privacy inevitably varies from society to society.[3] Others advise that perhaps it is best to concentrate on identifying the specific individual interests that the law ought to protect in core cases of privacy violation.[4] Following this logic, we find that continental Europe grounds its concept of privacy in human dignity,[5] while the English hold fast to their concept of breach of confidence with its roots in proprietary right, protecting thereby the reasonable expectation arising from such confidential relationships;[6] the Americans, on the other hand, are primarily concerned with protecting individual autonomy from state interference.[7] With each in their perfect distinctiveness, the notion of privacy may have settled well within their own national terrain.

Yet the internet requires us to re-examine privacy as a concept now that geographical boundaries have dissolved and ethnographical uniqueness is dwindling in the cyber world. Of particular challenge is the ever-growing popularity of online sharing culture and the rise of citizen participatory journalism.[8] The internet user can literally be a reporter and add his story onto the internet news. Many also like to take mobile phone photographs or videos and post them on the internet.[9]

The content of online video or discussion may vary from innocuous personal sharing on the joy and oddities in life, to the daring exposure of perceived injustices in society, to perceived personal grievances against particular individuals. Once information or comment about any one of us is disclosed and expressed on the internet, we may become famous or infamous in a matter of seconds. In other words, each one of us is potentially under surveillance all day long, and our daily lives may be under the minute scrutiny of our neighbours, anyone we have ever met, or even the passer-by on the street whom we

3 For examples, see James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1152; Frederick Schauer, 'Free Speech and the Social Construction of Privacy' (2001) 68 *Social Research* 221; Alan Westin, *Privacy and Freedom* (Bodley Head, 1968) 29–30.

4 For examples, see Avishai Margalit, 'Privacy in the Decent Society' (2001) 68 *Social Research* 259; Jeffrey Rosen, 'Out of Context: The Purposes of Privacy' (2001) 68 *Social Research* 209.

5 See Whitman (n 3).

6 See discussion in Geoffrey Robertson and Andrew Nicol, *Media Law* (Penguin, 2002) ch 5.

7 See Whitman (n 3).

8 A successful example is OhmyNews, a Korean online newspaper with the motto 'Every Citizen is a Reporter'. It was founded by Oh Yeon Ho on 22 February 2000. It has a floating staff of 47,000 amateur journalists all over the country and the site receives an average of 1 to 1.5 million hits a day. See *The End of 20th Century Journalism—OhmyNews CEO Addresses the 2004 World Association of Newspapers* at http://english.ohmynews.com/articleview/article_view.asp?article_class=8&no=169396&rel_no=1. *The International Herald Tribune* has its own team of citizen-reporters, set up in 2007.

9 A common site that enables such online sharing is YouTube, introduced into the cyber world in early 2005. The average daily viewing figures jumped from 10 million videos being watched every day in 2005 to 100 million in 2006. On average, users upload 65,000 new videos to the site every day. John Cloud, 'The Youtube Gurus' *Time Magazine* 46 (25 Dec 2006–1 Jan 2007). People are watching less television but spending more time streaming online video. A BBC Online survey in 2006 revealed that 43% of its respondents who watched internet videos more than once a week would spend less time watching television. Adam Sherwin, 'Why Do 900m People Tune in to Watch This Teenager?' *Times Online,* 27 November 2006, http://entertainment.timesonline.co.uk.

hardly noticed. For instance, in 2005, a South Korean university student who allegedly had refused to clean up the faeces of her dog in a subway compartment was featured as *The Dog Poop Girl* on the internet.[10] The story soon hit the national headlines in Korea and even made it into the *Washington Post*.[11] Internet users were not only content to expose her wrongful deeds, but they mobilised one another through the internet to hunt her down and expose her personal contact information, including her name and address. Facing mounting public pressure, the girl eventually withdrew from her university.

In the exposure of anti-social behaviour, it is typical that beyond the deliberate taking of photographs initially involved, there is subsequent posting on the internet, and then further calling for identification of the perceived villains. This last step easily escalates, as already indicated, into a form of internet witch hunting, online mob trial, or harassment in real life. All of these eventually may amount to become a form of virtual persecution. Several issues, therefore, arise involving the legitimacy of modern technology to intrude in others' lives at the stage of information gathering, the extent to which disclosure is justified, and the resulting harm caused to the victims, all of which remain unresolved. This internet phenomenon of exposure and shame has also given us an opportunity to re-examine the universality of the privacy right enshrined in article 12 of the Universal Declaration of Human Rights, and to seek its underlying values.[12]

Thus, this article focuses on the violation of privacy through virtual persecution, defined to be the exposure of acts that take place in public through wide dissemination on the internet without consent, followed by a call for identification of the concerned individuals, with a further divulgation of personally identifiable information of the victims by the anonymous internet crowd, with the intention to achieve focused ridicule, shaming or punishment. Part II of this article will discuss various examples of virtual persecution by which individual lives have been ruthlessly disrupted.

The social phenomenon of virtual persecution thus lead us to the heart of the debate on the concept of 'public privacy' and concern about the protection of privacy in public places.[13] Alan Westin, in his influential work on *Privacy and Freedom,* points out that 'public privacy' occurs 'when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance'.[14] The term 'public

10 For an account of the story see Daniel J Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007) 8.

11 Jonathan Krim, 'Subway Fracas Escalates into Test of the internet's Power to Shame' *Washington Post,* 7 July 2005, D01, www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html.

12 Article 12 of the Universal Declaration of Human Rights stipulates that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

13 The term was used by Nicole Moreham to describe the protection of privacy in public spaces. NA Moreham, 'Privacy in Public Places' (2006) 65 *Cambridge Law Journal* 606.

14 Westin (n 3) 31. Westin also uses a second sense of public privacy, by which he refers to a person expressing ideas in public but who wishes to be anonymous, 32.

privacy,' by definition, has highlighted the complexity embedded in the very notion of privacy. Alone in itself, privacy is likely to conjure images of inviolable secrecy, personal intimacy and secluded spatial solitude. However, public privacy also concerns individual acts that take place in public, where the boundary between what is public and what is private becomes immediately blurred. In addition, the nature of the action is more likely to be of public concern when social norms have been violated. These two factors point to the difficulty in claiming privacy protection, especially in common law countries.

Part III of this article will show that the common law concept of privacy is unable to deal adequately with the variety of privacy infringements on the internet. For instance, the current understanding of privacy under English common law is premised on one's 'reasonable expectation of privacy'.[15] This circular definition of privacy is not only perplexing to apply, but the exact nature of reasonable expectation is open to dispute. The matter is made worse when events take place in public. In a similar vein, the recognition of privacy rights under American law is often defeated if the act takes place in public.[16] The rationale is that what happens in the plain view of the public is considered public information.[17] In this sense, privacy is preoccupied with both geographical and spatial concerns.

If common law understanding offers little guidance, the civil law perception of privacy as an essential aspect of personality right calls for careful consideration of various issues concerning internet privacy, in particular the question of whether so-called social villains could still claim respect for their dignity when they are apparently at fault. To answer this, Part IV will draw on common law jurisprudence on autonomy, continental literature on dignity, and writings on the unique enduring harm that the internet can inflict on an individual. This part argues that social villains may be entitled to the protection of privacy regardless of the facts that the acts take place in the glaring view of the public and that their nature is socially reprehensible. When one realises that possible violation of public privacy on the internet is ultimately a question of how control should be exercised in society, namely with regard to who is observing whom, how, and for how long,[18] one is also being asked to address the issues of what should be on the public agenda and who and what actually requires public supervision. From the above perspective, privacy should not be confined to the notions of seclusion, isolation or intimacy but should include protection against the violation of the individual personality which occurs when he is under observation and surveillance, subject to permanent scrutiny, and forced to carry an internet profile that is accessible to and searchable by all. At its core, privacy is about the

15 *Campbell v MGN Ltd* [2004] AC 457.

16 See Don R Pember *Mass Media Law* (McGraw-Hill, 2004) 267–74.

17 See Deckle McLean, 'Plain View: A Concept Useful to the Public Disclosure and Intrusion Privacy Invasion Tort' (1999) 21 *Communications and the Law* 9.

18 This is borrowed from Westin's idea that privacy is the claim of individuals to determine for themselves 'when, how, and to what extent information about them is communicated to others'. Westin (n 3) 7.

'right to be let alone',[19] the right to remain anonymous, and freedom from being targeted. In a relational context, therefore, privacy is about how to achieve decent participation in the cyber world, and how to safeguard autonomy and dignity in one's life against the powerful social moral force of monitoring and enduring sanctions exercised through the internet.

In the last part of the article, I will address the concern of jurisdiction and the potential responsibility of internet service providers. This article focuses on the infringement of public privacy of private citizens, rather than political figures or public officials. The term 'personal information' in my article refers to any information that identifies an individual. And my major argument is that the protection of public privacy is best understood to be a form of personality rights when vigilantism and informal sanctions through disclosure of personal information have gone too far in the internet era.

II. THE COURT OF PUBLIC OPINION: VIRTUAL PERSECUTION ON THE INTERNET

In the internet age, we are witnessing an explosion of personal and private information in cyberspace, due neither to state orchestrated effort nor to the commercial press. The aim is not to reap any profits. Rather, it often occurs as a result of the new power of individuals to reveal perceived hypocrisy, air grievances, expose a possible wrong, or purely to enjoy the possibilities of shared entertainment. In this internet era of gossip, revelations, and citizen reporting, paradoxically the most powerful predators in term of privacy violations have become we ourselves.

Once targeted, the objects may endure a miserable fate. They are accused of anti-social behaviour, their images or activities being captured on all sorts of recording devices, and they later find themselves cast as internet characters. In the following discussion, we will see that the internet mob often like to target individuals for the sake of pure entertainment or to punish those who have violated social norms.

A notorious example of targeting for the sake of malicious entertainment and amusement happened to Qian Zhijun in China. Qian, a 16-year-old school boy, was spotted on his way to attend road safety class in 2003 by an anonymous photographer.[20] He was fat with a pudgy face and weighed over 100 kg. His image was then posted on the internet, and he was dubbed Little Fatty. Pictures of his face were then superimposed

19 This famous saying is borrowed from Warren and Brandeis. See Samuel Warren and Louis Brandeis, 'The Right to Privacy' [1890] *Harvard Law Review* 193, 195.

20 Qian's family wanted to sue but did not know who to sue. Qian himself stated that he was angry at the netizens initially but he gradually learnt to accept his 'fame'. The account on Little Fatty was based on Clifford Coonan, 'The New Cultural Revolution: How Little Fatty Made it Big' *The Independent*, 16 November 2006, www.independent.co.uk. The story was also discussed in Solove (n 10) 44–45.

onto images of Mona Lisa, Jackie Chan, and one of the presidential heads on Mont Rushmore. Qian and his family seriously contemplated lodging a legal action, but it was nearly impossible for them to identify all the violators. Since graduating from high school, Qian has worked as a gas station attendant, but his image has been regularly tracked on the internet, with a hit rate in the tens of millions.[21] Qian was so famous that *The Independent* in the UK and *Reuters News* covered his story.[22]

Little Fatty may easily win our sympathy if he brings any claims of privacy violations. After all, the harassment he was forced to put up with constituted bullying of the most insidious kind. However, there have been other cases in which the behaviour of the people photographed has been socially or morally reprehensible. Would we in those cases show similar sympathy? In the Introduction to this paper, I related the incident of the Korean Dog Poop girl. Would we support her fight for a claim to privacy protection? More significantly, would she ever dare to fight for her privacy claims? Reality tells us that she withdrew from university.

A similar story took place in China in 2006. A hospital pharmacist, Wang Yu, bowed to public pressure and issued a public apology on the internet and actually thanked the netizens for reprimanding her, after pictures of her using her high heels to kill a small kitten on a pavement had been circulating on the internet.[23] Initially the killing had been videoed by a company catering for the needs of a group of sadistic animal torturers. Though animal torture in itself is not a crime in China, the pictures caused huge uproar. A virtual warrant was issued by netizens to hunt down the kitten killer. Wang's personal details—name, address, and work unit—were called for.[24] Within four days she had been identified and her personal details were exposed. Eventually, she was suspended by the hospital that she worked for. Both the hospital and Wang issued a public statement. The issue of her privacy violation was never raised; Wang explained that she was under immense pressure from a failed marriage, although this explanation could hardly qualify as a mitigating factor. To the netizens, she was regarded as an unforgivable culprit, therefore she had to apologise, and even show gratitude for the 'friendly admonition' of others.

Between the dishonourable treatment of the innocuous case of Little Fatty, on the one hand, and the absolutely reprehensible case of the kitten torturer on the other, lies another category which is also related to the violation of social norms. In 2008, in a subway station in Shanghai, China, a young couple were sharing a passionate moment,

21 *Ibid.*

22 *Ibid.*

23 'Public Apology from the Kitten Torturer' *Beijing News,* 16 March 2006, http://news.thebeijingnews.com/china/2006/0316/014@167629.htm.

24 'Netizens Identified the Kitten Killer within 4 Days, The Relevant Work Unit has Confirmed the Incident' *Southern Weekend,* 9 March 2006, A7 (in Chinese).

kissing for almost three minutes.[25] As far as they were concerned, no one was in sight, but their kissing was captured on closed circuit television in the subway station. The clip was posted on YouTube and KU6,[26] most likely by the subway station staff since there were side comments from them. The young couple were so angry that they brought a legal action of privacy violation against the subway company. However, the young man resigned from his employment and it is not hard to guess the reason why when public display of passion is still largely frowned upon in Chinese society.

Equally, an act perceived by the perpetrator as wholly justified may also be reacted to as socially unacceptable behaviour. In 2007, a 13-year-old high school girl in China condemned the corrupting trend of the internet as too violent and too pornographic in a television interview.[27] She was immediately attacked by angry netizens who mobilised public opinion, and utilised the internet as a 'human search engine'[28] to track the girl down. Within five days, there were 1,200 postings concerning her personal information, running to 12 full web pages. Her picture was also posted, information about her was called for and stories that she was not as pure and good as she had presented flooded the internet.

After reading these stories, one may be tempted to conclude that using the internet to target and criticise is a unique feature of Asia. Yet, this is hardly the full picture. In 2009, in the US, a University student named Cynthia Moreno expressed in an ode her disdain for the town in which she had grown up on the social network site MySpace.[29] The ode was posted only for six days with her first name, but it caught the attention of her former high school principal, who then sent the ode with her full name to a local newspaper. Once the ode was printed, the local community reacted violently. Moreno's parents received death threats and a gunshot was fired at their home. Eventually, the family had to shut down its family business and move out of town. Moreno brought an action for invasion of privacy by the public disclosure of private facts against the school principal and the newspaper but lost the legal battle.[30] The California Court of Appeals ruled that once the information is already public or has become part of the public domain,

25 The account of the Shanghai Lovers incident is from http://news.sina.com.cn/s/2008-01-16/041914752613.shtml.

26 KU6 is the Chinese version of YouTube.

27 The account is from 'Pupil: Web Pages are Very Pornographic and Very Violent', www.xkb.com.cn/view.php?id=184695 (in Chinese).

28 In China, triggering internet users to hunt down individuals to impose social sanctions has become such a popular and alarming trend that it even has a name: 'human flesh search engine'. Bai Xu and Ji Shaoting, '"Human Flesh Engine": An Internet Lynching?' *Xinhua News*, 4 July 2008, http://news.xinhuanet.com/english/2008-07/04/content_8491087.htm.

29 *Moreno v Hanford Sentinel, Inc* 172 Cal App (4th) 1125 (2009).

30 On the other cause of action, whether there was intentional infliction of emotional distress, the court ruled that it was an issue for the jury to decide. *Moreno, ibid.*

no reasonable person would have had an expectation of privacy.[31] In addition, the court further held that her last name was not a private fact, and was easily ascertainable.[32]

On other occasions, it may not only be the privacy of the social villains that we are concerned with. Those who happened to interact with the social villains may also be captured under the internet's gaze. In 2006, a middle aged man blasted foul language at a young man for a continuous period of four minutes on a bus in Hong Kong, just because the latter had tapped on his shoulder and asked him to lower his voice while talking on a mobile phone [33] The scene was captured by another passenger, who later posted the clip onto YouTube, which soon reached a hit rate of 1.7 million within three weeks. The story was covered by *Wall Street Journal* and *CNN*, and the middle aged man was dubbed Bus Uncle.[34] While Bus Uncle enjoyed his fame, the young man abhorred the publicity which put him at the centre of attention.[35]

The above stories illustrate that the internet is not only a hotbed for gossip and rumour, but also a powerful instrument for shaming and imposing social sanctions on many kinds of lawful but anti-social behaviour. The characters affected find that their lives are invaded unwarrantedly. Worse, they are often helpless to claim any privacy protection before the law. Why is this the case? To answer this question, we need to examine the various legal positions governing public privacy in different countries.

III. THE PUZZLE OF PUBLIC PRIVACY

In the examples we have mentioned, we found that the acts concerned take place in public, that what is shown is true, that the nature of information may not be obviously private or particularly sensitive, that the posting of the information on the internet is not for commercial exploitation, and that many of the people involved have created the embarrassing situations for themselves. The curious question has thus become: can privacy be experienced in the presence of a crowd, in public? Can one carry a zone of privacy within oneself regardless of where one is? In fact, this question is not unique in the internet age. Different courts in various jurisdictions have been asked to draw up new rules and to provide solutions to accommodate the seeming inconsistency in public privacy.

31 *Ibid*, 1130.

32 *Ibid.*

33 The account is from Rowan Callick, 'Hong Kong Phone Rage "Not Settled Yet"' *The Australian*, 5 June 2006, www.theaustralian.news.com.au/story/0,20867,19362403-29677,00.html.

34 http://en.wikipedia.org/wiki/The_Bus_Uncle.

35 Callick (n 33)

A. English Law

In 2004, the House of Lords of the United Kingdom was given an outstanding opportunity not only to resolve the long fought debate about whether breach of confidence provided privacy protection, but also to decide whether a celebrity or a public figure could claim privacy in public, in *Campbell v MGN Ltd.*[36] The case concerned Naomi Campbell, a supermodel, whose photographs were taken on a public street at a moment when she was leaving a Narcotics Anonymous clinic, and then published by a tabloid newspaper, the *Daily Mirror*. While Campbell conceded that since she had misled the public before, the *Daily Mirror* was entitled to publish that she was an addict, she objected to the publication of any further details.

Though the House of Lords was split in reaching its decision in favour of Campbell, all five judges agreed that English law recognises a right to protection of private information. In the words of Lord Nicholls, the essence of the tort is better encapsulated as misuse of private information.[37] The judges noted that the European Convention on Human Rights has been incorporated into the local law of the United Kingdom and the court has an obligation to respect private life.[38] In addition, the court referred to both American and Australian positions on privacy protection.[39] In particular, it relied heavily on the Australian case of *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*[40] in their ruling on what was necessarily public and what was necessarily private. Quoting the High Court of Australia, the English court agreed that

> [a]n activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviours, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[41]

36 [2004] 2 AC 457.

37 *Per* Lord Nicholls, *ibid,* 464 para 14.

38 *Per* Lord Hope, *ibid,* 480 para 86.

39 Lord Hope cited American Law Institute, Restatement of the Law, Torts, 2d (1977), s 625D, *ibid,* 482 para 94. In general, American law does not protect privacy claims of individuals whose acts are visible or whose speech is audible by any person who happens to be in the vicinity as there cannot be a legitimate expectation of privacy, though different gradations of privacy are allowed.

40 [2001] 208 CLR 199. The Australian decision concerned the broadcasting of a film about the operations at a bush tail possum processing facility.

41 Quoted by Lord Hope (n 36) 482 para 93.

After considering both approaches, the Lords concluded that what is private should no longer be solely dependent on the geographical location of the act. Rather, what is critical is that the information disclosed must be of a private nature: 'the touchstone ... is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'.[42] In the opinion of the Law Lords, this is an objective test of what a reasonable person of ordinary sensibilities would feel if she were placed in the same position as the claimant.[43]

In applying the above understanding to Campbell, the majority of the judges found that the information was obviously of a private nature since it was about an individual seeking medical therapy. Though respect for the right to private life needs to be balanced with the right to freedom of expression, the Court pointed out that the public interest served in disclosing the contended information, and the benefits of disclosing such personal information, must be proportionate to the harm inflicted on the claimant.[44] In *Campbell*, the court noted the psychological and emotional harm that would be caused to a drug addict if her sense of security and respect were threatened at that very critical time,[45] and concluded that the balance came down in favour of Campbell. What is not clear from the judgment is when the element of harm would become relevant in the above legal analysis: is it at the initial stage of establishing a privacy claim based on reasonable expectation of privacy, or is it at the second stage of weighing the harm caused to the claimant against the public interest in publishing the concerned information?[46]

Following this interpretation, *Campbell* is now often seen as a landmark decision for the English courts in recognising the right to privacy. Yet it may be too early for us to celebrate the recognition of public privacy in English law because its recognition is highly dependent on the interpretation and application of what qualifies as a reasonable expectation of privacy. In particular, the position touching on information that is 'not obviously private' is far from settled. For example, Sir Elton John was refused any privacy protection when the media took a photograph of him on a London street outside his home, showing him dressed in a tracksuit and wearing a baseball cap, revealing his receding hairline, with possible signs of baldness.[47]

42 *Per* Lord Nicholls (n 36) 466 paras 21–22; Lord Hope also adopted a test involving the reasonable person of ordinary sensibilities, at 484–5 paras 99–100. This approach was endorsed by Baroness Hale, para 137. Moreham characterised the new standard set in Campbell to be the 'obviously private test', referring to the nature of information or activity; the test for reasonable expectation of privacy; and the highly offensive to a reasonable person of ordinary sensibilities test. See N Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 630–4.

43 *Per* Lord Hope (n 36) 484 para 99; Baroness Hale (n 36) 495–6, paras 135–6.

44 *Per* Lord Hope (n 36) 484 para 113; *per* Baroness Hale (n 36) 501 para 140.

45 *Per* Baroness Hale (n 36) 501 para 155.

46 Baroness Hale considered that publication would cause harm to Campbell at the second stage of balancing right to privacy and right to freedom of expression (501 para 157; 504 para 169) while Lord Hope mentioned the harm of disrupting Campbell's treatment in the discussion at the first stage of establishing a claim in privacy protection based on reasonable expectation of privacy (484 para 98).

47 [2006] EMLR 722.

But when JK Rowling, the author of the *Harry Potter* franchise, asserted the privacy right of her 19-month-old infant son against the prying *Sunday Express*, which had taken and published a photograph of the family in a public street in Edinburgh, the Court of Appeal ruled in the favour of the claimant.[48] Sir Anthony Clarke MR, in the interlocutory proceeding, held that a child of a famous parent is entitled to the same privacy protection as a child of parents who are not in the public eye.[49] He further remarked that a child would not expect the press to target him and publish his photograph. However, the court has also emphasised that privacy claims depend much upon circumstances and there is no simple rule.[50] In its opinion, the standard for a child is different from an adult.[51] It is, perhaps, difficult to tell whether this case has wider implications than the recognition of children's privacy in public.

All we can conclude is that the English position, as it now stands, is that the mere taking of one's photograph in public, the exposure to observation, and the subsequent dissemination of such information to the wider public may not necessarily trigger privacy protection. This is because judicial authorities suggest that the information revealed must have violated the plaintiff's reasonable expectation of privacy. Specific harm based on distress or harassment may not be an essential element to establish the cause of action, but will be considered as relevant factors. Inevitably, such an understanding of the nature of private information is highly context specific, which makes it almost impossible to come up with a principled approach and to arrive at a predictable outcome, except in those established and recognised categories of private information. However, the question of why some kinds of information are considered to be more sensitive than others has remained unanswered.

What is most perplexing in the *Campbell* decision is the court's circular formula in defining privacy to be dependent on the reasonable expectation of privacy of others in a like situation. Lisa Austin has argued that the above reasoning is highly contextual and fluid, since the norms of a particular community are malleable.[52] We are often left to guess what form of expectation will be considered as reasonable. When paparazzi activities are widespread, or when the taking of photographs of strangers on the street on mobile phones and their subsequent posting on the internet have become the norm, we

48 *David Murray v Express Newspapers and Big Pictures Ltd* [2007] EWHC 1908 (Ch), reversed *David Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 (CA). Express Newspapers was no longer the respondent in the appellate case as it had settled with the Murrays. The remaining respondents were the agent company that arranged for said photographs to be taken and the photographer who was responsible for taking the photographs.

49 [2008] EWCA Civ 446, para 46.

50 *Ibid*, paras 17, 43.

51 *Ibid*, para 37.

52 Austin is writing on the Canadian test of privacy, which is also dependent on the 'reasonable expectation of privacy'. See Lisa Austin, 'Privacy and the Question of Technology' (2003) 22 *Law and Philosophy* 119, 129–31.

can no longer claim that our privacy interests have been infringed because we should have foreseen that. In fact, our expectation is hardly 'reasonable'. In writing on the 'Peeping Tom' society that we are living in, Lawrence Friedman comments that 'seeing everything gives rise to a culture of expectation', which fosters a self-justificatory belief that we have a right to know everything.[53] Thus, appealing to social convention means that we can only expect, and must accept, widespread surveillance in our daily life. Indeed, public privacy does not fare any better in other common law jurisdictions where the standard of reasonable expectation of privacy has been incorporated into the qualifying test for privacy recognition and protection.[54] This is most pronounced in the US approach, where privacy is protected through the tort actions of intrusion upon seclusion and public disclosure of private facts.[55]

B. Before the US Courts

The dominant view in the US is that once we venture into the public domain, our privacy is compromised by being in public; we have waived our rights and can no longer harbour any reasonable expectation of privacy.[56] A cause of action in intrusion upon seclusion is established where the claimant can prove that 'the defendant has intentionally intruded, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person'.[57] The claimant must also have a reasonable expectation of privacy. Liability will not be found if matters are already in the public record or a person is in a public place, except where the intrusion is substantial and highly offensive to an ordinary reasonable person. A much cited case is *Daily Times Democrat v Graham*, where a woman's dress had been blown high in the draft caused by a passing aeroplane and a photograph of her was taken and published by a newspaper.[58] The court ruled for the victim and held that, though the event occurred in public, publication of the photograph would cause immense embarrassment to any person of reasonable sensitivity, and the public value of the photograph was extremely low.

53 Lawrence Friedman, *Guarding Life's Dark Secrets* (Stanford University Press, 2007) 260.

54 For discussion of the positions in Canada, New Zealand and the United States, see Elizabeth Paton-Simpson, 'Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places' (2000) 50 *University of Toronto Law Journal* 305.

55 American Law Institute, Restatement of the Law, Torts, Invasion of Privacy §652A (Restat 2d of Torts 1977). For the purpose of our discussion, we do not cover the other two causes of action, which are appropriation of the other's name or likeness and publicity that unreasonably places the other in a false light before the public.

56 This refers to the general position subject to exceptional and aggravating circumstances, eg harassment. See Paton-Simpson (n 54).

57 Restatement of the Law, Torts (n 55) §652B.

58 (1964) 276 Ala 380.

For the second cause of action of public disclosure of private facts, the matter disclosed must be of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public. Once the information is publicly available, the privacy claim will be defeated. The difficulty of satisfying the above test is illustrated by the notorious case of *Florida Star v BJF*,[59] where the US Supreme Court held that the identity of a rape victim could not be protected under the privacy action due to the fact that her information was already in the public record and the reporting of crime was of legitimate public concern. According to one study, the success rate in privacy actions in the US between 1980 and 1990 was less than 3 per cent.[60]

This trend continues in the internet age, as shown in *Borings v Google Inc.*[61] A couple sued Google for publishing pictures of their house on Google Street View and broadcasting the images on the web globally. The District Court of Pennsylvania ruled that the plaintiffs had failed to establish a cause of action under both intrusion upon seclusion and publicity given to private life. Despite the fact that the plaintiffs have clear signs outside their home marked 'Private Road' and 'No Trespassing', the court ruled that the first action of intrusion upon seclusion failed on the ground that the intrusion was not substantial such as to cause 'mental suffering, shame, or humiliation to a person of ordinary sensibilities'.[62] In the opinion of the court, only the 'most exquisitely sensitive'[63] would suffer shame or humiliation in a like situation. The second action was considered equally flawed as no 'reasonable person would be offended'.[64] The Borings may not be the only 'exquisitely sensitive' persons. Villagers in Broughton in the UK had blocked the driver of a Google Street View car from entering their village and complained to the UK's Information Commissioner on the grounds of privacy violations.[65] To their disappointment, the Commissioner concluded that the intrusion on privacy was 'relatively limited' and that it was a 'small risk of privacy detriment'[66] that society should pay.

Both incidents concerning Google illustrate vividly the shortcoming and the highly subjective nature of the reasonable expectation and offensiveness standards. While the Borings and residents of Broughton had asserted their privacy claims, the authorities had essentially dismissed their claims as unreasonable.

59 491 US 524 (1989).

60 The Law Commission of New Zealand referred to Randall Bezanson's study between 1890 and 1990. See Randall Bezanson, 'The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990' (1992) 80 *California Law Review* 1133, 1172, in Law Commission of New Zealand, *Invasion of Privacy: Penalties and Remedies, Review of the Law of Privacy Stage 3*, Issues Paper 14, 80 (2009), www.lawcom.govt.nz.

61 598 F Supp 2d 695 (2009).

62 *Ibid*, 699.

63 *Ibid*, 700.

64 *Ibid.*

65 'All Clear for Google Street View' *BBC News*, 23 April 23 2009, http://news.bbc.co.uk/2/hi/technology/8014178.stm.

66 *Ibid.*

C. Applying Common Law Principles to Cases of Virtual Persecution

When we apply the common law principles to cases of virtual persecution, we find that, as innocent as Little Fatty was, it is unlikely that he would successfully claim privacy protection. Under the common law, he would need to prove that the subject matter of the information disclosed was of a private nature such that his reasonable expectation of privacy had been violated. But his image was captured and recorded during his routine journey to class, an ordinary incident in his daily life. It was an unremarkable, trivial and innocuous event, comparable to Baroness Hale's allusion of Campbell popping out for a bottle of milk. Unlike Murray, he was not a child of tender years. He was alone and not engaged in any social activity with others. Since the nature of the information disclosed can hardly be considered to be 'private' under the common law test, a reasonable expectation of privacy is unlikely to arise. Moreover, there was nothing intimate or embarrassing in his activity to trigger the test of offensiveness (the American and the Australian requirement).

Equally, the high school girl who voluntarily entered the public arena and appeared on a national television programme might have great difficulty triggering privacy protection. We cannot stop the unflattering remarks and opinion targeted at her on the internet. At most, one can only protect her specific personal data or information being disseminated. Unfortunately, China does not have any national law on personal data protection at the moment.

In the *Moreno* case, referred to earlier, despite the fact that the university student was expressing her thoughts casually, intended only for her friends on MySpace, the California appellate court ruled that 'no reasonable person would have had an expectation of privacy regarding the published material'[67] on the internet. In the opinion of the court, the disclosure of the plaintiff's full name and sending her ode to a newspaper were 'merely giving further publicity to already public information'.[68] However, an empirical study on the behavioural pattern and expectation of online social networks users reveals that despite the voluntary disclosure of personal information online, most users still expect their privacy to be respected.[69] What constitutes reasonable expectation is, therefore, highly subjective and contingent on a particular sector in society. While the online community is likely to consider a person's last name and her thoughts to be private information, the American court ruled otherwise.

So, what about the Shanghai couple who kissed passionately in the subway station? Could we argue they were in an intimate moment that would warrant the protection of privacy under common law? The answer is likely to be negative. Indisputably, they

67 *Moreno* (n 29) part 1a.

68 *Ibid.*

69 Avner Levin and Patricia Sanchez Abril, 'Two Notions of Privacy Online' (2009) 11 *Vanderbilt Journal of Entertainment & Technology Law* 1001.

voluntarily engaged in an intimate act in an open public place. Though the act may be personal, it is doubtful whether they would be held to have had a reasonable expectation of privacy. Other than the fact that subway station is a publicly accessible place, the growing popularity of internet posting may have altered our expectation of privacy. In addition, it is also difficult to foretell what a reasonable expectation of privacy is, when so many indulge in homemade sex videos and share them willingly with others on the internet.[70] Patricia S Abril warns us that in the culture of cyberspace, there may be 'no such thing as unequivocally private subject matter'.[71] Logically, it is plausible for us to conclude that when a couple kisses openly in a public area, the reasonable expectation is that they would not object to being viewed by the masses on the internet.

If Little Fatty and the Shanghai Lovers are likely to face an uphill battle in relation to any privacy claims, we could imagine the almost doomed outcome for any claims by the Kitten Torturer, the Korean Dog Poop Girl, and Bus Uncle in common law jurisdictions. After all, they committed the socially reprehensible acts in public. The acts were not 'private' in the common understanding of being intimate, secret or personal. Furthermore, they themselves had directly created the embarrassing or humiliating events, causing their own disgrace.

Now, we have seen that what poses a particular difficulty for our present debate on the protection of privacy is not only that the acts took place in public, but what followed afterwards. The common thread running through many internet 'scandals' is the taking of photographs of the individuals concerned without their consent, followed by their subsequent posting and dissemination to a much wider audience on the internet. This is often followed by a call for identification of the culprits concerned, and a flood of relevant information being supplied by numerous individuals. Combining all these factors, it is not hard to see that the internet has revolutionised the concept of the public sphere into a global stage for media spectacle. The Korean student refused to clean up the dog faeces in the presence of the few passengers in that particular subway compartment. Yet the internet amplifies the public gaze from those present at the time to an entirely different audience. Similarly, by crossing a road or going to work in a gas station, Little Fatty might expect to be seen and noticed by the public, but he could hardly expect his image to be recorded, reproduced, analysed, passed onto others, and commented on night and day by millions of people. The internet has transformed the 'incidental nature of observation in a public place'[72] into a constant global drama, always available for viewing.

We should not overlook other aspects of internet posting in the exposure of anti-social behaviours. What has been happening is that the individuals concerned are under observation, their movements being recorded and information cumulatively collected;

70 Patricia Sanchez Abril, 'Recasting Privacy Torts in a Spaceless World' (2007) 21 *Harvard Journal of Law & Technology* 1, 23.

71 *Ibid.*

72 Lisa Austin, 'The Privacy Interests at Stake in Public Activities' [2006] *Innovate Magazine*, Spring, 20.

images are repeatedly disseminated; and lives are traced by a virtual community. Distinct from traditional media intrusion, these are often collective, spontaneous and cumulative acts by unknown individuals. The particular intrusiveness of the internet is its permanence and searchability. It is no longer meaningful to differentiate the act of mere photograph-taking from dissemination of information,[73] to distinguish the call for more information from targeting and subsequent shaming. All of them roll into one single act of virtual persecution that constitutes the ultimate violation by the unknown masses of an individual.

Hence, I will argue, in the following section, that the entire process of subjecting an individual to internet scrutiny has violated the right of privacy, better understood by the European Court of Human Rights to be a right to personality, an essential aspect to 'private life' and development of the self. The underlying values are respect for one's autonomy, dignity and prevention of harm.

IV. RECLAIMING PUBLIC PRIVACY AS RIGHT TO PERSONALITY

A. Across the Channel

1. Before the European Court of Human Rights: Peck v The United Kingdom

Unlike the common law approach of protecting *privacy*, The European Court of Human Rights (ECtHR) uses the terminology of protecting one's right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). In fact, before the decision in *Campbell*, an Englishman named Peck was so thoroughly disenchanted by the inadequate recognition of privacy before an English court that he fought all the way to the ECtHR.[74] In 1995, Peck suffered from depression and he attempted to commit suicide by cutting his wrists on a street in the town of Brentwood, England. Though Peck was duly rescued, his image was captured by a closed circuit television camera (CCTV). The photographs of Peck's rescue were later printed in the Council's own news bulletin. The story became so popular that it was covered in the local press, by a local TV station and eventually by BBC television, reaching an average of 9.2 million viewers.[75] Peck's image was not adequately pixellated in the television programmes so that he was recognised by his friends and neighbours. Embarrassed, Peck

73 This distinction was emphasised by Lord Hoffmann in *Campbell* (n 36) paras 74, 75, and Sir Anthony Clarke in *Murray* (n 48) para 54.

74 *Peck v United Kingdom* (Case 44647/98) [2003] EMLR 15 (ECtHR).

75 *Ibid*, paras 6–14.

argued that the disclosure of the footage constituted a serious interference with his private life.[76]

When the case went before the ECtHR, the British Government's defence was that Peck's action hardly qualified for protection of the right to private life as his actions took place in the public domain.[77] From the government's perspective, disclosure by various media simply constituted distributing a public event to the wider public.[78]

In dismissing the Government's defence, the Court ruled that private life as protected under Article 8 of the ECHR was a broad term which should not be confined to any specific category of information, but rather should embrace one's right to identity and personal development, and the right to establish and develop relationships with other human beings.[79] Contrary to the common law fixation on spatial location, the Court considered that the mere act of being in a public street did not necessarily mean a forfeiture of one's claim to private life, because there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".[80] Further, the Court held *obiter* that interference to an individual's private life may arise once any systematic or permanent nature of the record of an individual has come into existence.[81] What is significant for our present purpose is that the crux of Peck's complaint was the unforeseen dissemination of his image without his consent.[82]

2. Right to Private Life, Right to Personality: Von Hannover v Germany

In another case, Princess Caroline of Monaco sued the German press for taking a series of photographs of her everyday life in France, including her shopping at a market, playing sports, picking her children up from school and having dinner with a male friend in a secluded corner of a restaurant.[83] This legal battle lasted for more than 10 years. By the time it reached the ECtHR, the photographs of the Princess with her children and her male friend in the restaurant were no longer at issue.[84] The Princess applied to the ECtHR and argued that her right to private life guaranteed under Article 8 had been infringed.[85] While, like *Peck,* most of the activities in question occurred in a public place, the nature of the Princess's activities could not be considered to be of a sensitive or embarrassing nature. Arguably, they were not in a sense 'private' as delineated in *Campbell* or *Peck.*

76 *Ibid,* para 23.
77 *Ibid,* para 53.
78 *Ibid.*
79 *Ibid,* para 57.
80 *Ibid.*
81 *Ibid,* para 59.
82 *Ibid,* para 60.
83 The three magazines were *Bunte, Freizeit Revue,* and *Neue Post.*
84 The German constitutional court ruled that Princess Caroline was a 'public figure par excellence', and as such the public was deemed to have a legitimate interest in knowing how she generally behaved in public, regardless of whether she was performing any kind of official function.
85 (2005) 40 EHRR 1, para 10.

Yet the Court unanimously stood by the Princess on the ground that the protection of private life includes not only aspects relating to one's personal identity, name and photograph, but also one's physical and psychological integrity.[86] The Court's protection is intended to 'ensure the development, without outside interference, of the personality of each individual in his relations with other human beings ... even in a public context'.[87] To subject the Princess to the camera's lens at almost any time, with the resulting images being widely disseminated to a broad section of the public, was detrimental to the development of her personality as a human being. In facing the dilemma between the protection of private life and freedom of expression, the Court considered that the decisive factor should be whether the photographs or articles at issue would contribute to a debate of general interest.[88] Since the Princess was not exercising any official function and the photographs were exclusively snapshots of her private life, the Court concluded that privacy concerns would trump the right to freedom of expression.

Throughout this reasoning, issues of spatial isolation and the nature of information are only some of the many factors to be considered in relation to the protection of privacy or private life. It is clear that the Court has confirmed the extension of the protection of privacy beyond private spaces in both *Peck* and *Von Hannover*. In addition, what is certain from the *Von Hannover* judgment is that the information at issue does not need to be sensitive, embarrassing or humiliating in order to qualify for protection. 'Private' merely points to the private life of an individual. It includes aspects of her life both alone and with others in public. While it is true that the ECtHR condemned the practice of the tabloid press, one should note that it was regarded as only an aggravating factor in the weighing of the Court's ruling in favour of the privacy right. The determinant feature of private life or privacy is the protection of an individual's personality, including her physical and psychological integrity, and the development of her relations with other human beings without outside interference,[89] in which an individual's wish is a core concern.

To a certain extent, the English court in *Murray* has embraced the European Court's approach, which it has acknowledged and endorsed.[90] What we should not overlook is that the English test of reasonable expectation of privacy is fundamentally different from the ECtHR's approach. In its application, as Sir Anthony Clarke MR reminded us no less than three times in his judgment, 'all depends upon the circumstances'.[91]

Unlike the English approach of reasonable expectation of privacy, the ECtHR stresses the 'legitimate expectation' of protection of and respect for one's private life,[92] the space

86 *Ibid*, para 50.
87 *Ibid.*
88 *Ibid*, para 76.
89 *Von Hannover* (n 85) para 50.
90 *Murray* (n 48) paras 55, 59.
91 *Ibid*, paras 17, 55, 56.
92 *Von Hannover* (n 85) paras 51, 69.

that is essential for one's physical and psychological integrity. This protection extends to a person's right to control her image, to guard it against the abuse of others. Unless the information or photograph disclosed will contribute to a debate of public interest, the intrusion will be considered to be a gross violation. As a result, though English law after *Murray* may be moving towards the position of European privacy law, we can hardly be fully at ease with the empty formula of 'reasonable expectation of privacy'.

B. In Search of a Coherent Understanding

We have seen that in the scramble to find a working formula that will accommodate the ambivalent nature of public privacy, different courts have been wrestling with the concept of privacy. While decisions from the continental European tradition have placed personality at its core, the gulf between the continental and common law approaches may not be as stark and wide as we think. Underlying the right of personality is the common concern for one's autonomy, dignity, and the harm that may be inflicted by an invasion of privacy. The three concepts are intertwined and have been raised in legal literature in both traditions. Indeed, the concern for the prevention of harm is also a factor duly recognised in English judgments. An understanding of the above three notions will provide insights into the present debate on public privacy and virtual persecution.

1. On Autonomy

Privacy as an aspect of autonomy contains both freedom from undue demands to conform and freedom to control one's own information. Robert Post, in a debate with other scholars on the constituents of privacy, has highlighted autonomy as its key element,[93] by which he refers to freedom from state interference in making a wide range of personal choices. Yet in the internet era, what we have to guard against is not only the Big Brother of the Orwellian state, but all the little dictators around us.

Autonomy also often refers to freedom from unnecessary social regulation, and our ability to control its bounds. It is believed that permanent surveillance and exposure will only promote a conformist and oppressive culture, and turn private citizens into public figures. Living in such an information panopticon, we will internalise the surveillance architecture and self-censor our behaviour.[94] Unless we are shielded from the public gaze, we are unable to enjoy an authentic inner life and form intimate relationships precisely because of that pressure to conform. Our ability to act and think in unpopular ways, to be eccentric, or just to be different will be inhibited.[95] In the long run, it is harmful to democracy when people cannot beg to differ and cannot voice their opinion.

93 Robert Post, 'Three Concepts of Privacy' (2001) 89 *Georgetown Law Journal* 2087.

94 Lynne Duke, 'The Picture of Conformity' *Washington Post*, 16 November 2007, www.washingtonpost.com.

95 Austin (n 72).

In addition, the autonomy interest at stake is about maintaining informational privacy, controlling dissemination and disclosure of information about ourselves, and protecting ourselves against unwanted access by other people.[96] Privacy in a world of social beings is about control over information about ourselves, and determining the degree of either social isolation or social interaction that we have with other members in a society.[97] If our information or personal profile is constantly flowing on the internet, we are reduced to powerless objects available for capture. Control over our own profile means more than asserting proprietary rights over our images. Losing it implies that we become 'merely permeable',[98] a bundle of details, distortedly known, presumptuously categorised, instantly retrievable and transferable to numerous unspecified parties at all times. We lose our ability to decide when, to what degree, to whom, and under what circumstances we would like to relate to the outside world. Like the case of Princess Caroline, forced exposure to an unlimited audience is an intrusion into private life.

At the end of the nineteenth century, when Samuel Warren and Louis Brandeis pleaded for the right to be let alone, they were slamming their doors in the face of the snooping media.[99] In the twenty-first century, privacy should include being let alone by the 'omniveillance'[100] internet.

2. On Dignity

Closely related to the value of autonomy is the prime concern for dignity. Both James Whitman and Jeffrey Rosen have attributed the distinction between privacy as autonomy and privacy as dignity to a fundamental cultural difference between American and continental European culture.[101] To Whitman, the American legal approach is much more oriented towards values of liberty and autonomy, in particular freedom against state intrusion,[102] whereas the European approach is geared towards the protection of dignity and honour.[103] He further explains that the European tradition is rooted in the value of respect and the right not to lose face in public.[104] The German law of insult is intended to spare people from embarrassment or humiliation.[105] Article 1 of the German

96 Moreham (n 24) 647–8.

97 Beate Rossler, *The Value of Privacy,* RDV Glasgow (trans) (Polity, 2005) 106.

98 George Kateb, 'On Being Watched and Known' (2001) 68 *Social Research* 269, 278.

99 Warren was offended that details of his daughter's wedding were being covered by the intrusive media. See Friedman (n 53) 214.

100 Josh Blackman, 'Omniveillance, Google, Privacy in Public, and the Right to your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet' (2008) 49 *Santa Clara Law Review* 313.

101 Whitman (n 3); Jeffrey Rosen, 'Continental Divide' [2004] *Legal Affairs* 49.

102 Whitman *ibid*, 1161.

103 *Ibid*, 1164.

104 *Ibid*, 1161.

105 *Ibid*, 1169, 1182.

Constitution stipulates clearly that it is the duty of all state authorities to respect and protect human dignity.[106] Equally, French law essentially protects image rights; a person's photograph cannot be published without their consent because control over one's image is considered to be a sacred and inalienable right held by him or herself.[107] Under French law, a person's freedom of communication may be limited to the extent required for the respect of human dignity.[108]

In his debate with Robert Post, Jeffrey Rosen endeavours to draw a clear distinction between privacy as autonomy, which Post advocates, and privacy as dignity, which Rosen emphasises. The former, in Rosen's words, is concerned with the 'self-defined I', the autonomous self, while the latter is about the 'socially defined me'.[109] Privacy as an aspect of dignity is about the right not to be judged and penalised on the basis of personal information that is incomplete and taken out of context.[110] From the above, privacy as a form of dignity refers largely to the social forms of respect that we owe to each other as members of a common community.[111] However, dignity in the context of privacy is a highly nuanced concept. It is so closely intertwined with autonomy that I would argue that the two concepts are not mutually exclusive but complementary.

Indeed, a close reading of Whitman and Rosen will also reveal that it is almost impossible to treat autonomy and dignity as two completely distinct concepts. In his discussion of German law, Whitman observes that the German law of dignity and personality is a law of freedom, the law of the inner space to develop one's personality and to nurture self-realisation.[112] No less important, when Rosen supports the view that privacy should include the aspect of dignity, he is embracing more than the right to avoid being misunderstood. Rosen views the internet's power to stigmatise an individual as an application of democratic shame, social co-operation and control.[113] He refers expressly to the right to structure the most intimate relations in ways that differ from social norms and the right to control one's private information.[114] All these sentiments are harking back to our concern with autonomy and control, or rather the loss of control over one's personal information and image.

It could be that Beate Rossler, writing directly from a European perspective, is better able to provide an insight into the concept of privacy as aspects both of autonomy and

106 See Article 1 of the German Constitution: www.jurisprudentia.de/jurisprudentia.html.

107 Whitman (n 3) 1169, 1177.

108 Article 1, Freedom of Communication Act No 86-1067 of 30 September 1986, *Official Journal of 1 October 1986*, last amended in 2000 at www.legifrance.gouv.fr/html/codes_traduits/libertecom.htm.

109 Rosen (n 4) 211.

110 *Ibid*, 215, 216.

111 *Ibid*, 216.

112 Whitman (n 3) 1177, 1182.

113 Jeffrey Rosen, 'I-Commerce: Tocqueville, The Internet, and the Legalized Self' (2001) 49 *Drake Law Review* 427, 428, 433

114 Rosen (n 4) 215, 217.

dignity. In her explanation of the value of privacy, Rossler refers to 'decisional privacy', and uses the terms 'autonomy', 'freedom' and 'respect' almost interchangeably throughout her work.[115] She highlights the importance of informational privacy in the age of technology and defines it as 'a protective shield allowing the individual to act towards all possible unspecified third parties, whether individual persons or institutions, in accordance with his expectations concerning the "level of information" they each have'.[116] In this sense, privacy refers to the power to control access to one's own 'personhood', not to be reduced to an object of gossip. The content of gossip need not be humiliating or embarrassing.[117] Applying these principles to the internet, people can be 'de-privatised' against their will.[118] Therefore the focus in the debate on public privacy is not on the reactions of unknown outsiders, but on the violation of the individual and his or her wishes.

3. Harm

Advocating the protection of public privacy based on autonomy and dignity may work well if we are fighting for the rights of Little Fatty, who by venturing onto the streets for a routine activity was later ruthlessly exposed and mercilessly ridiculed. We will also side with the teenage Chinese girl who dared to express an unpopular view on the impact of the internet. But our sympathy may quickly wane if we are asked to defend the privacy right of the Dog Poop Girl or the Kitten Torturer. Isn't it true that in society such selfish and cruel acts need to be exposed and prevented? Isn't it also true that there are anti-social delinquents that we want to tame and educate to be civilised members of society? After all, they are the ones who put their own reputation at high risk in public.

Those are indeed valid concerns when considering acts that are indisputably socially and morally reprehensible. The difficult question then is whether the internet has struck the right balance between social sanction and privacy protection. If there is serious anti-social behaviour, has it been punished fairly? Seemingly, public anger has been vented and justice done. Yet in a moment of reflection, we cannot help but wonder whether the shaming and monitoring power of the internet has gone too far. Daniel Solove warns us

115 Rossler (n 97).

116 *Ibid*, 129.

117 An example that illustrates this is the Canadian case of *Aubrey v Editions Vice-Versa Inc* 78 CPR (3d) 289 (1998), in which continental legal principles of privacy were applied as the litigation originated from Quebec. The claimant was a teenage girl whose youthful air and spirit had caught the eye of the defendant magazine's photographer while she was sitting on a step in front of a building on a public street in Montreal. The published photograph depicted the claimant in a positive light, and the magazine was a respectable publication. But Aubrey successfully brought a legal action for infringement of her privacy right. The majority of the Supreme Court of Canada held that that unauthorised publication of an individual's photograph constituted infringement of a person's right to image, which was an essential element of the right to privacy. Injury to reputation and honour was not a concern.

118 *Ibid*,120.

that the internet is a 'cruel historian'[119] with an 'unforgiving memory',[120] keeping a permanent profile of the anti-social reprobates for millions over the world to watch and discuss. By now, it is not difficult for us to realise that the liberating power of the internet carries with it the potential for immense shaming and ostracisation. Solove asks us to consider other factors in the internet trial[121] since those events may be taken out of context.[122] Once we see the picture of the Dog Poop Girl, she loses all possibility of innocence. She is presumed guilty and becomes a pathological specimen placed under our constant implicit interrogation.[123] Rosen laments that in this world of short attention spans, we hardly have time to 'know' the stranger,[124] and 'one's public identity may be distorted by fragments of information that have little to do with how one defines oneself'.[125] To many of us, the Dog Poop Girl will forever be known only as that. She was unable to raise any defence. Her voice is likely to be feeble in the face of the many outpourings of condemnation.

The punishment that we choose to levy on social misbehaviour or delinquency often takes the form of humiliation, embarrassment or even molestation. Victims may be ostracised from their social circles or banished from their community, like the Korean student and the Kitten Torturer. In extreme cases, online attack may turn into real life violence. This unfortunately happened in 2008 to Wang Qianyuan, a Chinese student studying in the US at Duke University. She stated during a rally that she was sympathetic to the Tibetans' fight for independence in the run-up to the Beijing Olympic Games 2008. Because of her stance, she was labelled by netizens as a traitor. Not only was her personal contact information exposed on the internet, her parents' personal details were also distributed. Death threats were written on the outside wall of her residence in the US and her parents' home in China.[126] Another example involved an aggrieved wife who jumped to her death in Beijing in 2007 after discovering that her husband, Wang Fei, had been unfaithful.[127] Before her suicide, she had disclosed her frustration and the reason for her suicide on blogs, pinning the blame on Wang. After her death, many netizens were so angry at Wang that they used the human search engine to collect disclose the personal contact information of Wang, his parents, his brother, and the third party who allegedly had broken up the marriage. Death threats were painted on the walls of the apartment

119 Solove (n 10) 11.

120 *Ibid*, 8.

121 *Ibid*, 67.

122 *Ibid.*

123 Kateb (n 98) 274.

124 Jeffrey Rosen, 'The Purposes of Privacy: A Response' (2001) 89(6) *Georgetown Law Journal* 2117.

125 Jeffrey Rosen, 'The Eroded Self' *New York Times*, 30 April 2000), http://query.nytimes.com/gst/fullpage.html?res=990CE0DD1530F933A05757C0A9669C8B63&sec=&spon=&pagewanted=print.

126 See 'Duke University Student Wang's Father Says He Doesn't Need Police Protection' *China Daily*, 24 April 2008, www.chinadaily.com.cn/china/2008-04/24/content_6642160.htm.

127 The account of the Wang Fei story is taken from 'The First Case Against Human Search Engine' *Beijing News*, 18 April 2008, www.thebeijingnews.com/news/beijing/2008/4-18/015@71632.htm (in Chinese).

buildings of Wang and his parents. Eventually, Wang decided to sue the website providers for reputation damage and privacy violations in March 2008.[128] Though Wang won the case, the damages awarded were nominal because the Beijing court also condemned him to be an unfaithful husband violating the moral and social norms of society.[129] Put simply, what is evident in the abovementioned cases is that the internet has immense potential to tear one's life apart.

The immediate aftermath of a privacy violation is indeed worrying, yet the long-term effects may be worse than criminal sanctions. Unlike gossip, the images captured and disseminated are not fleeting or localised.[130] They will follow the lives of the individuals concerned, grow old with them and be remembered, retrievable and available to all. The freedom and the right to start a new life may be greatly hindered. For instance, it is known that employers in the US search and look at internet profiles of prospective employees.[131] Friedman argues that tying someone to the debris of the past goes against the societal belief in giving second chances to people to start over again and to begin a new life.[132] Technology has the power to threaten and destroy our values 'when our past is always present'.[133] The internet record has become a contemporary form of digital scarlet letter.[134] In light of the prospective harm to the individual targeted, and the interference caused to the autonomous self, the social sanctions imposed have become disproportionate to the act committed.

Thus, the argument supporting the protection of public privacy will view the whole series of violations as overstepping an individual's boundary of personhood and life. The forced exposure of oneself on the internet and the merciless criticism that one may have to face are blatant forms of violation to one's autonomy and dignity, constituting harm to an individual.

4. Jurisdiction in the Entangled Web

But, at this point, one may ask—how can we locate all the defendants in online public privacy violation litigation? And have we forgotten about the vexing problems of

128 Wang Fei is suing the websites oriochris.cn, daqi.com and tianya.cn, which have hosted discussions of the said incident, and the personal contact information of him, his family members and the alleged third party. He is claiming RMB$135,000 for damages. A copy of the writ of summons is available at http://cache.tianya.cn/publicforum/content/no11/1/539720.shtml (in Chinese).

129 *Wang Fei v Zhang Leyi, Daqi.com and Tianya.com*, Beijing Chaoyang District Court, No 10930 (2008), www.chinacourt.org:80/html/article/200812/18/336418.shtml (in Chinese).

130 Solove (n 10) 74.

131 *Ibid*, 34.

132 Friedman is writing on American culture, yet the need to protect a regime of second chances so that people can lead a new life should be equally applicable to all. Friedman (n 53) 218.

133 *Ibid.*

134 Both Friedman and Solove have drawn on the metaphor of the scarlet letter to describe the internet phenomenon of social sanction. See Friedman (n 53) 265; Solove (n 10) 76.

jurisdiction and enforcement of judgment when it comes to the entangled world wide web? Indeed, these are valid concerns.

Elsewhere, I have argued that internet service providers (ISPs) are in a good position to remove the offending materials upon receipt of actual notice.[135] This is largely due to the fact that virtual persecution is a collective act that often involves various anonymous individuals from more than one country. Given the quantity of user-generated content in cases of virtual persecution, the speed at which information is produced, the various roles that each poster contributes, the anonymity of most posters, and the enduring nature of the violations, the most practical and efficient solution is to appeal to ISPs for help and intervention. Once ISPs have received actual notice from the victims concerned, and once they have verified that personal information has been divulged without consent, they should remove the personal information and make a good-faith attempt to block or filter the information.

As to the second major set of concerns, undeniably the assertion and protection of internet privacy raises difficult problems of jurisdiction and choice of law since global communications pass through several states and jurisdictions. Until a common understanding of the nature and protection of public privacy on the internet can be reached, we have little option but to grapple with issues of conflicts of law on the internet. Various scholars have proposed various solutions to the difficult and complex problem of internet jurisdiction.[136] To discuss the problems in detail would require another article. For now, I will simply highlight the legal reasoning expounded in *Dow Jones & Co v Gutnick*,[137] the famous case on internet defamation, and argue that it may shed light on internet jurisdiction issues governing public privacy.

Gutnick concerned an Australian businessman suing an American publishing company in defamation with regard to an online publication accessible in his home state. The case outlined the various legal and technical concerns regarding choice of law and the exercise of jurisdiction concerning internet publication.[138] The places of uploading and downloading, and whether particular readers were being targeted, all became relevant factors to be considered by the court. The defendant argued that New Jersey law should apply since the server was in New Jersey. The High Court of Australia disagreed. It

135 Anne SY Cheung, 'A Study of Cyber-Violence and Internet Service Providers' Liability: Lessons from China' (2009) 18 *Pacific Rim Law & Policy Journal* 323, 340–45.

136 For discussion of different approaches see Kevin A Meehan, 'The Continuing Conundrum of International Internet Jurisdiction' (2008) 31 *British Columbia International and Comparative Law Review* 345, 357–62; Michael A Geist, 'Is There a There There? Toward Greater Certainty for Internet Jurisdiction' (2002) 16 *Berkeley Technology Law Journal* 1345; Eric Barendt, 'Jurisdiction in Internet Libel Cases' (2006) 110 *Penn State Law Review* 727, 734.

137 [2002] HCA 56.

138 For discussion of the case and other issues concerning defamation lawsuits and the internet, see Diane Rowland, 'Free Expression and Defamation' in Mathias Klang and Andrew Murray (eds), *Human Rights in the Digital Age* (Routledge, 2004).

considered the place where the plaintiff enjoyed a reputation to be crucial. Further, in the opinion of the court, it was important that the publications had been made available by subscription, so the defendant knew who had access to them. To the court, the subscription system proved that the defendant had made the material available to subscribers in Australia, willing to do business there, and had accepted the risk of litigation there.

One important lesson from *Gutnick* is that the place of uploading or the location of the server should not be the determining factor in deciding the choice of jurisdiction. Given the fact that most ISPs are based in the US, this would only result in extending and imposing American law, including its 'unusually tolerant values'[139] with regard to free speech and its poor record of privacy protection, upon other sovereign states without valid justification. Likewise, the enforceability of foreign judgments against US-based ISPs will pose similar problems. Reality informs us that enforceability of judgment depends very much on whether the defendant ISP has assets in a particular forum.

On our specific topic of public privacy and virtual persecution, the *Gutnick* test of plaintiff's home forum where he primarily enjoys his reputation provides a valuable guideline for us with regard to choice of law and jurisdiction. Similar to claimants in defamation lawsuits, victims of virtual persecution are unlikely to have contractual agreements with ISPs. They may not be users of the service provider concerned. What they want to protect most is their privacy—in particular any personally identifiable information about themselves. The repercussions of harm and violations to their personality will be suffered most in the community in which they are living. Thus, it is appropriate for their home state to exercise jurisdiction and to apply its law in privacy actions.

This brings us neatly back to the initial exploration of what constitutes public privacy. Unless we can agree on a consistent approach to protect public privacy, victims will be at the mercy of enduring violations of virtual persecution on the internet.

CONCLUSION

The growing popularity of using the internet to expose others' embarrassing moments, to air personal grievances or to reveal self-perceived hypocrisy to the world suggests that although understandings of privacy vary widely geographically, in reality we are more closely related to one another than we previously thought. Many private citizens do not yearn for the 15 minutes of fame that Andy Warhol once remarked on,[140] but only abhor their sudden loss of anonymity when pushed into the limelight.

139 Jack Goldsmith and Tim Wu, *Who Controls the Internet?* (Oxford University Press, 2006) 149.

140 Andy Warhol was a famous American pop artist in the 1960s and 1970s. His notable remark is: 'In the future, everyone will be world-famous for 15 minutes.' See '15 Minutes of Fame', http://en.wikipedia.org/wiki/15_minutes_of_fame.

The problems raised in our discussion of public privacy are evidence that private citizens are often observed, recorded, tracked and searched by millions of strangers. With the internet as the medium of transmission, one's image and personal details, accompanied by all the ensuing comments, will circulate and re-circulate, like a never ending game of whispers.[141] The internet problem illustrates that it is no longer adequate to banish privacy to the private domain. Equally, privacy is not and cannot be a mere function of concealment and solitude. In this paper, I have argued that what is universal about privacy rights is their intrinsic value to an individual's autonomy and dignity, and their concern for the unjustified harm inflicted on an individual. Far from being essentially opposed to each other, as some may think, autonomy and dignity are in fact two sides of the same coin. They signify the important aspects of freedom from being held to one's past indefinitely, and respect for one's personality.

141 Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, 2005).

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The Legal Framework for Public Service Broadcasting after the German State Aid Case: Procrustean Bed or Hammock?

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INTRODUCTION

Public broadcasting in Germany is funded by licence fees. In 2003 the VPRT, as the association of private broadcasting companies in Germany, submitted a complaint to the Commission stating that the licence fees constitute state aid within Article 87(1) of the EC Treaty and distort competition between the public and private broadcasting pillars by favouring public broadcasting companies. It was argued that the compensation and financial assistance granted to public broadcasters exceeds what is necessary to fulfil the public service obligation properly and that the system of public financing distorts competition with respect to new online content. Germany has subsequently argued that the licence fee granted to the public broadcasting corporations entrusted with the public service remit does not constitute state aid and contains no favouring of any specific undertaking within Article 87(1). It is argued by Germany that the public service remit is clearly defined, that the parameters used to calculate the licence fee are objective and transparent, and that the German legal framework ensures that the financial assistance granted to public broadcasting corporations does not exceed what is necessary to comply with the remit. The German legal framework is thus considered to fulfil all the criteria provided by the European Court of Justice (ECJ) in the *Altmark* case and is therefore no longer subject to the provisions of Article 87(1) of the EC Treaty.

On the other hand, the European Commission regards these fees to be state aid according to Articles 86 and 87 EC. The Commission first examined whether the German licence fee constituted state aid according to Article 87(1), concluding that the licence fee

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