflects an imbalance in favor of free speech."[265] She agreed that there were some justifications for outing gay celebrities, such as increasing the visibility of gays and lesbians, promoting the social tolerance to eliminate hostility and prejudice, and even setting up a role model for the minority; however, she still believes that "although all celebrities face scrutiny about their personal lives, the reality is that, for a celebrity, the fact that she is gay is qualitatively different than almost any other socially controversial or politicized reality."[266] Considering the homophobia among some social members, she was of the opinion that disclosing one's sexual orientation might be harmful enough to ruin lives and careers, so "sexual orientation and matters of sexuality are inherently private and should be allowed to remain so at the individual's discretion."[267] Only in exceptional circumstances can this private fact be disclosed to the public. For instance, if someone conceals his sexual orientation for personal gains at the expense of others' similar interest, the revelation of his private matters is justified.[268] As for this hypothetical case of homophobia, "sexual orientation is similarly at issue when an individual engages in hateful rhetoric designed to excite prejudice against homosexuals. There, the press would be performing a legitimate function in exposing any contradiction between an individual's public stance and private conduct."[269]

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[265] Hilary E. Ware, "Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for Outed Celebrities" (1997) 32 Harvard Civil Rights-Civil Liberties L. Rev. 450.
[266] *Ibid.* at 452.
[267] *Ibid.* at 450.
[268] *Ibid.* at 461.
[269] Barbara Moretti, "Outing: Justifiable or Unwanted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation" (1993) 11 Cardozo Arts & Entertainment L. J. 886.

Except in the above situation, any revelation or disclosure of a public figure's sexual orientation is an invasion of privacy because, according to Hilary, "it denies the individual's right to make decisions for herself about how she wishes to lead her life."[270] In the language we used to define the right to privacy earlier, such publication will hinder one's exercise of control over private matters. Especially for those who are involuntarily dragged into public eye, their sexual orientation should be duly concealed from report, lest it bring about permanent harm. In this sense, not all of the private facts of public figures shall be accessible by the media merely by virtue of the status one has acquired. As a public figure, whether all purpose public figure or limited public figure, one's personal, intimate sexual relationships and matters of intimate associations[271] are facts "that are outside of the realm of public interest or relevance."[272]

In fact, there are many observations about the potential problems arising from the public-private dichotomy regarding the protection of the right to privacy, which aims to clarify that public figure status does not necessarily mean that a person must be stripped bare in front of the public. Professor Gary Williams has suggested that physical and mental condition, financial affairs, or sexual and other personal relationships are subjects that even a public figure should generally be allowed to keep private.[273] Others argue that when the freedom of the press confronts the right to privacy, "the determining factor is the content and character of the publication, not the standing of the individual" since even the most famous have a right to be protected against unauthorized disclosure and publication of personal facts.[274]

In my opinion, these arguments have pointed out the pitfalls of the public-private dichotomy. Though this dichotomy may be useful in determining how much legal protection should be provided for one's right to privacy, it has its own

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[270] Hilary, *supra* note 265 at 455.
[271] See *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[272] Hilary, *supra* note 265 at 463.
[273] Gary Williams, "On the QT and Very Hush Hush": A Proposal to Extend California's Constitutional Right to Privacy to Protect Public Figures from Publication of Confidential Personal Information (1999) 19 Loy. L.A. Ent. L. J. 352-53.
[274] Louis Nizer, "The Right of Privacy" (1940-41) 39 Mxcrr. L. Rev. 526, construing *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909).

definitional problems which need to be further developed in order to form a more precise theory. For example, when a "public official" is discussed, does it refer to only the president, premier, and parliament members, or all government employees, no matter how inferior their positions are? It is clear that "the public has an independent interest in the qualifications and performance of all government employees,"[275] but the ambiguous question is: with "public official" status, can the latter enjoy the same level of privacy protection as the former? Besides this, it should be reemphasized that the public-private dichotomy is one very important but not the unique criterion to reconcile the conflicts between the freedom of the press and the right to privacy. Being a public figure causes a person to enjoy less privacy protection, but not be entirely exposed to the spotlight.

To determine what personal facts can be reported, the law must consider other equally important factors, such as the specific context of each case, whether the public has a legitimate interest in the controversial issue, to what extent the influenced person has allowed his privacy to be released, the necessity or relevance of such revelations to the public, etc. If the disclosure of a person's private facts, for example, the "identification of the plaintiff as the person involved, or use of the plaintiff's identifiable image, added nothing of significance to the story," then there comes an unnecessary invasion of privacy, even if the event is newsworthy.[276] In other words, public figures also have a reasonable expectation of privacy on their private facts, which "a reasonable member of the public, with decent standards, would say that he had no concern."[277]

C. "Public Privacy": Reasonable Expectation of Privacy in Public Places

After considering the nature of the reported events and the status of person, the media may be confident that as long as the newsgathering and disseminating process touches simply upon newsworthy occurrences and public figures, their chances of being sued for invasion of privacy may become very slim. They can

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[275] *Rosenblatt v. Baer*, 383 US 75 at 86 (1966).
[276] *Infra* note 284 at 484.
[277] *Supra* note 6 § 652D.

work freely in public places and not worry about the privacy issue, since everything is going on in the public view. Nevertheless, it's not the case. Sometimes the media may still be held liable in those "public privacy" cases.

1. United States

In the United States, generally, the law has recognized that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."[278] It means that when a person ventured out in public, his right to privacy is said to be forfeited. In a landmark article elaborating the four branches of privacy torts, Prosser made the following clear statement: "on the public street, or in any other public place, the plaintiff has no right to be alone, and it is no intrusion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see."[279] The *Restatement (Second) of Torts* §652B then followed his view and defined the tort of intrusion as the intentional intrusion, "physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" which is "highly offensive to a reasonable person."

Prosser's argument that there is no reasonable expectation of privacy in public places is based on the idea that such a person, by venturing out in public, has assumed the risk of scrutiny by others and thus waived the right to privacy. Prosser found a similar analysis in *Gill v. Hearst Publishing Co.* and used it to support his reasoning. In *Gill*, a husband and wife were kissing in their shop, the scene of which was photographed by a journalist and later published. The couple sued for invasion of privacy, but the court held that "here plaintiffs...had voluntarily exposed themselves to public gaze in a pose open to the view of any person who might then be at or near their place of business. By their own voluntary action the plaintiffs waived their right of privacy."[280] According to the

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[278] *Ibid.*
[279] Prosser, *supra* note 70 at 391-92.
[280] 253 P. 2d 441 at 444-45 (Cal. 1953).

court, since the embrace happened in a public place, it could be assumed that the couple were not adverse to being seen by others.

Following this precedent and Prosser's theory, which was incorporated into the *Restatement (Second) of Torts*, the courts in the United States adopted the no-public-privacy approach to determine the privacy in public places. Many court interpretations indicated that the law would not protect an intrusion on a person in a place accessible to the public. For example, In *Fogel v. Forbes, Inc.*, the plaintiffs had their picture taken without their consent while standing at an airline counter. The picture was subsequently used by the defendant magazine to illustrate a published article. When dealing with plaintiffs' claim of invasion of privacy, the court held that: "[t]his tort does not apply to matters which occur in a public place or a place otherwise open to the public eye."[281] Also, in *Jackson v. Playboy Enters.*, three boys were photographed without consent when they spoke with a policewoman on a public sidewalk. The photo later appeared in *Playboy* magazine beside nude photos of the policewoman. The boys sued for invasion of privacy; however, the court ruled that since the photo was taken on a public sidewalk "in plain view of the public eye,"[282] no intrusion existed. Similarly, in *Foster v. LivingWell Midwest, Inc.*, the plaintiff was filmed without her knowledge while she was exercising at a health spa. She sued, but the court stated that: "no one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation."[283]

In *Shulman v. Group W Productions*, Ms Shulman and her son encountered a serious automobile accident. They were air-transferred by the rescue helicopter, where a reporter accompanied them on their way to the hospital. The reporter filmed the rescue scene and used a hidden microphone to record Ms Shulman's conversation with the nurse, subsequently broadcasting it on television without her consent. The court found that there was no reasonable expectation of privacy at the scene of the accident because Ms Shulman's "statements or exclamations

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[281] 500 F. Supp. 1081 at 1087 (E.D. Pa. 1980).
[282] 574 F. Supp. 10 at 13 (S.D. Ohio 1983).
[283] No. 88-5340, 1988 WL 134497, at *2-3 (6th Cir. Dec. 16, 1988).

could be freely heard by all who passed by and were thus public, not private."[284] However, the court held that she had a reasonable expectation of privacy while in the helicopter, which was analogous to a hospital room because "once the ambulance doors swing shut, the unfortunate victim can and should reasonably expect privacy from prying eyes and ears."[285] Here, the court has implied that only within a confined place should a person have a reasonable expectation of privacy.

In *United States v. Vazquez*, the court ruled that videotaping women walking down a public street and entering an abortion clinic constituted no invasion of privacy because "[a]ny images filed by the video camera could also be viewed by member of the general public who were standing or walking in the vicinity of the clinic....a common law right to privacy does not exist because no one walking in this area could have a legitimate expectation of privacy."[286] Besides these public places, the court will deny any right to privacy in restaurants,[287] parking lots,[288] laundromats,[289] common areas of cruise ships,[290] etc. These case laws also interpreted the meaning of "public places," which includes any place to which the public has access, or anywhere that is visible from a publicly accessible point, etc.

It seems that the privacy in public places is generally excluded from legal protection. An interesting question then follows: must a person stay at home with all his doors and windows closed in order to claim a right to privacy?

Observing these court decisions, Professor McClurg has described the tendency as "the shrinking right of the right to privacy in tort law."[291] He was of the opinion that there should be a reasonable expectation of privacy in public places. He reexamined Prosser's conclusion, particularly the premise of the assumption of risk and found it was flawed. The *Restatement (second) of Torts* has clearly defined implied assumption of risk as "[a] plaintiff who fully

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[284] 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843; 955 P. 2d 469 at 449 (1998).
[285] *Ibid.* at 453.
[286] 31 F. Supp. 2d 85 at 91 (1998).
[287] *Wilkins v. National Broadcasting Co.*, 71 Cal. App. 4th 1066 (1999).
[288] *Turner v. General Motors Corp.*, 750 S.W. 2d 76 (Mo. App. 1988).
[289] *Batts v. Capital City Press, Inc.*, 479 So. 2d 534 (La. App. 1 Cir. 1985).
[290] *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471 (D. Me. 1987).
[291] Andrew Jay McClurg, "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusion in Public Places" (1995) 73 NCL Rev. 996.

understand a risk of harm to himself...and who nevertheless voluntarily choose to...remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk."[292] Apparently, the assumption of risk is closely related to the notion of consent. So, McClurg argued that a difference must be highlighted between "merely voluntarily appearing in a public place and voluntarily consenting to be stared at, photographed, and publicized."[293] Prosser's approach that privacy is an all-or-nothing concept is not only rigid, but also imprecise. It does not reflect that "privacy is a matter of degree."[294] In addition, McClurg discussed the distinction between observing a person with the naked eye and photographing, videotaping, or filming a person. The latter has made a permanent record of the person influenced, which could be regarded as the loss of control of the person. Furthermore, this permanent record will give people an opportunity to obtain more detailed information under study, such as mood, attitude, mental, and bodily state that cannot be noticed by transitory observation, thus multiplying the impact of the original invasion of privacy.[295] Thus, a person, by appearing in public places, does not mean he has implicitly waived his right to privacy to allow others to photograph, video, or record his action. In other words, a reasonable expectation of privacy should be justified.

Other scholars discussed the public privacy issue from another perspective. For instance, Professor Zuckman, in analyzing the tort or public disclosure of private facts, noted that each person dislikes "having their true and more complete personas exposed to public view."[296] Others furthered that people had an instinct to hide part of themselves from the public. "Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word 'person' was 'mask'....If this mask is torn off and the individual's real self bared to a world in which everyone else still wear his mask and believes in masked performances, the

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[292] *Supra* note 6 §496C(1).
[293] McClurge, *supra* note 291 at 1039-40.
[294] *Ibid.* at 1040.
[295] *Supra* note 291 at 1041-44.
[296] Harvey L. Zuckman, "Invasion of Privacy –Some Communicative Torts Whose Time Has Gone" (1990) 47 Wash. & Lee L. Rev. 260.

individual can be seared by the hot light of selective, forced exposure."[297] So, a person shall have a right to keep his mask on in public places while others are acting in the same way. Being watched continuously or being the subject of any permanent audio or visual record will compel a person to modify his public behavior in some way. In other words, "anything more than casual observation has the potential to profoundly affect personal freedom."[298] This explains that people should have a legitimate, reasonable expectation of privacy even in the places accessible to the public.

With the above reasoning to justify public privacy, the law has recognized a reasonable expectation of privacy accordingly. The *Restatement* clearly states an exception to the general exclusion of privacy protection in public places. "Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters."[299]

Courts also noticed, though occasionally, the arguments to support a public privacy as well as the development of technological and social realities, and began to protect the right to privacy in public places. In *Daily Times Democrat v. Graham*, a woman attended a public place of amusement "Fun House" where many tricks are played upon visitors. When her skirt was blown over her head by a concealed jet of compressed air, the defendant photographer took this photo and published it on the front page of its newspaper. The court held that an invasion of privacy was established. Although the photo "was taken at the time she was a part of a public scene,"[300] defendant's behavior was still actionable because it was "in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." [301] The *Restatement* also recognized that "liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

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[297] Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 33.
[298] S.A. Alpert, "Privacy and Intelligent Highways: Finding the Right of Way" (1995) 11 Computer & High Tech. L. J. 115.
[299] *Supra* note 6 § 652B cmt. c.
[300] 162 So. 2d 474 at 477 (Ala. 1964).
[301] *Ibid.* at 476.

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[302]

In *Dickerson v. Raphael*, the plaintiff was having a conversation in a public park with her adult children, one of whom had been fitted with a hidden microphone by the defendant TV reporter. Later, this recorded conversation, which involved much individual information such as marriage and religious beliefs, was broadcasted in a talk show. The court affirmed the invasion of privacy because "although the conversation occurred at a picnic table in a public park and an occasional passerby may have walked near the table, the videotape shows that no one lingered to overhear the conversation."[303]

Hence, Professor McClurg suggested that "private affairs or concerns" should, to some extent, be expanded to public places, and "a person's ability to move about in a public place without being followed, photographed, or videotaped could properly be regarded as a 'private concern' of a person."[304] To consider whether an act invades one's privacy or not in a public place, the court should adopt a multifactor test to evaluate the following aspects: the defendant's motive, the magnitude of the intrusion, the location, whether consent has been acquired, the plaintiff's implicit or explicit actions of objection, the dissemination of the information obtained during the intrusion, and whether the subject is a matter of legitimate public concern.[305] By doing so, the law can also develop a more consistent theory of the right to privacy, the aim of which is to guarantee a person's control over his private affairs, including others' access to his personal information. Such control shall not be substantively influenced by the private-public division. In this sense, the theory of "public privacy" is a respect of one's control power in public places.

2. Canada

In Canada, early judicial decisions concerning public privacy were very similar to the American court rulings. In *Harrison v. Carswell* where picketing in

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[302] *Supra* note 6 § 46 cmt. d.
[303] 222 Mich. App. 185 at 196 (Mich. Ct. App., 1997).
[304] *Supra* note 291 at 1055.
[305] *Ibid.* at 1087.

the common areas of a shopping centre was involved, Laskin C.J. made his dissenting statement that a person could not expect the same degree of privacy within the areas of a shopping centre as that in his private residence, because "those amenities are closer in character to public roads and sidewalks than to a private dwelling."[306] Later, the Canadian common law began to follow the American influence and use the American approach as a reference for determining public privacy cases.

For example, in *Silber v. B.C.T.V.*, the plaintiff was a furniture store owner whose employees were on strike. The event was covered by the defendant television station employee who further asked for a filmed interview but was refused by the plaintiff. When the defendant started to film in the parking lot, the plaintiff tried to stop him and finally a fistfight occurred. The whole process was recorded and shown afterwards. In response to plaintiff's claim of violation of privacy, Lysyk J. cited the United States case *Gill v. Hearst Publishing Co.*[307] and held that because "events transpiring on this parking lot could hardly be considered private in the sense of being shielded from observation by the general public. They occurred in the middle of the day, on a site open to unobstructed view from an adjoining heavily travelled thoroughfare, in a busy commercial neighbourhood."[308] Thus, the plaintiff could hardly expect a reasonable right to privacy on this occasion, since everything happened in public view. After this precedent, Canadian courts continued this exclusion of privacy protection in public places in *Ontario (A.G.) v. Dieleman.* In this case, the court faced the question of whether picketing women walking on public sidewalks and an entering abortion clinic would violate their right to privacy. By referring to the American approach, the court accepted the defendant's argument that the picketing was in public places, and that there was nothing private about these locations.[309]

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[306] [1976] 2 S.C.R. 200, at 207.
[307] *Supra* note 280.
[308] [1986] 2 W.W.R. 609 (B.C.S.C.) at 615.
[309] (1994), 117 D.L.R. (4th) 449 at 679 (Ont. Gen. Div.).

However, these court rulings do not mean that Canada will not recognize public privacy positively. In the Quebec case *Aubry v. Éditions Vice-Versa Inc.*, a 17-year-old girl was sitting on the steps of a building and a photographer took an artistic photo of which she was the subject without her consent. After the publication of this photo in a magazine, the girl sued for invasion of privacy. Here, the court had to deal with the balancing of the right to privacy and the freedom of expression: "it must be balanced against the reasonable expectation of privacy of the person whose image is reproduced and, generally, against the severity of the infringement of the parties' right."[310] The court unanimously found that the girl deserves a reasonable expectation of privacy in the street, and the photographer could not justify the appropriation of her image by means of public interest, because in the context of this case, the photographer could have easily obtained the girl's consent but did not do so; it was therefore determined that he had committed a fault and should be held liable.

Besides the *Aubry* case, Canadian scholars also discussed the consent issue. They argued that it was wrong to presume that a person, by appearing in public places, has made implied consent to waive his right to privacy. In fact, it is only made to causal observation by others in the vicinity.[311] Only under limited occasions can it be said that the consent to general publicity might be implied. For instance, it happens when a person "has sought attention by placing himself or herself in a position likely to create a good deal of interest, such as appearing in public in scanty clothing, or appearing in association with famous people," or "attends an event at which he or she knows there will be press or television coverage."[312] This was exemplified in *Milton v. Savinkoff* where the plaintiff carelessly left her topless photo in the pocket of the defendant's jacket. The defendant the showed this photo to others and the plaintiff sued for violation of privacy. However, the court dismissed the action for the reason that the plaintiff,

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[310] [1998] 1 S.C.R. at 591.

[311] See H.P. Glenn, "Civil Responsibility-Right to Privacy in Quebec-Recent Cases" [1974] 52 Can. Bar Rev. 302.

[312] P.H. Osborne, "The Privacy Acts of British Columbia, Manitoba and Saskatchewan" in D. Gibson ed., *Aspects of Privacy Law: Essays in Honor of John M. Sharp* (Toronto: Butterworths, 1980) 73 at 92.

by taking such a photo and having the film developed, has impliedly consented to the others' observation of her image; thus, she could not expect a reasonable right to privacy in this context.[313] But beyond these situations, the presumption of implied consent should be very cautious. When dealing with the public privacy claim, the court must be aware that "implied consent should be approached from the point of view of a reasonable person, entitled to the full respect of his dignity and autonomy, and thereby entitled to enjoy the maximum privacy compatible with life in Canadian society."[314]

In summary, in balancing the freedom of the press and the right to privacy, newsworthiness is a very influential factor. One point must be made clear: newsworthiness should not be limited to "news" in the narrow sense of the reporting of current events. "It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."[315] Public figures, due to their frequent presence and fame before the public, are among those people for whom the public have a legitimate concern. Although public figures can exercise their control power over their private affairs more advantageously than ordinary people, the conclusion that they shall enjoy less privacy does not necessarily mean that they deserves no "breathing space" from the public gaze. The "logical relationship or nexus...between the events or activities that brought the person into the public eye and the particular facts disclosed"[316] must be assessed in dealing with public figures' right to privacy.

The media's newsworthiness defense should also consider the public privacy claim by ordinary people. It is reasonable that the right to privacy can exist in places accessible to the general public, because "public privacy has its own

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[313] The court's "blame-the-victim" approach to implied consent has been criticized by many scholars. Their questioning focuses on one point: if this decision were correct, then people would expect no right to privacy in their own photos. If having a film developed equals waiving the privacy right, then people have to own their own dark rooms to secure their right to privacy. See Craig, *supra* note 193 at 398; See also, Osborne, Case Comment on *Milton v. Savinkoff* (1994) 18 C.C.L.T. (2D) 292 at 296.

[314] Craig, *supra* note 193 at 397.

[315] *Supra* note 6 § 652D, com. J, at 393.

[316] *Supra* note 284 at 485.

special role to play in furthering the values connected with privacy generally, such as freedom, individual self-fulfillment, autonomy, independent thought, and human dignity."[317]

[317] Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50 U. Toronto L.J. 342.

Chapter IV Prospects for the Media and Privacy Laws in China

After an extensive study of the freedom of the press and privacy laws in United States, Canada, and other countries, a clear framework of legal references has been unfolded to shape and improve the relevant Chinese laws, which have a shorter history and less developed theories of the freedom of the press and the right to privacy. Also, China's legal system differs from the western common law countries. This difference will influence the process of transplanting outside laws and reforming them into their fittest forms during the localization process. The freedom of the press and right to privacy in China are two relatively new and immature concepts, in that they have not been adequately studied by academia and that practice has revealed the awkwardness in implementing them. Generally speaking, these two interests have become more and more conflicting, especially under the background of a market-economy where some media has been largely released from prior restraints and offered more freedom to develop its own business. They have come to appear vigorous in catering to the public's appetite for better profits, thereby endangering people's right to privacy. However, what Chinese media encountered and what the right to privacy means to Chinese people have their own particularities. This is where the outside theories and laws may work with some feasible answers.

A. Chinese Media Law: A Statute yet to Come

In China, the laws regulating media activities can be found dispersed throughout various statutes in constitutional, administrative, civil, and criminal law. But despite the fact that mass media scholars have been proposing such a bill since the mid-1980s, a specific *Media Law* remains absent from the Chinese legal system. Twenty years later, the questions being debated in the efforts to pass such a law provide an indication as to why the delivery of such a new law is so difficult and how similar problems should be addressed in the future.

1. Conceptual Debate of Freedom of the Press

In 1980, the concept of freedom of the press was first raised by some scholars in a bill titled *Media Law*, which aimed to "guarantee the freedom of the press and

regulate the abuse of this freedom."[318] The purpose of this bill clearly stated that it would serve as the legal basis to protect the freedom of the press and the due rights of journalists, while simultaneously limiting and punishing expressions and publications against the Constitution and other laws. Some hot debates emerged immediately after the bill, one of which was whether there should be a so-called "freedom of the press" in the Chinese legal system. What would be the function of the Chinese press if there were such a "freedom of the press?"

The opponents claimed that this freedom lacked constitutional support because the wording "freedom of the press" is not mentioned or specified in the Constitution.[319] It is true that the *Constitution* 1978 did not expressly state such a right,[320] only article 52 reads that "Citizens have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits."[321] But supporters argued that this article also stated in the latter part that "The state encourages and assists creative endeavors that are made by citizens engaged in science, education, literature, art, press, publication, health and other cultural work."[322] They contended that press activities should be included within the scope of the freedom of "other cultural pursuits," and that article 52 should be interpreted in a broader sense. Following this debate, the *Constitution* 1982 amended this article by singling out the freedom of the press and stating it clearly in the article regarding citizens' fundamental rights. Article 35 provides: "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."[323] In addition, article 22 specifies state obligations to guarantee freedom of the press: "The state promotes the development of art and literature, the press, radio and television

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[318] See Zonghou Zhang, "Laws and Regulations of Media Work" in *Preliminary Studies on News Theory* (Beijing: People's Daily Press, 1982) at 223 [translated by author].
[319] See generally, Wenli Ma, "*Freedom of the Press* Found in Classical Works" (1995) Journalists 10 [translated by author].
[320] After the foundation of People's Republic of China in 1949, there were four versions of Constitution enacted in 1954, 1975, 1978 and 1982. The 1982 version is the current Constitution.
[321] *PRC Constitution 1978* (adopted at the First Session of the Fifth National People's Congress on March 5, 1978) [official translation].
[322] *Ibid.*
[323] *PRC Constitution* 1982 (adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982 and adopted at the First Session of the Eighth National People's Congress on March 29, 1993) [official translation].

broadcasting, publishing and distribution services, libraries, museums, cultural centers and other cultural undertakings that serve the people and socialism, and it sponsors mass cultural activities."[324]

With the freedom of the press enshrined in the Constitution, the initial debate questioning the legal basis of this freedom has come to an end. At the constitutional level, this debate seems very similar to that on the right to privacy in the United States. The only difference is that the debate in China contains certain political concerns, which stress the principle of "socialism freedom of the press,"[325] indicating that the freedom of the press in a socialist society should not be used to incite public opposition or hatred to overthrow the ruling party and the government. This principle has been reiterated many times by governmental officials in different ages. For example, "The general public is entitled to the rights and freedoms of publishing their full opinions, expressing their free will and exercising their supervision on the execution of social affairs by means of mass media. In order to protect people's fundamental interest, the freedom should not be given to any illegal press activities with the attempt to alter the socialism system, and such activities should be published by law."[326] In the late 1990s, it was re-emphasized that "the freedom of the press must be beneficial to the development of the nation and the stability of society."[327]

It is without question that the freedom of the press shall not be abused in order to protect other equally important interests. Even in western countries, the principle of "clear and present danger" is adopted to prevent the harm caused by the improper exercise of the freedom of the press.[328] But in China, the situation might be slightly different. Though the freedom of the press has been defined as "a democratic right enjoyed by citizens to know domestic and international events, acquire various information, express opinions and participate social life and

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[324] *Ibid.*
[325] Xupei Sun, "The Socialism Freedom of the Press" in *Freedom of the Press Analects* (Shanghai: Wenhui Press, 1988) at 1, [translated by author].
[326] Zemin Jiang, "Several Issues Regarding the Press Work of the Communist Party," *Xinhua News* (March 1, 1989)[translated by author].
[327] Peng Li, "The People's Congress System and the Democracy and Legal Construction," *People's Daily* (December 1, 1998)[translated by author].
[328] *Schenck v. United States*, 249 U.S. 47 at 52 (1919).

national political life," [329] the political interpretation of this freedom has largely affected the extent to which the public can exercise this right and the role played by the mass media. As will be discussed below, the direct outcome is that the mass media is more likely to invade people's right to privacy, whether in the past or at present.

2. The Traditional Role of the Media in China

Some western scholars believe that mass media in China enjoys no freedom of the press because it is controlled by the government. According to them, this freedom is a dead letter until the media can get rid of the restraints imposed by the government and become totally independent.[330] Their opinions may be correct, but they also neglect the fact that the freedom of the press concept was imported into Chinese society in 1980s, about 20 years ago. Compared with the long history of this principle in the western countries, the interpretation and development of this concept is still in its preliminary stage. More importantly, this freedom was localized with the specific consideration and blending of traditional factors.

The history of the People's Republic of China's media system can be traced back to the 1950s when the Stalinist Russia model of media control prevailed and was followed by the Chinese government. At that time, the media was under the strict control of the government and was used as a means of propaganda for socialist ideology and leadership, which scholars have called the "government organs" media system.[331]

From a macro level, the media is sponsored, subsidized, and owned by the central and local governments and is directly led by the Party's propaganda departments at all levels. For example, the State General Publishing Administration is in charge of the print press, and the State Ministry of Radio, Film, and Television is responsible for the electronic media and film industry. As a non-profit institution, the media around the country serves as the mouth, eyes,

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[329] National Press and Publication Administration, Press Law (Bill), *Press Law Newsletter* 4 (1988)[translated by author].
[330] See generally, Ke guo & Zhihong Xu, "The Status Quo of the Freedom of the Press in China and the West" (2003) 7 China Press Research [translated by author].
[331] See generally, Ganwu Wang, "Several Considerations on the Chinese Legal System Regarding the Press" (2004) 4 China Press Research [translated by author].

and ears of the government, fulfilling its propaganda function assigned by the government and creating an advantageous environment of news opinions for the state administration and economic developments.

At the micro level, all media institutions strictly obey the rule of "supremacy of propaganda," which requires that news reports be primarily positive and criticism be published in rare occasions with discretion. Also, the media has no right of control on its revenue, which, under the planned economic system, is taken and managed by the State. So, from the 1950s to the early 1990s, the Chinese media could not act as the watchdog of the government as its western counterparts did. Though the Constitution has declared the freedom of the press to be a fundamental right of the citizen, it can only be exercised by means of state-controlled newspapers and radio stations, to the extent that the expressed opinions shall not be politically sensitive. In other words, the Party's policies or instructions are more determinative for the freedom of the press than the law.

For example, one of the approval replies by the Party Central Committee's Propaganda Department in 1953 reads that "the Party organ is the newspaper of the Party's Committee. The editor department of the Party organ has no right to oppose the Party's Committee. In the event of any dissenting opinions, it shall forward them, within the scope of its power, to the Party's Committee, the upper Committee and Party organ, or even to the Central Government if necessary. Without request for instructions, the editor department shall not criticize or argue with the Party's Committee on its own in the newspaper, which is an act deviating from the leadership of the Party's Committee and a serious phenomenon of no buildup and no discipline."[332]

This approval reply is still effective today, illustrating that most mass media in China is actually a watchdog of the central government towards the lower governments and the people instead of the people's watchman who will check and supervise the government power to prevent any abuse. If such a situation arises, citizens can raise their claim to the relevant governmental departments for redress.

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[332] Central Propaganda Department, *An Approval Reply to Guangxi Provincial Propaganda Department Regarding the Issue that the Party Organ Shall not Criticize the Party's Committee at the Same Level*, March 1953 [translated by author].

According to article 41 of the Constitution, "Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited."

During the period from the 1950s to the 1990s, mass media cannot become an effective platform for citizens to supervise the exercise of state power and officials' behavior, because the main role of the media industry is propaganda rather than the dissemination of information to realize the public's right to know. Due to the influence of such a policy, the *Media Law* bill failed to pass in the legislature many times. Of course, in addition to policy reasons, scholars had many debates about *Media Law*, such as how to refine the definition of freedom of the press, whether individuals have the right to run a newspaper, whether any prior approval and censorship are needed for the media to be a forum for the supervision by public opinion, the exact role played by the media, etc.[333] The controversies over these issues also make it impossible for the *Media Law* bill to be generally accepted.

Having observed the political and legal situations, one scholar wrote that "in a socialism country, the media is equal to the state organ or institution, the management of which is based on policy instead of law. Accordingly, the freedom of the press in Constitution level is never heard of."[334] I would agree that the main feature of freedom of the press is that the media shall be removed any harsh and unnecessary censorship and restraints in order to be an independent "fourth estate" power supervising and restricting the government performance. But the freedom of the press in China has not reached this stage. In fact, it is the "fourth arm" of the government, serving the purpose of official ideology. However, ongoing social reforms may provide an opportunity for the media to squeeze out

[333] See Dan Li, "Four Hot Issues Regarding the Enactment of Press Law" (1988) 12 Press Association Newsletter 64-66.
[334] See generally, Wuming, "What Kind of Freedom of the Press China Needs" (2003) 8 China Press Research [translated by author].

of government control to undertake the watchdog duties it should have performed long ago.

3. The Media in the Transformation Age

Having discussed traditional political control and the traditional role of the media in early China, some people may conclude that "without the overthrow of the one-party state, freedom of expression in such jurisdiction is barely worth talking about."[335] Such a view may be too simplified to be true. As one scholar has noticed, "sweeping reforms had been releasing economic life from central strictures to operate according to market forces...it is possible that China's increasingly market-driven media will immediately collide with its stubbornly resistant, Leninist state in a politically tectonic way."[336] The role of the media in the transformation age is more complex than one may expect.

Since 1978, the "open door" policy has been adopted by the Chinese government to catch up with globalization.[337] The policy which "allow[s] the enterprises more rights of independent operation" according to economic rule has launched the reform of the planned economic system, which means the government will loosen the restrictive control over state-owned enterprises or institutions and authorize them with certain operation rights to satisfy market demands. In 1992, establishing the "socialism market economy," which includes pushing state-owned enterprises into the marketplace, was upheld as the aim of the reform of the economic system.[338] So far, stated-owned enterprises are authorized with complete operation rights, which make them responsible for their own profits and losses. By 2003, the policy was further amended to accord with

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[335] Richard Cullen & Hua Ling Fu, "Seeking Theory from Experience: Media Regulation in China" in V. Randall ed., *Democratization and the Media* (London: Frank Cass, 1998) at 160-61.
[336] Orville Schell, "Maoism vs. Media in the Marketplace" in Everette E. Dennis & Robert W. Snyder ed., *Media & Democracy* (New Brunswick: Transaction Publishers, 1997) at 35.
[337] On December 18, 1978, the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) was held in Beijing. It is on this meeting that the CCP amended its policy to shift the work emphasis from the "class struggle" to "construction of economy" and took the "open door" policy as a basic national policy.
[338] *The Congress Report* (the Fourteenth National Congress of CCP, October 12, 1992) [translated by author].

China's obligations under the WTO agreement.[339] The new policy has permitted private investments to enter public utilities and cultural fields that are not forbidden by law. [340] The admission of private capital, including foreign investments has injected new life into the market economy, which requires the enterprises and institutions to compete more actively with their new opponents.

Against the above backdrop, the media in China has undergone similar reform. Since 1978, although the main function of the media still adheres to the propaganda of official ideology, a substantial reduction in state subsidies has caused media outlets to find their own way to survive financially in the market. For example, in 1983 the government issued a seminal decision "On the Programming of Radio and Television," calling for a new "four-tier development policy" allowing for the approval of various levels of locally funded electronic medias.[341] In fact, such decision began to show the start of decentralization and liberal growth of the media.[342] Especially in recent years, the opening of the media industry towards foreign investments has contributed to booming numbers of media of all kinds.[343]

Over the past 27 years, the media's rapid development of in China has provoked the same legal concerns as those in the United States and Canada.[344] As far as the right to privacy is concerned, the profit-driven media has violated

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[339] *The Protocol on China's Accession to the WTO* was effective as of December 11, 2001 and since then China has become a formal member of the WTO.

[340] *Decisions of CCP on Several Issues Concerning the Perfection of Socialism Market Economy*, (the Third Plenary Session of the Sixteenth Central Committee of the CCP, October 11, 2003) [translated by author].

[341] Orville, *supra* note 336 at 37.

[342] According to statistics, in 1978 China had only 32 TV stations, but by 1992 the number had increased to 591. The number of newspapers had risen from 186 in 1976 to 2040 in 1993 (See Cullen & Hua, *supra* note 335 at 39).

[343] For example, since 2002 China has gradually opened up its wholesales market of books, newspapers and journals towards the foreign investors. By the end of the year 11 foreign invested enterprises had been approved to run business in China; In December 2003, the Ministry of Radio, Film and Television has approved that the film production and distribution joint ventures can be established in China. Since October 2004, the foreign investment can flow into the Chinese film industry with the cap of 49%. From November 28, 2004, foreign media companies are allowed to make capital contributions to the joint ventures producing domestic radio and television programs. See "The Open-up Process of Major Industries in 3 Years After China's Entry into WTO," *Sina Finance* (December 8, 2004), online: http://finance.sina.com.cn/g/20041208/13091210612.shtml [translated by author].

[344] See "Behind the 'Fourth Estate': For Whose Right to Know" in Part B of Chapter I.

personal privacy in quite an aggressive manner, even more severely than its western counterparts. On one hand, while ongoing economic reform has loosened official control of the media to a certain extent, government supervision and censorship of published contents has not been relaxed. Politically sensitive topics or speeches are always within the forbidden domains regulated by different forms of sedition, subversion, national security, and secrets laws and interpretations. The development of Internet in China clearly illustrates these two points. The use of Internet is booming in China[345] and, due to the technological advantages which make wide and instant flow of information possible, it has promoted the freedom of the press to some extent. However, the development and use of the Internet is under strict governmental censorship, which prioritizes an Internet filtering regime for content from political dissidence to religious material to pornography. Though there are some laws concerning the use of the Internet, they are basically regulations regarding domain name registration, dispute resolution, electronic commerce, and intellectual property rights protection. Despite the fact that the privacy disputes have arisen from online news reports, the current Internet laws rarely touch upon the right to privacy.

In this sense, Chinese media in the new era is restricted as usual in terms of reports on and comments about politics and social issues. In order to compete and survive in the marketplace, the media must focus its news resources on the lives of individuals rather than politics and public officials. As a result, "vulgar pulp offerings have hit China like a *tsunami*... Publications with real intellectual and political content have tended to be squeezed out, proportionally diminishing the national political dialogue."[346] On the other hand, since the media was once the mouth and voice of the government, it enjoys some privileges that the individual does not have during the newsgathering process, even if the media and its journalists are not owned by the state.

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[345] According to the *15th Statistical Survey Report on the Internet Development in China* released on January 2002 by China Internet Network Information Center (CNNIC), the number of computer hosts in China has raised to 41.60 million, an increase of 14.6% over the past 6 months. The numbers of domain names and websites registered under .CN were 432077 and 668900, increasing by 50000 and 43000 respectively, compared with the figures of 6 months ago. The number of mainland Internet users has increased to 94 million.

[346] Orville, *supra* note 336 at 37.

Facing increasing disputes arising out of media reports, scholars and society have raised the question of the right to privacy to defend their private interests. Unfortunately, the theories and laws about the right to privacy still emerge as a new subject to be studied comprehensively, the reality of which leaves the public in an insecure position for the media's licentiousness in prying into the private lives. Therefore, individuals' right to privacy has been encroached more severely in China than in the West.

4. Specific Issues in the Future of Media Law

China's age of reform did not merely change the economic system; it affected the legal system. The voice for the enactment of a *Media Law* has never disappeared; however, there lacks a unanimous bill for the legislature to vote. Nevertheless, the legal debates about the framework of this Law and some specific issues to be addressed therein prevail. The period spanning from 1978 to the present day can be said to be a very prosperous period for both the media and the law. So far, the discussions regarding the *Media Law* bill have centered on the following questions.

The first question concerns the freedom of the press, whether the subject is the citizens or the journalists and media. The common theory states that, although the freedom of the press is interpreted as the freedom of newsgathering, freedom of free communication, freedom of running a newspaper, and freedom of criticism, and they are exercised more by the media and journalists than by the ordinary people, all these freedoms are actually extensions of the freedom of the press, which is primarily a fundamental right of the citizen. The rights and freedoms enjoyed by media and journalists come from the authorization of citizens to facilitate and fulfill their freedom of the expression and right to know. Therefore, the media and journalists shall not be empowered with some privileges that cannot be enjoyed by common citizens.[347] Analyses of the freedom of the press followed the same approach in the West, i.e. the freedom of the press is the means

[347] Yongzheng Wei, "The Freedom of the Press under the Chinese Legal System" (1999) China Journalism Review, online: http://www.cjr.com.cn/node2/node26108/node30205/node30212/node30213/userobject7ai1668.html [translated by author].

rather than the end.[348] So, future *Media Law* shall expressly regulate the nature and dimensions of the freedom that the media and journalists can enjoy, in order to avoid the possibility that they may invade the private lives in name of the people, and to clarify the obligations and liabilities in case of abuse.

For instance, *Media Law* may add in some articles of the present *Regulations on Management of Publications*, which reads, "When untruthful or unfair contents of publications cause damage to the legitimate rights and interests of citizens, legal persons, or other organizations, the publishing units should make corrections publicly to remove the consequences, and undertake other civil liabilities in accordance with the law."[349] Meanwhile, *Media Law* shall also detail professional ethics for journalists, absorbing the current provisions in the *Professional Ethics Code of Journalists* 1997, for example, "to maintain the citizens' rights stipulated in Constitution, to report without disclosing others' privacy and libel or slander, to acquire news with legitimate and proper means and to respect interviewees' declaration and due claim."[350] By stipulating the rights and obligations of the media and journalists, *Media Law* can serve as a direct legal text for media activities.

The second question demands whether *Media Law* should be a media tort law. This debate started in the mid-1980s and continues today, along with the development of the studies of personality rights in civil law, such as reputation right, right to privacy, right of publicity, etc. Scholars have noticed that when *Media Law* is mentioned, media tort is the first concept that comes into one's mind.[351] Indeed, studies about media tort are more abundant than those about the freedom of the press as a constitutional right; however, current tort law is far from enough to protect the individual's civil rights and interests. Thus, it is urgent to have a statute which can embody a complete tort law theory and the merits of some present laws.

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[348] See "Responsibility Does Matter" in Part C of Chapter I.
[349] *Regulations on Management of Publications*, 2002, article 28 [official translation].
[350] *Professional Ethics Code of Journalists*, 1997, §3.3 [translated by author].
[351] See generally, Xiaobing Deng, "Several Basic Issues in the Legislation of *Media Law*" (2005) 3 China Press Research [translated by author].

In fact, the tort law theories in China are basically transplanted from the West, primarily from the United States. Concerning the media tort with regard to right to privacy, scholars strongly recommended that China follow Prosser's four classifications: "an intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; Public disclosure of embarrassing private facts about the plaintiff; Publicity which placed the plaintiff in a false light in the public eye; and Appropriation for the defendant's advantage, of the plaintiff's name or likeness."[352] Though Chinese laws have not accommodated all of these four branches, some statutes are interpreted to have reflected the acceptance of Prosser's approach.

For example, the *General Principles of the Civil Law* 1987, the Chinese civil code, contains simple provisions about the first and fourth tort. Article 101 says, generally, "The personality of citizens shall be protected by law," and article 100 stipulates specifically, "Citizens shall enjoy the right of portrait. The use of a citizen's portrait for profits without his consent shall be prohibited." Also, in 1993, the Supreme Court of China issued a judicial interpretation titled *Interpretation and Reply to Several Questions regarding the Trial of Right of Reputation Cases*, which covered the second and third tort. According to article 9.2, if the descriptions of real persons or events in a work of literature contain insult, libel, or "disclosure of privacy" that is detrimental to the right of reputation, such descriptions should be deemed as infringements upon the right of reputation. These laws and interpretations are frequently cited during media tort disputes, unfortunately they are too simple to satisfy the increasing and varied forms of media torts, plus the absence of an expressly recognized right to privacy by law. Many scholars have placed their hopes on the future *Media Law* to address these problems. In this sense, *Media Law* should offer some solutions in response to the growing media torts.[353]

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[352] Prosser, *supra* note70.

[353] On this point, scholars' opinions diverged. Some argued that the Media Law shall cover both the principles and concrete forms of media tort. Others hold that the Media Law shall be a special law only listing out certain forms of media tort, the general principles shall be regulated in the *Civil Code*, which is in the legislation process now. Xiaobing, *supra* note 351.

Third, how will *Media Law* specify the legal requirements and liabilities of certain torts? This question has been manifested by the discussion of surreptitious newsgathering, defined as "without disclosing the true identity and the purpose of the interview to the interviewees, the journalists gather the news by means of surreptitious recording or photographing."[354]

Basically, academia has considered the following aspects of a justified surreptitious newsgathering. The first question is whether the surreptitious interview is for purpose of public interest instead of media's own interest. It has been widely accepted that any surreptitious newsgathering that aims to expose serious offenses or crimes against public interest shall be allowed, especially the exposure of illegal conducts such as corruptions and abuse of power by governmental officials. [355] This principle recognizes the media's role as a watchdog of the government and a forum of the public. Unfortunately, however, "public interest" is not duly defined and analyzed, which may give the media the chance to engage in surreptitious interviews to gain vulgar news materials to cater its audience or readers and achieve more profits. In this regard, China should examine the "public interest" arguments in the West to improve this principle.[356]

The second question is surreptitious newsgathering occurring in a private or public place. The law has provided clearly that private places shall not be trespassed because individuals are entitled to a reasonable expectation of privacy. For example, Article 39 of the *Constitution 1982* reads: "The residences of citizens of the People's Republic of China are inviolable. Unlawful search of, or intrusion into, a citizen's residence is prohibited." Thus, surreptitious newsgathering is forbidden in the private sphere. But in a place open to the view of any person, surreptitious newsgathering can carry on. Here, questions arise whether any place exposed to public gaze, such as a phone booth, a park pavilion where a couple is kissing, or a restaurant table around which a family is having a birthday party, shall be regarded as a "public place" in which the individuals

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[354] See generally, Junjing Fan, "How to Balance the Conflicts between Surreptitious Interview and Right to Privacy in TV News" (2003) 6 China Press Research [translated by author].
[355] *Ibid.*
[356] See the "Public Interest" arguments in Part A of Chapter III.

concerned enjoy no right to privacy. Neither the scholars nor the courts have elaborated these challenging issues, so the future *Media Law* may incorporate western theories of "reasonable expectation of privacy in public places" in its provisions to address the potential dispute.[357]

The third question is whether the interviewees are specific and identifiable individuals or unidentifiable persons in a group. In the situation of the former, journalists must acquire the consent of interviewees before the newsgathering activity; otherwise they will infringe upon the interviewees' rights of publicity, reputation, right to privacy, or other personality rights. But if surreptitious photographing or recording is made towards groups of people, there is no need to obtain the prior consent of each person, because the shooting subject is the group as a whole rather than its specific members.[358]

Also, interviewees' statuses shall be taken into consideration, i.e. is the interviewee a private figure or public figure? If it is the latter, he will enjoy less right to privacy than ordinary person. In China, some scholars have studied the possibility of introducing the U.S. public figure classifications into Chinese society. Professor Liming Wang, a notable civil law expert, commented that China could adopt two classifications of public figures instead of three: first, "public officials," which includes public servants in government and other national officials; second, "social public figure," meaning leaders in non-profit organizations, popular stars in culture and art circle, entertainment zone or sport field, and well-known writers, scientists, scholars, and working models, etc.[359] Professor Wang did not follow the U.S.'s approach, because it is not scientific to divide public figures into "all purpose public figure" and "limited purpose public figure." In particular, the "involuntary public figure" in the latter classification will largely depend on the judge's judgment of the factual pattern of each case,

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[357] See the "Public Privacy" elaboration in Part C of Chapter III.

[358] See generally, Yongzheng Wei, "Cautious Use of Surreptitious Photographing or Recording: Commenting Journalists' Newsgathering and Interviewing Rights" (2000) 2 News Tactics [translated by author].

[359] See Liming Wang, "Limitations and Protection on Public Figure's Personality Rights" (2005) 2 China Civil Law Network, online: http://www.civillaw.com.cn/weizhang/default.asp?id=21876, [translated by author].

which leaves the judge too much discretion to determine freely who will be a public figure and, as a result, deserves less protection of privacy. [360]

I do not think Professor Wang correctly understood the doctrine of "involuntary public figure," discussed earlier as a person who is dragged into public controversies by the press and who "has not accepted public office or assumed an influential role in ordering society."[361] Moreover, Professor Wang's classifications of public figures, basically by means of enumeration, do not recommend some rules or doctrines for the court to follow; they are more theoretical than practical. As a result, the Chinese courts did not adopt a public-private figure dichotomy, although some cases have essentially touched on this issue. The future *Media Law* should clarify the above misinterpretations about the classifications, as well as some misconceptions about the relationship between one's public figure status and right to privacy. Whether it takes the U.S. approach or Canadian one, it is vital to read these approaches clearly and correctly. [362]

In short, the media in China is undergoing a reform which has released them from restrictive official control and returned to them a gradually-opening freedom of the press. During this transitional period, the Chinese media has encountered the same legal dilemmas as their western counterparts did in the past. Although there exist certain differences in the legal systems between China and the West, scholars' continuing introductions of western media laws and theories to China as well as the ongoing localization of these western experiences indicate that the future *Media Law* will become a legal document clearly stating not only the freedom of the press and status of the media, but also solutions regarding how to balance the media's competing interests with individuals' right to privacy. With the first question having been discussed, we will move on to the next issue of how the theory of the right to privacy in China can be improved with the help of a western approach.

B. Right to Privacy in China: A Concept to be Broadened

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[360] *Ibid.*

[361] *Gertz v. Robert Welch, Inc.*, *supra* note 243 at 351.

[362] See the "Public Figure v. Private Figure" in Part B of Chapter III.

In contrast with the freedom of the press debate, the study of right to privacy in China was launched more recently and is discussed primarily in civil law rather than at the constitutional level. Nevertheless, the concept and scope of the right to privacy have been narrowly defined and interpreted so that the right to privacy in China can neither provide enough protection for individuals in media tort cases, nor give insufficient theoretical bases for judges and lawyers to cite in advocating plaintiff's claims. After a brief review of China's present privacy laws and theories, we may find that the right to privacy theories in the United States and Canada can enrich the Chinese privacy laws significantly, particularly as they concern the future *Civil Code*.

1. Chinese Privacy Laws: Indirect Protection of Privacy Right

In China, the right to privacy is still in its conceptual stage and lacks an independent recognition and direct protection under the law. Some Chinese civil laws, though believed by some scholars to be the sources of privacy laws, have neither expressly defined the concept of "privacy" nor correctly interpreted such a right.

For example, in the *General Principles of Civil Law 1986*, there is no provision regarding the direct stipulation of the right to privacy. In practice, Chinese scholars and judges refer to Article 101 as a basis for the indirect protection of privacy claims. Article 101 provides, "citizens and legal persons shall enjoy the right of reputation. The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited." Here, it is believed that by saying "the personality of citizens," the law has already included the right to privacy despite the fact that the purpose of this provision is mainly for protection of the right of reputation because the civil law will reflect the fundamental constitutional principle. For example, Article 38 of *Constitution 1982* reads, "The personal dignity of citizens of the People's Republic of China is inviolable." Also, it is well-known that the contents of personality right or dignity can never be

enumerated by law; therefore, Article 101 of the *General Principles of Civil Law 1986* will be interpreted extensively to accommodate the right to privacy. [363]

This view was soon given a judicial interpretation by the Supreme Court in 1988. The *Opinions on Several Questions concerning the Implementation of the General Principle of Civil Law 1986*, paragraph 140.1, provides, "The cases in which, a person discloses others' privacy in written or oral way, or fabricates facts to publicly vilify others' dignity, or damages others' reputation by such means as insults and defamation, and these acts have caused a certain negative impact on the persons concerned, shall be regarded as an infringement of citizen's right of reputation." In this paragraph, the disclosure of personal secrets can be treated as a tort of one's right of reputation, which means that the right to privacy is actually a right attached to the right of reputation. The Supreme Court follows the logic that if one's privacy is invaded, published, and circulated in society, the disclosed information, which contains matters of personal affairs,[364] may lower the social comments towards a person and lead to the loss of reputation.

But, as I argued in another paper, this indirect protection of the right to privacy under the provision of the right of reputation will frequently put plaintiffs in an awkward position.[365] For plaintiffs in such privacy cases, the burden of proof is upon them that there is first disclosure of privacy matters, and second, that the disclosure is harmful enough to lower the social comments upon their personality, i.e. the infringement of right of reputation. As noted in Chapter II, this two-step approach is very questionable, as the determination of whether the right to privacy has been invaded is not based solely upon the fact of whether one's right of reputation has been impaired, although in most cases it might happen. Thus, it is unfair to impose such a heavy burden on plaintiffs' shoulders to that show the media has ultimately violated their right of reputation if they want to win a privacy case. In fact, the right to privacy represents the autonomy to

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[363] See generally, Liufang Fang, "Comments on a Privacy Case" (2000) 3 Legal Journal Weekly of Peking University.

[364] In the following part, I will elaborate that the term "privacy" has a special meaning in Chinese society at the very beginning, which refers particularly to those bad things.

[365] Zhendong Sun, "Protection of Patients' Right to Privacy in Clinic Teaching" (2001) 2 Law Science 76.

control one's private sphere; therefore, any act with the intent to interfere with or even hinder such control will suffice, as categorized by Prosser in his four branches of invasion of right to privacy. Therefore, the future *Civil Code* should separate the right to privacy from the umbrella of the right of reputation and treat it as an independent personality right for direct protection.

Another noticeable question is that the Supreme Court's judicial interpretation did not list what constitutes privacy and what the scope of privacy is. After its first judicial interpretation in 1986, the Supreme Court issued another judicial interpretation in 1993, entitled *Interpretation and Reply to Several Questions regarding the Trial of Right of Reputation Cases*, paragraph 7 of which stipulates, "The cases in which, a person publicizes others' privacy materials without prior consent, or discloses others' privacy in written or oral way, and these acts have damaged others' reputation, shall be treated as an infringement of right of reputation." In this way, the absence of a clearly interpreted term "privacy" has resulted in confusion about the concept of privacy: on the one hand, privacy has been mentioned in the law, and it is possible for plaintiffs in media tort cases to claim such protection; on the other hand, privacy remains a undefined term, requiring privacy plaintiffs and their lawyers to refer to other laws to support their claims and arguments that there is first a privacy interest, and second an invasion.

The question of how other Chinese laws specify the right to privacy then arises. We first examine the Constitutional provisions. In addition to Article 38 of the *Constitution 1982*, which provides for the protection of "personal dignity," other provisions have been constantly cited as sources of privacy laws by lawyers and scholars who hold that an individual's residence and correspondence shall fall within the scope of the right to privacy. Article 39 provides, "The residences of citizens of the People's Republic of China are inviolable. Unlawful search of, or intrusion into, a citizen's residence is prohibited." Furthermore, Article 40 states, "Freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon citizens freedom and privacy of correspondence, except in cases

where, to meet the needs of state security or of criminal investigation, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law."

Second, the Chinese *Criminal Law 1997* even regulates that serious intrusion into one's residence and infringement of the freedom and privacy of correspondence will be a punishable offense: "Those illegally physically searching others or illegally searching others' residences, or those illegally intruding into others' residences, are to be sentenced to three years or fewer in prison, or put under criminal detention," and "Those infringing upon the citizens right of communication freedom by hiding, destroying, or illegally opening others' letters, if the case is serious, are to be sentenced to one year or less in prison or put under criminal detention."[366]

Third, in the *General Principles of Civil Law 1982*, Article 100 protects an individual's personal image: "Citizens shall enjoy the right of portrait. The use of a citizen's portrait for profits without his consent shall be prohibited." It is also believed that Article 101, the "personality" and "reputation" provision, maintains that "personality" includes the respect of an individual's body, especially the private parts, against illegal searches other than those committed by judicial personnel in circumstances prescribed by law.

Fourth, the right to privacy is also protected in other specific laws. The *Statistics Law 1996* regulates that personal or family information shall be considered private, and that any disclosure of "single-item personal or family investigation data," which cause losses of personal interests, shall be given administrative sanctions.[367] In the *Law on the Protection of Minors 1992*,[368] the right to privacy of youngsters is recognized in Article 30: "No organization or

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[366] Article 252, *PRC Criminal Law 1997* (Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997).

[367] Article 30, *PRC Statistics Law 1996* (Adopted at the Third Meeting of the Standing Committee of the Sixth National People's Congress, on December 8, 1983, and revised in accordance with the Decision of the Standing Committee of the National People's Congress on Revising the Statistics Law of the People's Republic of China adopted on May 15, 1996).

[368] (Adopted at the 21st Meeting of the Standing Committee of the Seventh National People's Congress on September 4, 1991, promulgated by Order No.50 of the President of the People's Republic of China on September 4, 1991 and effective as of January 1, 1992).

individual may disclose the personal secrets of minors." Further, Article 42 expressly regulates that crimes committed by minors, as well as other items of their background information, should be kept confidential. "All cases involving crimes committed by minors over fourteen years old but under sixteen shall not be tried publicly. Cases involving crimes committed by minors over sixteen years old but under eighteen shall, in general, not be tried publicly" and "With regard to cases involving crimes committed by minors, the names, home addresses and photos of such minors as well as other information which can be used to deduce who they are, may not be disclosed, before the judgment, in news reports, films, TV programs and in any other openly circulated publications."

Also, in the *Law on the Protection of Rights and Interests of Women 1992*,[369] Article 30 provides that "Women's right of reputation and personal dignity shall be protected by law. Damage to women's reputation and personal dignity by such means as insult, libel, or publicizing private affairs shall be prohibited." Fourth, some administrative laws and regulations, such as *Several Regulations on the Supervision and Management of AIDS 1988*, have stipulated that "any unit and person shall not discriminate AIDS patients, AIDS virus-infected individuals and their family members. It is forbidden to publicize or circulate the name, address and other relevant information about patients and infected individuals."[370] So, information about one's health status or disease history can be protected under the right to privacy.

After a brief review of some Chinese laws, we can summarize that privacy zones in China includes three aspects: First, "territorial privacy" or "physical privacy" protects personal residences against intrusion; second, "personal privacy" provides legal recognition to attributes of personal identity such as body, name, likeness, image, and photograph; third, "informational privacy," a predominate concept in Chinese laws, covers one's correspondence, family data, address, crime and disease history, and other information that shall be considered

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[369] (Adopted by the Fifth Session of the Seventh National People's Congress on April 3, 1992).
[370] Article 21, *Several Regulations on the Supervision and Management of AIDS 1988* (Approved by the State Council on December 26, 1987 and promulgated jointly by Health Ministry, Foreign Affairs Ministry, National Education Committee, National Tourism Bureau, National Civil Aviation Bureau and National Foreign Experts Bureau on January 14, 1988).

as private affairs. These three branches of privacy are in accordance with those in the United States and Canada, and can become the legal bases for media tort plaintiffs to claim their privacy rights.

Nevertheless, Chinese law still lacks a "decisional privacy" branch, which, in my opinion, is the most important and dominant category in privacy law because, as elaborated earlier,[371] the concept of privacy is more than simple isolation or solitude. Instead, privacy matters therein can provide us with a zone of autonomy and non-interference in which we can develop and sustain a self-concept, as well as decide and control the extent to which others can access our personal affairs. In this way, the control-based account shall prevail over the separation-based account. Chinese law should incorporate the control-based account and "decisional privacy" in its current legal system, although this process may take some time to realize, considering the fact that Chinese scholars have not yet shifted their research emphasis from "informational privacy" to "decisional privacy."

2. Theoretical Analysis of Right to Privacy in China

The academic debate on the right to privacy in China has also undergone a maturation process. At the very beginning, the concept "privacy" and a pertinent right were narrowly defined in the aspect that "privacy" or "private affairs" means "the contents offend public decency, involve sexual affairs or other private matters and things. They are such as, in criminal crimes, rape, having sexual relations with minors; in indecent cases, indecent behavior and insults towards a woman, sodomy, and prostitution; and unusual relationships concerning a third person who intrudes into the couple in cases of divorce, and so on."[372]

Obviously, the early definition of "privacy" represents a negative meaning, referring particularly to something immoral, bad, and illegal that should be kept hidden or confidential, i.e. the best illustration of a separation-based account of privacy. In the history of Chinese society, the concept of "privacy" did not exist; it is a recent import into Chinese law. As one scholar has noticed, no article about

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[371] See the "The Value of Privacy" in Part B of Chapter II.
[372] *Law Dictionary*, 3rd ed. (Shanghai: Shanghai Dictionary Publisher, 1989) at 407, 944.

the right to privacy can be retrieved from the literature between 1949 and 1987 in China.[373] Also, the Chinese pronunciation of "privacy" (*yinsi*) is similar to another traditional concept "shameful secret" (*yinsi*), of which the latter has been widely recognized as being closely related to sexual affairs before marriage or out of marriage, behavior that is condemned by traditional ethics and morality. Without a clear elaboration on the distinctions between the two, the general public has believed that "privacy" equals "shameful secret," and that if an individual does nothing wrong or shameful, he has no reason to conceal his private life. Accordingly, "privacy" was defined narrowly with a derogative meaning. For example, Article 120.1 of the *Civil Procedure Law* [374] stipulates, "Civil cases shall be tried in public, except for those that involve State secrets or personal privacy or are to be tried otherwise as provided by the law," and Article 120.2 further explains, "A divorce case or a case involving trade secrets may not be heard in public if a party so requests." Apparently, a divorce case, which involves love or sexual affairs, has dominated the content of "personal privacy."

Nevertheless, with the arising media tort cases in the late 1980s, Chinese scholars began to study the right to privacy in depth and width. The traditional view of privacy, which focuses merely on sexual matters, has been challenged by some scholars who hold that the right to privacy should be an independent personality right protected under the law. A famous civil expert, Xinbao Zhang argued that "the right to privacy is a legal right, by which a citizen's residence, inner world, financial situations, social relations, sexual life, and the past and current matters of a purely personal nature that they do not wish to divulge to the outside world should be protected from any intrusion of others."[375] Another prestigious civil researcher, Rou Tong, believed that "the right to privacy, also called the right to private life, is a right of personality under which any

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[373] Yongzheng Wei, *Journalists at the Bar* (Shanghai: Shanghai People's Publishing House, 1994), at 104.

[374] (Adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991, promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991, and effective as of the date of promulgation).

[375] See generally, Xinbao Zhang, "On the Right to privacy" (1990) 3 Study on Legal Science.

interference by others with citizens' secrets and liberty of personal life is prohibited."[376]

Besides these preliminary arguments of the right to privacy, there are scholars who elaborate the definition and dimension of right to privacy in detail. For instance, Professor Liming Wang wrote, "the right to privacy is a right of personality, enjoyed by a natural person, under which he can dispose of all personal information, private activities and private areas which belong only to the person and have no relation to public interest."[377] Furthermore, Professor Wang classified personal privacy in three branches: personal private matters, personal information, and personal areas. Also, he argued that in modern civil law, privacy shall bear the following important features: first, privacy represents a right which can be enjoyed by a natural person to live a stable and tranquil life, and to protect his normal life against others' harassment; second, privacy includes a right to prevent a natural person's residence from intrusion since the residence itself constitutes a private living space, the protection of which reflects the respect towards not only the property rights but also personality right; third, privacy means that a natural person's correspondence shall be kept confidential, that any behavior of opening and reading others' mail without prior consent shall be regarded as a tort; fourth, privacy also involves a right to secure personal information and data. It is illegal to circulate any information concerning a person's privacy.[378]

Lixin Yang, another notable civil law scholar, not only discussed the contents of privacy, but also interpreted the right to privacy in four levels. Professor Yang wrote, "Privacy means the private life secrets which have nothing to do with the public interest. The contents of privacy are personal information, personal

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[376] Rou Tong, *Chinese Civil Law* (Beijing: The Law Press, 1990) at 487.
[377] Liming Wang, *Restatement of the Law of Personality Rights* (Changchun: Jilin People's Press, 1994) at 487.
[378] See generally, Liming Wang, "Construction of Personality Rights System in the New Civil Code" (2003) 4 Legalist, online: http://www.civillaw.com.cn/weizhang/default.asp?id=21876 [translated by author].

activities and personal space." [379] According to his definition, "personal information" refers to all the information, data, and documents about a person, such as height, weight, income, past experience, home telephone number, health, and disease history, etc. "Personal activities" are those activities that are purely personal and not concerned with public interest, for example, one's daily life, social intercourse, sexual life between husband and wife, and other personal activities and facts that a person would not disclose to the public. "Personal space" or "personal territory" is defined as the personal and private sphere, including the private parts of one's body, personal residence, luggage, bag, diary, correspondence, etc.

In fact, Professor Yang's definition of privacy is similar to Professor Wang's classifications, though the specific factors under each category may vary slightly. But the real difference between these two scholars is that Professor Yang studied further on the scope of right to privacy. According to him, the right to privacy can be divided into at least four branches. The first of these is a right to conceal one's privacy. To maintain one's dignity, it is necessary that a person should be given the right to keep his private information from unwanted disclosure or publicity. This is a basic function that the right to privacy shall serve. Second, the right to use privacy indicates that a person can make use of his privacy to satisfy his spiritual and material needs, such as writing a work of literature with one's real life experience, so long as the exercise of this right does not harm the public order. Third is the right to govern one's privacy, i.e. the right-bearer can dominate his privacy by allowing or forbidding others to know or use his private information. Professor Yang believed that this is the core of the right to privacy. Fourth is the right to remedy one's privacy. When the right to privacy is invaded, the right-bearer can seek legal protection and remedies by bring a lawsuit to a court of law and requesting that the person who infringed the right to privacy be held liable for such a tort.[380]

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[379] Lixin Yang, "On Right to Privacy and Several Issues regarding its Legal Protection" (2000) 1 People's Procurator, online: http://www.cddc.net/shownews.asp?newsid=2468, [translated by author].
[380] *Ibid.*

After a brief review of the academic discussions about the right to privacy, it is clear that Chinese legal academia still follows the separation-based account of privacy. Nearly all the civil law professors have tried to unfold the concept of privacy from the perspective of "a right to be let alone." Therefore, privacy has been constantly, though not unanimously, construed as "secrets" regarding one's private life. The only difference is that some scholars made simple arguments, while others made an attempt to discuss privacy more deeply. For example, Professor Liming Wang argued that the right to privacy can only be enjoyed by a natural person, which is a breakthrough on the subject of this right; however, he failed to grasp the essential value of privacy and its relevant right. In this aspect, he is in fact an advocate of a separation-based account of privacy, because his descriptions of privacy tort are basically on the studies of "solitude" and "intrusion."

Professor Lixin Yang, however, argues that what makes the right to privacy remarkable is that this right includes the power for a person to govern his privacy. I would consider it a dawning light on the control-based account of privacy in China, since Professor Yang held that this should be the core value of why the right to privacy exists. He further argued that the right to privacy contains a right to seek legal protection and remedy.

In my opinion, the right to seek remedy shall not become a characteristic of the right to privacy. When a legally recognized right, e.g. the freedom of the press or the right of reputation, has been infringed or violated, it will automatically confer on the right-bearer an option to settle the dispute through litigation or arbitration. But Professor Yang raised this argument, taking it as a sub-right under the right to privacy because he suggests that the right to privacy, with its core value of governing one's private sphere, has its distinguishing feature and shall thus be separated from the right of reputation article in the *General Principle of Civil Law 1986* and worthy of independent legal recognition and protection.

Nowadays, Professor Yang's argument still belongs to a minority theory. The good thing is that neither strong supporting nor dissenting voices are ever heard on his theory. The short-term or primary aim of most Chinese scholars might be to

add the right to privacy as a personality right in the future *Civil Code* in order to address the current awkwardness of the right of reputation article. Though this objective is on the right track, without an accurate account of the right to privacy, the new *Civil Code* will eventually encounter problems. I therefore favor Professor Yang's theory and strongly recommend that future legislation adopt his account of a privacy right.

In short, freedom of the press and the right to privacy in China are new concepts, both culturally and legally. Traditionally, the Chinese press served primarily as the government's means of propaganda. During the transitional period from a state-sponsored media to a market-oriented one, the freedom of the press has been advocated by the media to survive in a competitive market environment and by society to promote the public's right to know. On the other hand, the right to privacy, as a representative of the competing interests with the freedom of the press, has questioned how far the press can go into individual's private life. Although the theory of the right to privacy is still immature, even incomplete in China, it has, appropriately, been recognized that it should be an independent personality right of the category of the right of reputation, and that it should be centered on one's autonomy to govern one's own affairs. Though the political and social systems in China and North America vary, the ongoing economic reform in China and the globalization of the trend of jurisprudence has urged the transplantation of international legal theories and doctrines. It is likely that, after intensive study and the selective introductions of outside laws and theories, the future *Media Law* and *Civil Code* in China will regulate all these questions.

Conclusion

The conflicts and balancing of the freedom of the press and the right to privacy is a never-ending study in each country. The reasons may vary, but they are quite common because the definition of each right is itself a controversial issue. The peculiarity of each case explains why applying the preceding rules or tests to determine which of the two interests shall prevail is always a difficult process, as any improper decision will cause not only a chilling effect on the media, but also compromise personal security to live a peaceful private life.

As the watchdog of state power, the media should be an independent, free, and vigorous "fourth estate" to serve the public's right to know. As a liberated agent, the media existed not only as a platform for individuals to exercise their freedom of expression and speech, but also as a self-interest bearer to pursue its maximized profits by catering to readers or audiences with vulgar stories acquired by invading private lives. As the role of the media has been correctly recognized, the freedom of the press is understood as a means of promoting citizen's fundamental freedom, rather than a privilege enjoyed by media alone. To claim its freedom, the media shall follow its duties, both legal and ethical, and respect other equally important rights.

The right to privacy shall thus be duly respected. Originating as the "right to be let alone," the right to privacy first represented an interest of not having one's solitude interfered with. But it is more than isolation or separation from the outside world because, as a social being, each individual must have certain relationship with others, whatever the degree of intimacy. What makes the right to privacy distinctive is that the right to privacy respects a person as a potential chooser and recognizes one's autonomy to determine when, how, and to what extent others can have access to one's private information and sphere. In this way, the right to privacy represents, to some extent, a right of control.

Newsworthiness plays an important role in weighing the conflicting interests between the freedom of the press and the right to privacy, which includes at least three factors: first, the nature of news, i.e. the issue of public interest; second, the status of the person concerned, i.e. the public-private figure dichotomy; and third,

the place of newsgathering, i.e. the public privacy analysis. Among them, the public interest shall be news *in* rather than merely *of* public interest, and shall be judged by the court instead of the self-definition by media; third, public figures enjoy less privacy in exchange for the strong control power acquired by their fame, but there must be a logical relationship between the privacy disclosed and the identity; and fourth, in places accessible to the general public, a person can have a reasonable expectation of the right to privacy because one's right to control his privacy interest is not forfeited simply by exposure to the public gaze.

All these theories, laws and court decisions regarding the freedom of the press and the right to privacy have special meanings for the construction of Chinese *Media Law* and *Civil Code*. It is not only because the present Chinese society is undergoing some similar circumstances that other countries have experienced long before, but also because the Chinese press and privacy laws primarily follow the North American approach. The correct and intensive study of that approach will certainly help China reshape its press and privacy laws more scientifically in order to reflect the essence of each right and balance their conflicts.

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