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Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward

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I. INTRODUCTION

"Privacy is a term with many meanings".^[1]

"The simple word 'privacy' has taken on so many different meanings in so many different corners of the law that it has largely ceased to convey any single coherent concept".^[2]

The functions of a general commitment to the value of privacy as a part of the law are varied, and cannot be reduced to the amount of protection actually given to that value in the legal system ... the commitment to privacy is no different than the commitment to other values, such as freedom of expression or liberty.^[3]

{1}In cyberspace, as in today's real world, there seems to be confusion in regard to what *privacy*^[4] is and what it is not. One scholar, Ruth Granson highlights recent efforts to fully comprehend privacy: "the concept of privacy is a central one in most discussions of modern Western life, yet only recently have there been serious efforts to analyze just what is meant by *privacy*."^[5] Over the years, the conception of the nature and extent of privacy has been severely bent out of shape. The definitions and concepts of privacy are as varied as those in the legal and academic circles who explore privacy. Another scholar, Judith DeCew, examines the diversity of privacy conceptions: "the idea of privacy [which is] employed [by various legal scholars], is not always the same. Privacy may refer to the separation of spheres of activity, limits on governmental authority, forbidden knowledge and experience, limited access, and ideas of group membership...[c]onsequently ... privacy is commonly taken to incorporate different clusters of interest."^[6]

{2}At one time, privacy implied that individuals could be secluded, but that has radically changed. Logistical barriers created by geography once protected a person. This too, though, has radically changed. The geographical wall of protection, which incidentally was not created by our legal system, has been removed by the development of the Internet, and more recently, by the World Wide Web. The loss of these once formidable barriers has not been accounted for in the scholarship available today.

{3}For today, "effective protection of personal data and privacy is developing into an essential precondition for social acceptance of the new digital networks and services." ^[7] Privacy can no longer be assumed, even in the security of one's own home. Instead, privacy is a condition that is much easier to violate, and thus, is much more difficult to establish and protect.

{4}The way in which we continue to view privacy has not significantly changed across time, and in some cases, change has been actively resisted. Yet somehow, privacy has evolved from a small single-function business into a complex conglomerate. A basic paradigm shift in the way we conceptualize privacy is in order. For at this instance, "privacy" should be viewed as a foundational concept in the same manner that life, liberty, and the pursuit of happiness are foundational concepts in our society. In order to begin to accomplish this paradigm shift, it is first necessary to revisit the cultural evolution of "privacy," so that we can fully analyze the ramifications and impact of emerging technologies.

II. PRIVACY REMODELED BY EMERGING TECHNOLOGIES

A. New Issues Raised by Technology

{5} Uses of new technologies raise policy issues that are often defined in terms of invasion of privacy. [8] Supporting this contention, one commentator, Patricia Mell, notes that the use of computers to manage information has considerably blurred the demarcation between public and private realms. [9] Unfortunately, this blurring of the realms of privacy by the influx of technological advances only adds to the problem we are now striving to address. This contention also supports a similar, and ever - present condition, which Arthur Miller noted in 1971, by stating that, "[it] is essential to expose the ways computer technology is magnifying the threat to informational privacy - a threat that we have faced in some form ever since man began to take notes about himself and his neighbors;" [10] and which have also been supported by the 1978 and 1993 Louis Harris polls. [11] Yet, another legal scholar, Henry Perritt observes: "in the long run, adoption of information technologies will blur the boundaries between citizen and agency and between agency and court. Blurring of these boundaries may necessitate rethinking the definitions of some of the basic events that define the administrative process, public participation, and judicial review." [12]

{6} Finally, noted constitutional scholar Lawrence Tribe recommends, "that policy makers look not at what technology makes possible, but at the core values the Constitution enshrines." [13] Principles, such as those that underlie privacy, must be "invariab[le] ... despite accidents of technology." [14] Thus, an irony now presents itself: the very technology that simplifies our lives simultaneously complicates our legal analysis of this most fundamental of concepts.

B. The Concept of Privacy Evolves

{7} The primary reason for current concern appears to be directly related to the changing nature and magnitude of threats to privacy. This is due, in large part, to technology. The legal provisions of the past can simply no longer protect an acceptable level of privacy. Technological advances have made it either impossible or extremely costly for individuals to achieve the level of privacy that was once enjoyed. Thus, it now seems appropriate to revisit even the most basic and fundamental underpinnings of privacy. In order to gain an appreciation of the law regarding privacy, it is appropriate to ask first what privacy is, and then, to proceed to question the extent to which the law protects it. This two-prong method of analysis "raises questions as to why people want privacy, why it is that although they want it, they do not make claims for legal protection, and, if they do, why the law is reluctant to respond." [15] Through answering these questions, we are provided with a greater "understanding of the scope of actual legal protection and the way the law reflects social needs, the limits of the law in protecting human aspirations, and the need for further legal protection created by changes in social and technological conditions." [16] Thus, the inquiry evolves into a multi-faceted exploration that crosses many disciplines, such as sociology, law, psychology, and most recently, technology.

{8} It is also helpful to identify those aspects of human life that would be impossible - or highly unlikely - without some form of privacy. For instance, our health, both physical and mental, our religion, and many similar lifestyle decisions necessitate the affordance of some elements of privacy. Additionally, one cannot begin to explore privacy by investigating existing laws and court decisions without possessing a well-founded concept of privacy itself beforehand. For this reason, an exploration of the basic nature of privacy, what privacy is, what privacy is not, and its functions will assist in developing an understanding of privacy in our electronic society. This understanding will then enable an improved comprehension of what is theoretically and practically needed to assist the evolution of the current concept of privacy in today's society.

{9}It was not until the latter Nineteenth Century that legal thinkers began to first conceive of the notion of privacy as a legal right. [17] The emergence of a newly-industrialized society required a greater quantity and quality of information than did pre-industrial society. [18] The U.S. labor force was migrating toward urban centers where industry was burgeoning.[19] The aggregation of so many people into condensed areas greatly facilitated compiling information. [20] This fostered a greater reliance on newly-developed machines, by which to boost the process of information gathering. [21] An "individual's ability to shield information about himself from the public was beginning to erode in response to society's increased need for more information." [22] This erosion became more pronounced when, in 1876, the telephone was invented, followed closely by the invention of the radio. [23] At that time, there was an increasing ability of information technology to pervasively intrude upon privacy. [24] As a result of this intrusion, the framework was laid for "first modern cases of government surveillance." [25]

{10}The moment was at hand for someone to step forward and to postulate a new legal paradigm. Justices Warren and Brandeis did just that when they crafted a notion of privacy that spoke of personality and character. These scholars built upon the work of Judge Thomas Cooley, who, in his famous treatise on torts that was published in 1879, spoke of the right "to be let alone" as matter of personal security. [26] The concept of privacy that Warren and Brandeis put forth in their landmark law review article was supported by a many legal thinkers of the time. Indeed, in their often cited article, "Warren and Brandeis attempted to carve out an interest - viewed by some as a 'personality interest' and by others in more proprietary terms - without concomitantly attempting a clear description of that interest." [27]

{11}In their search for privacy in the form of solitude, Nineteenth Century Americans invented barbed wire and proceeded to build fences along the frontier. [28] Similarly, the private Pullman compartment was invented when railroads became the rage. As a result of these processes, Americans have evolved a deep-rooted concern for privacy, and have since continually sought to satisfy their desire to "be let alone." [29]

{12}New developments in Nineteenth Century technology and business methods require that the next steps be taken to protect the right "to be let alone." [30] Warren and Brandeis' argument posited that, while some aspects of privacy involve the ownership or possession of real property, we also need to protect human 'personality.' [31] These forward-thinking legal scholars wanted to extend the scope of the law to include a person's feelings and emotions in its coverage. [32]

{13}However, the law of the land in 1928 did not yet recognize that the right to privacy included a person's character. In 1967, the Supreme Court first intervened in this area in *Katz v. United States*. [33] In *Katz*, the Court ruled that a wiretap was an invasion of privacy. Following the *Katz* decision, the Congress, in 1968, supported by the Court's *Berger v. New York* [34], established a framework to allow electronic wiretapping only under the most limited circumstances. Congress made it clear that wiretapping was to be considered only as a last resort. [35] The Supreme Court spoke to the constitutional right of privacy that protected citizens from governmental officials. Over the years this right was expanded to protect the autonomy of the individual to make certain important decisions of a very personal nature in such matters as marriage, procreation, contraception, family relationships, child rearing, and education. [36]

In the 1970's, the U.S. emerged as a world leader in the area of privacy protection. Despite difficulties with the right to privacy and the privacy torts, the Fair Credit Reporting Act of 1970[37] and the Privacy Act of 1974 [38] "provided comprehensive privacy protection for records held by the federal government." [39] There seemed to be a national trend developing through policymaking and legislation that viewed privacy as a concept upon which to craft our statutes, rather than as an end unto itself.

{14}In the "mid-1980's the growth of the Internet and new communications services were apparent." [40] There was an explosion of the use of desktop computers and electronic mail. Questions about the appropriate standards for government searches and seizures were arising. [41] In response to these questions, Congress

amended Title III and enacted the Electronic Communications Act. [42] These congressional measures extended existing privacy protections to the realm of electronic communications.

{15}But the U.S.'s leadership role has slipped away. The U.S. is now "viewed by many as falling behind in the effort to protect this critical right." [43] Today, we are "not only behind the curve in developing sensible privacy policies to respond to public concerns, we have left the law enforcement community and the marketing industry to determine how much privacy there will be in the future." [44] The end result is not surprising. There is growing public concern about the loss of privacy in addition to a widening gap between the problem we face and the solutions that we should pursue. [45] Simply stated, our current policy is backward in its approach. We impose government controls on techniques to protect privacy, where market-based solutions are preferable. Yet, we continue to leave privacy problems to the market, where government involvement is required." [46] Still, we cannot escape the reality that "privacy is one of the most discussed, and the most confused, subjects in the online world." [47] However the issues of privacy and technological advances entwined with market and governmental controls is not a new development by any means:

From the end of the nineteenth century on ... the development of widespread communication through newsprint, the growth of mass transportation, and the inventions of the telephone and radio made informal methods of privacy protection both insufficient and ineffective.[48]

There are a great many authors who offer differing views on the issue of privacy and its protection in our various communication modes. For example, Bovenzi views privacy as "a subjective matter, the bounds of which depend on social norms that can change." [49] Boevnezi speculates that, "in a world that fosters the application of new technologies to unusual activities and transactions, the introduction of new concepts of privacy, adapted to protect new interests, may render the new forms of communication less intrusive and more acceptable." [50]

{16}Diedre Mulligan, Staff Counsel for the Center for Democratic Technology espouses another view in her regard of privacy as a mechanism that will evolve to "keep pace with changes in technology...[and suggests that] [t]his requires a periodic assessment of whether changes in technology pose new threats to privacy that must be addressed through changes in law." [51] Mulligan has a traditional view of privacy. To her, privacy protects those things that have been defined down through the years as well as the personal and informational rights of citizens. [52]

{17}Westin defines privacy in still a slightly different manner, as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." [53] Here, the control over the information communicated is integral to preservation of privacy. Westin also offers a second and different definition of privacy. He states that, "viewed as in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means." [54] Authors Cavoukian and Tapscott "would take it one step further by including [the conditional] 'if [to the equation] - if personal information should be collected or gathered in the first place.'" [55] This pair believes in the stringent safeguarding of personal information from the onset. Perhaps Cavoukian and Tapscott press for the most stringent protectionism of the survey of academics mentioned in this article, as they question why individuals' private information is ever initially collected, let alone disseminated.

{18}Professor Cate does "not suggest that privacy is inherently evil, but rather [,that it] is not inherently good." [56] Instead, he seems to view the unimpeded "availability of information and [the] free-flow of data" [57] as the inevitable result - a casualty. Cate states that, to "the current extent that legal protections and social mores concerning privacy interfere with creating the systems necessary to acquire and to use personal information, privacy may even conflict with the interest of the persons whose privacy is being protected." [58] Professor Cate further comments that, "[w]hile privacy is certainly a necessary element of quality life in

modern society, protecting the privacy of information imposes real costs on individuals and institutions." [59]

{19} Author Steven Miller also views the public's concern in regard to privacy as being overblown. For example, in his book on how policy should civilize cyberspace, Miller remarks that he "feel[s] that the public's concern for privacy is like the River Platte, a mile wide but only an inch deep." [60] James Castelli similarly proposed his views on how to handle personal information in his recent publication about civilizing cyberspace. In one instance, Castelli comments: "the public's concerns are fueled by a steady supply of articles and televised programs about the dire implications of data-driven marketing." [61] He points a finger of blame at the media for creating much of this resulting frenzy.

{20} Solveig Singleton adopts a similar stance of skepticism towards what he views as an ill-equipped movement to regulate private sector privacy. Singleton also supports the notion that the public's concern for loss of privacy lacks a substantial foundation in provable reality. [62] He states that the public views the collection of information in databases and the erosion of privacy "as a serious threat only because advanced technologies let us wander about the world in new, automated ways, and we realize that the collection of information has become mechanized as well. It is a mistake to view the collection as morally shocking simply because we have never noticed that it goes on." [63] Clearly, Singleton is impatient with the Internet neophytes who are too quick to panic about the vast nature of the web's audience and its broad scope of coverage solely because the information first appears overwhelming to them due to their own inexperience.

C. Privacy in Our Electronic Society

{21} It is inevitable that personal privacy will be one of the most significant pressure points in our national fabric for most of the 1990's. Advancing technology depersonalization of the workplace and other social environments, a growing population can be expected to create a greater personal need for a sense of space and dignity. [64]

{22} The Web is in the midst of a phenomenal period of growth and innovation. Fathered by Timothy Berners-Lee, it made its public appearance in 1992. [65] Today, the Web "is now used by more than one-quarter of the U.S. population, making it the fastest-growing medium in human history." [66] Other technologies have taken much longer to capture such a comparably large market share. For instance, television took thirteen years, radio took thirty-eight years, and cable television took ten years to capture their respective comparable audience bases. [67] The Internet Domain Survey released in January 1998 indicates that the Web continues to grow at a dramatic rate. The statistics are mind-boggling. There were 29.7 million hosts in January 1998, up from twenty-six million hosts in July 1997. This statistic can be compared to 1.3 million hosts in 1993. [68]

{23} Regardless of how privacy is defined, it appears that the Web has stretched and contorted the concept. Cyberspace has done this through being more than a one-dimensional entity. It is analogous to many familiar real-life metaphors, not just to one. [69] For example, cyberspace has been analogized with the following objects, places, and entities:

- newspapers;
- republishers/disseminators;
- common carriers (i.e., telephones);
- traditional bulletin boards;
- broadcasters;
- desks at the office;
- desks at home in the den;
- free and open frontier (a.k.a., The Old West);
- safe deposit boxes in a bank;

- hotel/motel rooms which one has rented; and
- fraternity/sorority houses [70]

{24}The definitions of the Web are as broad as the entity itself. Some scholars are already referring to computer networks as "the printing press of the Twenty-first Century." [71] But, Loundy argues that computer network "services are more like common carriers (e.g., more like the Telephone Company than like publishers)." [72] However, Loundy's argument, which is similar to a number of other scholars, presupposes that cyberspace is comparable to something that already exists.[73]

{25}The nature of computer systems will vary greatly depending upon the ultimate legal definition of online computer networks. If an online computer system is like any or all of the items listed above, how do we legally and ethically deal with this multifaceted, multidimensional environment? Further, how do we deal with a situation in which two antithetical metaphors seem appropriate?

{26}Problems in applying a legal metaphor have arisen, most notably, in the 1994 *LaMacchia* case. [74] The case involved an allegation that the defendant, an MIT student, committed fraud by establishing a computer system at MIT, supposedly for pirated software trafficking. Unfortunately, "the question of whether the defendant had in fact committed any crime at all turned out to be a difficult [question] for authorities to answer." *LaMacchia*. [75] Defendant David LaMacchia's attorney, Harvey A. Silverglate, stated, "[t]he government attempts to assert control over this burgeoning thing called the Internet [from time to time]... [and] spasmodically overreacts in order to set an example, to deter behavior the government doesn't like," [76] which then leads to a misapplication of the law.

{27}Instead, the Internet raises many privacy issues that seem to be novel. Yet, in reality, these issues may not be really novel; instead they may simply challenge our understanding of certain already familiar metaphors. For example, there are many search engines that will find information anywhere on the Internet, and store the identity of the person who searched for that information. Given this reality of search engines and the Internet, should this information be saved knowing that it can be disclosed, sold, or used for marketing purposes? While this seems to present a clear and present danger for privacy, Marc Rothenberg, the director of the Electronic Privacy Information Center views such activity as less threatening. Rothenberg states the following premise: "virtually all privacy law and policy is based on the belief that when individuals give up personally-identifiable information to organizations, the organizations take on some obligation[,] and the individuals are granted some rights." [77] Rothenberg envisions an exchange of rights and responsibilities that is mutually beneficial to service providers or suppliers and customers or end-users. These issues address the very nature of a computer network and cause confusion in regard to these issues. For example, "[l]iability for illegal activities in cyberspace is affected by how the particular computer information service is viewed." [78] If a computer system allows one entity to deliver messages to a large number of users, then the system may be viewed as a publisher. Many publishers are utilizing computer networks to supplement or publish editions of their product. [79] In *Cubby v. Compuserve*, the position of Compuserve was that as an Internet Service Provider, they were analogous to a library, bookstore, or newsstand. [80] With similar circumstances at issue in the *Stratton Oakmont v. Prodigy*, Prodigy was analogized to a publisher with the same content responsibilities as a newspaper. The difference between Compuserve and Prodigy as providers can be explained by the different analogies that each used to describe the nature of their specific operations. [81] One commentator summarized the legal community's shock at the holdings of those landmark cases in the following manner:

It is correct that risk-averse lawyers who had no faith in, or understanding of, jurisprudential processes were panicky about *Stratton Oakmont*. That *Stratton Oakmont's* outcome was nonsensical was apparent to most readers of the case who knew the holding in *Cubby*; I think the reason *Stratton Oakmont* was taken so seriously in some circles was that too many Washington lawyers are in the habit of reading headnotes instead of cases." [82]

{28}The lack of understanding as to the nature of online computer networks is also seen at the state level. In a 1995 symposium on cyberspace law, panelist Frank Easterbrook noted, "[e]rror in legislation is common, and never more so than when technology is galloping forward." [83] Easterbrook comically likened cyberspace to a horse for that very reason. In New York, for example, the state legislature has considered the passage of telecommunications legislation that seems to ignore even the most fundamental constitutional issues. [84]

{29}In addition to the gaps being created by this new online electronic technology, a legal and ethical blurring is also occurring due to the lack of consensus among the various stakeholders, as to which legal metaphors should apply. [85] This discord causes a legal and ethical blurring due to the lack of stakeholder consensus as to the application of appropriate rules and metaphors. [86]

In the long run, the adoption of information technologies will blur the boundaries between citizen and agency and between agency and court. [The B]lurring of these boundaries may necessitate rethinking the definitions of some of the basic events that define the administrative process, public participation and judicial review. [87]

{30}A clarification of privacy as a global principle for computers, a principle for individual systems, a non-existent principle, or as some combination of these options needs to be established before other concerns are then addressed. By deciding upon this classification, society will facilitate the process of developing a basis of thought upon which other issues (e.g., computer as a newspaper, office desk, common carrier, broadcaster, etc.) will later rely. Establishing the basic notions of public and private in regard to online computer systems is critical in order to build a foundation upon which the resolution of other issues will be based. The relationship of these decisions and analyses demands attention to one level of inquiry before subsequent levels can be addressed adequately and successfully.

{31}Two points of view appear to exist concerning the broad notion of privacy. On one hand, the Electronic Frontier Foundation ("EFF") and the Computer Professionals for Social Responsibility ("CPSR") favor an almost exclusive form of privacy from governmental intrusion. On the other hand, the system administrators want to be able to ensure the security and integrity of their online systems. The administrators of online networks, such as system administrators, postmasters, system operators, want and deserve the legal ability to protect their systems from vandalism and illegal intrusion, as well as to prevent them from acting as conduits for pirated software, or from serving as homes for illegal activity. There is legitimate concern that, given free rein, those who craft policy will follow a path that may not consider the rights of the individual users.

{32}Unlike other constitutional rights, the Supreme Court has not yet explicitly defined the right to privacy. The Court and Congress avoided a straight tackle of the issue of privacy rights when they "defined and shaped the right to privacy according to the public's reactions to changes in the society." [88] Thus, the definition that emerges for privacy is amorphous, fluid, implicit, and somewhat ambiguous. The fact that legislative actions have been reactive, instead of proactive, has compounded the difficulty of anchoring any lucid privacy rights firmly into our society. Many scholars perceive that the judicial and legislative avoidance to squarely confront adjudication, legislation, and regulation of privacy in the context of today's technology has become destructive and must be addressed: "detailed examination of some of the privacy invasion issues in the rapidly changing telecommunication technology will demonstrate that the right to privacy cannot continue to be defined by a capricious approach." [89]

{33}Clearly, the notion of privacy is not what it once was. Yet, it is not now what it will need to be in the future. A paradigm shift is needed - due in large measure, to the staggering advance of technology. This paradigm shift must either be based upon technology as not only a mechanical entity, but also as an organic entity - one that serves as a commonly-shared resource for the common good.

III. REVISING OUR CONCEPT OF PRIVACY - STEPPING FORWARD

I am not an advocate for frequent changes in laws and institutions. But laws and institutions must go hand-in-hand with the progress of the human mind. And that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with change in circumstances, institutions must advance also to keep pace with the times. [90]

{34}Thirteenth Century emperor Fredrick II proclaimed that legal instruments were not valid if they were written on paper instead of on parchment. [91] In spite of resistance from the legal community, "paper was eventually deemed to be dignified enough to replace parchment in legal use." [92] "Centuries later, typewriters made handwritten documents obsolete." [93] The continuum of change advanced further when, "time and again technologically new ways of conducting business encounter initial resistance, but ultimately are embraced by the common law." [94]

A. Evolving a New Perspective on Privacy

To ensure individual privacy, existing laws, practices and policies must be examined and adapted to the new environment.[95]

{35}Traditional information practices that were "developed in the age of paper records..., must be adapted to this new environment where information and communications are sent and received over networks on which users have very different capabilities, objectives[,] and perspectives." [96] New principles and paradigms of thought must acknowledge that all facets of our society share responsibility "for ensuring the fair treatment of individuals in the use of personal information, whether in paper or electronic information. The principles should recognize that the interactive nature of the Internet would empower individuals to participate in protecting information about them." [97] This approach to conceptualizing privacy is unique and progressive, in that it recognizes the empowerment provided by greater technological capabilities, rather than fearing the impacts of the Web's reach. With an educated and enlightened approach to regulation and policymaking for an entity as novel as the Internet, society has the ability to achieve a "win-win" balance. We can achieve a mutually-beneficial equilibrium of regulation and policy that restricts abuses of privacy only as much as necessary, while simultaneously enabling progress at a continued fast pace with minimal regulatory and legislative intrusion.

We have the technological means at our disposal to provide essentially any desirable balance between the conflicting extremes of offering privacy to one group[,] while retaining the right to tap the information transactions of another group. [98]

{36}What remains to be decided is a matter, not based upon the technology alone, but based upon a balancing of social and technical issues.

Law is a process that is oriented around working with information. As new modes of working with information emerge, the law cannot be expected to function or to be viewed in the same manner as it was in an era in which print was the primary communications medium. Nor can the law be expected to support the same symbols and metaphors. Not only the seamless web, but "fine print," "black letter law," "law on the books," "going by the book," and other print based expressions will be replaced by allusions that are more consistent with the qualities of law and information in electronic form. [99]

{37}Protecting privacy will be one of the greatest challenges for the Internet. To address those challenges, we should revisit the notion of privacy with the intent of viewing it - not as a definable entity - but as a mission.

Where once, privacy was a clearly-definable entity, it is no longer such. We cannot continue to accept the ever-expanding and ever-blurring definition of privacy. Today, privacy is an overarching principle that defines many varied torts, many varied wrongs, and many types of rights. Privacy must be recognized in this changed role and applied to situations based upon the facts, and not upon what is merely technologically possible.

B. Privacy is More of a Concept Than A Formalistic Definition

{38} One approach to the law of privacy is to ponder the question of 'what privacy actually is, and to what extent it is protected by law.' This raises questions about our desire for privacy, "why it is that although they want it they do not make claims for legal protection, and, if they do, why the law is reluctant to respond."

[100] Another approach is to attempt to understand and to formulate a definition of privacy from the legal decisions or moral institutions that address this issue. [101] But, the dilemma of crafting a single or even multiple definitions of privacy becomes a Herculean task that necessarily yields a vague and overly broad definition. It would appear that defining "privacy," while, albeit a noble and necessary activity, is much the same as if we were to attempt to set a single definition to codify "life, liberty, and the pursuit of happiness." In our society, "life, liberty, and the pursuit of happiness" are goals - concepts, if you will - that the founding fathers built upon and that we have expanded, interpreted, and continued to evolve throughout the years. So too, "privacy" is a concept that must remain vague and overly broad so as to allow the flexibility to expand and to contract existing categories of law in order to accommodate the needs of an ever-evolving society. The law seems never to "protect privacy, per se, as is indicated by the fact that whenever a remedy for invasion of privacy is given, there is another interest such as property or reputation [or trespass] that is invaded as well."

[102] The crimes of murder and unlawful imprisonment are violations of our right to life and liberty. However, violations of these rights are not addressed as infringements of the concepts of "life" and "liberty." Instead, they are addressed by the application of specifically-defined statutes. So, "privacy" must be viewed as a "concept" that applies to torts, and that has already been defined. Likewise, privacy applies to access-to-personal-information issues. Thus, statutes must be created and our thinking must be adjusted to realize that notion.

{39} We are continually challenged "to define [and even redefine] 'privacy.' Of course, the constitutional jurisprudence involving the 'right to privacy,' the 'right to be let alone' evolved in lines substantially different from [those] that set forth in...Prosser[']s famous] Torts [treatise] although the [F]ourth [A]mendment concepts of 'reasonable expectation of privacy' were eventually imported into civil actions as threshold measures of liability." [103] Where once the issue of "privacy" was primarily one having to do with one's physical seclusion, one's personal domain, and one's physical withdrawal from society's gaze, it has now come to include access to information about one's self. [104]

{40} The principles of privacy, in general, must encompass the fundamental notions defined by Professor Prosser, but must also focus primarily on the responsibility of organizations that collect personal information, and thereby, control, restrict, or affect access to personal information. The following principles merit our detailed consideration if we are to effectively address privacy regulation:

- The privacy implications of new network services should be made fully known to the public;
- The principle should set out clear rights for individuals whose personal information is collected;
- Enforcement of the principles will require legal rights; [and]
- The sale of personal data should require informed consent, possibly even financial compensation. [105]

Other issues that must be addressed in order to evolve coherent privacy statutes include the following:

- Viewing cyberspace not just a mechanical entity but as a commonly shared resource--as a town common once was viewed;
- Establishing the concept and define what a reasonable expectation of privacy is in cyberspace;
- Creating a national privacy agency; [and]
- Balancing of benefits when creating statutes that impact privacy. [106]

IV. CONCLUSION

{41}Technology has again brought us to a critical juncture. We must now look at what technology has made possible, rather than simply at the legal principles that underlie these advances. We tend to misapply legal metaphors due to a lack of conceptual understanding of privacy itself, as well as of modern day technology. [107] A number of critical issues must be addressed in order to move technology and society forward in tandem. Understanding the foundational concept of privacy is paramount in such a paradigm shift.

{42}Technology is merely another variable to add to the equation, and should not be viewed as an insurmountable stumbling block. Just as Warren and Brandeis advocated change in the paradigm surrounding privacy in their 1890 law journal article, today we should also reassess "our metaphors, customs, [and] rules" to account for that which can intrude on our basic right to be let alone and not intruded upon. And, in this day in age, our right to have our personal data kept private must be ensured. We must accomplish this from a paradigm that has already been developed, by revisiting the conceptual foundations of privacy in light of cyberspace. [108]

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[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Robert A. Reilly, *Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward*, 6 RICH. J.L. & TECH. 6 (Fall 1999), at <http://www.richmond.edu/jolt/v6i2/article1.html>.

[1]. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 424 (1980).

[2]. J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY §5.7[B] (1995).

[3]. Gavison, *supra* note 1, at 471.

[4]. The Right of Privacy is a general right to be left alone. *See Katz v. United States*, 389 U.S. 347, 350 (1967). The Right of Privacy is a "generic term encompassing various rights recognized ... to be 'inherent in the concept of ordered liberty' [... including protection from] governmental interference." *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 679 (1976). "The four forms of invasion of privacy are unreasonable intrusion upon seclusion, appropriation of name or likeness, unreasonable publicity given to a person's private life, and placing another in false light before the public." 77 C.J.S. *Right to Privacy and Publicity* § 8 (1997). Privacy is also a right to "live life free from unwarranted publicity." *Harms v. Miami Daily News*, 127 So.2d 715 (1961). Although the term *privacy* is not mentioned in the U.S. Constitution, it has been defined by the Supreme Court, through the years, in a line of decisions. The Court has held in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) that "specific guarantees in the Bill of Rights have **penumbras**, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one." (emphasis added.). *See also Roe v. Wade*, 410 U.S. 113, 152-153 (1973). "**The Constitution does not explicitly mention any right of privacy**. In a line of decisions, however, ...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.... This right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (emphasis added).

[5]. JUDITH DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 1 (1997).

[6]. *Id.* at 13.

[7]. *Electronic Privacy Information Center, Report 94-1, Privacy Guidelines for the National Information Infrastructure: A Review of the Proposed Principles of the Privacy Working Group* (visited Sept. 13, 1999) <http://www.epic.org/privacy/internet/EPIC_NII_privacy.txt>

[8]. *See* PRISCILLA M. REGAN, *PRIVACY, TECHNOLOGY AND PUBLIC POLICY* 2 (1995).

[9]. *See* Patricia Mell, *Seeking Shade In a Land of Perpetual Sunlight: Privacy As Property in the Electronic Wilderness*, 11 *BERKELEY TECH. L.J.* 1 (1996).

[10]. ARTHUR MILLER, *THE ASSAULT ON PRIVACY* 23 (1971).

[11]. *See* Louis Harris Poll, *INVASION OF PRIVACY CAUSES CONCERN* (1978).

[12]. Henry H. Perritt Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 *ADMIN. L. REV.* 79, 80 (1992).

[13]. Laurence Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote address at the First Conference on Computers, Freedom and Privacy (Boston, March 1991) (visited Sept. 13, 1999) <<http://www.swissnet.ai.mit.edu/6095/articles/tribe-constitution.txt>>.

[14]. *Id.*

[15]. Gavison, *supra* note 1, at 460.

[16]. *Id.*

[17]. *See* Daniel Bell, *Communications Technology--For Better or Worse*, *HARV. BUS. REV.*, May-June, 1979, at 22.

[18]. *See id.*

[19]. *See generally* Robert F. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, 34 AM. J. JURIS. 87, 88 (1989).

[20]. *See* Bell, *supra* note 17, at 20 (noting that the invention of the telegraph has been referred to as the birth of modern society's information infrastructure).

[21]. *Id.* at 22.

[22]. *See* Mell, *supra* note 9, at 5.

[23]. *See* Anthony Oettinger, *Information Resources: Knowledge and Power in the 21st Century*, SCIENCE, 1980 at 191.

[24]. *See id.* at 192.

[25]. Mell, *supra* note 9, at 5.

[26]. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); accord THOMAS COOLEY, LAW OF TORTS (1st ed. 1880, 2nd ed. 1888). *See generally* Mell *supra* note 9; but see Gavison, *supra* note 1, at note 48, 437, stating that Warren and Brandeis "never equated the right to privacy with the right to be let alone; the article implied that the right to privacy is a special case of the later." That notwithstanding, court decisions have equated the right to privacy as a right to be let alone -- to be secluded. *See e.g.*, Lewis v. Physicians and Dentists Credit Bureau, 177 P.2d 896, 897, 899 (Wash. 1947), Gregory v. Byran-Hunt Co., 174 S.W.2d 510, 512 (Ky. 1943), Smith v. Doss, 37 So.2d 118, 120, 121 (Ala. 1948), Berg v. Minneapolis Star Tribune 79 F. Supp. 957 (D. Minn. 1948), Cason v. Baskin, 20 So.2d 243, 247, 248 (Fla. 1944), Metter v. Los Angeles Exam'r, 95 P.2d 491, 494, 495, 496 (Cal. 1939), Barber v. Time, Inc. 159 S.W.2d 291, 294, 295 (Mo. 1942).

[27]. Mell, *supra* note 9, at n.32 (citing to Sheldon W. Halpern, *The "Inviolable Personality"--Warren and Brandeis After One Hundred Years: Introduction to a Symposium on the Right of Privacy*, 10 N. ILL. U. L. REV. 387, 389 (1990)).

[28]. *See generally* Denis O'Brien, *The Right to Privacy*, 2 COLUM. L.REV. 437, 444 (1902).

[29]. Warren and Brandeis, *supra* note 26, at 195.

[30]. *Id.* The notion of a right "to be let alone" was first advanced in THOMAS COOLEY, LAW OF TORTS 29 (2nd ed. 1888). In FRED R. SHAPIRO, THE MOST CITED LAW REVIEW ARTICLES (1987), the author states that the Warren and Brandeis' article is the most cited pre-1947 law review article. *See* American Enterprise Institute, *Privacy Protection Proposals: 96th Congress* (1979) ("[d]efining privacy as the right to be let alone is regarded by many as an over simplification.") *Id.* at 3; *see also* Milton Kontovitz, *Privacy and the Law: A Philosophical Prelude*, LAW AND CONTEMPORARY PROBLEMS 272-279 (1966) (regarding the 'right to be let alone' as better expression of what is intended than a 'right of privacy,' which is vague and overly broad for practical purposes).

[31]. Warren and Brandeis, *supra* note 26, at 202.

[32]. *See generally* *Id.*

[33]. 389 U.S. 347 (1967). Defendant Katz was convicted in the United States District Court for the Southern

District of California of a violation of statute proscribing interstate transmission of wire communication of bets or wagers, and he appealed. The Court of Appeals, 369 F.2d 130, affirmed, and certiorari was granted. The Supreme Court held that government's activities in electronically listening to and recording the defendant Katz's words spoken into telephone receiver in public telephone booth violated the privacy upon which the defendant justifiably relied while using the telephone booth. Thus this action constituted a "search and seizure" within Fourth Amendment, and the fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. The Court further held that the search and seizure, without prior judicial sanction and attendant safeguards, did not comply with constitutional standards. Although, accepting the account of the government's actions as accurate, the magistrate could constitutionally have authorized with appropriate safeguards the very limited search and seizure.

[34]. 388 U.S. 41 (1967). Petitioner was indicted and convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority based upon evidence obtained by eavesdropping. An order pursuant to 813-a of the N. Y. Code of Crim. Proc. permitting the installation of a recording device in an attorney's office for a period of 60 days was issued by a justice of the State Supreme Court, after he was advised of recorded interviews between a complainant and first an Authority employee and later the attorney in question. Section 813-a authorizes the issuance of an "ex parte order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department." The oath must state "that there is reasonable ground to believe that evidence of a crime may be thus obtained, and particularly describing the person or persons whose communications . . . are to be overheard or recorded and the purpose thereof." The order must specify the duration of the eavesdrop, which may not exceed two months, unless extended. On the basis of leads obtained from this eavesdrop, a second order, also for a 60-day period, permitting an installation elsewhere was issued. After two weeks of eavesdropping a conspiracy, in which petitioner was a "go-between," was uncovered. The New York courts sustained the statute against constitutional challenge. Held: The language of 813-a is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area, and is, therefore, violative of the Fourth and Fourteenth Amendments. *Id.* at 45-64.

[35]. *Testimony Before the Subcomm. On Crime, Comm. on the Judiciary, House of Rep.* (March 28, 1998) (testimony of Marc Rotenberg, Director, Electronic Privacy Information Center).

[36]. 16A AM. JUR. 2D, Constitutional Law, §§ 601-606.

[37]. Fair Credit Reporting Act, 15 U.S.C. 1681 (1992) "This Act regulates the collection and distribution of information by credit bureaus. The main issues addressed are:

- Accuracy of Information.
- Obsolete information - certain information may not be included in credit files after a number of years have passed.
- Limited uses of information - the conditions under which an agency may supply a report.
- Notices to individuals - if an adverse report is filed or if an investigation about an individual is undertaken, the individual must be notified.
- Individual's right of access to information.
- Individual's right to contest information - if an individual feels information in their file is incorrect, they may cause a reinvestigation. If the dispute is not resolved, the individual may write a short note for inclusion in the file.

Although the Act covers many different issues, there are a number of loopholes as noted above. Although it is permitted to bring suit under the Act, the lengthy time involved in such cases can be greatly detrimental to wronged individuals. The law also does not limit the information that can be gathered. And, importantly, this

law covers only credit bureaus, not other sources of personal information.

In 1992, a modernized version of the Act was proposed that attempted to deal with a number of these problems." Fair Credit Reporting Act of 1970 (visited Sept. 20, 1999)

<<http://stasi.bradley.edu/privacy/FCRA.html>>.

[38]. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974). The Privacy Act's purpose was "to provide certain safeguards against an invasion of personal privacy." Individuals are given control over what personal records (pertaining to themselves) can be collected and maintained by the Federal government. The Act has five basic provisions:

1. Individuals have control over the dissemination of personal records gathered by one agency when other organizations or agencies request that information.
2. Individuals can gain access to their records in any agency and can have such information corrected or amended.
3. Agencies are required to assure that all information is current and accurate for its intended use.
4. Agencies are exempted from other provisions of the Act "only in cases where there is an important public policy need for such exemption."
5. Agencies violating an individual's rights under this Act are subject to civil litigation by the individual.

[39]. Rotenberg, *supra* note 35.

[40]. *Id.*

[41]. See Mitchell Kapor & Michael Godwin, *Civil Liberties Implications of Computer Searches and Seizures: Some Proposed Guidelines for Magistrates Who Issue Search Warrants* (visited Sept. 6, 1999) <http://www.eff.org./pub/publications/mitch_kapor/search_and_seizure_guideline.ett7>. Commenting further upon this issue, Kapor and Godwin note that the American Bar Association's (the "ABA") Criminal Justice Section suggested search and seizure guidelines are faulty because there was no guidance to the magistrate as to when the computer or related equipment should not be seized, either because it is not necessary as evidence or because such a seizure would intolerably "chill" the lawful exercise of First Amendment rights or abridge a property owner's Fourth Amendment rights. There was inadequate recognition of the business or individual computer owner's interest in continuing with lawful commercial business, which might be hindered or halted by the seizure of an expensive computer. There was no effort to measure the likelihood that investigators would find computers equipped with such justice-obstructing measures as automatic erasure software or 'degausser' booby-trapped hardware, the presence of which might justify a 'no-knock' search and seizure, among other responses.

[42]. The Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (1986) contains two main parts or *Titles*. Title I deals with "Interception of Communications and Related Matters." This Title updates existing laws to encompass computer 'acts' as illegal if there is an equivalent real life law. For example, where the law is such that you can not electronically eavesdrop on private telephone communications, it now states that you can not electronically eavesdrop on private computer communications. Where the law preserved your right to *listen* to public radio transmissions, it preserves your right to *listen* to public computerized transmissions.

Title II deals with "Stored Wire and Electronic Communications and Transactional Records Access." This

Title makes certain acts federal crimes. Equally important, it protects certain common-sense rights of system operators (sysops). Under the Act, it is now a federal offense to access a system without authorization.

[43]. Rotenberg, *supra* note 35.

[44]. *Id.*

[45]. Business Week/Harris Poll: *Online Security*, BUS WK., Mar. 16, 1998.

[46]. Rotenberg, *supra* note 35.

[47]. LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 165 (1995).

[48]. DECEW, *supra* note 5, at 3.

[49]. Giorgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 BERKELEY TECH L. J. 1 (1996) <<http://www.law.berkeley.edu/journals/btlj/>>.

[50]. *See id.*

[51]. *Testimony Before the Subcomm. on Courts and Intellectual Property, House Judiciary Comm., U.S. House of Rep.* (Mar. 26, 1998) (testimony of Dierdre Mulligan, Staff Counsel, Center for Democratic Technology).

[52]. *Id.*

[53]. ALAN WESTIN, PRIVACY AND FREEDOM 7 (1967)

[54]. *Id.* at 7.

[55]. ANN CAVOUKIAN & DON TAPSCOTT, WHO KNOWS - SAFEGUARDING YOUR PRIVACY IN A NETWORK WORLD 20 (1997).

[56]. *Privacy in Electronic Communication, 1998: Testimony Before the Subcomm. On Courts and Intellectual Property, House Judiciary Comm.* (Mar. 26, 1998) (testimony of Fred H. Cate, Professor of Law, Ind. Univ. Sch. of Law).

[57]. *Id.*

[58]. *Id.*

[59]. *Id.*

[60]. STEVEN MILLER, CIVILIZING CYBERSPACE: POLICY POWER AND THE INFORMATION SUPERHIGHWAY 265 (1996).

[61]. James Castelli, *How to Handle Personal Information*, AMERICAN DEMOGRAPHICS 1 (1996).

[62]. Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector* (last modified Jan. 22, 1998) <<http://www.cato/pubs/pas/pa-295.html>>.

[63]. *Id.*

[64]. Erwin Chemerinsky *quoted in* Josh Kratka, *For Their Eyes Only: The Insurance Industry and Consumer Privacy*, BOSTON: MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP 1 (1990).

[65]. Cate, *supra* note 56.

[66]. *Id.*

[67]. *Id.*

[68]. Net Wizards, *Internet Domain Survey* (1998) (visited Sept. 19, 1999) <<http://www.isc.org/dsview.cgi?domainsurvey/index.html>>.

[69]. See Robert Reilly, *Mapping Legal Metaphors in Cyberspace: Evolving the Underlying Paradigm*, 16 JOHN MARSHALL J. OF COMPUTER AND INFO. L. 579 (1998); MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHORE AND THEOLOGY (1985); GEORGE LAKOFF & MARK JOHNSON, METAPHORES WE LIVE BY (1980); M. Ethan Katsh, *Law in a Digital World*, 38 VILL. L. REV. 403 (1993); David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (And Our Contracts) Be Our Guide?*, 38 VILL. L. REV. 487 (1993); ELIZABETH EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE, (1979). In her classic study of the impact of printing, Eisenstein noted that Church officials hailed printing as a "divine art" and as being "divinely inspired." *Id.* at 317. Yet as printing was employed in novel ways and as it became a mass medium, individuals became empowered and were able to challenge the Church in ways that had not been possible in earlier periods. The Reformation was "a movement that was shaped at the very outset (and in large part ushered in) by the new powers of the press." *Id.* at 303. Thus, in 1519, when Martin Luther tacked his complaints about the Catholic Church to the church door in Wittenberg, Germany, the Ninety-Five Theses were also printed and circulated widely. *Id.* at 306. Eisenstein wrote:

When Luther proposed debate over his Ninety-Five Theses, his action was not in and of itself revolutionary. It was entirely conventional for professors of theology to hold disputations over an issue such as indulgences and 'church doors were the customary place for medieval publicity.' But these particular theses did not stay tacked to the church door (if indeed they were ever really placed there). To a sixteenth century Lutheran chronicler, 'it almost appeared as if the angels themselves has been their messengers and brought them before the eyes of all the people.' Luther himself expressed puzzlement, when addressing Pope Leo X six months after the initial event: It is a mystery to me how my theses, more so than my other writings, indeed those of other professors, were spread to so many places. They were meant exclusively for our academic circle here.

Id.

[70]. Ball, *supra* note 69, at 21-36. The author suggests that current metaphors of law as bulwark of freedom promote "order" rather than "justice" and that the new conceptual metaphor is needed to open the dam and allow circulation, connection and progress. Persuasion is also a key function of the metaphor.

Many metaphors have been offered in attempts to capture the nature and meaning of an on-line computer network. An on-line computer network is analogous to many familiar real-life metaphors, not just to one. It is analogous to a: newspaper, republisher/disseminator, common carrier (e.g., telephone company), traditional bulletin board (the wood and cork type), broadcaster, desk at the office, desk at home in the den, free and open frontier (a.k.a. *The Old West* of the 1800s), safe deposit box in a bank, hotel/motel room which one has rented, fraternity/sorority house. Depending on which metaphor is invoked, the legal perspective of a computer account will vary greatly.

- [71]. Ithiel de Sola Pool, *quoted in* John Markoff, *Some Computer Conversation is Changing Human Contact*, NY TIMES, May 13, 1990, at 1.
- [72]. David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 COMPUTER/L.J. 101 (1993).
- [73]. *Id.*
- [74]. United States v. David M. LaMacchia, Criminal No. 94-10092RGS, (D. Mass. Mar. 12, 1994) (MIT student LaMacchia was alleged to committed fraud by virtue of establishing a computer system at MIT for the purpose of trafficking in stolen or pirated software).
- [75]. Interview by Mike Godwin with Harvey Silvergate, attorney for LaMacchia, Internet World, (Mar. 1995). Mike Godwin, *No copycat criminal: LaMacchia case reveals a federal attitude problem*. (visited Sept. 19, 1999) <<http://swissnet.ai.mit.edu/6805/articles/dml/godwin-internet-world-march95.html>>.
- [76]. *Id.*
- [77]. Rotenberg, *supra* note 35.
- [78]. Loundy, *supra* note 72, at 88.
- [79]. *See generally*, T.L. Johnson, *Fred the Computer: Electronic Newspaper Services Seen as Ad-ons*. UCOMM. DAILY, April 10, 1990 at 4.
- [80]. *Cubby v. CompuServe*, 776 F.Supp 135 (E.D.N.Y. 1991) (CompuServe cannot be held liable for information in a newsletter it did not originally publish. His decision, the first of its kind, held that computer databases are the equivalent of newsstands or book stores, whose owners cannot be held liable for the content of the papers they sell unless they know beforehand that the stories are false). *See Bovenzi, supra* note 49 at 14.
- [81]. Mike Godwin, *CYBER RIGHTS*, 1998. In a lengthily discussion, Godwin presents a sound case that the *Stratton Oakmont* opinion was based upon a critical misreading of *CompuServe*; Email from Mike Godwin, (Sept. 7, 1998) (On file with the *Richmond Journal of Law and Technology*).
- [82]. *Id.*
- [83]. Frank H. Easterbrook, *Cyberspace and the law of the horse* (Nov. 1995) (Unpublished paper presented at the University of Chicago Legal Forum's Symposium on the Law of Cyberspace, Chicago, Illinois.) (On file with the *Richmond Journal of Law and Technology*).
- [84]. *Update on New York State Bill*, BILLWATCH (Feb. 18, 1996) (New York Internet, a business oriented Internet Service Provider in New York state, suggested that New York State Internet bill (S210/A3967) was poorly drafted as it had major Constitutional flaws and conflicted with existing statutes. The major problems were: a. inappropriate liability for Internet providers, b. criminalization of speech that is currently legal in print, and, c. no mention of the plethora of parental control tools).
- [85]. *See generally* Lakoff and Johnson, *supra* note 69 at 139. ("[M]etaphors are capable of giving us a new understanding of our experience. Thus they can give new meaning to our past, to our daily activity, and to what we know and believe"); James B. White, *The legal imagination: Studies in the Nature of Legal Thought and Expression* 57-64, 58-9 (Little, Brown and Company 1973). ("As [the lawyer] works on an antitrust or criminal appeal, the lawyer may say to himself that what he is doing and saying really means something else .

. . The activity of law can be spoken of in other terms").

[86]. See Gavison, *supra* note 1 at 461. ("The reasons for this [in one regard] are well known by any student of adjudication. Judges tend (and are encouraged) to prefer a just result based upon weak doctrine to an admission that current law does not provide a way to justify an otherwise deserved recovery. The price of justice is thus often the coherence of the concepts involved. Privacy is an example of this...")

[87]. Perritt Jr., *supra* note 12 at 105.

[88]. JAMES M. ATKINSON, *RIGHT TO PRIVACY IN THE AGE OF TELECOMMUNICATION* 2 (1990).

[89]. *Id.*.

[90]. John C. Yates, *Recent Legal Issues in Electronic Commerce and Electronic Data Interchange*, 430 *PLI/PAT.* 271, 277 (1996).

[91]. See DOUGLAS C. MCMURTRIE, *THE BOOK: THE STORY OF PRINTING AND BOOK MAKING* 61-67, 67 (Oxford University Press 1943). See also Bovenzi, *supra* note 49 at 1.

[92]. *Id.*

[93]. *Id.*

[94]. *Id.*.

[95]. Electronic Privacy Information Center, Report 49-1, *Privacy Guidelines for the National Information Infrastructure: A review of the Proposed Principles of the Privacy Working Group* at 2 (1994). Available at: <www.epic.org/privacy/internet/EPIC_NII_privacy.txt>. A flurry of privacy protection legislation has been offered in the Congress, which are intended to protect an individual's personal information from abuse, misuse, and inappropriate use. See, H.R. 98, 105th Cong. (1997); H.R. 1180, 105th Cong. (1997); Taxpayer Browsing Act of 1997, Pub. L. No. 105-35 (1997); H.R. 1287, 105th Cong. (1997); H.R. 1330, 105th Cong. (1997); H.R. 1367, 105th Cong. (1997); H.R. 1813, 105th Cong. (1997); H.R. 1815, 105th Cong. (1997); H.R. 1964, 105th Cong. (1997); H.R. 2368, 105th Cong. (1997); H.R. 3261, 105th Cong. (1997); S. 600, 105th Cong. (1997); S. 1368, 105th Cong. (1997).

[96]. Report 94-1, *supra* note 95 at 5.

[97]. *Id.*

[98]. MICHAEL DERTOUZOS, *WHAT WILL BE* 225 (1997).

[99]. See Ball, *supra* note 69 at 21-36. See also Robert Reilly, *Mapping Legal Metaphors in Cyberspace: Evolving the Underlying Paradigm*, 16 *J. MARSHALL J. COMPUTER & INFO. LAW* 579 (1998); Katsh, *supra* note 69.

[100]. Gavison, *supra* note 1, at 460.

[101]. See Thompson, *The Right to Privacy*, 4 *Philosophy and Public Affairs* 295 (1975).

[102]. Gavison, *supra* note 1, at 463.

[103]. Email communications with Andrew Greenberg (Sept. 5, 1998).

[104]. Many Congressional bills in the 105th Cong. (1997-98) have been focused on 'access' to all sorts of personal information. *See* H.R. 98, 105th Cong. (1997); H.R. 1180, 105th Cong. (1997); Taxpayer Browsing Act of 1997, Pub. L. No. 105-35 (1997); H.R. 1287, 105th Cong. (1997); H.R. 1330, 105th Cong. (1997); H.R. 1367, 105th Cong. (1997); H.R. 1813, 105th Cong. (1997); H.R. 1815, 105th Cong. (1997); H.R. 1964, 105th Cong. (1997); H.R. 2368, 105th Cong. (1997); H.R. 3261, 105th Cong. (1997); S. 600, 105th Cong. (1997); S. 1368, 105th Cong. (1997).

[105]. *See* Report 94-1, *supra* note 95.

[106]. *See* Reilly, *supra* note 99.

[107]. *Compare* *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 244 (1915) (stating that motion pictures "[are] not to be regarded...as part of the press of the country") *with* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (observing that "moving pictures...are included in the press whose freedom is guaranteed by the First Amendment") *and* *Olmstead v. United States*, 277 U.S. 438 (1928). Court ruled that the wiretaps were made without having to physically trespass on private property because the phone wires were not part of Olmstead's house or office. The Court found that the Fourth Amendment had not been violated as there had been no physical invasion, *with* *Katz v. United States*, 389 U.S. 347 (1967) The Court essentially rejected the Olmstead notion that there needed to be a "physical intrusion...[or] trespass" into a given area before there can be an invasion of one's privacy. Katz clearly established that the Fourth Amendment "protects people" and not places.

[108]. BRUCE STERLING, *THE HACKER CRACKDOWN* 247 (1995).