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*Article*

## Revisiting Privacy and Dignity: Online Shaming in the Global E-Village

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**Abstract:** Since the introduction of new Web-based technology in the early 21st century, online shaming against those who have violated social norms has been proliferating fast in cyberspace. We have witnessed personal information of targeted individuals being disclosed and displayed for the purpose of humiliation and social condemnation by the anonymous Internet crowd, followed often by harassment and abusive behavior online and offline, resulting in serious disruption of personal life. While public shaming as a form of criminal sanction has been widely discussed in present literature, social policing by shaming transgressions via the Internet is largely a new terrain yet to be explored and studied. Drawing on socio-legal literature on shaming and punishment, and jurisprudence from the English Courts on defamation, harassment and misuse of personal information and the European Court of Human Rights on the relationship between the right to private life and dignity, the discussion will explain how the role of dignity has informed the development of the right to privacy where its value has played a distinctive role. This refers especially to the context in which the plaintiffs could be said to be partly at fault as transgressor-victims. It argues that the recognition and protection of the dignity and privacy of an individual is necessary in order to arrive at norms and values inherent in decent participation in the e-village. In this article, the term “dignity” refers to one’s innate personhood, integrity and self-respect.

**Keywords:** privacy; dignity; shaming; harassment; Internet

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## 1. Introduction

The use of shaming as a form of criminal or social sanction has been a controversial subject. Professor James Whitman of Yale Law School describes the practice as “intuitively barbaric” when society shows its contempt or disgust towards individual wrongdoing by subjecting the perpetrator to a form of peculiar vulnerability, which can deprive him or her of dignity and personhood [1]. Professor James Carey, who is famous for his work on the ritual view of communication [2], also warns against the use of the rituals of shame for they are “dangerous moments in the life of democracies... when the power of the state, public opinion or both is inscribed on the body” of the targeted individuals [3]. Yet, shaming has been used, in various degrees as a form of state or socially approved forms of punishment in different cultures for a long time. For example, the practice of “perpetrator walk” (better known as perp walk) in marching a suspect in handcuffs from the police station to the courthouse, dating back to the 19th century practice, is still common in the U.S., Canada, Columbia and Mexico [4]. Instilling a sense of shame has been seen traditionally as a form of positive social control and healthy emotional fostering in India, Japan, China and the Mediterranean regions [5]. Now, we have seen a unique form of “shaming” acting as a method of social sanction arises in the Internet age.

This new form of shaming involves the exposure of personal identifiable information of the targeted individuals, who are perceived to have transgressed different degrees of social norms (though often violated none or only minor legal offences), for the purpose of humiliation, social condemnation and punishment. Such behavior easily escalates into a form of online mob trial, or even real life harassment. The individuals who may have transgressed and violated social norms in the first place have now themselves become transgressor-victims. As a result, one must question who the victims here are when such people are mercilessly tracked and ridiculed together with personal information, or even intimate embarrassing information is widely exposed. In such circumstances, the empowering nature of the Internet can become tyrannical as we witness blatant forms of online shaming in which individuals are able to invade the privacy of others in the name of freedom of expression.

In the search for a legal solution, victims in England have attempted to protect themselves through the legal actions of misuse of personal information, harassment and personal data protection [6]. Despite the fact that the results may not be entirely satisfactory, the English experience has provided us with valuable lessons on the possibilities and limitations of the above mentioned actions, and prompted us to reconsider the underlying values of privacy. Meanwhile, there has been growing jurisprudence from the European Court of Human Rights (ECtHR) on the meanings of reputation, honor, dignity and their relations with privacy [7].

Thus, this article analyzes these emerging cases, with a particular focus on how the above cases could better inform us as to the debate on online shaming. I argue that dignity should be recognized as part and parcel of a right to privacy, which should not be compromised easily regardless of whether one is at fault or not ([8], p. 619). One may question the value of fighting for privacy in the “New Digital Age” when Big Data is readily available to identify individuals, and when both individuals and society have arguably become “transparent” [9,10]. However, it is exactly this development of the Internet and technology at this time that warrant the urgent call for a re-examination of the concept of privacy and its core values of dignity. What we should also bear in mind is that this concept of dignity refers to an intrinsic value in each human being which must allow for freedom from humiliation and

the development of physical and psychological integrity. The exposure of truth in cases of wrongdoing does not justify the unrestrained disclosure of personal information, particularly in cases where one's physical security and psychological health could be severely threatened. What is needed, therefore, is the recognition and protection of the dignity and privacy of the individual in order to arrive at norms and values inherent in decent participation in the e-village.

In what follows, there is a detailed discussion concerning the concept of "shame". Section 2 explains why civilized society should not use shame sanctions from a socio-legal perspective for protection of dignity, and against the dehumanizing effect on society as a whole. Examples of online shaming are included and discussed in this part. It is not hard to notice that the majority of the incidents reported, which forms the scope of the present study, reflect violations of social rather than legal norms. Even when breaches of legal norms were involved, the cases were concerned largely with minor legal offences (for examples, littering in the subway). In the absence of state or legal regulation, the outpouring of online shaming acts as a form of social policing, and a powerful display of mass "moral indignation" and "public denunciation" against the transgressors [11]. Although one may find that shame sanctions are objectionable, society needs a legal basis to prohibit such behavior and give recognition to the value of dignity. Followed in Section 3, this article will outline various international legal instruments related to the concept of dignity and its close connection with the right to privacy. However, it becomes evident that in the English courts, the judicial interpretation of both dignity and privacy is in a nebulous state. And the recourse to harassment and personal data legislation needs further elaboration on the test for abusive speech. On the other hand, as will be discussed in Section 4, the rulings from the ECtHR on the meanings of reputation, honor, dignity and privacy have given us new insight, despite the fact that the doctrine on dignity is not yet settled. The final part will address the issue of why the right to privacy, including the aspect of dignity, should never be compromised in the face of so-called freedom of expression in online shaming. Although the English court uses the term "privacy" while the ECtHR adopts more commonly "the right to respect for private life", I will use those terms interchangeably.

## **2. Shaming, Punishment and Social Sanctions**

Toni Massaro, in her influential work on shame, points out that it covers a vast emotional terrain of shyness, defeat, alienation and guilt ([12], p. 658), while at the same time, stretching into the normative realm in condemning the defeated self who has failed to reach an expected standard imposed either by society or by oneself ([12], p. 651). In an equally important work of scholarship on shame, Bernard Williams argues that shame has both internal personal and external societal dimensions that are closely intertwined [13]. For Williams, the experience of shame is "being seen, inappropriately, by the wrong people, in the wrong condition" ([13], p. 78).

In the writings of both Massaro and Williams, shame is related to one's perception of self-worth, that is to say, self-esteem with a close affiliation to dignity ([12], p. 658; [14]) a concept which will be explained in the next section. While writing on official shaming or shame penalties other than explaining why official shaming will not be effective to achieve the aim of deterrence from a psychological perspective, Massaro has highlighted the key features of official public shaming as a call for public humiliation, an expression of disgust and contempt towards the offender by the public and a crude form of boundary-drawing to ostracize the offender from the community ([12], pp. 647, 649). In

other words, although what is central to “shame” is a sense of self-awareness or self-consciousness, “shaming” is essentially about directing community disapproval and hostility against an individual.

Different societies, such as Victorian England, colonial America, and pre-World War II Japan had state sanctioned shaming penalties ([12], pp. 676–83). In the aftermath of Maoist China, public trials and sentencing rallies have also been prominently used [15]. In modern times, we continue to witness attempts to bring back this practice by agents of the state. For example, in 2006, Judge James Kimbler from Ohio, in the U.S., posted videos of sentencing hearings on YouTube to shame the criminals and to educate the public [16]. Again between 2000 and 2009, the media in Wellington, New Zealand, published the names of all convicted drink drivers in the region as part of a policy of “naming and shaming” with state approval and endorsement [17]. In 2011, Dominique Strauss-Kahn, the chief of the International Monetary Fund and the then potential French presidential contender, was arrested on sexual assault charges and forced to do the “perp walk” in New York [4]. This practice of public humiliation caused a huge uproar in the French media and in France. Other than what Strauss-Kahn had to suffer personally, the respect to the cardinal principle of presumption of innocence in civilized society was also called into question [4]. Likewise, since April 2011, the First People’s Court of Dongguan City of Guangdong China, has been uploading photos of defendants who have defaulted or refused to pay damages in civil actions onto Sina microblogs [18]. Those photos often show the defendants being arrested or in handcuffs. All in all, arguably one could say that shaming is inherent in any formal legal process when one is being charged with an offence, tried and convicted. Nevertheless, in the context of criminal procedures, one is at least afforded with due process, with a chance to defend oneself before any verdict is being reached.

However, with the Internet and other information communication technologies, we no longer need to rely on state approval for shaming or on state laws to indicate which act should be condemned. Commenting on the early days when television was first introduced, James Carey already noticed that media events in the age of television have become distinct ceremonies of degradation and excommunication when “bodies are stigmatized, reputations destroyed and citizens expelled into a guild of the guilty” by the media industry ([3], p. 42). Yet, the scale and complexity of such ceremony has been amplified in the Internet age to an extent beyond the imagination, when each individual can participate directly, induce shame and moral indignation and turn the others into mere social objects, and invoke the authority of a public denouncer on behalf of the community to speak in the name of the ultimate moral values [11]. For instance, in China, the Internet is being used as a “human flesh search engine” in order to expose individuals who have transgressed social norms [19]. These include exposing the identity of an unfaithful husband [20], of a kitten torturer ([21], p. 336), and of a university student regarded as a traitor for showing sympathy to the Tibetan independent movement ([21], p. 340). In another Korean case, a university student who refused to clean up the faces of her dog in a subway train compartment was labelled as the Dog Poop Girl and her story was reported widely (including *The Washington Post*) [22]. It was covered both in an academic book [23] and circulated on the Internet [24]. In the U.S., another female university student’s identity was revealed without her consent after she had posted an ode in the social network site “My Space” expressing her disdain for the town community in which she had grown up [25]. Because of this, not only was she harshly criticized, but also her family faced death threats and were eventually forced to relocate [25]. In the United Kingdom, photos of women who eat in the subway are featured onto

Facebook as “Women Who Eat on Tubes” [26]. Although the founder of the group claims that it is an art project on observational study [27], the “implicit sneering in the comments posted” and the “unsavory sexism” that pervades the group are easily noticeable [28]. Concerns over privacy and safety of women travelling on public transportation were also rightly raised. As we can see, therefore, the trend of using easy means to expose others’ deeds via the internet can cause unexpected responses to say the least and uproar at most. Again, this is well illustrated in Clay Shirky’s accounts of the “StolenSidekick” story. This concerns a woman’s attempt to get back a mobile phone which she had accidentally left in a New York cab. It was picked up by a teenage girl who refused to return it. Through successfully mobilizing all the social connections of the phone owner on the Internet, the personal information of the teenage girl and her family was exposed on the Internet. Eventually, she was arrested by the police [29]. This story was covered in the *New York Times*, CNN, over 60 newspapers, the radio, and more than 200 weblogs ([29], p. 9).

In all these stories of so-called “human endeavor” ([29], p. 8; [30]) in the name of righting of wrongs, the public feels a strong need to condemn the actions of the violators and to shame them by “showcasing social transgressions on websites” [31]. Whether we are referring to state sanctioned shame penalties or online shaming, these punishments are highly objectionable because they encourage citizens to resort to dehumanizing and brutalizing behavior towards the offender or the social delinquent [32]. The latter is displayed as a labelled and defined object exposed to the public sphere in either the real or cyber world. The public is then enlisted to humiliate, ridicule and punish him/her all over again. As related in the earlier cases, the inevitable consequence is ex-communication of the “social untouchable” ([1], p. 1071). For example: the Dog Poop Girl in Korea withdrew from her University; the Kitten Torturer in China, who was a pharmacist, was dismissed by her hospital; and the American university student was forced to relocate following criticism of her home town.

In his work on shaming penalties, Whitman considers that the entire process of stirring up a mixture of public indignation and public merriment ([1], p. 1090), and inciting hatred, is akin to public spitting ([1], p. 1078). However, what he finds the most objectionable is the arbitrary display of force which turns the victim into a “plaything” ([1], p. 1075), making him aware of societal disgust toward him. In other words, the message is that the violator is less than human and deserves our contempt ([12], p. 691). This is why Whitman argues so forcefully that this is violation of individual dignity which runs “contrary to some deep norm requiring us to treat even criminals with respect” ([1], p. 1068). The state authorities, therefore, should only deprive offenders of property and liberty alone [1]. Furthermore, Whitman advocates a call for “transactional dignity”, by which he means that citizens should never be forced to deal with wild or unpredictable responses from other fellow citizens ([1], p. 1090). To him, this is tantamount to a form of “lynch justice” subjecting an individual to the public exercise of enforcement of power ([1], p. 1089), and it breaches our commitment to maintain decent social institutions which do not humiliate people [33]. To a great extent, Whitman’s arguments are echoes of Michel Foucault’s definitive study on punishment in Europe [34]. Foucault attributes the end of using torture as a form of ritual violence in public, and the end in using publicly executed punishment as a spectacle to be a significant recognition to the respect of “humanity” even in the worst of murderers [34]. He characterizes this as a remarkable awakening in the Enlightenment period for there must be a legal limit, a “legitimate frontier of the power to punish” and an end to “the sovereign’s

vengeance” [34]. What Whitman and Foucault have advocated are equally applicable and valid to online shaming in the Internet age.

### 3. In Search of a Legal Right: Dignity and Privacy

Convinced as we may be by arguments, any serious effort to prohibit or regulate online shaming has to be anchored in legal principles. Massaro, Whitman and Foucault may well have argued persuasively for a halt to public humiliation but the real challenge to be faced is to explain why the law must recognize and legally protect the need for dignity and why such dignity should prevail over the right of freedom of expression in the case of online shaming. Thus, I will argue that this concept of dignity should be embedded in the protection of privacy rights as part and parcel of one’s personhood and integrity. Above all, it should not be conflated with the notion of dignity as mere reputation.

#### 3.1. The Legal Concept of Dignity

Dignity as a legal principle or right has been enshrined in numerous international treaties. For instance, the Preamble of the *Universal Declaration of Human Rights* (UDHR) mentions the principle of dignity twice [35], and Article 1 stipulates that “all human beings are born free and equal in dignity and rights”. Likewise, the Preamble of the *International Covenant on Civil and Political Rights* [36] and the *International Covenant on Economic, Social and Cultural Rights* [37] states that “the inherent dignity...of all members of the human family is the foundation of freedom, justice and peace of the world...recognizing that these rights derive from the inherent dignity of the human person”. Also, other local, regional and international legal documents that have recognized dignity as a core human rights principle or right have been neatly summarized by Christopher McCrudden [38]. The scope of such protection ranges from autonomy, equality, protection from degrading treatment to protection of group identity and culture. Despite this lack of an “agreed content”, there are two important lessons that we can draw from McCrudden’s detailed study of international legal documents and judicial interpretation on dignity.

First, after examining the historical development of the concept of dignity, McCrudden reminds us that dignity as a question of status, honor and respect differs entirely from the notion of the natural dignity inherent in any human being and is not, therefore, dependent on any particular additional status or achievement ([38], p. 657). The former is tied to a person’s worth as judged in accordance to the estimation of others and their place in society, which is characterized as “prosaic dignity” by another scholar ([39], p. 1522). In contrast, the latter refers to the intrinsic existential worth and value of the individual human being. In the words of other scholars, it is a form of “fundamental dignity” ([39], pp. 1535–41), a kind of “interpersonal respect” ([40], p. 1164), and a principle of “inviolable personality” ([41], p. 971). The distinction between these two understandings of dignity is particularly pertinent to our debate on online shaming because many may not feel sympathetic to the transgressor-victims. After all, they have breached the social norms in society, and have contributed to their own misery. Thus, many may perceive that the protection of reputation under defamation law (which is based on falsity) is a non-issue here in that the notion of dignity as part of a right per se might be seen as rendering the culpability of the transgressor irrelevant. Nevertheless, in spite of

wrongful or unlawful deeds, Denise Reaume would argue that no one deserves to be mocked, degraded, humiliated or toyed with ([42], pp. 81, 85).

In sum, therefore, McCrudden points to three elements as the basis for core dignity: (i) every human being possesses an intrinsic worth, merely by being human; (ii) this intrinsic worth should be recognized and respected by others, meaning that dignity has a relational claim on how one should be treated; and (iii) the intrinsic worth of the individual requires the state to recognize that it exists for the sake of the individual and not *vice versa* ([38], p. 679).

While McCrudden analyses various cases, it is to the specific association of dignity with freedom from humiliation to which he refers, in particular, “where restrictions are placed on the publication of information or data that would lead to a person being pilloried” ([38], p. 685). This understanding of dignity also explains why torture, inhuman, degrading or ill-treatment against war criminals should be prohibited. Quoting *Ireland v. United Kingdom*, McCrudden draws our attention to the European Court of Human Rights” (ECtHR) interpretation of degrading treatment, which is prohibited under Article 3 of the European Convention of Human Rights (ECHR), defined as treatment “intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta... or dress up in a way calculated to provoke ridicule or contempt...” [43]. In addition, relying on *Pretty v. United Kingdom*, the European Court rules obiter that where treatment “humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterized as degrading” [44]. Here it is important to note that the kind of treatment that would qualify as degrading has to reach an intense degree, involving exceptional, life-threatening conditions [45]. In *L v. Lithuania*, the applicant faced embarrassment, humiliation, severe hostility and taunts in daily life for being a transsexual who was unable to go through complete gender-reassignment surgery due to the lack of legal regulation on the matter in Lithuania [45]. Facing unbearable social ostracism, he brought an action before the ECtHR, arguing that the state had subjected him to degrading treatment and had violated his privacy rights. Nevertheless, the European Court held that the degree of severity for degrading treatment that he had to face had not reached the legal level required under Article 3. However, it ruled that there was violation of article 8 because the right to respect for private life includes the respect for human dignity and the quality of life ([45], para. 56). Applying this to our discussion, though the state may yet not be a party in administering online shaming, arguably, it will have a positive obligation to prohibit such an act under the doctrine of horizontal effect [46].

When the protection of dignity is based on the noble ideal of respect for each human being, irrespective of achievement or wrongdoing, its scope necessarily becomes diverse and broad. For the present, therefore, I will concentrate first on the role of dignity in informing the development of the right to privacy in cases influenced by the ECtHR jurisprudence in the English court. Then, I will discuss the other facets of the right to privacy, as manifested in the alternative legal remedies under harassment and personal data legislation. Finally, I will analyze the decisions from the ECtHR in which the value of dignity has played a distinctive role especially in the context where the plaintiffs could be said to be partly at fault as transgressor-victims.



### 3.2. Dignity and Privacy under English Common Law: The Right of “Liars”

English common law does not recognize a separate cause of action for infringement of dignity, and has also been slow in recognizing a full right of privacy [47]. It was not until 2004 that the House of Lords of the United Kingdom breathed new air into this area in the landmark case of *Campbell v. MGN Ltd* [48], a case concerning the world renowned supermodel, Naomi Campbell whose photos were taken in a public street at a moment when she was leaving a Narcotics Anonymous clinic. The photos were then published by a tabloid newspaper, *the Daily Mirror*. The case was plagued with difficulties because Campbell was a public figure who maintained that she had not succumbed to the habit of taking drugs before and the photos were taken in an unobtrusive manner on a pavement.

Though the Court was split in reaching its decision in favor of Campbell, all five judges agreed that English law recognizes the 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 ([49], per Lord Nicholls, para. 14). The judges noted at the time that the ECHR had been incorporated into the local law of the United Kingdom and the court, therefore, has an obligation to respect private life ([49], per Lord Hope, para. 93). The House of Lords’ famous ratio indicates that “[t]he touchstone...is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy” ([47]; [49], para. 21, 22). However, the exact legal basis for this right remains controversial.

Ironically, it was Lord Hoffmann, one of the dissenting judges, who was the only one to discuss the relationship between respect for dignity and privacy, but he decided to rule against Campbell. In his judgment, Lord Hoffmann often used the term autonomy and dignity together ([49], per Lord Hoffman, para. 50, 51, 53, 56). He ruled that “[w]hat human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity” ([49], para. 50). To him, this protection consists of “the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people” ([49], para. 51). Although he considered one’s state of health to be part of human autonomy and dignity and any unauthorized disclosure constituted a plain and obvious violation of the citizen’s autonomy, dignity and self-esteem ([49], para. 53, 56), he concluded there was sufficient public interest to override this right because Campbell had lied in this regard before ([49], para. 58). While he considered the widespread publication of a photograph of someone in a situation of humiliation or severe embarrassment, making a direct reference to the judgment of *Peck v. United Kingdom*, to be an infringement of one’s privacy and an affront to one’s personality ([49], para. 74–75; [50]), he ruled that there was nothing embarrassing about the printed photos of Campbell by narrowly focusing on the fact that the photos had only revealed Campbell neatly dressed and smiling ([49], para. 76). By doing so, he had ignored the entire context in that Campbell was attending a Narcotics Anonymous therapy meeting.

From the above perspective, Lord Hoffmann’s interpretation of dignity and privacy has, in fact, treated dignity to be on par with one’s honor and reputation as perceived by the world. It would be lost, however, if one had lied, thereby proving Campbell to be unworthy of such protection. As discussed above, this is only the first aspect of dignity in the prosaic sense. In contrast, the majority of the judges found that the disclosed information concerning Campbell was obviously of a private nature since it was about an individual seeking medical therapy. In addition, the court also noted the distress and 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 of treatment ([49], per Lord Hope, para 98; per Baroness Hale, para. 98, 155). The fact that Campbell had lied was peripheral in the Court's opinion and the media's desire to set the record straight had to be subordinated to the interest of her private life ([49], per Lord Hope, para. 117; per Baroness Hale, para. 151–54). Indeed, the outcome of the case is laudable. Arguably, the majority judgment is closer to the spirit of respecting one's right of innate dignity since it is about protecting one's self-esteem and feelings from being intruded or assaulted by the public.

If revealing a lie concerning one's painful dependence on drugs has failed to convince all the law lords of the importance of privacy right and its relation to one's innate dignity, how does this compare with the case of the unenviable position of Max Mosley, the President of Formula 1? In 2008, unauthorized photos were published which showed him indulging in sado-masochistic activities with five dominatrix prostitutes [51]. Other than covering the story with photos in its printed version, the *News of the World* had published video footage on its online website. The allegations alluded to Nazi overtones of concentration camp role-play which was ruled to be unfounded by Justice Eady from the High Court. At this point, it is relevant to give a brief background of Mosley which is helpful for us in understanding the controversy of the case. Max Mosley is the son of Oswald Mosley, who founded the British Union of Fascists in the 1930s and had close ties to Hitler [52]. Mosley and his family were interned in 1940 soon after World War II had broken out. In public, Max Mosley had always shown strong disapproval of Nazi beliefs and practices ([6], para. 26, 27). Against this background, the tabloid news had a field day—in effect, accusing Mosley of being a sexual pervert and a hypocrite. Understandably, Mosley was outraged and brought an action for breach of confidence and invasion of right to private life under article 8 of the European Convention of Human Rights. Although the English High Court sided with Mosley, the support was not unreserved. As the analysis of the judgment will show below, its interpretation on privacy and dignity seems to have suggested that Mosley himself should be held partly responsible, if not in law, at least for his own “misfortune” and downfall ([6], para. 224–25).

It is well-known that *News of the World* is a tabloid publication so the headline they chose to cover the Mosley story was not only “saucy” but with heavy moral overtone. It read—“FORMULA One motor racing chief Max Mosley is today exposed as secret sado-masochist sex pervert” ([6], para. 26), with a sub-heading “SHAME” to follow ([6], para. 40). It labelled Mosley as a liar ([6], para. 38), and its defense counsel described his activities as “immoral, depraved and to an extent adulterous ([6], para. 124).” Thus, in the public sphere and in the court room, *News of the World* played the role of a moral crusader in condemning a public figure for disrespectful and deceitful behavior. Its whole legal defense rested on the fact that freedom of expression should prevail over privacy rights because there was public interest in exposing “lies,” including private sexual behavior.

Eady J made it clear, at the outset of the judgment, that the action was not “directly concerned with any injury to reputation” because it was not a claim in defamation ([6], para. 3). He further pointed out that sexual activity is inherently private and the law protecting private life is there precisely to prevent the violation of a citizen's autonomy, dignity and self-esteem ([6], para. 7). By their nature, photographs and visual images are particularly intrusive as a means of invading privacy since they “enable the person viewing the photograph to act as a spectator” ([6], para 19; [53]). In the particular context, Justice Eady elaborated that sexual activity in private places between consenting adults

indisputably engages the rights of private life under article 8 of the European Convention for it is “an essentially private materialization of the human personality” ([6], para. 99). He made it very clear that despite the fact that the relationship may have been adulterous, or was perceived to be “unconventional or perverted”, it did not mean one would lose the right to privacy ([6], para. 128). Justice Eady pushed it even further in ruling that even for those who have committed serious crimes, it does not necessarily mean that they would become the “outlaws” of privacy protection ([6], para. 118).

It is of particular relevance to our discussion on dignity that when Justice Eady acknowledged that privacy rights are there to protect one’s personal dignity and autonomy, he also addressed directly the fact that while a particular sexual activity or inclination may seem undignified, it should not compromise one’s personal dignity ([6], para. 214–15), and to take away that dignity strikes at the core of Mosley’s personality ([6], para. 216). He ruled accordingly that damages awarded should compensate for one’s distress, hurt feelings and loss of dignity. If we had actually stopped reading the judgment at this point, we might have thought Mosley was going to win a full legal victory. Yet, it was at this stage of considering the award of damages that Justice Eady suddenly decided to slip back into defamation law analysis.

On substantive law, Justice Eady clarified that a privacy claim is not directly concerned with compensating for, or vindicating, injury to reputation ([6], para. 214). As a result, on calculating the damages to be awarded, he drew an analogy between the award criteria under defamation law and personal injury actions, which might well be justified ([6], para. 218–23). However, midway in his analysis, he suddenly changed his tone. First he agreed there was no doctrine of contributory negligence in this area of privacy invasion but then he ruled that the extent to which Mosley had “contributed to the nature and scale of the distress *might* be a relevant factor on causation”. Following this, he raised the question of whether Mosley had “put himself in a predicament by his own choice which contributed to his distress and loss of dignity? To what extent is he the author of his own misfortune?” ([6], para. 224–25) Justice Eady then commented on Mosley’s behavior as “reckless and almost self-destructive” ([6], para. 226). In his opinion, although this would not excuse the intrusion into the defendant’s privacy, it “might be a relevant factor to take into account when assessing causal responsibility for what happened. It could be thought unreasonable to absolve him of all responsibility for placing himself and his family in the predicament in which they now find themselves. It is part and parcel of human dignity that one must take at least some responsibility for one’s own actions” ([6], para. 226).

Therefore, on the one hand, Justice Eady ruled that one’s sexual taste, preference and activities in private are not for anyone to judge, and should warrant the protection of privacy law based on the notion of dignity. On the other hand, he himself was passing judgment on the plaintiff, and ruled that the plaintiff should not be granted full compensation for privacy invasion because he had not proven himself entirely worthy of dignity protection. This is contradictory to our previous analysis on innate dignity right.

Consequently, in both *Campbell* and *Mosley*, we find that some English judges have confused the concept of innate dignity with the notion of reputation. Plaintiffs have to prove their own worthiness, as if they have to come to the court with clean hands in equitable actions. Moreover, the failure to appreciate and to articulate dignity interests, and to understand its relations with privacy protection has compromised unfairly the rights of the claimants. Taking the facts in the two cases discussed, other than the nature of the activities, the claimants had only been involved either alone or with other

consenting adults. As such, the courts should have emphasized that the principal value behind privacy rights is the protection of individual autonomy in the pursuit of self-realization and innate dignity. The misuse of information was based on the violations to private, intimate, intense and sensitive subjective feelings [54], and on activities that had not interfered with the interest of a third party. Also, the unauthorized disclosure and wide dissemination of the information, especially in the form of images, was particularly intrusive. The additional fact that both parties might be perceived to be insincere and had misled the public in this regard would not be sufficient grounds of justification because the media's methods of revealing the so called-truth would constitute public shaming and massive character attacks in holding the claimants to ridicule, severe embarrassment or contempt. The intensity had reached such a level that their self-esteem, self-respect and innate dignity were damaged. The devastating impact on Mosley, is well illustrated by the continuing wide circulation of the sexual images and video in cyberspace even at the time of writing. Worse, there is no way of stopping them. In the words of Justice Eady, it is "hardly exaggerating when [Mosley] says that his life was ruined" ([6], para. 36).

### 3.3. Protection against Harassment and Personal Data Breach: Victims of Online Listing Site

#### 3.3.1. Protection from Harassment

This deleterious power of the Internet in exposing an individual in a permanent form has been well documented and analyzed [23,55]. While Mosley resorted to bringing an action under the right to privacy, victims of *The Law Society v. Kordowski* [56] decided to rely on libel, anti-harassment and data protection law.

*Kordowski* is a case directly concerned with an online black-listing and shaming site called "Solicitors from Hell." The English court was asked to grant a permanent injunction to order the defendant, Kordowski, to cease publication of his website, to restrain him from publishing any similar website, and to restrain him from transferring the website outside jurisdiction under libel law, Protection from Harassment Act 1997 (PHA) and Data Protection Act 1998 (DPA). The claimants included the Law Society for England and Wales, a law firm and an individual lawyer representing on behalf of all those individual lawyers and law firms currently featuring on the website and those who might, in the future, feature on the site. A schedule listing 354 individual solicitors and organizations had expressly indicated their wish to "opt in" to the litigation ([56], para. 24).

The defendant's website had existed since 2005, and had enjoyed a substantial readership ([56], para. 8). It was featured in the national media, claiming an average of over a million click rate per month ([56], para. 32 (c)). On the website home page, it was written "Name and Shame. Those shady Solicitors. No need to register or even leave your name...this website will expose these shameless, corrupt, money grabbing, incompetent specimens of humanity!" [56]. Kordowski claimed he was exposing wrongdoing and providing a public service. As he was unrepresented, and he had relied only on his right of freedom of expression under article 10 of the ECHR in a general manner, legal defense was inevitably weak.

For instance: given that libel law is based on the presumption that the statement published is false, and that Kordowski did not justify any of the allegations complained of under the legally recognized defense of truth or honest opinion, the Court sided easily with the claimants ([56], para. 131, 132).

As to the harassment claim, although there is no comprehensive definition of harassment under the PHA, it is stated under section 7(2) that harassing a person includes “alarming the person or causing the person distress”. And under section 1, a person must not pursue a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment. Under section 7(3) of the Act, a “course of conduct” refers to conduct on at least two occasions in relation to the person, and under section 7(4), it is specifically stated that conduct includes speech.

What becomes critical here are: when have mere words or when has the exercise of free speech become abusive and turned into a form of harassment, and how to quantify the number of publication to be a course of conduct when posting is done on the web. As the defendant was not legally represented, detailed legal arguments on both sides were never laid out, which may have explained partly why the judgment delivered by Justice Tugendhat tended to be one-sided in favor to the claimants and with room for further clarification.

On the first question on whether the postings at issue constituted harassment, Justice Tugendhat considered that it was “plain” that the statutory requirements were satisfied as “any normal person would be distressed” by the postings if targeted ([56], para. 133). As to whether the Defendant knew or ought to know his conduct amounted to harassment, we can infer that Justice Tugendhat had also accepted the arguments forwarded by the claimants’ counsel, including the highly offensive nature of the site and the comments, the number of previous libel lawsuits, and the number of removal requests brought by other lawyers against the Defendant ([56], para. 69).

On the second issue as to whether posting on the website amounted to a course of conduct, Justice Tugendhat accepted the claimants’ argument that: since publication on a website was an ongoing one, the distress and alarm caused by the publication was continuous, which necessarily satisfied the required standard of “at least two occasions” ([56], para. 64, 75). He also accepted the further argument from the claimants’ counsel that the publication had caused the third claimant (the individual lawyer) extreme embarrassment as different individuals had drawn his attention to postings on the site, which had caused repeated distress and alarm to him ([56], para. 62, 75).

As for the counter argument of freedom of expression, this point was at best touched on but never properly analyzed. One possible indicator why Justice Tugendhat felt so strongly against the website was the “unlimited punishment by public humiliation such as the Defendant has done” ([56], para. 133). He considered this conduct as “a gross interference with the rights of the individuals he names” ([56], para. 133), such that “[e]ven if there evidence that the allegations were true, the conduct of the Defendant could still not even arguably be brought within any of the defenses recognized by the PHA” [56,57]. Another factor that might have explained also the Judge’s stance was that the Defendant charged a fee for removal of the posting, which was considered by a law firm to be extortion ([56], para. 24, 25).

While the condemnation of the site to be a form of harassment may well be justified, a thorough deliberation of legal reasoning is yet to be seen. First, the court has never explained the nature of words that would amount to harassment. It would be overbroad to set a test based on whether any normal person will be distressed. If harassment will be founded on every instance that a person is embarrassed or distressed, this will catch easily most forms of criticism. Second, it is equally over-encompassing for the Court to endorse the argument from the claimants counsel that posting on the Internet is bound to be continuous, and would constitute a course of conduct. In this sense, even

one single online posting would amount to harassment. Similarly, the Court seems to have condoned tacitly that the course of harassment conduct could be contributed by third parties' comments, which the Defendant should be held accountable without identifying the roles of different individuals involved.

This ruling may have set a dangerous precedent for over censoring web discussion. A better approach can, in fact, be found in *Thomas v. News Group Newspapers Ltd.* [58], an authority discussed only briefly in *Kordowski* ([56], para. 58). *Thomas* was not about online publication but whether publication in a newspaper was capable of constituting harassment. The Court of Appeal ruled in the affirmative with detailed reasoning.

The facts of the case concerned a column writer who wrote three pieces of articles in *The Sun* describing the claimant to be a black clerk, playing a pivotal role in the demotion of two police officers in a complaint on race discrimination against a refugee seeker. One article was featured on the front page of the newspaper. The claimant's full name and place of work were also published in the articles. In ruling in favor of the claimant, Lord Phillips recognized the importance of freedom of the press and freedom of expression protected under section 12(4) of the Human Rights Act 1998 and article 10 of the ECHR ([58], para. 17–26). At the same time, he explained that harassment "describes conduct targeted at an individual which is calculated to produce the consequences [of alarm and distress] and which is oppressive and unreasonable" ([58], para. 29).

Applying harassment law to the specific context of the exercise of free speech, Lord Phillips pointed out that "[i]n general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment" ([58], para. 34), which includes the publication of a series of articles that have foreseeably caused distress to an individual ([58], para. 34). In specific, he expressed the view that only in rare and exceptional circumstance will sanctions be justified on the ground of harassment ([58], para. 35; [59]). In the case of *Thomas*, the parties had conceded that publication calculated to incite racial hatred or to provoke hostility on the part of its readers against an individual based on her race is capable of amounting to harassment ([58], para. 37–38). The appellants newspaper had also conceded that the tone of the articles was "strident, aggressive and inflammatory" ([58], para. 40). What was not agreed and which proved to be decisive was whether the statement was racist or not. Eventually, Lord Phillips concluded that what weighed in favor of the claimant were the facts that: the reference to the claimant's color was gratuitous, the newspaper had omitted important facts that there were other white witnesses in the complaint case, and the publication of the full name and work address of the claimant had resulted in hate mail against her, causing her fear to go to work ([58], para. 43–46). In sum, it was on the specific ground that an arguable case of harassment based on mere words was established due to the publication of racist criticism, which was foreseeably likely to stimulate a racist reaction on the readers and to cause alarm and distress on the targeted individual.

Based on the reasoning in *Thomas*, *Kordowski* would require a more detailed factual investigation and legal analysis. Although the name of the website and the call for naming and shaming of lawyers may have spoken for themselves in regard to satisfying the standard of oppressiveness, vilification, and incitement to hatred, the exact test on what constitutes a course of conduct is yet to be formulated. So often in the cyberspace, anonymous individuals unknown to one another will join in an online discussion to contribute bits and pieces of information. It may be difficult to identify precisely at what point that the

parties involved should know or ought to know the line of harassment has been crossed. Furthermore, the test for foreseeable consequence in causing distress or alarm also needs further clarification. In *Kordowski*, the claimant lawyer received enquiries from prosecutors, court staff, clients and other lawyers about his name being listed on the site ([58], para. 62). Understandably he was embarrassed but this was different from receiving hostile treatment and hate mail like the victim in *Thomas*. A better alternative will be to examine “whether real damage and distress has been caused by a course of conduct which prohibits the individuals from living their private/home life as they would wish” [60].

### 3.3.2. Data Protection

As this point, one may ask whether it is easier to invoke the Data Protection Act (DPA) to stop the disclosure, and to order the erasure of personal data on website. After all, personal data is clearly involved in the case of *Kordowski*, and there has been unfair and unlawful processing, defined under the law to include the unlawful act of libel and harassment [61]. Plus, there has been inaccuracy and falsity of data disclosed in violation of the Fourth Data Protection Principle of the DPA. Furthermore, under section 10(1), the DPA also sets out the right to prevent processing of data likely to cause damage or distress.

While all these could be settled easily, the difficult part was the extent to which website operators should be held legally responsible for the content they host. The Information Commissioner, who had a chance to consider the complaint, did not consider that *Kordowski* should be held responsible for the content others had posted ([56], para. 96). However, the Court did not address specifically the extent of responsibility for website operators. Although Justice Tugendhat agreed that the DPA was outdated to deal with contemporary problems on the Internet ([56], para. 97), he ruled that *Kordowski* was obviously a data controller ([56], para. 134). Under section 1 of the DPA, such person is one “who...determines the purposes for which and the manner in which any personal data are, or are to be processed.” Indeed, he was right given the fact that *Kordowski* conceded that he was the founder, operator and publisher of the website ([56], para. 8). Besides, he had admitted that he reviewed all the comments on his website before publication, and claimed to have intercepted and deleted 80% of them ([56], para. 14). The hands-on approach of the Defendant made him to be in the like position of an editor and a publisher in print media, as in *Thomas*. However, in other situations, website operators are unlikely to play the role of an editor or publisher. In those situations, the exemption clauses under the European Union Directive 2000/31/EC (better known as the Electronic Commerce (EC) Directive) will apply for those in Europe [62]. Given the unique facts in *Kordowski*, and the heavy reliance on the English statutes, it is uncertain how widely applicable the ratio of the judgment can be to other jurisdictions. What is worth noting is that Justice Tugendhat had acknowledged that the underlying value behind harassment law and personal data protection law is the protection of one’s privacy ([56], para. 59, 74).

### 3.4. European Court of Human Rights: Reputation, Honor and Dignity

Until we can identify the core values behind privacy protection, including the entitlement to dignity as one’s self-respect and innate value protected under international human rights law, we will be continually challenged by the legal conundrum of privacy rights. To a certain extent, this is

understandable or even forgivable. While Article 17 of the *International Covenant on Civil and Political Rights* [63], and Article 12 of the *Universal Declaration of Human Rights* [64], have mentioned the protection of one's honor and reputation under privacy right, Article 8 of the *European Convention of Human Rights* only states that "everyone has the right of respect for his private and family life, his home and his correspondence". Despite this rather brief elucidation of the content of privacy rights, the jurisprudence which emerged from the Council of Europe and the ECtHR is rich. Back in 1970, the Council of Europe had already defined the right to privacy to be "the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honor and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by individual confidentiality" [65].

The high watermark on privacy protection from the ECtHR came in 2004 in *Von Hannover v. Germany (No. 1)*, concerning Princess Caroline of Monaco asserting her privacy rights against the tabloid media [66]. 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 ([66], para. 50). 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" ([66], para. 50). 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 2012, the ECtHR was asked a second time to deliver a judgment concerning the right to private life of the Princess Caroline and her husband on similar facts [67]. The Court formulated a more refined test to balance the interest of privacy with freedom of expression, listing five criteria [68]. In addition to the content, form and consequences of the publication, the contribution to a debate of general interest are also included. Rather than granting a blanket protection to the Princess on all the photos complained, the Court only granted privacy protection to two of the three photos complained [69]. The above approach was confirmed in the third case brought by Princess Caroline in 2013 concerning the publication of a photograph of the Princess and her husband taken without their knowledge while they were on holiday, accompanying an article on how the rich rented out their holiday homes [70]. The ECtHR dismissed the case and restated that the balancing act between right to private life and freedom of expression has to take into account the following factors: contribution to a debate of general interest; the fame/notoriety of the person concerned; the subject of the report; the prior conduct of the person concerned; the content, form and consequences of publication; and the circumstances in which the photographs were taken.

While the contours of the right to private life which touch on various aspects of an individual's development are gradually becoming clearer, the growing jurisprudence elaborating on the relationship between reputation, honor and dignity under the right to private life has remained blurred [71–73].

In defamation cases, the debate is about whether attacks on one's reputation based on false statements has violated one's right to a private life. This position was elucidated in *Karako v. Hungary* [74], in which the ECtHR made a clear distinction between reputation and personal integrity, and ruled that both could come under the umbrella of the right to private life. The applicant in *Karako* was criticized by the media for compromising the interests of his own electoral district when he was a



candidate. He brought an action in libel and argued there was a violation of Article 8. The Court considered that the protection to reputation could come under Article 10 (2) of the Convention which has provided a ground for the restriction of freedom of expression ([74], para. 24; [75]), and could also come under protection of private life under Article 8 ([74], para. 23, 25). In addition, in the Court's opinion, the right to personal integrity which is part of privacy right is covered by the concept of "the rights of others" and provides a justified ground to restrict freedom of expression under Article 10 (2) of the European Convention of Human Rights ([74], para. 25).

The Court acknowledged that the protection of reputation "has traditionally been protected by the law of defamation as a matter related primarily to financial interests or social status" ([74], para. 22). Yet, in order for reputation to fall also within the ambit of privacy right, the Court ruled that the factual allegations must be "of such a seriously offensive nature that [the] publication had an inevitable direct effect on the applicant's private life" ([74], para. 23) It is on this ground that the Court finally concluded that the right to private life of the applicant had not been breached because he had not shown that "the publication in question, allegedly affecting his reputation, constituted such a serious interference with his private life as to undermine his personal integrity" ([74], para. 23). Directly on the distinction between reputation and personal integrity, the Court explained—"personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: one may lose the esteem of society—perhaps rightly so—but not one's integrity, which remains inalienable." ([74], para. 23).

Analyzing the above quote from our previous discussion, the Court's analysis on personal integrity is in fact referring to the innate dignity of an individual.

In contrast to the recognition and development of reputation as part of a right to privacy in defamation lawsuits, privacy right is also invoked when one faces attacks of true allegations. This was addressed in *Sidabras and Dziatvas v. Lithuania* [76] and *A v. Norway* [77].

The first case concerned two former KGB (*i.e.*, "Committee for State Security" of the Soviet Union) officers who had faced discrimination having been barred from engaging in professional activities in various areas of the private sector following the implementation of the local KGB Act after the downfall of the Soviet Union. They had been dismissed from their jobs as tax inspector and prosecutor respectively. Their claim concerned the negative publicity caused by the KGB Act. They had suffered constant embarrassment because of past history, as a result of which they had great difficulty in finding jobs ([76], para. 35).

Since the ECtHR had ruled that there had been violation of the anti-discrimination principle under Article 14 taken in conjunction with Article 8, it held that it was unnecessary to rule whether there had been violation of Article 8 alone. Nevertheless, the Court had elaborated on the meaning and application of Article 8 to the specific case. First, it reiterated that the right to private life is "a broad term not susceptible to exhaustive definition" ([76], para. 43). But it is established that it includes one's right to live privately, away from unwanted attention, to pursue freely the development and fulfillment of one's personality, and to establish and develop relationships with others ([76], para. 43–44). Second, in applying the interpretation of private life to the case at bar, the Court noted that the applicants had been "marked in the eyes of society on account of their past association with an oppressive regime" ([76], para. 49). The constant embarrassment and the continued burden that they had to face amounted to "possible impediment to their leading a normal personal life", which are

relevant factors to be taken into account in the consideration of Article 8 violations ([76], para. 43). In the reasoning, the Court made it clear that Article 8 could not be invoked by the applicants to protect reputation for the loss was foreseeable ([76], para. 43). Following this logic, the likely consequence that we can deduce is that the ECtHR would reach the conclusion that Article 8, on its own regarding the protection to private life, had been violated.

In the second case of *A v. Norway*, the claimant was a convicted murderer, and a substance abuser with an underdeveloped mental capacity. Shortly after he had served his prison term, a horrific murder took place involving the rape of two young girls in the same area where he had lived. During that period, the claimant was living in his family's cabin and had been working on a rehabilitation scheme. Because of the murder of the young girls, he was interrogated by the police. Not only had the murder attracted much media attention, but the claimant's interrogation by the police and his background were also reported in three national newspapers and a TV station. In one national television broadcast, the news broadcast stated that "possibly the most special candidate of these persons (former convicted...) is precisely this 42-year old" ([77], para. 9). Though the claimant was not named, he was filmed from behind and partly from the side. His place of residence and his past history were also revealed. He was the only candidate featured in that story. Other newspapers had published information about his work place, photos of him going to work, and going home ([77], para. 51). Eventually, two young men were later arrested and convicted of the murder. However, the claimant's life had been severely disrupted—he was dismissed from his job, and forced into relocation in an isolated place. Because of all this, he suffered from serious psychological problems ([77], para. 29, 53). As a last resort, he brought an action in defamation before the local courts but was unsuccessful, so he appealed to the ECtHR for violation of his right to protection of reputation under Article 8 of the European Convention.

The case was vexed with difficulty, partly because the murder of the young girls was of legitimate and serious public interest, and partly due to the fact that what the media had disclosed was largely based on true facts. Yet none of the media had mentioned the name of the claimant, or stated that he was a suspect. One even printed the claimant's claim of innocence stated in an interview ([74], para. 69).

Despite the legal intricacies, the ECtHR framed the case as an issue of protection of honor and reputation and as part of the right to respect for private life. At the outset of the analysis, the Court reminded us that, before Article 8 could come into play, "the attack on personal honor and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life" ([77], para. 64). The fact that the applicant had not been mentioned by name was not considered by the Court to be a decisive factor, because the Court pointed out that the photographs and details of his work and residence had made it possible for all those who knew him to identify him with a crime particularly reprehensible and sensitive. Furthermore, the court ruled that though the media had reported largely factual information about the investigation "the way it was presented wrongly conveyed the impression that there was a factual basis justifying the view that the applicant could be considered as a possible suspect" ([77], para. 70). Finally, the Court did not consider that the serious public interest could justify the defamatory allegation against the claimant with consequent harm done to him. The Court described the claimant as "persecuted by journalists against whom he found it difficult to protect himself" ([77], para. 72). He was in a critical phase of rehabilitation and social reintegration after serving his prison sentence but was "driven into social exclusion" by the media ([77], para. 72). What the publication had caused was a "particularly grievous

prejudice” against a person’s honor and reputation that was “especially harmful to his moral and psychological integrity and to his private life” ([77], para. 73).

The reasoning of *A v. Norway* has provided valuable insight for our present study on online shaming because the ECtHR ruled that literally true statements, conveying false implications, could amount to defamation. And the way of media coverage could amount to a form of persecution if causing serious disruption and interference to the victim’s private life. Yet, what is left unclear is that the Court has not elaborated in detail whether there is any distinction between honor and reputation in the protection of the right to private life. Do both concepts refer to estimation in the minds of third parties? Or did the European Court use the term “honor” to refer to one’s inherent dignity, while “reputation” to the estimation in the minds of third parties?

Scholars have provided insightful guidance on this issue. Manfred Nowak argues that although there is overlapping between honor and reputation, they are different in nature ([54], p. 404). Prima facie, both terms are related to the “conformity of a person’s conduct with the moral or social requirements” of society ([54], p. 404). However, on a careful look, Nowak observes that honor “tends to give expression more to this person’s subjective opinion of himself or herself (subjective feeling of honor)” ([54], p. 404). Therefore, attack on a person’s honor is a condemnation of the moral character of a person, and an impairment to a person’s self-esteem that interferes more severely with one’s “dignity, integrity and privacy than the mere injury to reputation” ([54], p. 404). Furthermore, a “massive attack” on one’s honor may constitute a form of degrading treatment and may amount to a violation of the right to respect for dignity ([54], p. 404). By comparison, Nowak further explains that reputation is about the appraisal of one by others. It can only be harmed by an attack accessible to the public ([54], p. 404).

This view is supported by David Feldman, who further analyzes the distinction between honor and reputation, and their relation to dignity. He writes, “honor and reputation together are akin to dignity in allowing one to develop a flourishing social and business life, and honor is a particularly significant contributor to the self-respect and dignity which form a major part of one’s view of oneself” [78]. While the legal action of libel will protect one’s reputation from false allegation, the protection of one’s dignity is not dependent on the truth or falsity of the statement. Feldman considers that “unrestrained publication of unpleasant personal truths” has a definite impact on private life, self-respect and public order, which rightly explains why Lord Mansfield once said “The greater the truth, the greater the libel.” ([78], p. 56). He further suggests that, unless there is strong public interest to disclose, there should be legal remedies for the harm done to reputation, dignity and self-respect by publication of true information where an aspect of a person’s private life is likely to be held up to ridicule or contempt because he should be entitled to protect his dignity, including both “self-respect and the esteem of others, from assault on the basis of activities which are nobody else’s business” ([78], p. 57). In our discussion, what Nowak and Feldman describe as “honor” is in fact innate dignity. Both of them refer to honor as self-esteem, related to one’s subjective self. Assaults on it are unjustified regardless of whether the attacks are based on true facts or falsity.

### 3.5. Freedom of Expression

The protection of people’s privacy based on autonomy and dignity, and of respect as *qua persona*, may make us wonder whether these above propositions would place undue restraint on freedom of

expression. While it is beyond the scope of this article to draw the exact dividing line between the right to privacy and freedom of expression, suffice it to say that while the right to privacy is never absolute, neither is freedom of expression. Specifically, privacy should yield to freedom of expression when overriding public interest is at stake, namely when life threatening behavior has taken place. For instance, in 2001, U.S. police abuse of power in an incident concerning a black taxi-driver, Rodney King, was rightly filmed and exposed by private citizens [79]. In 2011, in China, the son of a senior official hit two university students on campus with his car. It was alleged the young man attempted to flee and bragged to the crowd present that his father was Li Gang, the deputy police chief of that region. The incident was reported on the Internet by netizens who were determined to bring the young man to justice. In the end, he was sentenced to six years imprisonment for manslaughter [80]. Netizens in China are known to use the Internet to expose the corrupt and immoral behavior of officials so as to bring about their downfall [81].

Yet conceding that public interest and freedom of expression should prevail under certain situations (for instance when serious crime is being committed or when abuse of power by officials is involved) is not equivalent to endorsing the practice of hunting down perceived wrongdoers, exposing their personal details, harassing them or administrating justice as one's wish. It is entirely disproportionate to the aim of revealing and correcting social wrongs. And there is no public interest to be served in making a vicious attack on an individual which is likely to threaten his life and security in reality. What we have to guard against is the abuse of freedom of expression on a public interest matter which becomes a form of online violence, spilling into threats in real life.

#### 4. Conclusions

It was Marshall McLuhan, writing in the 1960s on the phenomenon of electronic media, who already had foretold that we would live in a state of "new electronic interdependence" in a "global village" [82]. To him, the speed of this electronic media would wire us up to act and react to global issues instantaneously, continuously and collectively [83]. McLuhan warned us that the global village has every potential to become a place where totalitarianism and terror may rule due to the sacrifice of individualism and lack of in-depth reflection ([82], p. 32). He left us with a piece of advice, asking us to be vigilant towards the dynamic that technology would bring and to the impact of the influence of the media on our social interaction, lest we would find ourselves locked in a small world of "total interdependence, and superimposed co-existence" ([82], p. 32).

Sadly, McLuhan's prophesy holds true for the 21st century cyber global village because we have seen that the Internet is replete with examples of online shaming. Individuals who are perceived to have transgressed social or moral boundaries are being persecuted by the anonymous crowd on the Internet for the purpose of public humiliation. This new form of "status degradation ceremony" [11] in turning the others into a form of lower social objects in the Internet era is often constituted by the exposure of personally information of the transgressor-victims concerned, followed by online or offline harassment or abusive behavior, leading ultimately to the ostracism of the individuals concerned from their communities or causing real or psychological harm to them. In other words, new information communication technologies have led to an increasing popularity and fascination with capturing others' images, exposing others' wrongdoing, and bringing the people concerned to a brand of online justice in the form of a manhunt which, in both the cyber and real world, can easily and

quickly spin out of control, often descending into various forms of shaming, humiliation, character assault, and even harassment.

Indeed, this form of Internet mob trial is a dangerous administration of justice. Arguably, the transgressor-victims are worse off than the defendants in legal process when the principles of presumption of innocence and due process are being upheld by the court. This distorted form of freedom of expression is enjoyed by an anonymous online mob at serious heavy cost to the dignity of others, a core element of one's privacy. As a result, this practice of online shaming has raised as yet unanswered ethical and legal questions. However, the current legal understanding on privacy, personal data and harassment law in English common law is inadequate to meet the challenges posed by the above phenomenon. Instead, this article argues that the right to privacy, especially its core concept of dignity regardless of the wrong of the transgressor-victim should be recognized. In our attempt to search for legal guidance from the European Court of Human Rights, we have noticed an emerging jurisprudence on the recognition of one's innate dignity and its relational claim on how one should be treated by others as part and parcel of human dignity, forming the fundamentals of the right to respect for private life. Yet in all those cases, the defendants could be clearly identified, while the perpetrators of online shaming are likely to be an anonymous crowd from different jurisdictions. Indeed, another research project would be necessary to do justice to the issues of accountability and responsibility but it is hoped, at least, that this article has laid the ground work for the recognition of a legal right to privacy, based on the right to dignity.

Dignity has been described vividly by Reaume as a guardian angel hovering over our laws ([42], p. 62). It is, perhaps, time now to call upon our legal guardians for protection in favor of a proper responsible participation in the E-village.

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The author declares no conflict of interest.

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4. Sandrine Boudana. "Shaming Rituals in the Age of Global Media: How DSK's Perp Walk Generated Estrangement." *European Journal of Communication* 29 (2014): 52, 50–67.

5. Jin Li, Lianqin Wang, and Kurt W. Fischer. "The Organization of Chinese Shame Concepts." *Cognition and Emotion* 18 (2004): 768–69, 767–97.
6. For claim under privacy protection, see *Max Mosley v. News Group Newspaper Ltd* ([2008] EWHC 1777 (QB)). Available online: <http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html> (accessed on 1 May 2014). Although Mosley was awarded damages for privacy violations by the English court, he argued before the European Court of Human Rights for a right of prior notification before publication so that he could have a chance to apply for injunction. The European Court ruled against him in May 2011. *Case of Mosley v. The United Kingdom* (Application no. 48009/08). Available online: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104712#{%22itemid%22:\[%22001-104712%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104712#{%22itemid%22:[%22001-104712%22]}) (accessed on 1 May 2014). However in 2013, the French and German courts ruled in favor of Mosley against Google. Both jurisdictions required Google to filter unlawful images concerning Mosley engaging in sexual acts circulating on the Internet. Such circulation was considered to be unlawful under French and German law as this constituted grave infringement to his right to private life and led to stigmatization of him in reality. See *Max Mosley c. Google Inc et Google France*, TGI Paris, 6 Novembre 2013, RG 11/07970; *Max Mosley v. Google Inc*. LG Hamburg, 24 January 2014, 324 O 264/11. For claims under harassment and personal data protection, see *The Law Society v. Kordowski* [2011] EWHC 3182 (QB). Both cases will be discussed further in Section 3 of this article.
7. Richard Clayton, and Hugh Tomlinson. *Privacy and Freedom of Expression*. Oxford: Oxford University Press, 2010, pp. 105–07, 201.
8. Kevin D. Haggerty, and Richard V. Ericson. "The Surveillant Assemblage." *British Journal of Sociology* 51 (2000): 605–22.
9. Eric Schmidt, and Jared Cohen. *The New Digital Age: Transforming Nations, Businesses, and Our Lives*. New York: Vintage, 2014, pp. 32–81.
10. David Brin. *The Transparent Society: Will Technology Force Us to Choose between Privacy and Freedom?* New York: Perseus Press, 1998.
11. Harold Garfinkel. "Conditions of Successful Degradation Ceremonies." *The American Journal of Sociology* 61 (1956): 420–24.
12. Toni M. Massaro. "The Meanings of Shame: Implications for Legal Reform." *Psychology, Public Policy, and Law* 3 (1997): 645–704.
13. Bernard Williams. *Shame and Necessity*. California: University of California Press, 1993.
14. Massaro discusses one's individual sense of self and social esteem.
15. Susan Trevaskes. "Propaganda Work in Chinese Courts." *Punishment and Society* 6 (2004): 5–21.
16. TeevBlogger. "Judge YouTubes for Justice." *BC Blog Critics*, 3 July 2006. Available online: <http://blogcritics.org/video/article/judge-youtubes-for-justice/> (accessed on 1 May 2014). At the time of writing, the video clips on YouTube is no longer accessible.
17. Greer McDonald. "Privacy Fears End 'Shame' Lists." *The Dominion Post*, 17 August 2009. Available online: <http://www.stuff.co.nz/national/2757493/Privacy-fears-end-shame-lists> (accessed on 1 May 2014).
18. Donguan Shi Di Yi Ren Min Fa Yuan (1st People's Court of Dongguan City, China). *Weibo*, 31 March 2011. Available online: <http://weibo.com/2024295957/wr4kLEpUP3> (accessed on 5 June 2014).

19. The term refers to the utilization of human participation on the Internet to filter search results and to identify specific individuals. Often, thousands of individuals are mobilized in a cyber relay with a single aim to dig out facts and expose the social delinquents to the baleful glare of publicity.
20. The case ended up in Beijing court which ISP companies were held liable for privacy violations. See *Wang Fei v. Zhang Leyi, Daqi.com and Tianya.com*, No. 10930 (Beijing Chaoyang District People's Court, 18 December 2008). Available online: <http://old.chinacourt.org/html/article/200812/18/336418.shtml> (accessed on 1 May 2014).
21. Animal torture is not a crime in China. For an account of the kitten torturer scandal, see Anne S. Y. Cheung. "A Study of Cyber-Violence and Internet Service Providers' Liability: Lessons from China." *Pacific Rim Law & Policy Journal* 18 (2009): 323–46.
22. Jonathan Krim. "Subway Fracas Escalates into Test of the Internet's Power to Shame." *Washington Post*, 7 July 2005. Available online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html> (accessed on 1 May 2014).
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24. "Dog Poo Girl." *Know You Meme*, 2005. Available online: <http://knowyourmeme.com/memes/dog-poo-girl> (accessed on 1 May 2014).
25. *Moreno v. Hanford Sentinel Inc.* 172 Cal App (4th) 1125 (2009).
26. Facebook. "Women Who Eat on Tubes." Available online: <https://www.facebook.com/wwe.ot> (accessed on 1 May 2014).
27. Eleni Cresci. "Founder of Women Who Eat on Tubes Claims Facebook has Taken Group Down." *The Guardian*, 11 April 2014. Available online: <http://www.theguardian.com/technology/2014/apr/11/founder-of-women-who-eat-on-tubes-claims-facebook-has-taken-group-down> (accessed on 1 May 2014).
28. Rupert Hawksley. "Is it OK to Laugh at Women Who Eat on Tubes?" *The Telegraph*, 11 March 2014. Available online: <http://www.telegraph.co.uk/men/thinking-man/10690381/Is-it-OK-to-laugh-at-Women-Who-Eat-on-Tubes.html> (accessed on 1 May 2014).
29. Clay Shirky. *Here Comes Everybody*. New York: Penguin Press, 2008, pp. 1–6.
30. This was the term that Evan, the friend who helped the original mobile phone owner to track down the teenage girl, used in the StolenSidekick story.
31. Marko M. Skoric, Jia Ping Esther Chua, Meiyan Angeline Liew, Keng Hui Wong, and Pei Jue Yeo. "Online Shaming in the Asian Context: Community Empowerment or Civic Vigilantism." *Surveillance & Society* 8 (2010): 181–99.
32. Chad Flanders. "Shame and the Meanings of Punishment." *Cleveland State Law Review* 54 (2006): 609–35.
33. Avishai Margalit. *The Decent Society*. Translated by Naomi Goldblum. Cambridge, MA: Harvard University Press, 1996.
34. Michel Foucault. *Discipline and Punish: The Birth of the Prison*, 2nd ed. Translated by Alan Sheridan. New York: Vintage, 1991, p. 74.
35. The Preamble reads "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the

equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom...” The Universal Declaration of Human Rights, 1948, GA Res 217A (III). UN Doc A/810: 71.

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37. United Nations Human Rights Office of the High Commissioner for Human Rights. “International Covenant on Economic, Social and Cultural Rights.” Available online: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed on 1 May 2014).
38. Christopher McCrudden. “Human Dignity and Judicial Interpretation of Human Rights.” *The European Journal of International Law* 19 (2008): 655–724.
39. Jeffrey Berryman. “Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss.” *University of San Diego Law Review* 41 (2004): 1521–50.
40. James Q. Whitman. “The Two Western Cultures of Privacy: Dignity versus Liberty.” *Yale Law Journal* 113 (2004): 1151–21.
41. Edward J. Bloustein. “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser.” *New York University Law Review* 39 (1964): 962–1007.
42. Reaume in arguing for dignity based tort writes that each one is a bearer of human dignity not to be manipulated. Denise G. Reaume. “Indignities: Making a Place for Dignity in Modern Legal Thought.” *Queen’s Law Journal* 28 (2002): 61–94.
43. *Ireland v. United Kingdom* (1978) 2 European Human Rights Report. 25, para. 27, discussed in ([38], p. 686).
44. The case of *Pretty* was about whether one has a right to assisted suicide. *Pretty v. United Kingdom* (2002) 35 European Human Rights Report (2002) 1, para. 52; discussed in ([38], p. 687).
45. *L v. Lithuania* (2008) 46 European Human Rights Report 22, para. 46.
46. It is generally understood that international human rights documents are binding on the states and public authorities only. However, the courts being public authorities have a duty to act in accordance with the human rights law, thus leading to the consequence that their decisions dealing with private parties may be affected, giving rise to a form of “horizontal effect”. See: Helen Fenwick, and Gavin Phillipson. *Media Freedom under the Human Rights Act*. Oxford: Oxford University Press, 2006, pp. 124–26.
47. There has been a long fought debate about whether breach of confidence under common law was encompassing enough to include privacy protection. Nicole Moreham. “Privacy in the Common Law: A Doctrinal and Theoretical Analysis.” *Law Quarterly Review* 121 (2005): 628–56.
48. The case was further appealed to the European Court of Human Rights. The finding on substantive law was confirmed while new ruling was given on calculation of damages. See: Case of *MGN Limited v. The United Kingdom* (Application no. 39401/04). *European Court of Human Rights*, 18 January 2011. Available online: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102965#%22itemid%22:\[%22001-102965%22\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102965#%22itemid%22:[%22001-102965%22]) (accessed on 1 May 2014).
49. *Campbell v. MGN Ltd* [2004] UKHL 22. Lord Hope also adopted a test of reasonable person of ordinary sensibilities (para. 99–100). This approach was also endorsed by Baroness Hale (para. 137). Moreham characterized the new standard set in *Campbell* to be the “obviously private



- test’ referring to nature of information or activity; the test for reasonable expectation of privacy; and the highly offensive to a reasonable person of ordinary sensibilities test ([47], pp. 628, 630–34).
50. The *Peck Case* was concerned about the applicant who attempted to commit suicide at night in the public. The process was captured by CCTV camera, and later broadcast in local and national television programmes. *Peck v. United Kingdom* (2003) 36 Eur. H.P. Rep. 41.
  51. *Max Mosley v. News Group Newspaper Ltd* [6]. In 2008, Mosley was the President of the Federation Internationale de l’Automobile.
  52. Caitlin Fitzsummons. “Max Mosley Profile: ‘In F1, No One Cared Who My Father Was’.” *The Guardian*, 24 July 2008. Available online: <http://www.theguardian.com/media/2008/jul/24/privacy.newsoftheworld1> (accessed on 1 May 2014).
  53. Justice Eady quoted *Douglas v. Hello! Ltd (No.3)* [2006] QB 125.
  54. Manfred Nowak. *UN Covenant on Civil and Political Rights: CCPR Commentary*. Kehl am Rhein: N.P. Engel Publisher, 2005, p. 387.
  55. Viktor Mayer-Schoenberger. *Delete: The Virtue of Forgetting in the Digital Age*. Princeton: Princeton University Press, 2009.
  56. *The Law Society v. Kordowski* [2011] EWHC 3182 (QB).
  57. Defenses under the PHA are governed under Section 1(3), which include conduct in pursuit for the purpose of preventing or detecting crime, for the pursuit under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or for conduct that was reasonable in the given circumstances.
  58. *Thomas v. News Group Newspapers Ltd.* [2001] EWCA Civ 1233.
  59. For discussion on harassment claims based on pure speech, see: Peter Carey, Nick Armstrong, Duncan Lamont, and James Quartemaine. *Media Law*. London: Sweet & Maxwell, 2010, pp. 132–33.
  60. Mark Thomson, and Nicola McCann. “Harassment and the Media.” *Journal of Media Law* 2 (2009): 149–58.
  61. DPA, the First Data Protection Principle and Schedule 2, discussion in ([56], para. 78).
  62. Council Directive on Electronic Commerce, 2000/31/EC, article 14, 2000 O.J. (L 178/1) (EC). The United Kingdom is bound by the European Union standard under the Electronic Commerce Regulation of 2002 (The Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013 (U.K.)). The EC Directive defines the circumstances in which internet intermediaries should be held accountable for material they host, cache, or carry but which they do not create. In effect, it provides a “safe haven” exemption for ISPs’ when they are mere conduits, unless they have actual knowledge of unlawful activity or information and have failed to act expeditiously to remove the materials. Articles 12–15 of the EC Directive.
  63. Article 17 of the ICCPR states that “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.” [36].
  64. Article 12 of the Universal Declaration of Human Rights reads “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.” [35].

65. Consultative Assembly of the Council of Europe, *Resolution 248*, 21st Ordinary Session (Third Part), texts adopted (1970).
66. *Von Hannover v. Germany (No.1)* (2005) 40 Eur. H.P. Rep. 1, para 10.
67. *Von Hannover v. Germany (No. 2)* 40660/08 [2012] ECHR 228.
68. They are contribution made by the photos and articles to debate of general interest; the role or function of the person concerned and the subject of the report; prior conduct of the person concerned; content, form and consequences of the publication; and circumstances in which the photos were taken. ([67], para. 109–13).
69. The photos that were not granted protection under article 8 of the ECHR involved Prince Rainer, and the claimants walking on the street. On the first photo, the Court found that there was public interest involved in showing the reigning sovereign of Monaco and with comments on his health. ([67], para. 117). On the second one, the Court found nothing offensive of the photo. ([67], para. 123).
70. Registrar of the European Court of Human Rights. “German Courts’ Decisions Respected Private and Family Life of Princess Caroline von Hannover.” 19 September 2013. Available online: <http://www.coe.int/t/dghl/standardsetting/dataprotection/Judgments/Judgment%20von%20Hannover%20no.%203%20v%20Germany%20National%20courts%20respected%20private%20life%20of%20Caroline%20von%20Hannov.pdf> (accessed on 1 May 2014). *Von Hannover v. Germany (no.3)* 87712/10 [2013] ECHR 264. Judgment is in French, official press release in English. European Court of Human Rights Press Release.
71. Inform’s Blog. “Revisited: Strasbourg on Privacy and Reputation, Part I: ‘A Positive Obligation’.” *Inform’s Blog*, 7 March 2010. Available online: <http://inform.wordpress.com/2010/06/18/revisited-strasbourg-on-privacy-and-reputation-part-1-%E2%80%9Ca-positive-obligation%E2%80%9D/> (accessed on 1 May 2014).
72. Brid Jordan. “Reputation and Article 8: Karako v. Hungary.” *Entertainment Law Review* 21 (2010): 109–11.
73. Loukis Loucaides. “Freedom of Expression and the Right to Respect Private Life.” *Media Law Resources Centre London Conference*, 17 September 2007. Available online: <http://www.medialaw.org/images/stories/files/events/london/JudgeLoucaidesSpeech.pdf> (accessed on 5 June 2014).
74. *Karakó v. Hungary*, Application no. 39311/05, 28 April 2009.
75. Article 10 provides that “1. Everyone has the right to freedom of expression...2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of...the protection of the reputation or rights of others...”.
76. *Sidabras and Dziatuas v. Lithuania*, Applications nos. 55480/00 and 59330/00, 27 July 2004.
77. *A v. Norway*, Application No. 28070/06, 9 April 2009.
78. David Feldman. “Secrecy, dignity, or autonomy? Views of privacy as a civil liberty.” In *Current Legal Problems*. Edited by Michael D.A Freeman and Roger Halson. Oxford: Oxford University Press, 1994, vol. 47, part II, pp. 41–71.
79. Rodney King was a black taxi driver whom was detected speeding on the highway by police officers in Los Angeles in 1991. When he was eventually stopped, he was beaten by four white

police officers with their batons. This was filmed by George Halliday who lived nearby. The police officers were later charged but acquitted which led to a widespread riot in Los Angeles causing the death of 55. See: Eric Deggans. "How Rodney King Video Paved the Way for Today's Citizen Journalism." *CNN NEWS*, 7 March 2011. Available online: <http://www.cnn.com/2011/OPINION/03/05/deggans.rodney.king.journalism/index.html?iref=allsearch> (accessed on 1 May 2014).

80. Associated Press. "Son of Senior Chinese Policeman Jailed over Fatal Hit and Run." *The Guardian*, 30 January 2011. Available online: <http://www.guardian.co.uk/world/2011/jan/30/son-chinese-policeman-sentenced-hit-and-run> (accessed on 1 May 2014).
81. Michael Wines. "Court Brings Swift Victory to Netizens in China Woman's Release Shows the Internet's Potential as Catalyst for Social change." *International Herald Tribune*, 17 June 2009. Available online: <http://www.highbeam.com/doc/1P1-164957721.html> (accessed on 1 May 2014).
82. Marshall McLuhan. *The Gutenberg Galaxy: The Making of Typographic Man*. London: Routledge & Kegan Paul, 1962, pp. 31–32.
83. Marshall McLuhan. *The Medium is the Massage: An Inventory of Effects*. California: Gingko Press, 2001, p. 63.

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