

**Privacy - Two Episodes: Princess Diana's Death and *Les Editions Vice-Versa Inc. v. Aubry***

**A. Raphael Cohen-Almagor<sup>1</sup>**

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<sup>1</sup>. Raphael Cohen-Almagor, D.Phil. (Oxon) is Chairperson of Library and Information Studies, and Associate Professor at the Dept. of Communication, University of Haifa. Formerly member of the Israel Press Council (1997-2000); author of five books, including *The Boundaries of Liberty and Tolerance* (1994); *Speech, Media and Ethics* (2001), and *The Scope of Tolerance* (forthcoming). Editor of five other books, including *Challenges to Democracy* (2000) and *Liberal Democracy and the Limits of Tolerance* (2000). The author thanks the British Council and the Canadian government for their kind support.

## I. Abstract

When news is becoming entertainment (infotainment) and private stories become public spectacle, individual lives can be mercilessly exposed to the glaring spotlight of unwanted publicity. In delineating the boundaries of intrusion, distinctions are made between public figures and ordinary citizens, and between people who choose to live in the spotlights, and ordinary citizens who stumble into the public fore. I discuss the tragic death of Princess Diana and then examine the Quebec *Charter of Human Rights and Freedoms* and Chapter III of the *Civil Code of Quebec [1994]* that were invoked in *Les Editions Vice-Versa Inc. v. Aubry*. Siding with the Court's majority in this case it is asserted that the public's right to know does not grant permission to magazines to take photos of people to decorate their covers without the people's consent.

## B. 1. Introduction

This essay canvasses the issue of privacy. When news is becoming entertainment (infotainment) and private stories become public spectacle, individual lives can be mercilessly exposed to the glaring spotlight of unwanted publicity. In delineating the boundaries of intrusion, distinctions are made between children and adults; between public figures and ordinary citizens; between people who choose to live in the spotlights, and ordinary citizens who stumble into the public forum, and between ordinary citizens doing something of public significance and those who do not. I discuss the tragic death of Princess Diana and then examine the Quebec *Charter of Human Rights and Freedoms* and Chapter III of the *Civil Code of Quebec [1994]* that were invoked in a recent Supreme Court case, *Les Editions Vice-Versa Inc. v. Aubry*. Siding with the Court's majority in this case it is asserted that the public's right to know does not allow scope to magazines to take photos of people to decorate their covers without the people's consent.

It is argued that free expression does not include the right to do unjustifiable harm to others.<sup>2</sup> Indeed, one of the four key principles of Sigma Delta Chi, the Society of Professional Journalists' Code of Ethics, is to minimize harm. It says, "ethical journalists treat sources, subjects and colleagues as human beings deserving of respect." The Code further instructs journalists to show compassion for those who

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<sup>2</sup>. Canadian Charter of Rights and Freedoms, section 1; *R. v. Keegstra* [1990] S.C.J. No. 131, 3 S.C.R. 870; *Canadian Human Rights Commission et al. v. Taylor et al.* [1990] 3 S.C.R. 892, 75 D.L.R. (4<sup>th</sup>); *R. v. Butler* [1992] 1 S.C.R. 452.

may be affected adversely by news coverage and to avoid pandering to lurid curiosity, maintaining that the “pursuit of the news is not a license for arrogance.”<sup>3</sup>

With due appreciation for the liberal inclination to provide wide latitude to freedom of expression, we must also acknowledge the “democratic catch” and the need for prescribing the scope of tolerance. The right to free expression and free media, supplemented and strengthened by the concept of the public’s right to know, does not entail the freedom to invade individual privacy without ample justification.<sup>4</sup>

## 2. Privacy

During the past twenty years or so the media have shifted to entertainment, and the sensational media prefer to intrude on private matters at the expense of analyzing political matters. We witness far more gossip and a tendency to popularize the news, and the tabloids around the globe have specialized in character assassina-

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<sup>3</sup> . Founded in 1909 as Sigma Delta Chi, the Society of Professional Journalists is the US’s largest and most broad-based journalism organization. SPJ is a not-for-profit organization made up of more than 10,000 members dedicated to encouraging the free practice of journalism; stimulating high standards of ethical behavior; and perpetuating a free press. Sigma Delta Chi’s first Code of Ethics was borrowed from the American Society of Newspaper Editors in 1926. In 1973, Sigma Delta Chi wrote its own code, which was revised in 1984 and 1987. The present version of the Society of Professional Journalists’ Code of Ethics was adopted in September 1996. <http://spj.org/awards/SDX98/rules.htm#society>; <http://spj.org/ethics/ethics.pdf>. See also Ontario Press Council, *24th Annual Report* (Toronto, Ontario, 1996), p. 79.

<sup>4</sup> . See Section 8 of the *Canadian Charter of Rights and Freedoms*, and Article 17 of the *International Covenant on Civil and Political Rights*: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” U.N.T.S. No. 14668, Vol. 999 (1976).

tions and incidents of intrusion on privacy. The large sensational narratives are taking so much space that they drive out discussion about politics.

According to the Angus Reid polling firm, two out of three Canadians think the media are guilty of sensationalizing scandals, and more than one third (35 per cent) have actually boycotted certain media because of their extensive intrusive reporting. Almost two thirds (65 per cent) feel reporting delves too deeply into the personal lives of public figures.<sup>5</sup>

This phenomenon, of course, is not uniquely Canadian. We are living in an age when news is becoming entertainment (infotainment) and private stories become public spectacle. One of the characteristics of the modern media is their intrusiveness. In today's world the leaders of democracies and celebrities are continuously watched, even hounded. Political leaders and public figures live in a media bubble where their every move is likely to be observed. Their public faces can almost never be taken off, and their private lives can be mercilessly exposed to the glaring spotlight of unwanted publicity. The willingness of public figures to have themselves aired demonstrates both the seductiveness and the reach of the media.<sup>6</sup>

In a public lecture delivered at Columbia University in 1995, The Right Honourable Brian Mulroney said that the personal abuse by the media that leaders suffer nowadays has become an unfortunately high - but necessary - price for them to pay for the privilege of service in democracies. He maintained that politicians are not the only ones tracked by the media, or by individuals masquerading as journalists: they are only the most numerous and the most visible. Prime Minister Mulroney called for responsibility and accountability by the media as they fulfil their

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<sup>5</sup>. "Most of us feel reporters pry too much into lives of public figures", *Globe and Mail* (October 10, 1998), p. C3.

<sup>6</sup>. David Taras, *The Newsmakers: The Media's Influence on Canadian Politics* (Ontario, Canada: Nelson Canada, 1990), p. 235.

“indispensable roles as vigorous critics and faithful chroniclers of our lives and times”.<sup>7</sup>

In this context it is important to distinguish between public figures and ordinary citizens. Public figures are more susceptible to media invasion of their privacy. Ordinary citizens are usually of no interest to the public and therefore do not, generally speaking, attract media attention. For instance, ordinary people attending a funeral are not, generally speaking, photographed. In the first instance, there should be a very good reason to send a photographer to a funeral to take such pictures (for instance, when covering a funeral of a hostage killed by terrorists), and the photographer is obliged to ask for permission prior to taking the photos. Celebrities and politicians who attend funerals might be photographed and usually this conduct does not raise any controversy. Politicians attend those funerals as part of their public responsibilities, and celebrities not only do not mind the presence of the camera; often they welcome it.

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

If, for instance, a public figure known and respected for preaching family values, decency among couples and honesty in marriage, is found to be betraying his wife, the media have a right to break the news and bring the issue to public attention. The public is entitled to know that the person who spoke so eloquently about family values does not espouse those values at home.<sup>8</sup> The issue is different when

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<sup>7</sup> The Right Honourable Brian Mulroney, public speech delivered at Columbia University, New York (March 20, 1995).

<sup>8</sup> In his comments on this chapter, Eric Barendt says that he is unsure that the public is always entitled to know that someone who supports family values, and poses as married with wife and children

the public figure has made his reputation in other spheres, unrelated to his family life, and the conduct in his private life does not affect his public duties. Most broadsheet papers would not cover the infidelity story, while most of the popular press would probably publish the story in the name of public right to curiosity and peeping.

Another pertinent distinction is between public figures who choose to live in the spotlights, and ordinary citizens who stumble into the public forum. On occasion, people stumble unintentionally into the spotlight, under circumstances that are not under their control. They, for instance, commit a significant public act, like saving a family from a fire, or rescuing a public figure from danger. The media should publish the heroic deed of the individual but should refrain from intruding into his or her private life that is of no importance to the public.<sup>9</sup> If that person would prefer to remain in the public eye and to harvest more attention by further deeds or expressions, then he or she is no longer a private citizen and should accept the pros and cons involved in public life. But many of those who stumbled may wish to regain their privacy and return to normal life. With regard to these people, the media should refrain from intruding into their private lives and should respect their pri-

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on his election address has had, or even is currently having an affair. That does not mean that his views are less entitled to respect and discussion. The argument that the press makes that it is always right to expose hypocrisy is, in Barendt's view, too crude.

<sup>9</sup> See the discussion on the Oliver Sipple story in R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL.: University Press of Florida, 1994), pp. 113-115. Sipple was the ex-marine who knocked a gun out of the hands of a would-be assassin of then American President Gerald Ford. Shortly after the incident, it was revealed by the media that Sipple was active in the San Francisco gay community, a fact that had not been known to Sipple's family, who thereupon broke off relationship with him. His entire life was shattered as result of this publication. The good deed he had done brought about extremely harmful consequences for Sipple.

vacy, especially when exposure of certain details could harm one or more of the people involved.<sup>10</sup>

Look, for instance, at the painful story of the massacre of fourteen women in Montreal in December 1989. During the days that followed, there was what one writer describes as “a savage hunt” for gossip from neighbors and friends, and the ravaged faces of mourners. Information on the victims was gleaned from every possible source, invading people’s privacy in the pursuit of a story. The killer’s mother had to go into hiding, and her private life was reported in minute details taken from divorce papers.<sup>11</sup> The fact that her son was a killer legitimized crossing all ethical borders. In another case, a Canadian woman and her child were killed during a sky-jacking in Malta in November 1985. When the husband returned to Canada, a “milling crowd of reporters, photographers and TV cameramen” met him at the airport. The man told them that they were not invited to the funeral.<sup>12</sup> After this episode, it was said that the encounter prompted soul searching in the newsrooms as editors weighed the news value of the event against the human grief and pain involved.<sup>13</sup>

In this context it should be noted that the CBC’s *Journalistic Standards and Practices* holds: “An individual’s right to privacy is cherished in Canada... The invasion of an individual’s privacy is repugnant. Privacy in its broadest sense means

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<sup>10</sup>. Section IIB(b) of the Quebec Press Council’s *The Rights and Responsibilities of the Press* (second edition, 1987) holds: “Media and journalists should distinguish between matters of public interest and public curiosity. The publication of information concerning the private life of individuals is acceptable only to the extent that it is in the public interest”.

<sup>11</sup>. Ronald D. Crelinsten, “Victims’ Perspectives,” in David L. Paletz and Alex P. Schmid (eds.), *Terrorism and the Media* (Newbury Park, CA.: Sage, 1992), p. 217.

<sup>12</sup>. *Ibid.* p. 219.

<sup>13</sup>. For review of other disturbing episodes in which the media hinder activities of security forces and have even cooperated with terrorists, see *Chapter 4*.



being left alone. It means protecting an individual's personal and private life from intrusion or exposure to the public view."<sup>14</sup>

### **3. Gossip**

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

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<sup>14</sup> See also Section VI of the Statement of Principles for Canadian Daily Newspapers, Canadian Daily Newspapers Publishers Association, adopted in April 1977: "Every person has a right to privacy. There are inevitable conflicts between the right to privacy and the public good or the right to know about the conduct of public affairs. Each case should be judged in the light of common sense and humanity." Quoted in Nick Russell, *Morals and the Media* (Vancouver: UBC Press, 1995), pp. 123, 199. For further discussion on privacy see <http://www.screen.com/mnet/eng/issues/priv/privacy.htm>

series during the advanced months of pregnancy? These are top priority questions for the captive followers of the series.<sup>15</sup>

Gossip is not supposed to be stripped of ethics either. People's honor must be dealt with carefully and the boundaries of decorum must be maintained. Pure voyeurism might cause unjustified harm to celebrities and their families, and often this attitude does not add to a paper's reputation.

The British press has been constantly under public scrutiny during the past two decades. At the end of the 1980s there was a growing uneasiness with regard to the functioning of the press. It was decided to set up an inquiry committee to consider the behaviour of the press and to suggest remedies. In particular, the issue of privacy was in the forefront of concern. The first report of June 1990 concluded with the view that "the press should be given one last chance to demonstrate that non-statutory self-regulation can be made to work effectively. This is a stiff test for the press. If it fails, we recommend that a statutory system for handling complaints should be introduced".<sup>16</sup>

The press failed the test and in January 1993 a second report was issued by Sir David Calcutt QC, arguing that the Press Complaints Commission (PCC) was not an effective regulator of the press. Sir David maintained that the PCC did not "hold the balance fairly between the press and individual. It is not the truly independent body, which it should be. As constituted, it is, in essence, a body set up by the industry, and operating a code of practice devised by the industry and which is over-favourable to the industry".<sup>17</sup> Accordingly the report recommended the re-

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<sup>15</sup>. For further discussion, see R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave, 2001), chap. 5.

<sup>16</sup>. Home Office, *Report of the Committee on Privacy and Related Matters* (London: Her Majesty's Stationary Office, June 1990), Cm 1102, at 73. Sir David Calcutt Report.

<sup>17</sup>. Sir David Calcutt QC (January 1993) *Review of Press Self-Regulation* (London: Her Majesty's Stationary Office), Cm 2135, at xi.

placement of the self-regulatory body of the press with a statutory regime designed to ensure that privacy “is protected from unjustifiable intrusion, and protected by a body in which the public, as well as the press, has confidence”.<sup>18</sup>

Although Sir David thought that his recommendations were “designed to make a positive contribution to the development of the highest standards of journalism, to enable the press to operate freely and responsibly, and to give it the backing which is needed, in a fiercely competitive market, to resist the wildest excesses”,<sup>19</sup> the government did not accept his recommendations. The feeling was that the formation of a statutory regime might hinder freedom of expression and the right of the public to know. However, the proprietors who formed the PCC out of necessity, fearing a possible governmental intervention, understand after Princess Diana’s death that it is up to them to make the necessary accommodations, otherwise voices for governmental regulations might be reheard, possibly with greater public support.

The London tabloids compete in the same market, and design themselves to a particular slice of the market: working people who want an easy read, entertaining, not sophisticate, providing the news with good portions of gossip, sports, pictures and humour. This is arguably the most competitive market in the print industry worldwide. Soon enough the tabloids had realized that Princess Diana was their best sales promoter. Her picture on the front page may prompt people to buy their journal instead of another. Diana became the most photographed person in the world. The tabloids were willing to pay enterprising and shameless photographers millions of dollars for capturing Diana in her private moments. The more private, the better. According to one report, the widely circulated photo of Diana embracing boyfriend Dodi al-Fayed netted the photographer more than \$3.2 million, an incen-

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<sup>18</sup>. Calcutt, 1993, at xiv.

<sup>19</sup>. Calcutt, 1993, at 63. I asked Sir David to grant me an interview during the summer of 1997 but he refused, saying that he had shifted his interests to other spheres.

tive that drove paparazzi to break any ethical boundary on the book in search for a quick fortune.<sup>20</sup>

On August 31, 1997, the Princess of Wales was killed in a shocking road accident in Paris. Princess Diana and her lover were trying to escape some paparazzi photographers who raced after their car. Princess Diana was exceptional among celebrities because she insisted upon continuing to live as normal a life as possible despite the constant surveillance to which she was subjected (in her words, “to sing openly”, a way of living that the Royal family did not appreciate so much but the paparazzi adored). Princess Diana understood the power of the media and frequently used them and manipulated them for her own advantage. One can say that Diana confused public interest with public prurience. Although the paparazzi made her life very difficult in recent years, Princess Diana never filed a complaint against newspapers (under Section 8, Harassment, of the Code of Practice). Even after her pictures were taken in a gym and subsequently published in the *Daily Mirror* (November 1993), she chose not to complain and to resolve the matter through conciliation.<sup>21</sup> To a large extent her image was built by the media that, in turn, used her to

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<sup>20</sup>. Charles J. Sykes, *The End of Privacy* (New York: St. Martin's Press, 1999), p. 190.

<sup>21</sup>. In August 1996, the Princess of Wales obtained an injunction restraining a named freelance press photographer from coming within 300 metres of her, wherever she might be, because of fear of harassment; and there have been cases where injunctions have been obtained to restrain publication of photographs taken of the Princess and other members of the royal family in intimate settings, by means of telephoto lenses, etc. The general rule is that the taking of photographs cannot in itself be controlled (except where it is likely to cause a breach of the peace), unless the interference with the subject's life is so significant that it amounts to serious and probably intentional harassment. See Helen Fenwick and Gavin Phillipson “Confidence and Privacy: A Re-examination”, *Cambridge Law Journal*, Vol. 55, No. 3 (November 1996): 447-455, at 448-450. In *Hellewell v. Chief Constable of South Yorkshire* [1995] 1 WLR 804 Laws J. said that if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent dis-

sell newspapers. You need two to tango, and the two - Princess Diana and the media - were eager to dance. Princess Diana was struggling against a far superior opponent, the Royal Court, and soon enough realized that her main, perhaps only, asset were the media. This was the only sphere in which she was able to compete against the court, and win. She knew what a good picture was and supplied those photos that were printed all over the world and helped newspapers to increase their sales. She attracted wide public attention and provided endless numbers of stories for the reporters and photographers who followed her. What she did not understand is that she could not choose which pictures should be taken, and which not; which photographers could accompany her during her trips, and which should not follow her. Princess Diana was disgusted and appalled by the behaviour of the unscrupulous paparazzi photographers who made their living by recording her private moments. The famous British dictum, My Home is My Castle, was transformed when Diana was concerned to Her Castle Is Our Homework, or rather, Our Golden Peepshow. Apparently, Diana failed to recognize until her very last day that when you open the door for the media they would enter in force, to make the most of this opportunity to make some profit.<sup>22</sup>

And Diana did open the door to document her most private moments. When she was vacationing in St. Tropez with her two sons, each morning they

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closure of the photograph would amount to a breach of confidence and the law would protect a right of privacy, although the name accorded to the cause of action would be breach of confidence (at 807).

<sup>22</sup>. Mr. Robin Esser, Consultant Editor of *The Daily Mail*, argued that Princess Diana was obsessive about her image. It was not rare for her to phone our Royal reporter a few times a week, sometimes a few times a day. Princess Diana was on the phone with him regularly every week for the past 2-3 years. Interview with Mr. Esser (October 20, 1997). Mr. Charles Moore, Editor of the *Daily Telegraph*, said that Princess Diana was regularly in touch with senior people in the paper, like himself, the Royal affairs reporter, and another senior member who is close to the Royal family. Interview with Mr. Moore on October 21, 1997.

would appear on the beach where they cavorted willingly in full view of the photographers. The resulting pictures of the princess in a bathing suit were devoured by much of the world press. Reportedly, the paparazzi were so grateful for her cooperation that they sent her one hundred red roses. Not coincidentally, public attention completely overshadowed her ex-husband's birthday party for Camilla Parker-Bowles. She had trumped her rival by sacrificing her privacy. Furthermore, as her romance with Dodi al-Fayed intensified, Diana tipped off photographers about her "secret" rendezvous. She passed information to fashion photographer Mario Brenna about their whereabouts, enabling him to shoot rolls of film showing Diana and Dodi frolicking together in the surf. She also let photographer Jason Fraser know the exact time and locations along the French and Italian coasts where she and Dodi would be sailing. The results were seemingly intimate shots of the couple romping together on a Jet Ski.<sup>23</sup>

Following Princess Diana's tragic death, many people in England called for a re-examination of the tension between the right to freedom of expression and the right to privacy. Lord Wakeham, Chairperson of the Press Complaints Committee declared immediately after Princess Diana's funeral (September 6, 1997) that the PCC will need to ponder ways to protect the privacy of Princes William and Harry so that they will not have to go through the agonizing experiences that their mother lived almost daily after she became the Princess of Wales.<sup>24</sup> Lord Wakeham said he

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<sup>23</sup>. Charles J. Sykes, *The End of Privacy*, p. 191.

<sup>24</sup> . Following Princess Diana's funeral, as part of the soul searching the *Guardian* contemplated the idea of appointing an "external" ombudsman, in addition to the Readers Editor. In the *Guardian* system, the Readers Editor is the first person to whom complaints are referred. He would either adjudicate, and if he thinks it is a substantial complaint he would ask the reporter for response. The Editor cannot tell him what he should write. He cannot be sacked by the Editor. At the same time he is a staff member. The external ombudsman will be paid by the Guardian Group but is not a staff member. He may write everything that he wants and according to the planned scheme the *Guardian*

was “extremely concerned” about what will happen as the Princes reach the age of 16,<sup>25</sup> conceding that the PCC’s Code of Practice might change after consultation with editors.<sup>26</sup> Lord Wakeham’s statement followed the pledge made by Earl Spencer, Princess Diana’s brother, during her funeral. The outraged Earl committed himself to protect her children from the media, not allowing them “to suffer the anguish that used regularly to drive you [Diana] to tearful despair”.<sup>27</sup> Of course, all people concerned realize that it is not enough to join the Press Council and to subscribe to its Code of Practice. Although almost all newspapers in England subscribe to the Code, this is more of a lip service.<sup>28</sup> Clearly the tabloids still often betray it in their publications.<sup>29</sup>

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will publish his words in a prominent place in the paper. Interview with Mr. Alan Rusbridger, Editor of *The Guardian* (October 28, 1997).

<sup>25</sup>. Clause 12 of the PCC Code of Practice holds that children under sixteen should not be interviewed or photographed on subjects involving their personal welfare without the consent of a parent or other adult responsible for them”. For further discussion see Lord Wakeham’s speech at St. Bride’s Institute (August 23, 1995), in *Moving Ahead* (Press Complaints Commission, 1995).

<sup>26</sup>. Alison Boshoff, “Curbs on Press to Protect Princes”, *The Daily Telegraph* (September 8, 1997), p. 1.

<sup>27</sup>. “Earl Spencer’s Funeral Address”, *The Sunday Telegraph* (September 7, 1997), p. 2.

<sup>28</sup> . However, it is noted that the *Daily Mail* incorporated the Code of Practice into its journalists’ contracts, and there were cases in which journalists were dismissed for breaching the Code. In one incident a reporter was dismissed because he did not identify himself as a journalist. Interview with Mr. Robin Esser, Consultant Editor of *The Daily Mail* (October 20, 1997).

<sup>29</sup>. Shortly after Princess Diana’s tragic death, Rupert Murdoch had an interview during which he was asked whether he has any regrets regarding the conduct of his papers during Princess Diana’s life. His answer was that the only regret he has is that he needed to pay too much money for the pa-

It should be added that civil actions and prosecutions are easier under the UK Protection from Harassment Act (1997). This law makes it a criminal offence, punishable by imprisonment, for a person knowingly and unreasonably to pursue “a course of conduct which amounts to harassment of another”. The test of constructive knowledge is whether “a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other”.<sup>30</sup> Harassment includes causing alarm or distress, and civil actions for damages may also be pursued.<sup>31</sup>

On September 8, 1997, three daily newspapers, *The Mirror*, *The Sun*, and *The Independent*, announced that they would no longer use paparazzi pictures of Princes William and Harry in the first step to agreeing to tighter self-regulation. *The Mirror* said it “will now work swiftly with the Press Complaints Commission to protect these boys from intrusive paparazzi pictures”.<sup>32</sup> Andrew Marr, editor of the *Independent*, declared that “we will never again publish any pictures of the princes in a private situation and we will be more sparing of pictures of the princes and other

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parazzi photos.

<sup>30</sup>. Protection from Harassment Act 1997, section 1(2).

<sup>31</sup>. Cf. David Pannick, “Resist Pressure for A Rushed Law”, *The Times* (September 9, 1997), p. 33. It should also be noted that Section 8 (ii) of the PCC Code of Practice holds: “Unless their enquiries are in the public interest, journalists should not photograph individuals on private property... without their consent; should not persist in telephoning or questioning individuals after having been asked to desist; should not remain on their property after having been asked to leave and should not follow them” (my emphasis, RCA). Section 18 defines the term “public interest” as: “i) Detecting or exposing crime or a serious misdemeanour. ii) Protecting public health and safety. iii) Preventing the public from being misled by some statement or action of an individual or organization”.

<sup>32</sup>. Kamal Ahmed, “Editors Bar Snatched Pictures of Princes”, *The Guardian* (September 9, 1997), p. 2.



members of the royal family in other situations as well”.<sup>33</sup> Associated Newspapers, publishers of the *Daily Mail*, *Mail on Sunday*, and London’s *Evening Standard*, have declared that any use of paparazzi pictures will have to be cleared with Lord Rothermere, the proprietor who, in turn, proclaimed that there would be a ban on “all intrusive pictures except where they are considered necessary”.<sup>34</sup> Max Hastings, editor of the *Standard*, said: “There can be few British journalists who did not spend some hours this weekend brooding about privacy after Lord Spencer’s vengeful contribution... Some members of the newspaper trade have behaved like animals, and it is strongly in the public interest that they should be deterred from doing so”.<sup>35</sup>

Because of the public sensitivity after the death of Princess Diana, the tabloids indeed honoured the privacy of young Princes William and Harry as long as they were at school. Eton is a relatively big open place, yet no pictures of the two young boys were taken at school. The only photos that were released were those issued by the Palace.

Indeed, privacy of children is usually respected far more by the media than the privacy of adults. Children are conceived as more vulnerable and sensitive, and rightly so. This is not to say that the media do not report stories about children. Of course they do. Maltreatment of children is of public interest. The media take upon themselves to protect weak third parties. If the children’s conduct is conceived as news story, then children will also be photographed. Children who take part in wars and other hostilities appear often on the airwaves. For instance, Palestinian

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<sup>33</sup>. *Ibid.*

<sup>34</sup>. *Ibid.*

<sup>35</sup>. *Ibid.* For an interesting American case involving a paparazzi who made a career of photographing Jacqueline Kennedy Onassis and her children in public places and whose intrusions were enjoined by the courts, see *Galella v. Onassis*, 487 F.2d 986 (2<sup>nd</sup> Cir. 1973); *Galella v. Onassis*, 533 F.Supp. 1076 (S.D.N.Y. 1982).

children who throw stones at armed soldiers are photographed, and with a good reason. The public should know that children are in the frontline, fighting against armed men with stones. Such photos inform the public of the Palestinian determination, of the balance of power between the two sides, of the sensitivity (or lack thereof) that both sides to the conflict show regarding the use of children in the battlefield. The media love David versus Goliath stories and, in such instances, one photo is better than a thousand words. And, of course, the issue of privacy invasion is irrelevant. The children want to be shown, and the Palestinian leaders who orchestrate the hostile events are quite eager to have such photos taken and published. A photo showing a child throwing stones at Israeli tank serves the Palestinian propaganda and national interest.

There have been some interesting cases about the scope of privacy under the UK Human Rights Act which incorporates the European Convention on Human Rights (ECHR).<sup>36</sup> It was recently held in a case brought by the ex-news reader Anna Ford who had been photographed through a long distance lens on a beach that she had no reasonable expectation of privacy in a public place, and that if she wore a bikini in public she could not object to being photographed.<sup>37</sup>

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<sup>36</sup>. Article 8 of the ECHR provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>37</sup> . I am grateful to Geoffrey Marshall for this piece of information. For further discussion on privacy and English law, see Sir Brian Neill, "Privacy: A Challenge for the Next Century", in Basil S. Markesinis (ed.), *Protecting Privacy* (Oxford: Oxford University Press, 1999), 1-28. See also *Naomi Campbell v Mirror Group Newspapers Ltd* where it was held that the media to conform with Art.8 European Convention on Human Rights should respect information about aspects or details of the

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

So far, Quebec is the only province in Canada to have enacted constitutional provisions about privacy for the private sector.<sup>38</sup> The Quebec *Charter of Human Rights and Freedoms* holds that “Every person has a right to the safeguard of his dignity, honour and reputation”, and that “Every person has a right to respect for his private life”.<sup>39</sup> In turn, Chapter III of the *Civil Code of Quebec [1994]* holds:

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

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

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

(1) entering or taking anything in his dwelling;

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private lives of celebrities and public figures that they legitimately chose to keep private, certainly "sensitive personal data" under the 1998 Act, unless there was an overriding public interest duty to publish consistent with Art.10(2) of the Convention. Striking the balance between Art.8 and Art.10 of the Convention and having full regard to s.12(4) of the 1998 Act, the court held that Campbell was entitled to the remedy of damages and/or compensation. Cf. *Campbell v Mirror* [2002] EWHC 499 (QB) QBD (Morland J) 27/3/2002. <http://www.cs.mdx.ac.uk/staffpages/cgeorge/PrivacyIssues.doc>

<sup>38</sup>. The first legislation designed to protect privacy in the private sector was enacted in 1993 with the *Loi de protection des renseignements personnels dans le secteur privé*. For examination of existing legislation, international laws and initiatives relating to privacy and freedom of information as well as voluntary codes of conduct for Canadian businesses to ensure the safety of their clients' personal information see Media Awareness Network: Media Issues – Privacy, <http://www.media-awareness.ca>; <http://www.screen.com/mnet/eng/issues/priv/laws/laws.htm>

<sup>39</sup>. Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c C-12.

- (2) intentionally intercepting or using his private communications;
- (3) appropriating or using his image or voice while he is in private premises;
- (4) keeping his private life under observation by any means;
- (5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) using his correspondence, manuscripts or other personal documents.<sup>40</sup>

Both statutory provisions were invoked in a recent Supreme Court case, *Les Editions Vice-Versa Inc. v. Aubry*.<sup>41</sup> The case was concerned with Ms. Aubry who brought an action in civil liability against a photographer and the publisher of a magazine dedicated to the arts, for taking and publishing a photograph showing her, then aged 17, sitting on the steps of a building. The photograph was published without her knowledge and consent. The trial judge recognized that the unauthorized publication constituted a fault and ordered the *Vice Versa* magazine to pay her \$2,000.<sup>42</sup> The majority of the Court of Appeal for Quebec affirmed this decision, and then the magazine appealed to the Supreme Court.

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<sup>40</sup>. Chapter III, "Respect of Reputation and Privacy," *Civil Code of Quebec [1994]*. It is argued that the Quebec privacy laws are too broad, having unintended effects on historical research because they impede the development of access to archival holdings. See Joanne Burgess, "The Right to Privacy in the Private Sector: What is at Stake for Historians and Historical Research," *Canadian Historical Association* (Summer 1998), pp. 26-27. See also <http://www.cam.org/~ihaf>.

<sup>41</sup>. *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R.

<sup>42</sup>. Eric Barendt notes that in libel, damages are presumed to flow from publication of defamatory statement, and the same principle perhaps should apply to invasion of privacy.

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

An artist's right to publish his or her work is not absolute and cannot include the right to infringe, without any justification, a fundamental right of the subject whose image appears in the work. It has not been shown that the public's interest in seeing this photograph is predominant. In these circumstances, the respondent's right to protection of her image is more important than the appellant's right to publish the photograph of the respondent without first obtaining her permission.<sup>43</sup>

The minority of the Court, *per* Lamer CJ. and Major J., accepted the appeal because, in their opinion, there was no evidence of damage. The respondent's statement that her classmates laughed at her did not in itself constitute sufficient evidence of prejudice, as it did not provide any information about how she felt. Nor was there any evidence that Ms. Aubry had become a "well-known figure" or that

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<sup>43</sup>. *Les Editions Vice-Versa Inc. v. Aubry* [1998] 1 S.C.R. In his comments on this essay, Joe Magnet argues that *Aubry* is a property type case following a well-established property law doctrine in Canada as to the ownership of the image. Magnet thinks that the privacy aspect in this case, while interesting, is a side issue.

the instant proceedings and the media coverage they received increased her notoriety.

I side with the majority in this case. In the name of the public's right to know, magazines should not send photographers to the streets to take photos of people to decorate their covers without the people's consent. It is one thing to publish a group photograph, when none of the faces is identifiable, and quite another to zoom in on one person and circulate his or her photo. It is one thing to take a photo of a public place where people are depicted *en masse* and quite another to use a public place as a background for showing a person who is the true subject of the photo. I do not see any reasonable justification or a legitimate purpose in invading any one's privacy without his or her consent. Of course, if consent is granted then no problem arises. But people should enjoy the freedom to remain anonymous if they so desire.

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

Chief Justice Lamer argued in his dissent that Ms. Aubry's statement "people laughed at me" does not in itself constitute sufficient evidence of damage, because it did not provide any information about how she felt.<sup>44</sup> But surely no one would like to be laughed at. This statement shows that Ms. Aubry felt that the dissemination of her photo was wrong, and that it did cause her moral prejudice. As the Court of Quebec held, to learn through teasing by friends that Aubry's picture had been pub-

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<sup>44</sup> *Les Editions Vice-Versa Inc. v. Aubry*, para. 32 in Lamer CJ.'s judgement.

lished in a prestigious, large-circulation magazine without her even knowing that her picture had been taken and without her authorization merits compensation for the humiliation, discomfort and upset suffered as a result of the invasion of her privacy. The majority of the Supreme Court adopted this opinion.<sup>45</sup>

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

## 5. Conclusion

Individuals should be allowed to define themselves and to decide how much of themselves to reveal or to conceal in different situations. As Jeffrey Rosen notes, privacy is a form of opacity, and opacity has its values. We need more shades, more blinds and more virtual curtains. By respecting the boundaries between public and private speech and conduct, a liberal state can provide sanctuaries from the invasions of privacy that are inevitable in social interactions.<sup>46</sup>

The two fundamental background rights underlining every democracy are respect for others and not harming others.<sup>47</sup> They should not be held secondary to considerations of profit and personal prestige of journalists and newspapers. Media freedom does not entail, nor does it protect, the taking of unlimited measures

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<sup>45</sup>. *Les Editions Vice-Versa Inc. v. Aubry*, paras. 41, 71 of the majority judgement delivered by L'Heureux-Dube and Bastarache JJ.

<sup>46</sup>. Jeffrey Rosen, *The Unwanted Gaze* (New York: Random House, 2000), pp. 223-224.

<sup>47</sup>. Ronald Dworkin, "Liberalism", in *A Matter of Principle* (Oxford: Clarendon Press, 1985): 181-204; *idem*, *Taking Rights Seriously* (London: Duckworth, 1976); R. Cohen-Almagor, "Between Neutrality and Perfectionism", *Canadian J. of Law and Jurisprudence*, Vol. VII, No. 2 (1994): 217-236.

designed to increase the sales of a newspaper or promoting the ratings for certain broadcasts.<sup>48</sup>

Journalists should see people as ends and not as means - a Kantian deontological approach.<sup>49</sup> This view implies the ability to control the power that lies in the hands of media professionals when reporting in the name of the people's right to know might cause unjustified harm to others. These instances should be distinguished from incidents when the harm is justified. For instance, when a person acts corruptly, and there is evidence to prove it, the media are allowed, and even obliged, to look into the issue and bring it to public scrutiny. This is what is meant when calling the media "the watchdog of democracy."<sup>50</sup>

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<sup>48</sup>. See Richard Clutterbuck, *The Media and Political Violence* (London: Macmillan, 1983).

<sup>49</sup>. See Immanuel Kant, *Foundations of the Metaphysics of Morals* (Indianapolis, Ind.: Bobbs-Merrill Educational Publishers, 1969).

<sup>50</sup>. For further discussion on privacy, see Privacy Commissioner, *1997-98 Annual Report* (Ottawa, Ont., 1998); Jay Black, Bob Steele and Ralph Barney, *Doing Ethics in Journalism* (Boston: Allyn and Bacon, 1995), pp. 181-196; Carman Cumming and Catherine McKercher, *The Canadian Reporter* (Toronto: Harcourt Brace, 1994), pp. 387-390; Philip Meyer, *Ethical Journalism* (New York: Longman, 1987), pp. 77-93. See also <http://strategis.ic.gc.ca/privacy>