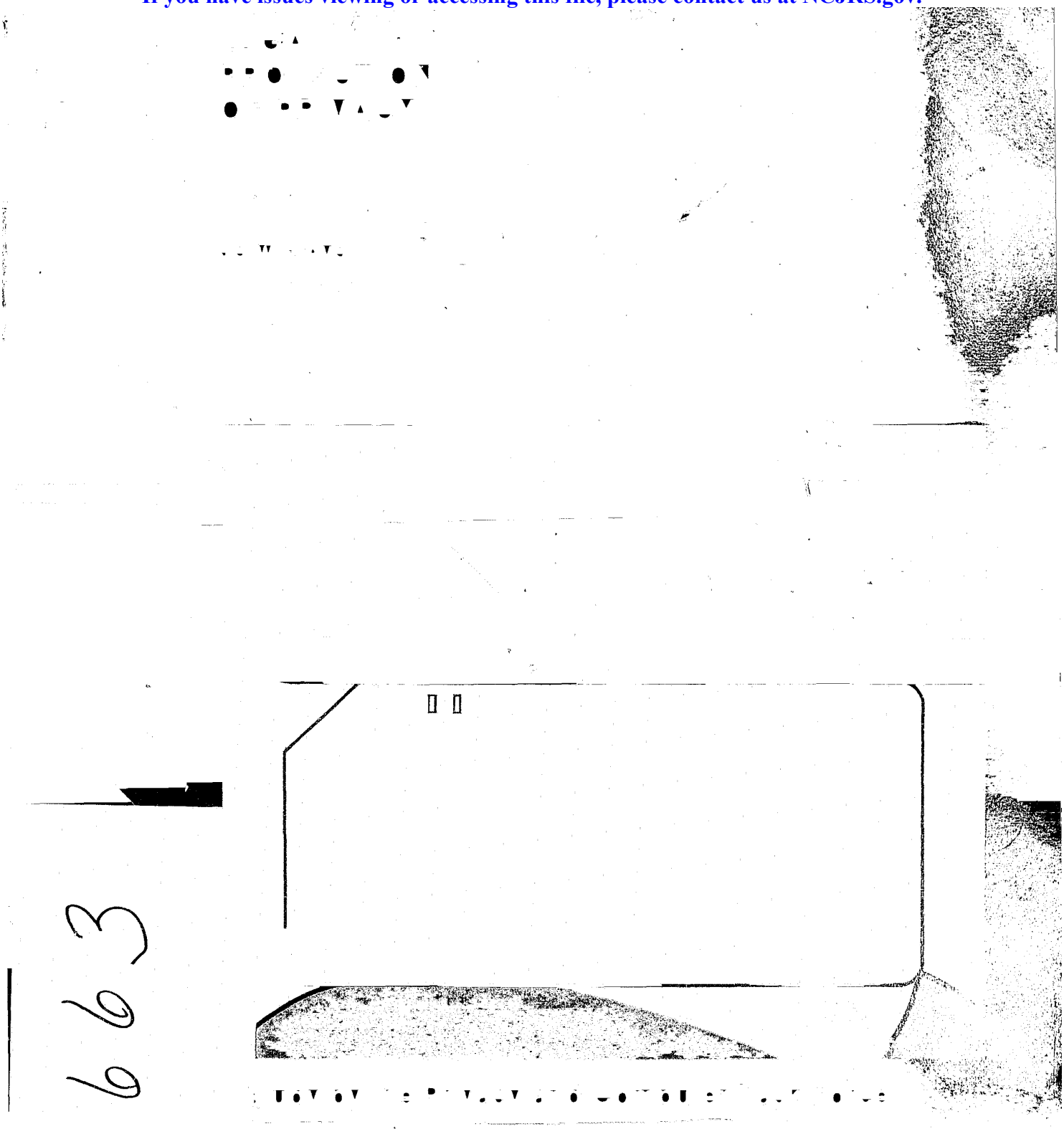

LEGAL PROTECTION OF PRIVACY

A STUDY FOR THE

PRIVACY AND COMPUTERS TASK FORCE

DEPARTMENT OF COMMUNICATIONS

DEPARTMENT OF JUSTICE

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This report was prepared for the Privacy and Computers Task Force, an inquiry sponsored by the Departments of Communications and Justice, and should not be construed as representing the views of any department or of the Federal Government. The views expressed herein are exclusively those of the authors, and no inference of any commitment for future action by any department or by the Federal Government should be taken from any recommendations contained herein.

This report is to be considered as a background working paper and no effort has been made to edit it for uniformity of terminology with other studies.

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I. INTRODUCTION

Broad and narrow views may be held as to the meaning of privacy. Any invasion of an interest or right inhering in another person may be said to be an incursion into his privacy.[1] A narrower view of what is essential to an individual in society has traditionally been taken by the common law. A great increase in technical advances has caused a re-evaluation of what this essential core of privacy consists. Resolution of how extensive an individual's right to privacy ought to be depends upon social and philosophical criteria. Study of the law in this context is merely the study of techniques of enforcement and regulation. Such a study may give an indication of the practical limits to protection and assist in the elucidation of the interests to be protected. However, ideas of what interests ought to be protected must be produced originally by other disciplines.

The gathering of information is now a widespread commercial enterprise. This has necessitated an examination of the present order of priorities, and it may produce an attempt to achieve a slightly different balance between the interests of individuals and those of society. A paramount and pervasive interest is one common to both society and the individuals composing it. This

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[1] Even invasions of intangible or nebulous rights and interests may be encompassed by the expression. Dignity, liberty, reputation and wounded feelings are all recognized by the law and infringements of these interests acknowledged to be harmful.

dominant interest is that in free speech.[1] The fact that this right has been revered as constitutional and inalienable does not preclude it from examination and possible modification.

Communication forms a large part of the behaviour of individuals in society. It occurs throughout the domestic and working life of most people. Expression may take place either verbally or non-verbally, and the law has been concerned with both of these forms. Oral and written communication has formed a large, if disjointed, subject of legal relevance. The problems that information gathering, storing and receiving have presented have been disposed of under diverse nomenclature and legal pigeon-holes. This has obscured consideration of how information affects the common law.

Facilitation of the information gathering, storage and retrieval processes has caused several social problems to appear. Some of these did not exist as problems before current technological advances were made while others have merely been rendered more acute. These problems stem from the presentation of a threat to various interests of individuals in society.[2]

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[1] It should be noted that encounters between privacy and other constitutionally protected freedoms may also occur. Excessive pursuit of religion may curtail the privacy of others: see R. v. Harrold (1971) 19 D.L.R. (3d.) 471. The existence of such constitutionally secured freedoms clearly bestows a benefit on Canadian society as a whole and not merely on its constituent individuals. Nevertheless, the courts are bound to balance these interests as they would those protected by the common law or by statute.

[2] Among these interests the following may be identified; freedom from incorrect, damaging or deleterious information and the interests of secrecy and confidentiality. Other threats of smaller social significance are denominated "intrusions" and are set out below in III. Present Legal Protection.

There has been some protection of privacy on the constitutional, common law and statutory planes. Such protection has been developed relatively recently. Its history has been one of isolated and sporadic extension of principles designed to cover particular circumstances.[1] These extensions have differed according to the jurisdiction within which the conflicting interests have been compromised or reconciled.[2] The principal way in which the law has recognized that individuals may be aggrieved by invasions of their privacy is by allowing them a tort action.[3]

The criteria used to determine whether an interest should be accorded legal protection may be the subject of some dispute. Individuals may disagree about what rights and interests deserve protection. The courts have often had to decide whether a particular interest should be protected. (1) The norm may be taken as the average or reasonable person in society. Conduct offensive or threatening to the standard man (who is somewhat similar to the "ordinary reasonable man" fabricated by the courts) might be prevented by the law. Measuring the utility of conduct by the reaction to it of an average man is an artificial process. It is designed to introduce a measure of objectivity into the drawing of the areas of legal protection. The

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[1] This development is traced in some detail in Ernst & Schwartz Privacy: the right to be let alone (1962). See also Long The Intruders (1967), Rosenberg The death of privacy (1969) and Packard The Naked Society (1964).

[2] In particular, it is noteworthy that jurisdictions within the U.S.A. have responded differently from Canadian or English jurisdictions.

[3] The relevant tort actions are set out below in III. Present Legal Protection.

aim of objectivity may be deleteriously affected by the reflection that certain individuals will be charged with the responsibility of determining the reactions of the average man. (2) An alternative course is presented by the attempt to determine what the majority of individuals in society actually see as threats. This is a compromise between the objective and the subjective approaches to the problem. Such a measure by the majority would include not only actual threats but also misguided or fanciful threats actually commonly apprehended. Both the foregoing tests would be part of an attempt to set up a general standard. (3) A further alternative and purely subjective method of circumscribing legal protection remains. This is to recognize that intrusions are very much personal matters and to prevent such of them that actually threaten or offend individuals in society. This will have the effect of recompensing those who claim to be aggrieved or those who can satisfy others that they are aggrieved.

Of the three approaches to the problem of how to measure interests worthy of protection the second is probably the most fair standard. The method chosen as the measure will naturally determine the conclusion of how broad a spectrum of rights and interests will be comprehended. It will also dictate the ease with which future changes in social values may be assimilated and translated as legal protected interests. This has been the measure used by the courts in the resolution of tort claims, both in areas relevant to the assertion of privacy claims and more generally.

The courts have arrived at a workable balance of the interests surrounding the concept of privacy. Generally, the compromise between the interests of the individual and those of society has been reached by affording a solution acceptable to the majority of individuals in the society involved.

The law of torts has developed as a series of isolated responses to particular threats or frustrations that have been felt by individuals. Extensions of protection afforded by recognized principles of tort law were first undertaken by the courts. The concept of property as protected by the tort remedies of conversion, detinue, trespass and ejectment was extended to cover the proprietary interest that an author has in his writing or painting.[1] Torts, such as assault, battery, false imprisonment and defamation, had long been available to protect the individual's interest in his person, integrity and reputation. These remedies were also extended in ways that now apparently protect privacy.[2] In Canada, this protection given by means of tort remedies remains peripheral.[3] The interests in privacy currently protected by the law of torts are merely those that have so far been accommodated within the diverse principles of

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[1] See, for example, Millar v. Taylor (1769), 4 Burr. 2303; 98 E.R. 201, Pope v. Curl (1741), 2 Atk. 342; 26 E.R. 608 and Prince Albert v. Strange (1849), 1 Mac. & G. 25; 41 E.R. 1171.

[2] See Monson v. Tussauds Ltd. (1894) 1 Q.B. 671, Argyll v. Argyll (1965) 1 All E.R. 611 and Williams v. Settle (1960) 2 All E.R. 806.

[3] At least in those jurisdictions which have not enacted statutes specifically conferring remedies for invasions of privacy.

legal liability. Those that have been accommodated so far have been physical and tangible intrusions. The intangible intrusions are currently recognized as being sinister but the common law has been slow to afford a remedy for such invasions.

Two torts have dealt to a great extent with injuries arising from communications. These are the torts of defamation and negligent misrepresentation. Great developments have taken place, particularly in the latter, in recent years. The development of the tort of defamation took place, for the most part, earlier in legal history.

In recent times two developments in the law have taken place so as to widen the possibility of recovery for those aggrieved by the circulation of false information about them. The tort of negligent misrepresentation is now extended to allow recovery for all types of loss occasioned as a result.[1] This extends also to misrepresentation made by agents of governments and other public bodies as well as those made by individuals.[2] The other development is the refusal of Canadian courts to allow certain defendants to rely on the defence of qualified privilege. Those defendants are organizations existing for the commercial purpose of trading and selling information.[3] This fact and the expansion of the tort of negligent misrepresentation

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[1] See, for example, Goad v. Canadian Imperial Bank of Commerce (1968) 1 O.R. 579 and Schwebel v. Telekes (1967), 61 D.L.R. (2d.) 470.

[2] See Windsor Motors Ltd. v. District of Powell River (1969), 4 D.L.R. (3d.) 155 and Hendricks v. The Queen (1970), 9 D.L.R. (3d.) 454.

[3] Cossette v. Dun (1890), 18 S.C.R. 222. The rule in jurisdiction of the U.S.A. is that the defence of qualified privilege is available to those who sell information.

have increased the capability of the potential plaintiff to bring actions for the circulation of false information.

II. INTERESTS CAPABLE OF BEING PROTECTED

Interests capable of being protected by the law are various. They are also competitive in that they inhere in the individual, in institutions and in society in general. Some personal interests are often thought to be inviolable and in other circumstances it is generally recognized that an enquirer sometimes has a moral right to have his enquiry answered. Reconciliation of these competing interests may have to proceed on the basis of compromise. This may be difficult because both the individual and society have a cluster or amalgam of discrete interests.

A distinction should be drawn between interests which could be protected and those which should be protected. Possibility and desirability should exist concurrently before an interest is protected. The ways in which interests might be protected will have a profound effect on whether society ought to protect such interests at all.

Many types of intrusion may be prevented and correlative protection is given to the interests which might otherwise be harmed by such intrusions. Invasions of individual interests falling within the generally recognized notion of privacy are many and various. Some examples of intrusions which might commonly be offensive to the person intruded upon are:[1]

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[1] The following list is one of intrusions, grievances or frustrations that might be felt by an ordinary member of society. It is not an attempt either to be eclectic or to order the intrusions in terms of the harm they may cause or the threat they may present. An attempt to list such intrusions is made in Virginia Law Weekly, DICTA, vol. XVII 1965.

1. unauthorized disclosure of private information,
2. intrusion into an individual's usual retreat or into his private affairs.
3. improper publicity which creates a false impression in the minds of the recipients of this publicity,
4. appropriation, for advantage, of the name or likeness of another,
5. disclosure of information supplied by the subject of it for another purpose,
6. disclosure of information collected about a subject for a purpose other than that for which it was collected,
7. disclosure of any information required to be given by law,
8. disclosure of any information obtained by duress or by trick,
9. surveillance or compilation of information about an individual that is unreasonable in point of time or place,
10. solicitation of indirect or second-hand information,
11. the collection, retention and dispensation of false information, improper impressions or misleading conclusions,
12. failure to inform an individual that information about him is in existence.

All of the foregoing are individual invasions of an interest from which it is possible to protect the subject. It may or may not be desirable for these actions to be prevented. The countervailing

public or institutional right is the all-encompassing one of knowing or having access to the means of knowledge of all observable facts about individuals in society.

There are several benefits which may result from the collection, storage and dissemination of information. The utility of such activities is for the benefit of society generally or of a large, amorphous group within it. There are several such general benefits.[1] Their recognition may be merely the articulation of various assumptions.

1. Society has an interest in freedom of speech. England, Canada and the U.S.A. each have formal guarantees of such a right.[2] Such a right clearly has to be modified in certain circumstances but is generally regarded as fundamental to the existence of democracy.
2. Those engaged in commercial transactions have an obligation to circulate information. This extends to credit information passed between credit-reporting agencies and buyers and the right of prospective purchasers to be informed about products and those who manufacture, handle or sell them.
3. There is a general interest in the restricted circulation of military and governmental information. Both the passage of the information and the secrecy with which it is done are regarded as being important.

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[1] These are listed below without any attempt to formulate priorities between them.

[2] Clearly many other countries also have such guarantees. In Canada the right is guaranteed in the Canadian Bill of Rights, R.S.C. 1970 App. III s. 1(d).

4. There is a similar interest in restricted circulation of government records of a confidential nature.

5. There is an interest inhering in all members of society that they be allowed to exercise their fundamental freedoms whether these be secured by the constitution, by the general law or by any other method. These freedoms may conflict with the individual's interest in privacy but such a conflict may be incidental to the main purpose of the freedom. Among the freedoms which may impinge upon privacy are:

   (a) freedom of association,

   (b) freedom of religion,

   (c) freedom from capricious or arbitrary discrimination,

   (d) freedom of speech,

   (e) freedom of assembly,

   (f) freedom of the press,

   (g) freedom to derive satisfaction or enjoyment from whatever one chooses,[1] and

   (h) freedom from unlawful imprisonment or interference with one's person without redress.

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[1] Clearly, all the listed freedoms are subject to some curtailment but this one is particularly so.

III. PRESENT LEGAL PROTECTION

The interests referred to above are diverse. These diverse interests may be regarded separately (which is undoubtedly the way the legal protection of them has grown up) or they may be treated as an integrated whole. Legal protection of the interests has been sporadic, limited and peripheral.

The law recognizes the right of individuals to maintain certain parts of their lives private and inviolable. Legal protection of this interest has been fragmented and almost every traditional legal subject has some small portion of it devoted to holding a balance of some sort between the interest of the individual in his own privacy and the interests of society in general. In the present state of the law both the nature of the interest invaded and the way in which an interest is invaded may make a difference as to whether a legally recognized grievance exists. These may be characterized respectively as substantive and adjectival invasions of privacy. Both types of interest in privacy are currently recognized as equally worthy of protection. Traditionally substantive legal subjects usually refer to substantive interests and procedural legal subjects relate to adjectival interests. A similar, but not precisely corresponding, analysis of the whole legally protected sphere of privacy may be found in its reduction into unconditionally and conditionally protected legal interests. Some types of invasion of privacy have been granted automatic legal protection in some form while others have only been granted qualified protection. (The automatically protected interest may often be one

of substance: qualified protection usually relates to an adjectival interest). It is noticeable that some privacy interests are accorded unqualified protection in the present state of the law. Other privacy interests do not attract legal recognition or redress unless accompanied by a particular state of mind or unjustifiable and outrageous conduct.

The modern Canadian common-law jurisdictions may be subjected to either of the foregoing analyses, but the inevitable conclusion must be formed that isolated and particular privacy interests are legally recognized but that no thought has been devoted to protection of the sum of all these isolated interests. The common law is an obstacle to clear thought about the individual's interest in privacy. The body of the law is compounded from the resolution of particular disputes between individuals. While general pronouncements are made by judges these rarely relate to anything outside the formal legal category which is the background of the dispute. Discussion of the individual's interest in privacy at a sufficiently high level of abstraction is inhibited.[1]

A further fundamental tenet of the law has always been that no conduct is actionable unless it falls within the definition of a particular tort. Similarly, no conduct is criminal unless expressed

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[1] Although the hope has been expressed by many that the common law may expand and that it may provide redress in many circumstances in which it does not now do so. This infinite capacity for growth of the common law was adverted to by Holtzoff J. in Peay v. Curtis Publishing Co. 78 F. Supp. 305 (1948).

by the law to be so. Most of the law relating to intrusions into privacy ultimately may be resolved into one or other of these categories. This is the method by which the law has held the balance between the interests of the individual and society. Sanctions of a civil and criminal character exist only to restrain specified excessive conduct. The basic proposition is that individuals are free to collect, retain and disseminate information so long as their conduct is not legally reprehensible. In this sense all legal restraint upon conduct is peripheral. Legal restraints upon a particular form of activity, namely invasions of privacy, will naturally be even more restricted, peripheral and limited.

The development of the law, particularly the law of torts, has been referred to above.[1] However, privacy and the countervailing public and general rights pose problems for more branches of the law than may be subsumed under the heading of "Torts". This is because problems are raised in many types of human activity. Because of the existence of the computer controversy and the assumption by many that it is an important weapon in the erosion of personal privacy, three major areas of concern have been exposed. These are the utilization of information within (1) the corporate structure,[2] (2) the professional

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[1] See I. Introduction.

[2] This refers not only to collection, storage, exchange and dissemination of information within individual corporations but extends also to the part played by information in a society which relies on the existence of corporations. This extends to all information circulated because of the existence of corporations in society.

relationship[1] and (3) the security context.[2] These current problems exist within the framework of the legal subjects set out below.

Many of the traditional legal subjects encompass some forms of privacy interest. In an ad hoc and cautious fashion judicial and statutory attempts to resolve the conflicts between the individual's interest and that of society have been made. The legal framework within which privacy interests are resolved include the following topics:[3]

1. Real Property. In the keeping of a record of title under the Torrens system information relating to the owner and other interest-holders is recorded. Such record-keeping is done under the authority of a statute. This information is often available to the general public. Prices paid and the values of mortgages and liens and by whom they

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[1] This involves all the problems created in the privacy context because of the existence of professional relationships.

[2] This embraces all political and governmental information as well as that kept or recorded by derivative organizations or agencies.

[3] These are arranged in terms of how important the subject is for the protection of the cluster of interests that an individual has. Such an order of priorities necessarily imports a bias and this fact is recognized. Obviously, the arrangement could have been made in terms of the cluster of interests held by society or some substantial sector of it. Furthermore, the mere fact that protection or redress is available in a given circumstance for an invasion of privacy does not necessarily mean that the law is particularly zealous to protect privacy in this case. Any considered acceptance or rejection of the existence of a legal right will suffice to demonstrate awareness of the problem on the part either of the court or the legislature.

are held may thus become freely available.[1] Private organizations may also keep records.[2] Title insurance companies (insofar as they operate in Canadian common-law jurisdictions) retain records of such matters, but they do not generally publish the information. However, such companies only refrain from publishing the information gained because it is not in their own commercial best interests to do so. Personal information is sought by landlords before they accept rental applications and such information is subsequently stored. Landlords' associations have formed in some cities, and they very commonly pool information relating to their tenants and would-be tenants. Tenants' associations have also formed, and they may correspondingly pool information about their landlords.[3]

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[1] Records relating to real property under the Land Titles Acts of Alberta and Saskatchewan are available. Records kept under the English Land Registration Act, 1925, are not available to the public. Under that Act members of the public may discover only if the land is registered. If a person wishes to search the register (as he will prior to becoming a purchaser or mortgagee of the property) he must produce the authority of the registered owner. It should be borne in mind that real property transactions are often the most important that a man makes throughout his life.

[2] It should be borne in mind that throughout the discussion of specific legal subjects corporate, government and professional relationships may be the background within which privacy problems arise.

[3] Financial and other personal information about landlords is of little use to tenants unless they are able to bring political pressure to bear as a result of it. Furthermore, it is usually impossible for tenants to obtain private information from landlords because they are not usually in a position to obtain such information voluntarily.

Private organizations and persons may also keep records. This is not done under statutory authority but is done merely because there is nothing to prevent such records being made. Only certain sorts of information may not be gathered, and there may be a prohibition relating to the collection of information in a particular way.

Financial information conveyed about an individual's home is often particularly insidious because many people regard their homes as a last retreat. This idea is, in fact, encouraged and fostered in other branches of the law.[1]

Inventories of real and personal estate may be compiled as conditions precedent to other transactions. Such compilations may be viewed as threats because of their mere existence even if the individual who is the subject of them originally had control over them or freely volunteered the information for the purpose for which it was originally used.

Some conduct related to invasions of privacy by computers and incidental human activity may fall into two or more of the separate legal categories listed here. This merely means that an actual human problem has ramifications in two or more distinct legal spheres. Relationships connected with the ownership of property may create problems relevant to privacy. For example, the landlord-tenant relationship has produced such

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[1] For example, the law of self-defence supports this notion in that it requires retreat, wherever possible, before retaliatory force may be justifiably used. This general rule does not apply when an individual has reached his home. See R. v. Hussey (1925) 18 Cr. App. R. 160, Beale Retreat from a Murderous Assault (1903) 16 Harv. L. Rev. 567 and Russell on Crimes v. I at p. 492.

problems.[1] However, it is felt more appropriate for these to be dealt with in the context of the law of torts.

2. Personal Property. Records are kept of personal property transactions by interested parties and by disinterested governmental agencies. Sales of large value items and contracts of large value may be recorded by both buyer and seller. More often records of sales are kept only by the seller.[2] Chattel mortgages, liens and security interests in certain types of personal property may be recorded in the file of government departments and agencies. This is usually done under statutory authority. Intangible personal property often only exists in terms of records and, therefore, much information is stored about it. Commercial paper is retained by the person to whom it is issued. Bonds, stocks, shares and debentures are recorded. Thus, records are kept primarily of transactions but, in the aggregate, these may amount to a complete financial exposure of a sort that might offend the sensibilities of ordinary man.

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[1] It is not unusual for the landlord-tenant relationship to be the background for victimization, harassment and the causing of some mental shock. See Perera v. Vandiyar (1953) 1 All E.R. 1109, Welsh v. Pritchard 125 Mont. 517, 241 P. 2d. 816 (1952) and Gorsky The Landlord and Tenant Amendment Act, 1968-9--Some Problems of Statutory Interpretation (1970, Special Lectures of the Law Society of Upper Canada), at p. 439.

[2] Often there is a legitimate interest to be served by records kept by a seller or by a buyer. A defect in the item sold may be more easily remedied if adequate records are retained by the parties. However, information may not be used in a way that is socially justifiable. Thus, records kept by car dealers may be sold to companies soliciting the sale of extra equipment.

3. Torts. Several torts are designed to give civil redress to the aggrieved subject of the passage of information. The torts of defamation, negligent misrepresentation, passing-off, deceit and invasion of privacy (where it exists) are all relevant.[1] The law of torts provides redress in the following circumstances.

The law of defamation permits recovery of damages when a false statement to the detriment of the plaintiff's reputation is published by the defendant.[2] This tort is obviously applicable in cases where a communication is made about a recognizable individual. The communication must be substantially untrue or misleading. Truth or fair comment is a complete defence.[3] Alternatively, there will be no liability where the statement is made in circumstances protected by the defence of absolute privilege[4] or that of qualified privilege.[5] The defence of qualified privilege attaches where there is a mutual interest of the publisher and

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[1] Lord Mancroft thought that the tort of nuisance ought to be added to this list (H.L. Deb., 13th March 1961 col. 617).

[2] Knupffer v. London Express Newspaper Co. Ltd. (1944) A.C. 116.

[3] Kemsley v. Foot (1952) A.C. 345.

[4] Veeder Absolute Immunity in Defamation (1910) 10 Col. L. Rev. 130.

[5] See Sharp Credit Reporting and Privacy (1970) at p. 40 and Beach v. Freeson (1971) 2 All E.R. 854.

recipient of the statement in, respectively, making and receiving it. This has been held, in English and Canadian courts, not to extend to a purely commercial bond between the publisher and recipient.[1] (The opposite conclusion on this point has been reached in the U.S.A.[2] Therefore, the circumstances in which a defamation action may be brought in Canada are limited but the tort will be of greater assistance than in the U.S.A.). However, the defence of qualified privilege will be available in Canada where the publication is internal to an organization or business and is necessary for conducting its affairs.[3] The defence is also available when the publication takes place within a trade protection association or other body set up for purposes which are not purely or primarily commercial.[4] This limits the defence of qualified privilege to a fairly narrow ambit in Canadian law. Nevertheless, the redress afforded by this tort is not extensive nor is the tort a practical or suitable measure in many circumstances. This will often be the result of the potential plaintiff not knowing he has been defamed.

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1 See Macintosh v. Dun (1908) A.C. 390 London Association for Protection of Trade v. Greenlands Ltd. (1916) 2 A.C. 15 Cossette v. Dun (1890), 18 S.C.R. 222 and Lemay v. Chamberlain (1886) 10 O.R. 638.

2 Wetherby v. Retail Credit Co. 201 Atl. Rep. (2d.) 344 (1964).

3 Harper v. Hamilton Retail Grocers Association (1900) 32 O.R. 295.

4 London Association for Protection of Trade v. Greenlands Ltd. (1916) 2 A.C. 390.

Actions for negligent misrepresentation may be brought when any harm is suffered by the plaintiff as a result of an erroneous statement given currency by the defendant. All that is necessary for success in this action is for an erroneous statement to be made in breach of a duty of care and for it to cause harm.[1]

Actions for deceit may be brought in substantially the same circumstances as those for negligent misrepresentation except for the requirement that the representation be made intentionally or wilfully.[2]

It should also be recognized that sometimes the damage that occurs is what gives the event the hallmark of an invasion of privacy. Some injuries, such as wounded feelings, outraged dignity or mental shock, may be regarded as very personal. Such damage may, however, flow from breaches of contract or other recognizable wrongs as well as resulting from torts.[3]

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[1] This tort has had an increase in popularity since the decision in Hedley Byrne v. Heller (1964) A.C. 465. See Dodds v. Millman (1964) 45 D.L.R. (2d.) 472 and Central B.C. Planers v. Hocker (1970), 10 D.L.R. (3d.) 689.

[2] See Pasley v. Freeman (1789) 3 Term Rep. 51 and Derry v. Peek (1889).

[3] See the comments made by Lord Denning in Cook v. Swinfen (1967) 1 W.L.R. 457. Not only may other wrongs become relevant when the damage caused is of a private nature but certain torts which do not ordinarily have anything to do with privacy may also become relevant for the same reason. One such tort may be that of trespass.

The essence of the tort of passing-off is that goods are represented to be those of the plaintiff when they are in fact those of the defendant.[1] This tort may be committed in several ways which may consist of appropriation of the plaintiff's name, imitation of his goods or even use of a picture of him.[2]

Other old torts may be revived and more modern ones modified. These torts generally have their origin in the common law although some (such as privacy) may have their origin in a statute and others (such as defamation) may have their origin partly in a statute. The uncertainty of recovery and total cost of tort actions to enforce observance of the minimal rights they purport to secure are great. The individual about whom information is passed or gathered may often not know of it because he is neither the informer, collector, or recipient of the information. The actual cost of bringing a tort action is great. Unless the plaintiff claims to have suffered considerable actual loss or claims punitive damages it may not be worth the cost involved. Furthermore, lack of available evidence may preclude success in tort actions.

It should be noticed that there has been additional residual and peripheral protection of privacy afforded by

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[1] See generally Street on Torts (4th. ed., 1968) at p. 367 et seq.

[2] Henderson v. Radio Corporation Pty. Ltd. (1960) S.R.N.S.W. 576.

> the common law, by equity and by statute. Much of this protection is not easily consignable to any individual branch of the law. This is because those courts which have had the matter of protection before them have concentrated on the remedies and not upon the rights.
>
> These remedies developed by the common law, by equity or by statute may not be particularly relevant to the law of torts but they appear to depend to some extent on a notion of a pre-existing right of personality or of property.

Common law, statutory and equitable relief has been afforded in cases involving representations or likenesses of recognizable persons, in connection with their work or products and with their otherwise undisclosed communications. In most jurisdictions one or the other source of the law has provided at least minimal relief for those suffering invasions falling within these categories. Since protection for such invasions has been primarily within the jurisdiction of the provinces, the Canadian Parliament will be unable to affect directly the civil rights and remedies involved. However, appropriate supportive legislative assistance may be given if the present legal rules applicable in the province, and their possible future development, are examined.

(1) The right to one's own likeness. Photographic and other pictorial representations may be used unauthorisedly either for the gain of the representor or else in a way offensive to the individual

represented.[1] This may merely give offence to the person represented or it may amount to an intrusion upon his solitude or an injury to his reputation. The law of defamation makes any representation actionable which causes a false and injurious impression provided that it is neither substantially true nor of a person otherwise in the public eye. The action for invasion of privacy (in those jurisdictions where it exists) also gives some relief for the unauthorized use of a person's likeness. This protection in the law of torts is fragmentary. In those common law jurisdictions which recognize a statutory or other right to privacy there is, characteristically, a more connected and cohesive prohibition against the indiscriminate use of another's likeness.[2] All but four states of the U.S.A. have such a general protection as the result of acceptance of the tort of privacy in a limited or extensive form.[3] Continental

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[1] Although controversy centres on pictorial reproductions there may be other distinctive attributes of personality. Particular voices or fingerprints may be imitated. It was held in Sim v. Heinz (1959) 1 All E.R. 547 that it could not be shown that damage would necessarily ensue from the reproduction of a voice. There was, in that case, no argument as to the proprietary interest in a voice.

[2] See, generally, Wagner The Right to One's Own Likeness in French Law (1970) 46 Indiana L.J. 1.

[3] Nebraska, Rhode Island, Texas and Wisconsin seem to be the only U.S. jurisdictions that might today follow Roberson v. Rochester Folding Box Co., 171 N.Y. 538; 64 N.E. 442 (1902). See Pollard v. Photographic Co. (1888) 40 Ch.D. 354, Correlli v. Wall (1906) 22 T.L.R. 532 and Williams v. Settle (1960) 2 All E.R. 806.

European systems have developed a large scheme for protection of individuals from the reproduction of their own likenesses. This may be either on the basis that there is a proprietary or a "personal" right to restrain such reproduction. It does not appear to matter whether such rights inhere in property or the person for the results will usually be the same. Common law jurisdictions in Canada will probably extend their protection along parallel lines. In Manitoba and British Columbia it is probable that such extensions will be attributed to the existence of the statutes.

(2) The right to one's work or product. Such work may be of an artistic nature or may be anything else that is not so common as to lose its link with its author or originator. Statutory protection is afforded to some of these works under the aegis of the law of copyright and of patents. This statutory protection is the clearest recognition that there ought to be some relief for some unauthorized uses of another's achievements. Otherwise, the general rule is that one may use another's intangible property as one pleases. There are some rather limited exceptions to this principle but there is no law against plagiarism.

Protection for the exclusive right to use one's own distinctive product as one chooses has been spasmodic at common law. Some statutes allow relief on a more organized basis. Equitable rules appear to be based upon the degree of unconscionability of the supposed infringement. The justification for statutory relief in the case of unauthorized use of patents and copyrights is clear whereas in the case of common law and equity such relief must be based on

a pre-existing rule or principle. Decisions have indicated that there are circumstances in which such relief may be obtained. Such decisions indicate that where the product or work is distinctive enough for those through whose hands it passes to, or to be put on notice, that it is the product of a particular individual whose identity is revealed then he may restrain its use or display.[1]

(3) The right to confidential communications. Although these communications may fall within the above principle, there is an added factor in that what is at stake is an express or implied assertion of confidentiality and not a general rule allowing or forbidding a right to reproduce or alter products.[2] Some communications may be artistic and assume the character of a product as well.

The confidentiality of communication may result from the relationship between the parties, the intrinsic nature of the information imparted or from the express stipulation of the communicator. It seems natural that everyone will have a reserve of information about the communication of which they may be reticent or unqualifiedly opposed. Individual positions with respect to different types of information may vary and may change from time to tome. Such variations and changes in attitude may depend entirely on whether the content of the revelation if favourable or unfavourable, creditable or discreditable.

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[1] Prince Albert v. Strange (1848) 1 Mac. & G. 25; 41 E.R. 1171, Pope v. Curl (1741), 2 Atk. 342; 26 E.R. 608, Lord Byron v. Johnston (1816), 2 Mer. 29, - 35 E.R. 851.

[2] In Tournier v. National Provincial and Union Bank (1924) 1 K.B. 461 there was held to be an implied term requiring confidentiality in the contract between banker and customer.

One such type of communication is that about age of birthdate. Women, and others, seem generally reluctant to disclose such information. However, such information may be elicited in all sorts of transactions. In some, such as insurance or pensions, the age may be relevant to the transaction; in others, the information as to age is useful only as a general criterion of identity. Other examples of such types of communication relate to aspects of the family unit, employment and transactions about which individuals generally maintain silence. The standards of usual silence are those which the courts generally employ.[1] These are the areas in which the unauthorized disclosure of facts about individuals may do great damage. It may well be argued that the individual has the right to maintain an area of secrecy different from that of the norm in his society. These areas are also those threatened by technological advances.

(4) The right to security in one's person and property. Various forms of civil law relief exist to compensate or prevent unjust or unreasonable restraints on persons or dealings with property. This right is one of a physical or tangible nature. Nevertheless, violation of this interest affects the dignity, and perhaps the reputation, of the individual aggrieved. Redress for, and relief from, the consequences of such invasions of this right are essentially peripheral since all conduct constituting personal or proprietary

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[1] Argyll v. Argyll (1967) Ch. 302. See also Yovatt v. Winyard (1820), 1 Jac. & W. 394; 37 E.R. 425 and Saltmann Engineering Co. v. Campbell Engineering Co. (1963) 3 All E.R. 413 n (which case was followed in Peter Pan etc. Corpn. v. Corsets etc. (1963) 3 All E.R. 402).

invasion is permitted if not specifically prohibited. Common law, equitable and statutory relief for such invasions is fragmentary. The rules that support the right to injunctive relief, writ of habeas corpus, mandamus or other judicial resolution support damages. Substantial recent developments in such rules have been in the sphere of torts. In modern times, invasions of individual security have emanated largely from public authorities. The fact that such invasions may be committed by a figure of authority and that standards of which invasions are just and reasonable have tended to vary (in part, because they depend upon larger societal attitudes) has produced an amorphous and vacillating body of law.

Other torts and forms of relief may be aimed directly at a particular type of invasion of privacy. A revival of the old tort of besetting has been suggested.[1] It is actionable for one to unreasonably watch and beset the dwelling place or place of business or employment of another. The tort of intimidation may well also be relevant in the protection against some breaches of privacy. The decision of the House of Lords in Rookes v. Barnard[2] extended the ambit of this tort from the single two party situation to those cases in which one puts pressure on another to the detriment of a third party. Such pressure may be used to effect an intrusion into privacy or to obtain private information. The same considerations apply to the tort of conspiracy.

Invasions of a physical nature are easier to see and were provided for in the early law of torts. Assault, battery and false

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[1] See the book review by Newark of Westin Privacy and Freedom at (1971) 87 L.Q.R. 264.

[2] (1964) A.C. 1129.

imprisonment attracted redress early in the development of the law of torts.

Just as various forms of action may predictably expand in such a way as to extend protection to individuals' interests in privacy so the converse may also occur. Legally recognized defences, justifications and excuses will also expand to protect the public's or other smaller group's right to know, and the individual's right to communicate information about himself.[1] There has also been clear recognition of the public's right to receive information emanating from a person other than the subject of it.[2] This will relate to substantially truthful statements or newsworthy communications about public figures, for in these cases a defence will be afforded to tort actions for libel or for invasion of privacy where that action exists.[3] The more emphasis placed on constitutional rights of free speech and the public interest the greater will be the expansion of these defences.

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[1] See Slough Privacy, Freedom and Responsibility (1969) at p. vii.

[2] See New York Times v. Sullivan, 376 U.S. 254 (1969) and Time Inc. v. Hill, 385 U.S. 374 (1966). Many other cases also involve such a relationship. See also Spahn v. Messner 260 N.Y.S. 2d. 451 (1965), Coleman v. Mackennan 98 Pac. 281 (1908) and Curtis Publishing Co. v. Butts 388 U.S. 130 (1966).

[3] Ready availability of such defences may tend to produce a deterioration in the standards of accuracy and fairness striven for by publishers. Also, such defences may be self-serving in that it may sometimes be the action of the defendant publisher which causes a plaintiff to be involuntarily thrust into the limelight.

The whole of the preceding discussion is directed at peripheral protection afforded by the law of torts. In the aggregate there is a substantial amount of legal protection afforded indirectly by the law of torts. However, this protection and redress is not always available or useful in individual fact situations. The problem now to be confronted is whether there is a remedy provided by the law of torts for "invasions of privacy" per se.

Different jurisdictions have taken different positions on whether there is direct tort protection of the right to privacy and the form which such protection might take. The following is an attempt to set out different forms of protection in various common law jurisdictions.

The undeveloped basic common law position was that no tort remedy existed for those aggrieved by invasions of privacy.[1] This position is still taken in some jurisdictions in which there has been no judicial or legislative attempt to protect individual privacy.[2] In those jurisdictions in which the right of privacy has been directly protected the degree of protection bestowed has varied. In addition, the type of protection afforded has not been exclusively of a tortious nature. For constitutional and other reasons an invasion of privacy may expose the perpetrator to prosecution.[3]

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[1] See, for example, Yoeckel v. Samonig 75 N.W. 2d 925. This was the position where no other tort remedy was applicable. Other tort protection almost always existed to redress some wrongs.

[2] For example, the states of Texas, Rhode Island and Wisconsin.

[3] The Protection of Privacy Bill introduced in the Canadian House of Commons would have this effect. So also would the statutes of New York and Utah.

Some jurisdictions have protected the right by statute. These include New York, Utah, Virginia and Manitoba and British Columbia. In addition, it may be held in some cases that the rather vague formulation of a constitutionally secured right may protect privacy.[1]

The scope of the rights secured by such Acts depends upon the constitutional limitations on the legislature which passed them[2] as much as on the philosophy of the framers of the legislation itself. British Columbia's Act[3] provides that an action sounds in tort for the violation of the privacy of another "wilfully and without a claim of right."[4] The Privacy Act of Manitoba is substantially similar.[5] Its terms may be somewhat wider than those of the British Columbia Act. These two Acts are the only ones in existence in Canada.

It should, however, be noticed that there has been U.S. federal and state legislation[6] as well as other proposals and Bills in

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[1] See, for example, Melvin v. Reid 112 Cal. App. 285 (1931).

[2] Naturally, in Canada, this caused the Acts in British Columbia and Manitoba to be enacted as well as the introduction in the Canadian Parliament of a Bill entitled the Protection of Privacy Act. This Bill made invasion of privacy a crime although it purported to award $5,000 punitive damages to the aggrieved individual in some cases.

[3] Privacy Act, S.B.C. 1968 c. 39.

[4] Ibid, s. 2. See also Davis v. McArthur (1970), 17 D.L.R. (3d.) 760.

[5] S.M., 1970, c. 74; R.S.M. 1970, c. P125.

[6] See the New York Civil Rights Law, 1903, Utah Rev. Stat. (1933) ss. 103-4-7 to 103-4-9, the Federal Fair Credit Reporting Act, Pub. Law. 91-508 (1970) and the Federal Consumer Protection Act, U.S.C. Ann. 1970, Title 15, c. 41.

Canada[1] and England.[2] In addition there has been much indirect and limited legislation which tends to affect privacy.[3]

In other jurisdictions the right to privacy has been judicially secured.[4] There have been different formulations of the extent to which privacy has been protected and these have been linked to

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[1] Among others are the Canadian Protection of Privacy Bill, Ontario Bill 46 providing for Data Surveillance and Privacy and Manitoba's Bill 27: The Personal Investigations Act.

[2] A series of Bills have been introduced in both of the Houses of Parliament. One of the first was Lord Mancroft's in 1961 and one of the more recent was that of Mr. Walden in 1970.

[3] See, for example, Ontario's Private Investigators and Security Guards Act So., 1965, c. 102. The whole of the preceding discussion of the realm of tort law is to some extent relevant to privacy. See also, Canadian House of Commons Bill C-38 and C-96 introduced Third Sess., 19 Eliz. II, 1970.

[4] See Pavesich v. New England Life Ins. Co. 106 Am. St. Rep. 104 (1905), Pearson v. Dodd 410 F. (2d) 701 (1969), Nader v. G.M.C. 255 N.E. 2d 765 (1970) and Rugg v. McCarty 476 P. 2d 753 (1970).

academic writing to a large extent.[1] The courts have operated on an ad hoc basis but Prosser was able to discern four broad types of interest subsumed within the general rubric of privacy.[2] These types of interest had attracted some protection by the courts. These, he denominated, respectively, intrusion, public disclosure of private facts, putting the plaintiff in a false light in the public eye and the appropriation or exploitation of attributes of the plaintiff's identity. While some of these interests would not be protected by

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[1] Clearly articles such as those written by Warren & Brandeis, Prosser and Winfield have had a marked effect, See Prosser, Privacy, (1960) 48 Cal. L. Rev. 383, Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser, (1964), 39 N.Y.U.L.R. 962, Beaney, The Right to Privacy and American Law, (1966), 31 Law and Contemp. Prob. 253, Brittan, The Right of Privacy in England and the United States, (1963) 37 Tul. L.R. 235, Davis, What Do We Mean By Right to Privacy? (1959) 4 S. Dak. L. Rev. 1, Ezer, Intrusion on Solitude, (1961) 21 Law in Transition 63, Farquhar, The Statutory Right of Privacy in the State of New York and its Importance for New Zealand (1970) 5 N.Z.L.R. 277, Feinberg, Recent Developments in the Law of Privacy, (1948), 48 Col. L.R. 713, Gordon, Right of Property in Name, Likeness, Personality and History (1961) 55 Northwestern Univ. L.R. 553, Green, Right to Privacy (1932) 27 Ill. L. Rev. 237, Gutteridge, The Comparative Law of the Right to Privacy (1931), 47 L.Q.R. 203, Kacedan, The Right of Privacy (1932) 12 Bost. U.L.R. 353, 600 Kalven, Privacy in Tort Law - Were Warren and Brandeis Wrong? (1966), 31 Law and Contemp. Prob. 326, Larremore, The Law of Privacy, (1941), 39 Mich. L.R. 526, Miller, Personal Privacy in the Computer Age, (1969) 67 Mich. L.R. 1091, Nizer, Right of Privacy, (1941), 39 Mich. Law Rev. 526, Paton, Broadcasting and Privacy, (1938) 16 Can. Bar R. 425, Pedrick, Publicity and Privacy: Is It Any of Our Business? (1970) 20 U. of Tor. L.J. 391, Ragland, The Right of Privacy (1929) 17 Ky. L.J. 85, Taylor, Privacy and The Public (1971) 34 Mod. L.R. 288, Yang, Privacy: A Comparative Study of English and American Law (1966) 15 Int. & Comp. L.Q. 175, Wade, Defamation and the Right of Privacy, (1962) 15 Vand. L.R. 1093, Wagner, The Development of the Theory of the Right to Privacy in France, (1971) Wash. Univ. L.R. 45, Walton, The Comparative Law of the Right to Privacy, (1931) 47 L.Q.R. 219, Warren & Brandeis, The Right to Privacy, 4 Harv. L.R. 193, Westin, Science, Privacy and Freedom: Issues & Proposals for the 1970's, (1966), 66 Col. L. Rev. 1003, 1205, Winfield, Privacy, (1931) 47 L.Q.R. 23, Yankwich, The Right of Privacy, (1952) 27 Notre Dame L.R. 429.

[2] See Prosser Privacy (1960) 48 Cal. L. Rev. 383.

the courts in the absence of a developed law of privacy, other interests would be protected by extension of other branches of the law. For example, legal and equitable protection has always been afforded for appropriations of the plaintiff's artistic product.[1] In those jurisdictions which have a developed law of torts precluding invasion of privacy, the protection usually extends to all of the four types. Thus, in Colorado,[2] the Supreme Court of that state was able to recognize an invasion of privacy in harassment to obtain payment of a supposed debt. In Rugg v. McCarty,[3] the court recognized a general duty not to interfere with another person's interest in being let alone. Thus, the four types of invasion identified by Prosser should not be construed narrowly or be regarded as exhaustive. The protection given by the common law was no less wide than the statutes referred to above.

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[1] See Pope v. Curl (1741), 2 Atk. 342; 26 E.R. 608. This is merely an example of the peripheral protection that may be available. It makes little difference whether these rights are characterized as proprietary or as extensions of the personality. See Privacy and the Law: A Report by Justice (London: British Section of the International Commission of Jurists, 1970) and Freund Privacy: One Concept or Many in Privacy (Nomos XIII ed. Pennock & Chapman, 1971). There was also an interesting contention that the rights which an individual might have in his own likeness were property rights in Krouse v. Chrysler Canada Ltd. (1970) 12 D.L.R. (3d) 463. However, the point was raised only procedurally and was not decided. See also Poole v. Ragan (1958) O.W.N. 77.

[2] Although Colorado does not have as well developed a common law of privacy it was able to recognize extensions of the above four types of invasion quite readily because its law was to some extent committed to a recognition of the tort.

[3] 476 P.2d 753 (1970). See also Nottingham Right of Privacy and Emotional Distress in Colorado (1971) 43 Colo. L. Rev. 147.

Although some jurisdictions have expressly denied the existence of a common law protection of privacy per se there is always some peripheral protection at common law. In addition to this, many jurisdictions have judicially or by legislation recognized the right to privacy. Either method seems to give coverage as extensive as the other. In any case, the question of whether a particular fact situation is an invasion of privacy is a matter for the decision of the individual court.

4. Sentencing. A sentence by any criminal court may be influenced by a pre-sentence report. The subject of the report may be exposed in the report as much or as little as the probation officer or other preparer of the report wishes. Conviction itself leads to a further series of reports whether the sentence is one of incarceration or not. If the criminal is committed to an institution of any sort, that institution maintains records of him. Independent bodies, such as parole boards, also keep appropriate records.

Conviction itself is a matter of public record and there is no power on the part of the individual affected to prevent a true report of the fact being circulated. For the law to adopt any other posture would be inconsistent with the fundamental proposition that justice should be seen to be done.[1]

Nevertheless, disclosure of the fact of conviction may expose the discloser to the possibility of an action in tort. This will be

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[1] Melvin v. Reid 112 Cal. App. 285 (1931).

so when the fact is revealed wilfully, maliciously, sensationally or erroneously.[1]

5. Law Enforcement. As an ancillary measure to law enforcement activities records are kept by the various police forces. The various internal police forces which might keep such records include: R.C.M.P., Provincial Police, city and township police and campus police. Outside Canada, Interpol and the F.B.I. may be relevant forces.

Evidence is available that information is circulated more freely than is consistent with the secrecy and confidentiality that is ordinarily to be expected of law enforcement records.[2]

6. Social Protection Legislation. Records are kept by the various governments and their agencies under social protection legislation. Social protection legislation encompasses all those schemes from which the individual derives some benefit which corresponds to the detriment of giving up the information about himself. Examples include the Canada Pension Plan, Social Insurance, medical, hospital, pharmaceutical and doctoer's records and legal aid schemes.

Such records are kept in conformity with specific statutory direction. Files kept under each particular statute need not contain much information but, together with other files, a considerable amount of information may be amassed.

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[1] In which case the tort of defamation will be in issue.

[2] See the Report prepared by J. Carroll for the Privacy and Computers Task Force.

The dispensation of welfare has caused some discussion of the extent to which the privacy of the recipient should exist. Individuals' views on this subject tend to conform with attitudes struck on the question of whether funds should be dispensed at all.

7. Banking. Banking institutions maintain records of the property and transactions of their clients. Chartered banks, credit unions and trust companies keep such records. They also compile credit information and subsequently sell it to or exchange it with others. No particular legal principle appears to require or permit the collection of information which the banks clearly do for their own benefit.[1] The collection, storage and dissemination of information may often take place in circumstances in which the customers who are the subject of the transaction do not know of its existence. There may be civil liability in some circumstances in negligent misrepresentation, deceit, defamation or breach of confidence.

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[1] See Hedley Byrne & Co. Ltd. v. Heller (1964) A.C. 465, Goad v. Canadian Imperial Bank of Commerce (1968) 1 O.R. 579, Mutual Mortgage Corp. Ltd. v. Bank of Montreal (1965) 53 W.W.R. 220. and Bank of Montreal v. Young (1967) 60 D.L.R. (2d) 220.

8. Labour Law. Both unions, individual employers and sometimes consortia of employers might keep records relating to individuals. Either party might keep records on parties not contractually involved with them.[1] Since labour relations is a field in which both corporations and trade unions wield enormous pressure situations are created in which individuals may easily be sacrificed.[2] As well as the possible invasions of privacy of employees, potential employees and past employees, the question of privacy will also arise with respect to corporations and associations.[3] Quite clearly, some basic principles of law relating to trade secrets, trademarks and copyrights may be applicable. So also may be the general constitutional principles.[4] Psychological and other kinds of testing may be undertaken and the elicitation of other information may take place. This may be quite widespread and not merely confined to government employment and other notoriously sensitive occupations.[5] One of the problems is that it is far from universally accepted that these

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[1] Rookes v. Barnard (1964) A.C. 1129. See also Pratt v. British Medical Ass'n. (1919) 1 K.B. 245.

[2] See Meany, Virginia Law Weekly, DICTA, Vol. XVII, No. 24 (1965).

[3] See Harris, Virginia Law Weekly, DICTA, Vol. XVII, No. 18 (1965).

[4] Which in Canada will include rights and freedoms guaranteed by the British North America Act and the Canadian Bill of Rights. As to how these constitutional principles may become relevant see N.A.A.C.P. v. Alabama 357 U.S. 449 (1958), 377 U.S. 288 (1964), in which case the Supreme Court of the U.S.A. refused to allow the State of Alabama enforce its statute requiring a list of members composing the appellant organization.

[5] Cooper & Sobol Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion (1969) 82 Harv. L. Rev. 1598 and Creech The Privacy of Government Employees (1966) 31 Law and Contemp. Problems 413.

tests are efficacious in the contexts in which they are used.[1]

Thus, in employment and prospective employment situations there is considerable pressure and opportunity to obtain information, particularly that relating to employees.

In attempting to control the use of privacy intrusive devices (such as the inappropriate tests referred to above) and in attempting to regulate the storing and dissemination of information one may have to formulate rules arbitrarily selecting data banks of over a certain size.[2] Such a distinction might serve to create different rules applicable to the employee of a large, rather than a small, company.

9. Taxation. Taxation is another means whereby information is collected about individuals. The payers of income, estate, gift and real property taxes are identified. Sales tax transactions (unless on large items) do not involve identification of the payer. Since the payment of income taxes is referred to an individual whose social security number is recorded, correlation of information and compilation of large stores of information is facilitated.

It is generally accepted that this information should remain personally unidentifiable but that digests and compilations may be published. Legally, there is probably nothing that could be done by an individual aggrieved at the publication of taxation information

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[1] See Legal Implications of the Use of Standardized Ability Tests in Employment and Education (1968) 68 Col. L. Rev. 691.

[2] See the draft Bill annexed to The Right to Privacy (1971) by the Oxford Group of the Society of Labour Lawyers.

relating to him. However, if a culprit could be found criminal and administrative sanctions could be applied to him.[1] However, such procedures may vindicate the victim's right to confidentiality but they may not give him solace.

10. Traffic and Highway Law. The licensing of vehicles and drivers and the obtaining of insurance all involve the solicitation of information. The records of vehicle licenses are consistently sold by provincial governments to commercial concerns. The collection and giving of information is required by statute; the sale of such information is not.[2] Clearly, the statutory requirement is for the betterment of the roads and drivers and it may be thought that public agencies and departments abuse their powers to collect such information when they use it for purposes other than those originally intended.

11. Insurance Law. Life, real property, car and personal insurance are all sold on the basis of full disclosure of a large amount of information. Failure to provide full and complete information may result in cancellation of a policy since the contract is one uberrimae fidei. Insurance companies certainly have a legitimate interest in full disclosure by the applicant yet insurance companies are one of the most important sources of information for the obtaining of information by credit corporations.

The same comments apply to the subject as to that immediately preceding, Traffic and Highway Law. The legitimacy and morality of

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[1] See, for example, s. 196 (1)(a) & (b) Income Tax Act, R.S.C., 1970, c. I-5.

[2] Sale of such information has attracted adverse criticism recently.

extracting the information is recognized but the purposes to which it may be put are unintended by the subject of it and are not within the scope of the transaction.

12. Government Records. Federal, provincial and local government records of various types may be kept. These may be kept without the individual about whom they are kept deriving any corresponding benefit from the keeping of them. The benefit may accrue only to society as a whole or to institutions. Such records may be maintained by Customs and Excise authorities, harbour authorities or public health authorities. Access to these records may or may not be easily obtained.[1] Some records are of a public nature but there seems to have been a tendency in recent years to maintain secret records.[2] The Canadian Statistics Act allows limited access to public records to those who are authorized under it. It also requires that those directly responsible for the keeping of the records shall facilitate access by those so authorized.[3]

This topic relates only to records kept of information yielded by individuals without the individuals receiving any counterveiling

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[1] The information recorded by censuses and its accessibility has recently been the focus of some attention. See Mayes London Letter in Saturday Review, November 6, 1971, at p. 10.

[2] See s. 15 Statistics Act, R.S.C., 1970, c. S-16 in connection with the secrecy with which such public records as fall within the Act are to be kept.

[3] See s. 10 Statistics Act, R.S.C., 1970, c. S-16.

benefit. Thus, it does not extend to those records kept incidentally to a government operation of more obvious social utility, such as taxation, welfare payments and workmen's compensation. However, in connection both with pure record-keeping and activities of social utility, the governments have never spelled out the degree of confidentiality to be expected in its transactions. The individual may be forced to give up more and more information which may cause internal harmful results to him and which may subject him to outward and recognizable wrongs without the government being forced to assess the utility of its activities.

13. Law of Contract. Simple contracts are not generally the subject of record. However, several types of transaction may be recorded. These will include transactions in which one or more of the following elements is present: credit, large contract price, mortgage, conditional sale, chattel mortgage and lien. In short, economic protection is the motive prompting the collection of the information and the disparity in bargaining power is the instrumentality facilitating such collection.

Usually such records are informal and kept by one of the parties to the contract. However, government agencies may become involved and keep records under statutory authority.

14. Family Law. Records relating to the statistics, size, health, composition and decomposition of families and the individuals that form them are kept by independent government agencies. Decrees of courts relating to divorce, separation, alimony, maintenance and child support are recorded.

A bond of confidence exists among those within the family unit.[1] Confidence extends to those matters normally considered confidential. However, this may not prevent those outside that unit gathering information relating to a family. Information freely available to outside observers may be given currency in any way. Information which emanates from within the family unit may not be given undue publicity.[2]

These principles primarily affect the civil law aside from any statutorily sanctioned intrusions that may exist. These are dealt with under the headings of Government Records and Social Protection Legislation.

15. Criminal Law. The criminal law attempts to prohibit the passage of information in some circumstances.[3] The crimes of sedition, treason, perjury, conspiracy and attempted crimes may all be relevant. These crimes aim at the passing of information as often being central to the commission of the crime. The prohibition is, in Canada, statutory. The existence of these crimes makes a fairly small difference to the passage of information.

What may make more of a difference to the passage of information are the strictures that may be placed on communication about criminal offences of all types and about suspected criminal activity.[4]

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[1] Argyll v. Argyll (1965) 1 All E.R. 611.

[2] Unless it is actionable within the tort of invasion of privacy; Melvin v. Reid 112 Cal. App. 285 (1931).

[3] See also VI. Developments in Legal Protection, below.

[4] See Baran Some caveats on the contribution of technology to law enforcement (1967; Santa Monica, Calif.).

Clearly, information about criminal activity and cases of security and intelligence concern will be computerized[1] and physically very readily available unless some limitations are imposed upon that availability.

16. Criminal and Civil Procedure. Proceedings in judicial, quasi-judicial and administrative tribunals depend upon the communication of information. The communication is often recorded. Judgments and resolutions are always recorded. Bankruptcy proceedings and all types of administrative proceedings may depend on transmission of information about individuals. Often a document involved in judicial proceedings may not be evidence of its contents. It may be a mere assertion or allegation such as a writ or statement of claim. Thus, such documents should not be taken as informative although they may be matters of record. Some non-probative information is undoubtedly recorded both for the purposes of law enforcement and purposes unconnected with it.

17. Evidence. The law of evidence recognizes a privileged communication between individuals in some cases (between spouses, lawyer and litigant and to or from the Crown) but not in others (between doctors, priests, journalists and their informants). Thus, it is recognized that some relationships may yield information more prejudicial than probative and that the protection of some relationships is a paramount policy consideration. Other relationships are not recognized as supporting the privilege and in these the public interest has been treated as paramount.

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[1] See Carroll Personal Records: Procedures, Practices and Problems (Report to the Privacy and Computers Task Force, 1971).

This balance is achieved usually by the common law with occasional statutory intervention.

The rule relating to illegally obtained evidence also has a bearing upon privacy. It is debatable whether the exclusionary rule which applies throughout the U.S.A. has the effect of diminishing the frequency with which evidence is illegally obtained. However, it is designed to secure that end, among others. As such, it is relevant to privacy and intrusions upon it.[1] The Canadian rule is that illegally obtained evidence is admissible unless it consists of a confession obtained by threat or promise.[2]

18. Company Law. Records are kept by disinterested government agencies about the formation, composition and dissolution of companies. Both provincial and federal agencies may here be involved. Records may be kept by such agencies and Securities Commissions and these may relate to the trading of stocks, investments and securities. These, and the records kept by companies themselves, may relate to the individuals. Such records are usually kept under the specific or general direction of a statute.

Naturally, company law raises the questions of trade secrets, patents and trademarks. While a specific body of law relates to

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[1] See the judgment of Cardozo J. in People v. Defore 242 N.Y. 13, 150 N.E. 585 (1926).

[2] See Martin The Exclusionary Rule Under Foreign Law-Canada 52 J. Crim. L.C. & P.S. 271 (1961).

these subjects, it should be recognized that corporations take physical and contractual precautions to prevent information about their operations being too freely available. Industrial spying has greatly increased in recent times.[1] This subject obviously has less to do with company law than with the impact of the corporation on society. Other problems may be the result of the existence of corporations in society and the pressures that may be produced by them.[2]

19. Trade Regulation. Under the Combines Investigation Act and under other particular statutes government investigative staff might record the activities of companies.

20. Military Law. Military law sanctions the keeping of records. Records may be kept about individuals currently serving, those who have served and those who may serve in the future. In addition, records may be kept in the interests of national security on individuals now having nothing to do with the armed forces.

21. Professional Regulation. Professions generally keep records relating to members. This may be regarded as part of administrative law generally, but the regulation of professions usually takes place under the aegis of a particular statute. The records retained by professional societies and associations are not generally easily available.

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[1] See Engberg The spy in the corporate structure and the right to privacy (1967; Cleveland).

[2] This merely goes to the point that the corporate structure may be the one within which problems arise. See, for example, 8 Labour Law, above.

22. Probate. Records of the size of estates and the principal beneficiaries are commonly printed in newspapers in some places. The figures and names concerned are obtained from the Courts and offices regulating probate matters. This subject might be expanded to cover not only probate but matters relating to confidentiality and secrecy surrounding trusts and estates.

The foregoing list is both a catalogue of types of legal action which may be taken and a classification of the different types of authority for collection, retention and distribution of information. However, the legal subjects set out above indicate the circumstances in which and the conditions under which legal protection may exist. Strictures under which legal protection is accorded and types of legal protection differ according to the subject.[1] Some of the legal subjects mentioned above give great and detailed attention to the passage of information while others do not.

Even in cases where there is a prima facie transgression of the legal protection or authority to keep or collect records there may yet be a legal defence available. Defences vary according to the type of legal protection or authority. However, some defences may be applicable in a wide range of illegal or unauthorized actions. Generally, there is a difference between legal protection accorded by the common law and that accorded by statute. While the

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[1] An attempt has been made above to describe the coverage in each of the legal subjects. The subjects are also arranged in terms of priority. It should also be borne in mind here that the problems may be raised in the context of professional, government and corporate activities.

common law protection depends on a rather loosely-defined prima facie case and a rather vague defence, statutes are generally more precise both as to whether and when a particular defence is available.

1. Consent. This may alternatively be referred to as acquiescence, assent or volenti non fit iniuria. In some circumstances an individual may not complain of conduct that affects him. This principle applies to almost all causes of action, whether it is a legal or equitable right that is infringed. One such circumstance is where he has knowingly and after adequate time for reflection freely consented to that conduct. This defence applies to most torts[1] and to crimes which have not the express purpose of protecting the individual. The defence is not usually relevant to intrusions perpetrated under statutory authority. Such intrusions are conducted irrespective of the consent of the subject and the only question is whether the statutory authority is broad enough to cover the activity.

   Much of the information recorded about individuals is initially compiled either with their consent or at least with their reluctance unexpressed because they feel that no real alternative is available to disclosure. The choice is usually limited in the case of applications for employment, housing, insurance or credit. It amounts to the completion

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[1] In defamation the effect of a consent by the plaintiff is unclear. See Street Torts (4th. ed.; 1968) at pp. 74 and 310.

of a large and detailed standard form or to refusal to comply coupled with failure to obtain the desired result. The choice is "take it" or "leave it."[1]

The more objectionable aspect of the giving of information for certain transactions is that the information is not retained for its original purpose. It is often sold or transferred by the original recipient. Whereas the consent of the individual giving the information may be confined to the original transaction the information may be used in an unrestricted way. This sort of "freely volunteered" information may be hard to restrict in circulation. This is because the basic presumption of the law is that no conduct is tortious, criminal or other breach of authority unless it is expressed to be so.

In view of the fact that much of the information recorded about individuals is furnished by them little hope of subsequent legally enforced suppression exists.

2. Truth and fair comment. These are defences which relate to different types of statements. The principal relevance of these defences is in the law of defamation. A factual statement may be true or untrue. A statement of opinion

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[1] Exactly this type of choice is presented in employment situations. Whereas the law at one time was that the employee's consent was given to an unsafe system of work if he took a job, the law now looks for evidence of real consent. See Smith v. Baker (1891) A.C. 325 and I.C.I. Ltd. v. Shatwell (1965) A.C. 656.

may or may not be a natural and available inference from true facts. In short, a comment may be fair or unfair. This includes fair comment on matters of public interest in the law of defamation.[1] Tort and contract liability in particular, may also be subject to the successful raising of this defence. Whether liability in tort or contract will exist depends upon the existence of either a self-imposed obligation or carelessness, recklessness or malice. Other forms of responsibility may depend upon the truth of statements or the maker's belief in the truth of them.[2]

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[1] New York Times v. Sullivan 376 U.S. 254 (1964), Time Inc. v. Hill 385 U.S. 374, 87 Sup Ct. 534 (1966) and Adam v. Ward, (1917) A.C. 309. While the first of these cases, technically, deals with defamation, the second is concerned with the tort of invasion of privacy. Comparable principles apparently apply to both torts. The fact that the statements of fact are not true was held by the United States Supreme Court not to be the vital issue determining whether truth could be a good defence whichever tort was in question. (The Canadian rule on truth as a defence in defamation is more literal than that applicable in the U.S.A.). What amounts to fair comment may be a similar judgment in both defamation and invasion of privacy. Comment will be unfair when prompted by malice or spite or when it is the result of an unreasonable intrusion of a physical or mental nature. Fortas J. said in Time Inc. v. Hill (supra), "Particularly where the right of privacy is invaded by words - by the press or in a book or pamphlet - the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required." One such right is that of freedom of speech. This is secured in the U.S.A. by the First Amendment and in Canada by s. 1(d) of the Canadian Bill of Rights R.S.C. 1970 App. III.

[2] This may play a part in the making of a prima facia case in deceit: Derry v. Peek (1889), 14 App. Cas. 337.

3. Privilege. Privilege is a defence that is relevant in various branches of the law. It is a legal recognition of an overriding interest which permits departure from the ordinary and mundane principles of law which normally govern. Various branches of the law are affected by claims of privilege. Claims of privilege may be made by specific individuals and institutions in defined circumstances. The law of defamation and that of evidence are subject to the defence of privilege. Privilege may manifest itself in different ways: it may constitute a relief from the necessity to disclose information, or it may constitute a freedom from suit for the improper disclosure of it.

4. Contributory negligence. Where contributory negligence exists on the part of the complainant it may provide a defence for any action by him. The action for negligence may be important in certain situations. If, for example, the plaintiff in an action has supplied false information or has negligently failed to check the accuracy of information when he was under a duty to do so, he may be precluded from bringing action to recover more than the portion of his loss which is attributable to the act of the defendant. It is a partial defence, applicable for the most part, in the law of torts.[1]

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[1] The probability is that this principle applies as a defence in torts intentionally committed. The result, in Canadian jurisdictions, will be that the loss will be proportioned according to the degrees of contributing fault between plaintiff and defendant.

5. Necessity. There may be some acts which amount to invasions of privacy yet which may be justified by resort to the defence of necessity. This defence is available generally in the law of torts and amounts to a complete defence and not merely a partial defence. It is available where the acts done were reasonably necessary to save human life or property of an apparently greater value.

6. Statutory authority. Statutory authority is a good defence in both the civil and the criminal law. There is no higher authority than a constitutionally valid statute or a statutory regulation which is intra vires and made under such a statute. The general presumption is that statutes do not change the common law and so a statute will not justify the commission of a tort or other illegal act unless it does so in the clearest language.[1]

7. Acts of State and acts of military authorities. These defences may be available in a few limited circumstances. Those circumstances include certain judicial acts,[2] parliamentary proceedings, Acts of State and of the Royal Prerogative.[3]

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[1] Both this defence and that following may affect the law in a more positive way then merely to act as a defence. For example, either statute or the Royal Prerogative may authorize something to be done. See, for example, the collection of statistics within the Statistics Act R.S.C.

[2] The defence covers acts of judges in superior courts of record even though they may be malicious: Anderson v. Gorrie (1895) 1 Q.B. 668.

[3] See, generally, Nissan v. A.-G. (1967) 2 All E.R. 1238 and Burmah Oil v. Lord Advocate (1965) A.C. 75.

IV. FUTURE PROTECTION AFFORDED BY THE PRESENT LAW

The present legal processes available to protect individuals from intrusions and invasions of their privacy will be confronted with various technological and societal changes. These changes will facilitate the interests of gatherers of information to a large extent. The law recognizes the utility both to the individual and society of these interests in the collection of information. These changes will test the protection afforded by the present law for both the individual and society as a whole.

The growth of the law can be projected. It may advance into hitherto unprotected areas and provide some relief for those affected by intrusions and minimize the risk of socially unacceptable intrusions. However, in a common law jurisdiction the ways in which the law is likely to grow are limited. It is predictable that the law will remain in the traditional legal divisions.[1] Protection may also be widened into areas not previously covered and that protection may become more exacting and rigorous but such increases in quantity and quality of protection will be advances made from the traditional legal background. If the history of the development of common law and legislation is any guide, increments to the present law will be cautiously and slowly made.

Scientific and technical advances have facilitated intrusions into what the public has generally thought of as its own private interests. This has occurred along with the general benefit bestowed by such advances. A great deal of useful and important information

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[1] This refers to the harm that may be caused incidentally to a generally beneficial operation.

may now be stored. Vast increases in the ability to collect, store and disseminate information have recently occurred. These are not the only incursions into the area generally accepted as constituting privacy. However, in sum the technical advances do not alter the nature of the problem. They only increase the risk and incidence of harm.[1] The technical advances may be said to act as catalysts.

Various technical devices such as parabolic microphones and infra-red cameras allow collection of information which previously would have taken a greater investment of human effort to collect. Computers can store and disseminate information on a vast scale. Since human effort is substantially reduced by these technical advances, the human effort released by the use of technologically advanced equipment may be used in other fields. Storage and dissemination of information (with the use of a computer) takes mainly technical personnel to operate. Those persons, or an equivalent number, who formerly were engaged in the record-keeping process might now be turned to collection or checking of information. Because of the speed of assimilation of computers, organizations must spend a great deal more time collecting information for storage or else must share the time of a computer. Both increasing the speed of collection and time-sharing present problems. The former consists in the risk of recording inaccurate information and the latter of the possibility of wider dissemination than intended. The danger is that adequate checking of stored information may not be in the

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[1] This refers to the harm that may be caused incidentally to a generally beneficial operation.

best interests of corporations and others who operate for profit. This may endanger individual interests. The primary task of the law as a balance between social interests will be to ensure that, on a continuing basis, an even hand is kept between these competing social interests. Technological change will undoubtedly threaten the present balance by (1) permitting things to be done which were formerly impossible and (2) permitting all transactions to be executed very much more rapidly.

Public agitation and legal responses to it have centered around the compilation and dissemination of personal information.[1] In this context the questions presented for resolution are:[2]

1. the type of information,
2. the method by which it is gathered,
3. the accuracy and fairness of such information,
4. how and where it is stored, and
5. the purpose for which, and the persons to whom it is communicated.

There is public concern in matters not relating to the collection of personal information but which may be regarded as privacy interests

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[1] Collection of information relating to identified and identifiable persons are noted above in III. Present Legal Protection.

[2] These are simply the points covered in Bills and legislations recently presented in various legislative bodies. See, for example, the Data Surveillance Bill of Ontario (182 of 2nd Sess. 1968-0), Computers and Personal Records Bill (Imp.) (H.L. Deb. 3rd Dec. 1969 col. 149), Fair Credit Reporting Bill (Can.; c-128, 1970) and the U.S. Fair Credit Reporting Act, 1971. Different priorities among the problems presented for resolution are presented by these Bills and Acts.

such as misleading, or unsolicited and unjustifiable, publicity and unwarranted intrusions.[1] The latter forms of invasion of privacy may be thought by the general public to be less insidious and less prevalent than the passage of information between persons unknown to the subject of that information. However, these areas of widespread concern and fears should be allayed or rendered groundless wherever possible.

The countervailing benefits of modern technology include the following:

1. greater speed in all phases of information storage and dissemination,
2. reduction in manpower necessary to achieve the same result,
3. collection, availability and accessibility of more information on which to base a judgment or decision,
4. free circulation of more information generally, and
5. for the most part, accurate information.

The development of the law in responses to these assaults on traditional concepts of privacy may be predicted. The prediction is partly based on surmise and partly on the response of other jurisdictions to parallel problems. The law may be unable to cope with problems presented by advances in technology and, even if it is able in particular respects for the law to hold an even balance

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[1] See Prosser Privacy (1960) 48 Cal. L. Rev. 383, Glasbeek Outraged Dignity - Do we need a new Tort? (1968) VI Alta. L. Rev. 77, Warren & Brandeis The Right to Privacy (1890) IV Harv. L. Rev. 193 and the Privacy Acts of British Columbia and Manitoba (S.B.C. 1968 c. 39 and R.S.M. 1970 c. P. 125 respectively). Naturally, there are a great many other problems. Particular problems are set out in VI. Developments in Legal Protection.

between the interests of society and those of individuals, it may be slow to do so. The common law has developed as a system of responses to isolated and particular fact situations. It seems apparent that there will be problems with the development of the law and that some of these problems will not be merely transitional. However, it also seems apparent that part of the resolution of most problems is to be found in the law as it is at present.

V. THE PROCESS OF COMPLAINT RESOLUTION AT COMMON LAW

There seems to be little doubt that the legal system as now constituted will not adequately protect society from some threats and invasions from which its members would like to be protected. This deficiency stems partly from the fact that the law usually moves only after the appearance of potential threats. Since the law develops as a response to a social situation, various rights, interests and remedies are on the verge of being recognized at any particular time. Because of technical and scientific discoveries and the availability of equipment embodying these discoveries the gap between the possibility of threats to the way in which people now conduct their lives and legal protection for that regimen may well widen. The rapidity of technical changes will mean that either the ways in which people conduct their lives will alter and their concepts of privacy will shrink or else that swift development of the law will be necessary even to maintain the status quo. Some inadequacies of the law are now apparent, and it seems likely that more will appear.

The inadequacies of the law will, it may be predicted, fall into several categories. These are based on the hypothesis that the general form of the law will remain as it is.

1. Inadequate protection. The law will be slow to move to secure the interests that individuals are accustomed to regard as their prerogative. Protection may be afforded by

either common law or statutory change but in either case it seems unlikely that any change will be belated for some individuals. This argument may relate only to a transition period but such a period will probably be protracted as use of currently available hardware spreads and as further developments are made. This relates to the substantive rules of law.

2. Costly redress. The civil action is an extremely costly means of vindication of a right. This is so especially where the sum claimed is not large. Class actions, to vindicate the rights of several similarly placed invididuals, are less costly in proportion to the redress claimed. Nevertheless, the social cost and that to litigants is high.

3. Tardiness. Neither civil nor criminal justice is swift. A determination may have lost all meaning by the time it is actually made.

4. Problems of proof. An individual who is wronged may not know he has a cause of action or the right to set in motion criminal proceedings. Even if he does know of an invasion of his rights, the difficulty of securing testimony may be overwhelming.

5. Exposure in court of secret or confidential matters.[1]

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[1] Such secret or confidential matters may emanate from the professional, corporate or government relationship.

There are lacunae or gaps in the substantive law that will be difficult to close.[1] There are also inadequacies of an adjectival sort which occur in all the modern branches of the law (civil, criminal and regulatory).

The traditional methods of resolving complaints afforded by the common law have some benefits. These beneficial features may be utilized in developing procedures for giving effect to substantive rules. Principal benefits conferred by the common law decision making process include the following:

1. decisions relate to particular and concrete fact situations. A body of general principles of law is built up by the gradual accretion of such decisions. Since each individual decision relates only to particular facts it may be somewhat safer than the assertion of a general rule.

2. The fact that common law decisions are incremental not only makes them individually more secure from obscure ramifications and unforeseen criticism but also gives ample opportunity for review and explanation. The procedure is a cautious one. It is one which deprives most generalizations about the law of more force than predictions or speculations.

3. Class actions may be brought on behalf of groups of individuals generally having the same interest. Development of this procedure has occurred to some extent in the U.S.A.

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[1] Some deficiencies are exposed in the treatment of the substantive law, above.

in recent years. The cost of such proceedings may be borne by a larger group than that which might be party to an orthodox action.

VI. DEVELOPMENTS IN LEGAL PROTECTION

Consideration should be given to fundamental changes in the law. Consideration should also be paid to more minor changes that may come about as the result of applying the modern law to changed circumstances and modifications produced by technology. The law ought to represent an attempt to balance the justifiable or legitimate interests of governments and commercial concerns with those of individuals. One way in which this might be done is by the formulation of a substantive code of conduct conforming with the desire of the majority. Alternatively, such a code might reflect the needs of weaker members of society. The principal advantage of the former is that it may be more practicable to effect.

Any such code which is formulated ought to be both realistic and enforceable. There should also be considerable reliance on techniques of prevention, discussion and discouragement. Such methods would obviate some of the principal deficiencies of the present system.

The aim of legal protection ought to be to strike a balance between the interests of individuals and those of society. This balance should be apparent both in substantive rules and the means of enforcement of them.

After determination of what is socially desirable conduct, attention must be paid to the most appropriate means of securing it. The usual approach has been to set out the conduct to be discouraged rather than the conduct to be encouraged. In either event any attempt to define conduct and its relation to society should be direct and precise. By this is meant simply that the conduct

to be encouraged or discouraged should be defined and not acts which are anterior or ancillary. Thus, a precise code of desirable or undesirable conduct may be defined. Acts peripheral to the principal acts to be encouraged or discouraged may be referred to if it is also desirable to promote or suppress them.

The interests to be balanced are those of the information collectors and the subjects of that information. It should be recognized that both have legitimate and generally beneficial interests in the compilation of information and in privacy. Once it is recognized that both rights are socially useful, care must be taken to ensure that the exercise of either does not infringe on the scope within which the other may be exercised. On the substantive plane the balance may be struck as follows:[1]

A. The information should be collected with a particular aim in mind. Such aim or purpose should be fairly narrowly defined. Among such aims would be credit worthiness, prospective employment and security trustworthiness. Normally, information collected would be relevant only to one of these purposes. This may not always be so. Generaly data banks may operate

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[1] This proposed balance related principally to the activities of commercial information collecting agencies. It is not designed to be exhaustive but merely a model for the resolution of the central problems. This model is an attempt to resolve problems within the professional, corporate and government spheres. Conditions producing conflicts may arise within each of these spheres and the solutions may well differ. The outcome of these conflicting interests is set out in the form of rules. Throughout these rules, the context in which problems may arise should be borne in mind. It should also be remembered that though these principles are stated in the form of rules they are nevertheless merely statements of what, perhaps, ought to be the case.

but the information collected by them would be divided into distinct portions relating to different types of legitimate enquiry.[1] The same information may sometimes be relevant to more than one purpose or type of legitimate enquiry and should then be repeated in both categories. However, the tendency to duplicate information should be restrained.

B. Information collected should be relevant only to the particular aim contemplated. Information irrelevant to this purpose should not be collected. Thus, data relevant only to an academic, sociological or other purpose with no current social utility should not be collected about identified or identifiable subjects.[2] Information collected voluntarily or with the apparent consent of the informer-subject ought never to be irrelevant to the transaction or purpose contemplated. Furthermore, information obtained from an informer-subject is taken with the latter's consent only to the transaction or series of transactions with the immediate recipient of that information. Responsibility for the veracity of the information is solely that of the second recipient if there is a transmission by the original recipient.[3]

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[1] Information disseminated would be correspondingly restricted. See letter L, below.

[2] Data banks in which information about anonymous subjects who are incapable of being identified is stored ought not to be subject to any of these rules.

[3] See also letter I, below. Where information is given by an informer-subject directly to a data bank or information collector with no immediate corresponding benefit to the informer-subject (such as payment) he will not be responsible for its accuracy.

C. Information whose prejudicial effect outweighs its probative value (given the contemplated aim) should not be collected. This principle extends to a large amount of marginally useful material. For example, sexual conduct or misconduct would ordinarily only be relevant in files relating to medical history or to criminal records.[1] Information collected from secondary sources is generally less probative unless taken from reliable records.

D. Test results and other data purporting to be more accurate than they are, or to be significant in a wider range of circumstances than they are, ought not to be collected. If test results and other similar information are to be included on the ground that they are accurate and useful they ought to be accompanied by a statement reflecting their accuracy for certain stated purposes.

E. Erroneous information ought not to be collected. This principle extends to misleading omissions. The subject of the information ought to be properly identified by means of enough distinguishing criteria to ensure that he may not theoretically be confused with any other person. The risk of human error

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[1] These seem to be the circumstances in which such information would really be relevant. Examples might include surgical removal of foreign objects from the body or prosecution for the molesting of small children. See the examples of highly prejudicial information in Wetherby v. Retail Credit Co. (1963) 253 Md. 237, Macintosh v. Dun (1908) A.C. 390, Todd v. Dun (1888), 15 O.A.R. 85, Robinson v. Dun (1897), 24 O.A.R. 287 and London Association v. Greenlands (1916) 2 A.C. 15.

should be reduced by the expedient of requiring three separate[1] human errors to take place before there could be a confusion of identity. Not only should the identity of the individual be secure but the completeness of the information should be such that it does not given a false impression. This may mean that it is necessary to collect more complete information as to transactions and suits than is now done.[2]

The onus of ensuring that all this is done ought to be upon the collector of information since the matter is under his control, and he is the person most easily able to correct information. If he relies on secondary sources he ought to be bound to take responsibility for them.

F. The individual subject of the information ought to have an "unqualified right to print-out", or be permitted to see the whole of the record compiled about him. This principle ought to apply even in the case of information relating to tests performed on him and psychiatrists' reports. The only exceptions to this principle ought to be those of:

(1) national security, and

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[1] Such errors ought not to be able to flow from a single source of human error. It should also be remembered that any rule forcing information collectors to rely on secondary sources may result in an increase in false or unreliable information.

[2] This may have the effect of placing a heavy burden on data banks or they may be more reluctant to record information, particularly when secondary sources (and an increased chance of error) are involved.

(2) information furnished by a psychiatrist and accompanied by his certificate that the subject ought not to see the information.[1]

The agency ought to be bound to disclose the sources of the information and thus cannot guarantee confidentiality. There will be an increased risk of actions for negligence or deceit against such sources. It may be necessary to allow the subject of a file to see it without charge.

G. It is envisaged that the individual subject need not be routinely informed of the existence of the file. He should, however, be informed of its existence and that a recent enquiry was made if, and when, that takes place. Such communication could be in the form of a printed postcard and sent out to the address at which the information collector could be contacted. At this stage he would be aware of the file's existence and could check its accuracy.

H. Information and comment on the file may be expunged, corrected or noted as disputed at the instigation of the subject of the file.[2] An independent arbiter would be necessary to ensure that this was properly done.

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[1] This exception is designed to cover the case in which therapy or rehabilitation might be impeded by disclosure. This is clearly a much narrower exemption from disclosure than that of the Fair Credit Reporting Act of the U.S.A. That Act exempts medical information and "investigative information" and the sources of all information until suit is brought.

[2] The latter solution is the one preferred by the Fair Credit Reporting Act of the U.S.A. These are all available alternatives for reducing the area of the dispute.

I. The individual subject of the file ought not to be held responsible for the information contained in the file even when he has seen the contents of it and failed to correct it. Here it should be recognized that many different types of files are maintained within the professional, corporate and government spheres. Clearly, such files may differ from each other. Different steps may be necessary to keep these files correct. However, it would appear from the present state of the law that the basic responsibility for the accuracy of the file now rests on the person who gives it currency.

Furthermore, responsibility for the accuracy of the contents of the file ought to rest with the data bank or other person or agency which collects and disseminates information. The data bank ought to be responsible for secondary sources on which it relies. There should be two exceptions to this principle:

(1) no suit ought to be brought by an informer-subject complaining of an error of which he was the source or origin, and

(2) an action might be brought against an informer-subject complaining of an error of which he was the source or origin in any case in which it can be shown that he intentionally, maliciously, fraudulently or with other indirect and positive motive supplied the

information.[1] Such action ought never to relate to information about identity: for that the data bank ought always to be responsible.

J. Information recorded about residents of Canada ought always to be kept so as to necessitate that all parties involved are bound by these rules.[2] It may be thought to be generally undesirable for foreign law and practice to govern the way in which files about residents of Canada are maintained.

K. The information ought only to be released to bona fide enquirers. The enquirer should state his own identity, accurately describe that of the subject of the enquiry, state

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[1] This would involve some changes in what is now the common law rule allowing success in an action in negligent misrepresentation where there is a statement in breach of a duty of care causing loss. It is certainly arguable that the common law rules reflect an appropriate direction. However, if it were desirable to restrict the bringing of an action in negligent misrepresentation it would be easy enough to do by means of either common law or statute. In the context of a common law development, the duty of care might be restricted to those circumstances in which information is not passed through any agency which has as a main or subsidiary function the collection of information. This limitation might be expressed by the courts as one of public policy. The ambit of duty of care, and the range of persons to whom it is owed, is normally a matter of foreseeability but there is no doubt that considerations of public policy may override; Daborn v. Bath Tramways (1946) 2 All E.R. 33, Troppi v. Scarf U.S.S.C. 1971, Priestman v. Colangelo (1959) 19 D.L.R. (2d)1. Enactment of this type of restriction would be more certain and precise but would involve an Act or Ordinance in all eleven common law jurisdictions of Canada.

[2] This is designed to eliminate avoidance of these rules by resort to "computer havens." The Canadian federal jurisdiction could be bringing criminal sanctions to bear on users of information collected, stored or disseminated without adherence to these rules.

the purpose of the enquiry and pay the requisite fee. The enquirer should satisfactorily demonstrate his identity, and it should be recorded.[1] Except for the requirement of recording, this is the procedure now supposedly adhered to by the operators of data banks.

L. The information released ought to consist of all the information relating to the identity of the subject and information relevant to the purposes of the enquiry. Only information relevant to the scope of the particular enquiry should be released. For this, the purpose of the enquiry is the most important matter. For example, employment history is probably relevant to credit-worthiness and to prospective future employment, but information as to past credit transactions would not be relevant to possible future employment except in particular types of jobs. No request for a variety of different and unconnected types of information ought to be entertained. However, one request may encompass more than one type of information.[2] Perhaps an absolute limit of four types of information might be imposed.

The preceding points relate only to the balance of interests that may be struck with reference to a commercial information-gathering service. Other interests impinging on the realm of

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[1] To require the release of the subject of the enquiry would probably be too restrictive. However, it should be open to the information collector to ascertain from the subject whether this is a proper enquiry.

[2] The personnel officer of the Mint may well ask for information on a prospective employee as (1) a security risk, (2) as to credit-worthiness and (3) as to employment history.

privacy may be protected.[1] These are interests which are to a large extent protected by the law currently in force. The law has something to say on defamation and on trespass. However, since concepts of privacy are so much an individual and subjective matter, it may be thought necessary to pay more attention to those branches of the law which are designed to give solace to injured feelings. Most of the branches of the law which do give such redress do so on the basis of the objectified standard of when this type of damage might occur. Although the law is objective in this respect, whether injury to sensibilities will occur or not depends upon individual attitudes and the strength with which they are held.[2]

Consideration of a wide range of methods of securing the desired conduct should be undertaken. It is not sufficient to rely only upon the usually automatic means of enforcement, namely creating a new criminal offence or the granting of a new civil cause of action. A range of supportive devices might be employed to secure the desired conduct. Any legal rules that are developed must be designed to secure conforming conduct but must not be so heavy-handed as to infringe upon other rights and interests. In this connection, it will be very important to rely on legal devices already in existence where these are sufficient to produce conduct which generally conforms to the pattern thought desirable.

A. The Criminal Law may legitimately intervene when no other device would be adequate to secure conduct conforming to the

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[1] See above, II. Interests Capable of being Protected.

[2] An example of an outpouring of apparently firmly held views is Michener The Quality of Life (1971).

substantive code. The criminal law ought usually to be used with some care since it is a rather heavy instrument to employ and might sometimes be inappropriate. For this reason, there may be some reluctance on the part of prosecutors to invoke it even where it does exist.

Some acts which may be characterized as breaches are now proscribed by the criminal law. From this basis of current prohibition may be projected the developments of the criminal law. There are several criminal and quasi-criminal offences relevant to the issue of privacy. It depends upon how broadly privacy is defined as to what offences may be regarded as relevant.

Those crimes which are trespassory in nature tend to infringe upon a privacy interest whether committed against persons or property.

Defamatory libel is a crime which also tends to transgress privacy interests. The offence consists of circulation of a printed false and defamatory communication.[1] This offence is probably still designed to suppress breaches of the peace, although that aim is nowhere made clear.

The offence of defamatory libel is restricted in its scope in that it amounts to a good defence to show that the recipient had an interest in receiving information of that type and that the conduct of the defendant was reasonable and not motivated by

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[1] See ss. 261-281 Criminal Code R.S.C. 1970 c. C-34.

ill-will. The rather confined limits of this offence make it unlikely that it will be a serious factor in controlling the conduct of purveyors of information.

The same criticism would appear to be true of the other crimes relating primarily to the passage of information, namely sedition, treason and obtaining goods or credit by false pretences or fraud. These crimes are useful, if narrow, but the collection, storage and dissemination of information which is now under consideration is substantially unaffected by it.

There are other crimes relevant to more serious, direct and physical invasions of privacy. Such crimes as forcible entry, forcible detainer, assault, battery and false imprisonment obviously curb invasions of privacy. They are also effective in resisting invasions of privacy facilitated by technological advances.

The criminal law is, therefore, of little assistance in shaping the conduct of those who deal in information because its dictates are limited and peripheral. The crimes that now exist are useful in that they prescribe generally appropriate penalties for anti-social conduct. However, it may be hypothesized that a large number of different types of invasion of privacy may be committed without infringing the present dictates of the criminal law.

B. Certain civil law remedies may usefully continue to exist to redress grievances. Certain modifications and presumptions

might also be made about the existing legal order, so as to facilitate and ensure the substantive balance outlined above. Existing civil law remedies include the following and may be expected to expand as indicated:

1. Action for negligence. Most of the situations in which passage of information occurs are those in which there is a duty of care. Where careless and substandard conduct occurs in such a situation, that will amount to a breach which is actionable if it causes direct and foreseeable damage. The range of circumstances in which an action for negligence will lie is almost infinite. Some of these circumstances will actually affect an individual's interest in privacy. One of the circumstances in which privacy may be affected is that of the negligently made false statement. The circumstances in which such a statement will attract liability to its maker include all those considerations that normally surround the tort of negligence.[1] Such representations may be put in circulation by the subject of them or by a third party.[2] Such statements may not refer to an individual at all, in which case they will usually amount to no more

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[1] See Williams Misrepresentation in Commercial Transactions in Fridman (ed.) Studies in Canadian Business Law (1971).

[2] Reid v. Traders General Ins. Co. (1964), 41 D.L.R. (2d) 148, Babcock v. Servacar Ltd. (1970) 1 O.R. 125 and Central B.C. Planers Ltd. v. Hocker (1970), 10 D.L.R. (3d) 689.

than bad advice, but they may, in some cases, affect an individual's interest in privacy.[1]

The type of harm suffered by the plaintiff may cause an action in negligence to be regarded as one for redress of an invasion of privacy. Sometimes the damage is a very personal type of damage. This is particularly the case when the damage is mental or nervous. There may be a need to redress more of these wounds.[2] Unfortunately people are very different in their apprehensions of what amounts to an insult or injury and also in their reactions to them. These subjective factors have presented obstacles to the erection of rules governing compensation for damage which is not easily discernible. Such invisible damage is typically private in that it relates to internalized aspects of the person. In other cases it is the type of negligent invasion of the plaintiff's interest which may give the act its privacy connotations. The careless destruction of a person's home

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[1] Compare Windsor Motors Ltd. v. District of Powell River (1969) 4 D.L.R. (3d.) 155 with J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co. (1969) 2 O.R. 473.

[2] See Glasbeek Outraged Dignity - Do We Need a New Tort (1968) 6 Alberta L. Rev. 77. It is certainly arguable that redress is not afforded in many cases in which dignity is outraged. Furthermore, levels of sensitivity and awareness appear to be increasing and it might be felt more appropriate to extend redress to more circumstances in which intangible harm is suffered.

life is more of a negligent intrusion into his privacy than the careless destruction of his automobile.

The type of damage or the nature of the wrong may cause torts other than that of negligence to be characterized as invasions of privacy.

2. Actions in deceit. These actions consist of a false representation made knowingly or recklessly so that the plaintiff relies on it and thereby suffers a loss.[1] The tort is actionable only where one of these positive states of mind exists in the defendant, but the conduct may be in all other respects similar to that found in negligent misrepresentation. Since the conduct may be similar in all respects to that involved in negligent misrepresentation, the effect for the purposes of privacy will also be the same.

3. Actions in defamation. These actions were devised to give men an alternative way of venting outrage. Any false statement communicated by the defendant to a party other than the plaintiff and which tends to bring the plaintiff into hatred, ridicule and contempt (or which tends to lower him in the eyes of right-thinking members of society) is actionable. However, three factors have tended to deprive this tort of the utility it would otherwise have had:

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[1] See Pasley v. Freeman (1789), 3 Term Rep. 51; the defendant must be shown to know or be reckless about the falsity of the statement Derry v. Peek (1889), 14 App. Cas 337.

(1) Qualified Privilege is a defence in some circumstances. It is a defence where those between whom the defamation passes have a mutual interest in the passage of information of that type. In Canada, this defence has not extended to those who make a business out of the dissemination of information.[1] Such commercial disseminators of information are liable in defamation.[2] Where the disseminator obtains no commercial or other advantage from his activity then the defence of qualified privilege operates.[3]

(2) Lack of knowledge of the currency of the defamatory material on the part of the plaintiff may prevent him, purely practically, from bringing suit. Commonly, the parties between whom the information passes contract for silence, at least on the part of the recipient.

(3) The terms of a contract between the disseminator and recipient of the information may have the effect of shifting the loss to the recipient on whom, it may be argued morally, the loss ought not to fall. This may not be a very common contractual provision requiring the recipient to indemnify the communicator.

4. Action to set aside a judicial or quasi-judicial decision for want of natural justice. Actions may be brought for certiorari

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[1] This is not the rule in the U.S. There commercial enterprises avail themselves of the defence of qualified privilege. See Sharp Credit Reporting and Privacy (1970) at pp. 40 et seq.

[2] Cossette v. Dun (1890), 18 S.C.R. 222, Macintosh v. Dun, (1908) A.C. 390, Sawatzky v. Credit Bureau of Edmonton Ltd. (unreported) 19th May, 1970.

[3] London Association v. Greenlands (1916 2 A.C. 15.

to quash, for a declaration or for damages.[1] The rules relating to bias may be invoked when what is ordinarily a private interest, or at least an interest of limited concern, affects persons other than those primarily affected by the interest.[2] The means of obtaining knowledge of something normally held private is not facilitated by reason of the existence of this action but such private matters may assume a greater importance because of its existence.

5. Actions for trespass. In the context of protecting interests in privacy, trespasses may be either to persons, land or goods. These consist of direct, and apparently intentionally committed, physical invasions. Any type of trespass may evoke feelings of outrage or indignity in an ordinary reasonable man. This was the case in Bivens v. Six Unknown Names Agents[3] in which trespasses to land, goods and realty were alleged. As in that case, it is often the manner in which trespassory acts are done which gives them their character of a breach of

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[1] See, for example, Ridge v. Baldwin (1964) A.C. 40, Cooper v. Wilson (1937) 2 K.B. 309 and Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180.

[2] The interest in conflict may be pecuniary or not. See Jeffs v. New Zealand Dairy Board (1967) 1 A.C. 551 Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, (1970) 8 Alberta L. Rev. 447 and Wade Administrative Law (1971, 3rd. ed.) at pp. 171 et seq.

[3] 91 S. Ct. 1999 (1971). In that case the U.S. Supreme Court held that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

privacy. However, in all cases in which trespass to the person or to property has succeeded there has been some sort of physical intrusion or other overtly wrongful act. Problems arise with expansion of the trespass concept to intangible intrusions or interference with intangible property. However, such an extension is not impossible.[1] The law of trespass ought to be able to encompass interference with persons and with property that does not amount to a denial of title. The trespassory torts[2] have been extended in their ambit in recent years. A widened concept of what amounts to a property right might have the effect of extending the tort further. Unauthorized use of chattels is trespassory[3] and this principle may be extended so as to make the unauthorized use of intercepted communications or the improper or intrusive gathering of information. The

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[1] See the parallel history of illegally obtained evidence in the U.S. in Schwartz Excluding Evidence Illegally Obtained: American Idiosyncracy and Rational Response to Social Conditions (1966) 29 M.L.R. 635 and Hartman Admissibility of Evidence Obtained by Illegal Search and Seizure under the American Constitution (1965) 28 M.L.R. 298. There was greater reluctance to exclude evidence obtained by intangible intrusions, such as electronic surveillance, than there was to exclude evidence obtained by illegally breaking down doors.

[2] The expression "trespassory torts" is intended to include trespass to land and to chattels as well as assault, battery, false arrest, false imprisonment and intentional infliction of nervous shock.

[3] See Penfolds Wines Pty. Ltd. v. Elliott (1946) 74 C.L.R. 204.

indirect infliction of harm may now give rise to action in trespass.[1] These advances produce a widening of the borders of trespass. Nevertheless, the law of trespass is dependant upon proprietary notions, whether they relate to one's own person or to goods or land. For this reason, it may be doubtful whether cases such as Davis v. McArthur[2] may be brought within the confines of any of the trespassory torts. It may not be possible to classify the conduct of the defendant as acts calculated to cause nervous shock.[3] However, it must be admitted that courts in the U.S. have not hesitated to extend that principle to cover similar cases.[4]

6. Actions against those whose conduct tends to deny title. In modern times these actions have included those for conversion and ejectment, as well as those for slander of title and

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[1] This principle is disputed. The traditional view of the trespassory torts was that they were, characteristically, intentionally committed and that the resultant harm was directly inflicted. This borderland between trespass and actions on the case has caused some controversy. See Fridman Trespass or Negligence (1971) 9 Alberta L. Rev. 250. There are some cases in which indirectly caused damage has sounded in trespass: Mee v. Gardiner (1949) 3 D.L.R. 852.

[2] (1969), 10 D.L.R. (3d.) 250.

[3] This was the basis for the decision of Wright J. in Wilkinson v. Downton,(1897),2 Q.B. 57. It is suggested that this principle would have supported the decision in Robbins v. C.B.C. (1957), 12 D.L.R. (2d.) 35, had that case been decided in Ontario.

[4] See, for example, Blakeley v. Shortal's Estate 236 Iowa 787, 20 N.W. 2d 28 (1945), Wiggins v. Moskins etc. 137 F. Supp. 764 (1956) and State Rubbish Collectors Association v. Siliznoff 240 Pac. 2d 282 (1952). Undoubtedly there are now many types of injury to nerves or feelings produced by different things. It is thought that courts may attempt to quantify more of these injuries and give redress in more circumstances: (1968) XLVI Can. B. Rev. 515.

appropriation of intangible property. Civil law remedies available to those wronged by these types of tortious conduct depend very much on notions of property. The reactions of individuals who suffer such indignities vary greatly depending upon how they are affected by attacks on their property.

7. Actions for breach of contract or confidence. This involves breaches of both consensual and externally imposed obligations.

   Actions for breach of contract are of several sorts. Those in which the breach may consist of the passage of information include past and subsisting employment contracts, contracts of marriage, contracts requiring secrecy between informer and informant.

   Situations in which an action for breach of confidence lies where there is no contractual or property right affected are difficult to justify on this exclusive basis. Those decisions that have been made at common law may often be founded on an alternative explanation.

8. Actions for oppression. This includes a variety of actions both at common law and for equitable relief.

9. Actions for breach of privacy. Such an action depends upon the existence of a statute conferring the action. Manitoba and British Columbia have such statutes.[1] These statutes give a cause of action to one who is aggrieved by a "violation of his privacy." What amounts to a violation of privacy

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[1] See the Privacy Act R.S.M. 1970 c. P125 and the Privacy Act S.B.C. 1968 c. 39.

is vague although particular examples are set out in the body of the text. Particular examples of interests otherwise only protected vestigially are set out above.[1] They include the interest an individual has in his own likeness to his own work or product, to confidential communications and to personal and proprietary security. These are clearly not the only interests in privacy but these are the interests that otherwise have little protection. More than anything else, it is a matter of emphasis whether this tort is regarded as central to the issue raised by the computer.

In the absence of such statutes expressly protecting privacy, the orthodox view is that no "general right of privacy exists."[2] This is undoubtedly the traditional view but in some common law jurisdictions the idea that the courts may redress breaches of privacy in the absence of statute has gained wide currency. This difference in attitude is largely an ideological and philosophical one. Protection of privacy in the law of torts has gained acceptance in the states of the U.S.A. This is largely because a different attitude prevails with respect to the function of the courts, their responsiveness to extra-judicial suggestion, the operation of the stare decisis rule and the vagueness of the

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[1] On pages 23-28. They are set out there because "incidental relief" is the best description of the present legal protection of these interests.

[2] Per Latham C.J. in Victoria Park Racecourse v. Taylor (1937) 58 C.L.R. 479, at p. 496. See also Yoeckel v. Samonig (1956) 272 Wis. 430, 75 N.W. 2d 425 and Prosser and Wade Cases and Materials on Torts (5th ed.; 1971) at p. 925.

legal precepts which they are accustomed to applying.[1] This may be because a somewhat different attitude prevails towards the law and its structures from that applicable in other common law jurisdictions. In this case the suggestion that the courts should extend common law protection to invasion of privacy arose in an article written by Warren and Brandeis.[2]

10. Actions for common law, equitable and statutory relief which incidentally involve breaches of privacy. Although relief depends upon the prior existence of a right conferred by common law, equity or statute, it is not always easy to ascertain the existence or scope of such rights. Judicial relief in cases which incidentally involve breaches of privacy is exemplified by isolated decisions but is generally very ill-defined. It is also apparent that some of the situations in which judicial relief has been granted represent legally dissimilar grounds for such relief.

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[1] The immediate problem may be that there is very little likelihood of any legislative action. A large number of states still retain the rule in Shelley's Case.

[2] The Right to Privacy (1890) 4 Harv. L. Rev. 193. The authors' suggestions were preceded by those of Godkin in Scribner's Magazine, July, 1890 at 65. See also Cornfield The Right to Privacy in Canada (1967) 25 Fac. of L. Rev. 103, Green The Duty to Give Accurate Information (1965) 12 U.C.L.A. Rev. 464, Switkay Tort Liability of Credit Investigating Agencies (1957) 31 Temp. L.Q. 50 Wade Defamation and the Rights of Privacy (1961-2) 15 Vand. L. Rev. 1093 and Prosser Law of Torts (4th ed.; 1971) at pp. 802 et seq.

These various grounds support different "zones of privacy."[1]

Common law, statutory and equitable relief has been afforded in cases involving representations or likenesses of recognizable persons, in connection with their work or products and with their otherwise undisclosed communications. In most jurisdictions one or the other source of the law has provided at least minimal relief for those suffering invasions falling within these categories. The present rules relating to such protection have been set out above. The primary responsibility for such protection is provincial. However, appropriate supportive legislative assistance may be given if the present legal rules applicable in the province, and their possible future development, are examined. Other interests than those of the individual should be recognized in these contexts.[2]

(1) The right to one's own likeness. Photographic and other pictorial representations may be used unauthorisedly

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[1] Which may be constitutionally and not merely legally secured; Griswold v. Connecticut 381 U.S. 479, per Douglas J. at p. 486. If so, this has some effect on the law of torts. It is clear that in Canada the Canadian Bill of Rights, R.S.C. 1970 App. III, is legislation paramount to the general law and other legislation; R. v. Drybones (1970) 9 D.L.R. (3d.) 473. In Section 1 of the Canadian Bill of Rights the "human rights and fundamental freedoms" set out express reasons for people's retention of an ambit of privacy. The general interests in liberty, security of the person and enjoyment of property, as well as the specific freedoms which follow, are protected by the Canadian Bill of Rights. The means of effecting intrusions into these interests are prevented by the general law relating to privacy where it exists.

[2] Interests inhere in the government, the public generally, corporations and other individuals.

either for the gain of the representor or else in a way offensive to the individual represented. This may merely give offence to the person represented or it may amount to an intrusion upon his solitude or an injury to his reputation. The law of defamation makes any representation actionable which causes a false and injurious impression provided that it is neither substantially true nor of a person otherwise in the public eye. The action for invasion of privacy (in those jurisdictions where it exists) also gives some relief for the unauthorized use of a person's likeness. This protection may be either on the basis that there is a proprietary or a "personal" right to restrain such reproduction. It does not appear to matter whether such rights inhere in property or the person for the results will usually be the same. Common law jurisdictions in Canada will probably extend their protection, along parallel lines. In Manitoba and British Columbia it is probable that such extensions will be attributed to the existence of the statutes. In any case, it seems likely that expansion will take place in this part of the law.

(2) The right to one's work or product.[1] Protection for the exclusive right to use one's own distinctive product as

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[1] The legal rules are set out on pages 23-28, above.

one chooses has been spasmodic at common law. Nevertheless, it is obviously a subject for expansion within the common law framework.[1] Some statutes allow relief on a more organized basis. Equitable rights appear to be based upon the degree of unconscionability of the supposed infringement. The justification for statutory relief in the case of unauthorized use of patents and copyrights is clear whereas in the case of common law and equity such relief must be based on a pre-existing rule or principle.

(3) The right to confidential communications. The confidentiality of communication may result from the relationship between the parties, the intrinsic nature of the information imparted or from the express stipulation of the communicator. In the protection of confidentiality arising from any of these origins the common law will be attentive to change. The standards of usual silence are those which the courts generally employ and will probably continue to employ. These are the areas in which the unauthorized disclosure of facts about individuals may do great damage.

(4) The right to security in one's person and property.[2] Various forms of civil law relief exist to compensate or prevent unjust or unreasonable restraints on persons or

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[1] See the recent U.S. annotation on the allowance of punitive damages for invasion of common law rights in literary property: 40 A.L.R. 3d 248.

[2] The law affecting this subject is set out at page 27, above.

dealings with property. It may be expected that the law will recognize forms of physical invasion as they are made possible by more advanced technology. Recent developments in such rules have been in the sphere of torts. In modern times, invasions of individual security have emanated largely from public authorities. Nevertheless, the law may be expected to recognize the invasion. The usual problem will, no doubt, be whether the invasion is justifiable.

11. Other torts and forms of relief may be aimed directly at a particular type of invasion of privacy. This is what has prompted the suggestion of a revival of the old tort of besetting[1] (It is actionable in tort for one to unreasonably watch and beset the dwelling place or place of business or employment of another). The tort of intimidation may well also be relevant in the protection against some breaches of privacy. The decision of the House of Lords in Rookes v. Barnard[2] extended the ambit of this tort from the single two party situation to those cases in which one puts pressure on another to the detriment of a third party. Such pressure may be used to effect an intrusion into privacy or to obtain private information. The same considerations apply to the tort of conspiracy. Further developments may be expected

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[1] See the book review by Newark of Westin "Privacy and Freedom" at (1971) 87 L.Q.R. 264.

[2] (1964) A.C. 1129.

along similar lines. Different and specific torts that now exist may be used to give redress for unacceptable conduct.

Invasions of a physical nature are easier to see and were provided for in the early law of torts. Assault and battery and false imprisonment attracted redress early in the development of the law of torts.

Various forms of action may predictably expand in such a way as to expand protection to individuals' interests in privacy and so also may defences protecting the public's or other smaller group's right to know, and the individual's right to communicate information about himself.[1]

The projected development of Canadian common law and the judicial extension of statute law already in existence will undoubtedly afford some protection for privacy. Several duties may, in the aggregate, amount to the correlative of the individual's right to privacy.[2] Experience of the common law and of statutory interpretation in Canada tends to indicate that these duties will be extended cautiously. The problem which is presented is whether such predicted extensions will afford sufficient protection for the interests on the existence of which men depend.

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1 See page 29, above.

2 Absolute and unrestricted personal privacy can probably only exist in a state of nature. Agencies for the public order, safety and control must exist to secure whatever aspects of privacy are thought important. However, it may be these very agencies that allegedly infringe privacy interests on occasion.

The interests collectively, and loosely, referred to as privacy include those in dignity, equality and secrecy as well as those in personal and proprietary inviolability. Such sensibilities are those to which the law might extend some solace in the case of injury. Generally, and in order to make redress depend on objective criteria, the redress might be obtained in certain identifiable circumstances.

VII. GENERAL SCHEME OF LEGAL PROTECTION

The general scheme of legal protection encompasses the rights and remedies bestowed by common law, equity and statute. It would seem practicable to balance those parallel systems on the basis of the rights and privileges now legally secured and, on the basis of the status quo, of those which predictably will be secured. The interests that the majority of society wishes to protect automatically or indirectly produce a code of substantive rules. Methods of securing those ends and interests should depend not on the whim of the populace but on the development of a rational and integrated scheme. Cautious extension and expansion in the realms of common law, equity and statute ought to produce the basis for legal departures and developments. Judicial hesitation and reluctance dictate that any prediction of expansion in the law should be modest and conservative.[1]

The means whereby these rights and privileges may be protected, which may collectively be known as privacy, are important. Naturally these procedural matters affect the substance of the interests affected.

There may be two broad types of forum in which complaints may be heard and in which enforcement proceedings may be taken:

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[1] This is only one manifestation of what may be called the "techno-cultural lag." This is meant to express the difference between a society's technical abilities and the social control of them. This is not necessarily to espouse any theory of technological determinism. See generally Toffler Future Shock (1970) chapter 19.

1. The Courts. Ex post facto remedies and sanctions will always be useful as a part of the pattern of enforcement. However, as noted above, the function of the courts is not limited to this as the operations of the courts may mould and influence conduct prospectively as well as retroactively. A greater willingness by the Courts to extend declaratory judgments into the sphere of hypothetical fact situations would assist in solving problems relating to classes of aggrieved persons or mass dissemination of information. If courts are to be a visible force in questions of privacy undue delay must be eradicated and their procedure generally should be modern. The advantages and disadvantages of the intervention of the court have been set out above.

2. Government Administrative Agencies. These might be either federal or provincial. Such agencies are best suited to regulating fairly small groups with a common interest. A particular type of industry or profession affected by the issue of privacy might be a suitable group to be regulated by an administrative agency. Proposals in connection with provincial and other legislation have been relative to the credit reporting industry.[1] Such an administrative agency could be established pursuant to statutory regulations. It might be quasi-legislative or quasi-judicial in function. It might be particularly useful in the case of apprehended or general invasions of privacy. The object of such an organization would be to hold the balance in a general or specific

[1] See the Business Records Protection Act, R.S.O. 1960 c. 44, S.O. 1970 c. 426 and the U.S. Fair Credit Reporting Act.

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way between the interests of information collectors and the subjects of the information collected. Some administrative staff would be necessary to support a quasi-judicial function.

The above two types of agency might dominate the judicial and quasi-judicial spheres. There may, however, be several other functions for which some sort of administrative tribunal or agency would be well suited. These consist of the regulatory, supervisory and enforcement functions.

The means of securing the desired conduct should be diverse and should consist of both preventive and remedial measures. Included among the measures designed to secure the desired conduct might be the following:

1. Preventive Measures.

   A. Licensing. Any person whose conduct may constitute an invasion of privacy might be licensed.[1] If licenses were required for such conduct a revocation might preclude the licensee from carrying on his business. This system makes it easy to spell out the circumstances and conditions under which such conduct may take place. It also makes it possible for conditions and regulations to be altered swiftly and for the information to be conveyed quickly to the licensees. Nevertheless, some of these advantages are possessed by institutions which already exist, such as the courts.

   B. Sanctions. The range of criminal sanctions ordinarily visited by a court of criminal jurisdiction may be imposed

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[1] In connection with the licensing function the primary report is that compiled by Sharp.

for the more serious offences. In some cases the offenders may be corporations, societies, associations and other such bodies. The range of sanctions in these cases may be more limited.

C. Penalties and Exactions. Any detrimental order emanating from a quasi-judicial or other administrative tribunal may be applicable.

The foregoing are means of possible procedure based on the hypothesis that a code of conduct in matters which concern privacy exists. The contents of such a code depend upon criteria outlined above.

The following remedial measures that may be employed are the principal ones now in use:

2. Remedial Measures.

A. Criminal or quasi-criminal sanctions. These sanctions might be imposed as the result of a breach of a criminal or regulatory statute. The aim of these exactions will usually be deterrence but may be, in some cases, prevention. In either case, the result ought to be that infractions are limited.

B. Civil remedies. These will usually consist of liquidated or unliquidated damages, injunctions and orders for specific performance. Awards of damage should always be such that it is made unprofitable to engage in the prohibited activity but not so much that the individual is heavily punished.

The authorities and the sanctions that they impose should result from positive rules of law that form a connected body of law. In this way excessive or minimal coercion can be avoided and the coercion may be proportioned to the degree of desirability of securing the conduct.

VIII. INTERESTS REQUIRING RESOLUTION

Development along the lines set out above may be expected but such development is unlikely to satisfactorily resolve all the conflicts that may arise. Assuming that development and extension may take place within the existing legal framework to produce an optimum compromise of the interest of the public in knowing and the interest of individuals in their privacy, the following topics are relevant for attention:

1. the question of whether land titles records should be freely available. This is a matter within the jurisdiction of the provinces and would thus require action by them.

Access to, and availability of, land titles records ought to be considered. Land transactions represent to many people the most important arrangements they may make both in terms of financial investment and in terms of the solitude and security the investment may represent. The records of such transactions are freely available in provinces with registration systems. The principal reasons for such information not yet having been stored by commercial agencies are the cost of recording all such information and the lack of financial return for doing so. It would appear that the first obstacle may soon be diminished and the second may soon disappear. In short, it may well be to the advantage of credit-reporting agencies to keep these records.

It may be thought undesirable for such easy access to these records to be obtained. However, it will always be necessary for prospective purchasers or other interested parties to be able to inspect the title. The simplest reconciliation would be to limit inspection to those persons designated by the recorded owner. Other persons, who may have interests less than that of ownership in fee simple, may authorize inspection of their own interests. This imposes the decision of who is bona fide and has a legitimate reason for inspection upon the person whose interest is inspected. In addition, it would be necessary for those public authorities invested by the general law with the right to inspect the records to do so.[1] Since the common law would not authorize inspection, it is presumed that there would thus be legislative reconciliation of the interests involved.

A change, such as that proposed above, depends entirely upon provincial legislation to restrict to those authorized by the owner the power of inspection of a title. The general legislation authorizing public authorities to inspect titles already exists. Further general legislation authorizing extended inspection ought to be passed separately.

2. The use of information for purposes other than those for which it was originally obtained should be investigated. Where such information is elicited with the consent of the subject

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[1] This would include local authorities, municipalities and cities with the power to tax, or levy rates for particular purposes, on land.

of it, the limits and purposes of such consent ought to be clearly set out. This might be effected by statute or at common law but it is largely a provincial matter. If this problem arises in the context of whether consent is a valid defence then it is one appropriate for the consideration of the courts. Such courts ought to consider more narrow restrictions on the utility of consent as a defence. Consents narrowly construed ought to be closely related to the purposes for which consent was given.[1]

Also, use of information for purposes other than those intended by the original supplier of it should receive attention. Information may be used for a variety of purposes which are relevant both in the federal and provincial sphere.

This relates primarily to the situation in which an individual may receive an advantage or benefit in return for his giving a certain amount of information. It would appear that the giving of the information is unobjectionable when it is relevant to the substance of the transaction. However, since it is a general practice for much irrelevant information to be elicited it would appear to be reasonable to limit the use to which such information may be put. It is hoped that this would produce the secondary result that such information would not be collected. This would apply to all information which does not both have an obvious relevance to, and directly produce, the benefit that the subject-informant wishes to

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[1] See VI. Developments in Legal Protection.

obtain. It is also reasonable and necessary to maintain information relating to identity. Some information, such as age and type of employment, is less probative of identity than it is potentially prejudicial.[1] Where the relevance is outweighed by countervailing societal pressures, it ought not to be recorded and it ought certainly not to be used for purposes other than those intended. Characteristics physically distinguishing any individual from others in society ought to be those recorded under the rubric of "Identity."

The disclosure of information may take place in the context of a commercial transaction and may be given either to the person or body bestowing the benefit or to an agent selected to receive that information. In either case, the gathering of such information is very much a commercial operation. (Information may be gathered in a context which is not obviously commercial but in return for which a social benefit is bestowed. Examples of these situations include intelligence, personality and educational testing.[2])

The purposes for which information ought not to be used are set out above.[3] These are the limits which ought to affect both the civil and the regulatory mechanisms contemplated.

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[1] Certainly a coincidence of numbers does not prove identity. Although it may tend to show that an individual involved in a transaction is the same as another it in no way demonstrates an immutable and fundamental characteristic of a particular person.

[2] See Miller The Assault on Privacy (1970) at pp. 90-124. See also Pennock Privacy (1971).

[3] See pages 63-70, containing figures A-L in which these limits are set out.

The most important aspects of this conclusion are the limits placed upon the circulation of information by the supplier of it. This involves the interpretation of the defence of consent in most cases. Such an interpretation is ordinarily within the purview of the courts. Within recent years the courts have tended to construe the defence of consent narrowly, so as to let it conform with a reasonable interpretation which might be placed on it by the consentor. If a subject-informant is sued in negligent misrepresentation, it would appear that he ought to have a defence if the plaintiff is not a person to whom he supplied the information or that information is not being used for purposes for which he supplied it. Insofar as the ordinary tort defences of consent, volenti non fit iniuria and others, are not available, new defences ought to be created so as to eliminate the possibility of a successful action. This would necessitate provincial statutes unless the matter could come within the criminal law power of the federal government. This part of this conclusion is set out in the next following conclusion.

In addition to the above it may well be possible for regulatory agencies to control the use of information for purposes other than that for which it was originally put in circulation. Regulations controlling data banks may well include some to attempt to ensure that information is not improperly used. In cases of widespread use of information

for purposes other than those for which it was intended, this may be the only effective way of curbing the practice.

3. A means should be devised of ensuring that the subject of information is not sued in negligent misrepresentation where information supplied by him has been used for purposes other than those intended by him at the time he supplied it.

This conclusion also depends on the construction of the defence of consent. An individual who supplies information will be entitled to the defence of consent if the substance of the communication is one about which, to the actual or presumed knowledge of the representee, he is not in a particularly good position to judge or opine. Such a situation, as well as affording the above defence will also preclude the plaintiff from making out a prima facie case of liability in negligence. He cannot be said to have been negligent when the subject about which he is asked to give information is not peculiarly within his knowledge.

However, this conclusion goes further than merely not making the defendant-informer liable in negligence. The aim of this conclusion is to make him liable in nothing less than the tort of deceit for the supply of erroneous information about himself unless the information was supplied for the purposes contemplated by the parties and was supplied directly to the plaintiff.

This forms a part of conclusion 2, above.

4. An examination should be made of conduct which is lawful per se but which may be excessive in point of time, place or force. Such conduct may be associated with the information-gathering process. It should be ensured that any information collected is not the product of coercion or oppression. The means most suited to eradicating this type of conduct may well be an administrative agency charged with licensing or supervision of information-gatherers.[1]

There should be eradication of coercion and improper inducements as devices to extract information. Governments and other bodies are often able to coerce information from individuals who may then not be in a position to restrict access to such information. The same is true of all information once it has been given.

Coercion and unwarranted inducements seem to be morally objectionable if they have as their purpose the elicitation of information. Since the conduct is to be eliminated the most appropriate method of doing so would appear to be by creating a criminal offence "the procurement or elicitation of information by means of a threat, blandishment, coercion or inappropriate inducement, undue reward or promise of the same." This may be at least partly within present criminal proscriptions.

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[1] There are difficulties with leaving everything for the criminal jurisdiction of the courts although they may be best suited for making findings of fact which may be prejudicial to the defendant. The information-gathering agency should not be subjected to arbitrary disposition of its case. However, it may be difficult to encourage complaints if the potential complainant is not the party adversely affected by the product of the coercion. The best compromise may be to ensure that the administrative agency observes the dictates of natural justice.

If conduct of this sort ever creates a serious practical problem, which does not seem to be the case at present, then it may be discouraged indirectly by preventing reliance on information so detained. This may be achieved by exposure to a criminal sanction and to loss of licence.

5. Organizations or businesses existing for the purpose of, or making a practice of, disseminating information about individual subjects to the information should be examined. There has been some suggestion that such organizations or businesses ought to communicate unreservedly all such information to the subject of it. At any rate, a convenient method of breaking down the barrier that now exists ought to be achieved.[1]

An unqualified or qualified right to print-out should be recognized. This would seem to be entirely appropriate. There appears to be only two impediments to the revelation of all information stored about the subject:

1. determination of the most economical method of achieving the print-out contemplated, and
2. whether the right should be qualified or unqualified. This question should be decided on the basis of what it may be expected would cause harm for the subject to see.

It is thought that it might be best to require a print-out of the information collected on a subject only when the

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[1] The usual means of resolving this difficulty on the part of the subject of information is for him to be granted the right to see the whole of the record with certain specified exceptions. See above, VI. Developments in Legal Protection at letter F.

same information is being shown to an independent enquirer. Furthermore, it should only be necessary to show it to the individual subject as long as the material has not been altered since the last time it was shown to the subject. Exceptions to the general right to print-out are matters of national security and information certified by a psychiatrist not to be in the best interests of the individual to see. Federal or provincial regulation of data banks might include this as a condition of operation.

6. Intrusions into the usual retreat of an individual ought to be restrained.[1] This might be achieved through an extension of the concepts of trespass or by allowing recovery for invasion of privacy. Provincial statute or judicial activity may suppress these invasions.

These may be the subjects of tortious or equitable relief anyway. This conclusion has the aim of firmly establishing the usual retreat of persons as inviolate. The usual remedies attendant upon civil actions (for example, damages and injunctions) are here contemplated. This conclusion has the status only of anticipation of judicial activity. (It could be incorporated into a statute but that is within the jurisdiction of the provinces. The British Columbia and Manitoba Acts would probably be construed to allow an action in damages for violation of this tenet. Such damages might, however, be awarded at common law).

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[1] Intrusions of a trespassory nature may already be restrained. Those for which no redress is apparently available are contemplated here.

7. Appropriation of the likeness of another ought to be discouraged. This might best be effected by a civil action for damages.[1] This refers to all detailed and accurate representations.

Likenesses may be appropriated in many different ways but the graphic input devices to be found in conjunction with computers may facilitate copying or appropriation.

The right to one's own likeness ought to be regarded as a proprietary right. There are judicial decisions regarding unauthorized use of likenesses and these may be expected to continue and restrain a greater range of conduct. Future development of the common law will probably encompass this conclusion. Those jurisdictions with Privacy statutes will also provide redress.

8. Appropriation for advantage of the name of another should be prohibited.[2] This may now constitute various crimes and torts under certain conditions. However, it might be established as a general and cohesive principle in law. It might be wise to append both civil remedies and criminal sanctions to this sort of conduct.

9. Disclosure of information for purposes other than those for which it was originally given ought to be prevented.

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[1] This might effectively be achieved by development of the common law.

[2] Criminal sanctions are already available in appropriate circumstances.

This conclusion does overlap with that in 2, above. However, this conclusion relates primarily to information voluntarily elicited, or elicited with the consent of the subject-informant. The situation here is that this conclusion applies to information freely given by the subject-informant and not that which is a prerequisite for any quid pro quo or benefit bestowed in return. Information is commonly given to assist those who conduct surveys, for social science research,[1] to government agencies for various purposes and to charities.

There does seem to be a substantial body of information which is elicited freely and voluntarily from the individual who is the subject of it. Conditions and representations made prior to the gathering of such information are often not a matter of record and, as a matter of practice, are not in the best interests of the recipient of the information to record. It would often be unfair to record the answers to the questions but without the conditions and limitations made at the time the information was elicited.

The basic problem would appear to be that of whether to preclude circulation of the information or to allow circulation of the information with the strictures and limitations placed upon its use. It would appear that limitations and conditions could often be disregarded. Prejudice could thereby be occasioned to the subject without any corresponding benefit to him.

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[1] In this connection the Report by McPhail entitled Social Science Research and the Rights of Human Subjects is most interesting.

Generally, the controls adopted in conclusion 2, above, would also be applicable here. As far as the civil remedy is concerned, it might be natural to extend an even greater indulgence in the case of a gift, as opposed to a sale, of information.

10. Disclosure of information obtained by duress or trick ought to be prevented. Controls outlined above[1] will be relevant here. Information is not uncommonly obtained by trick, although duress would not appear to be a commonly used device to elicit information.

It would appear that there ought to be a civil action for the mere obtaining of information by duress or trick. This is proposed on the ground that substantial humuliation and resentment might be occasioned by such conduct to a person of ordinary sensibilities. It would appear that none of the existing tort remedies would appropriately cover the situation.

It would not seem to be necessary for any additional legal devices to be necessary.

11. Solicitation of second-hand information ought to be discouraged. This applied particularly to those in the business of gathering information.

This would appear to be justified on the ground of the greatly increased chance of error. It may not be necessary to directly discourage the collection of such information at the present. If discouragement were to take place it might be

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[1] See conclusion 4, above. After such cases may fall within the ambit of conclusions 2 and 3.

channelled through regulatory agencies controlling data banks and possibly also through criminal proscription.

The solicitation of "soft data" or impressions of others ought to be eliminated. This amounts to no more than gossip. It would be sufficient for an administrative agency concerned with licensing to make it a requirement of the holding of a licence that no such data be recorded.

12. The subjects of information ought to be protected as far as possible from collection, retention and dissemination of false information, improper impressions and misleading opinions and conclusions about them.

Collection of false information, improper impressions and misleading opinions and conclusions ought not to occur. In all fairness, it would seem difficult for a data bank to be sure of the truth of the information it collects. However, it ought not to keep such erroneous information on file after it has had a chance to remove it.

It would appear that the best remedy would be a tort action for failure to remove such information after a reasonable opportunity to do so had been afforded.[1] Such a tort action could only be created by provincial statute.

Alternative procedures might exist in the realm of criminal law or of regulation.

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[1] An alternative method would be to record the information as "disputed", but this may serve to create an unnecessary stigma.

13. The gathering, retention and dissemination of information which is necessary or useful for a purpose internal to the organization engaged in record-keeping ought generally not to be affected by rules regulating this activity.[1]

It would appear to be impossible to define those organizations within this exception by size: that classification may apparently be made only on the basis of purpose.

14. Consideration ought to be given to the expunging of certain criminal records after the lapse of a certain amount of time.[2]

This idea has been considered for some time. It would ordinarily apply only to those records over which the federal government had control. An appropriate delay before the expunging of records might be from ten to twenty years.

15. The amassing and compilation of government records also poses a serious threat to individuals. Many individuals feel that too great an amount of information may result from the pooling of information by government departments.

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[1] This is merely intended to indicate that the rules of administrative agencies with respect to the industry or business of information gathering ought not to govern mutual protection associations or personnel records of companies. However, this exception ought only to operate when information is distributed within the organization and then only if the activities of the organization are reasonable.

[2] Such a system has recently been introduced in the state of Ohio.

A large amount of information may now be amassed about individuals. In the aggregate this may be very threatening to ordinary people. Adequate safeguards for the interests of individuals ought to exist if research is contemplated.

16. Sale of information by government departments ought not to take place whether such sale is to individuals, business concerns or charities.[1] This is a policy decision which ought to be reached by governments both federal and provincial.

17. Individuals ought to have the exclusive right of disposition over their own distinctive products. This may be accomplished by extension of the common law.

This exists as a property right. It ought to be completely recognized and secured by the award of damages and injunctions where necessary. This conclusion does not require change in the civil law. It may require a little judicial extension of principles.

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[1] Information might, however, be given to charities in certain circumstances. Information ought not to be given to any other recipients under any circumstances.

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The Nature of Privacy - D.N. Weisstub and C.C. Gotlieb.

Personal Records: Procedures, Practices, and Problems - J.M. Carroll and J. Baudot, Carol Kirsh, J.I. Williams.

Electronic Banking Systems and Their Effects on Privacy - H.S. Gellman.

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The Theory and Practice of Self-Regulation - S.J. Usprich.

Privacy, Computer Data Banks, Communications and the Constitution - F.J.E. Jordan.

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[1] A joint Study by the Privacy and Computers Task Force and the Canadian Computer/Communications Task Force, to be published by the latter.

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